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JURISDICTION IN INTERNATIONAL LAW

United States and European Perspectives

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ABBREVIATIONS OF JOURNALS

AFDI	Annuaire français de droit international
A.J.I.L.	American Journal of International Law
Ala. L. Rev.	Alabama Law Review
Alb. L. Rev.	Albany Law Review
Am. J. Comp. L.	American Journal of Comparative Law
Am. U. J. Int'l L. & Pol'y	American University Journal of International Law and Policy
Am. U. L. Rev.	American University Law Review
Ann. IDI	Annuaire de l'Institut de Droit International
Antitrust L. J.	Antitrust Law Journal
ASIL Proc.	Proceedings of the Annual Conference of the American Society of International Law
Aust.l J. Int'l Aff.	Australian Journal for International Affairs
Austl. L.J.	Australian Law Journal
AWD	Aussenwirtschaftsdienst der Betriebsberater
B.C. Third World L.J.	Boston College Third World Law Journal
B.C. Int'l & Comp. L. Rev.	Boston College International and Comparative Law Review
Berkeley J. Int'l L.	Berkeley Journal of International Law
Brigham Young U. L. Rev.	Brigham Young University Law Review
Brookl. J. Int' L.	Brooklyn Journal of International Law
B.U. Int'l L. J.	Boston University International Law Journal
B.U. L. Rev.	Boston University Law Review
Butterworths J. Int'l Banking & Fin. L.	Butterworths Journal of International Banking and Financial Law
B.Y.I.L.	British Yearbook of International Law
Cal. L. Rev.	California Law Review
Cal. West. Int'l L.J.	California Western International Law Journal
Can. Bus. L. J.	Canadian Business Law Journal
Can.-U.S. L.J.	Canada – United States Law Journal
Cardozo J. Int'l & Comp. L.	Cardozo Journal of International and Comparative Law
Cardozo L. Rev.	Cardozo Law Review
Case Western Res. J. Int'l L.	Case Western Reserve Journal of International Law
Cath. U. L. Rev.	Catholic University Law Review
Chi. J. Int'l L.	Chicago Journal of International Law
CLR	Criminal Law Review
Colum. Bus. L. Rev.	Columbia Business Law Review
Colum. Hum. Rts. L. Rev.	Columbia Human Rights Law Review
Colum. J. Eur. L.	Columbia Journal of European Law
Colum. J.L. & Soc. Probs.	Columbia Journal of Law and Social Problems
Colum. J. Transnat'l L.	Columbia Journal of Transnational Law
Colum. L. Rev.	Columbia Law Review
C.M.L.R.	Common Market Law Review
Conn. J. Int. L.	Connecticut Journal of International Law
Cornell J. Int'l L.	Cornell Journal of International Law
Cornell L.Q.	Cornell Law Quarterly
Cornell L. Rev.	Cornell Law Review

Del. J. Corp. L.	Delaware Journal of Corporate Law
Denver J. Int'l L. & Pol'y	Denver Journal of International Law and Policy
DePaul L. Rev.	DePaul Law Review
Dick. J. Int'l L.	Dickinson Journal of International Law
Dick. L. Rev.	Dickinson Law Review
Duke J. Comp. & Int'l L.	Duke Journal of International and Comparative Law
Duke L.J.	Duke Law Journal
E.C.R.	European Court Reports
E.C.F.R.	European Company and Financial Law Review
E.C.L.R.	European Competition Law Review
E.I.P.L.R.	European Intellectual Property Law Review
E.J.I.L.	European Journal of International Law
E.L. Rev.	European Law Review
Emory Int'l L. Rev.	Emory International Law Review
Emory J. Int'l Disp. Res.	Emory Journal of International Dispute Resolution
Emory L.J.	Emory Law Journal
E.P.I.L.	Encyclopedia of Public International Law
EuZW	Europäische Zeitschrift für Wirtschaftsrecht
Fla. J. Int'l L.	Florida Journal of International Law
Fletcher F. World Aff.	Fletcher Forum of World Affairs
Fordham Int'l L.J.	Fordham International Law Journal
Fordham J. Corp. & Fin. L.	Fordham Journal of Corporate and Financial Law
Fordham L. Rev.	Fordham Law Review
Ga. J. Int'l & Comp. L.	Georgia Journal of International and Comparative Law
Ga. L. Rev.	Georgia Law Review
Geo. L. J.	Georgetown Law Journal
Geo. Mason L. Rev.	George Mason Law Review
Geo. Wash. J. Int'l L. & Econ.	George Washington Journal of International Law and Economics
Golden Gate U. L. Rev.	Golden Gate University Law Review
G.Y.I.L.	German Yearbook of International Law
Hamline L. Rev.	Hamline Law Review
Harv. Int'l L. J.	Harvard International Law Journal
Harv. L. Rev.	Harvard Law Review
Harvard Hum. Rts. J.	Harvard Human Rights Journal
Hastings Int'l & Comp L. Rev.	Hastings International and Comparative Law Review
Hofstra L. Rev.	Hofstra Law Review
Houston J. Int'l L.	Houston Journal of International Law
Hum. Rts. Q.	Human Rights Quarterly
ILSA J. Int'l & Comp. L.	International Law Students Association Journal of International and Comparative Law
Ind. Int'l & Comp. L. Rev.	Indiana International & Comparative Law Review
Ind. J. Global Legal Stud.	Indiana Journal of Global Legal Studies
Indian J. Int'l L.	Indian Journal of International Law
I.C.L.Q.	International and Comparative Law Quarterly
I.F.L.R.	International and Financial Law Review
Int. Bus. Law.	International Business Lawyer
Int. Law.	International Lawyer

Inter-Am. L. Rev.	Inter-American Law Review
Int'l L. Forum	International Law Forum
Int'l Tax & Bus. Law	International Tax and Business Law
Iowa L. Rev.	Iowa Law Review
IPRax	Praxis des Internationalen Privat- und Verfahrensrechts
J. Air L. & Com.	Journal of Air Law and Commerce
J.C. & U.L.	Journal of College and University Law
J. Corp. L.	Journal of Corporate Law
J.D.I.	Journal du droit international (Clunet)
J. Crim. L. & Criminology	Journal of Criminal Law and Criminology
J.I.C.J.	Journal of International Criminal Justice
J. Int'l L. & Econ.	Journal of International Law and Economics
J. Mar. L. & Com.	Journal of Maritime Law and Commerce
J. Marshall L. Rev.	John Marshall Law Review
J. Pub. L.	Journal of Public Law
J. Small & Emerging Bus. L.	Journal of Small and Emerging Business Law
J. Transn'l L. & Pol'y	Journal of Transnational Law & Policy
J. World Trade L.	Journal of World Trade Law
J.W.T.	Journal of World Trade
Law & Contemp. Probs.	Law and Contemporary Problems
Law & Pol'y Int'l Bus.	Law and Policy in International Business
LQR	Law Quarterly Review
L.J.I.L.	Leiden Journal of International Law
Lloyd's Mar. & Com. L. Q.	Lloyd's Maritime and Commercial Law Quarterly
Louis. L. Rev.	Louisiana Law Review
Loy. Consumer L. Rev.	Loyola Consumer Law Review
Loy. LA Int'l & Comp. L. J.	Loyola of Los Angeles International and Comparative Law Journal
Loy. U. Chi. L.J.	Loyola University of Chicago Law Review
Manitoba L.J.	Manitoba Law Journal
Md. J. Int'l L. & Trade	Maryland Journal of International Law and Trade
Me. L. Rev.	Maine Law Review
Mich. L. Rev.	Michigan Law Review
Mil. L. Rev.	Military Law Review
Minn. L. Rev.	Minnesota Law Review
Modern L. Rev.	Modern Law Review
N.C. J. Int'l L. & Comm. Reg.	North Carolina Journal of International Law and Commercial Regulation
N.C. L. Rev.	North Carolina Law Review
Neth. Q. Hum. Rts.	Netherlands Quarterly of Human Rights
New Eng. L. Rev.	New England Law Review
N.I.L.R.	Netherlands International Law Review
NJW	Neue juristische Wochenschrift
Notre Dame L. Rev.	Notre Dame Law Review
N.T.E.R.	Nederlands Tijdschrift voor Europees Recht
Nw. J. Int'l L. & Bus.	Northwestern Journal of International Law and Business
Nw. U. L. Rev.	Northwestern University Law Review
N.Y.I.L.	Netherlands Yearbook of International Law

NY Law Sch. J. Int'l & Comp. L.	New York Law School Journal of International and Comparative Law
N.Y.L.J.	New York Law Journal
N.Y.U. J. Int'l L. & Pol.	New York University Journal of International Law and Politics
N.Y.U. L. Rev.	New York University Law Review
Ohio St. L.J.	Ohio State Law Journal
Or. L. Rev.	Oregon Law Review
Pac. Rim L. & Pol'y J.	Pacific Rim Law and Policy Journal
Pal. Yb. Int'l L.	Palestine Yearbook of International Law
Pepp. L. Rev.	Pepperdine Law Review
RabelsZ	Rabels Zeitschrift für ausländisches und internationales Privatrecht
RBDI	Revue belge de droit international
R.C.A.D.I.	Recueil des Cours de l'Académie de droit international
RCDIP	Revue critique de droit international privé
RDAI	Revue de droit des affaires internationales
Regent J. Int'l L	Regent Journal of International Law
Rev. dr. pén.	Revue de droit pénal
Rev. dr. int. sc. dipl. pol.	Revue de droit international, de sciences diplomatiques et politiques
Rev. int. dr. écon.	Revue internationale de droit économique
Rev. sc. crim. dr. pén. comp.	Revue de science criminelle et de droit pénal comparé
Rev. suisse dr. int. concurr.	Revue suisse du droit international de la concurrence
RGDIP	Revue générale de droit international public
RIW	Recht der internationalen Wirtschaft
RTDE	Revue trimestrielle de droit européen
San Diego L. Rev.	San Diego Law Review
S. Cal. L. Rev.	Southern California Law Review
Seattle J. for Soc. Just.	Seattle Journal for Social Justice
Seattle U. L. Rev.	Seattle University Law Review
S.E.W.	Sociaal-Economische Wetgeving. Tijdschrift voor Europees en Economisch Recht
S. Ill. U. L.J.	Southern Illlinois University Law Journal
Sing. J. Int'l & Comp. L.	Singapore Journal of International and Comparative Law
SMU L. Rev.	Southern Methodist University Law Review
Spanish Yb. Int'l L.	Spanish Yearbook of International Law
Stan. J. Int. L.	Stanford Journal of International Law
Stan. L. Rev.	Stanford Law Review
St. John's J. Legal Comment	St. John's Journal of Legal Comment
St. Louis U. L.J.	St. Louis University Law Journal
St. Thomas L. Rev.	St. Thomas Law Review
Suffolk Trans'l L. J.	Suffolk Transnational Law Journal
Sup. Ct. Rev.	Supreme Court Review
Syracuse J. Int'l L. & Comm.	Syracuse Journal of International Law and Commerce
Temple Int'l & Comp. L. J.	Temple International and Comparative Law Journal
Temp. L. Rev.	Temple Law Review

Tex. L. Rev.	Texas Law Review
Tex. Int'l L.J.	Texas International Law Journal
Tilburg For. L. Rev.	Tilburg Foreign Law Review
Transnat'l Law.	The Transnational Lawyer
Transnat'l L. & Contemp. Probs.	Transnational Law and Contemporary Problems
Tul. J. Int'l & Comp. L.	Tulane Journal of International and Comparative Law
Tulsa J. Comp. & Int'l L.	Tulsa Journal of Comparative and International Law
Tulsa L. Rev.	Tulsa Law Review
U. Chi. Legal F.	University of Chicago Legal Forum
U. Chi. L. Rev.	University of Chicago Law Review
U. Chi. L. Sch. Roundtable	University of Chicago Law School Roundtable
U. Cin. L. Rev.	University of Cincinnati Law Review
UCLA J. Int'l L. & For. Aff.	University of California Los Angeles Journal of International Law and Foreign Affairs
U. Miami L. Rev.	University of Miami Law Review
U. Pa. L. Rev.	University of Pennsylvania Law Review
U. Pa. J. Int'l Econ. L.	University of Pennsylvania Journal of International Economic Law
U. Pitt. L. Rev.	University of Pittsburgh Law Review
U. Rich. L. Rev.	University of Richmond Law Review
U.S.F. L. Rev.	University of San Francisco Law Review
Utah L. Rev.	Utah Law Review
Vand. J. Transnat'l L.	Vanderbilt Journal of Transnational Law
Va. J. Int'l L.	Virginia Journal of International Law
Wash. L. Rev.	Washington Law Review
Wash. U. L.Q.	Washington University Law Quarterly
Wash. Univ. Glob. L. Rev.	Washington University Global Studies Law Review
Wayne L. Rev.	Wayne Law Review
W. Comp.	World Competition
Whittier L. Rev.	Whittier Law Review
W. Va. L.Q.	West Virginia Law Quarterly
Wm. & Mary L. Rev.	William and Mary Law Review
Wisc. Int'l L.J.	Wisconsin international law journal
WuW	Wirtschaft und Wettbewerb
Yale J. Int'l L.	Yale Journal of International Law
Yale J. Reg.	Yale Journal on Regulation
Yale L.J.	Yale Law Journal
Yb. Int'l Human. L.	Yearbook of International Humanitarian Law
Z.a.ö.R.V.	Zeitschrift für Ausländisches Offentliches Recht und Völkerrecht
ZEuS	Zeitschrift für Europarechtliche Studien

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"The function of scholars of international law offers less opportunity for creative thinking [compared to scholars of conflict of laws]: they may compile and analyze state practice, but they cannot replace it with their own concepts."[1]

PART I. GENERAL PART

CHAPTER 1: INTRODUCTORY CHAPTER

1.1. Scope and method of this study

1. In his 1964 Hague Lecture on the international law of jurisdiction, the late Professor MANN stated that, "[a]lthough there exists abundant material on specific aspects of jurisdiction, not a single monograph seems to have been devoted to the doctrine as a whole."[2] This statement still holds true as we write. Impressive monographs have been written about the international law of antitrust jurisdiction,[3] securities jurisdiction,[4] export controls,[5] and universal jurisdiction.[6] An overarching

[1] *See* K.M. MEESSEN, "Antitrust Jurisdiction under Customary International Law", 78 *A.J.I.L.* 783, 790 (1984).
[2] F.A. MANN, "The Doctrine of Jurisdiction in International Law", 111 *R.C.A.D.I.* 1, 23 (1964-I).
[3] *See, e.g.*, R.A. EPSTEIN & M.S. GREVE (eds.), *Competition Laws in Conflict: Antitrust Jurisdiction in the Global Economy*, Washington, D.C., AEI Press, 2004, xiii + 381 p.; R. DEVILLE, *Die Konkretisierung des Abwägungsgebots im internationalen Kartellrecht*, Nomos, Baden-Baden, 1990, vi + 169 p.; E. NEREP, *Extraterritorial Control of Competition Under International Law with Special Regard to U.S. Antitrust Law*, Stockholm, Norstedt, 1983, xxvii + 716 p.; J.B. TOWNSEND, *Extraterritorial Antitrust: the Sherman Antitrust Act Versus U.S. Business Abroad*, Boulder, CO, Westview Press, 1980, xiii + 308 p.; J.B. GRIFFIN, *Perspectives on the Extraterritorial Application of U.S. Antitrust and Other Laws*, Chicago, ABA, 1979, xii + 241 p.; K.M. MEESSEN, *Völkerrechtliche Grundsätze des internationalen Kartellrechts*, Baden-Baden, Nomos, 1975, 288 p.; F. HERMANNS, *Völkerrechtliche Grenzen für die Anwendung kartellrechtlicher Verbotsnormen*, Cologne, Heymanns, 1969, xiv + 93 p.; E. REHBINDER, *Extraterritoriale Wirkungen des deutschen Kartellrechts*, Baden-Baden, Nomos, 1965, 426 p.
[4] *See, e.g.*, G. SCHUSTER, *Die internationale Anwendung des Börsenrechts*, Berlin, Springer, 1996, xxv + 729 p.; I. TUNSTALL, *International Securities Regulation*, Sydney, Thomson, Lawbook Co., 2005, xxv + 479 p.

study of the theory of jurisdiction is however lacking, although MANN and AKEHURST have done a remarkable effort at connecting the threads of jurisdiction.[7] To be true, some authors have published on 'extraterritorial' jurisdiction in general, yet typically they only addressed extraterritorial jurisdiction in the field of economic law (antitrust and export controls in particular).[8]

The compartmentalization of the law of jurisdiction stems from the very nature of the concept of jurisdiction. As an abstract concept, it is in need of application and elaboration in particular areas of substantive law. A clear grasp of the underlying substantive regulations is often required, so that substantive law specialists rather than general international lawyers have ventured into the vast field of international jurisdiction.[9] The nitty-gritty of highly technical analyses of the scope *ratione loci* of particular substantive regulations has, not surprisingly, not always been helpful in clarifying the theory of jurisdiction under public international law.

2. This dissertation does not pretend to represent the ultimate monograph on the law of jurisdiction. It does not, and cannot, examine all substantive branches of the law which have been given extraterritorial application, or in which jurisdictional problems have arisen. It makes a selection of those branches of the law in which jurisdictional assertions have been most controversial, in particular from a transatlantic point of view. Starting from the field of criminal law, in which the theory of jurisdiction finds its roots, this dissertation will go on to study the reach of such legal fields as antitrust law, securities law, discovery, the law of export controls, and international humanitarian and human rights law, as it has been given shape, often in a dialectical manner, in the United States and Europe.[10] It will eventually be endeavoured to discern common principles of jurisdiction.

This study does not aim to develop the ideal level of international regulation in different legal fields. It will not discuss the merits of either multilateral regulation by international institutions or unilateral (jurisdiction-based) regulation. It will assume

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[5] *See, e.g.*, A.L.C. DE MESTRAL & T. GRUCHALLA-WESIERSKI, *Extraterritorial Application of Export Control Legislation: Canada and the U.S.A.*, Canadian Council on International Law, Dordrecht, Martinus Nijhoff, 1990, vii + 276 p.

[6] *See, e.g.*, M. INAZUMI, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law*, Antwerp-Oxford, Intersentia, 2005, xiv + 269 p.; L. REYDAMS, *Universal Jurisdiction: International and Municipal Legal Perspectives*, Oxford, Oxford University Press, 2003, xxvii + 258 p.; A. PEYRO LOPIS, *La compétence universelle en matière de crimes contre l'humanité*, Brussels, Bruylant, 2003, vi + 178 p.

[7] *See* F.A. MANN, "The Doctrine of Jurisdiction in International Law", 111 *R.C.A.D.I.* 1 (1964-I); F.A. MANN, "The Doctrine of Jurisdiction Revisited after Twenty Years", 186 *R.C.A.D.I.* 9 (1984-III); M. AKEHURST, "Jurisdiction in International Law", 46 *B.Y.I.L.* 145 (1972-73).

[8] *See, e.g.*, C.J. OLMSTEAD (ed.), *Extraterritorial Laws and Responses Thereto*, Oxford, International Law Association, 1984, xv + 236 p.; K.M. MEESSEN (ed.), *Extraterritorial Jurisdiction in Theory and Practice*, London/The Hague/Boston, Kluwer, 1996, xvii + 262 p.

[9] *Compare* A. BIANCHI, "Extraterritoriality and Export Controls: Some Remarks on the Alleged Antinomy Between European and U.S. Approaches", 35 *G.Y.I.L.* 366, 374 n. 32 (1992) (stating that "[t]he remarkable amount of litigation antitrust cases have caused has favored the development of principles and techniques the application of which seems to be the object of a somewhat autonomous scientific debate").

[10] Areas of the law which will not be studied, but where important issues of extraterritoriality have nevertheless arisen, include bankruptcy law, trademark law, environmental law, tax law, employment law, and cyberspace law. In this dissertation's general theory of jurisdiction, reference may however be made to these areas.

that unilateral jurisdictional assertions by States will in almost all legal areas persist, since all-encompassing international regulation by international supervisors and dispute-settlement and enforcement mechanisms, will, for sovereignty-related reasons, prove elusive for the time being. In areas where international mechanisms exist, such as in the field of international humanitarian law (the International Criminal Court and *ad hoc* international criminal tribunals), the shortcomings of such mechanisms will ensure that national jurisdictional assertions will continue to exist alongside them.[11]

3. COMMON THREADS – Having said what this study does not pretend to do (not presenting the ultimate overview of the law jurisdiction, nor analyzing the benefits or feasibility of regulation by international institutions), it may be useful to state what it pretends, in all modesty, to do. For one, as will probably be clear by now, it only studies the law of jurisdiction *ratione loci*, and not the law of jurisdiction *ratione temporis, personae* or *materiae*, although, if useful for the analysis, issues of temporal or personal jurisdiction will be touched upon (*e.g.*, retroactivity of criminal laws, foreign sovereign immunities, norms amenable to (universal) jurisdiction). For another, two threads run throughout this study.. The first thread is the thread of jurisdictional reasonableness. This study indeed aims at developing a theory of (unilateral) jurisdiction which, informed by an overarching principle of jurisdictional 'reasonableness', takes into account the sovereign interests of States other than the forum State (*i.e.*, the State exercising its jurisdiction), yet which at the same time ensures that the interests of the forum State *and* of the international community are sufficiently heeded. A reasonable exercise of jurisdiction may alleviate the 'extraterritorial' impact of jurisdictional assertions. It may render unilateral jurisdiction in fact 'multilateral', *inter alia*, through low-level contacts between regulators and courts, and thus obviate the need, if any, for an international institutional solution to regulatory problems.

The second thread is the comparative U.S-EU perspective. Granted, other States (or groups of States) may also have applied, and apply, their laws to foreign situations (notably other Western countries such as Canada, New Zealand, Australia …). However, almost all assertions of jurisdiction over foreign situations, in both the field of economic law and the field of human rights law, have originated in either the United States or in the European Union. In addition, the international conflict which the expansion of the reach of national law has given rise to, has, to a great extent, been a *transatlantic* conflict between the world's two most powerful economic and political blocks. This justifies a limitation of the scope of this study to the jurisdictional practice of the United States and Europe. Occasionally, if useful for this study, reference will be made at the jurisdictional practice of other States.

It may be challenging but nevertheless still feasible to give quite an exhaustive overview of U.S. practice in the field of jurisdiction. Giving such an overview of European practice in the field is however a nearly impossible task. As of 2006, the European Union has a membership of 25 States. In the near future, it is likely to expand to 27 and more States. Language constraints obviously make it not feasible to

[11] *See also* B. VAN SCHAACK, "Justice Without Borders – Universal Civil Jurisdiction", *ASIL Proc.* 120, 121 (2005) ("Supranational mechanisms will never supplant domestic proceedings, so domestic courts will continue to play a central role in enforcing international law.").

give a scientifically sound overview – which requires studying the sources in their original language – of all these States' jurisdictional practices. As far as Europe is concerned, the geographical scope of this study will be confined to the European Union (Community), and five Western European States: the United Kingdom, Germany, France, the Netherlands, and Belgium. The chapter on universal criminal jurisdiction will also feature a section on Spanish practice, given its importance for the development of international law there. The primary sources will be examined in their original version and language (English, French, German, Dutch, and Spanish). Translations will not be used, although, in footnote, reference will be made at them (if available) for the reader's convenience.

4. MATERIALS – This study is a study in international law. In order to determine what the international law in a particular area is at a given time – and apply it – international lawyers, rely, in accordance with Article 38 of the Statute of the International Court of Justice, on international conventions, international custom, "the general principles of law recognized by civilized nations", judicial decisions, and "the teachings of the most highly qualified publicists of the various nations." This study will follow the international law method. Given the near total absence of useful treaty law in the field of jurisdiction,[12] the study will mainly be geared to identifying customary international law norms on the law of jurisdiction. To that effect, and in keeping with the nature of customary international law, it will primarily analyze State practice, as could be gleaned from States' adoption of certain laws, their application by courts and regulatory agencies, and protests by States against the application of other States' laws adversely affecting them. Because State jurisdictional practice has historically been influenced in no small measure by doctrinal writings, legal doctrine on the law of jurisdiction will also be given a prominent place, although *actual* State practice will be the main point of reference of the study. The lengthy footnotes will illustrate that the relevant material is abundant, if not overwhelming. Yet this study aspires to distill from this wealth of sources *common principles*, which may be of use for States and legal practicioners looking for a solution to jurisdictional problems.

1.2. Structure of the study

5. Having set out this study's scope and method, it is appropriate now to present its structure. The starting point of a study of the law of jurisdiction is, inevitably, the *Lotus* case (chapter 2). This case, decided by the Permanent Court of International Justice (P.C.I.J.) in 1927, is to date still the only case in which an international court has addressed the question of jurisdiction. In *Lotus*, the P.C.I.J. took a very liberal view of State's rights to exercise jurisdiction which is only limited by 'prohibitive rules'. It will be argued that this approach is either obsolete or unwarranted, and that under customary international law, States have always considered the territoriality principle to be the basic principle of international jurisdictional order (chapters 2 and 3). Principles of extraterritorial jurisdiction have nonetheless been developed in the field of international criminal law (chapter 4). Even when a jurisdictional assertion could be subsumed under the classical principles of jurisdiction, reasonableness is not assured though, given the malleability of these principles. A jurisdictional rule of

[12] Only in the field of international criminal jurisdiction (chapter 10) have treaties been concluded, although none of these treaties dealt exclusively with the law of jurisdiction. Their jurisdictional provisions are often vague and in need of clarification by State practice.

reason, which draws on conflict of laws principles, may therefore be proposed so as to mitigate exorbitant jurisdiction (chapter 5).

6. A second part of this study will be devoted to questions of jurisdiction in particular subject matter areas. Notably the field of antitrust law will be examined in depth (chapter 6). It is there that controversial assertions of jurisdiction have first surfaced, and there that conceptual volatility has been most widespread. It may be noted that the overbroad reach of U.S. antitrust laws led to calls for jurisdictional restraint which eventually resulted in the adoption of a rule of reason of more general application. Assertions of 'extraterritorial' jurisdiction have also arisen in the field of securities law, another field of economic law, although there, international protest has so far remained rather mute (chapter 7). U.S. export controls or secondary boycotts, by contrast which prohibited foreign corporations from exporting goods to foreign States have engendered much transatlantic acrimony, especially in the 1980s and 1990s (chapter 8). Similarly, the application of U.S. discovery (evidence-taking) rules to persons over whom the United States could secure personal jurisdiction, rules which *inter alia* require them to hand over foreign-located documents even in the face of conflicting foreign legislation, has caused much controversy in Europe, which employs much stricter rules of evidence (chapter 9). Eventually, the gaze of this study will turn to universal jurisdiction over gross violations of human rights, a field of the law the subject matter of which could hardly differ more from the fields previously discussed. It is the only field of which the substantive norms are international law norms. The international law character of the substantive norms (the nature of the offences) renders it also the only field in which jurisdiction may be exercised without any nexus with the regulating State. The heinousness of certain human rights (*jus cogens*) violations has impelled European courts and prosecutors, especially since the late 1990s to assert universal *criminal* jurisdiction over them (chapter 10). U.S. courts exercise universal *tort* jurisdiction over more or less the same violations since 1980 (chapter 11).

1.3. Jurisdiction as a concern of international law

7. DEFINING AND REGULATING JURISDICTION – Since this study examines the law of jurisdiction *ratione loci* under international law, it might be useful to define 'jurisdiction under international law'. While international lawyers often employ the term 'jurisdiction', and most of them have an inkling of what it means, it is hardly self-evident to exactly define it.[13] What is certain is that jurisdiction somehow relates to sovereignty. In a world composed of equally sovereign States, any State is entitled to give shape to its sovereignty or *imperium* by adopting laws,[14] to "*juris-dicere*", to state what the law is relating to persons, activities or legal interests.[15] Jurisdiction

[13] *See, e.g.*, B.J. GEORGE, Jr, "Extraterritorial Application of Penal Legislation", 64 *Mich. L. Rev.* 609, 621 (1966) (stating that "[o]ne of the most difficult words in the legal lexicon to delineate is the term "jurisdiction"). *See also United States v. Vanness*, 85 F.3d 661, 663, n. 2 (D.C.Cir.1996); *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998); *United Phosphorus, Ltd.* v. *Angus Chemical Co.*, 322 F.3d 942, 948 (7th Cir. 2003) ("Jurisdiction is a word of many, too many, meanings.").

[14] *See* H.E. YNTEMA, "The Comity Doctrine", 65 *Mich. L. Rev.* 9, 19 (1966) (referring to "the principle definitively established by Justinian, that the first attribute of the *imperium* is the power of legislation").

[15] *See* J.H. BEALE, "The Jurisdiction of a Sovereign State", 36 *Harv. L. Rev.* 241 (1923) (defining jurisdiction as "the power of a sovereign to affect the rights of persons, whether by legislation, by

becomes a concern of international law when a State, in its eagerness to promote its sovereign interests, adopts laws that govern matters of not purely domestic concern.[16]

The public international law of jurisdiction guarantees that foreign nations' concerns are also accounted for, and that sovereignty-based assertions of jurisdiction by one State do not unduly encroach upon the sovereignty of other States. The law of jurisdiction is doubtless one of the most essential as well as controversial fields of international law, in that it determines how far, *ratione loci*, a State's laws might reach.[17] As it ensures that States, especially powerful States, do not assert jurisdiction over affairs which are the domain of other States, it is closely related to the customary international law principles of non-intervention and sovereign equality of States.[18] Guaranteeing a peaceful co-existence between States through erecting jurisdictional barriers which States are not supposed to cross, the law of jurisdiction is one of the building blocks of the classical, billiard-ball view of international law as a 'negative' law of State co-existence.

8. 'EXTRATERRITORIAL' JURISDICTION – The international law of jurisdiction is sometimes referred to as the law of 'extraterritorial' jurisdiction, especially in the field of economic law.[19] The use of the term 'extraterritoriality' derives from the previous observation that jurisdiction becomes a concern of international law where a

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executive decree, or by the judgment of a court"); C.L. BLAKESLEY, "United States Jurisdiction over Extraterritorial Crime", 73 *J. Crim. L. & Criminology* 1109 (1982) (defining jurisdiction as the authority to affect legal interests). This is also what *jurisdictio* originally meant in the Roman period: "the power of a magistrate to *ius dicere* , that is, to determine the law and, in accordance with it, to settle disputes concerning persons and property within his forum (sphere of authority)." (J. PLESCIA, "Conflict of Laws in the Roman Empire", 38 *Labeo* 30, 32 (1992)).

[16] *See* F.A. MANN, "The Doctrine of Jurisdiction in International Law", 111 *R.C.A.D.I.* 1, 9 (1964-I) (defining jurisdiction as "a State's right under international law to regulate conduct in matters not exclusively of domestic concern").

[17] *See id.*, at 15 (stating that "[j]urisdiction .. is concerned with what has been described as one of the fundamental functions of public international law, *viz.* the function of regulating and delimiting the respective competences of States …".). *See also* A.F. LOWENFELD, "International Litigation and the Quest for Reasonableness", 245 *R.C.A.D.I.* 9, 29 (1994-I) ("I believe that while we will not here address the cosmic issues of war and peace, of nuclear weapons and terrorist assaults, we will deal with legitimate and serious concerns of private persons and of States, and surely of lawyers, embraced within what Story calls the comity of nations.").

[18] *See* R.L. MUSE, "A Public International Law Critique of the Extraterritorial Jurisdiction of the Helms-Burton Act (Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996)", 30 *Geo. Wash. J. Int'l L. & Econ.*, 207, 241-42 (1996-97) ("Because each nation possesses exclusive authority within its territory – but no authority within the territory of another – each nation is co-equal in rights and status with other nations, regardless of disparities in economic or military power."). *See also* A. BIANCHI, "Extraterritoriality and Export Controls: Some Remarks on the Alleged Antinomy Between European and U.S. Approaches", 35 *G.Y.I.L.* 366, 385 (1992) (submitting that "principles of jurisdiction need to be studied in connection with other principles such as the prohibition of economic coercion and intervention, the consideration of which could be useful to set up standards of legitimacy for extraterritorial measures").

[19] See, e.g., R. HIGGINS, *Problems and Process: International Law and How We Use It*, Oxford, Clarendon Press, 1994, at 74 (arguing that "'extraterritorial jurisdiction' has come to have a discrete meaning of its own, over and above nationality, protective, and passive-personality jurisdiction", namely the ability "to exercise jurisdiction over persons abroad (even non-nationals) for acts occurring abroad, which were intended to have, and indeed have, significant harmful [economic] effects within the territory asserting jurisdiction."); B. STERN, "Can the United States Set Rules for the World? A French View", 31 *J.W.T.* 5, 13-14 (1997/4); B. STERN, "How to Regulate Globalization?", in M. BYERS (ed.), *The Role of Law in International Politics*, Oxford/New York, Oxford University Press, 2000, at 255).

State regulates matters which are not exclusively of domestic concern.[20] The term 'extraterritoriality' is confusing however. "Extraterritorial jurisdiction" ought to imply that a State exercises its jurisdiction without any territorial link ("*extra*-territorial"), although the expression is typically used in a context of States asserting jurisdiction on the basis of some, admittedly non-exclusive, territorial link.[21] The term "extraterritorial jurisdiction" is only accurate if it refers to assertions of jurisdiction over persons, property, or activities which have no territorial nexus whatsoever with the regulating State, *i.e.*, assertions based on the personality, protective, or universality principle of jurisdiction.[22] And even such jurisdiction is not wholly 'extra-territorial', as it is asserted by a State, or its courts, within a given territory.[23]

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[20] *See* A. BIANCHI, Reply to Professor Maier, in K.M. MEESSEN (ed.), *Extraterritorial Jurisdiction in Theory and Practice*, London/The Hague/Boston, Kluwer, 1996, 74, 76 (stating that "extraterritoriality" refers to situations where "a state may regulate matters not exclusively of domestic concern or, in other words, matters which present more or less significant links with other legal orders"); B. STERN, "L'extraterritorialité revisitée: Où il est question des affaires *Alvarez-Machain, Pâte de bois* et de quelques autres…", 38 *A.F.D.I.* 239, 242 (1992) (submitting that a rule is applied extraterritorially "si tout ou partie du processus d'application se déroule en dehors du territoire de l'Etat qui l'a émise."); P. DEMARET, "L'extraterritorialité des lois et les relations transatlantiques: une question de droit ou de diplomatie?", 21 *R.T.D.E.* 1-2 (1985) (referring to extraterritoriality « lorsqu'une autorité législative, gouvernementale, judiciaire ou administrative d'un Etat adresse à un sujet de droit un ordre de faire ou de ne pas faire à exécuter en tout ou en partie sur le territoire d'un autre Etat. »); A.T. GUZMAN, "Is International Antitrust Possible?", 73 *N.Y.U. L. Rev.* 1501, 1506 (1998) (stating that ""[e]xtraterritoriality" refers to a country's ability to govern activity in foreign countries").

[21] Extraterritoriality is often invoked to typify assertions of jurisdiction over violations of antitrust and securities laws abroad, which nevertheless impact on the regulating State. The very impact of the foreign conduct on the regulating State may be considered as a territorial effect. Jurisdiction on the basis of such an effect may be justified under the objective territorial principle. *See, e.g.*, E. COLMANT, « 14 juillet 1972, une date pour le droit de la concurrence : neuf arrêts règlent trois grandes questions. Affaire des matières colorantes : suite et fin », *Revue du marché commun* 15, 21 (1973) (« [C]ertains, dont l'Avocat général [in the *Dyestuffs* case], ont parlé d'application extra-territoriale du droit communautaire. Il ne faut pas se laisser abuser par ce terme : la Commission est compétente à l'égard d'entreprises localisées ou n'étant pas localisées dans le Marché commun, dès lors que des actes de celles-ci ont des effets dans le territoire où la Commission a reçu mission de sauvegarder un régime de libre concurrence, c'est-à-dire celui de la Communauté économique européenne … Bien que qualifiée d'extraterritoriale, elle n'a rien d'extraordinaire et se retrouve généralement dans tous les ordres juridiques nationaux. »).

[22] Most international law handbooks either avoid the use of the word "extraterritorial jurisdiction" or limit its scope to jurisdiction based on the nationality or personality principle, the protective principle or the universality principle. BOSSUYT & WOUTERS for instance distinguish between territorial and extraterritorial jurisdiction, the latter denoting jurisdiction based on the aforementioned non-territorial principles of international jurisdiction (M. BOSSUYT & J. WOUTERS, *Grondlijnen van internationaal recht*, Antwerp, Intersentia, 2005, at 286). MÜLLER & WILDHABER for their part do not conceptually distinguish extraterritorial jurisdiction, stating that "[z]u den anerkannten Anknüpfungspunkte gehören neben dem Territorialitätsprinzip das aktive und passive Personalitätsprinzip, das Weltrechtsprinzip und das Auswirkungsprinzip" (J.P. MÜLLER & L. WILDHABER, *Praxis des Völkerrechts*, 3th ed., Bern, Stämpfli Verlag, 2001, at 386). Similarly, DIXON & MCCORQUODALE identify territoriality, personality, protective principle, the 'effects' doctrine and universality as grounds for assertion of jurisdiction by national courts (M. DIXON & R. MCCORQUODALE, *Cases and Materials on International Law*, London, Blackstone, 2d ed., 1991, at 318-352). BROWNLIE concurs as to criminal jurisdiction, but deals separately with 'extra-territorial enforcement measures'. (I. BROWNLIE, *Principles of Public International Law*, Oxford, Clarendon Press, 1998, at 301-324). SHAW for his part talks plainly of 'extraterritorial jurisdiction', and, like BROWNLIE, refuses to treat them on the same footing as the grounds for criminal jurisdiction (M.N. SHAW, *International Law*, Cambridge, Cambridge University Press, 1997, at 452-490). According to QUOC DINH, the powers of the state can be divided in "compétences exercées par l'Etat sur son territoire" and "compétences exercées par l'Etat hors de son territoire". The extraterritorial application of national legislation is not dealt with in the

While "extraterritorial" may nonetheless be useful as shorthand for "not *exclusively* territorial", the term might best be avoided, because it is tainted by the pejorative connotation it has acquired over the years. As LOWENFELD has pointed out, those who term particular assertions of jurisdiction "extraterritorial" indeed often believe them to be illegitimate or outrageous,[24] although they may in fact be more territorial than other, non-controversial jurisdictional assertions (such as assertions based on the active personality principle). This study therefore prefers, as far as possible, not to use the term "extraterritorial jurisdiction". At times however, "extraterritorial jurisdiction" will be used, for the sake of brevity, to denote jurisdiction over situations arising abroad, typically causing adverse economic effects within the State asserting jurisdiction.

9. 'EXTRATERRITORIAL' U.S. LAW – The term "extraterritorial jurisdiction" is often used to condemn the long arm of U.S. law. ROCK GRUNDMAN's contention that the United States' three biggest export products are rock music, blue jeans and United States law,[25] inevitably springs to mind in this respect. Vexation stemming from the perceived hegemonical imposition of U.S. law on other States could also be gleaned from the answer I received when I asked an international students' audience the question who could claim jurisdiction over a criminal act initiated in Belgium and consummated in France: "the United States". The United States are perceived to champion a geographically almost unlimited application of their own 'exceptional' legislation, a perception which is stoked by U.S. unilateralism in world politics. The European Union and its Member States, by contrast, may be perceived, especially by Europeans themselves, as multilateralists who have due regard for foreign nations'

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latter section - as if the state would in that case not exercise any powers outside its territory - but in a third one, "concurrence et conciliation des compétences étatiques" (N. QUOC DINH, *Droit International Public*, 6th ed., Paris, L.G.D.J., 1999, 1455). By the same token, DUPUY only attributes territorial and personal jurisdiction to the State, although he deals with extraterritorial jurisdiction in a third section, "concurrence de compétences exercées par deux Etats" (P.M. DUPUY, *Droit International Public*, 5th ed., Paris, Dalloz, 2000, 731).

[23] In their separate opinion in the 2002 *Arrest Warrant* case, a case concerning immunity from prosecution under Belgium's universal jurisdiction law brought by Congo before the International Court of Justice, Judges Higgins, Kooijmans and Buergenthal, therefore believed it to be more accurate to use the term "territorial jurisdiction for extraterritorial events". ICJ, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal,, *Arrest Warrant*, para. 42.

[24] *See* A.F. LOWENFELD, "International Litigation and the Quest for Reasonableness", 245 *R.C.A.D.I.* 9, 43-44 (1994-I) ("The search for a satisfactory definition of extraterritorial jurisdiction … is doomed to failure: "extraterritorial jurisdiction", like "bureaucratic", is a term that could never be rescued from its unattractive reputation."). *See also* J.-M. BISCHOFF & R. KOVAR, "L'application du droit communautaire de la concurrence aux entreprises établies à l'extérieur de la Communauté", 102 *J.D.I.* 675, 676 (1975) (« [P]lutôt que de parler d'application extra territoriale du droit communautaire de la concurrence, il semble préférable de poser le problème en termes d'application de ce droit à des entreprises établies à l'extérieur des Communautés. Par sa neutralité, cette formulation évite de préjuger la conformité ou la non-conformité de cette application au regard du droit international. »).

[25] *See* V. ROCK GRUNDMAN, "The New Imperialism: The Extraterritorial Application of United States Law", 14 *Int. Law.* 257 (1980), also quoted by Justice BRENNAN in his dissenting opinion in *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 280-81 (1990) ("Particularly in the past decade, our Government has sought, successfully, to hold foreign nationals criminally liable under federal laws for conduct committed entirely beyond the territorial limits of the United States that nevertheless has effects in this country. Foreign nationals must now take care not to violate our drug laws, our antitrust laws, our securities laws, and a host of other federal criminal sanctions. The enormous expansion of federal criminal jurisdiction outside our Nation's boundaries hs led one commentator to suggest that our country's three largest exports are now "rock music, blue jeans, and United States law.")

concerns when extending their territorial sphere of jurisdiction. The working thesis of this study will indeed be that the United States applies its own laws more assertively to foreign situations than European States and the European Union (Community) do. Yet far from seeing States' jurisdictional practice through biased glasses, this study will ascertain whether perception is indeed reality. It will emerge throughout this study that, by and large, the jurisdictional reality is not at odds with the perception. However, it will also emerge that in quite some fields of the law, notably in antitrust law and international humanitarian law, the reach of European laws may be equally broad, or at times even broader than the reach of U.S. laws.

10. FORMS OF JURISDICTION – In this study, the term "jurisdiction" will be used interchangeably with prescriptive jurisdiction. Prescriptive jurisdiction refers to the "jurisdiction to prescribe, *i.e.*, to make its law applicable to the activities, relations, or status of persons, or the interests of persons in things, whether by legislation, by executive act or order, by administrative rule or regulation, or by determination by a court."[26] Put differently, questions of prescriptive jurisdiction relate to the geographical reach of a State's laws. Questions of adjudicative and enforcement jurisdiction will only be tangentially discussed, if needed to clarify prescriptive jurisdiction.

11. Enforcement jurisdiction refers to a State's jurisdiction "to enforce or compel compliance or to punish noncompliance with its laws or regulations, whether through the courts or by use of executive, administrative, police, or other nonjudicial action."[27] While States are entitled to prescribe laws that govern situations which may be located wholly or partly abroad under rules of prescriptive jurisdiction, it is generally accepted that they are not entitled to *enforce* their laws outside their territory, "except by virtue of a permissive rule derived from international custom or from a convention."[28] In order to enforce laws or decisions governing transnational or foreign situations, States are therefore required to resort to territorial measures. A conviction to imprisonment for instance could only be enforced if the convict is voluntary present in the territory, or if his presence is brought about by means of extradition. Monetary judgments could only be enforced by seizing territorially located assets, or by international cooperation with the State where the defendant's assets are located.

12. Adjudicative jurisdiction refers to a State's jurisdiction "to adjudicate, *i.e.*, to subject persons or things to the process of its courts or administrative tribunals, whether in civil or in criminal proceedings, whether or not the state is a party to the proceedings."[29] Adjudicative jurisdiction thus refers to the jurisdiction of the courts rather than to the reach of a State's laws. States may have legitimate prescriptive jurisdiction over a situation under international law, but may lack adjudicative jurisdiction over the situation, for instance because the defendant has no contacts with

[26] § 401 (a) Restatement (Third) of U.S. Foreign Relations Law.
[27] *Id.*, § 401 (c).
[28] P.C.I.J., *S.S. Lotus*, P.C.I.J. Reports, Series A, No. 10, pp. 18-19 (1927). At times, States *have* exercised their enforcement jurisdiction abroad, without the consent of the territorial State, for instance by arresting persons outside their territory (*e.g.*, the kidnapping of Adolf Eichmann in Argentina by Israeli secret agents), but such actions have usually met with considerable protest by other States. A general permissive rule of extraterritorial enforcement jurisdiction may possibly be the rule which entitles the parties in an international armed conflict to wage war in the other party's or parties' territory.
[29] § 401 (b) Restatement (Third) of U.S. Foreign Relations Law.

the State, or because the parties to a private contract have chosen another adjudicative forum. In section 1.4, the interplay between prescriptive jurisdiction and adjudicative jurisdiction will be illustrated in the context of transnational regulatory jurisdiction.

13. It may already be noted here that, somewhat counterintuitively, the courts may also exercise prescriptive jurisdiction under international law.[30] Admittedly, under the separation of powers theory the judiciary is not authorized to enact rules but only to settle disputes on the basis of rules enacted by the political branches. Nonetheless, it may occur that the reach of a particular statute is not clear. In that situation, the courts might themselves determine the reach of the statute, in light of the international law principles of jurisdiction. In so doing, they exercise prescriptive jurisdiction.

In common law countries, especially in the United States, courts are ordinarily loath to directly ground their exercise of prescriptive jurisdiction on international law. Instead, presuming that Congress does not intend to apply statutes extraterritorially, they only exercise jurisdiction when Congress indeed had the intent to apply its statute to foreign situations. Theoretically, prescriptive jurisdiction then remains with the political branches, although in practice, U.S. courts have at times conjured up congressional intent where there was clearly none, *e.g.*, in the field of securities law.[31]

1.4. The concept of jurisdiction in transnational private litigation

14. In criminal law litigation, courts may encounter difficulties in determining the reach of the applicable criminal law, or, put differently, in determining their prescriptive jurisdiction under international law, but at least they do not have to factor in complicated conflict of laws issues, and problems of adjudicative (*i.e.*, judicial or personal) jurisdiction. In private litigation by contrast, courts do face all these issues. It is not surprising that the lines between prescriptive jurisdiction, conflict of laws, and personal jurisdiction, which all stem from the transnational character of private litigation, have become blurred. A conceptual reconstruction of the exercise of jurisdiction over extraterritorial and transnational situations by courts is not an easy undertaking then. In such situations, jurisdiction becomes a multi-layered legal concept involving both public and private international law elements.[32]

In this subsection, an attempt will be undertaken at sketching the subtle interplay of jurisdiction and conflict of laws in transnational litigation concerning regulatory law. Regulatory law may be defined here as public 'market' law aimed at protecting a public economic order, that could, in certain legal systems such as the American system, also be privately enforced, *e.g.*, antitrust law or securities law.[33] It is precisely in these fields of the law that most assertions of 'extraterritorial' jurisdiction have

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[30] *See* F.A. MANN, "The Doctrine of Jurisdiction in International Law", 111 *R.C.A.D.I.* 1, 13 (1964-I).
[31] *See* subsection 3.3.2.
[32] Rules of public international law in theory connect a set of facts with a particular *legislator*, and rules of private international law these facts with a particular *legal system*. *See* F.A. MANN, "The Doctrine of Jurisdiction Revisited after Twenty Years", 186 *R.C.A.D.I.* 9, 28 (1984-III).
[33] *See, e.g.*, on the nature of antitrust law as a mixture of penal, administrative, and civil law: B. GOLDMAN, "Les champs d'application territoriale des lois sur la concurrence", 128 *R.C.A.D.I.* 631, 641-45 (1969-III). *See also* J.-M. BISCHOFF & R. KOVAR, "L'application du droit communautaire de la concurrence aux entreprises établies à l'extérieur de la Communauté", 102 *J.D.I.* 675, 701 (1975) (« En tant que droit du marché, le droit de la concurrence tend à la protection de l'ordre public économique . »).

arisen, and especially in (U.S.) private litigation, where actors do not exercise the same degree of jurisdictional caution that regulatory agencies do. Antitrust law and securities law will be discussed at length in chapters 6 and 7, and discovery law – the law of evidence-taking that supports assertions of antitrust and securities jurisdiction at the procedural level – in chapter 9. As a preliminary matter, it is appropriate to offer in this introductory chapter necessary terminological and conceptual clarification, if the reader is not to get lost in a dense forest of unfamiliar legal concepts. It will become clear in this subsection that the law of jurisdiction bridges the private/public international law divide. In chapter 5 then, it will be shown how solutions borrowed from private international law could serve to restrain the reach of a State's laws under public international law ("the rule of reason"). That rule of reason will in turn be applied to the different fields of the law studied, also these which fall outside the realm of regulatory law (universal jurisdiction over core crimes against international law, secondary boycotts).

1.4.1. Adjudicative and subject-matter jurisdiction

15. ADJUDICATIVE JURISDICTION – It is first important to further define adjudicative jurisdiction, termed personal or *in personam* jurisdiction in the United States and judicial jurisdiction in Europe. Adjudicative jurisdiction refers to the power of courts to claim jurisdiction over persons. The rules of adjudicative jurisdiction are designed to meet the foreign defendant's legitimate expectations of being hauled before a court. As they are mainly concerned with the interests of the party to the dispute and not with the interests of the party's home State, they may be considered as private international law rules. Overbroad rules of personal jurisdiction can however produce ripple effects on the conduct of foreign relations. Especially if they combine with the application of forum law instead of foreign law, a foreign sovereign may feel offended when on the basis of his own conflict-of-laws rules *his* law would have been applied. In that respect, the rules of adjudicative jurisdiction may also be a concern of public international law rules ensuring a smooth functioning of inter-State relations. It comes as no surprise that the Restatement (Third) of *Foreign Relations* Law urges U.S. courts to exercise their adjudicative jurisdiction in a reasonable manner.[34]

Historically, U.S. courts had personal jurisdiction over a defendant if they could deliver a writ to him. A writ could be delivered as soon as the defendant was present within U.S. territory. His presence was considered to spark "a corollary obligation to submit to jurisdiction upon proper notification."[35] The requirement of territorial presence was later relaxed by U.S. courts. Nowadays, "minimum contacts" with the U.S. suffice for a finding of personal jurisdiction over a defendant.[36] "Minimum contacts" are liberally construed by U.S. courts. The mere presence of a subsidiary of a foreign corporation in the United States may for instance provide the necessary minimum U.S. contacts of the parent corporation.[37] Also, transient presence of a defendant may suffice for a finding of so-called 'tag' jurisdiction by U.S. courts.[38] The minimum contacts doctrine was originally designed to address interstate

[34] § 421 of the Restatement (Third) of U.S. Foreign Relations Law.
[35] *See* B. PEARCE, "The Comity Doctrine as a Barrier to Judicial Jurisdiction: A U.S.-E.U. Comparison", 30 *Stan. J. Int'l L.* 525, 531 (1994).
[36] *International Shoe Co.* v. *Washington*, 326 U.S. 310, 316 (1945).
[37] *Boryk* v. *de Havilland Aircraft Co.*, 341 F.2d 666 (2d Cir. 1965).
[38] *Burnham* v. *Superior Court*, 495 U.S. 604 (1990).

activities, but it could easily apply to activities between different nations. It is codified in § 35 (1) of the Restatement of Conflict of Laws (Second).[39]

The U.S. minimum contacts standard goes much further than the standard for judicial jurisdiction used by continental European courts, which is mainly based on the place of domicile or residence of the defendant.[40] This has at times given rise to conflicts over the reach of U.S. judicial jurisdiction. The U.S. Supreme Court therefore stated in 1987 stating that "great care and reserve should be exercised when extending our notions of personal jurisdiction into the international field."[41] In spite of this warning, the controversy over personal jurisdiction by U.S. courts has generally been less heated than the controversy over the reach of U.S. laws. Conflicts over the exercise of personal jurisdiction have, much more than conflicts over the exercise of prescriptive jurisdiction, been eased by the application of the international comity principle,[42] which involves a balancing of U.S. and foreign interests,[43] and by the application of the constitutional principle of due process informed by "traditional notions of fair play and substantial justice."[44]

16. SUBJECT MATTER JURISDICTION – In the United States, the specific category of subject matter jurisdiction exists alongside the category of personal jurisdiction. Both

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[39] § 35 (1) of the Restatement (Second) ("A State has power to exercise judicial jurisdiction over an individual who does business in the state with respect to causes of action arising from the business done in the state.").

[40] EC Council Regulation 44/2001, *O.J.* L 12/1 (2001). Defendants can ordinarily only be sued in their place of domicile, although a number of special rules of judicial jurisdiction relating to a particular subject matter (tort, property, contract …) allow plaintiffs to sue defendants in other fora as well. English and Irish courts however have historically recognized that judicial jurisdiction could be premised on the mere presence of a defendant. *See* B. PEARCE, "The Comity Doctrine as a Barrier to Judicial Jurisdiction: A U.S.-E.U. Comparison", 30 *Stan. J. Int'l L.* 525, 536 (1994).

[41] *See, e.g.*, *Asahi Metal Indus. Co.* v. *Superior Court*, 480 U.S. 102, 115 (1987).

[42] *See* B. PEARCE, "The Comity Doctrine as a Barrier to Judicial Jurisdiction: A U.S.-E.U. Comparison", 30 *Stan. J. Int'l L.* 525, 536 (1994).

[43] *See, e.g.*, *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286 (1980) (calling on lower courts to weigh the interests of "several States" in "judicial resolution of the dispute and the advancement of substantive policies").

[44] *International Shoe Co. v. Washington*, 326 U.S. 310, 315 (1945) (ruling that "due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice."); *FTC v. Compagnie de Saint-Gobain-Pont-à-Mousson*, 636 F.2d 1300, 1321, n. 119 (D.C. Cir. 1980) (court assuming "court that just as a court may not validly exert its adjudicative authority over the defendant lacking "minimum contacts" with the forum . . . the FTC is subject to some limitations on its personal jurisdiction--set by the due process clause of the Constitution--which bar it from exercising its investigative authority over a foreigner lacking any contacts with the United States"); *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 415-16 (1984) (demanding that "the defendant's contacts with the forum [be] continuous and systematic, or that the suit [arise] out of or is related to those contacts"); *In the Matter of an Application to Enforce Admin. Subpoenas Duces Tecum of the SEC v. Knowles*, 87 F.3d 413, 417 (10th Cir. 1996) ("Even a single purposeful contact may be sufficient to meet the minimum contacts standard when the underlying proceeding is directly related to that contact."); *WorldWide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980) (requiring "that the defendant's conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there."); *Burger King v. Rudzewicz*, 471 U.S. 462, 473 (1985) ("Where a forum seeks to assert specific jurisdiction over an out-of-state defendant who has not consented to suit there, this "fair warning" requirement is satisfied if the defendant has "purposefully directed" his activities at residents of the forum, and the litigation results from alleged injuries that "arise out of or relate to" those activities.") (citation omitted).

personal and subject matter jurisdiction should be present before a U.S. court can actually entertain a claim. Where personal jurisdiction refers to the court's jurisdiction over a person, does subject matter jurisdiction refer to jurisdiction over the subject matter of a dispute. Subject matter jurisdiction relates to the existence of a cause of action for a controversy under U.S. law, or simply put, to the question of whether a statute applies to a particular conduct[45]. Not all controversies can indeed be brought before U.S. courts, even if personal jurisdiction over the parties can be readily secured. A claim is only actionable in U.S. courts if U.S. law provides for jurisdiction over its subject matter. For instance, if the Alien Tort Statute[46] had not provided for a cause of action in U.S. district courts for violations of the law of nations, these courts would never be in a capacity to legitimately establish their subject matter jurisdiction over such violations, even if the parties to the dispute had sufficient minimal contacts with the U.S. for purposes of personal jurisdiction.

In U.S. practice, problems of subject matter jurisdiction usually arise not over *whether* U.S. courts have subject matter jurisdiction over a case, but over *which* U.S. courts federal or state courts – can entertain the case. Under U.S. constitutional law, federal courts have only limited subject matter jurisdiction, while state courts enjoy plenary subject matter jurisdiction.[47] For purposes of this dissertation, the requirement of U.S. subject matter jurisdiction may appear of lesser importance, in that the analysis is limited to disputes arising under statutes conferring specific federal question jurisdiction, such as the antitrust and securities laws, and the Alien Tort Statute.

1.4.2. The interplay of private and public international law

17. U.S. district courts have undisputed subject matter jurisdiction over complaints alleging antitrust and securities laws violations if they are not frivolous. The main question then is whether the plaintiff has a cause of action under U.S. law, or whether instead foreign laws should apply to the dispute.[48] U.S. courts may regard

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[45] *See, e.g.*, P.R. WOOD, *International Loans, Bonds and Securities Regulation*, London, Sweet & Maxwell, 1995, p. 363, at nr. 20-4.

[46] 28 U.S.C. § 1350 (1988).

[47] Article III of the U.S. Constitution. Statutory authorization for federal subject matter jurisdiction for federal courts can be found in 28 U.S.C. §§ 1331 and 1332(a)(2) and (3). These provisions set forth that federal courts have federal question jurisdiction, and diversity and alienage jurisdiction.

[48] *Compare Hartford Fire Insurance Co.* v. *California*, 509 U.S. 764, 813 (1993) (Scalia J., dissenting) ("The second question – the extraterritorial reach of the Sherman Act – has nothing to do with the jurisdiction of the courts. It is a question of substantive law turning on whether, in enacting the Sherman Act, Congress asserted regulatory power over the challenged conduct."). The distinction between subject-matter jurisdiction and the territorial scope of U.S. (antitrust) laws as an additional element of the claim is not entirely academic. In the United States, issues relating to subject-matter jurisdiction can be resolved early in the litigation by deciding whether plaintiffs have a federal claim under Federal Rule of Civil Procedure 12(b)(1) (which provides for a motion to dismiss for lack of subject-matter jurisdiction). In contrast, if the determination of the territorial scope of U.S. laws is treated as an additional element of the claim, the analysis goes to the merits (motion for summary judgment on the merits in the absence of a genuine issue of material fact) and could delay resolution of the case, thereby producing an effect on foreign markets while the case is pending. Courts have therefore often considered the effects test to be a matter of subject-matter jurisdiction. The 7th Circuit recently ruled that, as a matter of policy, "treating the matter [the Federal Trade Antitrust Improvements Act] as one of subject matter jurisdiction reduces the potential for offending the economic policies of other nations" (*United Phosphorus, Ltd.* v. *Angus Chemical Co.*, 322 F.3d 942, 952 (7th Cir. 2003)).

this as a question of subject matter jurisdiction as well,[49] although it is rather a question of conflict of laws (a question which also arises in European courts that have established their judicial jurisdiction). If a court has adjudicative and subject matter jurisdiction, this does not imply that it may apply forum law. Under the rules governing conflict of laws, a court may well be required to apply *foreign* law.

In regulatory, public law matters (which are nevertheless privately enforced), such as securities and antitrust matters, the courts do however not face the choice of applying forum law or foreign law. As courts do not apply the public laws of another nation,[50] they either apply domestic regulatory law, or they dismiss the case.[51] Unlike with respect to non-regulatory tort matters, courts of the forum are unlikely to enforce foreign securities and antitrust laws in private suits involving claims for damages, because securities and antitrust laws reflect, much more than classical tort laws, the particular political economy and sovereignty of a State.[52]. In regulatory matters, rules on the conflict of laws have no decisive role to play. As a violation of the forum's economic regulations not only jeopardizes private but also public interests,[53] the court will shun traditional conflict of laws rules, and consistently apply forum law.

18. A court may however not apply forum law at will, lest it overstep the jurisdictional limits set by international law.[54] A determination of the applicable law

[49] Comment c to § 401 of the Restatement (Third) of U.S. Foreign Relations Law.

[50] *See Holman* v. *Johnson* (1775) 98 E.R. 1120 (KB) ("No country ever takes notice of the revenue laws of another country."); *The Antelope*, 23 U.S. (10 Wheat.) 66, 123 (1825) (Marshall, C.J.), ("The Courts of no country execute the penal laws of another"); *Guiness* v. *Miller*, 291 F.769, 770 (S.D.N.Y. 1923) ("[N]o court can enforce any law but that of its own sovereign."); *United States v. Aluminium Corp. of America*, 148 F.2d 416, 443 (2d Cir. 1945) ("[A]s a court of the United States, we cannot look beyond our own law."). DODGE attributes the unwillingness to apply foreign law not only to the public law taboo, as epitomized by *The Antelope*, but also to the absence of a federal question in case U.S. federal law does not apply – which deprives the federal courts of jurisdiction. W.S. DODGE, "Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism", 39 *Harv. Int'l L.J.* 101, 109, note 40 (1998). *Contra* this received wisdom: A.F. LOWENFELD, "International Litigation and the Quest for Reasonableness", 245 *Recueil des Cours* 9, 30 (1994-I). *See* for statutes that nonetheless provide for the application of another State's antitrust laws by the forum: Article 137 of the Swiss Private International Law Code; Article 99, § 2, 2° of the Belgian Private International Law Code.

[51] *See also* H.L. BUXBAUM, "Conflict of Economic Laws: From Sovereignty to Substance", 42 *Va. J. Int'l L.* 931, 935 (2002) (pointing out that the extraterritorial application of U.S. regulatory law does not raise choice-of-law questions in the strict sense of that term, although at the same time noting that "traditional choice-of-law jurisprudence is often used to analyze the extraterritorial reach of regulatory laws").

[52] *See also* J. KAFFANKE, "Nationales Wirtschaftsrecht und internationaler Sachverhalt", 27 *Archiv des Völkerrechts* 129 (1989). *Compare* M.M. SIEMS, "The Rules on Conflict of Laws in the European Takeover Directive", *European Company and Financial Law Review* 458, 463 (2004) (pointing out that in economic law, "the rules on conflict of laws do not follow the neutral principle of the closest connection, because their scope often depends on their content, namely the protection of the capital market and of the investors.").

[53] *See, e.g.*, H.G. MAIER, "Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law", 76 *Am. J. Int'l L.* 280, 289 (1982) ("A government always has a direct interest in the outcome of a regulatory case, even when the governmental viewpoint is represented by a citizen-prosecutor seeking private recovery").

[54] Although norms of public international law may not always be directly applicable in the domestic legal order, they could however still be indirectly applied through the presumption of consistency of domestic law with international norms (A. BIANCHI, Reply to Professor Maier, in K.M. MEESSEN (ed.), *Extraterritorial Jurisdiction in Theory and Practice*, London/The Hague/Boston, Kluwer, 1996, 74, 81), an interpretive technique which is widely used in the United States, where it is known as the

then yields to a determination of the precise scope of forum law,[55] or also, choice of law dissolves into prescriptive jurisdiction under international law. An inquiry into whether or not forum law applies to regulatory cases is no longer a choice-of-law analysis, but rather an inquiry under public international law, which "does not tell us what law is to be applied in a given case", but "requires a choice between two systems each of which may claim to be closely connected with the issue at hand."[56] In U.S. terms, where U.S. antitrust and securities laws confer exclusive and full subject matter jurisdiction on federal courts over antitrust and securities violations *in abstracto*, a determination of subject matter jurisdiction *in concreto* is subject to a determination of the laws' scope of application.[57]

19. The interesting thing now is that, especially in the United States, choice of law considerations are not entirely abandoned in the analysis, as courts may use the factors underlying choice of law analysis so as determine the precise scope of U.S. law and the reasonableness of assertions of prescriptive jurisdiction under Section 403 of the Restatement (Third) of U.S. Foreign Relations Law, a section which will be discussed in a separate chapter 5. This may appear counter-intuitive. While both public international law and conflict of laws delimit the competence of States and were historically not treated separately,[58] conflict of laws is now in essence *municipal* and thus *subjective* law. Is public international law, which is more objective in that its standards stems from the contemporary practice of States,[59] not supposed to limit the freedom of States in adopting conflict of laws rules in order to protect the interests of other States?[60]

Charming Betsy canon of statutory construction (*The Charming Betsy*, 6 U.S. (2 Cranch) 132, 143 (1804)).

[55] *Compare* G.A. BERMANN, *Transnational Litigation*, St Paul, MN, Thomson West, 2003, at 80; H.L. BUXBAUM, "Conflict of Economic Laws: From Sovereignty to Substance", 42 *Va. J. Int'l L.* 931, 935 (2002).

[56] *See* F.A. MANN, "The Doctrine of Jurisdiction Revisited after Twenty Years", 186 *R.C.A.D.I.* 9, 31 (1984-III).

[57] *Compare* H.L. BUXBAUM, "Conflict of Economic Laws: From Sovereignty to Substance", 42 *Va. J. Int'l L.* 931, 941 (2002) ("The method of resolving [conflicts of legislative jurisdiction] is to fold a consideration of competing jurisdictional claims into the analysis of statutory scope: despite the existence of a jurisdictional basis […], the regulatory interests of another country may be held sufficient to preclude application of U.S. law to that conduct."). *Compare Hartford Fire Insurance Co.* v. *California*, 509 U.S. 764, 796 n. 22 (1993) (majority stating, rebuffing Justice Scalia, that the Sherman Act is a "prime exampl[e] of the simultaneous exercise of prescriptive jurisdiction [*i.e.*, jurisdiction relating to the territorial scope of U.S. law] and grant of subject matter jurisdiction").

[58] *See* F.A. MANN, "The Doctrine of Jurisdiction Revisited after Twenty Years", 186 *R.C.A.D.I.* 9, 17 and 24 (1984-III).

[59] *See* A. BIANCHI, Reply to Professor Maier, in K.M. MEESSEN (ed.), *Extraterritorial Jurisdiction in Theory and Practice*, London/The Hague/Boston, Kluwer, 1996, 74, 80.

[60] *See* F.A. MANN, "The Doctrine of Jurisdiction Revisited after Twenty Years", 186 *R.C.A.D.I.* 9, 19 (1984-III). *Contra* G. FITZMAURICE, "The General Principles of International Law", *R.C.A.D.I.* 1, 218-22, vol. 92 (1957-II) (submitting that "apparently, public international law does not effect any delimitation of spheres of competence in the civil sphere, and seems the matter entirely to private international law", and somewhat naïvely believing that States will apply their conflict of laws rules reasonably, without being required to do so under public international law, because such would be in their own national interests) One may wonder why, if "honesty is the best policy", or "sincerity is worth any artifice", the international community actually developed binding rules of criminal jurisdiction, as if in the field of criminal law, an organically developed world order proved more elusive than in the field of civil law. *See* in the mould of Fitzmaurice also C. SCOTT, "Translating Torture into Transnational Tort: Conceptual Divides in the Debate on Corporate Accountability for Human Rights Harms", in C. SCOTT (ed.), *Torture as Tort*, Oxford, Portland, Oregon, Hart, 2001, 52

20. The explanation for the resurfacing of choice of law factors in the analysis of the scope of regulatory law is that these factors are aimed at identifying the most significant relationship of a legal situation with a particular sovereign.[61] They may mitigate the excesses of jurisdiction stemming from the unqualified exercise of jurisdiction on the basis of the classical public international law principles.[62] Although it is precisely public international law that is theoretically supposed to restrain private international law, the indeterminacy of the public international law rules of jurisdiction, the territorial principle in particular, makes these rules so malleable that they may justify nearly every jurisdictional assertion. Unlike public international law rules, which merely require a *strong* nexus of the regulating State with a situation, conflict of laws rules are ordinarily geared to identifying the State with the *strongest* nexus to the situation.[63] Rules of private international law are therefore particularly appropriate to solve normative competency conflicts.[64] In contrast, rules of public international law, which allow several States to exercise their jurisdiction over one and the same situation, will cast aside only the most outrageous assertions.[65]

21. The choice of law rules resorted to so as to assess the reach of a State's regulatory laws are not only geared to mediating conflicts between sovereign nations,

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(arguing that general public international law does not constrain private international law, and that each States chooses what rules to adopt). As the jurisdictional norms of both private and public international law are based on the nexus of a particular situation with (the law of) a particular sovereign, norms of private international law "may sometimes in fact reflect an *opinio iuris* of international law", without it being necessary to systematically inquire the conformity of these norms with public international law. *See* K.M. MEESSEN, "Drafting Rules on Extraterritorial Jurisdiction", in K.M. MEESSEN (ed.), *Extraterritorial Jurisdiction in Theory and Practice*, London/The Hague/Boston, Kluwer, 1996, 225, 227.

[61] *See* § 6 of the Restatement (Second) of Conflict of Laws.

[62] *See also* A.F. LOWENFELD, "International Litigation and the Quest for Reasonableness", 245 *R.C.A.D.I.* 9, 45 (1994-I) (submitting that "the issues of jurisdiction to prescribe can and should be addressed by reference to contacts, interests, and expectations [*i.e.*, the factors set forth in Section 403 of the Restatement] – that is to say meaningful contacts, genuine interests, and justified expectations – rather than with reference to the traditional vocabulary of public international law, focused on the over-used concept of sovereignty.").

[63] *See* G. SCHUSTER, *Die internationale Anwendung des Börsenrechts*, Berlin, Springer, 1996, 59.

[64] Comment c to § 101 of the Restatement (Third) of U.S. Foreign Relations Law clarifies the interplay of public and private international law as follows: "In some circumstances, issues of private international law may also implicate issues of public international law, and many matters of private international law have substantial international significance and therefore may be considered foreign relations law … The concepts, doctrines, and considerations that inform private international law also guide the development of some areas of public international law, notably the principles limiting the jurisdiction of states to prescribe, adjudicate and enforce law [citing, *inter alia*, §§ 402-403]… Increasingly, public international law impinges on private international activity, for example, the law of jurisdiction and judgments…"

[65] *Compare* D.J. GERBER, "The Extraterritorial Application of the German Antitrust Laws", 77 *A.J.I.L.* 756 (1983) (arguing that the (public international law) jurisdictional principles are insufficiently developed to account for the needs of the forum States and the interests of other States). The structure of the jurisdictional sections of the influential Restatement (Third) of U.S. Foreign Relations Law (1987) may serve to illustrate this. § 402 of the Restatement sets out the classical public international law principles on which jurisdiction may be premised: the territoriality, nationality and protective principles. Aware of the potentially broad sweep of § 402, § 403 subjects any exercise of jurisdiction on the basis of the § 402, by setting forth a set of conflict of laws-based factors to determine whether the exercise of jurisdiction is reasonable. The Section 403 factors may protect the interests of private actors – by conferring predictability and legal certainty on their international transactions – as well as the interests of States.

since the traditional goal of such rules is to ensure predictability and legal certainty for private actors. Confusion and tension may arise here, because regulatory law is essentially public law, which is also enforced by private actors. The scope of application of regulatory law has typically been cast in public international law terms,[66] regulators being in the first place concerned not to overstep the international law limits that delimit their jurisdictional sphere from other regulators' spheres. If the reasonableness of a State's jurisdictional assertion may not only be a function of respect for the interests of sovereign nations, but also of predictability and legal certainty for private actors, the latter "assume more significance as a regulatory goal in itself".[67] Thus, in the field of regulatory law, rules of prescriptive jurisdiction merge with choice of law rules, and, accordingly, do not only arbitrate sovereign interests, but also the claims and interests of private actors.[68] Needless to say, public interests and private interests will not always be neatly aligned in the absence of a robust mediation system conferring genuine predictability on the balancing process operated under § 403. This may explain the prevailing inconsistency in court decisions.[69]

1.4.3. Distinguishing private and public international law rules

22. The mixture of public and private international law rules in the assessment of the reach of a State's regulatory laws captures the peculiar U.S. approach to prescriptive jurisdiction. Europeans do indeed not seem to inject private international law considerations into the analysis of prescriptive jurisdiction. The absence of such considerations may be explained by the fact that regulatory law is hardly privately enforced in Europe. However, as will be discussed, not only do U.S. courts deciding private cases take choice of law into account, but so do U.S. regulators. While it may be argued that U.S. regulators piggybacked on the courts' approach – in the field of antitrust law there is some evidence thereof – it appears that there is something more at stake.

23. In regulatory cases, European States may put a higher premium on sovereignty-informed considerations than on considerations informed by predictability for private economic actors, because public international law does purportedly not oblige States to take private interests into account. Notably Professor MEESSEN has forcefully argued in favour of distinguishing public and private international law rules.[70] MEESSEN's main argument against the role of private international law in determining the reach of a State's laws indeed appears to be that "on the level of relations between sovereign states, domestic rules of conflict of laws cannot, of course, be relied upon at all", as "[t]he perspective of conflict of laws lies

[66] *Compare* H.L. BUXBAUM, "The Private Attorney General in a Global Age: Public Interests in Private Antitrust Litigation", 26 *Yale J. Int'l L.* 219, 220 (2001).
[67] H.L. BUXBAUM, "Conflict of Economic Laws: From Sovereignty to Substance", 42 *Va. J. Int'l L.* 931, 944 (2002).
[68] *Compare* H.L. BUXBAUM, "The Private Attorney General in a Global Age: Public Interests in Private Antitrust Litigation", 26 *Yale J. Int'l L.* 219, 262 (2001) (pointing out that "the traditional separation between public and private becomes unproductive").
[69] In international contract disputes, the public interests have been subordinated to private interests, which may explain the more consistent application of conflict-of-laws rules. *Id.*, at 221.
[70] He has nonetheless admitted that "in deciding practical cases, rules of each system will often have to be applied cumulatively."K.M. MEESSEN, "Antitrust Jurisdiction under Customary International Law", 78 *A.J.I.L.* 783, 789-90 (1984).

within a state" and "is directed to domestic interests, both public and private."[71] In MEESSEN's view, in conflict of laws, "[f]oreign interests are relevant only insofar as they form part of the state's foreign policy, for instance, if they reflect considerations of reciprocity."[72]

MEESSEN arguably takes an unduly narrow approach to the role of conflicts of law in deciding transnational regulatory cases. He may mistakenly believe that "[t]he perspective of [public] international law stands above the sovereign states."[73] In the noumenal world, there may indeed be a layer of international law that is disinterested as it is precisely created by mutual consent of sovereign States. However, rules of customary international law, especially in the field of jurisdiction, are often vague, and need elaboration by domestic courts in order to be operationalized in a phenomenal world, in specific cases. In essence, classical public international law rules make up a set of extremely malleable principles that allow States to "pull for the home crowd" at their discretion. Only domestic courts' development of a second layer of norms applicable to transnational situations might genuinely mitigate a State's jurisdictional assertions. These norms derive from the concept of comity. Comity has been adopted as an ill-defined principle of *public* international law, but, as will be shown in chapter 5, is historically the concept underpinning the whole system of *private* international law, a system that tries to link a private legal transaction or situation to the law of a particular sovereign in order to confer predictability on legal transactions.

24. Predictability not only serves private actors, but also sovereign actors. States will usually be reluctant to apply their laws to private transnational situations that other States have also an interest in regulating. Private international law, although domestic law, is thus not necessarily a complex of norms that is pro-forum biased and does not adequately heed foreign interests. Obviously, in certain cases the forum State's interests may be considered as controlling even in the face of equally strong foreign States' interests. Yet as a general matter, rules of private international law attempt to tie a situation to a particular sovereign in a much more intricate and neutral way than catch-all rules of public international law do.

MEESSEN admits that public international law only provides modest answers, answers that "may often be supplemented by richer ones of conflict of laws."[74] One is therefore at a loss why he takes so much issue with the apparent lack of distinction between public and private international law. Classical public international law rules are indeed the poor relation in the field of prescriptive jurisdiction. Arguably, MEESSEN hopes that courts take a more public international law approach through looking for international consensus on the application of specific conflict of laws rules.[75] Conflict of laws rules may thus come to reflect public international law rules, and private and public international law may ultimately be (re-)united.

[71] *Id.*, at 790.
[72] *Id.*
[73] *Id.*
[74] *Id*.
[75] *Id.* ("Rules of conflict of laws may be part of state practice and thereby contribute to the formation of customary international law.").

25. This brings us to the question whether the "concepts, doctrines, and considerations that inform private international law" that make up the rule of reason set forth in § 403 of the Restatement are so widely shared within the international community so as to constitute State practice and qualify as norms of *public* international law. The Restatement itself believes they are, and that the rule of reason is a rule of customary international law, which should accordingly be applied by any State – not only the United States – when exercising jurisdiction.[76] Most authors however believe that the rule of reason is *not* international law. In chapter 5, the international law nature of the rule of reason will be discussed in greater detail.

1.5. Concluding remarks

26. In this first introductory chapter, the scope and method of this study have been presented. It has been set out that this study aims at developing a rule-based framework of jurisdiction under international law, from a transatlantic perspective. In addition, as a preliminary matter, different concepts of jurisdiction – prescriptive or legislative, enforcement, adjudicative, judicial or personal, subject-matter … - have been clarified. It has been shown that, while this study is mainly concerned with issues of *prescriptive* jurisdiction under public international law, such issues become inexorably entangled in a web of private international law concepts of jurisdiction and choice of law, because, especially in the field of economic law, States typically apply their laws to private parties, and private parties may have a role to play in enforcing economic laws. Disentanglement requires recourse to one basic principle: reasonableness, the common thread throughout this study.

27. Under the classical law of jurisdiction under public international law, choice-of-law concepts of reasonableness did not play a prominent role though, possibly because the law of jurisdiction was seen as primarily governing the ambit of the criminal law. In the next chapter, the traditional public international law approaches to jurisdiction will be discussed. Later on, this study will return to reasonableness, and advocate it as a solution for the curse of concurrent jurisdiction. Concurrent jurisdiction is indeed the inevitable result of the classical public international law approaches: especially in the economic field may the effects of certain practices fan out globally nowadays, thereby possibly providing connections that are sufficient for more than one State to exercise their jurisdiction.

CHAPTER 2: PUBLIC INTERNATIONAL LAW APPROACHES TO JURISDICTION

28. Under public international law, two approaches could logically be taken to the question of jurisdiction. Either one allows States to exercise jurisdiction as they see fit, unless there is a prohibitive rule to the contrary, or one prohibits States to exercise jurisdiction as they see fit, unless there is a permissive rule to the contrary. The first approach was taken by the Permanent Court of International Justice in the 1927 *Lotus*

[76] In an apparent rebuff of Professor MEESSEN's critique of the operation of private international law, comment a to § 403 states that "[t]he principle [of reasonableness / comity] applies regardless of the status of relations between the state exercising jurisdiction and another state whose interests may be affected. While the term "comity" is sometimes understood to include a requirement of reciprocity, the rule of this section is not conditional on a finding that the state affected by a regulation would exercise or limits its jurisdiction in the same circumstances to the same extent."

case (section 2.1). The second approach, which purportedly reflects customary international law, has been taken by most States and the majority of the doctrine. Under this approach, States are *not* authorized the exercise their jurisdiction, unless they could rely on such jurisdictional principles as the territoriality, personality, protective or universality principle (section 2.2). It is unclear which doctrine has the upper hand. Not surprisingly, for purposes of shifting the burden of proof to the other party, States who assert their jurisdiction tend to rely on *Lotus*, whereas States who oppose another State's jurisdictional assertions tend to rely on the permissive principles approach.

29. In practice, a consensus opinion has crystallized. This opinion seems mainly informed by the restrictive approach, in that it requires that States justify their jurisdictional assertion in terms of a permissive international law rule. Indeed, leaving States almost unfettered jurisdictional discretion may run counter to the very regulating purpose of the international law of jurisdiction: delimiting States' spheres of action and thus reducing conflicts between States.[77] However, because a strict categorization of permissive principles may fail to do justice to legitimate State interests threatened by unfriendly foreign action (a categorization which requires that State wait for a norm of customary international law authorizing a new jurisdictional assertion to crystallize),[78] this opinion has construed the permissive principles rather broadly: States are generally considered to be authorized to exercise jurisdiction if they could advance a legitimate interest based on personal or territorial connections of the matter to be regulated. The indeterminacy of 'connections' and 'interests' has made States' room for action actually very broad, and has led to an internationally sanctioned system of possibly harmful concurring jurisdiction. In chapter 5, a way out of the conundrum of concurring jurisdiction will be sought.

2.1. The Lotus case

30. IMPORTANCE OF *LOTUS* - In 1921, the Permanent Court of International Justice held, in passing, in the case of the *Nationality Decrees in Tunis and Morocco* that "jurisdiction which in principle, belongs solely to the State, is limited by rules of international law".[79] Six years later, in the *Lotus* case, a case directly concerning the question of jurisdiction, the Court elaborated on this reference in an opinion which still constitutes the basic framework of reference for questions of jurisdiction under international law. Since *Lotus*, the P.C.I.J. and the ICJ have not directly addressed the

[77] *See, e.g.*, J.E. FERRY, "Towards Completing the Charm: The Woodpulp Judgment", *E.I.P.L.R.* 19, 21 (1989) (stating, in the context of the law of jurisdiction, that "the objective of international law" is to "help to reduce conflicts between states"); J.-M. BISCHOFF & R. KOVAR, "L'application du droit communautaire de la concurrence aux entreprises établies à l'extérieur de la Communauté", 102 *J.D.I.* 675, 712 (1975) (stating that "[i]l appartient au droit international de s'efforcer de résoudre les conflits susceptibles de naître d'une … pluralité de compétences. »); H.L. BUXBAUM, "Transnational Regulatory Litigation", 46 *Va. J. Int'l L.* 251, 304 (2006) (stating that the very purpose of international law "is to safeguard the international community against overreaching by individual nations").

[78] *See* W. MENG, "Neuere Entwicklungen im Streit um die Jurisdiktionshoheit der Staaten im Bereich der Wettbewerbsbeschränkungen", 41 *Z.a.ö.r.R.V.* 469, 471 (1981) (criticizing the permissive principles approach on the ground that under this approach, a State would violate international law "der einen neu aftauchenden Sachverhalt rechtlich regelt, ohne dass hierzu bereits eine entsprechende völkerrechtliche Ermächtigungsnorm bestände. Schätzt man das Trägheitsmoment bei der Bildung von Völkerrechtsatzen realistisch ein, so bestehen bereits unter pragmatischem Gesichtspunkt entscheidende Einwände gegen diese Theorie.").

[79] Series B., No. 4, pp. 23-24.

doctrine of (extraterritorial) jurisdiction. This is not to say that this doctrine has not been developing, on the contrary. Yet the development has come about solely in national legal practice, without supervisory guidance by an international court or regulator.[80]

31. In 1926, the Permanent Court for International Justice (P.C.I.J.) was requested to settle a dispute between Turkey and France with regard to a collision on the high seas, the so-called *Lotus*-case.[81] In August 2, 1926, the French mail steamer *Lotus* collided with the Turkish collier *Boz-Kourt*, as a result of which eight Turkish sailors perished. When the French steamer arrived in Constantinople the next day, Turkish authorities started investigations in the case. Two days later, Lieutenant Demons, the officer of the watch of the *Lotus*, a French national, was placed under arrest. On September 15, 1926, A Turkish criminal court sentenced him to eighty days' imprisonment and a fine of twenty-two pounds. During the proceedings, France lobbyed heavily, and contended that, by bringing Demons to justice, Turkey acted in conflict with the principles of international law.[82] On October 12, 1926, France and Germany signed a special agreement in which they submitted the question of

[80] *See* F.A. MANN, "The Doctrine of Jurisdiction Revisited after Twenty Years", 186 *R.C.A.D.I.* 9, 53 (1984-III) (pointing out that "the material of international origin which has a bearing upon the doctrine of jurisdiction is extremely meager. The material of national origin is enormous."); C.L. BLAKESLEY, "Extraterritorial Jurisdiction", in M.C. BASSIOUNI (ed.), *International Criminal Law II: Procedural and Enforcement Mechanisms*, 2nd ed., Transnational, Ardsley, NY, 1999, at 37 (stating that the international law on jurisdiction is much less developed than the domestic law on jurisdiction). Admittedly, in the 2001 *Bankovic* case, the European Court of Human Rights dealt with the concept of jurisdiction, yet in respect of the very limited question of whether Article 1 of the European Convention of Human Rights protects persons residing outside the Council of Europe's territory who were harmed by military action by member States of the Council of Europe. The question arose in particular whether the term "persons within the jurisdiction of member States of the Council of Europe" in Article 1 of the European Convention of Human Rights covered citizens of the Federal Republic of Yugoslavia who were victims of an aerial bombardment by NATO airplanes on a radio and TV tower in Belgrade. The Court held that the applicants did not fall within the jurisdiction of the member States concerned. *See* European Court of Human Rights, *Bankovic and others* v. *Belgium and 16 other Contracting States*, Application No. 52207/99, December 12, 2001, § 62 ("The Court finds State practice in the application of the Convention since its ratification to be indicative of a lack of any apprehension on the part of the Contracting States of their extra-territorial responsibility in contexts similar to the present case. Althouth there have been a number of military missions involving Contracting [NATO] States acting extra-territorially since their ratification of the Convention …, no State has indicated a belief that its extra-territorial actions involved an exercise of jurisdiction within the meaning of Article 1 of the Convention …"). The territoriality principle under public international law played an important role in the Court's reasoning (*Id.*, at §§ 59-60). The question raised by the *Bankovic*, whether European States are obliged to uphold human rights standards when their military is operating abroad, is certainly an interesting one. It will however not be discussed in this study, which is in the first place concerned with assertions of jurisdiction that raise sovereignty concerns in foreign nations. Clearly, *Bankovic* did not raise sovereignty concerns, quite on the contrary: the foreign plaintiffs themselves invoked European human rights law before a European court, apparently supported by their own government. *See Bankovic*, § 12 (stating that on 29 April 1999, the Federal Republic of Yugoslavia instituted proceedings with the International Court of Justice against NATO Members which Bankovic and others also sued in the European Court of Human Rights on October 20, 1999). *See* more extensively on the extraterritorial application of human rights treaties: F.T. COOMANS & M.T. KAMMINGA (eds.), *Extraterritorial Application of Human Rights Treaties*, Antwerpen, Intersentia, 2004, xiv + 281 p..

[81] P.C.I.J., *S.S. Lotus*, P.C.I.J. Reports, Series A, No. 10 (1927).

[82] *Id.*, at p. 18 ("The French Government contends that the Turkish courts, in order to have jurisdiction, should be able to point to some title to jurisdiction recognized by international law in favor Turkey. On the other hand, the Turkish Government takes the view that Article 15 allows Turkey jurisdiction wherever such jurisdiction does not come into conflict with a principle of international law.").

jurisdiction arisen in the *Lotus* case to the P.C.I.J. In 1927, in a controversial verdict, decided by the president's casting vote, the P.C.I.J. ruled that Turkey was indeed entitled to institute criminal proceedings against the French officer. Even though the case could barely be considered as representative for jurisdictional conflicts, *Lotus* soon became the main standard of reference for such conflicts in all legal areas. It will also be treated as such in this study (although with quite some reservations). It is therefore useful to discuss the Court's holdings in greater detail.

32. ENFORCEMENT V. PRESCRIPTIVE JURISDICTION – In *Lotus*, the P.C.I.J. made an important distinction between enforcement and prescriptive jurisdiction. Whereas States would be precluded from enforcing their laws in another State's territory absent a permissive rule to the contrary, international law would pose no limits on a State's jurisdiction to prescribe its rules for persons and events outside its borders absent a prohibitive rule to the contrary.

The Court held as to enforcement jurisdiction:

> "[T]he 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."[83]

A State cannot use coercive power to enforce its rules outside its territory. Stating the contrary would mean shattering the sacrosanct principle of sovereign equality of nations. A State cannot use military force to compel another State to abide by its laws. Likewise, a State cannot resort to legal implementation measures such as penalties, fines, seizures, investigations or demands for information to give extraterritorial effect to its rules.[84]

The Court held that, in contrast, international law would *permit* jurisdiction to *prescribe* rules extraterritorially:

> "It does not, however, 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

[83] *Id.*, at 18-19.

[84] *See also Alvarez-Machain v. United States et. al.* (No. 99-56762); *Alvarez-Machain v. Sosa et. al.* (No. 99-56880) (9th Cir., June 3, 2003). The United States had argued that the abduction of the plaintiff in Mexico was lawful pursuant to its authority to apply U.S. criminal law extraterritorially under the Controlled Substances Act, 21 U.S.C. § 878(a)(3). The Ninth Circuit disagreed, noting that Congress did not authorise the unilateral, extraterritorial enforcement of this provision in foreign countries by U.S. agents. According to the Ninth Circuit, *"[e]xtraterritorial application, in other words, does not automatically give rise to extraterritorial enforcement authority." Compare United States v. Alvarez-Machain*, 112 S. Ct. 2188 (1992); B. STERN, "L'extraterritorialité revisitée: Où il est question des affaires *Alvarez-Machain, Pâte de bois* et de quelques autres…", 38 *AFDI* 1992, at 268-288.

> 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."[85]

Thus, States could set rules for persons, property and acts outside their territory in the absence of a prohibitive rule, provided that they enforce these rules territorially (in keeping with the ban on extraterritorial enforcement jurisdiction). Indeed, the Court held that "the territoriality of criminal law […] is not an absolute principle of international law and by no means coincides with territorial sovereignty."[86] Territorial sovereignty would relate to enforcement jurisdiction, but not to prescriptive jurisdiction. States would be free to exercise their jurisdiction extraterritorially absent a prohibitive rule to the contrary. Such a rule might emerge through abstract declarations of *opinio juris* made before the claim to extraterritorial jurisdiction is made, and by protesting the claim once it is made.[87]

33. On the face of it, it may require imagination to separate extraterritorial prescriptive or legislative jurisdiction from its logical complement enforcement jurisdiction. It may be submitted that a State that enacts rules governing conduct outside its territory (prescriptive jurisdiction) surely wants to have them also implemented there under the threat of sanctions (enforcement jurisdiction). This is no doubt true. However, a State can use indirect territorial means to induce the conduct it desires. As JENNINGS observed, " […] the excessive devotion to legalism has often blinded us to the fact that the exercise of straight jurisdiction over a person present in the territory may – albeit indirectly – be in fact the most effective way of exercising the State's power extraterritorially."[88] If a person outside the territory does not abide by the norm prescribed extraterritorially, he could be sued in the territory of the enacting State. If he does not pay the fine, his assets in the territory could be seized. Similarly, he could be precluded from entering the territory or registering with a government agency. Thus, territorial enforcement jurisdiction could compel persons to comply with norms prescribed extraterritorially. When a person has no assets in the territory of the prescribing State and does not entertain contacts with that State, extraterritorial jurisdiction will ordinarily prove ineffective.

34. UNBRIDLED SOVEREIGNTY: ITS CONTENTS AND ITS DISCONTENTS – In claiming jurisdictional freedom for States, *Lotus* may be considered as the high watermark of

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[85] *S.S. Lotus, loc. cit.*, at 18-19.
[86] *S.S. Lotus, loc. cit.*, at 20.
[87] *See* A.V. LOWE, "Blocking Extraterritorial Jurisdiction: the British Protection of Trading Interests Act, 1980", 75 *A.J.I.L.* 257, 263 (1981).
[88] *See* R. JENNINGS, *Extraterritorial Application of Trade Legislation*, ILA, Tokyo, 1964, at 311; cited in: B. STERN, "Can the United States Set Rules for the World? A French View", 31 *JWT* 1997/4, 14. Illustrating that States may prescribe unreasonable laws while enforcing them reasonably, and vice versa, O'KEEFE even concludes: "Jurisdiction to prescribe and jurisdiction to enforce are logically independent of each other." He admits nonetheless that the act of prescription and the act of enforcement are, in practice, intertwined. *See* R. O'KEEFE, "Universal Jurisdiction: Clarifying the Basic Concept", 2 *J.I.C.J.* 735, at 741 (2004).

the concept of unbridled sovereignty of the State under international law. It paid no, or at least only marginal attention, to the sovereignty of *another* State that might possibly be encroached upon by the assertions of the regulating State. Nonetheless, one should concede that the *Lotus* court anticipated the increasing irrelevance of physical borders in a time of exploding transnational mobility of persons and activities.[89] In the modern era, genuine sovereign equality of States may not imply that States always refrain from exercising extraterritorial jurisdiction, but, rather on the contrary, that "the people whom that sovereignty protects" ought not to be placed "at the mercy of the internal acts and politics" of another sovereign.[90] Consequently, "[a] consensual legal system could not, in logic or practice, contain a rule prohibiting a sovereign state from prescribing rules against activities outside its borders that have harmful effects within the state's territory", *i.e.*, from exercising (effects-based) jurisdiction.[91]

The flipside of unbridled sovereignty is an inflation of possible assertions of concurrent jurisdiction by different States.[92] Moreover, if States could, at the level of exercising jurisdiction, basically do as they please, the very regulating role of international law may be negated.[93] Aware of this danger, in the 1970 *Barcelona Traction* case before the ICJ (which did not directly revolve around issues of jurisdiction), Judge FITZMAURICE therefore implicitly amended, albeit cautiously, the Court's *Lotus* holding, emphasizing jurisdictional limits and restraint under international law, without however indicating the existence of particular international norms.[94] In the field of criminal law, a number of jurisdictional principles have been derived from joint State practice and convictions. They arguably constitute customary international law. Their underlying structure is a scathing indictment of the *Lotus*

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[89] *See* F.A. MANN, "The Doctrine of Jurisdiction in International Law", 111 *R.C.A.D.I.* 1, 36 (1964-I) (pointing out that the rejection of a strict test of territoriality "would not be inconsistent with the requirements of modern life").

[90] *See* H.G. MAIER, "Jurisdictional Rules in Customary International Law", in K.M. MEESSEN (ed.), *Extraterritorial Jurisdiction in Theory and Practice*, London/The Hague/Boston, Kluwer, 1996, 64, 66.

[91] *Id.*

[92] *Compare* M. INAZUMI, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law*, Antwerp-Oxford, Intersentia, 2005, 138 (also drawing a link with the terrorism conventions of the 1970s, which seem to depart from the pre-eminence or even exclusivity of the principle of territoriality).

[93] *See* W.W. COOK, "The Application of the Criminal Law of a Country to Acts Committed by Foreigners Outside the Jurisdiction", 40 *W. Va. L.Q.* 303, 326 (1934) (arguing that "if states really were fully "sovereign"", … there would be no such thing as "international law""); M.R. GARCIA-MORA, "Criminal Jurisdiction Over Foreigners for Treason and Offenses Against the Safety of the State Committed Upon Foreign Territory", 19 *U. Pitt. L. Rev.* 567, 568 (1958) (terming the postulate of absolute sovereignty "the denial of a community of interests existing in the World Society and the belief that States live in isolation concerned only with interests of their own", and that "its continuous adherence is highly incompatible with the existence of a World Society fundamentally grounded on the conception of the interdependence of States").

[94] Case concerning *Barcelona Traction, Light and Power Co. Ltd., ICJ Reports* 1970, at 105 ("It is true that under present conditions international law does not impose hard and fast rules on States delimiting spheres of national jurisdiction in such matters – namely bankruptcy jurisdiction (and there are of course others – for instance in the field of shipping, "anti-trust" legislation, etc.) – but leaves to States a wide discretion in the matter. It does, however, (a) postulate the existence of limits – though in any given case it may be for the tribunal to indicate what these are for the purposes of that case; and (b) involve for every State an obligation to exercise moderation and restraint as to the extent of the jurisdiction assumed by the courts in cases having a foreign element, and to avoid undue encroachment on a jurisdiction more properly appertaining to, or more appropriately exercisable by, another State."). *See also* subsection 5.4.1.

theory of jurisdiction unbound. The basic norm is not the *Lotus*-like jurisdictional merry-go-round with States doing whatever they like, but the outright prohibition of extending a State's jurisdiction beyond its physical borders. Other principles function as exceptions to the territoriality principle (*see* chapters 3 and 4).

2.2. Customary international law

2.2.1. Persisting influence of Lotus

35. The *Lotus* judgment has been vehemently criticized in the doctrine. It is nowadays often considered as obsolete,[95] and even as never a precedent at all.[96] Nevertheless, States continue to rely on it as it is the only judgment of an international court directly relating to the problem of jurisdiction. In 1984, KUYPER stated that "insufficient research has been done so far to decide with any degree of certainty whether or not the *Lotus* decision has been set aside by subsequent developments in international customary law."[97] This statement probably still holds true as of today. Jurisdictional assertions based on the universality principle, which rose to prominence in the 1990s, are often implicitly premised on the permissive scheme of *Lotus*. And assertions of economic jurisdiction are still often only nominally premised on the principle of territoriality, with protesting States in practice bearing the burden of establishing that the territorial effects of a business-restrictive practice are insufficient to justify jurisdiction.

2.2.2. The priority of territorial jurisdiction under customary international law

36. JURISDICTION UNDER CUSTOMARY INTERNATIONAL LAW – It is widely submitted that, whilst *Lotus* permits extraterritorial prescriptive jurisdiction as a principle, arguably even as an *a priori* theoretical construction,[98] customary

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[95] *See, e.g.*, F.A. MANN, "The Doctrine of Jurisdiction in International Law", 111 *R.C.A.D.I.* 1, 35 (1964-I) (stating that *Lotus* countenances "a most unfortunate and retrograde theory" which "cannot claim to be good law"); INTERNATIONAL COURT OF JUSTICE, *Arrest Warrant* (Democratic Republic of Congo v. Belgium), diss. op. VAN DEN WYNGAERT, § 51 ("It has often been argued, not without reason, that the *"Lotus"* test is too liberal and that, given the growing complexity of contemporary international intercourse, a more restrictiveapproach should be adopted today.").

[96] *See, e.g.*, R. HIGGINS, *Problems and Process*, at 77 ("… I do feel that one cannot read too much into a mere dictum of the Permanent Court. This is, for me, another example of the futility of deciding law by reference to an unclear dictum of a court made long years ago in the face of utterly different factual circumstances. We have better ways of determining contemporary international law."); A.V. LOWE, "Blocking Extraterritorial Jurisdiction: the British Protection of Trading Interests Act, 1980", 75 *A.J.I.L.* 257, 263 (1981) (believing that is it "likely that the Court in the *Lotus* case only intended the presumption to apply in cases such as that then before it, where there is a clear connection with the forum"); F.A. MANN, 1964, at 35 (noting that "there is no certainty that [the Court] was contemplating the doctrine of jurisdiction in general or any of its ramifications outside the field of criminal law"). *See also* J. VERHOEVEN, "Remarques critiques sur les lois [belges] du 16 juin 1993 et du 10 février 1999", in: J. WOUTERS & H. PANKEN, *De Genocidewet in internationaal perspectief [The Belgian Genocide Act in International Perspective]*, Ghent, Larcier, 2002, at 188 ("Il est vrai qu'elle deviendrait singulièrement détestable si elle devait permettre à tous les Etats de se doter d'une compétence universelle…ce qui est bien autre chose que leur pouvoir de punir les infractions commises par ou sur un navire qui ne bat pas leur pavillon, seul en cause dans l'affaire soumise à la Cour permanente.").

[97] P.J. KUYPER, "The European Community and the U.S. Pipeline Embargo: Comments on Comments", *G.Y.I.L.* 72, 93 (1984).

[98] *See* A. BIANCHI, Reply to Professor Maier, in K.M. MEESSEN (ed.), *Extraterritorial Jurisdiction in Theory and Practice*, London/The Hague/Boston, Kluwer, 1996, 74, 89.

international law based on actual State practice turns *Lotus* upside down. Under customary international law, as historically developed, extraterritorial prescriptive jurisdiction is prohibited in the absence of a permissive rule.[99] Although both the *Lotus* and the customary international law approach could yield the same outcome in a particular case,[100] the fact that the *Lotus* approach places the burden of proof on the State assailing the jurisdictional assertion of another State, doubtless has the effect of widening the scope of extraterritorial jurisdiction.

Especially the 1935 *Harvard Research on International Law* has been instrumental in the customary international law of jurisdiction becoming the main framework of reference for assessing the legality of jurisdictional assertions.[101] Its Draft Convention on Jurisdiction with Respect to Crime has however never been translated into a treaty, given the sensitivity of limitations on a State's jurisdiction.[102] The proper scope *ratione loci* of a State's laws thus remains a matter of customary international law, with the concomitant problems of ascertaining what that law actually is at a given moment in time.[103]

37. SOVEREIGNTY – Under customary international law, inductively derived from the practice of States, sovereignty is usually linked to territoriality ('territorial sovereignty'), with territorial jurisdiction being the fundamental rule of the international jurisdictional order.[104] In the 1928 *Island of Palmas* arbitral case for instance, Max Huber held:

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[99] BRADLEY terms this "the conventional view". *See* C.A. BRADLEY, "Universal Jurisdiction and U.S. Law", *U. Chi. Legal F.* 323 (2001). In the *Lotus*-case the P.C.I.J. held the view that this was certainly not the case under international law as it stood in 1927. *See* ICJ, *Arrest Warrant*, Judge Guillaume, separate opinion, § 4 ("Under the law as classically formulated, a State normally has jurisdiction over an offence committed abroad only if the offender, or at the very least the victim, has the nationality of that State or if the crime threatens its internal or external security. Ordinarily, States are without jurisdiction over crimes committed abroad as between foreigners").

[100] If, as a principle, international law allows States to exercise extraterritorial jurisdiction, the State that claims jurisdiction need not cite a rule of international law authorizing it to exercise jurisdiction (*Lotus*, *loc. cit.*, at 18-19). This consideration merely implies that the burden of proof shifts to the objecting or complaining State. It is not a blank cheque for states to apply their rules extraterritorially, as indeed, once a prohibitive rule is identified upon submission of the objecting State, the jurisdiction of the prescribing State is restricted. HARVARD RESEARCH ON INTERNATIONAL LAW, "Draft Convention on Jurisdiction with Respect to Crime", 29 *A.J.I.L.* 439, 468 (1935) ("The two points of view presented in the case of the *S.S. Lotus* may be regarded as essentially nothing more than two avenues of approach to a single principle, significant only as the choice between them may determine which contestant should take the initiative in proving the law in the case before the court.")

[101] HARVARD RESEARCH ON INTERNATIONAL LAW, "Draft Convention on Jurisdiction with Respect to Crime", 29 *A.J.I.L.* 439, 444 (1935) (pointing out that "the international law of jurisdiction must rest primarily upon a foundation built of materials from the cases, codes and statutes of national law").

[102] *Compare* G.R. WATSON, "The Passive Personality Principle", 28 *Tex. Int'l L.J.* 1, 40-41 (1993) (noting that "a multilateral convention on jurisdiction would probably be riddled with reservations").

[103] *Id.*, 39 (1993) (noting, discussing United States practice, that "the public, Congress, and even many parts of the Executive Branch may never know whether the United States government repeatedly objects to or acquiesces in other governments' use of [extraterritorial] jurisdiction", as "[t]he relevant material may consist of confidential diplomatic notes or classified internal memoranda").

[104] *See however also Lotus*, *loc. cit.*, at 20 (holding that "in all systems of law the principle of the territorial character of criminal law is fundamental", and that "the exclusively territorial character of law relating to this domain constitutes a principle which, except as otherwise provided, would, *ipso facto*, prevent States from extending the criminal jurisdiction of their courts beyond their frontiers."); F.A. MANN, "The Doctrine of Jurisdiction Revisited after Twenty Years", 186 *R.C.A.D.I.* 9, 20 (1984-III) (stating that "in assessing the extent of jurisdiction the starting point must necessarily be [the territoriality of sovereignty] such as it was developed over the centuries").

> "Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the function of a State. This development […] of international law [has] established this principle of the exclusive competence of the State in regard to its own territory in such a way as to make it the point of departure in settling most questions that concern international relations."[105]

38. The primacy of territorial jurisdiction is usually premised on the principle of sovereign equality of States and the principle of non-intervention (or non-interference),[106] which render unlawful "such legislation as would have the effect of regulating the conduct of foreigners in foreign countries".[107] Other grounds of jurisdiction than the territoriality principle ("extraterritorial" jurisdiction") are not logically deduced from that principle. Instead, they function as exceptions to the cornerstones of international law, territoriality, sovereign equality and non-intervention,[108] "based upon ideas of social expediency".[109]

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[105] Perm. Ct. Arb. 1928, *Island of Palmas* (U.S. v. Neth.), 2 R.I.A.A., 829. It has been argued that the Permanent Court seemed to limit territorial sovereignty to "the function of a State", and would thus limit the exclusivity of territorial jurisdiction to the field of public law. The regulation of the relations between private persons through private law would not be a function of a State, and would be subject to the concurring competency of all States (*see* B. STERN, "L'extraterritorialité revisitée: Où il est question des affaires *Alvarez-Machain, Pâte de bois* et de quelques autres…", 38 *A.F.D.I.* 239, 254 (1992); M. AKEHURST, "Jurisdiction in International Law", 46 *B.Y.I.L.* 145, 190-91 (1972-73)). This reasoning should however be rejected. It is unlikely that the Permanent Court referred to the dichotomy public – private law, when referring to "the function of a State". "[T]he function of a State" may be just another word for "the power to set rules", be they of a private or public law nature. Kelsenian legal theory for instance equates law with the State. The State has no other function or even *raison d'être* than setting rules of conduct according to a pyramidal structure the top of which is formed by the Constitution, or Kelsen's hypothetical *Grundnorm* (*see* H. KELSEN, *Reine Rechtslehre: Einleitung in die Rechtswissenschaftliche Problematik*, Scientia Aalen, 1934, XV + 236 p.). Similarly, the 19th century legal theoretician John Austin considered law to be a set of sovereign commands that had to be obeyed by all citizens. He made no distinction between their dealings with each other and their dealings with the State (J. AUSTIN & R. CAMPBELL (ed.), *Lectures on Jurisprudence or the Philosophy of Positive Law*, Linn Jersey City (N.J.), s.d., 2 v.). It may be objected that private actors could regulate themselves and that States are entitled to regulate private conduct on a subsidiary basis, even when performed outside their territory. Several States could then regulate private conduct on a unilateral basis, wherever it occurs. Pursuant to this argument, legislation of State X could apply to citizen A who resides and conducts all his activities in State Y which refrains, for one reason or the other, to apply its laws to citizen A. The absurd result of this approach is that allows State X to know better what is good for State Y's citizens than the latters' democratically elected government (*see also* the vacuum theory, discussed and rejected in subsection 6.7.4). Doubtless, the Permanent Court of Arbitration cannot be said to have permitted such truly extraterritorial jurisdiction over private activities.

[106] MANN has argued that there exists merely a terminological difference between sovereignty, territoriality and the principle of non-intervention. *See* F.A. MANN, "The Doctrine of Jurisdiction Revisited after Twenty Years", 186 *R.C.A.D.I.* 9, 20 (1984-III). *Compare* I. BROWNLIE, *Principles of Public International Law*, 4th ed., Oxford, Clarendon Press, 1990, at 310 ("Extra-territorial acts can only lawfully be the object of jurisdiction if … (ii) … the principle of non-intervention in the domestic or territorial jurisdiction of other states [is] observed."). The question obviously arises what the actual content of the principle of non-intervention is. *See also* subsection 5.4.1.

[107] *See* F.A. MANN, "The Doctrine of Jurisdiction in International Law", 111 *R.C.A.D.I.* 1, 47 (1964-I).

[108] *Compare* : H. ASCENSIO, "Are Spanish Courts Backing Down on Universality? The Supreme Tribunal's Decision in *Guatemalan Generals*", 1 *J.C.I.J.* 690, 699 (2003) (who severely limits the scope of the principle of non-intervention as a general prohibitive rule in matters of extraterritorial prescriptive jurisdiction: "Considering the customary process which led to the establishment of the principle, 'intervention' is usually understood as a concrete, material act, infringing the exclusive

39. It is interesting to point out here that both the expansive view taken by *Lotus* (based on prohibitive rules) and the restrictive view of the grounds of jurisdiction under customary international law (based on permissive rules) are both underpinned by the principle of sovereignty. Jurisdiction is indeed, as the Permanent Court of International Justice held in the *Legal Status of Eastern Greenland* case, "one of the most obvious forms of the exercise of sovereign power".[110] The former view however takes the perspective of the prescribing State, emphasizing its absolute sovereign right of unilaterally exercising jurisdiction,[111] whereas the latter view takes the perspective of the State feeling the adverse effects of the jurisdictional assertions of the prescribing State, a view emphasizing notions of reciprocity that are necessary for any viable concept of sovereignty.[112]

40. AN ALTERNATIVE READING OF *LOTUS* – It is submitted that the P.C.I.J. in *Lotus* is unlikely to have meant to impose the burden of proof upon those objecting to assertions of jurisdiction,[113] or if it meant to, it was either plain wrong or its holding is by now obsolete.[114] States may indeed not have given themselves unlimited discretion in the matter of extraterritorial jurisdiction.[115] Espousing a historical reading of the *Lotus*, ICJ Judge Guillaume has even argued that "[t]he adoption of the United Nations Charter proclaiming the sovereign equality of States, and the appearance on the international scene of new States, born of decolonization, have strengthened the territorial principle."[116] By the same token, three other ICJ judges considered *Lotus* to

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jurisdiction of a state over its own territory. A normative act may constitute a kind of immaterial intervention only if it necessarily implies a material implementation in a foreign country, without the agreement of the territorial authorities, or a strong pressure over that country with considerable negative consequences.").

[109] *See* W.W. COOK, "The Application of the Criminal Law of a Country to Acts Committed by Foreigners Outside the Jurisdiction", 40 *W. Va. L.Q.* 303, 328 (1934).

[110] Series A-B, 1933, p. 48.

[111] *Compare* M. INAZUMI, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law*, Antwerp-Oxford, Intersentia, 2005, 133.

[112] *See, e.g.*, F.A. MANN, "The Doctrine of Jurisdiction Revisited after Twenty Years", 186 *R.C.A.D.I.* 9, 20 (1984-III), 20 ("[J]urisdiction involves both the right to exercise it within the limits of the State's sovereignty and the duty to recognize the same right of other States.").

[113] *See* A.V. LOWE, "Jurisdiction", in M.D. EVANS (ed.), *International Law*, Oxford, Oxford University Press, 2003, 329, 335; A.V. LOWE, "Blocking Extraterritorial Jurisdiction: the British Protection of Trading Interests Act, 1980", 75 *A.J.I.L.* 257, 263 (1981) (rejecting the idea that the *Lotus* court would have accepted "the view that there is a presumption in favour of the legality of claims to legislative jurisdiction").

[114] *See* M. INAZUMI, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law*, Antwerp-Oxford, Intersentia, 2005, 134 ("[N]owadays, States are expected to indicate the evidence for the legality of their act"); A. BIANCHI, Reply to Professor Maier, in K.M. MEESSEN (ed.), *Extraterritorial Jurisdiction in Theory and Practice*, London/The Hague/Boston, Kluwer, 1996, 74, 89 ("The *Lotus* case is too anachronistic and specific to be a starting point for analysis.").

[115] *See* R.Y. JENNINGS, "Extraterritorial Jurisdiction and the United States Antitrust Laws", 33 *B.Y.I.L.* 146, 150 (1957) ("Are we to conclude then that extraterritorial jurisdiction is a matter left within the discretion of each sovereign State; that it is not governed by international law? The practice of States leans against such a conclusion. For the fact is that States do not give themselves unlimited discretion in the matter.").

[116] ICJ, *Arrest Warrant*, Separate Opinion Judge Guillaume, § 15. *Contra*: ICJ, *Arrest Warrant*, Dissenting Opinion Judge Ranjeva, § 9 (« Sans aucun doute, on peut analyser l'évolution des idées et des conditions politiques dans le monde contemporain comme favorable à une atténuation de la conception territorialiste de la compétence et à l'émergence d'une approche plus fonctionnaliste dans le

"represent[] the high water mark of *laissez-faire* in international relations, and an era that has been significantly overtaken by other tendencies."[117] Probably, *Lotus* should be construed as principally authorizing jurisdiction on the basis of the *objective territorial principle* – which the Court repeatedly referred to (*in casu* jurisdiction based on the effects caused on a Turkish vessel which is to be assimilated to Turkish territory)[118] – or at least in cases with a strong nexus with the State, and *not* as a general matter.[119]

As we shall see in this study, States - in particular the United States and the European Union and its Member States - have never primarily substantiated their claims of economic jurisdiction in *Lotus* terms. Instead, they relied upon the classical principles of jurisdiction, although such required at times stretching them.[120]

2.2.3. Legitimate interests, foreign harm, power, and reasonableness

41. LEGITIMATE INTERESTS – The customary international law principles of jurisdiction are entwined in that they all put forward a link between the situation they govern and the competence of the state. This link is not necessarily the territory. It can as well be one of the two other constituent elements of the definition of a State, namely its population or its sovereign authority.[121] More generally, it may be

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sens d'un service au profit des fins supérieures communes.» Judge Ranjeva subsequently noted however that « [l]e caractère territorial de la base du titre de compétence reste encore une des valeurs sûres, le noyau dur du droit international positif contemporain »).

[117] ICJ, *Arrest Warrant*, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, § 51 (arguing that the "vertical notion of the authority of action [of States as agents for the international community] is significantly different from the horizontal system of international law envisaged in the "*Lotus*" case.")

[118] *See Lotus*, *op. cit.*, at 23. It may be noted that international conventions on the law of the sea overruled the *Lotus* holding. *See* Article 11 of the 1958 Convention on the High Seas and Article 97(1) UNCLOS ("In the event of a collision or any other incident of navigation concerning a ship on the high seas, involving the penal or disciplinary responsibility of the master or of any other person in the service of the ship, no penal or disciplinary proceedings may be instituted against such person except before the judicial or administrative authorities either of the flag State or of the State of which such person is a national.").

In *Lotus*, jurisdiction could also be premised on the passive personality principle, given the Turkish nationality of the victims, although – since the accident happened on the high seas – it may not be regarded as authority for passive personality jurisdiction within the territory of another State (*see* R. HIGGINS, *Problems and Process: International Law and How We Use It*, Oxford, Clarendon Press, 1994, 66).

[119] *See also* A.V. LOWE, "Blocking Extraterritorial Jurisdiction: the British Protection of Trading Interests Act, 1980", 75 *A.J.I.L.* 257, 258-59 (1981) ("If [the Court] intended more than this, it was probably wrong."). *See also*, although not specifically discussing *Lotus* and taking a rather broad view: K.M. MEESSEN, *Völkerrechtliche Grundsätze des internationalen Kartellrechts*, 1975, 101 and 171; K.M. MEESSEN, "Zusammenschlusskontrolle in auslandsbezogenen Sachverhalten", *ZHR* 143 (1979), (holding that, in the face of the multiplicity of economic and antitrust conceptions, a general international jurisdictional rule could not be developed, and that international law merely requires there to be a significant nexus).

[120] *See, e.g.*, A.V. LOWE, "Blocking Extraterritorial Jurisdiction: the British Protection of Trading Interests Act, 1980", 75 *A.J.I.L.* 257, 263 (1981), citing DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1973, at 197-98; 1975, at 339-40 (pointing out that States, including the U.S., never subscribed to the view advanced in the *Lotus* case).

[121] *See* B. STERN, "L'extraterritorialité revisitée: Où il est question des affaires *Alvarez-Machain*, *Pâte de bois* et de quelques autres…", 38 *AFDI*, 1992, 251 ; I. BROWNLIE, *Principles of Public International Law*, 4th ed., Oxford, Clarendon Press, 1990, at 310 (arguing that the threshold principle to be

submitted that a State may not exercise its jurisdiction when it has no legitimate interest in or when it is not affected by an activity.[122] RAMSEY has termed this the "none of your business" rule,[123] a rule which may arguably be traced to the 13th century Italian jurist BARTOLUS.[124]

42. HARM TO OTHER STATES: RESTRAINING THE JURISDICTIONAL PRINCIPLES – If a State does not have a link with or an interest in a subject-matter, it could not exercise its jurisdiction over it, even if foreign protest against a jurisdictional assertion remains absent. However, even if a link or interest could be discerned, and a State could rely on the accepted bases of jurisdiction under customary international law, the legality of the exercise of jurisdiction under international law might depend on the harm that such exercise causes to other sovereigns.[125] As BEALE already held in 1923, the legal wrongfulness for a sovereign to exercise his will derives from his infringing upon the rights of other sovereigns.[126] Similarly, in 1972, AKEHURST stated that "[t]he acid test of the limits of jurisdiction in international law is the presence or absence of

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observed if extraterritorial acts are lawfully to be object of jurisdiction is « that there should be a substantial and bona fide connection between the subject matter and the source of the jurisdiction »).

[122] *See, e.g.*, M. MORRIS, "High Crimes and Misconceptions: the ICC and non-Party States", 64 *Law & Contemp. Probs.*, 13, 64 (2001) (stating "the customary international law of criminal jurisdiction is based on a perceptible, if somewhat ill-defined, set of principles regarding the legitimate prosecutorial interests of states.").

[123] M.D. RAMSEY, "Escaping 'International Comity'", 83 *Iowa L. Rev.* 893, 920 (1998). *See also* R.Y. JENNINGS, "Extraterritorial Jurisdiction in the United States Antitrust Laws", 33 *BYIL* 146, 152 (1957) ("It is reasonable to say … that international law will permit a State to exercise extraterritorial jurisdiction provided that State's legitimate interests (legitimate that is to say be tests accepted in the common practice of States) are involved …"); A.T. GUZMAN, "Choice of Law: New Foundations", 90 *Geo. L.J.* 883, 894 (2002) ("When an activity has no effect on any person within a jurisdiction, that jurisdiction has no reason to regulate the activity," thereby distinguishing between an interest in permitting and an interest in regulating an activity).

[124] *See* D. OEHLER, *Internationales Strafrecht*, 2nd ed., Köln, Berlin, Bonn, München, Carl Heymanns Verlag, 1983, 69 (stating that with Bartolus's principle that "statuta sunt jus proprium civitatis", "die Lehre, dass die Einzelnorm des Strafanwendungsrechts immer einen Anknüpfungs-, besser einen Beziehungspunkt benötige, erkannt und ausgedrückt [wird]", a doctrine which guards against political instrumentalization of the law).

[125] *Compare Barcelona Traction*, 1970 I.C.J. at 105 (FITZMAURICE, J., separate opinion) (stating that under international law, every State should "exercise moderation and restraint as to the extent of its jurisdiction" so as "to avoid undue encroachment on a jurisdiction more properly appertaining to" another State); R.Y. JENNINGS, "Extraterritorial Jurisdiction in the United States Antitrust Laws", 33 *BYIL*, 146, 153 (arguing that against the international law authorization to apply one's antitrust laws extraterritorially "must be set also the legitimate and reasonable interests of the State whose territory is primarily concerned, for the extraterritorial exercise of jurisdiction must not be permitted to extend to the point where the local law is supplanted: where in fact it becomes an interference by one State in the affairs of another."); I. BROWNLIE, *Principles of Public International Law*, 4th ed., Oxford, Clarendon Press, 1990, at 310 ("Extra-territorial acts can only lawfully be the object of jurisdiction if … (iii) … a principle based on elements of accommodation, mutuality, and proportionality [is] applied. Thus nationals resident abroad should not be constrained to violate the law of the place of residence."); M. INAZUMI, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law*, Antwerp-Oxford, Intersentia, 2005, at 134 ("[A]n act of State is generally presumed to be legal until it is proven that it undermines the rights of other States … It should also be remembered that merely because a jurisdiction is legal does necessarily mean that a State has the absolute right to exercise it."); A. BIANCHI, Reply to Professor Maier, in K.M. MEESSEN (ed.), *Extraterritorial Jurisdiction in Theory and Practice*, London/The Hague/Boston, Kluwer, 1996, 74, 78 (stating that "[p]henomena of extraterritorial jurisdiction … vary a great deal in intensity, depending on the potential of collision with other states' commands and on how intrusive into other legal orders the attempt to exercise authority turns out to be.")

[126] J.H. BEALE, "The Jurisdiction of a Sovereign State", 36 *Harv. L. Rev.* 241 (1923).

diplomatic protests"[127] stemming from the harm purportedly cause to them by a particular jurisdictional assertion.

The harm test will in practice be the salient test to mediate jurisdictional conflicts.[128] Indeed, as States do generally not legislate or exercise jurisdiction when they have no interest in doing so or when a situation does not somehow have a link with an element of their statehood,[129] assertions of jurisdiction are generally legal under public international law,[130] at least if one construes the classical ground of jurisdiction in a broad manner.[131] Accordingly, "a theoretical preoccupation with the lawfulness *in abstracto* of these broad jurisdictional principles" may eclipse what BIANCHI terms "a realistic approach to the complexities of actual cases".[132] Pursuant to the harm test then, it could be examined whether the exercise jurisdiction in actual cases is reasonable, *viz.* whether it does not amount to an abuse of rights or to arbitrariness. Legal certainty in jurisdictional matters is then not derived from the classical extraterritoriality doctrine,[133] but from a case-by-case reasonableness analysis.

43. DEFINING HARM: THE ROLE OF PROTEST – Harm is not an objective category. One particular sovereign may feel harmed by assertions of extraterritorial jurisdiction,

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[127] M. AKEHURST, "Jurisdiction in International Law", 46 *B.Y.I.L.* 145, 176 (1972-73).

[128] *Compare* M.D. RAMSEY, "Escaping 'International Comity'", 83 *Iowa L. Rev.* 893, 922 (1998).

[129] As any 'extraterritorial' jurisdictional assertion is aimed at defending the interests of the State as a territorially defined entity, this assertion may be said to always have a territorial nexus. *Compare* H.G. MAIER, "Jurisdictional Rules in Customary International Law", in K.M. MEESSEN (ed.), *Extraterritorial Jurisdiction in Theory and Practice*, London/The Hague/Boston, Kluwer, 1996, 64, 65 ("Although the presumed limitation of governmental authority to a nation's territorial boundaries flows from the historic concept of the modern nation state, the proposition that a state may on occasion exercise authority over events beyond its borders also flows, paradoxically, *from the principle that the interests of the people that make up the state's population are territorially defined*.") (emphasis added).

[130] *See* M. INAZUMI, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law*, Antwerp-Oxford, Intersentia, 2005, 170; E.S. PODGOR, ""Defensive Territoriality": a New Paradigm for the Prosecution of Extraterritorial Business Crimes", 31 *Ga. J. Int'l & Comp. L.* 1, 13-14 (2002) (finding that "the reality is that few prosecutions of extraterritorial criminal conduct will be turned aside as falling outside the boundaries of international law. The bases of jurisdiction leave ample room for courts to find support for permitting the prosecution to proceed with cases premised on extraterritorial acts.").

[131] Construed strictly, they may, as BIANCHI pointed out, "fall short of doing justice in many cases", given the fact that the "internationalization of commercial and financial markets has enormously complicated factual matrices". *See* A. BIANCHI, Reply to Professor Maier, in K.M. MEESSEN (ed.), *Extraterritorial Jurisdiction in Theory and Practice*, London/The Hague/Boston, Kluwer, 1996, 74, 85. Indeed, as argued below in the context of *inter alia* antitrust, a strict reading of territoriality may give corporations free rein to prey on foreign markets.

[132] *See* A. BIANCHI, Reply to Professor Maier, in K.M. MEESSEN (ed.), *Extraterritorial Jurisdiction in Theory and Practice*, London/The Hague/Boston, Kluwer, 1996, 74, 83. *See also* A. BIANCHI, "Extraterritoriality and Export Controls: Some Remarks on the Alleged Antinomy Between European and U.S. Approaches", 35 *G.Y.I.L.* 366, 429 (1992). *See also*, in the context of criminal jurisdiction: J. MARTIN, *Strafbarkeit grenzüberschreitender Umweltbeeinträchtigungen. Zugleich ein Beitrag zur Gefährdungsdogmatik und zum Umweltvölkerrecht*, Freiburg im Breisgau, Max-Planck-Institut für ausländisches und internationales Strafrecht, 1989, at 137 ("Die Prinzipien des internationalen Strafrechts lassen sich … gewissermassen als Regelbeispiele dafür verstehen, wann die Ausdehnung der Strafgewalt völkerrechtlich gestattet ist. Selbst wenn eine Stat formal unter ein solches Prinzip des internationalen Strafrechts einzuordnen ist, kann es aber sein, das die Anknüpfung im konkreten Fall nicht ausreicht.")

[133] *Compare* X., Note, "Predictability and Comity: Toward Common Principles of Extraterritorial Jurisdiction", 98 *Harv. L. Rev.* 1310, 1319 (1985) (holding that "[e]xtraterritoriality doctrine lacks both the coherence imparted by guiding principles and the certainty provided by clear rules").

while another sovereign may not feel harmed. This renders extraterritoriality, as BIANCHI put it, "also a matter of degree".[134] In practice, the harm caused by an assertion of extraterritorial jurisdiction is a measure of the foreign protest levelled at the assertion .These protest may be regarded "as evidence of the fact that external effects of extraterritorial jurisdiction are being borne by the wrong parties."[135] They may bring the State asserting its jurisdiction to take into account the harmful effects on parties to which it is not democratically accountable, and possibly forgo its assertions, now and in similar future cases. It may be noted that a State ordinarily protests as soon as another State exercises prescriptive jurisdiction deemed undesirable, because the former will believe that the latter will sooner or later go on to effectively enforce its laws.[136]

Protests will however not always prove effective. Only if the affected State can credibly bring pressure to bear on the wrongdoer will he be likely to back down. International practice indicates that States scale back their jurisdictional assertions purportedly harming the interests of other States, if the latter States bring pressure to bear on the former States, more in particular by launching a credible threat of retaliation against these States.[137] Not all foreign governmental protests will indeed convince the 'aggressive' States to forsake its jurisdictional assertions. Only if the foreign State can cause similar or greater reciprocal harm to the aggressive State will the latter probably defer. As far as future cases are concerned, the aggressive State will defer if its expected losses through possible retaliatory action outweigh its expected gains through extraterritorial jurisdiction.[138] Deference will obviously depend on the foreign State's political and economic power.

44. JURISDICTION AND POWER – The efficiency of assertions of extraterritorial jurisdiction is a function of relative power. Put differently, as has been observed by an anonymous author in the *Harvard Law Review*, "jurisdiction is grounded on the capacity to coerce (a 'power' theory of jurisdiction)".[139] Powerful States will be able to impose their legislation on weaker States, while weaker States will almost never be able to impose their legislation on more powerful States. While this may be construed as a general norm of international realist thought, the question arises whether it is also a rule of customary international law. Weaker States might in practice defer to the

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[134] *See* A. BIANCHI, Reply to Professor Maier, in K.M. MEESSEN (ed.), *Extraterritorial Jurisdiction in Theory and Practice*, London/The Hague/Boston, Kluwer, 1996, 74, 79.

[135] *See* G. SCHUSTER, "Extraterritoriality of Securities Laws: An Economic Analysis of Jurisdictional Conflicts", 26 *Law & Pol'y Int'l Bus.* 165, 183 (1994). In fact, these protests are not so much directed against the exercise of legislative jurisdiction but rather against the likelihood of enforcement. *See* F.A. MANN, 1964, at 14 (stating that "it is not difficult to visualize circumstances in which the exercise of legislative jurisdiction so plainly implies the likelihood of enforcement that foreign States are entitled to challenge its presence on the statute book").

[136] *See* A. BIANCHI, "Extraterritoriality and Export Controls: Some Remarks on the Alleged Antinomy between European and U.S. Approaches", 35 *G.Y.I.L.* 366, 372, 427 (1992).

[137] *See, e.g.*, the rationale of restricting jurisdiction in *Lauritzen* v. *Larsen*, 345 U.S. 571, 582 (1953) (U.S. Supreme Court stating that it "cannot be unmindful of the necessity for mutual forbearance if retaliations are to be avoided."), and in *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21 (1963) (U.S. Supreme Court stating that upholding jurisdiction in that particular case would "invite retaliatory action from other nations as well as Honduras.").

[138] *See* G. SCHUSTER, "Extraterritoriality of Securities Laws: An Economic Analysis of Jurisdictional Conflicts", 26 *Law & Pol'y Int'l Bus.* 165, 189 (1994).

[139] X., Note, "Predictability and Comity: Toward Common Principles of Extraterritorial Jurisdiction", 98 *Harv. L. Rev.* 1310, 1319 (1985).

assertions of stronger States, but they will usually do this only grudgingly, not necessarily because they are convinced that it is the right thing to do from a normative point of view. If conduct is evidenced by State practice, but if it is not buttressed by *opinio juris*, *i.e.*, by the conviction that the conduct has legal validity, the conduct (*Sein*) may not be considered to be a norm of international law (*Sollen*).

If deference to foreign governmental protests were considered to be a norm of international law, one may conflate an external legal norm with an internal realist norm. States do not defer to foreign governmental protests because they are required to do so by some legal norm 'out there' which they comply with in spite of their perception that not complying with it will advance their interests (external legal norm). On the contrary, States defer to such protests precisely because they have no other choice than deferring: foreign retaliation may directly cause them political or economic harm (internal realist norm). Accordingly, it appears that the restraints on the exercise of extraterritorial jurisdiction are not necessarily governed by law, but rather spontaneously by the intricate workings of the balance of power. This obviously hampers the construction of a legal framework of jurisdictional restraint.

45. REASONABLENESS – The presence or absence of foreign protest is ill-suited as the defining factor to assess the legality of jurisdictional assertions because its argumentative strength is a function of relative power. Attempts have therefore been made at objectivizing the factors to be used in restraining jurisdiction, with foreign protest being just one factor to be taken into account. Such attempts may face difficulties in obtaining a foothold in the real world of international relations, where various underlying threats and promises of States ordinarily determine the desired reach of a particular State's law. The danger is real that, even if States and their courts are required to exercise jurisdiction reasonably in light of a number of 'objective' although malleable factors, power-based jurisdiction will just masquerade as 'reasonable jurisdiction'.

To date, the most commendable attempt to develop a jurisdictional rule of reason has been the American Law Institute's adoption of § 403 of the Restatement (Third) of U.S. Foreign Relations Law in 1987. This rule draws on the traditional international comity principle, but also on conflict of laws principles that protect private rather than sovereign interests. It operates as an overarching rule of jurisdictional restraint. Although the rule of reason considers the classical principles of criminal jurisdiction under public international law to be first-level principles of reasonableness,[140] it sets forth a more intricate reasonableness analysis, since the said principles, given their open-ended nature, may be ill-suited to guarantee reasonableness by themselves. Comity, the rule of reason, and jurisdictional interest-balancing will be discussed in a separate chapter 5. In the next two chapters, the basic international law principles of jurisdiction ("first-level principles of reasonableness") will be examined: the territoriality principle (chapter 3), and the personality, protective, and universality principles (chapter 4).

CHAPTER 3: THE TERRITORIALITY PRINCIPLE

[140] § 402 of the Restatement (Third) of U.S. Foreign Relations Law.

46. The territoriality principle is the most basic principle of international jurisdiction. Under the territoriality principle, jurisdiction obtains over acts that have been committed within the territory. Historically however, personality, and not territoriality, was the basic principle of jurisdictional order. Only in the 17th century did territoriality rise to prominence (part 3.1). Although territoriality is in both the United States and in Europe nowadays the primary base of jurisdiction, the common law countries in particular have, for reasons related to their peculiar system of domestic judicial organization, laid great emphasis on it (parts 3.2 and 3.3).

47. Application of the territoriality principle is not as self-evident as it seems. Indeed, the question arises what territorial connections are decisive in case a legal situation has a nexus with several States. In this chapter, jurisdiction over cross-border offences will be examined in the United States, the United Kingdom, France, Germany, the Netherlands and Belgium (part 3.4). It will be seen that most countries espouse the constitutive elements approach, pursuant to which jurisdiction obtains as soon as an essential element of an offense takes place within the territory. The constitutive elements approach, while being a criminal law approach in the first place, was after 1945 also applied to economic law. In the chapters on antitrust law (chapter 6), securities law (chapter 7), and export controls (chapter 8), it will be shown how 'territorial' jurisdiction over transboundary economic activity (which is sometimes denoted as 'extraterritorial' jurisdiction) was justified on the basis of the territorial effects, implementation, or conduct doctrines.

48. While this chapter provides necessary building-blocks for the development of this study's argument, it could also be viewed as a stand-alone chapter. Notably the technical discussion of the law of jurisdiction applicable to cross-border offences may be mainly of interest to criminal lawyers. In the final analysis, the criminal law of cross-borders offences is only one aspect of the law of cross-border activities, which, after all, much of the law of jurisdiction is. Also, the detailed discussion of the territoriality principle as understood and applied in the United States may seem to be of interest mainly to U.S. practicioners. However, this subsection is actually of great importance for the remainder of the study, as it will be shown how and why the presumption against extraterritoriality in U.S. law was, during the 20th century, set aside in some branches of the law (mainly economic law), and supplanted by arguments relating to regulatory purpose and reasonableness, arguments which will be taken up in chapters 5 *et seq.*

3.1. Historical growth of the territoriality principle in continental Europe

49. LESSER RELEVANCE OF TERRITORIALITY – In continental Europe, the territoriality principle, while being the basic principle of jurisdiction, is not endowed with the almost sancrosanct status which territoriality is traditionally endowed with in common law countries (chapter 3.2 and 3.3). As will be seen in chapter 4, the geographical reach of continental-European codes is fairly wide; the exercise of personality and universal jurisdiction is generally accepted. The lesser importance of territoriality harks back to ancient times, when personality, and not territoriality, was the basic principle of jurisdiction. While territoriality became more important later, with the rise of the sovereign nation-State with undisputed borders, some forces, which were ironically fed by the very power of the sovereign State, complicated the rise of territoriality, notably the development of the inquisitorial system of criminal

prosecution in the Middle Ages. Unlike the common law accusatorial system, the continental-European inquisitorial system was geared toward uncovering the entire truth, and contained less due process guarantees for the defendant. The desire of seeing substantive justice done then almost naturally cast aside jurisdictional constraints such as territoriality.[141] In England, as will be discussed in chapter 3.2, due process rather than substantive justice was the guiding principle of the criminal law. There, the principle of territoriality was supposed to ensure due process, because it was feared that the interests of the defendant would suffer if he were not tried in the place where he committed his offence.

3.1.1. Ancient times: personality prevailing over territoriality

50. In the ancient world, composed of communities rather than territories, allegiances based on religion, race or nationality prevailed over these based on territoriality.[142] Notions of territorial, as opposed to tribal, sovereignty and jurisdictional rules based on these notions were unknown. In ancient times, the emphasis placed on nationality usually translated into the exclusion of aliens from a community's law, and into their subjection to their own personal laws.[143] Only in ancient Palestine, resident aliens were subject to Jewish law (aliens of passage remained subject to their own laws). In ancient Egypt, foreign colonies such as the Jews, the Phoenicians and the Greeks lived under their own laws. In Babylonia, disputes between foreigners were excluded from the application of sacred Babylonian law and were dealt with by special courts.[144] Greece, which did not provide for legal redress for aliens in its early period, similarly placed resident aliens under the jurisdiction of special magistrates (*polemarchs*) who often applied foreign law in private suits.[145]

3.1.2. Rome

51. Even in the Roman time, a high-water mark of legal culture, 'personal sovereignty' often seemed to prevail over territorial sovereignty.[146] Aliens (*peregrini*) were typically allowed to resort to their own laws. When in Rome, they were not subject to the *jus civile* – which only applied to Roman citizens – but to the *jus gentium* (a sort of Roman Empire common law that had developed out of the law of the Roman *gentes* (clans) and later of the Italian tribes, but which was sufficiently romanized), or in case the *jus gentium* did not provide a solution, to the *jus*

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[141] *See* D. OEHLER, *Internationales Strafrecht*, 2nd ed., Köln, Berlin, Bonn, München, Carl Heymanns Verlag, 1983, p. 64.

[142] *See* S. KASSAN, "Extraterritorial Jurisdiction in the Ancient World", 29 *Am. J. Int'l L.* 237, 240 (1935).

[143] *See* J. PLESCIA, "Conflict of Laws in the Roman Empire", 38 *Labeo* 30, 32 (1992).

[144] *See* for an overview: S. KASSAN, "Extraterritorial Jurisdiction in the Ancient World", 29 *Am. J. Int'l L.* 237, 240 *et seq.* (1935).

[145] *See* C. PHILLIPSON, *The International Law and Custom of Ancient Greece and Rome*, London, MacMillan and Co., vol. I, 1911, 171. In criminal suits however, Greek law ordinarily prevailed, although foreigners were typically punished more severely than Greek citizens. *Id.*, at 172.

[146] *Id.*, 295 ("In comparison with the legislative policy of modern nations, Rome undoubtedly concerned herself little with the task of effecting a reconciliation between personal law and territorial law, between personal sovereignty and territorial sovereignty, by determining the limits of their respective applicability."). *See also* F.A. MANN, "The Doctrine of Jurisdiction in International Law", 111 *R.C.A.D.I.* 1, 24 (1964-I).

peregrinum (or *jus originalis*).[147] These latter laws were however not applied "when the interest of State or public morality was endangered."[148] The existence of this public order exception, which later became a mainstay of continental-European conflict of laws doctrine, testifies to the importance of territorial sovereignty in early European law.[149] In Rome, conflicts of laws were actually rare because the *jus gentium* was one body of law applicable to all foreigners.[150] After Emperor Caracalla granted Roman citizenship to all freeborn peoples of the Empire in 202 AD,[151] and especially after the centralization of the Roman Empire in the late Roman period, conflict of laws even fell into oblivion.[152]

52. As far as the competence of the courts (judicial jurisdiction) in the Roman Empire is concerned, MATTHAEUS, probably the most influential commentator of Roman criminal law texts, stated in his *De criminibus* (1622) that "[r]egarding a competent court, a primary rule of law is that the accuser follows the court of the accused."[153] This rule applied to both civil and criminal law cases. Relying on the Justinian Commentary C.3.15.1, MATTHAEUS pointed out that in practice "[t]he court [was] chosen not only where the accused offended but also where he [had] domicile and wherever he [was] found,"[154] although ACCURSIUS (1182-ca. 1260), one of the earliest authorities on C.3.15.1, only included the latter forum for *vagabundi*, persons with no fixed abode.[155] A system granting criminal jurisdiction to the *forum delicti commissi* (the territorial State), the national State, and the custodial State (*i.e.*, the State having custody of the offender present on its territory) also prevailed later, as will be seen in chapter 4, in France and especially Germany. Its influence reaches until the present time.[156]

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[147] Since the 2nd century B.C., a special magistrate, the *praetor peregrinus* dispensed justice in conflicts involving aliens. The *praetor peregrinus* had jurisdiction over cases between non-citizens and over diversity of citizenship cases. *See* J. PLESCIA, "Conflict of Laws in the Roman Empire", 38 *Labeo* 30, 38 (1992). *See* on the nature of the *jus gentium id.*, at 45-46

[148] *See* C. PHILLIPSON, *The International Law and Custom of Ancient Greece and Rome*, London, MacMillan and Co., vol. I, 1911, at 299.

[149] The importance of the territoriality principle could already be gleaned from the first treaty between Rome and Carthage (509-08 B.C.), in which it was stated that salesmen had to comply with territorial regulations: "Those who land for traffic shall not conclude any bargain except in the presence of a herald or town-clerk. That whatever is sold in their presence, the price is to be secured to the seller on the credit of the State, that is in the case of such sales as are effected in Libya or Sardinia." (given by Polybius, cited in *id.*, at 298).

[150] *Id.*, at 274.

[151] *See* J. PLESCIA, "Conflict of Laws in the Roman Empire", 38 *Labeo* 30, 34 (1992).

[152] *See* C. PHILLIPSON, *The International Law and Custom of Ancient Greece and Rome*, London, MacMillan and Co., vol. I, 1911, 300-301.

[153] A. MATTHAEUS, *De criminibus*, translated by M.L. Hewett & B.C. Stoop as "On Crimes", Cape Town, South Africa, University of Cape Town Press, 1994, p. 472, l. xlvii, c. 5, No. 3.

[154] *Id.*

[155] Cited in *id.*, p. 473 ("The accuser ought to follow the court of the accused. But the court of the accused is not wherever he is found but where he has domicile or where he committed the offence."). *Contra* MATTHAEUS, *id.* ("We base our assertion on the said C.3.15.1 which simply and without qualification states that accused persons can be accused where they are found.").

[156] As far as genuine extraterritorial jurisdiction is concerned, understood as Roman jurisdiction exercised outside the borders of the Roman Empire, it could be submitted that, because of the sheer size of the Roman Empire, which at its height encompassed all ancient Western civilizations, and whereby commercial intercourse with outside territories was accordingly very limited, issues of extraterritorial application of Roman laws to situations outside the Roman Empire did not arise.

3.1.3. Medieval Italy

53. Only after the fall of the Roman Empire,[157] and especially from the high Middle Ages on, when kingdoms and empires with more certain boundaries were built, scholarly attention turned to sovereignty problems surrounding the extraterritorial application of laws.[158] Nonetheless, in mediaeval conflict of laws doctrine, as coined by *glossatores* analyzing Roman law, it was still generally accepted that laws, notably personal statutes concerning capacity, followed the person, wherever he may be found, although it was admitted that some statutes could only receive territorial application. Indeed, under the 'statutist doctrine', developed in Italy in the 12th century, three sorts of laws were distinguished for purposes of territorial *c.q.* extraterritorial application. Real statutes, such as laws concerning property, ought to be applied on a territorial basis only. Personal statutes, such a laws concerning capacity or marriage, could be applied extraterritorially, in the sense that they follow the person wherever he or she goes. Mixed statutes, such as statutes concerning contracts, would be subject to a mixed territorial/extraterritorial regime.[159]

54. BARTOLUS of Sassoferrato (1314-1357), the great medieval jurist, was not a statutist though. The sole principle of his conflict of laws doctrine was that a State's law only governs the State's subjects and not another State's subjects present in the State's territory.[160] BARTOLUS however set forth numerous exceptions to this principle, so that in terms of its practical results, his doctrine resembles the statutist doctrine. One of these exceptions, relating to the reach of criminal law, is of particular relevance for us, because almost all laws discussed in this study are of a penal or quasi-penal (regulatory) nature. BARTOLUS opined that a State's criminal law applied to any person within that State's territory, even if that person was an alien. This was progressive, because quite some writers defended the thesis that an alien could only be penalized for acts done within the territory with penalties provided for in the *jus commune*, *i.e.*, the law common to the Italian States, or even that he could only be penalized for acts which also constituted a crime under the *jus commune.*[161] Yet in keeping with the basic personalist principle of his doctrine, BARTOLUS allowed foreigners to frequently invoke their ignorance as to the penal nature of a particular

[157] Initially, when the German tribes overran the Roman Empire, they adopted the same nationality-based system as the Romans. Romans living in Gaul continued to live under Roman law, while Germans living in Gaul lived under their tribal laws. *See* J. PLESCIA, "Conflict of Laws in the Roman Empire", 38 *Labeo* 30 (1992); MONTESQUIEU, *De l'esprit des lois*, Paris, Garnier, 1869, p. 466, l. 28, c. 2 (entitled "Que les lois barbares furent toutes personnelles") ("C'est un caractère particulier de ces lois des barbares, qu'elles ne furent point attachées à un certain territoire: le Franc étoit jugé par la loi des Francs, l'Allemand par la loi des Allemands, le Bourguignon par loi des Bourguignons, le Romain par la loi romaine; et, bien loin qu'on songeât dans ces temps-là à rendre uniforme les lois des peuples conquérants, on ne pensa pas même à se fair législateur du peuple vaincu.").

[158] *See* C. PHILLIPSON, *The International Law and Custom of Ancient Greece and Rome*, London, MacMillan and Co., vol. I, 1911, 284 ("It is of course, after the fall of the Roman Empire, and the subsequent establishment of a number of European autonomous and independent States, characterized by different local customs, actuated by different needs, and, in consequence, originating different legislations, that the more rapid development of private international law became possible.").

[159] *See*, *e.g.*, H.E. YNTEMA, "The Comity Doctrine", 65 *Mich. L. Rev.* 1, 9-16 (1966).

[160] *See* W. ONCLIN, "La doctrine de Bartole sur les conflits de lois et son influence en Belgique", in Università degli Studi di Perugia, *Bartolo da Sassoferrato. Studi e Documenti per il VI Centenario*, Milan, Giuffrè, 1962, vol. II, 375, 377.

[161] *Id.*, at 380-81 (although an exception was provided for in case a State's laws served public utility).

act, at least if that act was not a *jus commune* crime.[162] Ignorance could typically result in milder sanctions.

55. It is only a small step from partially exempting aliens from the full reach of the territorial State's criminal laws to allowing the extraterritorial reach of the laws of the State of nationality of the offender. In one of the first theories of *extraterritorial* jurisdiction, Bartolus indeed stated, also in keeping with the personalist principle, that a State's law could bind its nationals abroad if the legislator had the explicit intent to do so. This principle was picked up by the 17th century Dutch jurist Paul VOET,[163] and would later, especially in the Anglo-Saxon world, morph into the presumption against extraterritoriality, pursuant to which a State's law is not given extraterritorial application unless the legislator had the clear intent to do so.[164] In BARTOLUS's time, this principle was as progressive as the principle that aliens ought to be subject to territorial jurisdiction. Other writers indeed opined that States could always apply their penal laws to an act committed by their own citizens abroad if such an act also constituted a crime under the *jus commune*.[165]

3.1.4. Rise of territoriality in the 17th century

56. As early as the 13th century, canonical law emphasized that the reach of the law was limited to the territory of the State who enacted that law.[166] Yet it was only from the 17th century on, a century that witnessed the rise of the modern and fully sovereign nation-state in the aftermath of the Westphalian Peace (1648), that the pre-eminence of the principle of territoriality in public international law became gradually entrenched in Europe. The importance of origin, nationality, or religion declined, and the theory that a person who moved to another territory did not carry his personal laws with him, but became subject to the laws of that territory, gained support.[167]

3.1.4.a. France

57. In the field of criminal law, it was primarily in France that the entrenchment of territoriality was facilitated by the reinforcement of royal power and the centralization

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[162] *Id.*, at 381.

[163] P. VOET, *De statutis eorumque concursus*, lib. sing., Brussels, Simonis T'Serstevens, 1715, s. 4, c. 2, No. 10 ("Sic itidem potestas statuentium sese extendit extra territorium ad hune effectum, ut poena subdito imponatur, de gestis extra territorium, siquidem id expressum sit statuto, ut teneantur si simpliciter loquatur.").

[164] *See* in particular chapter 3.3.2. (the presumption against extraterritoriality in the United States). *See however also* Reichsgerichtshof, 18 April 1921, Fontes Juris Gentium, Series A, Section II, Volume I, at 69 (setting forth a presumption against extraterritoriality: "a German law is a priori to be considered as enacted only for German territory").

[165] These authors argued that a particular State's law did not introduce a new criminalization because the crime already existed under the *jus commune*. *See* W. ONCLIN, "La doctrine de Bartole sur les conflits de lois et son influence en Belgique", in Università degli Studi di Perugia, *Bartolo da Sassoferrato. Studi e Documenti per il VI Centenario*, Milan, Giuffrè, 1962, vol. II, 375, 382.

[166] *Id.*, at 378 (Bonifatius VIII, *Ut Animarum*). Where the pontifical authority seemingly put this as an absolute principle of jurisdiction, BARTOLUS, as set out in the previous paragraph, slightly amended it, allowing States to exercise extraterritorial jurisdiction on the basis of the active personality principle in case the legislator had made clear his intent to do so. *Id.*, at 383.

[167] *See* S. KASSAN, "Extraterritorial Jurisdiction in the Ancient World", 29 *Am. J. Int'l L.* 237-38 (1935).

of the State in the 16th century.[168] It was not surprising that in that century a *French* political philosopher, Jean BODIN, laid the theoretical groundwork for the sovereignty of the State.[169] A legal scholar, Pierre AYRAULT, set out the jurisdictional consequences of the concept of sovereignty. AYRAULT argued that a foreigner, when entering the territory of a State, voluntarily submitted to the jurisdiction of that State.[170] In 1670 then, the *grande Ordonnance criminelle* (1670) granted jurisdiction to the *forum delicti commissi*, *i.e.*, the place where the crime was committed. Although the *grande Ordonnance* was directed at the internal competency of French prosecutors and courts, it may have facilitated the rise of territoriality as a principle of international jurisdiction ("*in foro interno, in foro externo*").[171]

In practice however, the principle of territoriality was not rigorously applied in France. AYRAULT himself for instance approved of active personality jurisdiction, arguing that the offender was more familiar with his home State's law than with the territorial State's law.[172] Because of the role of the inquisitorial system of criminal justice in France, the reach of French law became almost unlimited. Until the late 18th century, French courts routinely established jurisdiction on the basis of the active and passive personality principles, and on the basis of the mere presence of a foreign offender in France (even if the offence or offender had no other nexus with France).[173]

58. Only with the French Revolution did territoriality become firmly established as the basic, and initially almost exclusive, principle of jurisdiction. In the revolutionary *Décret* of 3/7.9 1792, it was even ordered that all foreigners imprisoned for crimes committed outside France be released.[174] The revolutionary preference for the territoriality principle drew heavily on French enlightened philosophy. MONTESQUIEU for instance stated that "[l]es lois politiques demandent que tout homme soit soumis aux tribunaux criminels et civils du pays où il est, et à l'animadversion du souverain,"[175] and that "[u]ne société particulière ne fait point de lois pour une autre société."[176] He dismissed the extraterritorial application of laws because one society could not possibly make laws for another, given the cultural, historical, religious, and climatic differences between societies.[177] ROUSSEAU for his

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[168] D. OEHLER, *Internationales Strafrecht*, 2nd ed., Köln, Berlin, Bonn, München, Carl Heymanns Verlag, 1983, 158.

[169] *See also* J. BODIN, *On Sovereignty: Four Chapters from the Six Books on the Commonwealth*, translated and edited by J.H. Franklin, Cambridge, Cambridge University Press, 1992, 1 (« Sovereignty is the absolute and perpetual power of a commonwealth. »).

[170] P. AYRAULT, *L'Ordre, formalité et instruction judiciaire*, Paris, Caffin & Plaignard, 1642, Article 4, nr. 5, p. 44 (« Car bien qu'il se contracte quelque espece d'obligation & submission tacite, és pays & terres où l'on délinque : & il semble que franchement & volontairement nous nous rendions sujets aux lois de la Patrie, dont nous corrompons le repos ... »).

[171] *See also* H.F.A. DONNEDIEU DE VABRES, *Les principes modernes du droit pénal international*, Paris, Sirey, 1928, 14.

[172] P. AYRAULT, *L'Ordre, formalité et instruction judiciaire*, Paris, 1642, Article 4, nrs. 9 *et seq.*, pp. 47 *et seq.*.

[173] *See* D. OEHLER, *Internationales Strafrecht*, 2nd ed., Köln, Berlin, Bonn, München, Carl Heymanns Verlag, 1983, 83 (arguing that "die Strafgewalt gegen Ende des ancien régime fast uferlos war").

[174] *See* D. OEHLER, *Internationales Strafrecht*, 2nd ed., Köln, Berlin, Bonn, München, Carl Heymanns Verlag, 1983, 113.

[175] MONTESQUIEU, *De l'esprit des lois*, Paris, Garnier, 1869, p. 451, l. 26, ch. 21.

[176] *Id.*, p. 448, l. 26, ch. 16.

[177] *See, e.g., id.*, p. 257, l. 18, ch. 8. ("Les lois ont un très grand rapport avec la façon dont les divers peuples se procurent la subsistance. Il faut un code de lois plus étendu pour un peuple qui s'attache au commerce et à la mer, que pour un peuple qui se contente de cultiver ses terres. Il en faut un plus grand

part wrote in his *Contrat Social* that foreigners, when committing a crime within the territory, violated the social contract which the subjects of a given territory have agreed upon, because by entering the territory, the foreigner became part of the society that made the social contract.[178] This implies conversely that the home State of the offender has no interest in punishment because *its* social contract has not been violated. In ROUSSEAU's conception, the social contract only serves to protect the interests of the territorially circumscribed people who 'signed' that contract. In Italy, a similar view was held by the great criminal jurist BECCARIA, who argued that "[u]n crime ne doit être puni que dans le pays où il a été commis, parce que c'est là seulement, et non ailleurs, que les hommes sont forcés de réparer par l'exemple de la peine, les funestes effets qu'a pu produire l'exemple du crime."[179]

59. The territoriality principle was inserted as the basic principle of jurisdiction into Article 3 of the French *Code Civil* in 1804. Nationalist pressure and a desire to prevent impunity from arising (*i.e.*, to see substantive justice done) later resulted however in a quasi-return to *ancien régime*-style jurisdictional provisions, with ample room for the exercise of active and passive personality jurisdiction, protective jurisdiction, and even vicarious jurisdiction (chapter 4), although, in comparison with other continental-European countries, with few possibilities for the exercise of universal jurisdiction over heinous crimes (chapter 10.5).

3.1.4.b. Germany

60. In Germany, until the 17th century, the *locus delicti* existed alongside the offender's place of residence, and the place where the offender was caught, as a basis for jurisdiction, without any one basis enjoying primacy. While territoriality was generally recognized as a valid basis, personality still enjoyed widespread support. Because the States of the German Empire mistrusted each other, the accused often had the right to be tried by his home State, especially when the Emperor had conferred that privilege on the state.[180] Nationality-based jurisdiction was also justified on the ground that penal sanctions tended to be pecuniary in nature and had to be enforced where the accused had his assets, which was usually where he had his residence.[181] The place where the offender was caught was not a general ground of jurisdiction, but

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pour celui-ci que pour un peuple qui vit de ses troupeaux. Il en faut un plus grand pour ce dernier, que pour un peuple qui vit de la chasse."). Drawing on this insight, MONTESQUIEU lambasted further on in his book the Spaniards for judging the Inca king Athualpa under Spanish law, instead of under Inca or international law, for offences committed within the king's own territory. *Id.*, p. 452, l. 26, c. 22 ("Les principes que nous venons d'établir furent cruellement violés par les Espagnols. L'inca Athualpa ne pouvoit être jugé que par le droit des gens: ils le jugèrent par des lois politiques et civiles. Ils l'accusèrent d'avoir fait mourir quelques'uns de ses sujets, d'avoir eu plusieurs femmes, etc. Et le comble de la stupidité fut qu'ils ne le condamnerait pas par les lois politiques et civiles de son pays, mais par les lois politiques et civiles du leur.").

[178] J.J. ROUSSEAU, *Le contrat social ou principes du droit politique*, Garnier, Paris, 1850, l. 2, ch. 5 ("Or, comme il s'est reconnu tel, *tout au moins par son séjour*, [tout malfaiteur] … doit être retranché [de l'Etat] par l'exil comme infracteur du pacte [*i.e.*, le traité social], ou par la mort comme ennemi public …") (emphasis added).

[179] C. BECCARIA, R. Bellamy (ed.), R. Davies and others (transl.), *On crimes and punishments and other writings*, Cambridge, Cambridge University Press, 1995, para. XXI, p. 152 *et seq.*

[180] *E.g.*, Württemberg, Brabant (Goldene Bulle), the latter even taking (and being allowed to take) military reprisals when the Bulle was violated by foreign States. *See* D. OEHLER, *Internationales Strafrecht*, 2nd ed., Köln, Berlin, Bonn, München, Carl Heymanns Verlag, 1983, 86-89.

[181] *Id.*, at 86.

it was often used to try persons whose presence was deemed harmful to the State's interests and who could not be extradited.[182] As will be seen in chapter 4, territoriality, personality, and the latter ground of jurisdiction, the principle of vicarious jurisdiction or *Stellvertretende Rechtsprinzip*, still exist, as of today, alongside each other in the German *Strafgesetzbuch*.

61. During the formation of more centralized German States in the late 18th century, the *forum delicti commissi* eventually rose to importance, to the detriment of the other principles,[183] under the influence of such rationalist philosophers as Samuel PUFENDORF and Christian WOLFF. Both held that persons voluntarily submitted to a State's jurisdiction when they entered its territory, and that accordingly, another State would not be authorized to exercise jurisdiction over acts done by them in foreign territory.[184] PUFENDORF stated that sovereign States were not interested in what happened outside their borders,[185] and thus took a very restrictive, territorial view of the law of jurisdiction.[186] WOLFF concurred, yet he recognized the role of the active personality principle, limited to the situation where both perpetrator and victim were nationals of the regulating State – with the perpetrator returning to his home State –

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[182] *Id.*, at 90, 92.

[183] *See* H.F.A. DONNEDIEU DE VABRES, *Les principes modernes du droit pénal international*, Paris, Sirey, 1928, at 16.

[184] S. PUFENDORF, *De jure Naturae et gentium libri 8*, 1688, English translation by C.H. Oldfather & W.A. Oldfather, in J.B. Scott (ed.), in *The Classics of International Law*, Washington, D.C., Publications of the Carnegie Endowment for International Peace, Division of International Law, Oxford, Clarendon Press, 1934, p. 403, l. 3, c. 6, § 2 ("A stranger who, in the guise of a friend, enters a state whose policy has been the friendly reception of foreigners, even without giving any expression of his fealty, is understood to have expressed tacitly, by his act of entering the country, his willingness to conduct himself by the laws of that state, in accordance with his station, so soon as he has found ou that such a general law was promulgated for all who desire to sojourn within the limits of that state. And, on the same ground, he has tacitly stipulated from the state for a temporary defence of his person and the securing of justice."); C. WOLFF, *Jus Gentium Methodo Scientifica Pertractatum*, 1764, translated by J.H. Drake, in J.B. Scott (ed.), in *The Classics of International Law*, Washington, D.C., Publications of the Carnegie Endowment for International Peace, Division of International Law, Oxford, Clarendon Press, 1934, § 151 ("He who has offended against a nation or committed some crime against it cannot on that account be punished by another nation to which he has come. For since the evil is not such of itself that it ought to be punished, and by nature the right belongs to a man to punish one who has injured him; by nature also the right belongs to no nation to punish him who has not injured it. Therefore, although the right to punish is a part of the civil power, and consequently belongs to the nation against which any one has offended or committed some crime, nevertheless one nation cannot on this account punish him who has offended against another nation or committed some crime against it. And so it is plain that he who has offended against one nation or committed some crime against it, cannot be punished by another national to which he has come. Evil deeds are punished in a state because either some member of the state, or the corporation itself, has been injured. But he who for the purpose of escaping a penalty comes as an exile to another state, has not on that account injured any member of the state or any private citizen, nor the corporation itself. Therefore both reasons fail, as to why any one can be punished by a certain state, consequently a wrongful act committed in one state does not affect another state, nor from that thing itself does any right arise against an exile.").

[185] S. PUFENDORF, *De jure Naturae et gentium libri 8*, l. 8, c. 6, § 16 ("Thus even when a man in a formal war has exceeded in his slaughter and rapine the limits set by natural law, he would no commonly be held a murderer or thief, or be punished, were he by chance brought before a third nation which was at peace; And this not only because it is not our concern what offences a man has committed elsewhere, but also because it appears that nations have a tacit agreement not to take upon themselves decisions growing out of the wars of others.")

[186] PUFENDORF may be said to have laid the groundwork for the billiard-ball view of international law. *See* D. OEHLER, *Internationales Strafrecht*, 2nd ed., Köln, Berlin, Bonn, München, Carl Heymanns Verlag, 1983, 103 ("Bei Pufendorf … zeigt [es] sich die Wirkung des bindungslosen Nebeneinanders der Vielzahl von souveränen Staaten viel tiefgreifender als bei *Grotius*.").

and subjected its operation to the *ne bis in idem* rule.[187] Other principles of jurisdiction were rejected. COCCEJI, a criminal lawyer, similarly emphasized the *locus delicti*. He argued that the State having custody of the offender was required to extradite the offender to the territorial State, and that, if this were impossible, it should apply the *lex loci delicti*.[188]

62. Rationalist influence could be gleaned from the Bavarian Penal Code of 1751, the first German penal code. The Bavarian Code emphasized territoriality,[189] and although it upheld jurisdiction based on residence and presence, it stipulated that the *lex loci delicti* would always apply.[190] A similar emphasis on territoriality could be found in the Prussian *Allgemeines Landrecht* of 1794,[191] and the Prussian *Criminalordnung* of 1805.[192] In Austria, a similar statutory evolution could be witnessed.[193] The final breakthrough of the territoriality principle in Germany came about in the Prussian Penal Code of 1851, the jurisdictional provisions of which were inserted, after German unification, in the *Reichsstrafgesetzbuch* of 1871.[194] Under French influence, these codes provided for only limited exceptions to the territoriality principle: they only authorized protective jurisdiction and subjected active personality jurisdiction to double criminality and the principle of *ne bis in idem*. As will be discussed in chapter 4, territoriality came later under nationalist pressure in Germany,

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[187] C. WOLFF, *Jus Gentium*, § 325 ("Since foreigners living in alien territory or staying there remain citizens, or subjects of their own nation, the obligation by which they are bound to their own nation is not terminated, nor are citizens or subjects deprived of the right which they enjoy with the same, for the reason that they live for some time in alien territory or stay there on account of some business, and consequently if a citizen injures a fellow citizen in alien territory and the offender returns to his own people, he can be punished there according to the laws of the place and compelled to repair the loss. … Take such an example as the one of punishing him who has killed a fellow citizen in an alien territory and has taken to flight in order that he might not be punished there. If he should return to his native country, it cannot be doubted that he can be punished on account of the murder committed. But the situation is quite different if one freed from the ordinary penalty in the place of the offence returns to his native country; for one cannot be punished twice on account of the same offence, and every nation is bound to recognize the jurisdiction of another nation in its own territory, consequently to acquiesce in the decision which the other, following its own law, has reached. For since a nation is not conceivable without civil sovereignty, if one nation should be unwilling to recognize the jurisdiction of another nation in its own territory, this would be just the same as it should be unwilling to consider it as a nation, a thing which assuredly is directly opposed to the respect which one nation owes another.")

[188] H. DE COCCEJI, *Exercitationum curiosarum*, vol. 1, Longoviae, 1722, Disputatio LIV, *De fundata in territorio et plurium locorum concurrente potestate*, 1684, tit. 4, nr. 9, cited in D. OEHLER, *Internationales Strafrecht*, 2nd ed., Köln, Berlin, Bonn, München, Carl Heymanns Verlag, 1983, 10.

[189] 2. Teil, 1. Cap., § 10.

[190] *Id.*, § 21 and § 37.

[191] 2. Teil, 20. Titel, §§ 12 f. Extraterritorial jurisdiction was possible, but the *lex loci delicti* was applied. *Id.*, §§ 14-15.

[192] The *Criminalordnung* provides for active personality jurisdiction, but subjects its exercise to the requirement of double criminality. §§ 97-98.

[193] *See* D. OEHLER, *Internationales Strafrecht*, 2nd ed., Köln, Berlin, Bonn, München, Carl Heymanns Verlag, 1983, 108-109. The Theresiana (1768) recognized the three cited grounds of jurisdiction, but ordered that the *lex loci delicti* invariably be applied, a requirement which was abandoned in the *Josephinische Strafgesetz* (1787), § 12. Territorial jurisdiction was emphasized in § 31 of the Penal Code of 1803 and in §§ 37 and 234 of the Penal Code of 1852. Because Austria did not extradite its own nationals, impunity concerns underlied the insertion of the active personality principle into the Penal Codes of 1803 (§ 30) and 1852 (§ 36, § 235). Offences against the constitutional order and offencdes of counterfeiting were amenable to protective jurisdiction pursuant to § 32 of the Penal Code of 1803 and § 38 of the Penal Code of 1852. Vicarious jurisdiction applied when extradition was impossible by virtue of § 34 of the Penal Code of 1803 and § 40 of the Penal Code of 1852.

[194] §§ 3 *et seq.* of these codes.

to the point that personality seemed to supplant territoriality as the basic principle. Although there are quite some exceptions to territoriality nowadays, it remains nevertheless a cornerstone of German jurisdictional order.

3.1.4.c. Holland

63. 17th century Holland boasted among the greatest international lawyers ever, whose influence is still palpable as of today. Unlike contemporaneous theorists in Germany and France, the Dutch thinkers had however little influence on the Dutch law of jurisdiction proper. Hugo GROTIUS (Hugo DE GROOT), the "father" of modern public international law, was a staunch defender of territoriality. He argued that any State is entitled, and even obliged, especially as far as crimes harming other States are concerned, to exercise jurisdiction over violations occurring within its territory.[195] As a consequence, any State would be entitled to request the extradition of perpetrators who committed (serious) offences within the territory but had sought refuge abroad.[196] If the custodial State were to refuse to hand over the offender, it ought to establish its own (extraterritorial) jurisdiction over him (*aut dedere aut judicare*),[197] yet it had to apply the *lex loci delicti* (unless the act was prohibited by the law of nature or of nations).[198] Importantly however, GROTIUS abandoned territoriality where he advocated the exercise of universal jurisdiction by *any* State over violations of the natural law and the *jus gentium*.[199] GROTIUS's natural law views on universal jurisdiction over heinous crimes were to re-emerge after the Second World War, when they crystallized as positive conventional and customary international law (chapter 10.1).

64. A natural law approach to jurisdiction was also taken by a contemporary of GROTIUS, Antonius MATTHAEUS. For MATTHAEUS, the specter of impunity was a central concern. Because substantive justice ought somehow to be done to violators of the common good, he supported not only territorial jurisdiction but also

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[195] Hugo GROTIUS, *De jure belli ac pacis*, translated by A.C. Campbell as *The Rights of War and Peace*, M. Walter Dunne, London, 1901, lib. 2, c. 21, No. 3 (« But since established governments were formed, it has been a settled rule, to leave the offences of individuals, which affect their own community, to those states themselves, or tho their rulers, to punish or pardon them at their discretion. But they have not the same plenary authority, or discretion, respecting offences, which affect society at large, and which other independent states or their rulers have a right to punish, in the same manner, as in every country popular actions are allowed for certain misdemeanours. Much less is any state at liberty to pass over in any of his subjects crimes affecting other independent states or sovereigns. On which account any sovereign state or prince has a right to require another power to punish any of its subjects offending in the above named respect : a right essential to the dignity and security of all governments. »).

[196] *Id.*, at No. 4 (« [I]t is necessary that the power, in whose kingdom an offender resides, should upon the complaint of the aggrieved party, either punish him itself, or deliver him up to the discretion of that party. »).

[197] *Id.*, at No. 4 ("Yet all these instances [of demands to deliver up offenders in Antiquity] are to be understood not as strictly binding a people or Sovereign Prince to the actual surrender of offenders, but allowing them the alternative of either punishing or delivering them up."). *See also* at No. 5.

[198] *Id.*, at No. 6 ("If the act, of which refugees and suppliants are accused, is not prohibited by the law of nature or of nations, the matter must be decided by the civil law of the country, from which they come. This was received practice in ancient times, …").

[199] *Id.*, l. 2, c. 20, No. 40 ("It is proper also to observe that kings and those who are possessed of sovereign power have a right to exact punishment not only for injuries affecting immediately themselves or their own subjects, but for gross violations of the law of nature and of nations, done to other states and subjects.").

extraterritorial jurisdiction based on residence and on the place of arrest.[200] Yet because an offence harms the territorial State in the first place, he argued that the *lex loci delicti* ought to be applied in any event.[201] While the *lex loci delicti* rule had no lasting influence on continental-European criminal law, MATTHAEUS's concerns over *impunity* surely had. Combined with Kantian ideals of absolute justice unrestricted by territorial borders, they caused continental-European States to provide for broad possibilities of extraterritorial jurisdiction. Together with GROTIUS's ideas, they provided the theoretical groundwork for the agenda of the late 20th century civil society movement calling for an end to impunity for gross human rights violations.

65. Also in the field of the extraterritorial application of civil law did 17th century Dutch jurists prove very influential. These jurists re-opened a debate which had disappeared since Italian jurists coined the statutist doctrine in the 12th century. Considering the statutists to be unable to "explain how one state had authority to legislate a rule with effect in another state,"[202] the Dutch jurists developed another theory, against the background of the rise of independent States in Europe, and more directly, of the political organization of Holland as a polity of largely autonomous city-States. This theory, the territoriality or comity theory, as developed notably by Paulus VOET and Ulrik HUBER, casted conflict of laws theory for the first time in sovereignty terms.[203] The first maxim of HUBER's *De Conflictu Legum* (1684) in particular conveys the power of territoriality: "The laws of every sovereign authority have force within the boundaries of its state and bind all subject to it, but not beyond".[204] On grounds of international comity, States could apply foreign law within their borders (and foreign States could thus apply their laws extraterritorially), but they were under no obligation to do so. Interestingly, in French doctrine, as developed by Bertrand d'ARGENTRÉ in the same 17th century, the extraterritorial application of personal laws was not considered as a discretionary act, but as "une nécessité de droit,

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[200] A. MATTHAEUS, *De criminibus*, translated by M.L. Hewett & B.C. Stoop as "On Crimes", Cape Town, South Africa, University of Cape Town Press, 1994, p. 472, l. xlvii, c. 5, no. 5 ("For what is more to be regretted today than that so many murders go unpunished, now that the territories and jurisdictions of the Roman provinces have been chopped into such minute parts, and murderers easily flee and reach the boundaries of foreign lands. I know, that the very cutting up of the jurisdiction is used as an excuse, because he who committed an offence on foreign soil cannot be deemed to have offended against us. And I think the reasoning behind this must be approved, namely that an offence, perpetrated on foreign soil, was perpetrated against the statutes and law belonging to that country. But since, when murder has been committed, Divine Law and the *Jus Gentium* is also violated, it is right and proper that each and every judge into whose hands the a ccused falls be the guardian and defender of Divine Law a nd the common weal. It does not not matter whether it is Tros or Turnus who is killed, and it is no less a crime to murder men in India than in the middle of Spain. And so here, I most heartily approve of the edicts of those who, grasping basic principles, thought that they should investigate crimes committed outside the provinces.").

[201] *Id.*, c. 4, No. 24.

[202] *See* J.R. PAUL, "Comity in International Law", 32 *Harv. Int'l L.J.* 1, 13-14 (1991).

[203] P. VOET, *De Statutis eorumque Concursu* (1661) (holding that no statute according to the civil law, whether in rem or in personam, directly or indirectly, extends beyond the territory of the legislator, although drawing a list of nine exceptions, *inter alia* the principle of party autonomy and comity, as quoted in H.E. YNTEMA, "The Comity Doctrine", 65 *Mich. L. Rev.* 1, 22 (1966)); U. HUBER, *De Conflictu Legum Diversarum in Diversis Imperiis* (1684). D.J. LLEWELYN DAVIES, "The Influence of Huber's *De Conflictu Legum* on English Private International Law", 18 *B.Y.I.L.* 49 (1937).

[204] Translated in F.A. MANN, "The Doctrine of Jurisdiction in International Law", 111 *R.C.A.D.I.* 1, 26 (1964-I).

une exigence de la justice."[205] HUBER's view was later echoed in STORY's U.S. conflict of laws theory (1834) (although STORY also emphasized the importance of the nationality principle).[206] In chapter 5, this study will return to HUBER's comity principle, and argue that, in an amended form as the principle of jurisdictional reasonableness, the principle is especially useful to mediate present-day conflicts over economic jurisdiction between States.

3.1.5. Extraterritoriality under unequal treaties

66. As could be gleaned from German and French practice, the rise of territoriality in modern Europe did not prevent European States from continuing to exercise personality-based jurisdiction. They not only did so by hauling their own nationals before their territorial courts, but also by setting up *extraterritorial* courts in foreign nations, notably in non-European States. European States often concluded treaties with non-Christian States to subject their own nationals exclusively to special consular jurisdiction, because they feared the barbarous character of territorial jurisdiction by non-Christian, often Moslem, States. This practice is however not exactly a return to the ancient practice of foreign communities living under their own law. Indeed, in ancient times, the foreigner sought "to be equally treated with the native of the State and to be subject to his law",[207] whereas in the modern era, the foreigner, represented by his government, precisely sought *not* to be equally treated with the native of the State. To that end, Western States employed unequal treaties to cajole non-Christian States into granting jurisdictional favors to the former States' nationals. Bearing in mind that the principles of international law only applied between Christian States and did not govern their relations with other States at the time, the perceived exception to the territoriality principle that consular jurisdiction embodied should be put in perspective.

3.1.6. The continental-European view

67. Territoriality is an important principle of jurisdictional order in continental Europe, as also pointed out by the European Court of Human Rights in the *Bankovic* case (2001).[208] Under classical European jurisdictional theory, a State's power could not reach beyond its territory under international law, and acts were considered to only violate the law and authority of the territorial State. They were deemed *res inter*

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[205] B. D'ARGENTRE, *Commentarii in patrias Britonum leges seu consuetudines generales antiquissimi Ducatus Britanniae*, Paris, 1660, art. CCXVIII, glose VI, cited in W. ONCLIN, "La doctrine de Bartole sur les conflits de lois et son influence en Belgique", in Università degli Studi di Perugia, *Bartolo da Sassoferrato. Studi e Documenti per il VI Centenario*, Milan, Giuffrè, 1962, vol. II, 375, 390.

[206] J. STORY, *Commentaries on the Conflict of Laws, Foreign and Domestic* (1834).

[207] *See* S. KASSAN, "Extraterritorial Jurisdiction in the Ancient World", 29 *Am. J. Int'l L.* 237, 247 (1935).

[208] European Court of Human Rights, *Bankovic and others* v. *Belgium and 16 other Contracting States*, Application No. 52207/99, December 12, 2001, § 59 (contemplating the ordinary meaning of "persons within the jurisdiction of member States of the Council of Europe" referred to in Article 1 of the European Convention on Human Rights, and holding "[a]s to the "ordinary meaning" of the relevant term in Article 1 of the Convention, the Court is satisfied that, from the standpoint of public international law, the jurisdictional competence of a State is primarily territorial. While international law does not excluse a State's exercise of jurisdiction extra-territorially, the suggested bases of such jurisdiction … are as a general rule defined and limited by the sovereign territorial rights of the other relevant States.").

alios acta for other States.[209] Yet a number of criminal and political goals carved out numerous exceptions to the territoriality principle. For one thing, substantive justice and the desire to prevent impunity, a desire which reaches centuries back but was later fed by idealist German and Dutch thought, are goals of European criminal law which sit uneasy with procedural constraints. For another, the rise of nationalism in the 19th century caused continental-European States to instrumentalize the law and apply it extraterritorially when doing so served its interests.[210] The own law was romanticized and presented as the best law available, a view which was, as will be seen in the chapters on extraterritorial economic jurisdiction, echoed in 20th and 21st century U.S. exceptionalism. Apparently, fears of reciprocal extraterritorial application of criminal law did not play a major role as a restraining factor. In continental Europe, bringing the truth to light, bringing perpetrators to account, and defending national interests, were considered to be more important than upholding the due process rights of the defendant. This explains for instance why, as of today, common lawyers have difficulties in understanding the exercise of universal jurisdiction by continental-European countries, discussed at length in chapter 10. In the next section, it will be examined how the common law came to rely so heavily on the territoriality principle.

3.2. The territoriality principle in England

68. In England, territoriality occupies a very central position in the law of jurisdiction for historical reasons unrelated to the reasons why territoriality rose to prominence in continental-Europe. Modern English adherence to the territorial principle, enunciated by a number of late 19th-century court decisions,[211] harks back to mediaeval times, when criminal juries were summoned from the *locus delicti* (the jurymen originally being the eye and ear witnesses, with no formal witnesses being allowed at trial) and evidence was easiest to gather at the place where the crime occurred ("all crime is local").[212] A defendant was entitled to a trial by a local jury,

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[209] *See* H.F.A. DONNEDIEU DE VABRES, *Les principes modernes du droit pénal international*, Paris, Sirey, 1928, 12.

[210] *See* D. OEHLER, *Internationales Strafrecht*, 2nd ed., Köln, Berlin, Bonn, München, Carl Heymanns Verlag, 1983, 117-18.

[211] *See, e.g.*, *Regina* v. *Keyn*, L.R. 2 Ex. D. 63, 13 Cox C.C. 403 (1876) ("No proposition of the law can be more incontestable or more uniformly admitted that that, according to the general law of nations, a foreigner, though criminally responsible to the law of a nation not his own for acts done by him while within the limits of its territory, can not be made responsible to its law for acts done beyond such limits."); *MacLeod* v. *Attorney-General for New South Wales* [1891] AC 455, 458 (Lord Halsbury LC) ("All crime is local. The jurisdiction over the crime belongs to the country where the crime is committed …"); *The Queen* v. *Jameson*, [1896] 2 Q.B. 425, 430 (court stating that no State is allowed to apply its legislation "to foreigners in respect of acts done by them outside the dominions of the sovereign power enacting. That is a rule based on international law, by which one sovereign power is bound to respect the subjects and the rights of all other sovereign powers outside its own territory."); *HM Advocate* v. *Hall* (1881) 4 Couper 438 (Lord Young) ("The general rule is that criminal law is strictly territorial – so that a man subject only to the criminal law of the country where he is, and that his conduct there, whether by acting, speaking, or writing, shall be judged of as criminal or not by that law and no other."). *See also Cox* v. *Army Council*, [1963] AC 48, 67 ("Apart from those exceptional cases in which specific provision is made in respect of acts committed abroad, the whole body of the criminal law of England deals only with acts committed in England.").

[212] *See* A. LEVITT, "Jurisdiction over Crimes", 16 *J. Crim. L. & Criminology* 316, 327 (1925) (describing the taking of evidence in a homicide case as follows: "[T]he dead body of the victim of a homicide had to be before the jury if the jury was to adjudge an alleged offender to be a murderer. If the body of the victim was in another country the jury did not have all the facts before it. They could not say that the man was dead. They did not know. They had to view the victim before they would

because a jury summoned from another place was deemed to put the defendant at a disadvantage and subject him to arbitrariness.[213] Unlike in continental-Europe, extraterritorial offenses could therefore hardly be created, because they ran the risk of never being capable of being tried in England.[214]

69. In the 19th century, the justification for local juries somewhat lost its strength when formal witnesses were allowed in criminal trials,[215] but the territoriality principle remained the bedrock principle of jurisdiction in England.[216] Only in the courts of the Admiral (which dealt with maritime law), extraterritorial jurisdiction gained a foothold, notably in cases of piracy (the archetypical offense giving rise to universal jurisdiction) because their procedure was civil law-based. As they could rely on testimony, they were not restrained by common law evidentiary restrictions.

70. While the strict jurisdictional view may to a great extent be explained by the doctrine of venue, which requires an offence to be tried by jury in the county where the offense occurred, it may also be explained by reference to the concept of crime in the common law. Whilst the civil law may emphasize a crime as an offense against the victim or against a natural order of justice, at least in recent times, the common law considers a crime to be an offense against the society in which it occurs or an affront to "the King's (or Queen's) peace".[217] As the great English political philosopher Thomas HOBBES also held, a crime committed in another State is an offense against the order of that State ("the King" or "the sovereign"), which then

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know. They could not see over a boundary line. Whatever happened outside of the territorial area of their community did not exist for them."). *See also* L. REYDAMS, *Universal Jurisdiction*, Oxford, Oxford University Press, 2003, 202. The English approach surely influenced the U.S. approach, epitomized by Article 1, Section 8 of the U.S. Constitution ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed.").

[213] *See* D. OEHLER, *Internationales Strafrecht*, 2nd ed., Köln, Berlin, Bonn, München, Carl Heymanns Verlag, 1983, pp. 60-61, nrs. 58-60.

[214] *See* M. HIRST, *Jurisdiction and the Ambit of the Criminal Law*, Oxford, Oxford University Press, 2003, 32-33; *R* v. *Page* [1954] 1 QB 171, 175 ("One can see the procedural difficulty which would have occurred to the medieval lawyers who would be unable to understand how a jury consisting of persons drawn from the *vicinage* could have knowledge of crimes committed abroad, sufficient to present them to the Sovereign's court."). DONNEDIEU DE VABRES has argued that England's 'splendid isolation' was particularly instrumental in extrapolating this domestic law of jurisdiction to the international level. H.F.A. DONNEDIEU DE VABRES, *Les principes modernes du droit pénal international*, Paris, Sirey, 1928, 14 (noting that a person prosecuted in England for an offence committed outside the territory could even plead not guilty, aside from arguing that the judge did not have jurisdiction).

[215] *See* M. HIRST, *Jurisdiction and the Ambit of the Criminal Law*, Oxford, Oxford University Press, 2003, 32.

[216] *See, e.g.*, England, *The Queen* v. *Jameson*, [1896] 2 Q.B. 425, 430 (court stating that no State is allowed to apply its legislation "to foreigners in respect of acts done by them outside the dominions of the sovereign power enacting. That is a rule based on international law, by which one sovereign power is bound to respect the subjects and the rights of all other sovereign powers outside its own territory."). In *Amsterdam and others* v. *Minister of Finance*, the Supreme Court of Israel defined the principle of territoriality as "the cornerstone of the Anglo-American system", *International Law Reports* 1952, 229, 231.

[217] *See* HOME OFFICE, "Review of Extra-Territorial Jurisdiction", Steering Committee Report, July 1996, p. 2, § 1.2; M. KIRBY, "Universal Jurisdiction and Judicial Reluctance: A New "Fourteen" Points", in S. MACEDO (ed.), *Universal Jurisdiction. National Courts and the Prosecution of Serious Crimes under International Law*, Philadelphia, PA, University of Pennsylvania Press, 2004, 247.

may exercise retribution.[218] The offence may be reprehensible, but it is not an offence against the United Kingdom's order.[219] If the offence does not implicate the order of the State, it is not amenable to English jurisdiction.

71. In the 20th century, to the classical justification of territoriality – the ready accessibility of evidence and witnesses in the State where the crimes have been committed –[220] another justification, based on international law, was added: territoriality would be dictated by the principle of non-intervention in the domestic affairs of another State.[221] In practice however, as of today, the international law of jurisdiction does not directly determine the ambit of English law, although in one case, a court relied on international comity and stated that "[i]t would be an unjustifiable interference with the sovereignty of other nations over the conduct of persons in their own territory if we were to punish persons for conduct which did not take place in the United Kingdom and had not harmful consequences there."[222] Nonetheless, English courts, when construing an act of Parliament, will usually presume that Parliament did not intend to violate international law,[223] a canon of statutory construction that is also used in the United States.[224] Furthermore, the jurisdictional latitude left by international law, the P.C.I.J's 1927 *Lotus* judgment in particular, has surely boosted the statutory extension of the English law of jurisdiction over the last few decades.[225]

72. The primacy of the territorial principle in England does not imply that Parliament cannot extend the territorial ambit of the law. It surely can, the territoriality of the law being a concept of the common law which may be overridden by statute in specific instances. However, in the absence of an unambiguous and clearly stated intent of Parliament to extend the ambit of the law, statutes are

[218] Th. HOBBES, *Leviathan*, Ch. 21, penultimate para.; W.W. COOK, "The Application of the Criminal Law of a Country to Acts Committed by Foreigners Outside the Jurisdiction", 40 *W. Va. L.Q.* 303, 328 (1934). *Contra* J. LOCKE, *Two Treatises of Government*, 2. Treatise, nr. 9 (propounding the personality principle when asking "by what right any prince or state can put to death or punish any alien for any crime he commits in their country").

[219] *See* D. OEHLER, *Internationales Strafrecht*, 2nd ed., Köln, Berlin, Bonn, München, Carl Heymanns Verlag, 1983, p. 59, nr. 57 (contrasting the Continental European view with the English view as follows: "Der Gedanke der materiellen Gerechtigkeit, dass ein Täter der Tat willen bestraft werden muss, oder eine schwere Tat um des Landes willen vor Gott nicht ungesühnt bleiben darf, is dem common law völlig fremd.") (footnotes omitted).

[220] *See* HOME OFFICE, "Review of Extra-Territorial Jurisdiction", Steering Committee Report, July 1996, p. 4, § 1.9 (on file with the author)

[221] *See* G. GILBERT, "Crimes Sans Frontières: Jurisdictional Problems in English Law", *BYIL* 1992, 416. *Compare* A. LEVITT, "Jurisdiction over Crimes", 16 *J. Crim. L. & Criminology* 316, 327 (1925) (terming this the "metaphysical foundation" of territorial jurisdiction, and stating that "[e]ach over-lord looked after his own domain and let the domain of another overlord severely alone", a notion which was backed up by the religious notion that "the king rules by divine right and as the temporal representative of omnipotent deity").

[222] *Treacy* v. *DPP* [1971] AC 537, 561. *Contra*: M. HIRST, *Jurisdiction and the Ambit of the Criminal Law*, Oxford, Oxford University Press, 2003, 9, 35.

[223] *See, e.g.*, *Mortensen* v. *Peters* (1906) 8 F (J) 93.

[224] *The Schooner Charming Betsy*, 6 US 64, 2 Cranch 64 (1804).

[225] *See* M. HIRST, *Jurisdiction and the Ambit of the Criminal Law*, Oxford, Oxford University Press, 2003, 45.

presumed not to apply extraterritorially,[226] a presumption which is also employed by U.S. courts.[227]

73. In light of the rapid growth of possibilities of transport and telecommunication and the ensuing international crime rate growth, however, the rigorous application of the territorial principle in England has been hollowed out,[228] as have the restrictions on the use of evidence[229]. This occurred especially in the latter part of the 20th century, when England adopted legislation implementing a number of international conventions dealing with terrorist crimes, conventions which provided for obligatory extraterritorial jurisdiction.[230] It may be noted that the relaxation of the territoriality principle in the United States took place along similar lines. England still takes a rather strict view on extraterritoriality however, as is apparent from the tests set forth in the 1996 Report of an Interdepartmental Steering Committee conducting a Review of Extraterritorial Jurisdiction, which ought alternatively to be satisfied before the ambit of English criminal law could legitimately be extended:[231]

(1) the offence is serious;
(2) by virtue of the nature of the offence, witnesses and evidence are likely to be available within the United Kingdom;
(3) there is international consensus as to the reprehensible nature of the crime and the need to take extraterritorial jurisdiction;
(4) the vulnerability of the victim makes it particularly important that offences are prosecuted;
(5) it is in the interests of the standing and reputation of the United Kingdom within the international community;
(6) there is a danger that such offences would not otherwise be justiciable.

3.3. The territoriality principle in the United States

[226] *Treacy* v. *DPP* [1971] AC 537, 551 ("It has been recognized from time immemorial that there is a strong presumption that when Parliament, in an Act applying to England, creates an offence by making certain things punishable, it does not intend this to apply to any act done by anyone in any country other than England. Parliament, being sovereign, is fully entitled to make an enactment on a wider basis. But the presumption is well known to draftsmen, and where there is an intention to make an English Act or part of such an Act apply to acts done outside England, that intention is and must be made clear in the Act."); *Air India* v. *Wiggins* [1980] 1 WLR 815; *R.* v. *Jameson* [1986] 2 QB 425. In *Lawson* v. *Fox* [1974] AC 803, the House of Lords seemed to take the view that the presumption did not apply if an act caused effects in England ("There is a presumption … that Parliament, when enacting a penal statute, unless it uses plain words to the contrary, did not intend to make it an offence in English law to do acts in places outside the territorial jurisdiction of the English courts – at any rate unless the act is one which necessarily has its harmful consequences in England.").

[227] *Foley Bros., Inc.*, v. *Filardo*, 336 U.S. 281, 285 (1949); *EEOC v. Arabian Am. Oil. Co.*, 499 U.S. 244 (1991).

[228] *Liangsiriprasert* v. *U.S. Government* [1991] 1 AC 225, 241 ("Unfortunately in this century crime has ceased to be largely local in origin and effect. Crime is now established on an international scale and the common law must face this new reality."); Hirst, at 56-57.

[229] The availability of live video-links in particular may boost the number of extraterritorial prosecutions. *See* M. HIRST, *Jurisdiction and the Ambit of the Criminal Law*, Oxford, Oxford University Press, 2003, 202.

[230] *See* M. HIRST, *Jurisdiction and the Ambit of the Criminal Law*, Oxford, Oxford University Press, 2003, 28 (arguing that "international treaty obligations now represent by far the most common reason for the creation of new exceptions to the territoriality principle").

[231] Review of Extraterritorial Jurisdiction, para. 2.21.

74. Throughout the history of U.S. law, U.S. courts have time and again pointed out the importance of the territorial principle. While in some early cases, the territorial principle was predicated on the law of nations, more recent cases do not make reference to international law,[232] but instead attempt to ascertain the intent of the U.S. legislature. This development has cut the territorial principle loose from its origins and has given it a distinctively American flavor. In this subsection, first, territoriality as a U.S. principle of jurisdictional restraint derived from international law will be discussed (3.1.1). In a second part, light will be cast on the presumption against extraterritoriality, pursuant to which U.S. courts may only apply a statute extraterritorially if such was the unambiguous intent of the U.S. Congress (3.1.2.). It will be shown that exceptions to this presumption have recently been carved out, notably in the field of economic regulation and criminal law, and that, in the final analysis, international law may now often be the decisive factor and outer limit of jurisdictional reasonableness in the U.S.

3.3.1. Territoriality as a restraining principle derived from international law

75. EARLY AMERICAN LEGAL HISTORY – The embrace of the territorial principle by the United States harks back to its very inception. Indeed, paragraph 21 of the 1776 Declaration of Independence denounced the English King George III, the nominal sovereign of British America, for "[t]ransporting us beyond Seas to be tried for pretended Offenses." The drafters of the Declaration took the view that offenses committed in the territory of the United States ought to be prosecuted in the United States and not abroad, even not in the courts of the colonizing State, England, which American citizens were subject to according to English law. This emphasis on territorial justice is however not merely a secession statement. Thomas JEFFERSON justified it by traditional common law arguments relating to evidence and fairness to litigants: only a local trial would guarantee that all relevant evidence be available and that litigants have access to familiar procedures.[233] In the Judiciary Article of the 1787 U.S. Constitution, Article III, § 2, clause 3, the same emphasis on territoriality comes to the fore: "The trial of all Crimes, except in Cases of Impeachment shall be … held in the State where the said Crimes shall have been committed.".[234] In spite of the

[232] *See, e.g.*, G. SCHUSTER, *Die internationale Anwendung des Börsenrechts*, Berlin, Springer, 1996, 51.

[233] T. JEFFERSON, "Draft of Instructions to the Virginia Delegates in the Continental Congress (1774), in J.B. BOYD (ed.), 1 *The Papers of Thomas Jefferson*, at 128 (1950). ("[W]ho does his majesty think can be prevailed on to cross the Atlantick for the sole purpose of bearing evidence to a fact?"); *Id.*, at 128-29 ("And the wretched criminal … stripped of his privilege of trial by peers, of his vicinage, removed from the place where alone full evidence could be obtained, without money, without counsel, without friends, without exculpatory proof, is tried before judges predetermined to condemn."). *See also* Resolution of 14 October 1774, in 1 *Journals of the Continental Congress*, 62, 65 (1774) (deciding that the colonies are entitled "to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law"). Quoted in G.R. WATSON, "Offenders Abroad: The Case for Nationality-Based Criminal Jurisdiction", 17 *Yale J. Int'l L.* 41, 45, notes 20-22 (1992).

[234] To be true, this sentence continues with the words: "but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed." "Within any State" should however probably be construed to refer to *terrae nullius* or "territories acquired or to be acquired by the United States", although it may not be excluded that the Framers also contemplated crimes committed in foreign States. *See* A.F. LOWENFELD, "U.S. Law Enforcement Abroad: The Constitution and International Law", 83 *Am. J. Int'l L.* 880, 882 (1989).

apparent constitutional preference for territorial jurisdiction, there does however not seem to be a constitutional *bar* to the extraterritorial application of U.S. laws.[235]

76. EARLY SUPREME COURT DICTA – In a number of early 19th century judgments the U.S. Supreme Court laid great emphasis on the territoriality principle. In *Rose* v. *Himely* (1808), the Supreme Court held that "legislation of every country is territorial"[236] Four years later, in *Schooner Exchange* v. *McFaddon* (1812), one of the most important early cases, the Supreme Court put forward the absolute and exclusive jurisdiction of the State within its own territory, a statement that was later echoed by the Permanent Court of Arbitration in *Island of Palmas* (1928)[237]: "The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction. All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself."[238]

The Supreme Court restated the *Schooner* dictum in *The Appolon* (1824), holding that "[t]he laws of no nation can justly extend beyond its own territories", that these "can have no force to control the sovereignty or rights of any other nation, within its own jurisdiction", that extraterritorial jurisdiction would be "at variance with the independence and sovereignty of foreign nations" and that such jurisdiction had "never yet been acknowledged by other nations, and would be resisted by none with more pertinacity than by the Americans."[239] The Court added that, "however general and comprehensive the phrases used in our municipal laws may be, they must always be restricted in construction, to places and persons, upon whom the Legislature have authority and jurisdiction."[240] In so stating, the Court tied the presumption of territoriality less to congressional intent than to the restrictions imposed by international law. A year later, in *The Antelope* (1825), the Supreme Court predicated the prohibition of extraterritorial legislation on the sovereign equality of nations, now widely accepted as one of the most basic principles of international law[241]: "No principle of general law is more universally acknowledged, than the perfect equality of nations. […] It results from this equality, that no one can rightfully impose a rule on another."[242]

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[235] *U.S.* v. *Felix-Gutierrez*, 940 F.2d 1200, 1204 (9th Cir. 1991), citing *Chua Han Mow* v. *United States*, 730 F.2d 1309, 1311 (9th Cir. 1984), *United States* v. *King*, 552 F.2d 833, 850 (9th Cir. 1976).
[236] 8 U.S. (4 Cranch) 241, 279 (1808).
[237] Perm. Ct. Arb. 1928, *Island of Palmas* (U.S. v. Neth.), 2 R.I.A.A., 829.
[238] 11 U.S. (7 Cranch) 116, 136 (1812). *Compare* Justice BLACKMUN, with whom Justice BRENNAN, Justice MARSHALL and Justice O'CONNOR joined, concurring in part and dissenting part, *Société Nationale Industrielle Aerospatiale* v. *United States District Court for the Southern District of Iowa*, 482 U.S. 522, 556-57 (1986), citing *The Schooner Exchange* v. *McFaddon* ("Under the classic view of territorial sovereignty, each state has a monopoly on the governmental power within its borders and no state may perform an act in the territory of a foreign state without consent."). *See also* in the context of criminal law: *United States* v. *Nord Deutscher Lloyd*, 223 U.S. 512, 517-18 (1912) ("A local criminal statute has no extraterritorial effect and a party cannot be indicted in the United States for what he did in a foreign country.").
[239] *The Appolon*, 22 U.S. (9 Wheat.) 362, 370-72 (1824).
[240] *Id.*, at 371.
[241] Article 2 (1) U.N. Charter.
[242] 10 Wheat. 66, 1825.

77. EARLY U.S. INTERNATIONAL LAW DOCTRINE – In the early American conflict of laws and international law doctrine, the territoriality of jurisdiction was propounded with equal force. The great conflict of laws scholar Joseph STORY for instance held in 1834 that "every nation possesses an exclusive sovereignty and jurisdiction within its own territory … He, or those, who have the sovereign authority, have the sole right to make laws … [W]hatever force or obligation the laws of one country have in another, depends solely on the laws, and municipal regulations of the latter … and upon its own express or tacit consent."[243] Francis WHARTON, probably the first public international law scholar in the United States, for his part held in 1887 that "the authority of a nation within its own territory is absolute and exclusive."[244]

78. TERRITORIALITY *WITHIN* THE UNITED STATES – The concept of exclusive territoriality applied to the states of the United States as well, especially in the field of criminal law.[245] The reach of the criminal laws of the states of the American union was deemed to extend to the state's borders but not beyond. In *Johns* v. *State* (1882), the Supreme Court of Indiana held with respect to the criminal jurisdiction of American states:

> "It may be assumed, as a general proposition, that the criminal laws of a state do not bind, and can not affect, those out of the territorial limits of the state. Each state, in respect to each of the others, is an independent sovereignty, possessing ample powers, and the exclusive right to determine within its own borders what shall be tolerated and what prohibited; what shall be decreed innocent and what criminal; its powers being limited only by the Federal Constitution, and the motive and objects of government. While each state is thus sovereign within its own limits, it can not impose its laws upon those outside the limits of its sovereign power."[246]

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[243] J. STORY, *Commentaries on the Conflict of Laws* 19-21, 24 (1834) (Arno Press ed. 1972). *See also* J.H. BEALE, *A Treatise on the Conflict of Laws* (1935) ("Since the power of a state is supreme within its own territory, no other state can exercise power there … It follows generally that no statute has force to affect any person, thing, or act [except as regards its own citizens] outside the territory of the state that passed it."). As under Beale's approach, rights vested in one State, his theory was known as the 'vested rights theory'. *See* W.S. DODGE, "Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism", 39 *Harv. Int'l L.J.* 101, 111-13 (1998).

[244] F. WHARTON, *A Digest of the International Law of the United States*, 2nd ed., 1887, vol. 2, p. 432, section 198.

[245] *State* v. *Knight*, 1 N.C. (Tay.) 143 (1799) (act done in Virginia by a citizen of Virginia is not punishable in North Carolina); *People* v. *Merrill*, 2 Parker's Crim. 590, 596 (N.Y. 1855), rev'd 14 N.Y. 74 (1856) ("It cannot be pretended or assumed that a state has jurisdiction over crimes committed beyond its territorial limits."). Some state courts were willing to exercise jurisdiction over an act done outside the state when its effects were felt in the state. *See Adams* v. *The People*, 1 N.Y. 173, 179 (1848); *People* v. *Rathbun*, 21 Wend. 509, 534-38 (N.Y. 1839); *Barkhamsted* v. *Parsons*, 3 Conn. 1, 8 (1819); *State* v. *Grady*, 34 Conn. 118, 129-31 (1867). *See also* the federal case of *United States* v. *Davis*, 25 F. Cas. 786 (C.C.D. Mass. 1837), rejecting the jurisdiction of the State from which a shot was found, while affirming the jurisdiction of the State where the man was killed by the shot ("although the gun was fired from the [American] ship Rose, the shot took effect and the death happened on board of the [foreign] schooner; and the act was, in contemplation of law, done where the shot took effect.").

[246] Worden, J., speaking for the court in *Johns* v. *State*, 19 Ind. 421, 81 Am. Dec. 408 (1882).

In *Pennoyer* v. *Neff* (1878), the U.S. Supreme Court drew an explicit comparison between interstate law and international law,[247] predicating the prohibition of state courts from exercising personal jurisdiction over persons located outside the state's territory on principles of international law, pursuant to which "every State possesses exclusive jurisdiction and sovereignty over persons or property within its territory", and "no State can exercise direct jurisdiction and authority over persons and property without its territory."[248]

79. EXPLANATION OF U.S. RELIANCE ON TERRITORIALITY – The emphasis on the territorial principle during the early 19th century may be attributable to the U.S.'s precarious existence as a fledgling nation that only recently wrought independence from the British Empire. The United States was particularly wary of foreign interference of the Great Powers of the time, such as the United Kingdom and France, in its own affairs. If the United States were not to uphold a strict reading of the territoriality principle, it would have deprived itself of the legal arguments to object to more powerful nations applying their laws in U.S. territory.[249] Such might have harmed U.S. interests to an extent that the perceived benefits of the extraterritorial application of U.S. laws could never offset.[250] The territoriality principle was nevertheless given a broad interpretation. Since the early 19th century, U.S. flag vessels are considered to be part of U.S. territory, and hence, crimes committed aboard vessels flying the U.S. flag were subject to U.S. jurisdiction.[251] Courts also considered U.S. consular premises abroad to be part of U.S. territory, although these decisions were overturned after the Second World War.

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[247] *See also* W.W. COOK, "The Application of the Criminal Law of a Country to Acts Committed by Foreigners Outside the Jurisdiction", 40 *W. Va. L.Q.* 303, 305 (1934) (arguing that "one state in dealing with criminal cases is in general as distinct and separate from other states as France is from England").

[248] 95 U.S. 714, 722 (1878). *See also Baker* v. *Baker, Eccles & Co.* 242 U.S. 394, 401 (1917) (stating that courts historically invoked rules of international law to limit the exercise of extraterritorial jurisdiction of U.S. states).

[249] The principle of territoriality was indeed fine-tuned in light of incidents involving the application of foreign laws in U.S. territory or to U.S. vessels. In 1793, Secretary of State Thomas Jefferson vigorously defended the territorial principle when France claimed jurisdiction over vessels in U.S. waters ("Every nation has, of natural right, entirely and exclusively, all the jurisdiction which may be rightfully exercised in the territory it occupies. If it cedes any portion of that jurisdiction to judges appointed by another nation, the limits of their power must depend on the instrument of cession.") (Letter from Mr. Jefferson to Mr. Morris (Aug. 16, 1793), in W. LOWRIE & M. ST. CLAIRE (eds.), *American State Papers* 167, 169 (1832), quoted in G.B. BORN, "A Reappraisal of the Extraterritorial Reach of U.S. Law", 24 *Law & Pol. Int'l Bus.* 1, 11 (1992)). Between 1873 and 1875, the United States similarly protested the exercise of civil jurisdiction over disputes involving sailors on U.S. vessels on the high seas, invoking principles of sovereignty, independence, exclusive jurisdiction, international comity and the equality of States. *See* extensive references in G.B. BORN, "A Reappraisal of the Extraterritorial Reach of U.S. Law", 24 *Law & Pol. Int'l Bus.* 1, 12, note 37 (1992)).

[250] *Compare Hudson* v. *Hermann Pfauter GmbH & Co.*, 117 F.R.D. 33, 38 (N.D.N.Y. 1987) ("The "classic" view of territorial sovereignty was summarized by Chief Justice Marshall in 1812 [in *Schooner Exchange*], during a period in which our nation better understood the resentment that results when a more powerful nation shows disrespect for the sovereign integrity of a weaker state."). *See also* G.B. BORN, "A Reappraisal of the Extraterritorial Reach of U.S. Law", 24 *Law & Pol. Int'l Bus.* 1, 11, note 33 (1992) ("The U.S. position was not unrelated to existing U.S. security and foreign policy concerns.").

[251] *United States* v. *Ross*, 27 F. Cas. 899 (C.C.D.R.I. 1813) (no. 16,196) (Story, J.); Act of 3 March 1825, ch. 65, 4 Stat. 115; *United States* v. *Flores*, 289 U.S. 137, 155 (1933) (holding that a merchant vessel "is deemed to be part of the territory of [the] sovereignty [whose flag it flies]").

The United States only shed the strict interpretation of territoriality when it dominated the world stage by the end of the Second World War in 1945. In that very year, the Second Circuit famously held in the *Alcoa* antitrust case that U.S. courts have jurisdiction over foreign conduct that affects the United States. When American power gradually rose in the late 19th and early 20th century, a loosening of the territorial principle was however not yet in sight, as the *Cutting Case*, the 1886 libel case in which the U.S. repudiated the passive personality principle (see subsection 4.3.3), and *American Banana*, the 1909 antitrust Supreme Court judgment which dismissed the effects doctrine, illustrate.

80. AMERICAN BANANA – In *American Banana* v. *United Fruit Co.* (1909), the first case in which extraterritorial application of the Sherman (antitrust) Act was claimed, the Supreme Court ruled that only the territorial State could determine the legality of an act. In so doing, it excluded the exercise of extraterritorial jurisdiction:

> "[T]he general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done. […] For another jurisdiction, if it should happen to lay hold of the actor, to treat him according to its own notions rather than those of the place where he did the acts, not only would be unjust, but would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent."[252]

In *American Banana*, the Supreme Court did conspicuously not rely upon the *law of nations* but on the *comity of nations* as a restraining factor. If anything, comity has less compelling legal force. Comity and the law of nations were in earlier times however not the separate categories that they are today, so that comity might as well have referred to international law.[253]

3.3.2. Territoriality as a restraining principle derived from congressional intent: the presumption against extraterritoriality

3.3.2.a. Presumption against extraterritoriality

81. In more recent times, the territorial principle has not been grounded upon international law, but rather on Congress's primary concern with domestic conditions.[254] Orphaned from its public international law origins, application of the

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[252] 213 U.S. 347, 356 (1909). Although strict territoriality was abandoned in the field of antitrust law as early as 1945, the force of the territoriality principle did not entirely disappear from later antitrust court opinions. See, e.g., *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 921 (D.C. Cir. 1984) ("[T]he territoriality base of jurisdiction is universally recognized. It is the most pervasive and basic principle underlying the exercise by nations of prescriptive regulatory power.").

[253] *Compare* G.B. BORN, "A Reappraisal of the Extraterritorial Reach of U.S. Law", 24 *Law & Pol. Int'l Bus.* 1, 21 (1992) (arguing that the three rationales of the territoriality presumption – public international law, private international law and the doctrine of comity – "were invoked interchangeably, often in the same opinions", this being "of little practical consequence however, because all three sources produced the same basic results – a territorial view of national jurisdiction and a strict territoriality presumption").

[254] *EEOC* v. *Arabian Am. Oil. Co.*, 499 U.S. 244, 248 (1991). It has been cunningly noted that Congress's primary concern with domestic conditions does not necessarily reinforce the territorial principle, as domestic conditions "may be substantially affected by conduct occurring outside U.S.

territorial principle became merely a matter of U.S. statutory construction. U.S. courts appeared to recognize that the demands of international commerce and globalization are prone to make inroads in the classical international law principle of territorial jurisdiction. They did however not leave the last say on the legality of these inroads to the international community, but rather to the democratically elected and accountable U.S. legislature. The bottom-line is that, if Congress has deemed it wise to apply its laws abroad beyond what is customarily accepted in international law, the courts should not second-guess it: they should only ascertain the true intent of Congress.[255]

82. The Supreme Court repeatedly held that it is a longstanding principle of American law "that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States".[256] Although in *EEOC* v. *Arabian American Oil Co.* (*Aramco*, 1991), the Supreme Court construed the presumption against extraterritoriality as protecting "against unintended clashes between [U.S.] laws and those of other nations which could result in international discord",[257] and thus appeared to hint at an international law foundation, it appears that this protection against normative competency conflicts is not the *rationale* of the presumption against extraterritoriality, but rather its *consequence*. The courts do not decide whether or not to apply foreign law after weighing the sovereign interests concerned: they only trace the intent of Congress. Obviously, courts may welcome the effects in terms of international comity entailed by applying the presumption against extraterritoriality. Indeed, a mere application of the common sense idea that statutes "stop at the border"[258] may avoid the politically sensitive weighing of governmental interests and the risk of embarrassing the political branches.[259]

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territory." *See* G.B. BORN, "A Reappraisal of the Extraterritorial Reach of U.S. Law", 24 *Law & Pol. Int'l Bus.* 1, 74 (1992).

[255] Even the Supreme Court cannot overrule Congress in this regard. The Court has repeatedly upheld the extraterritorial application of U.S. law against constitutional challenge. *See* G. BORN, "A Reappraisal of the Extraterritorial Reach of U.S. Law", 24 *Law & Pol. Int'l Bus.* 1, 3, references in note 6 (1992). In classical conflict-of-laws cases, the Supreme Court has however held that the Constitution requires that contract and tort liability be determined by the law of the State where the contract was made or the conduct took place, thus excluding the extraterritorial application of U.S. laws under U.S. constitutional law. *See Mutual Life Ins. Co.* v. *Liebing*, 259 U.S. 209, 214 (1922) ("[T]he Constitution and the first principles of legal thinking allow the law of the place where a contract is made to determine the validity and the consequences of the act"); *New York Life Ins. Co.* v. *Dodge*, 246 U.S. 357, 377 (1918) (application of U.S. law to contract made abroad violates Fourteenth Amendment); *Western Union Telegraph Co.* v. *Brown*, 234 U.S. 542, 547 (1914) (application of U.S. tort law to conduct abroad violates Commerce Clause).

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

[257] *EEOC* v. *Arabian American Oil Co.*, 499 U.S. 244, 248 (1991) (*Aramco*) (Congress later overruled the Supreme Court by adopting 42 U.S.C. Section 2000(e) (Supp. V 1993)).

[258] *See* M.D. RAMSEY, "Escaping 'International Comity'", 83 *Iowa L. Rev.* 893, 910 (1998).

[259] *See* J.R. PAUL, "Comity in International Law", 32 *Harv. Int'l L.J.* 1, 60 (1991) (arguing that "U.S. courts on occasion employ territorial analysis as way of achieving the purposes of comity").

83. In order to discern congressional intent, the Supreme Court set forth a three-factor test in *Foley Bros.* v. *Filardo* (a 1949 case the issue of which was the application of the Eight Hour Law[260] to the employment contract of an American citizen employed at U.S. public works projects in Iran and Iraq): (a) the express language of the statute; (b) the legislative history of the statute; (c) administrative interpretations of the statute.[261] In *Aramco*, the Supreme Court only deemed the first factor to be instrumental in discerning congressional intent,[262] although in a later case, it held that congressional intent must be traced using "all available evidence."[263] The courts appear to ascertain congressional intent without regard to the express intent to have a similar statute applied extraterritorially.[264] It may be noted that the presumption against extraterritoriality does not apply where conduct regulated by statute occurs primarily, if not exclusively, in the United States, and the alleged extraterritorial effect of statute will be felt in Antarctica.[265]

3.3.2.b. Clear v. unclear congressional intent

84. NO SECOND-GUESSING BY THE COURTS – If Congress's intent to give extraterritorial effect to a particular statute is clear, the presumption against extraterritoriality will not avoid jurisdictional conflict. U.S. courts will ordinarily not be in a capacity to prevent this. Once Congress has deemed it wise to enact an extraterritorial statute, the courts are not allowed to second-guess the legislature and review the statute in light of international law. Under U.S. law, Congress is indeed not bound by international law: "If it chooses to do so, it may legislate with respect to conduct outside the United States, in excess of the limits posed by international law".[266] This is an application of the American doctrine that later statutory law

[260] 40 U.S.C. Section 324 (1940).
[261] *Foley Bros., Inc.*, v. *Filardo*, 336 U.S. 281, 285-290 (1949).
[262] 499 U.S. 244, 248 (1991).
[263] *Sale* v. *Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 177 (1993) (relying on legislative history, at 174-79); *Smith* v. *United States*, 507 U.S. 197, 204 (1993) (relying on legislative purpose). *See also Kollias* v. *D & G Marine Maintenance*, 29 F.3d 67, 73 (2d Cir. 1994) (rejecting a "clear statement" rule – which would imply that the presumption against extraterritoriality cannot be overcome absent a clear statement in the statute itself – as identified by the dissent in *Aramco* (*EEOC v. Arabian Am. Oil. Co.*, 499 U.S. 244, 261 (1991), (Marshall, J. dissenting)); *Gushi Bros.* v. *Bank of Guam*, 28 F.3d 1535, 1542 (9th Cir. 1994) (relying on legislative history). In 1992, BORN had already argued that the presumption against extraterritoriality ought "to permit consideration of all ordinary indicia of legislative intent". *See* G.B. BORN, "A Reappraisal of the Extraterritorial Reach of U.S. Law", 24 *Law & Pol. Int'l Bus.* 1, 86 (1992).
[264] In *Aramco*, the Supreme Court refused to apply the Civil Rights extraterritorially, although in similar cases, Congress had overruled the courts' refusal to apply the Age Discrimination Law extraterritorially. *Aramco* itself was eventually overruled by Congress as well. M.P. GIBNEY & R.D. EMERICK, "The Extraterritorial Application of United States Law and the Protection of Human Rights: Holding Multinational Corporations to Domestic and International Standards", 10 *Temple Int'l & Comp. L.J.* 123, 133 (1996).
[265] *Environmental Defense Fund, Inc.*, v. *Massey*, 986 F.2d 528 (D.C. Cir. 1993).
[266] *United States* v. *Pinto-Mejia*, 720 F.2d 248, 259 (2d Cir. 1983). *See also The Over the Top*, 5 F.2d 838, 842 (D. Conn. 1925) (when congressional intent is clear, international law "bends to the will of Congress"); *Tag* v. *Rogers*, 267 F.2d 664, 666 (D.C. Cir. 1959), *cert. denied*, 362 U.S. 904 (1960) ("There is no power in this Court to declare null and void a statute adopted by Congress or a declaration included in a treaty merely on the ground that such provision violates a principle of international law");*United States* v. *Quemener*, 789 F.2d 145, 156 (2d Cir. 1986), *United States* v. *Allen*, 760 F.2d 447, 454 (2d Cir. 1985), *Am. Baptist Churches* v. *Meese*, 712 F.Supp. 756, 771 (N.D. Cal. 1989) ("Congress is not constitutionally bound to abide by precepts of international law, and may therefore promulgate valid legislation that conflicts with or preempts customary international law.").

prevails over prior international law.[267] It is rooted in Article I, Section 8 of the U.S. Constitution, which grants Congress the power to regulate commerce with foreign nations. U.S. courts are "bound to follow the Congressional direction unless this would violate the due process clause of the Fifth Amendment."[268] This has obviously been denounced by the more internationalist-minded doctrine.[269]

85. THE *CHARMING BETSY* CANON OF STATUTORY CONSTRUCTION – In case of doubt, however, as the *Supreme Court* held in the seminal *Charming Betsy* case (1804), "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains".[270] This canon of statutory construction may limit the extraterritorial application of U.S. law by U.S. courts, by requiring them to construe an act of Congress in light of the customary international law of international jurisdiction (which is considered to be part of the common law[271]).[272] Accordingly, if congressional intent is ambiguous, statutory construction may still

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See also G. BORN, "A Reappraisal of the Extraterritorial Reach of U.S. Law", 24 *Law & Pol. Int'l Bus.* 1, 3 (1992).

Contra: United States v. *Palmer*, 16 U.S. (3 Wheat.) 610, 641-42 (Johnson, J., dissenting) ("Congress cannot make that piracy which is not piracy by the law of nations, in order to give jurisdiction in its own courts over such offences.")

[267] *See Whitney* v. *Robertson*, 124 U.S. 190, 194 (1888). Obviously, this approach may lead to U.S. responsibility for an internationally wrongful act *vis-à-vis* other States, if the conduct consisting of an action or omission is attributable to the U.S. and constitutes a breach of an international obligation of the U.S. *See* Articles 1-2 of the Draft Articles on State Responsibility, adopted by the International Law Commission on May 31 and August 3, 2001 (http://www.un.org/law/ilc/reports/2001/2001report.htm).

[268] *United States* v. *Pinto-Mejia*, 720 F.2d 248, 259 (2d Cir. 1983). *See also United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979). *See also Federal Trade Commission* v. *Compagnie de Saint-Gobain-Pont-à-Mousson*, 636 F.2d 1300, 1323 (D.C. Cir. 1980): "[C]ourts of the United States are [...] obligated to give effect to an unambiguous exercise by Congress of its [power to grant jurisdiction to agencies or to courts] *even if such an exercise would exceed the limitations imposed by international law*." (emphasis added). *See also* L. BRILMAYER & C. NORCHI, "Federal Extraterritoriality and Fifth Amendment Due Process", 105 *Harv. L. Rev.* 1217 (1992).

[269] *See, e.g.*, G.B. BORN, "A Reappraisal of the Extraterritorial Reach of U.S. Law", 24 *Law & Pol. Int'l Bus.* 1, 80). BORN proposes an 'international law presumption' instead, but it remains to be seen whether his approach would make any difference. Indeed, he is adamant that "the presumption should focus on *U.S.* understandings of international law", because "[t]his is the approach that U.S. courts have historically taken, "it is the treatment of international law in the United States of which Congress and the President are most aware, and which provides the natural background for actions by them", and "to the extent that there are differences between U.S. government on international law issues and those of foreign governments, separation of powers concerns at a minimum counsel strongly for judicial application of those norms recognized by the U.S. political branches." *Id.*, at 82-83. In fact, BORN does not propose to draw on multilaterally shaped norms of public international law, but on the provincial application of any such norms, and on U.S. views of conflict-of-laws and comity as epitomized by Section 403 of the Restatement (Third) of Foreign Relations Law and the *Timberlane/Mannington Mills* legacy. He basically intends to discard the presumption against extraterritoriality and to replace it by an interest-balancing test as the main method of addressing issues of extraterritoriality in the U.S.

[270] *Murray* v. *Schooner Charming Betsy*, 2 Cranch 64, 118, 2 L.Ed. 208 (1804) (Marshall, C.J.); *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21 (1963).

[271] *See* J.H. BEALE, "The Jurisdiction of a Sovereign State", 36 *Harv. L. Rev.* 241, 242 (1923) (stating that "the principles [of international law] which give or withhold jurisdiction are … principles of our common law").

[272] *See also* § 114 of the Restatement (Third) of Foreign Relations Law (1987) ("Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States").

give a role to international law in assessing the limits of extraterritorial jurisdiction.[273] It is probably in this light that Justice SCALIA's statement in his dissenting opinion in *Hartford Fire* ought to be viewed: "In sum, the practice of using international law to limit the extraterritorial reach of statutes is firmly established in our jurisprudence."[274] Ordinarily however, international law is just another interpretive device to solve conflicts of jurisdiction,[275] alongside such devices as unambiguous congressional intent and arguments relating to public policy, welfare-enhancement and procedural economy.

86. AMENDING *CHARMING BETSY* – That the courts' assessment of the reach of U.S. laws might be informed by rules of public international law under the *Charming Betsy* canon of statutory construction might appear a blessing. In reality, however, reliance on *Charming Betsy* may prove a sheep in wolf's clothing. International jurisdictional rules, the territoriality principle in economic law in particular, are not well-defined and thus extremely malleable for domestic purposes. The danger is real that international law, the *Lotus* precedent in particular, is used as a fig-leaf for an otherwise rationally hardly defendable extraterritorial application of U.S. law. As BORN has argued in this context, *Charming Betsy* only requires Congress "not to overstep the bounds of *public* international law" and not to heed *private* international law rules.[276] The latter rules may limit the scope of U.S. law, "where public international law would permit U.S. law to apply".[277] As, the *Lotus* judgment may give States overbroad powers of extraterritorial jurisdiction, BORN has proposed to use a canon of statutory construction which slightly differs from *Charming Betsy*: an act of Congress ought never to be construed to violate (the stricter) *U.S. choice of law rules*.[278]

87. THE PRESUMPTION AGAINST EXTRATERRITORIALITY AS A THRESHOLD ANALYSIS – If it was Congress's intent not to give extraterritorial effect to a statute, and jurisdictional conflict or a violation of international law would not arise if Congress had the intent of applying the statute extraterritorially, the courts are not allowed to second-guess the legislature, swap the presumption against extraterritoriality for another test, and expand jurisdiction.[279] The presumption is then a matter of *Roma locuta causa finita*. It terminates the extraterritoriality analysis, and confines the reach

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[273] *Contra*: G.B. BORN, "A Reappraisal of the Extraterritorial Reach of U.S. Law", 24 *Law & Pol. Int'l Bus.* 1, 10 (1992) (arguing that the international prohibition of extraterritorial application of national laws was very much a 19th century understanding).

[274] *Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764, 818 (1993) (Scalia, J., dissenting).

[275] D.C. LANGEVOORT, "Schoenbaum Revisited: Limiting the Scope of Anti-fraud Protection in an International Securities Marketplace", 55 *Law & Contemp. Probs.* 241, 243 (1992) (stating that "[r]eferences to principles of international law … are not meant in their intended sense as limitations on the jurisdiction to prescribe, but rather for their heuristic role in helping think through the policy dilemmas posed in this setting.").

[276] G.B. BORN, "A Reappraisal of the Extraterritorial Reach of U.S. Law", 24 *Law & Pol. Int'l Bus.* 1, 85-86 (1992) (emphasis added).

[277] *Id.*, at 86.

[278] *Id.*

[279] In *Foley Bros., Inc.*, v. *Filardo*, 336 U.S. 281 (1949) for instance, it may be argued that international law would have allowed the extraterritorial application of the U.S. Eight Hour Law to U.S. companies employing U.S. workers on U.S. government projects, in view of the strong U.S. nexus and interest, although Congress had the intent not to apply the statute extraterritorially. *See* M.D. RAMSEY, "Escaping 'International Comity'", 83 *Iowa L. Rev.* 893, 911-12 (1998) (stating that *Foley* is "completely inexplicable as a decision based upon comity").

of the statute to U.S. territory. If, however, the presumption is rebutted after careful statutory analysis, techniques of jurisdictional restraint, *e.g.*, interest-balancing, may be used to limit the reach of the law. Put differently, the presumption against extraterritoriality serves as a threshold requirement. If it is overcome, other thresholds or hurdles may have to be overcome as well. If it is not overcome, the analysis ends, and the statute is not applied extraterritorially.

3.3.2.c. Economic justification

88. OVER- V. UNDERREGULATION – From an economic perspective, it has been argued that the presumption against extraterritoriality guards against economically inefficient overregulation, as, pursuant to the presumption, national courts are only authorized to exercise extraterritorial jurisdiction if Congress has exceptionally provided for the extraterritorial application of a statute. Congress will usually only provide for extraterritorial application as a sort of 'automatic correction mechanism' for flagrant instances of underregulation laid bare by particular cases.[280] Under this theory, Congress may be considered as being naturally inclined to correct judicial *under*regulation, while it would be disinclined to correct judicial *over*regulation in case the courts were not to employ a presumption against extraterritoriality. Congress may indeed be more willing to protect the interests of its own economy by extending the geographical scope of a statute, than it is to protect the interests of a foreign economy by scaling back the overbroad scope of a statute as defined by courts, unless, obviously, foreign States force them to do so.

Drawing on public choice theory, DODGE has however argued that this operation of the presumption against extraterritoriality, namely Congress stepping in when regulation is necessary, is actually a sham, since consumers, being the main beneficiaries of economic regulation, are too disorganized to bring pressure to bear on Congress to regulate.[281] In DODGE's view, courts are required to step in where Congress fails to protect the interests of U.S. citizens, thus also when Congress has not made clear its intent to have its act applied extraterritorially. While the absence of a presumption against extraterritoriality might result in overregulation – as Congress is in that situation not inclined to restrict the geographical scope of a statute – DODGE, relying on WEINTRAUB, argues that this is precisely a good thing, as it provides Congress with the bargaining chips to bring about a far more efficient international regime through international negotiations.[282]

89. This argument is flawed in two respects. For one thing, it supposes that traditional processes of popular democracy do not work adequately and that citizens had better turn to the courts as the ultimate guardians of the interests of the people. In a time when judicial activism is widely denounced, this argument does not seem particularly persuasive. It indeed seems to hark back to the era during which the U.S. Supreme Court under Chief Justice Warren pushed through a liberal, rights-creating agenda, largely in the absence of any meaningful input from a democratically elected

[280] *See* A.T. GUZMAN, "Choice of Law: New Foundations", 90 *Geo. L.J.* 883, 927 (2002).
[281] *See* W.S. DODGE, "An Economic Defense of Concurrent Antitrust Jurisdiction", 38 *Tex. Int'l L.J.* 27, 34 (2003).
[282] *Id.*, 34-35 (2003); R.J. WEINTRAUB, "The Extraterritorial Application of Antitrust and Securities Laws: An Inquiry Into the Utility of a "Choice-of-Law" Approach", 70 *Tex. L. Rev.* 1799, 1817 (1992). *See also* chapter 6.7.4.

legislature. As far as the tendency of the absence of a presumption against extraterritoriality toward multilateral negotiations is concerned, while broad assertions of extraterritorial jurisdiction may indeed at times have furthered negotiations, there does not seem to be solid evidence that this will always be the case. On the contrary, there is quite some evidence that assertions of extraterritorial jurisdiction precisely sour international relations and may diminish the prospect of ever reaching an international agreement.

90. THE PRESUMPTION AND DEMOCRATIC ACCOUNTABILITY – The presumption against extraterritoriality serves as an interpretive device that guarantees the democratic legitimacy of the extraterritorial application of U.S. laws. Courts arguably ascertain the true intent of Congress, which they do not substitute for their own idiosyncratic views of the desired scope of application of statutes. However, although courts claim to merely ascertain the explicit or implicit will of Congress, it has been submitted that Congress has in most cases not thought about any possible extraterritorial application of the laws it enacts, so that there may be no will to interpret.[283] It is indeed no exaggeration to say that the courts are legislating from the bench, apparently with tacit approval of congressional representatives,[284] the constitutionally designated lawmakers who are accountable to the people. In reality, U.S. courts are the *de facto* lawmakers in the field of extraterritorial jurisdiction. It has therefore been argued, quite convincingly, that a realignment of institutional roles is overdue, with the political branches clearly setting out the beacons of extraterritorial jurisdiction and the judiciary applying clear statements of Congress in this regard.[285] Nonetheless, if Congress (re)claims the higher ground, democratic objections will persist, not from a U.S. constitutional perspective, but from a global perspective. Indeed, the basic concept of extraterritoriality – the application of laws to persons located abroad – runs counter to the principle that those who are subject to the law should have a say in its making.

91. REJECTING THE PRESUMPTION: ECONOMIC V. LABOR LEGISLATION – In some fields of the law, notably in antitrust and securities law, courts have rejected the presumption against extraterritoriality. They have applied statutes extraterritorially in the absence of affirmative congressional intent, and subsequently employed other doctrines of jurisdictional restraint. In so doing, they in effect rejected the idea that the

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[283] *See* M.P. GIBNEY, "The Extraterritorial Application of U.S. Law: The Perversion of Democratic Governance, the Reversal of Institutional Roles, and the Imperative of Establishing Normative Principles", 19 *B.C. Int'l & Comp. L. Rev.* 297, 310 (1996). *See also* M.P. GIBNEY & R.D. EMERICK, "The Extraterritorial Application of United States Law and the Protection of Human Rights: Holding Multinational Corporations to Domestic and International Standards", 10 *Temple Int'l & Comp. L.J.* 123 (1996) (referring to "an intellectual dishonest search for congressional intent where there seldom is any").

[284] *See however*: Age Discrimination in Employment Act, 29 U.S.C. Section 623(f)(1) (1988) (overturning the territorial application of this Act by the courts in *DeYoseo* v. *Bell Helicopter Textron, Inc.*, 785 F.2d 1282 (5th Cir. 1986); *Pfeiffer* v. *Wm. Wrigley Jr. Co.*, 755 F.2d 554 (7th Cir. 1985); *Cleary* v. *United States Lines*, 728 F.2d 607 (3d Cir. 1984)), Civil Rights Act Pub. L. No. 102-66, Section 109 105 Stat. 1071, 1077 (1991), codified at 42 U.S.C. Section 2000e-n (Supp. III 1991) (overturning the territorial application of his act by the Supreme Court in *EEOC* v. *Arabian American Oil Co. (Aramco*), 499 U.S. 244 (1991)).

[285] M.P. GIBNEY, "The Extraterritorial Application of U.S. Law: The Perversion of Democratic Governance, the Reversal of Institutional Roles, and the Imperative of Establishing Normative Principles", 19 *B.C. Int'l & Comp. L. Rev.* 297 (1996).

presumption against extraterritoriality serves as a threshold analysis.[286] The question arises why this has happened in the field of economic law, and not in other fields of the law, notably in labor and employment standards legislation (the extraterritorial application of which was at issue in the seminal *Foley Bros.* and *Aramco* cases), and environmental legislation. Although the shift from rejecting extraterritoriality in the employment *Aramco* case (1991) to finding extraterritoriality in the antitrust *Hartford Fire* case (1993) may be attributable to the different facts of the case (both the majority and minority in *Hartford Fire* conducting the same reasonableness analysis as in *Aramco*, but reaching another outcome),[287] there is arguably more at stake. The application of the presumption against extraterritoriality to some statutes and not to others is often not premised on a different congressional intent, but is rather underpinned by the courts' own policy considerations. Indeed, as pointed out *supra*, in the absence of clear congressional intent, the courts have promoted themselves to the *de facto* lawmakers in the field of extraterritoriality.

92. GENERAL SOCIAL HARM – It has been argued that violations of antitrust and securities legislation, unlike violations of labor and employment legislation, produce general social harm, and that, accordingly, extraterritorial application of the former legislation in the absence of congressional intent would be justified.[288] Violations of U.S. labor and employment standards by contrast would have a much more tenuous effect on the U.S. economy than violations of U.S. antitrust and securities laws. Such violations would be the primary concern of foreign nations, and courts would not be allowed to cast aside the presumption against extraterritoriality.

93. LEVEL OF SOVEREIGNTY ENCROACHMENT – The stricter construction of the presumption against extraterritoriality may also be attributable to the fact that "market extraterritoriality is less invasive on the sovereignty of foreign states", whilst labor and employment 'non-market' regulations are more politically sensitive.[289] International tensions stemming from the extraterritorial application of the latter

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[286] *Contra* M.D. VANCEA, "Exporting U.S. Corporate Governance Standards Through the Sarbanes-Oxley Act: Unilateralism or Cooperation?", 53 *Duke L.J.* 833, 855 (2003-2004) (arguing that the exemptions granted by U.S. regulatory agencies such as the SEC, based on the fear of losing investment or listings of foreign companies, and on the fear of foreign retaliatory actions, make at any rate clear that these agencies are also willing to uphold the presumption against extraterritoriality in antitrust and securities cases").

[287] *See* A.-M. SLAUGHTER, "Liberal International Relations Theory and International Economic Law", 10 *Am. U. J. Int'l L. & Pol'y* 717, 735 n. 81 (1995)

[288] *See* W. ESTEY, "The Five Bases of Extraterritorial Jurisdiction and the Failure of the Presumption Against Extraterritoriality", 21 *Hastings Int'l & Comp. L. Rev.* 177, 187, n. 60 (1997). U.S. courts do not always decide against the extraterritorial application of labor regulations. In *Vermilya-Brown*, 335 U.S. 377 (1948), the Supreme Court applied the Fair Labor Standards Act (FSLA, Act of June 25, 1938, Section 3, 52 Stat. 1060, ch. 676, 29 U.S.C. Section 201) to all employees, U.S. or foreign, on a military base in Bermuda which the U.S. leased from the United Kingdom. In light of the facts of the case however – involving a *territory* leased by the U.S. government – the case is not representative of typical extraterritorial cases. Yet even in *Vermilya-Brown*, dissenting Justice Jackson argued against the application of U.S. laws to foreign employees of the military base ("Thus it was settled American policy … that … we should acquire no such responsibilities as would require us to import to those islands our laws, institutions and social conditions beyond the necessities of controlling a military base and its garrison, dependents and incidental personnel."). *Id.*, at 394.

[289] *See* J. TURLEY, "When in Rome: Multinational Misconduct and the Presumption Against Extraterritoriality", 84 *Nw. U. L. Rev.* 598 (1990). *See also* M.D. VANCEA, "Exporting U.S. Corporate Governance Standards Through the Sarbanes-Oxley Act: Unilateralism or Cooperation?", 53 *Duke L.J.* 833, 855 (2003-2004).

regulations appear therefore more likely to arise than in the context of the extraterritorial application of U.S. antitrust and securities laws.

94. TRANSNATIONAL SOLIDARITIES – The discrepancy between the reach of U.S. antitrust and securities laws and the reach of U.S. labor and environmental legislation may not only be explained by the extent of social harm entailed by violations of the respective laws, or by a disparity in international conflict potential. It may be argued that U.S. courts and regulators could harness the national interest to a much greater extent in the field of antitrust and securities than they could in the field of labor or environmental laws, since violations of the latter laws invite the formation of transnational solidarity groups much more than violations of the former laws do.[290]

Extraterritorial violations of labor and environmental laws will usually pit labor or environmental groups (*i.e.*, civil society) against multinational corporations and foreign governments. A U.S. court will usually face an uphill struggle in identifying 'the' national interest, as all these actors somehow represent the national interest. In light of the complicated transnational solidarities, the court may tend *not* to apply a statute extraterritorially (although in so doing it actually furthers the interests of a particular group).

Extraterritorial violations of antitrust and securities laws will usually not involve the sort of class struggle caused by violations of labor and environmental laws. To be true, violations of antitrust and securities laws may pit corporations against consumers, or issuers against investors, but this conflict is less outspoken, since corporations are often consumers as well, and issuers often investors as well, and *vice versa*. Persons may indeed belong to different 'classes' at the same time, also domestically, which may prevent them from claiming transnational allegiances. As they may identify with their supposed adversaries, they may form the overarching class of the national economic establishment defending its interests against encroachment by other States, or by asserting its interests through the forum State. If internal dissent and competing claims of national interest are silenced, courts and regulators of the forum State will no longer face substantial difficulties in identifying "one" national interest. Weighing this strong national interest against the interests of the foreign State, they will tend to prefer the national over the foreign interest, thereby expanding the reach of the law.

95. NATIONAL INTERESTS – At bottom, the extraterritorial application of U.S. laws is not a function of the presumption against extraterritoriality, but of the pursuit of the U.S. national interest, although, as shown *supra*, it may at times be difficult to discern this interest. The refusal of the U.S. to apply its laws to extraterritorial non-market cases may either be attributable to these cases having only a tenuous effect on the U.S. economy, or to the fact that extraterritorial application of U.S. laws might provoke a diplomatic backlash, but in either case, the perceived national interest might be the deciding factor.[291] As far as market cases are concerned, it may be

[290] *Compare* X., "Constructing the State Extraterritorially, Jurisdictional Discourse, the National Interest, and Transnational Norms", 103 *Harv. L. Rev.* 1273, 1293 (1990).

[291] *Compare* M.P. GIBNEY, "The Extraterritorial Application of U.S. Law: The Perversion of Democratic Governance, the Reversal of Institutional Roles, and the Imperative of Establishing Normative Principles", 19 *B.C. Int'l & Comp. L. Rev.* 297, 304-05 (1996) (adding that the U.S. often does not apply its laws to the conduct of its corporations abroad to enable them to compete in a global

submitted that the spread of the free market is coterminous with the pursuit of American interests. This ideologically charged statement will not be elaborated on here, but, assuming it is true, one should not fail to observe that the free market purpose is not always served by the extraterritorial application of U.S. market laws, and that, thus, U.S. interests may not be served.

96. Admittedly, in the antitrust field, the rationale of the extraterritorial application of the 1890 Sherman Act and the 1982 Federal Trade Antitrust Improvement Act is to break up foreign market-distorting conspiracies that harm U.S. consumers or exporters, and thus to promote a free and competitive market. However, the United States is singularly reluctant to use this stated free market creed to the detriment of its own (corporate) citizens. Under the 1918 Webb-Pomerene Act, it refuses to apply the Sherman Act to U.S. conspiracies that cause market-distorting effects abroad, because exercising jurisdiction over such conduct would arguably not serve the U.S. interest. Similarly, the U.S. does not apply the Sherman Act to the anticompetitve policies of U.S. governmental entities.[292] By applying the Sherman Act to foreign export cartels and, certainly after the *Hartford Fire* case (1993) (see subsection 6.7.3), casting aside permissive cartel-friendly policies by foreign governmental entities, the United States may obviously stand accused of applying a double standard.[293] Moreover, the application of U.S. extraterritorial regulation to foreign economic actors may precisely have the effect of restraining the development of a free market instead of promoting it, as corporations are burdened with layers of conflicting or non-conflicting governmental regulation. The application of wide-ranging corporate governance requirements set forth in the 2002 Sarbanes-Oxley Act to foreign issuers and their audit firms is a case in point. If economic actors shun the United States for fear of being subject to U.S. regulation, it may seriously be doubted whether U.S. interests are served. In the chapters on antitrust and securities jurisdiction, this problem will be examined in greater detail.

3.3.2.d. The Bowman criminal law exception to the presumption

97. The aforementioned explanations of the abandonment of the presumption against extraterritoriality in some fields of the law are of a doctrinal nature. They have not explicitly been mooted by the courts. In the field of criminal law, however, the U.S. Supreme Court has carved out, and justified, an exception to the presumption against extraterritoriality, implicitly relying on norms of permissive extraterritorial jurisdiction of public international law. In *U.S.* v. *Bowman* (1922), the Supreme Court held:

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market, *i.e.*, a refusal to apply U.S. laws extraterritoriality in light of the national interest). The perceived national interest may not always correspond to the genuine national interest as more legitimately construed by Congress.

[292] In *FTC v. Ticor Title Ins. Co.*, 112 S. Ct. 2169 (1992), the Supreme Court restated that immunity from federal antitrust law is conferred out of respect for ongoing regulation by the state, provided that the restraint must be one clearly articulated and affirmatively expressed as state policy, and that the policy must be actively supervised by the State itself. *See also* S. WEBER WALLER, "Can U.S. Antitrust Laws Open International Markets?", 20 *Northwestern Journal of International Law & Business* 207, 222 (2000).

[293] In *FTC v. Ticor Title Ins. Co.*, 112 S. Ct. 2169 (1992), the Supreme Court had restated that immunity from federal antitrust law is conferred out of respect for ongoing regulation by the state, provided that the restraint must be one clearly articulated and affirmatively expressed as state policy, and that the policy must be actively supervised by the State itself.

> "The necessary locus [of the crime], when not specially defined, depends upon the purpose of Congress as evinced by the description and nature of the crime and upon the territorial limitations upon the power and jurisdiction of a government to punish crime under the law of nations. Crimes against private individuals or their property, like assaults, murder, burglary, larceny, robbery, arson, embezzlement, and frauds of all kinds, which affect the peace and good order of the community must, of course, be committed within the territorial jurisdiction of the government where it may properly exercise it. *If punishment of them is to be extended to include those committed outside of the strict territorial jurisdiction, it is natural for Congress to say so in the statute, and failure to do so will negative the purpose of Congress in this regard.* But the same rule of interpretation should not be applied to criminal statutes which are, as a class, not logically dependent on their locality for the government's jurisdiction, but are enacted because of the right of the government to defend itself against obstruction, or fraud wherever perpetrated, especially if committed by its own citizens, officers, or agents. Some such offenses can only be committed within the territorial jurisdiction of the government because of the local acts required to constitute them. *Others are such that to limit their locus to the strictly territorial jurisdiction would be greatly to curtail the scope and usefulness of the statute* and leave open a large immunity for frauds as easily committed by citizens on the high seas and in foreign countries as at home. *In such cases, Congress has not thought it necessary to make specific provision in the law that the locus shall include the high seas and foreign countries, but allows it to be inferred from the nature of the offense.*[294]

98. Under the *Bowman* doctrine, Congress need not expressly provide for extraterritorial jurisdiction over crimes of which the government is a victim; such jurisdiction could be inferred from the nature of the offense. In order to overcome the presumption against extraterritoriality in this situation, the court thus seemed to draw on a combination of both a broad protective principle and the classical active personality principle under public international law. Indeed, the *Bowman* court addressed offenses impairing "the right of the government to defend itself against obstruction, or fraud wherever perpetrated" (*i.e.*, protective jurisdiction) provided that a *U.S. person* is the perpetrator ("especially if committed by its own citizens, officers, or agents") (*i.e.*, active personality jurisdiction).[295]

Courts have interpreted the *Bowman* standard rather liberally, according to PODGOR even "without regard to the government being a victim and without regard to the

[294] *United States* v. *Bowman,* 260 U.S. 94, 97-98 (1922) (emphasis). See also, *a contrario*, *American Banana v. United Fruit Co.*, 213 U.S. 347, 357 (1909) ("The foregoing considerations would lead, in case of doubt, to a construction of any statute as intended to be confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power. 'All legislation is prima facie territorial.' ").

[295] M.B. KRIZEK, "The Protective Principle of Extraterritorial Jurisdiction: A Brief History and an Application of the Principle to Espionage as an Illustration of Current United States Practice", 6 *B.U. Int'l L.J.* 337, 345 (1988) (stating that "since the defendants in the *Bowman* case were U.S. citizens, the Court specifically chose not to address the issue of whether it could exercise jurisdiction over alien defendants who had committed crimes abroad"). The court appeared reluctant to solely rely upon the protective principle, because this principle was historically mistrusted by U.S. courts. *See id.*, at 340.

government being affected by the conduct's criminality".[296] This led her to advocate a return to genuine *Bowman*-style "defensive territoriality".[297] She nevertheless made an exception for "conduct of United States businesses, deliberately occurring outside the United States for the purpose of avoiding United States jurisdiction",[298] conduct of which the government thus need not be a victim.

3.3.2.e. International law trumping the presumption

99. A statute almost never explicitly provides for its extraterritorial application.[299] Under the presumption against extraterritoriality, statutes should thus only rarely be given extraterritorial application. However, some courts have tended to distort the presumption by relying on the observation that a statute almost never rules out its

[296] E.S. PODGOR, "'Defense territoriality": a new paradigm for the prosecution of extraterritorial business crimes", 31 *Geo. J. Int'l & Comp. L.* 1, 28 (2002). *See* for cases relying on *Bowman*, *e.g.*, *Chuan Han Mow* v. *United States*, 730 F.2d 1308, 1311 (9th Cir. 1984) (relying on *Bowman* so as to permit the extraterritorial application of drug laws); *United States* v. *Zehe*, 601 F. Supp. 196, 200 (D. Mass. 1985) (relying on *Bowman* and ruling that "[g]iven Congress' failure to distinguish between citizens and noncitizens when repealing the territorial restriction, the Court sees no reason to infer that the [Espionage] Act does not continue to apply to both citizens and noncitizens. Therefore, the Court finds that the legislative record … does indicate that Congress meant the Act to apply extraterritorially to noncitizens as well as citizens."); *United States* v. *Thomas*, 893 F.Ed. 1066, 1068 (9th Cir. 1990) ("'[T]he exercise of [extraterritorial jurisdiction] may be inferred from the nature of the offenses and Congress' other legislative efforts to eliminate the type of crime involved'", quoting *United States* v. *Baker*, 609 F.2d 134, 136 (5th Cir. 1980); *United States* v. *Felix-Gutierrez*, 940 F.2d 1200 (9th Cir. 1991) (concluding "that the crime of "accessory after the fact" gives rise to extraterritorial jurisdiction to the same extent as the underlying offense [a drug offense in case, over which extraterritorial jurisdiction could be established under *Bowman*]", since "[l]imiting jurisdiction to the territorial bounds of the United States would greatly curtail the scope and usefulness of the accessory after the fact statute in cases in which extraterritorial crimes occur"); *United States* v. *Vasquez-Velasco*, 15 F.3d 833, 837, 840 (9th Cir. 1994) (relying on *Bowman* so as to permit the extraterritorial application of violation crimes in aid of a racketeering enterprise, 18 U.S.C. § 1959); *United States* v. *Bin Laden*, 92 F. Supp. 2d 189, 193 (S.D.N.Y. 2000) (holding that the extraterritorial application of U.S. criminal law is not allowed "unless such an intent is clearly manifested", quoting *Sale* v. *Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 188 (1993)); *United States* v. *Plummer*, 221 F.3d 1298, 1305 (11th Cir. 2000) (holding that "courts in this Circuit and elsewhere have routinely inferred congressional intent to provide for extraterritorial jurisdiction over foreign offenses that cause domestic harm");

[297] E.S. PODGOR, "'Defense territoriality": a new paradigm for the prosecution of extraterritorial business crimes", 31 *Geo. J. Int'l & Comp. L.* 1, 28 (2002). A "correct" application of the *Bowman* doctrine may possibly be found in *Gillars* v. *United States*, 182 F.2d 962, 979 (D.C. Cir. 1950) (holding that the "usual presumption against extraterritorial application of the criminal law does not apply to treason"). *See also Kollias v. D & G Marine Maintenance*, 29 F.3d 67, 71 (2d Cir. 1994) ("[T]he holding in Bowman should be read narrowly so as not to conflict with these more recent pronouncements on extraterritoriality. Reading Bowman as limited to its facts, only criminal statutes, and perhaps only those relating to the government's power to prosecute wrongs committed against it, are exempt from the presumption.").

[298] E.S. PODGOR, "'Defense territoriality": a new paradigm for the prosecution of extraterritorial business crimes", 31 *Geo. J. Int'l & Comp. L.* 1, 29 (2002).

[299] *See* for some rare examples: Pub. L. No. 101-298, 104 Stat. 201, codified at 18 U.S.C. Section 175 (Biological Weapons Anti-Terrorism Act) ("There is extraterritorial federal jurisdiction over an offense under this section committed by or against a national of the United States."); Maritime Drug Law Enforcement Act, 46 U.S.C. app. Section 1903(h) (1988) (This section is intended to reach acts of possession, manufacture, or distribution committed outside the territorial jurisdiction of the United States.").

extraterritorial application either.[300] They appear to take the view that the classical presumption is obsolete in light of technological and economic developments that have reduced the importance of State borders and the necessity of strict State sovereignty.[301] In the absence of prohibitive wording in the statute, they have relied upon policy considerations to assess the desired reach of the statute. In the seminal *Alcoa* antitrust case for instance, the Second Circuit might, in order to legally justify its effects-based jurisdiction, have construed the intent of Congress when enacting the Sherman Act in light of the objective territorial principle under international law,[302] or even simply have replaced congressional intent by broad international law authorization.

The bottom-line of this approach is that, if Congress did not want a statute to be applied extraterritorially, it could have explicitly stated so. This argument links up with international law where it denounces a strict presumption against extraterritoriality for being over-inclusive when no conflict between U.S. and foreign law exists,[303] or when laws are not given the extraterritorial reach that rules of public international law might authorize. Indeed, courts often pay only lip-service to the territoriality presumption and rely upon public international law rules such as the effects doctrine and the protective principle as principles that *permit* extraterritorial jurisdiction.[304] The presumption against extraterritoriality then becomes a presumption in favor of extraterritoriality, as vague public international law rules hardly serve as restraining devices.[305]

3.4. Territorial jurisdiction over cross-border offences

100. CROSS-BORDER OFFENCES – The contours of territorial jurisdiction are not as clear as might appear at first glance. Offences do not necessarily occur wholly within one State. A crime may be initiated in State X, and consummated in State Y. A person may make a criminal attempt from State X directed at State Y. Person A may participate in State X in a crime committed by person B in State Y. Cross-frontier offences raise the question of where exactly the *locus delicti* is, and thus, which State may legitimately exercise jurisdiction over the crime. According to OEHLER, writing

[300] *See* for a rare example: Fair Labor Standards Act, 29 U.S.C. Section 213 ("The provisions of sections 206, 207, 211, and 212 of this title shall not apply with respect to any employee whose services during the workweek are performed in a workplace within a foreign country.")

[301] *See* G.B. BORN, "A Reappraisal of the Extraterritorial Reach of U.S. Law", 24 *Law & Pol. Int'l Bus.* 1, 53, with references in notes 273 and 274 (1992).

[302] *See* D.J. GERBER, "The Extraterritorial Application of German Antitrust Laws", 77 *A.J.I.L.* 756, 759 (1983). *See* on justifying the effects doctrine: chapter 6.3..

[303] *Id.*, at 77 (citing the absence of any conflict between Saudi and U.S. law in *Aramco*).

[304] *See* G.B. BORN, "A Reappraisal of the Extraterritorial Reach of U.S. Law", 24 *Law & Pol. Int'l Bus.* 1, 53, with references in notes 273 and 274 (1992). *See* case citations of § 403 through June 2004, available at lawschool.westlaw.com. *See, e.g.*, *United States* v. *Vasquez-Velasco*, 15 F.3d 833, 841 (9th Cir. 1994) (court not applying the usual presumption against extraterritoriality to violent crimes committed in aid of a racketeering enterprise, instead holding that it is "convinced that extraterritorial application of [18 U.S.C. § 1959] to violent crimes associated with drug trafficking is reasonable under international law principles. Because drug smuggling is a serious and universally condemned offense, no conflict is likely to be created by extraterritorial regulation of drug traffickers").

[305] *See* E.S. PODGOR, ""Defensive Territoriality": a New Paradigm for the Prosecution of Extraterritorial Business Crimes", 31 *Ga. J. Int'l & Comp. L.* 1, 26 (2002) (arguing that, in the field of criminal law, "[b]y using "objective territoriality" in a globalized world, the presumption of not permitting extraterritorial conduct in criminal cases has become a presumption in favour of permitting these prosecutions.").

in 1983, this question is even the single most important issue in international criminal law,[306] a law which nevertheless, as FITZMAURICE, writing in 1957, pointed out, does not "very satisfactorily delimit[] the respective spheres of competence of States in cases of this kind."[307]

101. In international criminal law, it is commonly accepted that it is necessary and sufficient that one constituent element of the act or situation has been consummated in the territory of the State that claims jurisdiction. This solution was propounded as early as 1622 in *De criminibus*, an influential work by the Dutch criminal jurist MATTHAEUS,[308] who defended it on the ground that it prevented impunity.[309] The constituent elements approach is however problematic under international law, as it is not international law, but municipal law which defines the constituent elements of a particular offence.[310] International law seems therefore have satisfied itself with requiring that either the criminal act or its effects have taken place within a State's territory for the State to legitimately exercise territorial jurisdiction, irrespective of the municipal characterization of the act or the effects (in practice usually the effects) as a constituent element of the offence.

102. OBJECTIVE V. SUBJECTIVE TERRITORIALITY – In doctrinal writings, so-called 'objective territoriality' and 'subjective territoriality' are usually distinguished.[311] A State can exercise jurisdiction if the act has been initiated abroad,

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[306] D. OEHLER, *Internationales Strafrecht*, 2nd ed., Köln, Berlin, Bonn, München, Carl Heymanns Verlag, 1983, p. 201, nr. 226 ("Es gibt im internationalen Strafrecht kaum einen Punkt, der selbst innerhalb des einzelnen Landes mehr umstritten ist, als das Merkmal des Tatorts.").

[307] G. FITZMAURICE, "The General Principles of International Law", *R.C.A.D.I.* 1, 214, vol. 92 (1957-II).

[308] A. MATTHAEUS, *De criminibus*, translated by M.L. Hewett & B.C. Stoop as "On Crimes", Cape Town, South Africa, University of Cape Town Press, 1994, l. xlvii, c. 5, No. 6 ("Let us see what must be said if murder has been committed on a border and the judges of both territories vie for the inquiry. … There is also a third opinion of those who think that both [States] can hold a trial but the dispute must be resolved as follows, namely that he who is already busy with the accused ie he who has anticipated the other, is to be preferred. And this third opinion seems to me the more correct."). *Id.*, at No. 7 ("[O]bviously, he who has arrested him ought to have the stronger case. If, however, neither has arrested him, in that case precedence can also be achieved by laying a charge."). *Id.*, at No. 8 (arguing that the commentators of Roman law "say that … the judges of either territory can punish."). *Id.*, at No. 9 ("[A] crime begun in the territory of one magistrate and completed in the territory of another is righly said to have been committed in both, because a crime cannot be divided into parts."). *See also* P.C.I.J., *S.S. Lotus*, P.C.I.J. Reports, Series A, No. 10 (1927), 23 and 30; M. HIRST, *Jurisdiction and the Ambit of the Criminal Law*, Oxford, Oxford University Press, 2003, 45-46.

[309] A. MATTHAEUS, *De criminibus*, translated by M.L. Hewett & B.C. Stoop as "On Crimes", Cape Town, South Africa, University of Cape Town Press, 1994, l. xlvii, c. 5, No. 8 ("[W]e must see to it lest, by wanting to refer the enquiry to only one court, we open up a road for the accused to escape."). *Id.*, No. 9 ("Public utility ought to override niceties of argumentation lest while the jurisdiction is being debated, an escape is provided for the offender.").

[310] *See* H.D. WOLSWIJK, *Locus delicti en rechtsmacht*, Gouda Quint, Deventer, Willem Pompe Instituut voor Strafrechtswetenschappen (Willem Pompe Institute for Criminal Legal Science), Utrecht, 1998, 45.

[311] The subjective and objective theories of territoriality were introduced in conventional international law in Article 9 of the Convention for the Suppression of Counterfeited Currency, 112 *L.N.T.S.* 2624, 20 April 1929, and Articles 2 and 3 of the Convention for the Suppression of the Illicit Traffic in Dangerous Drugs, 198 *L.N.T.S.* 4648, 26 June 1936. They were apparently first used in 1887 by J.B. MOORE in his "Report on Extraterritorial Crime and the Cutting Case", U.S. FOR. REL. 575, 770 (1887) (distinguishing the "objective principle" and the "subjective principle").

but completed in its territory (objective territoriality).[312] Conversely, a State can exercise jurisdiction if the act has been initiated in the territory, but completed abroad (subjective territoriality).[313] However, it remains to be seen whether these criminal law concepts - handbooks typically cite the example of the firing of a gun across a frontier - are fully applicable to less clear-cut non-penal acts. Our analysis of economic law in chapters 6 and 7 will, *inter alia*, delve into this conundrum.

U.S. and English case-law in particular have pioneered the use of the objective and subjective territorial principle in the field of criminal law. Because of the emphasis laid on the principle of territoriality in the common law, these States could not rely on other grounds of jurisdiction and thus resorted to an expansive interpretation of the territoriality principle.[314]

3.4.1. Jurisdiction over cross-border offences in England

103. EARLY ENGLISH LAW – At the dawn of English legal development, a criminal act which had a territorial connection with two counties could not be subject to the jurisdiction of either county, because the jury in neither county could see or hear the evidence located in the other.[315] Under an extremely rigid conception of the territorial principle, only acts that took place wholly within a county's border could fall under the jurisdiction of that particular county. Under the reign of King Edward VI, this conception was however abandoned. By statute of 1548, the perpetrator of the lethal crime could be tried in both counties.[316] From then on, a dead body need no longer be hauled into the territory for there to be legitimate jurisdiction over a murder case (the territory where the blow was given was generally preferred over the territory

[312] *See* J.B. MOORE, *Report on Extraterritorial Crime and the Cutting Case*, 1887, p. 23; *U.S. For. Rel.*, 1887, 757, 771 ("The principle that a man who outside of a country willfully puts in motion a force to take effect in it is answerable at the place where the evil is done, is recognized in the criminal jurisprudence of all countries."). In this sense, the *Lotus* judgment may be premised on the objective territorial principle. *See also* A. CASSESE, "Is the Bell Tolling for Universality?", 1 *J.I.C.J.* 2003, 589, at 591.

[313] HARVARD RESEARCH ON INTERNATIONAL LAW, "Draft Convention on Jurisdiction with Respect to Crime", 29 *A.J.I.L.* 439, 484-87 (1935). AKEHURST observed that at the beginning of the 20th century, the arguments in favour of subjective and of objective territoriality were "*so evenly matched that it was eventually realized that there was no logical reason for preferring the claims of one State over the claims of the other." See* M. AKEHURST, "Jurisdiction in International Law", 46 *B.Y.I.L.* 145, 152 (1972-73). *See also* HARVARD RESEARCH ON INTERNATIONAL LAW, "Draft Convention on Jurisdiction with Respect to Crime", 29 *A.J.I.L.* 439, 487 (1935).

[314] *See* C.L. BLAKESLEY, "Extraterritorial Jurisdiction", in M.C. BASSIOUNI (ed.), *International Criminal Law II: Procedural and Enforcement Mechanisms*, 2nd ed., Transnational, Ardsley, NY, 1999, at 49, 53 (arguing that "[t]he territorial theories … have been extended liberally to mitigate the evils that would arise from a strictly territorial approach to jurisdiction.").

[315] *See* W. BERGE, "Criminal Jurisdiction and the Territorial Principle", 30 *Mich. L. Rev.* 238, 239 (1931).

[316] Statute of 2 and 3 Edw. VI, c. 24 (1548) ('An Act for the Trial of Murders and Felonies in Several Counties') ("That where any person or persons hereafter shall be feloniously stricken or poisoned in one country and die of the same … in another country that then an indictment thereof founden by jurors of the county where the death shall happen … shall be as good and effective in the law as if the stroke or poisoning had been committed … in the same county where the party shall die"). The same principle applied to Admiralty jurisdiction: 2 Geo. 2, c. 21.

where death ensued).[317] In the United States this practice nonetheless persisted until the early 19th century.[318]

104. *REGINA* V. *COOMBES* (1786) –An English court for the first time exercised jurisdiction over the textbook situation of a person firing a bullet from another jurisdiction, causing the death of a person in England, in the 1786 case of *Regina* v. *Coombes*.[319] In this case, which actually revolved around the question of whether a person should be tried under admiralty jurisdiction (*i.e.*, jurisdiction based on the crime taking place aboard an English vessel) or territorial jurisdiction, it was held that "if a loaded pistol be fired from the land at a distance of 100 yards from the sea, and a man is maliciously killed in the water 100 yards from the shore, the offender shall be tried by the admiralty jurisdiction, for the offense is committed where the death happened, and not at the place whence the cause of the death proceed."[320]

105. *REGINA* V. *KEYN* (1876) – Although *Regina* v. *Coombes* appeared to be an application of the objective territorial principle, with the territorial *effects* of an act conferring jurisdiction, a century later, an English court clarified in the case of *Regina* v. *Keyn* that not the locus of the effects, but the locus of the *criminal act* itself was decisive for purposes of jurisdiction.[321] The precedent of *Regina* v. *Keyn* was later used to extradite persons accused of making false statements in England as a result of which goods were obtained in another State, the obtaining of the goods being considered as the criminal act.[322]

In *Regina* v. *Keyn*, also known as the *Case of the Franconia*, an 1876 case before the Central Criminal Court of London, the question arose whether the *Regina* v. *Coombes* precedent could be relied upon to establish jurisdiction over a foreigner on a German steamer which collided, due to negligence, with a British ship on the high seas, resulting in the death of a number of sailors on the British ship (an offence which qualified as manslaughter under English law). Assuming that the English vessel was part of English territory, was the fact pattern of *Regina* v. *Keyn* indeed comparable to that of *Regina* v. *Coombes* for purposes of jurisdiction?

The Chief Justice, Cockburn, C.J., ruled that it was not, arguing that in *Regina* v. *Coombes*, "it may well be held that the blow struck by the bullet is *an act done in the jurisdiction* in which the bullet takes effect", whereas in *Regina* v. *Keyn*, "a case of manslaughter, arising from the running down of another ship through negligence, or to a case where death is occasioned by the careless discharge of a gun … there is no intention accompanying the act into its ulterior consequences. The negligence in running down a ship may be said to be confined to the improper navigation of the ship

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[317] *See* W. BERGE, "Criminal Jurisdiction and the Territorial Principle", 30 *Mich. L. Rev.* 238, 239 note 3 (1931); *State* v. *Hall*, 114 N.C. 909, 19 S.E. 602, 603 (1894).
[318] *United States* v. *McGill*, 4 Dall. 426 (1806); *United States* v. *Bladen*, 1 Cr. C. C. 548 (1809).
[319] 1 Leach 388 (1786). In 1776, it was already decided that a person who sent a letter threatening murder could be tried where the letter was received. *See King* v. *Girdwoord*, 1 Leach 142 (1776). In 1805, the *Girdwood* and *Coombes* principle that the consequences of the act determined the jurisdiction was applied in the libel case of *King* v. *Johnson*, 7 *East.* 65 (1805).
[320] *Id.*
[321] L.R. 2 Ex. Div. 63 (1876).
[322] *See, e.g.*, *The Queen* v. *Nillins*, 53 L.J., M.C. 157 (1884); *King* v. *Godfrey*, [1923] 1 K.B. 24.

occasioning the mischief; the party guilty of such negligence is neither actually, nor in intention, and thus constructively, in the ship on which the death takes place."[323]

The Court in *Regina* v. *Keyn* thus stuck to the classical view of the territorial principle, with the locus of the criminal *act*, and not its effects, conferring jurisdiction. In the situation of a cross-border intentional shotgun incident, the effect of the bullet striking the victim was considered to be part of the criminal act because that effect was wanted by the perpetrator. In the situation of a foreign vessel negligently causing harm to an English ship, the harm was not considered to be part of the criminal act because it was not wanted by the perpetrator.

The distinction between intentional and negligent acts appeared artificial and was already criticized by the dissenting justice Denman in *Regina* v. *Keyn*. Denman, J. was of the opinion "that the making of [a hole in the ship] was his negligent act done within British jurisdiction, just as much as if he had personally boarded the vessel and staved her in with a hammer, and that by doing that act, followed as it was by the immediate sinking of the vessel and drowning of the deceased, he was liable to be tried for a manslaughter committed on the high seas within the jurisdiction of the Central Criminal Court".[324] In spite of his criticism, Denman J., like Cockburn, C.J., did not consider the territorial effects of a particular act to be conferring jurisdiction. He only stretched the scope of the term "act" (the jurisdictional linchpin) by interposing a proximate territorial act between the distant extraterritorial act and the territorial harm.

106. TERMINATORY APPROACH V. CONSTITUENT ELEMENTS APPROACH – As of today, the exercise of jurisdiction over cross-frontier offences is conceptually still based on territorial conduct within England, on the basis of the 'terminatory approach' to jurisdiction. For cross-frontier fraud and dishonesty however, a constitutive elements approach has been espoused by the Criminal Justice Act 1993.[325] The terminatory approach is not synonymous with the subjective territoriality principle. Under the terminatory approach, England will exercise jurisdiction only when the last relevant constitutive act (the 'terminatory' act) of the offense took place in England.[326] Under the subjective territoriality principle in contrast, any relevant

[323] L.R. 2 Ex. D. 63, 234-255 (1876) (emphasis added).
[324] L.R. 2 Ex. D. 63, 106-107 (1876).
[325] A wholesale abandonment of the terminatoy approach was not considered to be a priority. *See* Law Com. No. 180, *Report on Jurisdiction over Offences of Fraud and Dishonesty with a Foreign Element*, 1989, para. 3.4 (submitting that "[e]xcept in relation to offences of dishonesty, no commentator suggested that the present jurisdictional rules had been found to be defective in practice or to give rise to difficulty").
[326] Constituent elements are offence-specific. On the basis of the terminatory approach, an English court could thus exercise jurisdiction over crimes of unlawful possession of firearms in England, even though these arms were not for use in England, as the crime was complete by the mere possession of the arms in England. *See R* v. *El-Hakkaoui* [1975] 1 WLR 396, 400 ("If [the elements which have to proved to establish an offence under § 16 of the Firearms Act 1968] are proved, the offence is complete. It is quite irrelevant whether or not the intention was carried out … In our view, the place where the intention would have been carried out, if it had been carried out, is equally irrelevant."). By the same token, jurisdiction could be established over the building of bomb timers in England destined for export. *R* v. *Berry* [1985] AC 246. In an example from outside the criminal law, English jurisdiction was not upheld in the case of a Swiss producer delivering goods to an agent in Switzerland, who shipped the goods to England, there allegedly violating the patents of BASF, a German chemical

conduct within England would confer jurisdiction on English courts, even when the last relevant constituent act, *e.g.*, the effects of the offence, took place abroad[327].

In case all essential elements of an offense take place abroad, English courts will not exercise jurisdiction, even if the offense causes effects within England.[328] Under international law, English courts would be allowed to assert jurisdiction over such an offense, since pursuant to the objective territorial principle, the jurisdiction of States may be predicated on the territorial consequences of foreign conduct, irrespective of how municipal law defines the constituent elements of a specific offence. HIRST has therefore proposed not only to abandon the terminatory approach, but also the constitutive elements approach which was adopted by the Criminal Justice Act 1993.[329] He argues that jurisdiction ought to based on a principle of 'inclusionary jurisdiction': English courts should have jurisdiction in the event the offence is initiated in England, but consummated abroad (conduct test), in the event the offence is initiated abroad, but consummated in England (effects test), and in the event an intermediate act has occurred in England, although the offence has been initiated and completed abroad (conduct test).[330] Under HIRST's proposal, the outer limits of the English law of jurisdiction over cross-frontier offences may possibly coincide with the outer limits of the international law of jurisdiction over such offences.

3.4.2. Jurisdiction over cross-border offences in the United States

107. In contrast to English courts, United States courts held in some early 19th century cases that the effects of a foreign criminal act within a state conferred jurisdiction on that state *per se*.[331] In these cases, no explicit effort was made to bring the act artificially within the territory in which the effects took place, as courts in England did in the late 19th century. In *United States* v. *Davis*, Justice Story nevertheless pointed out that "the act was, in contemplation of law, done where the

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corporation, because the relevant conduct was terminated in Switzerland, and not in England, because an "intelligent agent" interposed. *BASF* v. *Basle Chemical Works, Bindschedler* [1898] A.C. 200, H.L.

[327] *See for* the influence of the subjective territoriality principle in England: *Treacy* v. *DPP* [1971] AC 537, 561 (Lord Diplock) ("There is no rule of comity to prevent Parliament from prohibiting under pain of punishment persons who are present in the United Kingdom, and so owe local obedience to our law, from doing physical acts in England, notwithstanding that the consequences of those acts take effect outside the United Kingdom."). In *Treacy*, Lord Diplock also recognized the legality of the objective territoriality principle under international law. *Id.*, at 562 ("Comity gives no right to a State to insist that any person may with impunity do physical acts in its own territory which have harmful consequences to persons within the territory of another State. It may be under no obligation in comity to punish those acts itself, but it has no ground for complaint in international law if the State in which the harmful consequences had their effect punishes, when they do enter its territories, persons who did such acts.").

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[329] M. HIRST, *Jurisdiction and the Ambit of the Criminal Law*, Oxford, Oxford University Press, 2003, 340.

[330] HIRST relied upon § 49 (b) (ii) of a 1984 Working Paper on Extraterritorial Jurisdiction by the Law Reform Commission of Canada for his rejection of the English constituent elements approach. This article provided that an offence is committed in part in Canada – which would confer jurisdiction on Canadian courts – when "all of its constituent elements occurred outside Canada, but direct substantial harmful effects were intentionally or knowingly caused in Canada." Working Paper nr. 37, cited in M. HIRST, *Jurisdiction and the Ambit of the Criminal Law*, Oxford, Oxford University Press, 2003, 342.

[331] *See, e.g.*, *People* v. *Adams*, 3 Denio (N.Y.) 190 (1846); *United States* v. *Davis*, 2 Sumn. 482 (C.C.A. 1st Cir. 1837).

shot took effect".[332] In so doing, he laid the foundation for the "constructive conduct" theory employed by U.S. courts in the late 19th century. Remarkably, in the early 19th century cases, the objective territorial principle seemed to trump the subjective territorial principle traditionally relied upon: not the place where the act originated, but the place where it was consummated was deemed to be decisive for determining jurisdiction.[333] This preference for exclusive jurisdiction also prevailed in the late 19th century.

108. CONSTRUCTIVE CONDUCT – By the end of the 19th century, a number of U.S. courts no longer considered the territorial effects of a criminal act to confer jurisdiction by themselves. An English-style artificial territorial construction was resorted to, and found in the "constructive conduct" of the accused within the territory (although from a more mundane policy perspective, the disturbance of the territorial peace caused by the territorial effects undeniably underlied the jurisdictional assertion)[334]. The "constructive conduct" courts did not always rule that the constructive conduct of the offender in one state deprived the state in which the actual conduct took place of jurisdiction, although such may be a logical inference.[335]

An 1893 Georgia case eloquently expounded the concept of "constructive conduct":

> "Of course, the presence of the accused within this State is essential to make his act one which is done in this State; but the presence need not be actual. It may be constructive. The well-established theory of the law is, that where one puts in force an agency for the commission of crime, he, in legal contemplation, accompanies the same to a point where it becomes effectual. Thus, a burglary may be committed by inserting into a building a hook, or other contrivance, by means of which goods are withdrawn therefrom; and there can be no doubt that, under these circumstances, the burglar, in legal contemplation enters the building. So, if a man in the State of South Carolina criminally fires a ball into the State of Georgia, the law regards him as accompanying the ball, and as being represented by it, up to the point where it strikes."[336]

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[332] *United States* v. *Davis*, 2 Sumn. 482 (C.C.A. 1st Cir. 1837) (arguing that "the offense was committed on board of the [foreign] schooner; for, although the gun was fired from the [American] ship *Rose*, the shot took effect, and the death happened, on board of the schooner, and the act was, in contemplation of law, done where the shot took effect").

[333] *People* v. *Adams*, 3 Denio (N.Y.) 190, 206 (1846) (BEARDSLEY, J., stating that "[t]he fraud may have originated and been concocted elsewhere, but it became mature and took effect in the city of New York, for there the false pretences were used with success, the signatures and money of the persons defrauded being obtained at that place. The crime was therefore committed in the city of New York and not elsewhere."); *United States* v. *Davis*, 2 Sumn. 482 (C.C.A. 1st Cir. 1837) (holding that the United States had no jurisdiction over a defendant who struck a blow from the U.S. whaler *Rose* and killed a person on board a foreign schooner).

[334] *See* W.W. COOK, « The Application of the Criminal Law of a Country to Acts Committed by Foreigners Outside the Jurisdiction », 40 *W. Va. L.Q.* 303, 315 (1934).

[335] *See, e.g.*, *Stillman* v. *Manufacturing Co.*, 3 Woodb. & M. 538, Fed. Cas. No. 13, 446 (1847) (WOODBURY, J., stating: "I can conceive of crimes, likewise, like civil injuries, which may be prosecuted in two states, though sometimes in different forms as here … So, if one fires a gun in one state, which kills an individual in another state, there may be the offense of using a deadly weapon in the first state (that is, we suppose, by statute) and committing murder by killing in the second state."); *State* v. *Hall*, 114 N.C. 909, 19 S.E. 602, 604-605 (1894).

[336] *Simpson* v. *State*, 92 Ga. 41, 17 S.E. 984 (1893).

109. Even when the foreign criminal act fails to produce territorial effects, *e.g.*, because the bullet missed the person, jurisdiction may still be found under the constructive conduct theory. Indeed, not the territorial effects, but the constructive conduct confers jurisdiction:

> "If one shooting from another state goes, in a legal sense, where his bullet goes, the fact of his missing the object at which he aims cannot alter the legal principle … As we have already stated, the act of the accused did take effect in this state. He started across the river with his leaden messenger, and was operating it up to the moment when it ceased to move, and was therefore, in a legal sense, after the ball crossed the state line, up to the moment it stopped, in Georgia. It is entirely immaterial that the object for which he crossed the line failed of accomplishment. It having been established by abundant authority and precedent that in crime there may be a constructive as well as an actual presence, there can be, in a case of this kind … no rational distinction in principle, as to the question of jurisdiction, whether the attempt is successful of not."[337]

110. The artificial reliance on territorial conduct "in contemplation of law" was also espoused by the Supreme Courts of Michigan (1860), Indiana (1882) and North Carolina (1894),[338] with the latter court ruling that the offense of murder at common law is committed within the jurisdiction of the state where the victim is wounded or killed, there being no concurrent jurisdiction at common law.[339]

In 1912, in *Hyde* v. *United States*, the U.S. Supreme Court eventually supported the theory of constructive presence, upholding the jurisdiction of the state in which unlawful acts were done as a result of a conspiracy in another state.[340] In this case, Justice HOLMES forcefully dissented and denounced the theory for hindering precise analysis.[341]

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[337] *Id.*

[338] *Tyler* v. *People*, 320 Mich. 320 (1860) (ruling that "a wounding must of course be done where there is a person wounded, and the criminal act is the force against his person; That is the immediate act of the assailant, whether he strikes with a sword or shoots with a gun, and he may very reasonably be held present where his forcible act becomes directly operative."); *Johns* v. *State*, 19 Ind. 421, 81 *Am. Dec.* 408 (1882) ("But while it is clear that the criminal law of a state can have no extraterritorial operation, it is equally clear that each state may protect her own citizens in the enjoyment of life, liberty, and property, by determining what acts, within her own limits, shall be deemed criminal, and by punishing the commission of those acts. And the right of punishment extends not only to persons who commit infractions of the criminal law actually within the state, but also to all persons who commit such infractions as are, in contemplation of law, within the state."); *State* v. *Hall*, 114 N.C. 909, 19 S.E. 602, 603 (1894) ("The turning point … is whether the stroke was, in legal contemplation, given in Tennessee").

[339] *State* v. *Hall*, 114 N.C. 909, 19 S.E. 602, 604-605 (1894).

[340] 225 U.S. 363, 364 (1912) ("We see no reason why a constructive presence should not be assigned to conspirators as well as to other criminals.").

[341] 225 U.S. 386 (1912) ("To speak of constructive presence is to use the language of fiction and so to hinder precise analysis. When a man is said to be constructively present where the consequences of an act done elsewhere are felt, it is meant that for some special purpose he will be treated as he would have been treated if he had been present, although he was not.").

111. ABANDONING CONSTRUCTIVE PRESENCE THEORIES - After *Hyde*, theories of constructive presence, which relied on legal fictions, gradually disappeared. Influenced by legal realism, territorial jurisdiction was found to exist as soon as a constituent element of a crime took place within the territory. The disappearance of the constructive presence fiction was not only attributable to Justice HOLMES's influential dissenting opinion in *Hyde*, but was actually foreshadowed and boosted by almost contemporaneous statutory criminal law developments in various U.S. states.

In case a U.S. state enacted a criminal statute conferring jurisdiction on the State where the crime was committed, in whole or in part, or where the effects of violence or injury inflicted ensued, doctrines of ubiquity and effects indeed outmanoeuvred doctrines of constructive presence and exclusive jurisdiction.[342] It would suffice that a constituent element of the crime took place in the territory, such as firing a bullet or sending poison, *i.e.*, territorial conduct, or the dying of injuries, *i.e.*, territorial effect, for there to be legitimate – and concurrent – jurisdiction under the territorial principle. A Massachussets court could thus exercise jurisdiction over a citizen of Maine who had attacked a British subject on the high seas by virtue of the victim dying of his injuries in Massachusetts, on the basis of a Massachusetts law conferring jurisdiction on Massachusetts courts over offences "committed within or without the limits of the state", "by means whereof death ensues" in Massachusetts.[343] Conversely, a California court could exercise jurisdiction over a murder case in which the accused mailed poison from California with death of the addressee ensuing in Delaware, on the basis of a California statute conferring jurisdiction on California courts over "[a]ll persons who commit, in whole or in part, any crime within [California]".[344] In doctrinal terms, jurisdiction in the former case was premised on the *objective* territorial principle (effects jurisdiction), whereas in the latter case, it was premised on the *subjective* territorial principle (conduct jurisdiction).

112. By 1962, the constituent elements theory had gained such traction that it featured prominently in the proposed official draft of a Model Penal Code for the American states. Section 1.03 of this Code indeed provided that "a person may be convicted under the law of this State of an offense committed by his own conduct of another for which he is legally accountable if … either the conduct which is an element of the offense or the result which is such an element occurs within this State."[345] The Code however stipulated that a person could ordinarily not be punished for territorial conduct if the state in which the effects are felt did not consider these effects as an element of the offense.[346] Conversely, a person could ordinarily not be

[342] *See also State* v. *Hall*, 114 N.C. 909, 19 S.E. 602, 604 (1894) (holding that "unless whe have some statute expressly conferring jurisdiction upon the courts of [North Carolina], or making the act of shooting under the circumstances a substantive murder", the act of shooting across the border from North Carolina into Tennessee was only triable in Tennessee, where the victims were killed).
[343] *Commonwealth* v. *MacLoon*, 101 Mass. 1 (1869).
[344] *People* v. *Botkin*, 132 Cal. 231, 64 Pac. 288 (1901).
[345] Section 1.03 (1) (a) of the draft Model Penal Code.
[346] Section 1.03 (2) ("Subsection (1) (a) does not apply when either causing a specified result or a purpose to cause or danger of causing such a result is an element of an offense and the result occurs or is designed or likely to occur only in another jurisdiction where the conduct charged would not constitute an offense unless a legislative purpose plainly appears to declare the conduct criminal regardless of the place of the result.").

punished on the basis of territorial effects caused by foreign conduct if that conduct was legal in the state where it was done.[347]

113. The objective territoriality principle, one of the principles buttressing the constituent elements theory, was recognized by the U.S. Supreme Court in the 1911 case of *Strassheim* v. *Daily*, in which Justice HOLMES stated that "acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a state in punishing a cause of the harm as if he had been present at the effect, if the state should succeed in getting him within its power."[348]

3.4.3. Jurisdiction over cross-border offences in continental Europe

114. CONSTITUENT ELEMENTS AND UBIQUITY – In continental European countries, in which the principle of territoriality is not the sacred cow it is in common law countries, because the former were not "separated from the rest of the world by great sees",[349] courts have liberally asserted jurisdiction over cross-frontier offences. As soon as one of the constituent elements of the offense is committed in the State's territory, the State has ordinarily jurisdiction over the offense.[350] As all States in which a constituent element of the offense could be located, may exercise jurisdiction over the offense, the constituent elements approach is also denoted as the "theory of ubiquity" (from Latin *ubique*, 'everywhere').[351] Ubiquity, and the exercise of jurisdiction over the entire offence on the basis of criminal conduct or its consequences, is justified on the ground that the criminal conduct and its consequences could not be separated, and form a legal unity.[352]

115. FRANCE – In France, the courts have construed 'constitutive elements' in a much more extensive manner than English courts have. English courts require, on the basis of the terminatory approach, that the last constitutive element takes place in England for there to be jurisdiction. In France however, preparatory acts, "preliminary conditions" necessary for the commission of the offence (*la condition préalable*), or effects, within the territory can suffice for a legitimate exercise of jurisdiction, even when these acts or conditions are technically speaking not constituent elements of the offense.[353] What is more, French courts are willing to exercise 'territorial' jurisdiction

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[347] Section 1.03 (3) ("Subsection (1) (a) does not apply when causing a particular result is an element of an offense and the result is caused by conduct occurring outside the State which would not constitute an offense if the result had occurred there, unless the actor purposely or knowingly caused the result within the State.").

[348] 221 U.S. 280, 285 (1911).

[349] *See* M. SCHARF, "The ICC's Jurisdiction over the Nationals of non-Party States: a Critique of the U.S. position", 64 *Law & Contemp. Probs.* 67, 111 (2001).

[350] *See, e.g.*, Article 113-2 of the French Penal Code ("An offence is deemed to have been committed within the territory of the French Republic where one of its constituent elements was committed within that territory.") (formerly Article of the French Code of Criminal Procedure). This article was tailored to transnational fraud. *See* F. DESPORTES & F. LE GUNEHEC, *Le nouveau droit pénal*, Vol. 1, 7th ed., Paris, Economica, 2000, at 323.

[351] The theory of ubiquity has doctrinal roots in the writings of TRAVERS, *Droit Pénal Int.*, t. 1, p. 175 *et seq.* (France), and BINDING, *Handbuch des Strafrechts* I, 1885, p. 416 (Germany).

[352] *See* D. OEHLER, *Internationales Strafrecht*, 2nd ed., Köln, Berlin, Bonn, München, Carl Heymanns Verlag, 1983, p. 210, nr. 251; R. MERLE & A. VITU, *Traité de droit criminel*, Vol. I, Paris, Cujas, 1997, at 406.

[353] *See, e.g.*, Cass. fr. (Crim.) 11 April 1988, *B.*, n° 144 (holding that « la tentative d'escroquerie est réputée commise en France si des actes préparatoires constituant l'une des composantes nécessaires des

over autonomous crimes committed abroad that are sometimes only remotely connected with France, on the basis of the theory of 'indivisibility', a theory which is a creation of the courts and does not fall under the statutory 'constituent elements' provision.[354] On the basis of indivisibility, in reality "connectedness" (*connexité*),[355] French courts have exercised fictitious territorial jurisdiction over the concealment abroad of goods obtained through fraud in France,[356] over a murder abroad on a girl kidnapped in French territory,[357] over crimes committed abroad by a criminal organization formed in France[358], and over the abandonment on a deserted Melanesian island of pilgrims who had embarked in a French port[359].[360] Although such jurisdictional assertions may seem to go quite far,[361] they do not appear to overstep the boundaries set by international law, given the absence of international protest. In order to prevent international conflict from arising, the prosecutor will have to tread carefully and use its discretionary power not to prosecute certain offences when doing so risk offending other nations.

116. GERMANY – Like France, Germany entertains broad territorial jurisdiction over cross-frontier offences under the theory of "ubiquity". Under § 9 of the StGB, an offence is committed in every place where the offender has acted (or omitted) or where the effect – if part of the offence – has occurred or should have occurred.[362] As soon as a constituent element takes place in Germany (or subjectively speaking, 'should have taken place'), German courts have jurisdiction. There does however not seem to be jurisdiction for German courts on the basis of the mere territorial effects of an offence if proof of these effects is not required for conviction.[363] Nor seems the ubiquity principle to be thus construed that

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manoeuvres frauduleuses retenues ont été perpétrés sur le territoire national »); Cass. fr. (Crim.) 12 February 1979, *B.*, n° 60, *D.*, 1979, *IR*, 77, note Roujou de Boubée, *RSC*, 1980, 417, note Larguier; 13 October 1981, *B.*, n° 217, *JCP*, 1982, 19862, note Chambon) (ruling that French courts have jurisdiction over an offence of abuse of trust (*abus de confiance*) committed abroad on the ground that the object, a horse, was entrusted to the offender *in France* prior to the abuse – a *condition préalable*); Cass. fr. (Crim.), 2 February 1977, *B.*, n° 41; 7 October 1985, *RIDA* 1986, n° 130, 136; Paris, 30 March 1987, *JCP*, 88, II, 20965, note Bouzat (ruling that French courts have jurisdiction over an offense of imitation (*contrefaçon*) committed abroad if the imitated work (*l'oeuvre contrefaite*) is a French work or belongs to a French resident, *i.e.*, jurisdiction based on the effects felt in France). *See* for criticism of this extension of the territorial principle: P.-Y. GAUTIER, « Sur la localisation de certaines infractions économiques », *Revue Critique de Droit International Privé* 669, 671-72 (1989).

[354] *See, e.g.*, HARVARD RESEARCH ON INTERNATIONAL LAW, "Draft Convention on Jurisdiction with Respect to Crime", 29 *A.J.I.L.* 439, 494-95 (1935).

[355] F. DESPORTES & F. LE GUNEHEC, *Le nouveau droit pénal*, Vol. 1, 7th ed., Paris, Economica, 2000, at 327.

[356] Cass. fr. (Crim.), 9 December 1933, *B.*, n° 237, *S.*, 1936, 1, 313, note Légal.

[357] Cass. fr. (Crim.), 5 August 1920, *B.*, n° 355.

[358] Cass. fr. (Crim.), 23 April 1981, *B.*, n° 116; *RSC*, 609, note Vitu.

[359] Cass. fr. (Crim.), 11 August 1882, *D.P.* 1883.1.96, S. 1885.1.184.

[360] *See* for other cases: R. MERLE & A. VITU, *Traité de droit criminel*, Vol. I, Paris, Cujas, 1997, at 401-02.

[361] The expansion of the ambit of the criminal law on the basis of "indivisibility" has been criticized by the French doctrine because it possibly violates the principle of territoriality based on the occurrence of a constitutive element of the offence in France. *See, e.g.*, F. DESPORTES & F. LE GUNEHEC, *Le nouveau droit pénal*, Vol. 1, 7th ed., Paris, Economica, 2000, at 327.

[362] § 9(i) StGB ("Eine Tat ist an jedem Ort begangen, an dem der Täter gehandelt hat oder im Falle des Unterlassens hätte handeln müssen oder an dem der zum Tatbestand gehörende Erfolg eingetreten ist oder nach der Vorstellung des Täters eintreten sollte.").

[363] Accidental effects may however theoretically suffice for there to be jurisdiction for German courts, *e.g.*, in the situation of a victim dying in a German hospital of his wounds suffered abroad from an

extraterritorial offences which are "connected" with territorial offences are brought within the ambit of the criminal law, as happens sometimes in France.[364] Nonetheless, the sweep of the theory of ubiquity remains broad, certainly in combination with the principle of mandatory prosecution in Germany. As this may cause international tension, the Code of Criminal Procedure explicitly authorizes the prosecutor not to prosecute offences that are subject to German jurisdiction by virtue of an activity occurring abroad, if prosecution would cause a serious disadvantage for Germany or jeopardize important public interests.[365]

117. NETHERLANDS – In the Netherlands, unlike in France and Germany, there are no statutory provisions setting forth a constituent elements approach to jurisdiction over cross-frontier offences. The courts have filled the gap by developing three theories of jurisdiction. The "theory of the physical act" is probably the oldest theory. As a modality of the subjective territoriality principle, it confers jurisdiction on the place where the initial physical act occurred.[366] Since a judgment of the *Hoge Raad* (the Dutch Supreme Court) of 1915, in which jurisdiction was upheld over a German citizen who threw a rope around the neck of a horse in the Netherlands in order to pull it across the border into Germany, in violation of Dutch export law,[367] Dutch courts and doctrine also employ the "theory of the instrument", modeled upon the German 'Theorie der langen Hand' ("theory of the long hand"). Under this theory, the place where the instrument "does its work" is considered to be the place where the offence occurred.[368] This doctrine is a variation on the Anglo-American constructive presence approach, which used legal fictions to bring an extraterritorial act within its own territory. However, in its emphasis on the consequences of the use of an "instrument", it comes close to the objective territorial principle pursuant to which territorial jurisdiction may be premised on the territorial effects of a foreign act. As Dutch courts may also at times use the "theory of the consequence" in case the theory

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assault abroad). OEHLER has criticized the possible exercise of jurisdiction in this situation, because it jeopardizes the principle of legal certainty. He proposed to restrict the effects-based *locus delicti* to the place where the perpetrator intended to cause the effects. D. OEHLER, *Internationales Strafrecht*, 2nd ed., Köln, Berlin, Bonn, München, Carl Heymanns Verlag, 1983, p. 212, nr. 253.

[364] *See* D. OEHLER, *Internationales Strafrecht*, 2nd ed., Köln, Berlin, Bonn, München, Carl Heymanns Verlag, 1983, pp. 216-217, nr. 264 (no jurisdiction over larceny in France stemming from theft in Germany, no jurisdiction over a murder of in France to make possible an offence in Germany).

[365] § 153c(3) StPO ("Die Staatsanwaltschaft kann auch von der Verfolgung von Straftaten absehen, die im räumlichen Geltungsbereich dieses Gesetzes durch eine ausserhalb dieses Bereichs ausgübte Tatigkeit begangen sind, wenn die Durchführung des Verfahrens die Gefahr eines schweren Nachteils für die Bundesrepublik Deutschland herbeiführen würde oder wenn der Verfolgung sonstige überwiegende öffentliche Interessen entgegenstehen.").

[366] *See, e.g.*, HR, 16 October 1899, *W.* 7347; HR, 8 February 1926, *NJ* 1926, p. 285; HR, 23 March 1931, *NJ* 1932, 1547, *W* 12309. This doctrine has mostly German roots. Under the German "Handlungstheorie", the *locus delicti* is the place where a person's will comes to light, *e.g.*, where he fires a shot (even if the shot kills a person across the border). Only there could he be deemed guilty. The place where the effects of the physical act take place is considered to be uncertain, and predicating jurisdiction on these effects may smell of revenge. Also, it is argued, evidence is most easy to gather at the place where the initial physical act takes place. *See* D. OEHLER, *Internationales Strafrecht*, 2nd ed., Köln, Berlin, Bonn, München, Carl Heymanns Verlag, 1983, p. 206, nr. 241. This theory was also embraced by the Institut de Droit International in 1883 (Annuaire de l'Institut de Droit International, Vol. VII, 1883-1887, p. 156) and by the International Congress for Comparative Law in 1932 (Bulletin de la Société de Législation Comparée, Tome 61, 1931-32, Paris 1932, p. 411).

[367] HR, 6 April 1915, *NJ* 1915, 427, *W* 9764.

[368] J. REMMELINK, *Inleiding tot de Studie van het Nederlandse Strafrecht*, 14th ed., Gouda, Quint, 1995, 257-58.

of the instrument does not provide a satisfactory outcome,[369] it may rightly be asked whether a combination of the theories of the physical act, of the instrument, and of the consequence, do together not constitute a constituent elements approach to jurisdiction, with the first theory being the subjective prong of the territoriality principle, the third theory the objective prong, and the second theory the objective prong disguised as the subjective prong.[370] At any rate, no theory is entitled to exclusivity,[371] and Dutch courts could exercise jurisdiction over the entire offence even when some acts have taken place outside the Netherlands (ubiquity theory).[372] A broad French-style theory of indivisibility does however not apply in Germany: the courts have jurisdiction over extraterritorial acts that make the qualification of a territorial offense more severe, but not over extraterritorial acts that constitute other crimes.[373]

118. BELGIUM – Like Dutch statutory law, Belgian statutory law does not provide guidance as to the *locus delicti* of a cross-frontier offence. Since a 1979 judgment of the Court of Cassation, the courts generally apply the ubiquity theory or constituent elements theory, pursuant to which Belgian criminal law applies as soon as "one of the constituent elements of the offence has taken place, wholly or partly, on Belgian territory".[374] On the basis of this theory, offences of international fraud and abuse of trust could easily be prosecuted in Belgium.[375] Preparatory acts or remote effects which are not constituent elements of a particular offence do not seem to be subject to Belgian jurisdiction. However, like in France, the broad sweep of the theory of "indivisibility" may bring certain extraterritorial acts or offences within the territorial ambit of Belgian criminal law,[376] although mere connectedness ("*connexité*") will ordinarily not suffice.[377]

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[369] *Id.*, at 258, 260 (warning however against an expansion of the *locus delicti* through the "theory of the consequence" because such might unduly expand the ambit of Dutch criminal law). This doctrine may also claim German ancestry. *See* D. OEHLER, *Internationales Strafrecht*, 2nd ed., Köln, Berlin, Bonn, München, Carl Heymanns Verlag, 1983, p. 208, nr. 244.

[370] REMMELINK approvingly cites Belgian and German law, which recognize the constituent elements approach, and wonders whether the *Hoge Raad*, in a 1958 judgment in which it considered the place where the victim received defamatory documents from abroad as the *locus delicti* (HR, 4 February 1958, *NJ* 1959, 294), did not opt for the constituent elements approach.

[371] HR, 4 February 1958, *NJ* 1958, 294.

[372] HR, 30 September 1997, *NJ* 1998, 117; HR, 27 October 1998, *NJ* 1999, 221; HR, 13 April 1999, *NJ* 1999, 538; C.P.M. CLEIREN & J.F. NIJBOER (eds.), *Strafrecht: Tekst en Commentaar*, 5th ed., 2004, Deventer, Kluwer, 10-11.

[373] J. REMMELINK, *Inleiding tot de Studie van het Nederlandse Strafrecht*, 14th ed., Gouda, Quint, 1995, 509-10.

[374] Cass. b., 23 January 1979, *Teherancheque*, *Arr. Cass.* 1978-79, 575; Cass. b., 4 February 1986, *Arr. Cass.* 1985-86, 765; Cass.b., 23 December 1998, *Arr. Cass.* 1998, 1166, *R.W.* 1998-99, 1309; Cass., 14 November 2000, *T. Strafr.* 2001, 194, comment G. Stessens; Cass., 24 January 2001, *R.D.P.* 2001, 721.

[375] Cass. b., 29 October 1928, *Pas.*1929, I, 258; Cass. b., 8 December 1930, *Pas.* 1931, I, 8; Cass. b, 14 March 1972, *Arr. Cass.* 1972, 663; Cass., 14 November 2000, *T. Strafr.* 2001, 194; Court of Appeals Antwerp, 27 June 2000, *Limb. Rechtsl.* 2000, 408.

[376] Cass. b., 24 January 2001, *R.D.P.* 2001, 721 (ruling that, as "the jurisdiction of the Belgian courts is expanded when the acts committed in Belgium and abroad constitute an indivisible whole", Belgian courts have jurisdiction over a person who is suspected of participating in a murder committed in France, because, prior to the murder, he had consulted with a co-suspect in Belgium). Jurisdiction over continuous offences is also premised on the theory of indivisibility. *See, e.g.*, Court of Appeals Antwerp, 31 January 1995, *R.W.* 1996-97, 1027; Correctional Tribunal Turnhout, 5 December 1979, *R.W.* 1979-80, 2780, comment A. Vandeplas. *See also* B. SPRIET, "(Extra)territoriale werking van de Belgische strafwet, met enkele "klassieke" extraterritoriale jurisdictiegronden uit de Voorafgaande Titel van het Wetboek van Strafvordering", in UNION BELGO-LUXEMBOURGEOISE DU DROIT PÉNAL

3.4.4. Territorial jurisdiction over cross-border participation and inchoate offences

119. Problems as to the application of the territoriality principle may arise in the event of offences of participation (either territorial participation in an extraterritorial offence or extraterritorial participation in a territorial offence) and inchoate offences, *i.e.*, offences that are intended to result in an ulterior offence (either extraterritorial inchoate offences intended to result in territorial offences or territorial inchoate offences intended to result in extraterritorial offences).

120. PARTICIPATION – According to the Harvard Research on International Law, a State has jurisdiction over territorial acts of participation in a crime committed in whole or in part outside the territory, and over extraterritorial acts of participation in a crime committed in whole or in part within the territory.[378] Not all States go so far, which need however not undercut the legality of the aforementioned statement, which merely represents the outer limits of international law.[379] States ordinarily exercise territorial jurisdiction over domestic or foreign acts of participation in crime if the principal offender commits an offence triable under their laws (*accessorium sequitur principale*),[380] sometimes even when the act of participation is merely a

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(ed.), *Poursuites pénales et extraterritorialité*, Brussels, La Charte, 2002, 15 (observing that the expansive application of the theory of ubiquity through the theory of indivisibility may result in a far-reaching expansion of territorial jurisdiction, and believing that this expansion is at odds with the principle of territoriality set forth in Articles 3 and 4 of the Belgian Penal Code).

[377] Cass. b., 14 March 1972, *Arr. Cass.* 1972, 663.

[378] HARVARD RESEARCH ON INTERNATIONAL LAW, "Draft Convention on Jurisdiction with Respect to Crime", 29 *A.J.I.L.* 439, 503 (1935).

[379] *Id.*, 504 (arguing that "whether a State wishes to exercise such jurisdiction or not, it seems clear that competence must be acknowledged", and that "[f]rom the viewpoint of international law, there seems to be no doubt that a State may take jurisdiction of participation within its territory wherever the principal crime may be committed.").

[380] *See, e.g.*, **England:** *R* v. *Johnson* (1805) 6 East 583; *R* v. *Robert Millar (Contractors) Ltd and Millar* [1970] 2 QB 54. **United States:** Section 1.03 (1) (d) of the proposed Model Penal Code for American states (providing that "conduct occurring within the State establishes complicity in the commission of, or an attempt, solicitation or conspiracy to commit, an offense in another jurisdiction which is also an offense under the law of this State"); C.L. BLAKESLEY, "Extraterritorial Jurisdiction", in M.C. BASSIOUNI (ed.), *International Criminal Law II: Procedural and Enforcement Mechanisms*, 2nd ed., Transnational, Ardsley, NY, 1999, at 49-50 (stating that as to jurisdiction over participation, the United States follows the classical English common law approach). **France:** Cass. fr. (Crim.), 30 April 1908, *S.*, 1908, I, 553, comment Roux, *D.*, 1909, 1, 241, comment Le Poitevin). **Belgium** : Cass. b., 14 November 1904, *Pas.* 1905, I, 31; Cass. b., 7 March 1955, *Arr. Cass.*, 1955, 577; Cass. b., 20 February 1961, *Pas.* 1961, I, 664; Cass. b., 8 August 1994, *Arr. Cass.* 1994, 683; Correctional Court Brussels, 12 March 1992, *R.D.P.* 1992, 913; Correctional Court Brussels, 20 March 1998, *Soc. Kron.* 1998, 8. The **Netherlands** did initially not follow this principle (J.M. SJÖCRONA & A.M.M. ORIE, *Internationaal strafrecht vanuit Nederlands perspectief*, Deventer, Kluwer, 2002, 52-53), although a recent judgment of the *Hoge Raad* may have changed this. *See*: HR, 18 February 1997, *NJ* 1997, 628. **Germany**: Article 9 (ii) StGB ("Die Teilnahme ist … an dem Ort begangen an dem die Tat begangen ist … oder an dem nach seiner Vorstellung die Tat begangen warden sollte."). The subjective prong of this provision, which confers jurisdiction on German courts on the sole basis of the participant's idea that an offence subject to German jurisdiction should be committed, has been criticized by the doctrine because it is not based on the accessory nature of participation – as the offence subject to German jurisdiction need not actually have been committed. *See* D. OEHLER, *Internationales Strafrecht*, 2nd ed., Köln, Berlin, Bonn, München, Carl Heymanns Verlag, 1983, p. 272, nr. 363 (terming this "ein Fehlgriff des Gesetzgebers aus dem übertriebenen Willen zur Perfektion").

preparatory act.[381] Conversely, when the principal offence is not triable under their laws, States will usually not exercise jurisdiction over (territorial) acts of participation, although States that do no extradite their own nationals may do so, with restrictive conditions attached, in order to prevent impunity from arising.[382]

121. INCHOATE OFFENCES – Inchoate offences, *i.e.*, offences of criminal attempt, incitement or conspiracy, committed abroad, which are intended to result in a territorial ulterior offense, are not always subject to territorial jurisdiction. The same holds true for inchoate offences committed within the territory directed at a foreign State. In England, Germany, and to a limited extent, the United States, if the ulterior offence is punishable under municipal law, so is the inchoate offence committed abroad. In Germany and the United States, the inchoate offense committed in the territory but directed at a foreign State is also punishable under municipal law, even if it is not punishable under foreign law.[383] In France, the Netherlands and Belgium,

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[381] *See, e.g.*, **Germany**: Reichsgericht, Band 11, S. 20; Band 57, S. 144 (principle only applicable to co-authors); the **Netherlands**: C.P.M. CLEIREN & J.F. NIJBOER (eds.), *Strafrecht: Tekst en Commentaar*, 5th ed., 2004, at 11.

[382] *See, e.g.*, Article 113-5 of **French** Penal Code ("French criminal law is applicable to any person who, within the territory of the French Republic, is guilty as an accomplice to a felony or misdemeanour committed abroad if the felony or misdemeanour is punishable both by French law and the foreign law, and if it was established by a final decision of the foreign court.") (formerly Article 690 of the French Code of Criminal Procedure). This provision does not apply when the principal offender could be prosecuted in France (Cass. fr. (Crim.), 20 February 1990, *B.*, n° 84, *JCP*, 90, IV, 186, *D.*, 1991, 395, comment Fournier); § 9 (ii) **German** StGB ("Die Teilnahme is … begangen … an jedem Ort, an dem der Teilnehmer gehandelt hat oder im Falle des Unterlassens hätte handeln müssen oder an dem nach seiner Vorstellung die Tat begangen warden sollte. Hat der Teilnehmer an einer Auslandstat im Inland gehandelt, so gilt für die Teilnahme das deutsche Strafrecht, auch wenn die Tat nach dem Recht des Tatorts nicht mit Strafe bedroht is"). The very expansive jurisdictional view on participation in Germany, which is criticized by the doctrine (see, e.g., D. Oehler, Internationales Strafrecht, 2nd ed., Köln, Berlin, Bonn, München, Carl Heymanns Verlag, 1983, p. 270, nr. 360), is however soothed by § 153(1)1 StPO, pursuant to which the prosecutor is authorized to renounce from prosecuting the territorial acts of participation in a principal offence subject to foreign jurisdiction ("Die Staatsanwaltschaft kann von der Verfolgung von Straftaten absehen … die ein Teilnehmer an einer ausserhalb des räumlichen Geltungsbereichs dieses Gesetzes begangenen Handlung in diesem Bereich begangen hat."). See for Belgium: B. Spriet, "(Extra)territoriale werking van de Belgische strafwet, met enkele "klassieke" extraterritoriale jurisdictiegronden uit de Voorafgaande Titel van het Wetboek van Strafvordering", in Union Belgo-Luxembourgeoise du Droit Pénal (ed.), Poursuites pénales et extraterritorialité, Brussels, La Charte, 2002, 12-13 (pointing out that logically speaking, in view of the principle of accessorium sequitur principale, a Belgian act of participation in a foreign offence is not punishable under Belgian criminal law, but that, nonetheless, it could be argued that such an act of participation is punishable under the constituent elements approach, since an act of participation is a constitutive element of the offence of participation – together with the principal offence –, even if this act is in itself, as constitutive element, not punishable).
See for England: § 1 of the English Criminal Attempts Act 1981; R v. Governor of Pentonville Prison, ex P Naghdi [1990] 1 All ER 257, 267 (ruling that "where an attempted obtaining is alleged if the full offence would have been completed outside England and Wales, the attempt is not triable in England and Wales even though all the preparatory steps towards the commission of the full offence took place in England and the defendant had the necessary intent"); Board of Trade v. Owen [1957] AC 602, 634 ("A conspiracy to commit a crime abroad is not indictable in this country unless the contemplated crime is one for which an indictment would lie here …"); *R* v. *Governor of Brixton Prison , ex p Rush* [1969] 1 WLR 165; *R* v. *Naini* [1999] 2 Cr App 398, 416-17 ("[I]t is clear that the courts of England and Wales have no jurisdiction to try a defendant on a count of conspiracy if the conspiracy, although made here, was to do something in a foreign country, or which could only be done in a foreign country."). There may however be a distinction between inchoate offences committed within the territory and inchoate offences committed outside the territory. Whereas inchoate offences committed within the territory are ordinarily subject to territorial jurisdiction if the ulterior offense is also subject

to territorial jurisdiction, the inchoate offence committed abroad may not be, even if the ulterior offense may be punishable under municipal law. In England, it was long unclear whether English courts indeed had jurisdiction over inchoate offences committed abroad. Sometimes, inchoate offences committed abroad where construed – somewhat artificially – as having occurred in England. *See R* v. *Baxter* [1972] 1 QB 1 (attempt to obtain property by deception initiated abroad considered to be an ongoing act which also took place in England); *DPP* v. *Stonehouse* [1978] AC 55, 75 (communication of false representations made in Florida so as to benefit of life policies construed as taking place in England because the offender knew "that they were bound to be communicated to England"); *DPP* v. *Doot* [1973] AC 807 (English jurisdiction over a conspiracy hatched abroad, because the conspirators had entered England). In *Liangsiriprasert* v. *U.S. Government* [1991] 1 AC 225 however, the Privy Council made short shrift of this theory of constructive presence, and pointed out that "[i]n the case of conspiracy in England the crime is complete once the agreement is made and no further overt act need be proved as an ingredient of the crime" (adding that "[t]he only purpose of looking for an overt act in England in the case of a conspiracy entered into abroad can be to establish the link between the conspiracy and England or possibly to show the conspiracy is continuing. But if this can be established by other evidence, for example the taping of conversations between the conspirators showing a firm agreement to commit the crime at some future date, it defeats the preventative purpose of the crime of conspiracy to have to wait until some overt act is performed in pursuance of the conspiracy."). The *Liangsiriprasert* doctrine was later restated in *R* v. *Sansom* [1991] 2 All ER 145, *R* v. *Latif and Shahzad* [1996] 1 WLR 104, 116 ("The English courts have jurisdiction over … criminal attempts [to import heroin into the United Kingdom] even though the overt acts take place abroad. The rationale is that the effect of the criminal attempt is directed at this country."); *Re Al-Fawwaz* [2002] 1 All ER 545, 577-78 (House of Lords stating, in an extradition case, that English courts had jurisdiction over the inchoate offence of conspiring abroad to murder British nationals abroad, equating the murder with a murder in England: "a conspiracy to murder British subjects because they were British and for not other reason must be a conspiracy to murder them wherever they might be found, whether in England or elsewhere, and such a conspiracy is (*inter alia*) a conspiracy to commit a crime in England."). *See* for **Germany**: Article 9 (i) StGb ("Eine Tat ist an jedem Ort begangen, an dem der Täter gehandelt hat oder im Falle des Unterlassens hätte handeln müssen oder an dem der zur Tatbestande gehörende Erfolg … nach der Vorstellung des Täters eintreten sollte"). Criminal attempts committed in Germany and directed at another State are punishable in Germany under the first prong of this provision (an attempt being an act done in Germany), criminal attempts commited abroad and directed at Germany are subject to the second prong. OEHLER has criticized this two-pronged expansion of the ambit of German criminal law. He criticized the first prong because it subjects an attempt done in Germany to German jurisdiction even if that attempt is not punishable abroad, and the protection of the integrity of a foreign legal order may not be desire by Germany. He criticized the second prong because the German territorial order is not jeopardized by a criminal attempt directed at Germany which did not actually take place. He argued however, that, if one accepts this theory, one ought to make sure that the offender wanted to offence indeed to take place in Germany. D. OEHLER, *Internationales Strafrecht*, 2nd ed., Köln, Berlin, Bonn, München, Carl Heymanns Verlag, 1983, pp. 214-215, nrs. 258-259. *See* for the **United States:** Like England, the United States did historically not exercise jurisdiction over inchoate offences committed abroad in the absence of actual territorial effects. *See Strassheim* v. *Dailey*, 221 U.S. 280, 285 (1911) ("[A]cts done outside a jurisdiction, but *intended to produce and producing detrimental effects* within it, justify a state in punishing a cause of the harm as if he had been present at the effect, if the state should succeed in getting him within its power.") (emphasis added). *Contra*: Section 1.03 (1) (b) of the proposed Model Penal Code for American states (providing that "conduct occurring outside the State is sufficient under the law of this State to constitute an attempt to commit an offense within the State"); *Id.*, Section 1.03 (1) (c) (providing that "conduct occurring outside the State is sufficient under the law of this State to constitute a conspiracy to commit an offense within the State and an overt act in furtherance of such conspiracy occurs within the State"). Since the 1970s however, jurisdiction has been established under the objective territoriality principle over foreign conspiracies to import narcotics into the United States, although no such importation actually took place. *See, e.g.*, *United States* v. *Winter*, 509 F.2d 975 (5th Cir. 1975); *United States* v. *Brown*, 549 F.2d 954 (4th Cir. 1977) (holding that "the conspiracy alleged implicated a crime that would produce detrimental effects within this nation and affront its denouncement of the possession and trafficking in drugs like those contemplated in this case"); *United States* v. *Cadena*, 585 F.2d 1252 (5th Cir. 1978); *United States* v. *Ricardo*, 619 F.2d 1124, 1129 (5th Cir. 1980) (stating that "when the statute itself does not require proof of an overt act, jurisdiction attaches upon a mere showing of intended territorial effects"); *United States* v. *Mann*, 615 F.2d 668 (5th Cir. 1980) (stating that "[w]hen a conspiracy statute

foreign criminal attempts directed from abroad at the territory are usually not subject to municipal jurisdiction in the absence of territorial conduct. In the absence of case-law, it is unclear whether territorial attempts directed at a foreign State are subject to municipal jurisdiction in these States irrespective of the punishability of the ulterior offense in the foreign State.[384] Given that all these legal systems espouse a theory of ubiquity – as they consider all cross-frontier offences to be triable as soon as one constitutive element takes place within the territory – the former approach is sometimes denoted as "subjective" ubiquity (because it considers the subjective will of the perpetrator of the attempt as decisive for purposes of determining the *locus delicti*), and the latter as "objective" ubiquity (because it only considers the objective territorial conduct as decisive).[385] It may finally be noted that special statutory provisions at times provide for jurisdiction over cross-border participation in a crime

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does not require proof of overt acts, the requirement of territorial effect may be satisfied by evidence that the defendants intended their conspiracy to be consummated within the nation's borders", and basing this dictum on "the objective territorial theory"); *United States* v. *DeWeese*, 532 F.2d 1267 (5th Cir. 1980), *cert. denied*, 451 U.S. 902 (1981); *United States* v. *Wright-Barker*, 784 F.2d 161 (3rd Cir. 1986). *See also* the precursor of this string of cases: *Ford* v. *United States*, 273 U.S. 593 (1927) (jurisdiction over conspiracy on the high seas to violate U.S. liquor laws, with overt conspiracy acts nevertheless occurring in the United States). *See for* criticism of this expansion of the ambit of U.S. criminal law (which has nevertheless not met with foreign protest): C.L. BLAKESLEY, "United States Jurisdiction over Extraterritorial Crime", 73 *J. Crim. L. & Criminology* 1109, 1131 (1982) (arguing that "a conspiracy outside the sovereign territory, by definition, cannot have any effect within the territory as it is an inchoate offense"); C.L. BLAKESLEY, "United States Jurisdiction over Extraterritorial Crime", 73 *J. Crim. L. & Criminology* 1109, 1156-1162 (1982) (denouncing the use of the objective territoriality principle to establish jurisdiction over foreign conspiracies, and instead proposing to resort to a hybrid theory of jurisdiction based on the objective territorial, universality and protective principles consistent with the rule of reason set forth in § 403 of the Restatement (Third) of Foreign Relations Law). *Contra* H.D. WOLSWIJK, *Locus delicti en rechtsmacht*, Gouda Quint, Deventer, Willem Pompe Instituut voor Strafrechtswetenschappen (Institute for Criminal Legal Science), Utrecht, 1998, at 49 (arguing that an accumulation of different jurisdictional grounds to justify a particular jurisdictional assertion, *e.g.*, jurisdiction over foreign conspiracies to import narcotics, does not make such an assertion legal if the jurisdictional grounds, taken separately, do not suffice in themselves to justify jurisdiction). While there may be some ambiguity surrounding the applicability of U.S. law to inchoate offenses committed abroad, there is jurisdiction, at least for American states *vis-à-vis* other American states, over attempts done in a state causing harm outside the state, apparently even when the principal offense were not punishable under that state's law. *See* Model Penal Code (1962), comment to § 1.03 at 5-6 (Tent. Draft No. II); C.L. BLAKESLEY, "United States Jurisdiction over Extraterritorial Crime", 73 *J. Crim. L. & Criminology* 1109, 1122-23 (1982).

[384] Apparently *pro*: B. SPRIET, "(Extra)territoriale werking van de Belgische strafwet, met enkele "klassieke" extraterritoriale jurisdictiegronden uit de Voorafgaande Titel van het Wetboek van Strafvordering", in UNION BELGO-LUXEMBOURGEOISE DU DROIT PÉNAL (ed.), *Poursuites pénales et extraterritorialité*, Brussels, La Charte, 2002, at 9 (stating that a criminal attempt is punishable in Belgium under the territoriality principle if the execution of the offense has been embarked upon in Belgium); H.D. WOLSWIJK, *Locus delicti en rechtsmacht*, Gouda Quint, Deventer, Willem Pompe Instituut voor Strafrechtswetenschappen (Institute for Criminal Legal Science), Utrecht, 1998, at 274 (citing the *travaux préparatoires* of the Dutch Opium Law 1986, which considered attempts as "acts that are characterized on an autonomous basis, with their own time and place", and pointed out that the *locus delicti* of attempts could not be identified with the *locus delicti* of ulterior offense, TK 1982-83, 17975, nr. 3, pp. 8-9). Apparently *contra*: European Committee on Crime Problems, Select Committee of Experts on Extraterritorial Criminal Jurisdiction, *Questionnaires and Replies, Appendix to the Report on Extraterritorial Criminal Jurisdiction*, Strasbourg, 1990, Dutch answer to question 7b (stating that the punishability of the attempted offence will at least require that it "would constitute a criminal offence both according to Dutch law and according to the relevant foreign law").

[385] *See* D. OEHLER, *Internationales Strafrecht*, 2nd ed., Köln, Berlin, Bonn, München, Carl Heymanns Verlag, 1983, p. 209, nr. 246.

which is not an offence triable under municipal law or over territorial inchoate offences of which the ulterior offence is not an offence triable under municipal law.[386]

CHAPTER 4 – THE PRINCIPLES OF EXTRATERRITORIAL CRIMINAL JURISDICTION

122. PRINCIPLES OF CRIMINAL JURISDICTION – In chapter 3, the scope of the principle of territorial jurisdiction has been set out. In the customary international law scheme of jurisdiction, the territoriality principle serves as the basic principle of jurisdiction. Under customary international law, national criminal laws may however exceptionally be given extraterritorial application as well, provided that these laws could be justified by one of the recognized principles of extraterritorial jurisdiction under public international law: the active personality principle (Section 4.2), the passive personality principle (Section 4.3), the protective principle (Section 4.4) or the universality principle (Section 4.5). As will be apparent, continental European countries take a broader view of extraterritorial jurisdiction under these principles than common law countries do.

4.1. Continental Europe v. the common law countries

123. CONTINENTAL EUROPE – Most continental European criminal codes feature introductory provisions dealing with the geographical scope of application of domestic criminal laws that draw on the classical principles of criminal jurisdiction. The structure of most codes is such that they affirm at the outset the irreducible importance of the territoriality principle, and subsequently set out the scope of other jurisdictional principles. As has been discussed in the context of cross-border offences, they ordinarily state that domestic criminal law is applicable to all offences within the territory,[387] an offence being deemed to have been committed within the territory where one of its constituent elements was committed within that territory.[388]

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[386] *See, e.g.*, England: § 21 Trade Descriptions Act 1968; § 20 Misuse of Drugs Act 1971; § 71 Criminal Justice Act 1993 (concerning EC fraud); § 2 Sexual Offences (Conspiracy and Incitement) Act 1996; § 1A Criminal Law Act 1998 (conspiracy to commit an offence under foreign law); § 4 Offences Against the Person Act 1861 (solicitation to commit murder abroad); § 59 of the Terrorism Act 2000 (incitement to acts of terrorism overseas); § 5(3) of the Criminal Justice Act 1993 (conspiracy in England to commit fraud abroad).

[387] *See, e.g.*, Article 113-2 of the French CP; Article 2 of the Dutch Penal Code; § 3 StGB; Articles 3-4 of the Belgian Penal Code.

[388] *See, e.g.*, Article 113-2 of the French CP; § 9 (1) StGB. Offences on board or against ships flying the flag of a particular State or aircraft registered in a particular State are usually considered to be offences committed within the territory, wherever these ships or aircraft may be and whatever the nationality of the offender or victim. *See, e.g.*, Article 113-3 French CP; Articles 3 and 7 of the Dutch Penal Code; § 4 StGB. *Compare* HARVARD RESEARCH ON INTERNATIONAL LAW, "Draft Convention on Jurisdiction with Respect to Crime", 29 *A.J.I.L.* 439, 509-10 (1935) ("Ships and aircraft are not territory. It is recognized nevertheless, that a State has with respect to such ships or aircraft a jurisdiction which is similar to its jurisdiction over its territory." … "And the jurisdiction which became well established with respect to ships was extended by analogy to include aircraft when the development of aviation made the jurisdiction of aircraft a practical problem."); *Oteri* v. *The Queen* [1976] 1 WLR 1272, 1276 (Privy Council stating that British ships are not part of the United Kingdom). Although British ships may not be part of UK territory, offences committed on board British ships, committed by either a British citizen or a foreign citizen, are undeniably subject to English law pursuant to § 281 of the Merchant Shipping Act 1995. Under § 282 of this Act, seamen, both English nationals and foreigners, employed on a British ship may even be subject to English law

Importantly, they do not set forth territorial exclusivity, in the sense that domestic criminal law would apply to territorial offences to the exclusion of foreign criminal law.[389] Instead, they allow the exercise of jurisdiction on other, non-territorial grounds. These grounds are ordinarily based upon the classical principles of jurisdiction under public international law. Continental-European criminal codes may however also provide for special jurisdiction over foreign aircraft**,** provided that a link with the forum State can be established,[390] over offences committed by persons subject to military laws,[391] or over offences committed abroad when extradition proves impossible (vicarious jurisdiction).

124. COMMON LAW – The very fact of having general provisions dealing with the scope of application *ratione loci* of domestic laws attests to the important role that continental European countries have reserved for extraterritorial criminal jurisdiction. Criminal codes in England and the United States by contrast do not have introductory provisions on jurisdiction, which may be explained by the high premium that these countries historically put on the territoriality principle. England and the United States have only allowed extraterritorial jurisdiction for specific offences.

125. EXPLANATIONS OF COMMON LAW HOSTILITY TOWARDS EXTRATERRITORIAL CRIMINAL JURISDICTION – Common law countries have historically relied very heavily on the territoriality principle, in particular because of the strict evidentiary rules they employ. Their mistrust of hearsay evidence and emphasis on cross-examination (and their concomitant unwillingness to receive deposition testimony) may indeed prevent them from successfully applying their laws to situations arising abroad. Aside from a different tradition of evidence-gathering, some other reasons for common law countries' reluctance to exercise extraterritorial jurisdiction may be discerned. For one, their geographical features – the United Kingdom and the United States having mostly sea boundaries – may reduce the prevalence of transboundary crime, and thus obviate the need for an exercise of extraterritorial jurisdiction. For another, common law countries may emphasize retribution over prevention as a purpose of the criminal law. Under a retributive conception of the criminal law, criminal acts are considered to offences against the territorial sovereign. Criminal acts done abroad are offences against foreign sovereign and therefore in no need of punishment by another sovereign. Under a preventive or "cosmopolitan" conception of the criminal law[392] in contrast, the criminal law is "a means of selecting persons in need of remedial treatment, or of permanent detention

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for acts done abroad when they are not on board the British ship. HIRST has pointed out that, in light of the presumption against extraterritoriality, § 282 probably does however not cover acts done by foreigners employed on a British ship aboard a foreign ship (M. HIRST, *Jurisdiction and the Ambit of the Criminal Law*, Oxford, Oxford University Press, 2003, 297). English courts may exercise jurisdiction over offences committed on board British-controlled aircraft and foreign aircraft where the next landing is in the United Kingdom (subject to dual criminality) pursuant to § 92 of the Civil Aviation Act 1982.

[389] *Contra, e.g.*, Article 113-3 *in fine* French CP (providing that French criminal law "is the only applicable law in relation to offences committed on board ships of the *national navy*, or against such ships, wherever they may be") (emphasis added).

[390] *See, e.g.*, Article 113-11 French CP; Article 4, 7° Dutch Penal Code.

[391] *See, e.g.*, Article 10*bis* PT Belgian CCP.

[392] *See* for the intellectual groundwork for the "cosmopolitan" theory of criminal justice: H. GROTIUS, *De Jure Belli ac Pacis Libri Tres*, Indianapolis, Liberty Fund, 2005, ch. 20, § 40.

where "cure" is impossible",[393] irrespective of the place these persons have done their acts. It may therefore be incumbent upon any State, obviously within certain limits, to apply its criminal laws to offenders it might catch, even if they have committed their acts abroad.

126. THE COMMON LAW LEGISLATIVE TECHNIQUE OF EXTRATERRITORIAL JURISDICTION – Over the years, common law countries have somewhat relaxed their exclusive reliance on the territorial principle, yet they have, unlike the countries of continental Europe, not done so in a systematic way.[394] Instead of subsuming crimes under a general head of jurisdiction, they have extended the scope of application of particular substantive incriminations in a piecemeal fashion; the ambit of the law is part of the definition (*actus reus*) of the crime.[395] The common law legislative technique is such that the substantive provision at the same time defines the crime *and* sets forth its scope *ratione loci* (at least if the crime could be prosecuted if committed abroad), *i.e.*, an "offense-specific" type of extraterritorial jurisdiction.[396] In continental Europe by contrast, the crime is usually listed under a particular head of jurisdiction in a separate jurisdictional chapter. Needless to say, the common law approach, lacking general jurisdictional guidance and principles, spawns incoherence, which the English doctrine has not failed to criticize.[397] The introduction of general provisions has been proposed in England,[398] as it has in the United States,[399] yet these proposals have hitherto fallen on deaf ears.

127. The crime of torture, which is in both common law and continental countries subject to universal jurisdiction, may serve as an example. In England, pursuant to Section 134 of the 1988 Criminal Justice Act, it is a crime under English law if "[a] public official or person acting in an official capacity, whatever his nationality, commits the offence of torture if in the United Kingdom or elsewhere he intentionally inflicts severe pain or suffering on another in the performance or purported performance of his official duties." Similarly, under federal United States law, pursuant to 18 U.S.C. §2340A(b)(2), "[t]here is jurisdiction over [torture] if […] the alleged offender is present in the United States, irrespective of the nationality of the victim or alleged offender." In continental countries however, the crime of torture is usually defined in a chapter dealing with substantive crimes, yet the scope *ratione*

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[393] *See* W.W. COOK, "The Application of the Criminal Law of a Country to Acts Committed by Foreigners Outside the Jurisdiction", 40 *W. Va. L.Q.* 303, 329 (1934).

[394] *Compare* G.R. WATSON, "Offenders Abroad: The Case for Nationality-Based Criminal Jurisdiction", 17 *Yale J. Int'l L.* 41, 52 (1992) (writing about a "patchwork" of nationality-based jurisdiction).

[395] *See* M. HIRST, *Jurisdiction and the Ambit of the Criminal Law*, Oxford, Oxford University Press, 2003, 2-3.

[396] *Id.*, at 202.

[397] M. HIRST, *Jurisdiction and the Ambit of the Criminal Law*, Oxford, Oxford University Press, 2003, 7; P. ARNELL, "The Case for Nationality-Based Jurisdiction", 50 *I.C.L.Q.* 955 (2001) (stating that "[c]riminal jurisdiction in the United Kingdom is in a muddle.").

[398] Draft Criminal Code 1989, Law Commission No. 177, vol. 1, para. 3.13 ("The Code must contain general provisions relating to the jurisdiction of the criminal courts, that is to say, the definition of the territory of England and Wales for criminal purposes, and … Part 1 [of the Code] was the appropriate place for them."); M. HIRST, *Jurisdiction and the Ambit of the Criminal Law*, Oxford, Oxford University Press, 2003, 326 (arguing that a Criminal Jurisdiction Act is needed, which could later be incorporated within a Criminal Code).

[399] § 208 of the Final Report of the National Commission on Reform of Federal Criminal Laws (1971), available at http://wings.buffalo.edu/law/bclc/codein.htm.

loci is set out in a jurisdictional chapter, sometimes by means of an "enabling clause", *i.e.*, an open-ended statutory provision that grants prosecutors and courts universal jurisdiction over any offense which international (treaty) law requires them to prosecute.[400]

128. In the following sections, the scope of the jurisdictional principles (the personality, protective, universality, and vicarious principles of jurisdiction) in the U.S., England, and continental Europe will be discussed. It will be noted that, while the criminal codes of continental-European countries feature general jurisdictional provisions, these provisions do not set forth a wholesale assumption of personality, protective, or universality jurisdiction. Indeed, these States ordinarily predicate the exercise of extraterritorial jurisdiction on a number of restrictive conditions. Conversely, while common law criminal codes do not feature general jurisdictional provisions, this has not prevented common law countries from providing for extraterritorial jurisdiction over an increasing number of offences. Recent times have thus witnessed a convergence of practices of extraterritorial criminal jurisdiction in continental Europe and common law countries.

4.2. Active personality principle

4.2.1. Content

129. PRINCIPLE – Under the nationality or active personality principle, a State is entitled to exercise jurisdiction over its nationals, even when they are found outside the territory,[401] and even when the perpetrator is no longer a national or has only become a national after committing the crime.[402] It is hardly contested that a State can base its criminal jurisdiction on the nationality of the accused,[403] with some

[400] *See* for enabling clauses: Article 12*bis* of the Belgian Code of Criminal Procedure, Article 23.4 (g) of the Organic Law of the Judicial Power, and Article 6, § 9 of the German Criminal Code. *See* for a separation between explicit substantive incrimination and jurisdiction: Section 2 (jurisdiction) *juncto* Section 8 (incrimination) of the Dutch International Crimes Act, and Article 689-2 of the French Code of Criminal Procedure (jurisdiction) *juncto* Article 222-1 of the Criminal Code (incrimination).

[401] In private international law, national law often follows the national outside the territory as far as his personal status is concerned. Hence, courts may apply foreign law provided it does not violate domestic police laws or public order. In criminal law, the nationality principle rather refers to the jurisdiction to adjudicate: can a state adjudge crimes committed abroad?

[402] HARVARD RESEARCH ON INTERNATIONAL LAW, "Draft Convention on Jurisdiction with Respect to Crime", 29 *A.J.I.L.* 439, 532 (1935) (justifying this extension by arguing that, in the former case, "[w]ere the rule otherwise, a criminal might escape prosecution by change of nationality after committing the crime", and that in the latter case, "if a contrary rule were followed, impunity might result from naturalization in a State which refuses extradition of its nationals").

[403] HARVARD RESEARCH ON INTERNATIONAL LAW, "Draft Convention on Jurisdiction with Respect to Crime", 29 *A.J.I.L.* 439, 519 (1935) ("The competence of the State to prosecute and punish its nationals on the sole basis of their nationality is universally conceded."); M. AKEHURST, "Jurisdiction in International Law", 46 *B.Y.I.L.* 145, 156 (1972-73); G.R. WATSON, "The Passive Personality Principle", 28 *Tex. Int'l L.J.* 1, 2 (1993); J.H. BEALE, "The Jurisdiction of a Sovereign State", 36 *Harv. L. Rev.* 241, 253 (1923). It was long unclear whether domicile or residence would afford an adequate basis for jurisdiction under international law, although Scandinavian countries traditionally used it. *See* HARVARD RESEARCH ON INTERNATIONAL LAW, "Draft Convention on Jurisdiction with Respect to Crime", 29 *A.J.I.L.* 439, 533 (1935) (no adequate basis). In light of the fact that quite some States that did not use domicile or residence as a sufficient nexus, have recently expanded the ambit of their criminal law to include some offences committed by resident aliens abroad, it may be submitted that domicile or residence probably represents an adequate jurisdictional basis.

authors and the U.S. Supreme Court arguing that a State's treatment of its nationals is not a concern of international law,[404] and others even arguing that exercising active personality jurisdiction may be a State's *duty* under international law[405]. Even if the accused's conduct is not punishable in the territorial State, active personality jurisdiction might possibly be legitimate, although in that case, it may signal the inadequacy of territorial legislation, and thereby raise sovereignty concerns.[406] Active personality jurisdiction may cover all crimes committed abroad. National legislation incorporating the active personality principle however only covers serious offences, on the basis of a variety of legislative techniques,[407] although such appears not to be required by international law.[408]

130. JUSTIFICATIONS – The concept of active personality jurisdiction draws on the conception of a State as a group of persons, wherever located, who are subject to a common authority.[409] Outside the field of criminal law, this concept has been particularly influential in the field of international family law.[410] A variety of explanations traditionally underpin active personality jurisdiction, such as the need to prevent nationals from engaging in criminal activity upon their return to their home State, and from enjoying scandalous impunity in the eyes of the domestic public, the impossibility of locating an offence,[411] the representation of the territorial State in case the perpetrator could not be extradited (quite some States traditionally do not extradite their own nationals),[412] and the need to protect a State's reputation from

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[404] HARVARD RESEARCH ON INTERNATIONAL LAW, "Draft Convention on Jurisdiction with Respect to Crime", 29 *A.J.I.L.* 439, 519 (1935); *Blackmer* v. *United States*, 284 U.S. 421, 437 (1932) ("With respect to such an exercise of authority, there is no question of international law, but solely of the purport of the municipal law which establishes the duties of the citizen in relation to his own government.").

[405] *See* C. SCOTT, "Translating Torture into Transnational Tort: Conceptual Divides in the Debate on Corporate Accountability for Human Rights Harms", in C. SCOTT (ed.), *Torture as Tort*, Oxford, Portland, Oregon, Hart, 2001, 55 (arguing, in the context of sex tourism abroad, that international law may not only authorize, but also *require*, the application of U.S. law to U.S. nationals abroad).

[406] *See* G.R. WATSON, "Offenders Abroad: The Case for Nationality-Based Criminal Jurisdiction", 17 *Yale J. Int'l L.* 41, 77 (1992) (arguing that "[t]he dearth of state practice makes it premature to infer a dual-criminality requirement for all such prosecutions. If anything, international practice suggests the opposite conclusion."). *Id.*, at 79 (even noting that "not all states find it unacceptable to provide assistance in prosecuting a crime not included in their domestic criminal code").

[407] Legislation may make punishable all offences which are also punishable by the *lex loci delicti*; all offences of a certain degree; offences against co-nationals; or certain enumerated offences only. *See* HARVARD RESEARCH ON INTERNATIONAL LAW, "Draft Convention on Jurisdiction with Respect to Crime", 29 *A.J.I.L.* 439, 523 (1935).

[408] HARVARD RESEARCH ON INTERNATIONAL LAW, "Draft Convention on Jurisdiction with Respect to Crime", 29 *A.J.I.L.* 439, 531 (1935) ("It is believed, however, that [limitations on the exercise of active personality jurisdiction] are matters which each State is free to determine for itself. Both the crimes abroad for which it will punish its nationals and the circumstances under which it will punish its nationals and the circumstances under which it will exercise jurisdiction are matters which international law leaves each State free to decide according to local needs and conditions."

[409] H.F.A. DONNEDIEU DE VABRES, *Les principes modernes du droit pénal international*, Paris, Sirey, 1928, 77.

[410] *Id.*, at 80.

[411] An offence may sometimes be difficult to locate because it was committed on board of a train or a plane, when it was committed upon the crossing of a border, or when it was committed in disputed territory. DONNEDIEU DE VABRES, a product of his time, even added: "Il peut arriver aussi que le crime ait été commis sur un territoire que ne régit aucune souveraineté effective: territoire inhabité, ou habité par des populations d'une civilization inférieure." *Id.*, at 81.

[412] *Id.*, at 115; F. DESPORTES & F. LE GUNEHEC, *Le nouveau droit pénal*, Vol. 1, 7th ed., Paris, Economica, 2000, at 328.

being blemished by the conduct of its nationals abroad. As far as the latter justification is concerned, it has been argued that active personality jurisdiction is a compensation for the diplomatic protection that the State offers to its nationals abroad (the so-called 'allegiance theory').[413] As States often refuse to extradite their own nationals, active personality jurisdiction may even be necessary if offenders are not to go unpunished. The territorial State might even welcome the exercise of jurisdiction by the State of nationality of the offender, as this may relieve it of the task of harnessing its resources to prosecute the offense.[414] It may be noted that punishment for crimes under the active personality principle may be lighter than for territorial crimes, because the harm to a State's public order might be smaller in case of extraterritorial offences.[415]

131. HISTORICAL DEVELOPMENT – The active personality principle was already recognized at the time of Bartolus by the mediaeval city-states of northern Italy.[416] It was first codified in the legislation of the states of the German Confederation, the Swiss cantons, Sardinia and Tuscany, in the mid-19th century.[417] In the Anglo-Saxon countries, which have a strong territorial system, active personality jurisdiction was traditionally underdeveloped.[418] As these countries are however willing to extradite their own nationals, there is no compelling need for such jurisdiction. In some countries, active personality jurisdiction has historically been used as a political instrument. In Italy for instance, where it was known as "the nationality doctrine", it was tied to Italian irredentism, a nationalist movement that advocated the annexation to Italy of territories inhabited by an Italian majority but retained by Austria after 1866.[419]

4.2.2. Continental Europe

132. European criminal codes generally provide for some sort of active personality jurisdiction, *i.e.*, jurisdiction based on the forum nationality of the offender. Germany and France probably have the most liberal provisions relating to active personality jurisdiction. French and German criminal law even apply if the

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[413] H.F.A. DONNEDIEU DE VABRES, *Les principes modernes du droit pénal international*, Paris, Sirey, 1928, 63; F. DESPORTES & F. LE GUNEHEC, *Le nouveau droit pénal*, Vol. 1, 7th ed., Paris, Economica, 2000, at 328; G.R. WATSON, "Offenders Abroad: The Case for Nationality-Based Criminal Jurisdiction", 17 *Yale J. Int'l L.* 41, 68 (1992) (arguing that "the state provides its national the benefits of nationality, including protection at home and abroad, in exchange for the national's obedience").

[414] *See* G.R. WATSON, "Offenders Abroad: The Case for Nationality-Based Criminal Jurisdiction", 17 *Yale J. Int'l L.* 41, 69-70 (1992) (pointing out that "[t]he State Department has argued that [the] indictment of a U.S. national for a crime committed abroad might actually benefit bilateral relations, because it might reduce pressure on host states to prosecute").

[415] *See, e.g.*, Article 5 of the Italian Penal Code of 1889, which reduced the punishment by a sixth if the offense had been committed abroad. *See* H.F.A. DONNEDIEU DE VABRES, *Les principes modernes du droit pénal international*, Paris, Sirey, 1928, 64.

[416] *Id.*, at 57.

[417] *Id.*, at 60 and 63.

[418] Only the extraterritorial offences causing the greatest scandal in England have historically been subject to active personality jurisdiction. Murder and manslaughter (act of 1541, 33 Henry VIII, c. 23; act of 1813, 43 George III, c. 113; act of 1861, 24 and 25 Victoria, c. 100), bigamy and anarchist offences act of 1883, 46 Victoria, c. 3) can be cited in this context.

[419] H.F.A. DONNEDIEU DE VABRES, *Les principes modernes du droit pénal international*, Paris, Sirey, 1928, 63.

offender has acquired French or German nationality after the commission of the offence of which he is accused (extended active personality principle).[420]

133. GERMANY – German law applies to *any conduct* punishable under the legislation of the territorial State (or if no State has authority over the place where the conduct has taken place) performed by a German.[421] German law also applies without the requirement of double criminality with respect to certain sexual offences,[422] abortion,[423] certain environmental offences,[424] offences committed by German officials,[425] and trade in organs.[426]

The scope of the nationality principle under German law was even broader before January 1, 1975, when the Criminal Code was reformed. Until 1975, the nationality principle, and not the territoriality principle, was the basic jurisdictional principle under German law, at least since 1940 (although it has its roots in mediaeval times).[427] German criminal law applied to any crime "committed by a German citizen, regardless whether committed within the country or abroad", with an exception for a crime which "due to the special circumstances at the place where it occurred, does not constitute a punishable wrong."[428] The scope of the nationality principle was somewhat reduced in 1975, *inter alia* because of its Third Reich racial connotation[429] and international law concerns relating to the danger of interference with foreign States' sovereignty.[430] The scope of the nationality principle in Germany remains however broad when compared to other States. Germany indeed appears to put a high premium on the duty of loyalty of its citizens and on safeguarding German prestige abroad.[431]

134. FRANCE – Because of the revolutionary emphasis on territoriality, France was initially reluctant to exercise active personality jurisdiction. Pursuant to Article 7 of the *Code d'Instruction Criminelle* of 1808, personality jurisdiction could only be exercised when both offender and victim were French nationals, upon complaint, and subject to the *ne bis in idem* rule. Because in 1811, France authorized

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[420] Article 113-6 French CP ; § 7 (2) 1° StGB.
[421] § 7 (2) 1° StGB. Offenses such as perjury, or offenses against customs and tax laws committed abroad are however not punishable in Germany, as they serve exclusively national purposes and do not protect German interests. *See* J. MEYER, "The Vicarious Administration of Justice: An Overlooked Basis of Jurisdiction", 31 *Harv. Int'l L.J.* 108, 111-12 (1990).
[422] § 5, 8° StGB.
[423] § 5, 9° StGB. Active personality jurisdiction over abortions has been criticized because it makes it punishable under German law for a German doctor, "who has for some time practiced in a State applying the time-limit regime for termination of pregnancy", to terminate the pregnancy of a foreigner. *See* J. MEYER, "The Vicarious Administration of Justice: An Overlooked Basis of Jurisdiction", 31 *Harv. Int'l L.J.* 108, at 110 (1990).
[424] § 5, 11a StGB.
[425] § 5, 12° StGB.
[426] § 5, 15° StGB.
[427] *See* J. MEYER, "The Vicarious Administration of Justice: An Overlooked Basis of Jurisdiction", 31 *Harv. Int'l L.J.* 108, 109 (1990).
[428] StGB § 2 and § 3(1) (W. Ger. 1975).
[429] *See, e.g.*, Ph. JESSUP, *Transnational Law* at 50 (1956) (citing a case in which a German court, invoking the "purity of the German blood", exercised passive personality jurisdiction over a Jewish alien who had extramarital intercourse with a German girl in Czechoslovakia,).
[430] *See* J. MEYER, "The Vicarious Administration of Justice: An Overlooked Basis of Jurisdiction", 31 *Harv. Int'l L.J.* 108, 109-110 (1990).
[431] *Id.*, at 110.

the extradition of its own nationals,[432] it was not illogical to reject wide-ranging possibilities to exercise active personality jurisdiction. However, when the Constitution of 1830, in an outburst of nationalism, prohibited the extradition of French nationals, active personality jurisdiction proved necessary so as to close an impunity gap. In 1866, Article 5 of the *Code d'Instruction Criminelle* was amended and set forth a regime that still applies as of today. French criminal law is applicable to *any felony* committed by a French national abroad (also if the conduct is not punishable under the legislation of the territorial State), and to *any misdemeanor* committed by a French national abroad if the conduct is punishable under the legislation of the territorial State (double criminality rule).[433] Contraventions, *i.e.*, minor offences, committed by French nationals abroad are never punishable under French law. Since 1998, French law also applies to sexual offences committed abroad against a minor by a French national or a person habitually resident in France.[434] In the latter case, the double criminality rule nor the restrictive procedural conditions set out in nr. 138 apply.

135. BELGIUM AND THE NETHERLANDS – Belgium and the Netherlands have *prima facie* a slightly more restrictive regime, in that they apply their criminal law to *any felony* and *misdemeanor* subject to the double criminality rule.[435] However, a number of offences are not subject to this rule.[436] Moreover, as a further relaxation of the active personality principle in Belgium, foreigners residing in Belgium are equated with Belgian nationals.[437] The Netherlands for its part applies the same extended active personality principle as France and Germany do (the application of domestic criminal law to offenders who have acquired the nationality of the forum State over the commission of the offence),[438] and, since 2002, also applies its laws to sexual offences committed abroad by foreigners *domiciled* or *resident* in the Netherlands.[439]

136. RESTRICTIVE CONDITIONS – Restrictive conditions are sometimes attached to the exercise of active personality jurisdiction. In France, the prosecution of misdemeanors – but not of felonies – may only be instigated at the behest of the public prosecutor, which implies that civil party petition (*constitution de partie civile*) is not available.[440] Moreover, the public prosecutor cannot prosecute misdemeanors *proprio motu*, but has to await a complaint made by the victim (or his successor), or an official accusation made by the authority of the country where the offence was

[432] *See* D. OEHLER, *Internationales Strafrecht*, 2nd ed., Köln, Berlin, Bonn, München, Carl Heymanns Verlag, 1983, 114.
[433] Article 113-6 French CP.
[434] Articles 222-22 and 227-27-1 French CP.
[435] Article 7, § 1 PT Belgian CCP; Article 5-1, 2° Dutch Penal Code.
[436] In Belgium: offences against the security of the State, IHL crimes, terrorism and forgery (Article 6 PT Belgian CCP). In the Netherlands: immigration offenses (Article 5-1, 2° Dutch Penal Code) and corruption by Dutch officials abroad (Article 6 Dutch Penal Code).
[437] Articles 6 and 7 PT Belgian CCP. The principle of domicile has its roots in Scandinavian legal systems. *See* J. MEYER, *supra*, at 112.
[438] Article 5-2 Dutch Penal Code.
[439] Article 5a Dutch Penal Code.
[440] Article 113-8 French CP.

committed.[441] In Belgium, the same French-style restrictive regime applies to felonies and misdemeanors alike,[442] although some offences are subject to the general regime, notably offences against the security of the State, crimes against international humanitarian law, terrorism and forgery.[443]

4.2.3. England

137. A strict jurisdictional view, relying on territoriality, such as the view held in the United Kingdom, may further impunity for offenders, especially if the offender flees the foreign territory in which he committed his offense and seeks refuge in his home State which does not extradite its own nationals. In order to remedy this situation, continental European countries have expanded the ambit of their criminal law by applying the active personality principle to a wide range of offenses committed by their own nationals abroad. However, as the United Kingdom is willing to extradite anyone, including its own nationals (subject to a double criminality requirement),[444] declining jurisdiction over an extraterritorial offense will not necessarily result in impunity. This obviously undercuts the case for more expansive extraterritorial jurisdiction under the active personality principle by English courts.

138. Extradition is nevertheless not always possible, for instance if the territorial State does not guarantee the offender the right to a fair trial, if the territorial State still imposes the death penalty, if the offense is a political offense, or if an extradition request has just not been made. In these situations, the absence of a legal basis for the exercise of extraterritorial jurisdiction will encourage impunity and possibly damage the reputation of England. A number of offenses have therefore been subjected to active personality jurisdiction in England. However, "wholesale assumption" of active personality jurisdiction, as is the case in Continental Europe, while being advocated (with the qualification of a rebuttable presumption of double criminality for instance),[445] was rejected in 1996 by the UK Government's Interdepartmental Steering Committee, which favored a piecemeal expansion of criminal jurisdiction over individual offences.[446]

139. In spite of the limited reliance of the United Kingdom on the active personality principle, the expansive jurisdictional assertions of Continental European States based on this principle are nevertheless ordinarily not objected to by the United Kingdom, as Section 2 of the Extradition Act 1989 allows the granting of extradition by the United Kingdom where "the requesting state bases its jurisdiction on the

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[441] *Id.*
[442] Article 7 PT Belgian CCP.
[443] Article 6 PT Belgian CCP (*a contrario*).
[444] HOME OFFICE, "Review of Extra-Territorial Jurisdiction", Steering Committee Report, July 1996, p. 4, § 1.9.
[445] M. HIRST, *Jurisdiction and the Ambit of the Criminal Law*, Oxford, Oxford University Press, 2003, 333-35 (arguing that active personality jurisdiction over all offences triable on indictment is feasible, as prosecutors and courts could rely on the evidence-gathering mechanisms put in place to deal with cross-frontier offences; also arguing that active personality jurisdiction could be a solution for the prosecution of cross-frontier offences the locus of which is difficult to discern); P. ARNELL, "The Case for Nationality-Based Jurisdiction", 50 *I.C.L.Q.* 955 (2001).
[446] HOME OFFICE, "Review of Extra-Territorial Jurisdiction", Steering Committee Report, July 1996, § 2.21.

nationality of the offender".[447] This adds further weight to the observation of the Harvard Research on International Law that "[w]hile the exercise of such jurisdiction is perhaps the exception rather than the rule in countries deriving their jurisprudence from the English common law, the existence of such jurisdiction is fully conceded in countries belonging to this group."[448]

140. English active personality jurisdiction extends to offenses committed by particular classes of persons, such as offenses committed by 'crown servants' (*e.g.*, diplomats) in the course of their employment,[449] and the armed forces (and those employed by or accompanying them).[450] English nationals committing offences under the Official Secrets Acts abroad are also subject to English law.[451] In addition, English courts may exercise jurisdiction over murder or manslaughter,[452] bigamy,[453] slave trade,[454] certain terrorist offences,[455] sexual offences against children,[456] corruption,[457] and offences committed on board foreign ships,[458] committed by any

[447] Section 2(1). Section 2(3) of the Extradition Act however conditions the granting of extradition in this situation upon the requirement that, "if [the] conduct had occurred in the United Kingdom, it would have constituted an offence under the law of the United Kingdom punishable with imprisonment for a term of 12 months, or any greater punishment."

[448] HARVARD RESEARCH ON INTERNATIONAL LAW, "Draft Convention on Jurisdiction with Respect to Crime", 29 *A.J.I.L.* 439, 520 (1935). *See also* G. FITZMAURICE, "The General Principles of International Law", *R.C.A.D.I.* 1, 209, vol. 92 (1957-II) (stating that "[n]ot all States wish to exercise, or do exercise, in respect of their nationals when abroad, the full extent of the personal jurisdiction they could exercise without thereby exceeding their legitimate sphere of competence as recognised by international law", citing in footnote 1 the countries of the common law).

[449] Jurisdiction over crown servants dates back to the statute of 11 Will. III, c. 12. It is now governed by § 1 of the Criminal Jurisdiction Act 1802, and § 31 of the Criminal Justice Act 1948. There is no jurisdiction under these Acts over private and personal crimes committed by diplomats abroad. In order to prevent impunity from arising, the United Kingdom will in these situations have to waive their diplomatic immunity. *See* M. HIRST, *Jurisdiction and the Ambit of the Criminal Law*, Oxford, Oxford University Press, 2003, 211.

[450] § 70 Army Act 1955, § 70 Air Force Act; § 209 Army Act. Both offenses committed by members of the armed forces and civilians are triable by court-martial. Unlike in the United States (subsection 4.2.4), the jurisdiction of courts-martial over civilians has not raised (constitutional) due process concerns. M. HIRST, *Jurisdiction and the Ambit of the Criminal Law*, Oxford, Oxford University Press, 2003, 215; *R* v. *Spear and others* [2002] 3 All ER 1074 (House of Lords deciding that a trial of a civilian by a court-martial is compatible with Article 6 of the European Convention on Human Rights).

[451] *See* M. HIRST, *Jurisdiction and the Ambit of the Criminal Law*, Oxford, Oxford University Press, 2003, 221-224.

[452] § 9 of the Offenses Against the Person Act 1861 ("Where any murder or manslaughter shall be committed on land out of the United Kingdom, whether within the Queen's dominions or without, and whether the person killed were a subject of Her Majesty or not, every offence committed by any subject of Her Majesty in respect of any such case, whether the same shall amount to the offence of murder or of manslaughter, … may be dealt with, inquired of, tried, determined, and punished … in England or Ireland …"). Earlier legislation was adopted in 1541 by Act of 33 Hen. VIII, c. 23 in 1541 (murder) and by Act of 43 Geo. 3, c. 31 (manslaughter). The 1541 was however hardly enforced, because the King's Council, who decided whether or not to prosecute, was mostly not interested in murder cases. *See* M. HIRST, *Jurisdiction and the Ambit of the Criminal Law*, Oxford, Oxford University Press, 2003, 226.

[453] § 57 of the Offenses Against the Person Act 1861.

[454] § 1 of the Slave Trade Act 1843.

[455] Section 63A-B of the Terrorism Act 2000 (c.11). Quite a number of terrorist offences however are subject to universal jurisdiction. *See* subsection 10.7.4 .

[456] § 7 of the Sex Offenders Act 1997, which provides for jurisdiction even if the offender become a British citizen or resident after committing the offence. The Sexual Offences Act 1996 had already criminalized territorial conspiracy and incitement to commit sexual offences against children abroad.

[457] §§ 108 and 109 of the 2001 Act (not setting forth a dual criminality requirement).

British national abroad. It has been argued that the exceptions to the territoriality of English criminal law have been so numerous that they have challenged the general rule that "offences committed by British subjects out of England are not punishable by the criminal law of this country."[459] This may be an exaggeration. Not only is there no wholesale assumption of nationality-based jurisdiction in England, there are also only few reported cases of courts actually exercising such jurisdiction on the basis of existing laws.[460]

4.2.4. United States

141. The legality of active personality jurisdiction (or nationality-based jurisdiction), as opposed to *passive* personality jurisdiction, has traditionally been recognized by the United States.[461] In practice however, compared with other, especially European States, the United States has been reluctant to actually exercise it,[462] although throughout the 19th century, it negotiated treaties which provided for local consular jurisdiction over U.S. nationals in overseas territory. U.S. mistrust of active personality jurisdiction has created a jurisdictional gap in case the United States refuses to extradite its own nationals (who have fled the State where they committed their offence) and at the same time refuses to prosecute them. This has led to calls to broaden nationality-based jurisdiction.[463]

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[458] § 281 of the Merchant Shipping Act 1995. Jurisdiction only extends to offences committed by British citizen committed on board a foreign ship "to which he does not belong". § 281 does not refer to offences committed by passengers, but only to British citizens boarding foreign ships without authority, which is very uncommon nowadays. M. HIRST, *Jurisdiction and the Ambit of the Criminal Law*, Oxford, Oxford University Press, 2003, 291, 296.

[459] *R* v *Page* [1953] 2 All ER 1355, 1356 (Lord Goddard, CJ). *See also* P. ARNELL, "The Case for Nationality-Based Jurisdiction", 50 *I.C.L.Q.* 955 (2001).

[460] Hirst, at 231-233. *See* with respect to murder and manslaughter: *R* v. *Sawyer* (1815) Russ & Ry 294; *R* v. *Serva* (1845) 1 Cox CC 292; *R* v. *Helsham* (1830) 4 C & P 394; *R* v. *Azzopardi* (1843) 1 Car & Kir 203. *See* with respect to sexual offences against children: *R* v. *Rooney* [2001] All ER (D) 299 (Dec) (conviction based on 1997 Act quashed because Act was not yet in force when alleged offence was committed); *R* v. *Towner*, unreported, 18 June 2001 (Crown Court at Maidstone) (sexual offences committed in Cambodia by British citizen), cited in Hirst, at 271.

[461] See, e.g., *Rose* v. *Himley*, 8 U.S. (4 Cranch) 241, 279 (1808) ("beyond its own territory, [a State's legislation] can only affect its own subjects or citizens"); *The Appolon*, 22 U.S. (9 Wheat.) 362, 370 (1824) ("The laws of no nation can justly beyond its own territories, except so far as regards its own citizens") (emphasis added). See also J. STORY, Commentaries on the Conflict of Laws, 19 (1st ed. 1834) ("every nation has a right to bind its own subjects by its own laws in every other place"). LOWENFELD for his part, while conceding that jurisdiction based on the nationality of the accused is sound under international law, questioned its legality under the U.S. Constitution "without some additional link to the United States." A.F. LOWENFELD, "U.S. Law Enforcement Abroad: The Constitution and International Law", 83 *Am. J. Int'l L.* 880, 892 (1989). Contra G.R. WATSON, "The Passive Personality Principle", 28 *Tex. Int'l L.J.* 1, 30 (1993) (arguing that active personality jurisdiction is "inherent in sovereignty" or "that the misconduct of Americans abroad can affect United States foreign policy").

[462] *See* G.R. WATSON, "Offenders Abroad: The Case for Nationality-Based Criminal Jurisdiction", 17 *Yale J. Int'l L.* 41-42 (1992). *See* for rare instances of active personality jurisdiction before the Second World War: *United States* v. *Craig*, 28 F.795, 801 (1886) (jurisdiction over U.S. nationals assisting abroad in the illegal immigration of alien contract laborers); *Jones* v. *United States*, 137 U.S. 202 (1890) (jurisdiction over a murder committed by a U.S. national on the uninhabited Guano island); *Blackmer* v. *United States*, 284 U.S. 421, 441 (1932) (contempt of court by a U.S. citizen residing in France); *Cook* v. *Tait* (jurisdiction over U.S. nationals domiciled abroad failing to pay income taxes).

[463] *Id.*

142. Historically, active personality jurisdiction has statutorily been provided for crimes that threatened the very existence of the fledgling nation, such as treason,[464] the crime of engaging in diplomatic correspondence with foreign governments,[465] and later, failure to register for military service[466] and trading with the enemy[467]. For these crimes, the U.S. in effect linked the active personality principle up with the protective principle.[468] During the 20th century, the range of offenses subject to active personality jurisdiction was extended to 'international offenses', *i.e.*, offenses covered by an international treaty, such as hostage-taking,[469] biological weapons terrorism[470] and torture. Some common crimes were also made subject to active personality jurisdiction.[471]

143. In a 1992 note, WATSON proposed to extend active personality jurisdiction to all serious crimes of violence and non-violent felonies that most States criminalize, provided that the territorial state is unwilling or unable to prosecute,[472] a proposal that would bring U.S. practice more in line with continental European practice. As of today however, Congress has not acted upon his recommendation. The scope of the active personality principle in the U.S. thus remains rather limited if compared with the principle's scope in continental Europe.[473]

144. In the late 18th century, the United States adopted a variant of the active personality principle by providing for U.S. consular jurisdiction over U.S. persons accused of committing a crime in "barbarous lands",[474] on the basis of unequal treaties with, amongst others, a number of Moslem States including the Ottoman Empire, China, Persia and Japan.[475] This practice, based on ancient nationality-based jurisdiction, has been denounced as "legal imperialism",[476] although

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[464] Act for the Punishment of Certain Crimes Against the United States, ch. 9, of 30 April 1790.
[465] Act of 30 January 1799, ch. 1, 1 Stat 613, codified as amended at 18 U.S.C. § 953 (1988) (Logan Act).
[466] 50 U.S.C. app. § 453 (1982) (Military Selective Service Act of 1982).
[467] 50 U.S.C. app. §§ 1-39, 41-44 (1982) (Trading with the Enemy Act of 1917).
[468] *See* A.F. LOWENFELD, "U.S. Law Enforcement Abroad: The Constitution and International Law", 83 *Am. J. Int'l L.* 880, 883 (1989).
[469] Hostage Taking Act of 1984, 18 U.S.C. §1203(b)(1)(A) (1988).
[470] 18 U.S.C.A. § 175 (West Supp. 1991).
[471] *See, e.g.*, 26 U.S.C. § 78201 (1988) (tax evasion), 18 U.S.C. § 1621 (1988) (perjury), 18 U.S.C. § 793-794 (1988) (espionage), 18 U.S.C. § 1082(a) (1982).
[472] *See* G.R. WATSON, "Offenders Abroad: The Case for Nationality-Based Criminal Jurisdiction", 17 *Yale J. Int'l L.* 41, 81-82 (1992) (conceding that the unwillingness or inability to prosecute may also stem from U.S. economic or political coercion, which ought however not empower a U.S. court to "question the methods used to obtain the concession").
[473] *See* C.L. BLAKESLEY, "Extraterritorial Jurisdiction", in M.C. BASSIOUNI (ed.), *International Criminal Law II: Procedural and Enforcement Mechanisms*, 2nd ed., Transnational, Ardsley, NY, 1999, at 66.
[474] These "barbarous lands" where believed to harbour "a primitive animosity towards foreigners due to difference in religious beliefs", which made it impossible for Western citizens to abide by their regulations. *See* S. KASSAN, "Extraterritorial Jurisdiction in the Ancient World", 29 *Am. J. Int'l L.* 237, 239 (1935).
[475] An *equal* treaty was however proposed between France and the United States. Pursuant to Article 13 of this treaty, U.S. consuls in France would have jurisdiction over "offences committed in France by a citizen of the United States, against a citizen of the United States". *See* Resolution of 25 January 1782, in 3 *Secret Journals of Congress* 76 (1st ed. 1782).
[476] *See* G.R. WATSON, "Offenders Abroad: The Case for Nationality-Based Criminal Jurisdiction", 17 *Yale J. Int'l L.* 41, 50 (1992). The Greek republics for instance, who considered foreigners (*barbaroi*) as inferior to Greeks placed their nationals in Egypt under the protection of special magistrates (or in

imperialism did not go so far as subjecting alien perpetrators of crimes against U.S. persons abroad to U.S. jurisdiction under the passive personality principle.[477] Giving in to foreign States' sovereignty concerns, the U.S. abandoned it from the early 20th century on, although after the Second World War, it was re-introduced to a certain extent in the form of Status of Forces Agreements (SOFA's) and other bilateral agreements with States hosting U.S. servicemembers.

The imperialist brand of active personality jurisdiction is however not as extraterritorial as traditional assertions of activity personality jurisdiction are. In the latter case, U.S. courts *located in the U.S.* establish jurisdiction over crimes committed abroad, whereas in the former, U.S. courts (consuls) *located abroad* establish their jurisdiction over these crimes. Therefore, as WATSON pointed out, "[c]onsular jurisdiction comported with [territorial] common law ideals, since it ensured that U.S. nationals would be tried near the scene of the crime, with witnesses and evidence readily available."[478]

145. Active personality jurisdiction over U.S. civilians accompanying or employed by the U.S. armed forces abroad warrants a discussion of its own. Although "camp followers" of the U.S. military were already subject to U.S. jurisdiction during the War of Independence,[479] constitutional concerns have seriously impaired prosecutions of these civilians by U.S. courts in peacetime. The difficulties of prosecuting crimes committed by U.S. civilians abroad in the United States in effect opened an impunity gap, as the territorial State was either conventionally precluded from or not interested in prosecuting the crimes.[480] Most loopholes were closed by the Military Extraterritorial Jurisdiction Act of 2000.

Traditionally, civilians accompanying the military abroad were subject to military jurisdiction. After the Second World War however, the U.S. Supreme Court gradually deprived military courts of the jurisdiction to try them, invoking constitutional concerns. In 1955, in *United States ex rel. Toth* v. *Quarles*, the Supreme Court ruled that only individuals who were actually members of the Armed Forces could be court-martialed, which implied that courts-martial did not have jurisdiction over former servicemembers, in effect civilians.[481] In 1957, the Supreme Court for the first time addressed the question of whether civilians who actually accompanied the Armed Forces abroad could be subject to military jurisdiction. In the landmark case of *Reid* v.

U.S. terms: 'consuls'), *proxenoi*, who were appointed either by the Greek republic (the case of Athens) or by Egypt (the case of Sparta). *See* S. KASSAN, "Extraterritorial Jurisdiction in the Ancient World", 29 *Am. J. Int'l L.* 237, 245 (1935).

[477] *See* G.R. WATSON, "The Passive Personality Principle", 28 *Tex. Int'l L.J.* 1, 5 (1993) (believing that "United States discomfort with passive personality jurisdiction was strong enough to override the imperialist impulses that spawned consular jurisdiction").

[478] *Id.*, at 52, 54.

[479] Articles of War (1775), Arts. XXXII, XLVIII, 2 *Journals of the Continental Congress* 111, 116, 119 (1st ed. 1775).

[480] The problem is not a minor one: in 1999, more than 49,560 civilian employees of the Department of Defense were working overseas, and more than 193,000 dependent family members lived with military members overseas. In 1984, in 53 out of 415 serious cases committed by civilians overseas, the host State declined to prosecute. *See* F.A. STEIN, "Have We Closed the Barn Door Yet? A Look at the Current Loopholes in the Military Extraterritorial Jurisdiction Act", 27 *Hous. J. Int'l L.* 579, 587 (2005). Foreign States are often not interested in prosecuting crimes committed by Americans against Americans or American property.

[481] 350 U.S. 11 (1955).

Covert, the Court ruled that a (civilian) dependent who killed a U.S. servicemember, which is a capital offense, could not be subject to court-martial jurisdiction because members of a court-martial "do not and cannot have the independence of jurors drawn from the general public or civilian judges".[482] In a barrage of cases heard by the Supreme Court in 1960 then, court-martial jurisdiction was outlawed over respectively non-capital offenses committed by dependents,[483] capital offenses committed by civilian employees,[484] and non-capital offenses committed by civilian employees[485] in peacetime. In 1970, peacetime was defined as a period other than a time of "war formally declared by Congress".[486] Offenses committed by civilians dependents and employees during the Vietnam Conflict were therefore not triable by by military courts.

As a result of the Supreme Court's case-law, a vast jurisdictional gap was opened: the U.S. Constitution was considered to prohibit military courts from court-martialing civilians accompanying the military, and a statutory basis for civilian courts trying these persons was lacking. After *Reid* v. *Covert*, twenty-seven bills were introduced in Congress, but only after the *Gatlin* case, in which the Court of Appeals for the Second Circuit dismissed, "with regret", jurisdiction over a male civilian who had sexual intercourse with his thirteen-year-old stepdaughter in Germany,[487] did Congress step in. In 2000, it passed the Military Extraterritorial Jurisdiction Act,[488] pursuant to which civilian employees and civilians who accompany the Armed Forces could henceforth be prosecuted before civilian courts. As of 2005, only one case under this Act was reported.[489]

Under this Military Extraterritorial Jurisdiction Act, not all acts committed by civilians employed by or accompanying the U.S. Armed Forces could be prosecuted in the United States under an extended active personality principle. Initially, U.S. civilian courts only had jurisdiction over acts committed by civilians employed by the Department of Defense or by a contractor with the Department of Defense.[490] This flaw was somewhat remedied in 2004, when, in the wake of the Abu Ghraib scandal,[491] a law gave the courts also jurisdiction over civilian employees "any other Federal agency, or any provisional authority, to the extent such employment relates to supporting the mission of the Department of Defense overseas", or civilian employees of a contractor of such agency or authority.[492] Civilian employees of another agency who do not support the mission of the Department of Defense could however still

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[482] 354 U.S. 1, 36 (1957).
[483] *Kinsella* v. *United States ex. rel. Singleton*, 361 U.S. 234 (1960).
[484] *Girsham* v. *Hagan*, 361 U.S. 278 (1960).
[485] *McElroy* v. *Guagliardo*, 361 U.S. 281 (1960).
[486] *United States* v. *Averette*, 41 C.M.R. 363, 365 (1970).
[487] *United States* v. *Gatlin*, 216 F.3d 207, 209 (2d Cir. 2000). The court cautiously recommended Congress to change the law: "Finally, it clearly is within Congress's power to change the effect of this ruling by passing legislation to close the jurisdictional gap." *Id.*, at 592-93.
[488] 18 U.S.C.A. §§ 3261-3267.
[489] *See* F.A. STEIN, "Have We Closed the Barn Door Yet? A Look at the Current Loopholes in the Military Extraterritorial Jurisdiction Act", 27 *Hous. J. Int'l L.* 579, 598 (2005).
[490] 18 U.S.C.A. § 3267(1)(A).
[491] *See* G.R. SCHMITT, "Amending the Military Extraterritorial Jurisdiction Act of 2000: Rushing to Close an Unforeseen Loophole", 2005-JUN Army Law. 41, 42-43.
[492] Military Extraterritorial Jurisdiction Over Contractors Supporting Defense Missions Overseas, 108 *Pub. L. No.* 108-375, Sec. 1088, § 3267(1)(A), 118 Stat. 1811, 2066-67 (2004) (to be codified as amended at 18 U.S.C. § 3267(1)(A)).

evade prosecution under the Military Extraterritorial Jurisdiction Act, although they could possibly be prosecuted under the hitherto untested Torture Convention Implementation Act[493].[494]

4.3. Passive personality principle

4.3.1. Content

146. CONTROVERSIAL NATURE – It is unclear whether the nationality of the victim, which certainly constitutes a legitimate interest of the State,[495] also constitutes a sufficient jurisdictional link under international law.[496] It is, quite likely, be the most aggressive basis for extraterritorial jurisdiction.[497] Several dissenting opinions in the *Lotus* case rejected the passive personality principle, which could possibly have supported the *Lotus* judgment, and chided the majority for predicating their decision on the territoriality principle.[498] DONNEDIEU DE VABRES forcefully criticized passive personality jurisdiction as a solution that would, unlike the universality principle, not correspond to the way the judicial system is domestically organized, would not close an enforcement gap, and would lack any social aim of repression, but would instead merely be predicated on the egoism of States, and increase competency conflicts between States.[499]

147. RIGHTS OF THE DEFENDANT – It is submitted that, viewed from the perspective of the perpetrator's rights, under a jurisdictional system partly based on the passive personality principle, the perpetrator cannot anticipate what State's laws

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[493] 18 U.S.C.A. §§ 2340-2340B.

[494] F.A. STEIN, "Have We Closed the Barn Door Yet? A Look at the Current Loopholes in the Military Extraterritorial Jurisdiction Act", 27 *Hous. J. Int'l L.* 579, 601 (2005) (noting as other jurisdictional gaps the requirement that, under Section 3261(a) of the Act, only felonies are subject to the jurisdiction of the courts, although the most offenses committed are misdemeanors; that implementing regulations have not been enacted; that under Section 3267, citizens and those ordinarily resident in the host nation are excluded from the reach of the Act; and that civilians who are employed by another entity than a U.S. federal Agency could not be prosecuted under the Act. *See id.*, at 602-606).

[495] *See* G.R. WATSON, "The Passive Personality Principle", 28 *Tex. Int'l L.J.* 1, 18 (1993).

[496] *See* F.A. MANN, "The Doctrine of Jurisdiction in International Law", 111 *R.C.A.D.I.* 1, 39 (1964-I); HARVARD RESEARCH ON INTERNATIONAL LAW, "Draft Convention on Jurisdiction with Respect to Crime", 29 *A.J.I.L.* 439, 579 (1935) (stating that the principle of passive personality has "been more strongly contested than any other type of competence").

[497] *See* E. CAFRITZ & O. TENE, "Article 113-7 of the French Penal Code: the Passive Personality Principle", 41 *Colum. J. Transnat'l L.* 585, 599 (2003); G.R. WATSON, "The Passive Personality Principle", 28 *Tex. Int'l L.J.* 1 (1993); HARVARD RESEARCH ON INTERNATIONAL LAW, *Jurisdiction with Respect to Crime*, 29 *Am. J. Int'l L.* 435, 579 (Suppl. 1, 1935) (naming the passive personality principle "the most difficult [principle] to justify in theory", because accepting it "would only invite controversy without serving a useful objective").

[498] Eight Turkish nationals were killed as as result of the collision of *Lotus*, the French vessel, with the *Boz-Kourt*, the Turkish vessel. The Turkish penal code actually provided for jurisdiction over "[a]ny foreigner who … commits an offence abroad to the prejudice of Turkey or of a Turkish subject". P.C.I.J., *S.S. Lotus*, P.C.I.J. Reports, Series A, No. 10 (1927), at 14-15, quoting Article 6 of the Turkish Penal Code. *See for* the dissenting opinions: *Lotus*, diss. op. Loder, at 36, diss. op. Finlay, at 55-58, diss. op. Nyholm, at 62 and diss. op. Moore, at 91-93. *See also* G.R. WATSON, "The Passive Personality Principle", 28 *Tex. Int'l L.J.* 1, 7-8 (1993).

[499] H.F.A. DONNEDIEU DE VABRES, *Les principes modernes du droit pénal international*, Paris, Sirey, 1928, 170.

he will be subjected to, as he will usually not know the victim's nationality.[500] In case double criminality is not required, such a system may subject an individual to foreign criminal law if she unwittingly encounters a foreigner.[501] Under the active personality principle by contrast, individuals might reasonably be expected to be informed about the law applicable to their behaviour. They will not be surprised, as they know beforehand that, aside from the law of the territory they enter, they are also subject to the law of their national State, wherever they go.[502] Since individuals will be surprised about the applicable law if jurisdiction is exercised under the passive personality principle, the principle will not have major deterrent effects either (a classical aim of law, and criminal law in particular), although, to be true, a potential offender may, in case of doubt about the nationality of a potential victim, refrain from targeting the victim.[503] Yet also from a sovereignty perspective does the application of a foreign State's criminal law in a given territory raise concerns,[504] because it adds a regulatory layer and "blurs the accepted standards of conduct" within the territorial State.[505] The great theorist of jurisdiction, the late Professor MANN, therefore believed that "[passive personality jurisdiction] should be treated as an excess of jurisdiction" – although that was in 1964.[506]

148. RECENT STATE PRACTICE – In spite of calls to abandon the principle of passive personality,[507] recent State practice appears to consider jurisdiction on the basis of the passive personality principle to be reasonable, at least for certain crimes,[508] often linked to international terrorism.[509] *Aut dedere aut judicare* provisions

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[500] *See* J. MEYER, "The Vicarious Administration of Justice: An Overlooked Basis of Jurisdiction", 31 *Harv. Int'l L.J.* 108, 114 (1990).

[501] *See* Department of State, Report on Extraterritorial Crime and the Cutting Case, in *Foreign Relations Law of the United States*, 751, 840 (1887) (arguing that the passive personality principle would subject individuals "not merely to a dual, but to an indefinite responsibility" since they would be required to obey *any State's* law). *See also* E. CAFRITZ & O. TENE, "Article 113-7 of the French Penal Code: the Passive Personality Principle", 41 *Colum. J. Transnat'l L.* 585, 593 (2003). In a system of unlimited passive personality, any citizen would be required to be familiar with the criminal laws of every country. *Id.*, at 595 (conceding however that "it is not unrealistic to assume that [average citizens] would realize that committing *violent acts* might subject them to foreign prosecution.") (emphasis added).

[502] *See also* G.R. WATSON, "Offenders Abroad: The Case for Nationality-Based Criminal Jurisdiction", 17 *Yale J. Int'l L.* 41, 79 (1992) (stating that "[i]f a state imposes high standards of conduct on an individual and presumes that the individual is aware of those standards, then it is not unreasonable to expect the individual to abide by the same standards when abroad, even if the standards in the foreign country are lower.")

[503] *See* G.R. WATSON, "The Passive Personality Principle", 28 *Tex. Int'l L.J.* 1, 19 (1993) (arguing that "the very uncertainty of the passive personality remedy may enhance its deterrent effect").

[504] *See* E. CAFRITZ & O. TENE, "Article 113-7 of the French Penal Code: the Passive Personality Principle", 41 *Colum. J. Transnat'l L.* 585, 597 (2003)

[505] *See* G.R. WATSON, "The Passive Personality Principle", 28 *Tex. Int'l L.J.* 1, 16 (1993) (believing that "it seems unlikely that the international legal system will ever approve of passive personality jurisdiction unless there is at least some element of "dual criminality" built into it").

[506] *See* F.A. MANN, "The Doctrine of Jurisdiction in International Law", 111 *R.C.A.D.I.* 1, 92 (1964-I).

[507] *See, e.g.*, J. MEYER, "The Vicarious Administration of Justice: An Overlooked Basis of Jurisdiction", 31 *Harv. Int'l L.J.* 108, 114 (1990).

[508] *See* INTERNATIONAL COURT OF JUSTICE, *Case Concerning the Arrest Warrant of 11 April 2000* (Democratic Republic of Congo v. Belgium), sep. op. Higgins, Kooijmans and Buergenthal, § 47: "Passive personality jurisdiction, for so long regarded as controversial, is now reflected not only in the legislation of various countries, [..] and today meets with relatively little opposition, at least so far as a particular category of offences is concerned." *See also* sep. op. Rezek, *ibid.*, § 5: "[D]ans la plupart des pays, l'action pénale est possible sur la base des principes de la *nationalité active* ou *passive*[.]" *See also* sep. op. President Guillaume, *ibid.*, § 4: "Under the law as classically formulated, a State normally

in international conventions dealing with international terrorism, and later with torture, indeed authorize – but not compel – States to exercise passive personality jurisdiction.[510] The Restatement (Third) of American Foreign Relations Law (1987) took into account this evolution and, while stating that the passive personality principle "has not been generally accepted for ordinary torts or crimes", it pointed out that it is "increasingly accepted as applied to terrorist and other organized attacks on a state's nationals by reason of their nationality, or to assassination of a state's diplomatic representatives or other officials."[511]

It was initially unclear whether passive personality jurisdiction could also be exercised if it was not in implementation of an international (terrorism) convention.[512] State practice nowadays shows that it probably can, if "circumscribed by important safeguards and limitations".[513] To be true, as few States have actually applied their laws, it is difficult to discern a customary norm of international law authorizing passive personality jurisdiction, or more accurately, its scope.[514] However, if one draws on *Lotus*, the fact that international law does not explicitly authorize passive personality jurisdiction does not imply that international law outlaws is.[515] The lack of international protest against jurisdictional assertions based on passive personality may surely boost its legality.[516]

149. A REASONABLE EXERCISE OF PASSIVE PERSONALITY JURISDICTION – The absence of protest against passive personality jurisdiction is probably attributable to

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has jurisdiction over an offence committed abroad only if the offender, or at the very least the victim, has the nationality of that State or if the crime threatens its internal or external security." Text available at http://www.icj-cij.org

[509] *See* R. HIGGINS, *Problems and Process*, at 66 (attributing the revived interest in the passive personality principle to the explosion of international terrorism). *See, e.g.*, U.S.C. § 2331 (a)-(e) (1986).

[510] Article 4 (b) of the Convention of Offences Committed on Board Aircraft, Tokyo, 14 September 1963, 220 *UNTS* 10106; Article 6 (2) (b) of the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Rome, 10 March 1988, 222 *UNTS* 29004; Article 5 (1) (c) of the UN Torture Convention, New York, 10 December 1984, 1465 *UNTS* 85.

[511] Restatement (Third), § 402, cmt. g. In 1965, the Second Restatement still provided in an unqualified fashion that "[a] state does not have jurisdiction to prescribe a rule of law attaching legal consequences to conduct of an alien outside its territory merely on the ground that the conduct affects one of its nationals." (§ 30(2)).*See also* Restatement (Third), § 421 ("States exercise jurisdiction to adjudicate on the basis of various links, including […] the defendant's nationality […] reliance on other bases, such as the nationality of the plaintiff or the presence of property unrelated to the claim, is generally considered as 'exorbitant'."); B. STERN, "Can the United States Set Rules for the World? A French View", 31 *Journal of World Trade* 17 (1997/4); I. BROWNLIE, *Principles of Public International Law*, 4th ed., Oxford, Clarendon Press, 1990, 303.

[512] *See* A.F. LOWENFELD, "U.S. Law Enforcement Abroad: The Constitution and International Law", 83 *Am. J. Int'l L.* 880, 892 (1989).

[513] HARVARD RESEARCH ON INTERNATIONAL LAW, "Draft Convention on Jurisdiction with Respect to Crime", 29 *A.J.I.L.* 439, 579 (1935).

[514] *See* G.R. WATSON, "The Passive Personality Principle", 28 *Tex. Int'l L.J.* 1, 13 (1993); *See* J.G. MCCARTHY, "The Passive Personality Principle and Its Use in Combatting International Terrorism", 13 *Fordham Int'l L.J.* 298, 318 (1989-90).

[515] W. BERGE, "Criminal Jurisdiction and the Territorial Principle", 30 *Mich. L. Rev.* 238, 268 (1931) ("It is submitted that if this type of jurisdiction is undesirable it should be outlawed by international agreement, but that, until this can be done, nations disapproving of such jurisdiction whill have to tolerate its exercise by those nations which claim it.").

[516] *See* R. HIGGINS, *Problems and Process*, at 69 (pointing out that "[p]rotest are not usually over the assertion of such (limited) passive-personality jurisdiction *as such*, but over something else – the forcible bringing of the alleged offender into the territory of the state of the victim…") (original emphasis).

the restrictive conditions that usually surround its application, such as dual criminality, the requirement that only serious crimes are eligible for prosecution (certain classes of crime, *e.g.*, murder, rape, felonious assault, or only crimes with a minimum degree of punishment)[517], the presence requirement,[518] or the requirement of executive consent.[519]

The impact of jurisdictional assertions based on the passive personality principle could further be soothed by premising jurisdiction on the request, the consent or the acquiescence of the territorial State.[520] The unwillingness of the territorial State or the offender's home State to prosecute a particular crime against a foreign national does however probably not suffice for there to be jurisdiction that is respectful of the territorial State's sovereignty.[521] Indeed, it may be a territorial State's deliberate, sovereign and legitimate choice *not* to prosecute a crime, especially in States with a system of prosecutorial discretion. Against this, to be true, it could be argued that preventing impunity is in the international community's systemic interest,[522] and that, thus, some State should be able to exercise jurisdiction. It remains however to be seen if this also holds true for common crimes, *i.e.*, crimes which are not violations of obligations which any State owes to the international community (*erga omnes* obligations).

150. A MORE UNIFORM PASSIVE PERSONALITY REGIME – The myriad restrictive conditions accompanying the exercise of passive personality jurisdiction could not but undercut the efficiency of its exercise if the perpetrator is not present in the territory of the forum State. In order to bring about the perpetrator's presence, the custodial State's co-operation is required. States often only grant extradition on the basis of a jurisdictional principle (and the restrictive conditions of its application) that they themselves recognize in their domestic legal order. If the custodial State does not recognize the passive personality principle, it will usually not honor an extradition request by another State based on this principle. Also, if the custodial State subjects its own exercise of passive personality principle to restrictive conditions, it will similarly not honor an extradition request on the basis of the principle yet with less far-reaching restrictive conditions attached to it. Clearly, the efficiency of passive

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[517] *See* G.R. WATSON, "The Passive Personality Principle", 28 *Tex. Int'l L.J.* 1, 23 (1993); *See* J.G. MCCARTHY, "The Passive Personality Principle and Its Use in Combatting International Terrorism", 13 *Fordham Int'l L.J.* 298, 315 (1989-90).

[518] *See* J.G. MCCARTHY, "The Passive Personality Principle and Its Use in Combatting International Terrorism", 13 *Fordham Int'l L.J.* 298, 314 (1989-90).

[519] *Compare* E. CAFRITZ & O. TENE, "Article 113-7 of the French Penal Code: the Passive Personality Principle", 41 *Colum. J. Transnat'l L.* 585, 597-98 (2003) (pointing out that in Greece, Finland, Norway, and Sweden, the double criminality requirement is a statutory precondition to passive personality jurisdiction, and that in Norway, Finland, Italy and Sweden, executive (or the King's) consent is required for its application).

[520] *See* G.R. WATSON, "Offenders Abroad: The Case for Nationality-Based Criminal Jurisdiction", 17 *Yale J. Int'l L.* 41, 52 (1992).

[521] *See* G.R. WATSON, "The Passive Personality Principle", 28 *Tex. Int'l L.J.* 1, 21 (1993).

[522] *Id.*, at 44-45 (citing the reasonableness factors "the importance of the regulation to the international political, legal, or economic system" and "the extent to which the regulation is consistent with the traditions of the international system" in § 403 (2) (e)-(f) of the Restatement (Third) of Foreign Relations Law, to buttress the need for passive personality jurisdiction).

personality jurisdiction and international co-operation in criminal matters could benefit from a more uniform regime of passive personality jurisdiction.[523]

An international streamlining and consolidation of the abovementioned restrictive conditions may appear utopian, as efforts to align States' jurisdictional assertions with each other have failed so far. The international community could however be successful if it focuses on crimes of which the heinous nature is generally accepted by States, such as terrorist crimes.[524] Yet even for terrorist crimes, consensus on the exercise of jurisdiction may prove elusive, if only because there is no agreement yet on what actually constitutes terrorism. In *United States v. Yousef and others* (2003) for instance, the Court of Appeals for the Second Circuit held that there is no universal jurisdiction over terrorism based on customary international law, precisely because "there continues to be strenuous disagreement among States about what actions do or do not constitute terrorism".[525]

4.3.2. Continental Europe and England

151. Passive personality jurisdiction features in most European criminal codes, although its exercise is sometimes subject to restrictive conditions. Especially France entertains broad, possibly overbroad, passive personality jurisdiction,[526] although it was traditionally hostile to it.[527]

In France, *any felony* or *misdemeanor* punishable with imprisonment committed against a French national abroad, is subject to French criminal jurisdiction since 1994.[528] Unlike under the active personality regime, French nationality needs to be acquired at the time the offence was committed. Similar procedural restrictive conditions as these surrounding the operation of the active personality principle apply,[529] as does the principle of *non bis in idem*,[530] yet the conduct need not be punishable abroad.

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[523] *See* J.G. MCCARTHY, "The Passive Personality Principle and Its Use in Combatting International Terrorism", 13 *Fordham Int'l L.J.* 298, 319 (1989-90). *See also* C.L. BLAKESLEY, "Extraterritorial Jurisdiction", in M.C. BASSIOUNI (ed.), *International Criminal Law II: Procedural and Enforcement Mechanisms*, 2nd ed., Ardsley, NY, Transnational, 1999, at 105 (pointing out that coherence in grounds of jurisdiction needed for purposes of extradition).

[524] *Id.*, at 321-27 (1989-90).

[525] *United States* v. *Ramzi Ahmed Yousef and others*, 327 F.3d 56, 78-88 (2nd Cir. 2003), citing *Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984).

[526] *See, e.g.*, E. CAFRITZ & O. TENE, "Article 113-7 of the French Penal Code: the Passive Personality Principle", 41 *Colum. J. Transnat'l L.* 585, 587 and 593 (2003) (arguing that "the current language of the statute goes far beyond the standards of passive personality jurisdiction accepted by the international community" and calling for it to "meet the limitations imposed on extraterritorial jurisdiction by the principles of comity and customary international law").

[527] In 1974 still, France rejected Israel's request for the extradition of the Abu Daoud, a Palestinian terrorist implicated in the assassination of Israeli Athletes at the Munich Olympic Games in 1972. *Id.*, at 594. After French nationals were taken hostage that same year however, the French legislature adopted a law providing for passive personality jurisdiction (Law No. 75-624 of 11 July 1975, *J.O.*, 13 July 1975, p. 7219.

[528] Article 113-7 French CP. Under former Article 689-1 of the French CPP, passive personality jurisdiction only applied to felonies.

[529] Article 113-8 French CP.

[530] Article 113-9 French CP.

152. The broad sweep of the passive personality principle in France has been criticized because passive personality jurisdiction is, unlike *active* personality jurisdiction, merely geared to the protection of private interests and not to the protection of the French public order.[531] It may also make a host of economic and regulatory offences committed against French nationals, including corporations, abroad punishable in France.[532] This has led two commentators to cry foul in the following way: "A literal application of Article 113-7 [the article providing for passive personality jurisdiction] and subsequent jurisprudence would lead to a wholesale export of French economic regulations to foreign capital markets, at least in any dealings abroad involving French "victims".[533] This indictment of French economic extraterritoriality is surprisingly similar to the indictment of instances of U.S. economic extraterritoriality (such as the application of U.S. securities laws to transactions harming U.S. investors abroad). Notwithstanding the potentially broad reach of French laws under the passive personality principle, actual prosecutions have been rare. In practice, France will only exercise passive personality jurisdiction on a subsidiary basis. Only when French national security is endangered will it do so on primary basis.[534]

153. In Belgium, as a general principle, passive personality jurisdiction only applies to felonies if the conduct is punishable under the legislation of the territorial State with a penalty exceeding five years imprisonment.[535] This restrictive condition does however not apply to offences against the security of the State, crimes against international humanitarian law, forgery and certain acts of terrorism, although other restrictions may apply, such as the unavailability of civil party petition, the prosecutorial monopoly of the federal prosecutor (instead of a local prosecutor), or the requirement of an official accusation by the foreign State.[536] The Netherlands, relying on the intervention of the territorial State, does not provide for passive personality jurisdiction.[537]

154. Like France, Germany entertains broad passive personality jurisdiction over *any offence*, provided that the conduct is also punishable under the legislation of the territorial State (or in case no State has authority over the place where the conduct

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[531] *See* F. DESPORTES & F. LE GUNEHEC, *Le nouveau droit pénal*, Vol. 1, 7th ed., Paris, Economica, 2000, at 330.

[532] *See, e.g.*, C.A. Paris, Ch. Crim. 11, 24 February 2000, no. 116499 (defamation); C.A. Paris, Ch. Crim. 13, 18 June 2001, no. 158355 (trademark violation) (holding that "under the provision of [Article 113-7], French law applies to any misdemeanor punished by imprisonment, committed by a French or foreign national outside the territory of the French Republic, where the victim is a French national at the time of the offense, even if the victim is a legal person.")

[533] *See* E. CAFRITZ & O. TENE, "Article 113-7 of the French Penal Code: the Passive Personality Principle", 41 *Colum. J. Transnat'l L.* 585, 590-91 (2003) (discussing commercial law, labor law and consumer law. *Id.*, at 591-93).

[534] *See* C.L. BLAKESLEY, "Extraterritorial Jurisdiction", in M.C. BASSIOUNI (ed.), *International Criminal Law II: Procedural and Enforcement Mechanisms*, 2nd ed., Transnational, Ardsley, NY, 1999, at 68.

[535] Article 10, 5° PT Belgian CCP.

[536] Article 10, 1°-5° and 10*ter*, 4° PT Belgian CCP. Belgian courts may also entertain jurisdiction over terrorist offences committed against institutions or organs of the European Union, quite of a number of these institutions or organs being located in Belgium.

[537] *See* J. REMMELINK, *Inleiding tot de Studie van het Nederlandse Strafrecht*, 14th ed., Gouda, Quint, 1995, 528.

has taken place).[538] Yet even if the conduct is not punishable abroad, a limited number of offences, enumerated in § 5 of the Germany Penal Code and committed against German nationals or German residents, may still be subject to German passive personality jurisdiction. The § 5 offences are diversion (*Verschleppung*) and political suspicion (*Verdächtigung*),[539] child abduction (*Entziehung eines Kindes*),[540] violation of business secrecy,[541] certain sexual offences (provided that the offender is also a German),[542] offences against German officials or servicemembers,[543] and corruption[544].

155. Traditionally, there are no offenses subject to *passive* personality jurisdiction under English law, nor does England honor extradition requests based on the nationality of the victim.[545] Recently however, terrorist attacks abroad on UK nationals or residents have been made subject to passive personality jurisdiction by §§ 52 and 53 of the Crime (International Co-operation) Act 2003.[546]

4.3.3. United States

156. The U.S. has traditionally been hostile toward the passive personality principle. U.S. resistance against the principle may be epitomized by the *Cutting Case*. In the *Cutting Case*, Mexican assertions of libel jurisdiction over newspaper articles published in Texas were harshly denounced by the United States Government, whose diplomatic agent held: "There is no principle better settled than that the penal laws of a country have no extraterritorial force. Each state may, it is true, provide for the punishment of its own citizens for acts committed by them outside of its territory … To say, however, that the penal laws of a country can bind foreigners and regulate their conduct, either in their own or in any other foreign country, is to assert a jurisdiction over such countries and impair their independence."[547] In spite of this strong stance against passive personality jurisdiction, one may rhetorically ask whether it was not based on the American tradition of freedom of speech, and the accompanying light punishment of defamation in the U.S., which was at issue in the *Cutting Case*.[548] Moreover, as Cutting's Texas editorial was circulated in Mexico,

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[538] § 7 (1) StGB.
[539] § 5, 6° StGB.
[540] § 5, 6a StGB.
[541] § 5, 7° StGB.
[542] § 5, 8° StGB.
[543] § 5, 14° StGB.
[544] § 5, 14a StGB.
[545] *E.g.*, *Rees* v. *Secretary of State for the Home Department* [1986] AC 937 (no extradition to Germany for an offense of kidnapping of a German citizen in Bolivia).
[546] § 52 inserts § 63C after § 63 of the Terrorism Act 2000 (c.11). It provides for jurisdiction under English law over a limited number of terrorist offences against UK nationals, residents and diplomatic staff. § 53 inserts § 113A after § 113 of the Anti-terrorism Crime and Security Act. It provides for jurisdiction under English law over the use of noxious substances or things to cause harm and intimidate.
[547] *See* J.B. MOORE, *Report on Extraterritorial Crime and the Cutting Case*, reprinted in 1887 *Papers relating to the Foreign Relations of the United States* 757 (1888).
[548] *See* G.R. WATSON, "The Passive Personality Principle", 28 *Tex. Int'l L.J.* 1, 6 (1993) ("One might ask whether the United States would have protested Mexico's assertion of jurisdiction so loudly had Cutting been accused of mass murder of Mexican nationals in Texas.")

Mexico could possibly have exercised jurisdiction under the territoriality principle, a principle which the United States could have hardly taken exception with.[549]

In spite of the peculiarities of the case, the *Cutting Case* bears witness to U.S. uneasiness with the passive personality principle, an uneasiness which has not yet subsided as we write, although since the mid-1980s, passive personality jurisdiction has been considered to be legitimate for a limited range of offences.

157. Throughout the 20th century, U.S. courts and the doctrine remained hostile to the use of passive personality jurisdiction by the United States. In 1965, § 30 (2) of the Restatement (Second) of Foreign Relations Law unambiguously stated that "[a] state does not have jurisdiction to prescribe a rule of law attaching legal consequences to conduct of an alien outside its territory merely on the ground that the conduct affects one of its nationals."[550] Also, in the 1979 case of *United States* v. *Columba-Colella*, the Court of Appeals for the Fifth Circuit, addressing the question of whether U.S. courts had jurisdiction over a Mexican national accused of knowingly receiving in Mexico a car stolen from a U.S. citizen, that "[i]t is difficult to distinguish the present case from one in which the defendant had attempted not to fence a stolen car but instead to pick the pockets of American tourist in Acapulco. No one would argue either that Congress would be competent to prohibit such conduct or that the courts of the United States would have jurisdiction to enforce such a prohibition were the offender in their control. Indeed, Congress would not be competent to attach criminal sanctions to the murder of an American by a foreign national in a foreign country."[551]

158. From the early 1970s on however, the problem of international terrorism, to which U.S. citizens routinely fell victim, threw the American front against passive personality jurisdiction into disarray. The United States entered in a number of international conventions providing for jurisdiction based on the nationality of the victim, such as the 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents,[552] and the 1979 International Convention Against the Taking of Hostages.[553]

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[549] *Id.*, at 6-7.

[550] *See also* A.F. LOWENFELD, "U.S. Law Enforcement Abroad: The Constitution and International Law", 83 *Am. J. Int'l L.* 880, 884 (1989) (believing that that statement "accurately reflected the American view of international law in 1961"). § 25 the Restatement (First) of Foreign Relations Law (1949) similarly rejected the use of the passive personality principle.

[551] 604 F.2d 356, 360 (5th Cir. 1979).

[552] 28 *U.S.T.* 1975, 1035 *U.N.T.S.* 167. *See for* U.S. implementing laws: 18 U.S.C. §§ 1114, 1117 (1988). The murderer of the American Congressman Leo Ryan, killed in Guyana in 1978, could on this basis be prosecuted in the United States, although the United States did not provide for passive personality jurisdiction over common murder or manslaughter. *See United States* v. *Layton*, 509 F. Supp. 212 (N.D. Cal. 1981). The *Layton* court also grounded its jurisdiction on the objective territoriality principle (citing *Strassheim* v. *Dailey*, 221 U.S. 280, 285 (1911), 509 F. Supp. 215), and the protective principle ("The alleged crimes certainly had a potentially adverse effect upon the security or governmental functions of the nation, thereby providing the basis for jurisdiction under the protective principle.") (*Id.*, at 116-120).

[553] 1316 *U.N.T.S.* 205, 18 *I.L.M.* 1456 (1979). *See for* the U.S. implementation statute, the Hostage Taking Act, 18 U.S.C. § 1203 (1988).

159. In 1986 then, after the 1985 *Achille Lauro* incident, in which Leon Klinghoffer, an American national, was killed, the American intransigent stance on passive personality jurisdiction was further relaxed by the Omnibus Diplomatic Security and Anti-Terrorism Act of 1986.[554] Pursuant to this act, U.S. courts have jurisdiction over a crime to kill, or attempt or conspire to kill, or to cause bodily injury, to a national of the United States outside the territory of the United States, if the offense was intended to coerce, intimidate, or retaliate against a government or a civilian population.[555]

An important limitation on the 1986 Act is that the Attorney General has to consent to the exercise of jurisdiction under the Act.[556] The Attorney General may possibly tailor such exercise in particular cases to the requirements of international law under the *Charming Betsy* doctrine of statutory construction, depending on the fact pattern of the case.[557] This may defuse LOWENFELD's concerns that the Act failed to refer to internationally agreed offenses over which passive personality jurisdiction is authorized under international law.[558] When facing offenses over which passive personality jurisdiction is not generally recognized, the Attorney General could either dismiss jurisdiction or ground jurisdiction upon another, less controversial principle under customary international law, such as the protective principle. Such could preserve U.S. opposition to the passive personality principle.[559]

160. In 1996, the U.S. expanded its legal arsenal to combat terrorism by amending the Sabotage Act and *prima facie* providing for passive personality jurisdiction over offenses of aircraft sabotage.[560] Amended Section 32(b) states that "[t]here is jurisdiction over an offense under this subsection if a national of the United States was on board, or would have been on board, the aircraft."

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[554] Pub. L. No. 99-399; Tit. XII, § 1202(a), 100 Stat. 853, 896 (1986), 18 U.S.C. § 2331 (1988). BLAKESLEY has however stated that "the essence of this legislation is the protective principle, perhaps combined with the universality theory". *See* C.L. BLAKESLEY, "Extraterritorial Jurisdiction", in M.C. BASSIOUNI (ed.), *International Criminal Law II: Procedural and Enforcement Mechanisms*, 2nd ed., Transnational, Ardsley, NY, 1999, at 57.

[555] *See* for a conviction under this Act: *United States* v. *Munoz-Mosquera*, 101 F.3d 683 (Table) (2nd Cir. 1996) (accused convicted for 1989 bombing of Avianca flight 203 over Bogota, Colombia, as a consequence of which two U.S. nationals were killed). The accused was also charged with offenses under the Sabotage Act.

[556] "No prosecution for any offense described in this section shall be undertaken by the United States except on written certification of the Attorney General or the highest ranking subordinate of the Attorney General with responsibility for criminal prosecutions …". 18 U.S.C. § 2331 (e) (1988). It may be noted that, while the victim need be a U.S. citizen in order for jurisdiction to be established, the targeted "government or civilian population" need not be American. H.R. Conf. Rep. No. 783, 99th Cong., 2d Sess. 87-88 (1986).

[557] *See* J. ROBINSON, "United States Practice Penalizing International Terrorists Needlessly Undercuts its Opposition to the Passive Personality Principle", 16 *B.U. Int'l L.J.* 487, 495 (1998).

[558] *See* A.F. LOWENFELD, "U.S. Law Enforcement Abroad: The Constitution and International Law", 83 *Am. J. Int'l L.* 880, 890-91 (1989). *Contra* Statement of Senator Specter, 132 CONG. REC. S1383 (daily ed. 19 February 1986) ("[The 1986 Act] fills the gap in current law without in any way contravening or conflicting with either international or constitutional law.")

[559] *See* J. ROBINSON, "United States Practice Penalizing International Terrorists Needlessly Undercuts its Opposition to the Passive Personality Principle", 16 *B.U. Int'l L.J.* 487, 504 (1998).

[560] Pub. L. No. 104-132, 110 Stat. 1298, codified as amended at 18 U.S.C. § 32 (1996) ("Antiterrorism and Effective Death Penalty Act of 1996"). H.R. Rep. No. 104-518, at 122 (1996) ("The United States has a legitimate interest in punishing anyone who injures a U.S. national.").

161. The 1987 Restatement of Foreign Relations Law noted that jurisdiction based on the passive personality principle "is increasingly accepted as applied to terrorist and other organized attacks on a state's nationals by reason of their nationality, or to assassination of a state's diplomatic representatives or other officials",[561] relying *inter alia* on the 1986 Act.[562] Another year later, in 1988, a U.S. district court approved of passive personality jurisdiction over "crimes unanimously condemned by members of the international community" in the *Yunis* case, a holding affirmed by the Court of Appeals for the D.C. Circuit.[563] In 1998, in the *Rezaq* case, the latter Court re-affirmed its support for passive personality jurisdiction, ruling that a case against a terrorist who hijacked an Air Egypt flight originating in Athens, as a result of which a U.S. citizen, Scarlett Rogenkamp, died, "clearly [fell] within … the so-called "passive" personality principle [under international law]".[564] The Court held that "Scarlett Rogenkamp was a U.S. citizen and there was abundant evidence that she was chosen as a victim because of her nationality. This suffices to support jurisdiction on the passive personality theory."[565]

162. Although jurisdiction based on the nationality of the victim seems to be accepted in the U.S.,[566] U.S. courts do not yet entertain jurisdiction over common crimes, such as simple murder, *i.e.*, murder of a U.S. citizen abroad which is not the

[561] Restatement (Third) of Foreign Relations Law § 402 cmt. g (1987).
[562] *Id.*, Reporters' Note 3.
[563] *United States* v. *Yunis*, 681 F. Supp. 896, 901-903 (D.D.C. 1988). The court of appeals in this case rejected the argument that international law may not recognize passive personality jurisdiction over Yunis's offences, as an act of Congress prevails over prior international law. *United States* v. *Yunis*, 924 F.2d 1086, 1091 (D.C. Cir. 1991) ("Whatever merit appellant's claims may have as a matter of international law, they cannot prevail before this court. Yunis seeks to portray international law as a self-executing code that trumps domestic law whenever the two conflict. That effort misconceives the role of judges as appliers of international law and as participants in the federal system. Our duty is to enforce the Constitution, laws, and treaties of the United States, not to conform the law of the land to norms of customary international law.").
[564] *United States* v. *Rezaq*, 134 F.3d 1121, 1133 (D.C. Cir. 1998).
[565] *Id.* Under U.S. law, the court unmistakably had jurisdiction. 49 U.S.C.S app. § 1472(n) required the imposition of the death sentence or of life imprisonment in hijacking cases in which death results. Article 4 (1) of the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft on which the U.S. law was based, did however not provide for compulsory jurisdiction over acts of violence against passengers or crew on the basis of the nationality of the victim or on the basis of the presence of the offender in the territory of the forum State. Article 4 (3) of the Hague Convention nonetheless provides that the Convention "does not exclude any criminal jurisdiction exercised in accordance with national law". The Court believed that Article 4 (3) did not preclude the U.S. from providing for "death results" jurisdiction in § 1472, but reviewed any exercise of jurisdiction based on § 1472 in the light of customary international law. It may be noted that the Court's reliance on the passive personality principle has been criticized, because it undercuts U.S. opposition against the principle. Robinson argued that, in order to preserve this opposition, the D.C. Circuit had better invoked the protective principle to support the application of the "death results" provision. *See* J. ROBINSON, "United States Practice Penalizing International Terrorists Needlessly Undercuts its Opposition to the Passive Personality Principle", 16 *B.U. Int'l L.J.* 487, 503 (1998)
[566] J. ROBINSON, "United States Practice Penalizing International Terrorists Needlessly Undercuts its Opposition to the Passive Personality Principle", 16 *B.U. Int'l L.J.* 487, 504 (1998) ("Today, from an outside perspective, the international community has been given powerful evidence that the United States has accepted passive personality as a principle of customary international law."). U.S. authors, while admitting the exercise of passive personality jurisdiction by U.S. courts, may however sometimes take the view that *international law* does not support passive personality jurisdiction. *See, e.g.*, M.D. RAMSEY, "Escaping 'International Comity'", 83 *Iowa L. Rev.* 893, 922 (1998).

consequence of terrorist activity.[567] Admittedly, in *United States* v. *Benitez*, a 1984 case in which the defendant was convicted of conspiring to murder U.S. Drug Enforcement Administration agents in Colombia, the court held that "the nationality of the victims … clearly supports jurisdiction".[568] In *Benitez*, the victims were U.S. government agents, and not ordinary citizens, though. What is more, the *Benitez* court primarily relied on the *protective* principle to justify jurisdiction, and only subsidiarily on the passive personality jurisdiction.[569]

The absence of common crimes from the scope of application of the passive personality principle in the U.S., and its limitation to terrorist offences, may cast doubt on the characterization of jurisdiction based on the nationality of the victim of terrorist acts as actual passive personality jurisdiction. Indeed, as terrorist offences are offences which are in fact directed against the State, what is generally believed to be passive personality jurisdiction over these offences may in reality be protective jurisdiction.[570]

4.4. Protective principle

4.4.1. Content

163. SOVEREIGNTY – The protective principle links an activity performed abroad to a State's sovereignty. It protects the State from acts which jeopardize its right to political independence inherent in the sovereign equality of nations. As such acts, such as the offence of treason, may not be punishable in the State where they originate, protective jurisdiction by the State at which the acts are directed, may appear warranted.[571] For the operation of the protective principle, actual harm need

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[567] H.R. Conf. Rep. No. 783, 99th Cong., 2d Sess. 87 (1986) (stating that Congress did not intend the new statute to reach "[s]imple barroom brawls or normal street crime"). *See also United States* v. *Velazquez-Vasco*, 15 F.3d 833, 839-42 (9th Cir. 1994). From a constitutional perspective, Congress is probably authorized to establish passive personality jurisdiction regardless of the crime, as such may fall under the unenumerated foreign affairs power. WATSON has submitted in this context that crimes against U.S. nationals abroad may touch on U.S. foreign affairs, as harm to U.S. nationals may be viewed as implicating the interests of the United States. It is nonetheless obvious that *terrorist* crimes against U.S. nationals committed abroad are more directly related to Congress's constitutional foreign affairs power, as these crimes are usually politically motivated and aimed at state institutions. Congressional power to establish passive personality jurisdiction may moreover be justified under the constitutional clause that authorizes Congress to "define and punish … Offences against the Law of Nations") (U.S. Constitution, Article 1, § 8, clause 10). *See* G.R. WATSON, "The Passive Personality Principle", 28 *Tex. Int'l L.J.* 1, 30-34 (1993).

[568] 741 F.2d 1312, 1316 (11th Cir. 1984).

[569] *Id.* (holding that "jurisdiction exists in this case under [the protective and passive personality principles]. Under the protective principle, the crime certainly had a potentially adverse effect upon the security or governmental function of the [United States] …").

[570] *Compare* G.R. WATSON, "The Passive Personality Principle", 28 *Tex. Int'l L.J.* 1, 9 (1993); J. ROBINSON, "United States Practice Penalizing International Terrorists Needlessly Undercuts its Opposition to the Passive Personality Principle", 16 *B.U. Int'l L.J.* 487, 493 (1998) (submitting that this argument was "largely ignored").

[571] *See* M.R. GARCIA-MORA, "Criminal Jurisdiction Over Foreigners for Treason and Offenses Against the Safety of the State Committed Upon Foreign Territory", 19 *U. Pitt. L. Rev.* 567, 587 (1958) ("It is precisely because [territorial] States have failed to discharge adequately [their duty to prevent treasonable and other harmful activities from being carried on under the protection of their territorial sovereignty] that protective jurisdiction appeared as a necessary alternative thereby filling a gap in the international legal order."); HARVARD RESEARCH ON INTERNATIONAL LAW, "Draft Convention on Jurisdiction with Respect to Crime", 29 *A.J.I.L.* 439, 552 (1935) (explaining this lack of cooperation by

not have resulted from these acts. This distinguishes it from the objective territorial principle (or effects doctrine).[572] Protective jurisdiction was already recognized in the city-states of northern Italy in the 13th and 14th centuries. From the 15th and 16th centuries on, even before extradition became a common practice, European States committed themselves to surrendering the perpetrators of political offences.[573] Nowadays, given the widespread adoption of legislation based on the protective principle, the legality of protective jurisdiction is not in doubt.[574]

164. SELF-DEFENCE JUSTIFICATION AND POSSIBLE ABUSE – Continental European authors have traditionally considered the protective principle as deriving from a State's inherent right of self-defence.[575] Common law authors, in whose home countries protective jurisdiction was historically non-existent, have rejected this justification, primarily because it is conceptually fallacious and prone to politicization and abuse.[576] From a conceptual perspective, the self-defense justification has been criticized since protective jurisdiction operates *after* the act has taken place. Self-defense is ordinarily only allowed as an inherent right when an armed attack actually occurs.[577] Defense against a *fait accompli* may appear paradoxical.[578] It moreover requires imagination to equate the deterrent effect of punishment under the protective principle with the concept of self-defence, as self-defense could not only not be exercised in an anticipatory fashion, but it is also precisely invoked when the deterrent effect of existing penalties proves insufficient to prevent the attack.

More importantly, because the justification of the protective principle is rooted in the concept of State sovereignty and political independence, which every State defines for itself, there is unmistakably a danger that States might abuse the protective

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reference to "[t]he traditional political liberalism of certain States", which "has made them reluctant to lend any support to the protection or maintenance of régimes based upon principles different from their own.").

[572] *See* M.B. KRIZEK, "The Protective Principle of Extraterritorial Jurisdiction: A Brief History and an Application of the Principle to Espionage as an Illustration of Current United States Practice", 6 *B.U. Int'l L.J.* 337, 345 (1988). *Compare U.S.* v. *Evans et al.*, 667 F.Supp. 974, 980 (S.D.N.Y. 1987) (stating that "international law permits jurisdiction under [the protective principle and the effects doctrine] even if the act or conspiracy at issue is thwarted before ill effects are actually felt in the target State).

[573] H.F.A. DONNEDIEU DE VABRES, *Les principes modernes du droit pénal international*, Paris, Sirey, 1928, 86.

[574] HARVARD RESEARCH ON INTERNATIONAL LAW, "Draft Convention on Jurisdiction with Respect to Crime", 29 *A.J.I.L.* 439, 556 (1935); C.L. BLAKESLEY, "United States Jurisdiction over Extraterritorial Crime", 73 *J. Crim. L. & Criminology* 1109, 1138 (1982).

[575] *Id.*, at 87. *See also* M.B. KRIZEK, "The Protective Principle of Extraterritorial Jurisdiction: A Brief History and an Application of the Principle to Espionage as an Illustration of Current United States Practice", 6 *B.U. Int'l L.J.* 337, 339 (1988).

[576] *See, e.g.*, M.R. GARCIA-MORA, "Criminal Jurisdiction Over Foreigners for Treason and Offenses Against the Safety of the State Committed Upon Foreign Territory", 19 *U. Pitt. L. Rev.* 567, 585 (1958) ("[B]eing essentially a political doctrine, self-defense is singularly exempted from any legal regulation and, consequently, its application to specific cases is likely to make for highly unjust decisions … Concurrently with … disturbing [political] forces is the fluid and shifting nature of the ordinary political exigencies, which render manifestly impossible any attempt to evaluate objectively concrete situations.")

[577] *See, e.g.*, Article 51 of the Charter of the United Nations (providing for "the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations").

[578] *See* M.R. GARCIA-MORA, "Criminal Jurisdiction Over Foreigners for Treason and Offenses Against the Safety of the State Committed Upon Foreign Territory", 19 *U. Pitt. L. Rev.* 567, 585 (1958).

principle.[579] The trial of a defendant accused of a crime against the security of the State (the typical class of crimes giving rise to protective jurisdiction) would almost certainly be conducted in a climate of animosity and revenge which is bound to be detrimental to the fairness of the trial (which is especially anathema to the a tradition of protecting individual human rights, such as the right to a fair trial, brandished by States after the Second World War).[580] It may also poison international relations and cause other States to retaliate, not only because other States might have concurrent jurisdiction over the crime, but also because crimes against the security of a State may, unlike common crimes, be supported or condoned by a foreign government. Claiming protective jurisdiction over the author(s) of the acts may imply passing judgment on the acts of a foreign State and could possibly undermine the political independence of that State.[581]

165. INTERNATIONAL CONVENTION? – A better solution for crimes in which a foreign States is embroiled than the unilateral exercise of protective jurisdiction may possibly be State-to-State international dispute settlement on the basis of the rules of state responsibility.[582] Also, as a general matter, an international convention on protective jurisdiction, which objectively determines the crimes that could give rise to protective jurisdiction, and puts in place mechanisms of jurisdictional restraint, might be contemplated.[583] Nonetheless, as in other fields of jurisdiction, such a convention might prove elusive in the face of tenacious State interests. As it actually presupposes a world order in which States consent to the future unilateral exercise of jurisdiction by other States over crimes in which they have an own hand,[584] such a convention is

[579] *See* M.R. GARCIA-MORA, "Criminal Jurisdiction Over Foreigners for Treason and Offenses Against the Safety of the State Committed Upon Foreign Territory", 19 *U. Pitt. L. Rev.* 567, 583 (1958) (discussing the offense of treason and pointing out that "the very nature of this offense inevitably lends itself to inadmissible extensions of State power … in view of the fact that the application of criminal jurisdiction reaches out to acts affecting the State in its supreme function, namely its external defense and its sovereignty"); HARVARD RESEARCH ON INTERNATIONAL LAW, "Draft Convention on Jurisdiction with Respect to Crime", 29 *A.J.I.L.* 439, 553 (1935) (arguing that underlying the controversy with respect to the propriety of protective legislation is "a fear that its practical application may lead to inadmissible results").

[580] *See* M.R. GARCIA-MORA, "Criminal Jurisdiction Over Foreigners for Treason and Offenses Against the Safety of the State Committed Upon Foreign Territory", 19 *U. Pitt. L. Rev.* 567, 588 (1958).

[581] *See* M. AKEHURST, "Jurisdiction in International Law", 46 *B.Y.I.L.* 145, 159 (1972-73) (warning that the protective principle "loses all its validity when it is used, not to safeguard the political independence of the State claiming jurisdiction, but to undermine the political independence of other countries.") (assuming of course that the author is not a state organ enjoying foreign sovereign immunity under international or domestic law).

[582] International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, 2001, Articles 3-11.

[583] *See* M.R. GARCIA-MORA, "Criminal Jurisdiction Over Foreigners for Treason and Offenses Against the Safety of the State Committed Upon Foreign Territory", 19 *U. Pitt. L. Rev.* 567, 589 (1958). *See, e.g.*, Article 7 of the Draft Convention on Jurisdiction with Respect to Crime HARVARD RESEARCH ON INTERNATIONAL LAW, "Draft Convention on Jurisdiction with Respect to Crime", 29 *A.J.I.L.* 439, 543 (1935) ("A State has jurisdiction with respect to any crime committed outside its territory by an alien against the security, territorial integrity or political independence of that State, *provided that the act or omission which constitutes the crime was not committed in exercise of a liberty guaranteed the alien by the law of the place where it was committed.*") (emphasis added).

[584] *See* M.R. GARCIA-MORA, "Criminal Jurisdiction Over Foreigners for Treason and Offenses Against the Safety of the State Committed Upon Foreign Territory", 19 *U. Pitt. L. Rev.* 567, 590 (1958) (arguing that "there is a compelling need to develop a high degree of political integration of the international community. The fact, indeed, may have to be faced that future legal action in this area

possibly as utopian, or even if concluded, as unlikely to be implemented in practice, as a convention outlawing war is (such as the failed Kellogg-Briand Pact of 1928).[585] To be true, the flaws inherent in unilateral jurisdiction could be remedied by providing for an independent international tribunal competent to prosecute perpetrators of crimes against the security of the State, along the lines of the International Criminal Court. The prospects for the establishment of such a tribunal are however dim, as States will be reluctant to confer adjudicatory powers on a tribunal over offences against the security of a State, as States might have an interest in the commission of such offences. Especially in wartime, crimes of treason might yield important intelligence benefits for the warring parties. In spite of the bias potentially displayed by courts when exercising protective jurisdiction, one could however take comfort in the fact that protective jurisdiction is in practice hardly exercised, and that, when it is exercised, mostly after a war, it is only part of a wider emotional and State-sponsored climate of victor's justice.

4.4.2. Continental Europe

166. Unlike in common law countries, jurisdiction based on the protective principle usually exists as an independent jurisdictional principle in the criminal codes of continental Europe, although it is not widely used outside a war context[586]. It may be traced to the practice of 13th century Italian city-states.[587] In its codified form, it has its roots in the French Code of Criminal Procedure of 1808, of which the provision on protective jurisdiction (over crimes "against the security of the State, of counterfeiting the seal of the State, the national currency, national documents, or

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demands an overhaul of the basic principles upon which the international community has thus far rested.")

[585] *See* HARVARD RESEARCH ON INTERNATIONAL LAW, "Draft Convention on Jurisdiction with Respect to Crime", 29 *A.J.I.L.* 439, 553 (1935) ("In the present condition of the international community, it is doubtful whether substantial advance in this field through conventional agreement is to be anticipated.").

[586] Protective jurisdiction was widely exercised in the aftermath of the First and Second World War, especially in France and Belgium. *See* for France, *e.g.*, *In re Urios*, Court of Cassation (Criminal Chamber), January 15, 1920, H. LAUTERPACHT (ed.), *Annual Digest of International Law Cases* 1919-1920, at 107-108 (1932) ("Article 78 of the Penal Code, which punishes with imprisonment correspondence with the enemy such as that with which the accused was charged, was perfectly general in its terms and allowed no distinction to be drawn between Frenchmen and foreigners."); *In re Bayot*, Court of Cassation (Criminal Chamber), in H. LAUTERPACHT (ed.), *Annual Digest of International Law Cases* 1919-1920, at 109 (1932) ("Even if the right to punish, which emanates from the sovereign power, does not extend in principle beyond territorial limits, a contrary rule obtains in the case provided by Article 7 of the Code d'Instruction Criminelle which, based on the right of *légitime defense*, gives the French courts jurisdiction to take cognizance of crimes aimed at the security of the States committed outside French territory by a foreigner who has been arrested in France."). *See* for Belgium, *e.g.*, *Ministère Public* v. *D.M.*, Court Martial, Namur, May 25, 1945, *Annual Digest* 1946 at 138 (1951); *Morosini* v. *Belgian State*, October 21, 1946, *Annual Digest* 1946, at 138 (1951); *In re Friedman*, Court of Cassation, December 1, 1947, *Annual Digest* 1947 at 127, 128 (1951) (court ruling that the "acts of which the appellant is accused constitute crimes against the external safety of the State … even when they have been committed outside the territory of the Kingdom by an alien"); *Nusselein* v. *Belgian State*, Court of Cassation, February 27, 1950, in H. LAUTERPACHT (ed.), *International Law Reports* 1950 at 136 (1956).

[587] *See* M.B. KRIZEK, "The Protective Principle of Extraterritorial Jurisdiction: A Brief History and an Application of the Principle to Espionage as an Illustration of Current United States Practice", 6 *B.U. Int'l L.J.* 337, 339 (1988).

banknotes authorized by law")[588] – which was an answer to the revolutionary upheaval of the time – served as a model for other States.[589]

167. The offences over which protective jurisdiction could be exercised vary widely.[590] In the Netherlands, certain offences against the security of the State and against royal dignity, certain offences against public order, counterfeiting, and offences against internationally protected persons in Dutch service, are.[591] In Belgium, offences against the security of the State, forgery and counterfeiting are subject to independent protective jurisdiction.[592] France nowadays provides for protective jurisdiction over felonies and misdemeanours defined as violations of the fundamental interests of the nation, to forgery and counterfeiting of State seals, of coins serving as legal tender, banknotes or public papers (even if these offences harm the interests of foreign States rather than of France)[593], and over any felony or misdemeanour against French diplomatic or consular agents or premises committed outside the territory of the French Republic.[594]

§ 5 of the German Penal Code boasts a list of fifteen offences under the heading '*Auslandstaten gegen inländische Rechtsgüter*' (extraterritorial acts against domestic legal goods), thereby creating the impression that the protective principle covers a wide array of offences in Germany. In reality, jurisdiction over these offences is often not premised on the protective principle, but rather on the personality principle.[595] Offences that are subject to German protective jurisdiction in the strict sense are: the preparation of an aggressive war (against Germany), high treason (*Hochverrat*), endangerment of the democratic *Rechtsstaat* (although in certain cases the perpetrator ought to be German and have his center of living (*Lebensgrundlage*) in Germany), treason (*Landesverrat*) and endangerment of external security, and criminal acts against the country's defense (the same restrictions as in case of endangerment of the democratic *Rechtsstaat* apply).[596]

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[588] Original Articles 5 and 6 of the French Code of Criminal Procedure.

[589] *See* M.B. KRIZEK, "The Protective Principle of Extraterritorial Jurisdiction: A Brief History and an Application of the Principle to Espionage as an Illustration of Current United States Practice", 6 *B.U. Int'l L.J.* 337, 339-41 (1988). In France, protective jurisdiction was initially considered to be the only principle French courts could rely upon to haul foreigners before them for acts done abroad. *See* Cass. fr. (Crim.), *Fornage*, 84 J. du Palais 229 (1873) (holding that "except in the cases … founded on the right of legitimate self-defense, French tribunals are without power to judge foreigners for acts committed by them in a foreign country …").

[590] *See, e.g.*, J. REMMELINK, *Inleiding tot de Studie van het Nederlandse Strafrecht*, 14th ed., Gouda, Quint, 1995, 520 (arguing that the Dutch legislature's choice of offences subject to protective jurisdiction is arbitrary and divergent from what other States stipulate).

[591] Article 4, 1°-5° and 9° Dutch Penal Code. *See also* J. REMMELINK, *Inleiding tot de Studie van het Nederlandse Strafrecht*, 14th ed., Gouda, Quint, 1995, 528-31.

[592] Article 10, 1°-3° PT Belgian CCP.

[593] *See* F. DESPORTES & F. LE GUNEHEC, *Le nouveau droit pénal*, Vol. 1, 7th ed., Paris, Economica, 2000, at 333-34 (denouncing the ensuing exclusion of the *non bis in idem* requirement, making it possible for a foreign offender to be prosecuted in France for crimes committed against foreign interests abroad, even if he has already been tried for the offence abroad).

[594] Article 113-10 French CP.

[595] *See* K. LACKNER, *Strafgesetzbuch mit Erläuterungen*, 21nd ed., München, C.H. Beck, 1995, at 38-39 ("Die Vorschrift konkretisiert den Schutzgrundsatz, beruht zum Teil aber auch auf dem Personalgrundsatz") (references omitted). In German doctrine, passive personality jurisdiction is however considered to be an application of the protective principle protecting individual domestic interests. *See* J. MEYER, *supra*, at 113.

[596] § 5, 1-6 StGB.

168. The broad concept of protective jurisdiction employed in continental Europe is not a historical accident. As pointed out above, the extension of French laws to crimes against the security of State – which served as a model for other continental European States – finds its roots in the revolutionary time. Protective jurisdiction was also needed to clamp down on security-threatening activities performed by aliens against the State during the 20th century World Wars, activities which reached a scale not known in the United States or in the United Kingdom.[597]

4.4.3. England

169. Traditionally, England does not use the protective principle as an independent ground of jurisdiction for offenses that threaten the independence of its political institutions, such as crimes of treason. Instead, it relies on the legal concept of a "duty of allegiance" between the offender and the King (or Queen) of England[598]: only persons who the King protects, are considered to be subject to his laws (*protectio trahit subjectionem*), and conversely, because they are subject to his laws, they are protected by the King (*subjectio trahit protectionem*).

The "duty of allegiance" requirement initially implied that aliens residing abroad could not be hauled before English courts, because, being subject to another sovereign, they did not owe a duty of allegiance to the English King. Only aliens who resided *within* the territory could be indicted for treason. This made jurisdiction by English courts over treason a mere garden variety of traditional territorial jurisdiction. The *Calvin's Case*, a case decided in 1793, bears testimony to this restrictive jurisdictional approach. In this case, the House of Lords unambiguously stated that "if an alien enemy come to invade this realm, and be taken in war, he cannot be indicted for treason … for he never was in the protection of the King".[599]

From the early 20th century onwards however, English courts relaxed the strict standard – the bond of allegiance to the King – and moved away from a reliance on a rigid territoriality principle in England. They nevertheless did not *abandon* the *Calvin's Case's* "duty of allegiance" concept; they merely stretched its meaning.

170. In *Lodewyk Johannes de Jager* v. *The Attorney General of Natal*, a 1907 South African case (South Africa being at that time part of the British Empire), it was held that "[t]he protection of the State does not cease merely because the State forces, for strategical or other reasons, are temporarily withdrawn, so that the enemy for the time exercises the right of an army in occupation."[600] As the King's protection over a territory did not cease during occupation of that territory, acts done with that territory, such as collaboration with the enemy, also by aliens, remained subject to the English law, which could be enforced by the courts after the occupation has ceased: "[w]hen such territory reverts to the control of its rightful sovereign, wrongs done

[597] *See* M.R. GARCIA-MORA, "Criminal Jurisdiction Over Foreigners for Treason and Offenses Against the Safety of the State Committed Upon Foreign Territory", 19 *U. Pitt. L. Rev.* 567-68 (1958).
[598] *See, e.g.*, M.B. KRIZEK, "The Protective Principle of Extraterritorial Jurisdiction: A Brief History and an Application of the Principle to Espionage as an Illustration of Current United States Practice", 6 *B.U. Int'l L.J.* 337, 342 (1988).
[599] [1608] 4 Co. Rep. 1, 10-11 (1793).
[600] [1907] A.C. 326, 328-29.

during the foreign occupation are cognizable by ordinary courts. The protection of the sovereign has not ceased. It is continuous, though the actual redress of what has been done amiss may be necessarily postponed until the enemy forces have been expelled."[601]

171. In 1946 then, in another South African case, *Rex* v. *Neumann*, the Special Criminal Court of Transvaal held that even when a resident alien leaves the territory temporarily to fight for the King's forces in foreign territory, he still incurs a duty of allegiance to the King, and the King's courts may rightfully assert jurisdiction over the offense of treason that he commits outside the territory: "If on principle … it is the *protectio* which creates the obligation of allegiance, this court should … hold that when the accused left the country temporarily in consequence of his enlistment as a soldier in the Union Forces, his existing allegiance continued …"[602]

172. In another 1946 case, *Joyce* v. *Director of Public Prosecutions*, the House of Lords ruled that the duty of allegiance also applied to an alien accused of treason who held a British passport, even if he had obtained it through fraud, and even if he had never resided in England. The court ruled that on account of his holding a British passport, he was entitled to the protection of the King, and was thus subject to the King's laws (on treason): "[I]t appears that the Crown in issuing a passport is assuming an onerous burden, and the holder of the passport is acquiring substantial privileges … This rule [of protection] may be asserted by the holder of a passport which is for him the outward title of his rights."[603]

173. In the 20th century, the British courts have relaxed the "duty of allegiance" concept to the extent that even aliens residing abroad could be subject to British treason laws, provided they hold a British passport.[604] This remains however a far cry from the continental European practice of exercising jurisdiction over offenses against the security of the State, such as treason. Continental European States do not require any bond of allegiance between the offender and the State. Aliens who have never resided in the forum State nor hold a passport of this State, could be subject to the protective jurisdiction of the forum State by virtue of their mere threatening of its sovereignty and political independence, irrespective of their legal status. In communist countries, the reach of the protective principle was even more sweeping, in that it also applied to acts by aliens directed against the economic and social order of the State.[605]

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[601] *Id.*

[602] *See* H. LAUTERPACHT (ed.), *Annual Digest of Public International Law Cases*, 1949, at 239, 242-43 (1955).

[603] House of Lords, February 1, 1946, [1946] A.C. 347, 371.

[604] In *Joyce*, one of the law lords even seemed to endorse the protective principle as an independent legal ground in an *obiter dictum*, thereby impliedly abandoning the duty of allegiance requirement. *Id.*, at 372 (Lord Jowitt LC) ("No principle of comity demands that a state should ignore the crime of treason committed against it outside the territory. On the contrary, a proper regard for its security requires that all those who commit that crime, whether they commit it within or without the realm, should be amenable to its laws.").

[605] *See, e.g.*, Article 4(b) of the Hungarian Penal Code of 1950, quoted in S. GOROVE, "Hungary: International Aspects of the New Penal Code", 3 *Am. J. Comp. L.* 82 (1954); M.R. GARCIA-MORA, "Criminal Jurisdiction Over Foreigners for Treason and Offenses Against the Safety of the State Committed Upon Foreign Territory", 19 *U. Pitt. L. Rev.* 567, 582 (1958).

174. In spite of an English tradition wary of protective jurisdiction, proposals have been made to employ the protective principle as an independent jurisdictional ground so that English courts would be able to exercise jurisdiction over offenses of counterfeiting of English currency and forgery of English official documents committed abroad, offenses which are currently not offenses under English law.[606] The availability of protective jurisdiction over acts of terrorism directed against the State, in contrast, is no longer urgent, because a number of English statutes implementing international terrorism conventions provide for *universal* jurisdiction over such acts.[607]

4.4.4. United States

175. Like personality jurisdiction, both in its active and its passive form, protective jurisdiction also developed on case-by-case basis in the United States, without much intervention of a codifying legislature (as was the case in continental Europe).[608] As early as 1824, the U.S. Supreme Court recognized that "the authority of a nation … to secure itself from injury may certainly be exercised beyond the limits of its territory."[609] In spite of this apparent recognition of the legality of protective jurisdiction,[610] jurisdiction over acts that threatened the security and political independence of the United States was usually predicated on other principles: initially the English "duty of allegiance" concept[611], and later the territorial principle[612].

176. Territoriality may however not always be the proper jurisdictional ground to clamp down on offences against the security of the State. It would indeed require a stretch of the principle of territoriality to punish offences that threaten the security of the State but do not actually cause identifiable effects within the territory.[613] In the second half of the 20th century, U.S. courts therefore increasingly relied on the protective principle to bring these offences within the ambit of U.S. criminal law, as under this principle, no territorial effects are required.

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[606] M. HIRST, *Jurisdiction and the Ambit of the Criminal Law*, Oxford, Oxford University Press, 2003, 336.
[607] *Id.*
[608] *See* M.B. KRIZEK, "The Protective Principle of Extraterritorial Jurisdiction: A Brief History and an Application of the Principle to Espionage as an Illustration of Current United States Practice", 6 *B.U. Int'l L.J.* 337, 343 (1988).
[609] *Church* v. *Hubbart*, 6 U.S. (2 Cranch 187), 234-35 (1804). *See also United States* v. *Rodriguez*, 182 F.Supp. 479, 488 n. 8 (S.D. Cal. 1960); *United States* v. *Zehe*, 601 F. Supp. 196 (D. Mass. 1985) (holding that "Congress is competent to punish acts, wherever and by whomever committed, that threaten national security or directly obstruct government function.")
[610] From a constitutional perspective, the unenumerated foreign affairs power of Congress may justify it in exercising protective jurisdiction over crimes that affect the national security of the United States. G.R. WATSON, "The Passive Personality Principle", 28 *Tex. Int'l L.J.* 1, 30 (1993).
[611] *See* M.R. GARCIA-MORA, "Criminal Jurisdiction Over Foreigners for Treason and Offenses Against the Safety of the State Committed Upon Foreign Territory", 19 *U. Pitt. L. Rev.* 567, 575 (1958).
[612] *See* M.B. KRIZEK, "The Protective Principle of Extraterritorial Jurisdiction: A Brief History and an Application of the Principle to Espionage as an Illustration of Current United States Practice", 6 *B.U. Int'l L.J.* 337, 345 (1988). *See* for a critical appraisal: C.L. BLAKESLEY, "United States Jurisdiction over Extraterritorial Crime", 73 *J. Crim. L. & Criminology* 1109, 1135 (1982) (stating that "[m]ost United States courts and commentators confuse or at least fail to distinguish the objective territorial theory and the protective principle").
[613] *See* C.L. BLAKESLEY, "Extraterritorial Jurisdiction", in M.C. BASSIOUNI (ed.), *International Criminal Law II: Procedural and Enforcement Mechanisms*, 2nd ed., Transnational, Ardsley, NY, 1999, at 55.

177. Under the treason provision of the U.S. Code, only persons who owe allegiance to the United States, and levy war against them or adhere to their enemies, giving them aid and comfort within the United States or elsewhere, are guilty of treason.[614] Aliens not residing in the United States could not be guilty of treason, as U.S. Secretary of State Daniel Webster held in the 1851 *Thrasher's Case*: "Every foreigner born residing in a country owes to that country allegiance and obedience to its laws so long as he remains in it, as a duty upon him by the mere fact of this residence … [A]n alien or a stranger born, for so long a time as he continues within the dominions of a foreign government, owes allegiance to the laws of that government, and may be punished for treason or other crimes as a native-born subject might be …"[615] Aliens residing in the United States by contrast could be prosecuted for treason against the United States.[616] The exercise of jurisdiction over these aliens was not particularly controversial, firmly rooted as it was in the principle of territoriality.

178. Territoriality also informed jurisdiction over aliens who made false statements to U.S. officials, a crime which could possibly be subject to protective jurisdiction. In a 1933 and a 1943 case, jurisdiction over aliens who had made false statements to U.S. consular officials abroad was based on the legal fiction that consulates were U.S. territory.[617] After reliance on the territorial principle for purposes of establishing jurisdiction in the latter situation was rejected in 1955,[618] a U.S. court accepted in 1960 for the first time that "entry by an alien into the United States secured by means of false statements or documents is an attack directly on the sovereignty of the United States".[619] In so doing, it applied the protective principle without relying on territorial fictions. This stance was reiterated in a 1968 and a 1981 case.[620] In drug-smuggling cases however, the territorial principle was again invoked as a jurisdictional ground,[621] although other courts relied on the protective principle as an independent basis.[622] In a 1985 espionage case involving the transmission of

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[614] 18 U.S.C. § 2381.

[615] *See* 2 WHARTON, *A Digest of International Law of the United States*, §§ 190-357 (2d ed. 1887).

[616] *See, e.g.*, *Hannuer* v. *Doane*, 12 Wall. 342 (U.S. 1870); *Carlisle* v. *United States*, 16 Wall. 147 (U.S. 1872) (both cases involving the prosecution of resident aliens who aided the Confederate States during the American Civil War).

[617] *United States ex rel. Majka* v. *Palmer*, 67 F.2d 146 (7th Cir. 1933); *United States* v. *Archer*, 51 F. Supp. 708, 710 (S.D. Cal. 1943) (stating that "the offense was not committed in a foreign territory").

[618] *United States* v. *Baker*, 136 F. Supp. 546 (S.D.N.Y. 1955).

[619] *United States* v. *Rodriguez*, 182 F. Supp. 479 (S.D. Cal. 1960).

[620] *United States* v. *Pizzarusso*, 388 F.2d 8, 10 (2nd Cir. 1968), cert. denied, 392 U.S. 936 (1968) (defining the protective principle as "[the authority to] prescribe a rule of law attaching legal consequences to conduct outside [the State's] territory that threatens its security as a state or the operation of its governmental functions, provided the conduct is generally recognized as a crime under the law of states that have reasonably developed legal systems", and holding that lying to a consular officer constituted "an affront to the very sovereignty of the United States [and had] a deleterious influence on valid governmental interests"); *United States* v. *Khalje*, 658 F.2d 90 (2nd Cir. 1981).

[621] *See, e.g.*, *Rivard* v. *United States*, 375 F.2d 882, 885 (5th Cir. 1967), cert. denied, 389 U.S. 884 (1967) (ruling that "when a substantive offense is committed within the territorial limits of the United States, as the smuggling of the … heroin was here, the court has jurisdiction over an alien principle whose participation was all without those territorial limits."); *United States* v. *Egan*, 501 F. Supp. 1252 (S.D.N.Y. 1980) and *United States* v. *Mann*, 615 F.2d 668 (5th Cir. 1980).

[622] *United States* v. *Keller*, 451 F. Supp. 631 (D.P.R. 1978); *United States* v. *Newball*, 524 F. Supp. 715, 716 (E.D.N.Y. 1981) (holding that "for protective purposes, drug-smuggling threatens the security

classified U.S. documents relating to the U.S. anti-submarine defense system to the East German government by an alien, the protective principle was similarly invoked as an independent jurisdictional basis,[623] although traditionally, acts of espionage were only deemed to be punishable if committed by U.S. citizens.

179. Interestingly, the reliance on the territorial principle in the context of crimes that may actually give rise to protective jurisdiction under international law may not only be explained by the traditional justifications of territorial jurisdiction (evidence-gathering etc.), but also by U.S. hostility toward international law. Indeed, as KRIZEK has noted, the territorial principle is "strictly an invention of U.S. jurisprudence", whereas protective jurisdiction is an *international law* principle, the consideration of which by U.S. courts in deciding the cases before them, in the words of the Court of Appeals for the Second Circuit in the 1968 *Pizzarusso* case "may not be entirely free from doubt."[624]

4.5. Universality principle

180. PRINCIPLE – A last customary law principle is the much-disputed principle of universal jurisdiction, pursuant to which a State could claim jurisdiction over international crimes such as piracy, certain terrorist offences, genocide, war crimes or crimes against humanity committed abroad, committed by a foreigner and which do not threaten the State claiming jurisdiction. A link to statehood, be it the territory, the population or the sovereignty of the State is not required, as jurisdiction is based on the *nature* of the offence. There have however been attempts at introducing a territorial link, such as the presence of the criminal in the territory. At this moment, it is unsure whether international law permits jurisdiction by default. In chapter 10, the universality principle will be discussed at length.

181. STATE PRACTICE – Quite some criminal codes feature a provision conferring universal jurisdiction if the State is bound by international law to prosecute a particular offence.[625] Restrictive conditions often apply, such as the unavailability of civil party petition or the application of some sort of subsidiarity principle (see 10.11.3).[626] Some States also provide for unilateral, although usually uncontroversial, universal jurisdiction over offences such as sexual offences,[627] immigration offences,[628] corruption,[629] terrorism[630], offences involving nuclear energy, explosions or radiation,[631] attacks on air and see traffic,[632] traffic in human beings,[633] distribution

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and sovereignty of the United States by affecting its armed forces, contributing to widespread crime, and circumventing federal customs laws.").

[623] *United States* v. *Zehe*, 601 F. Supp. 196 (D. Mass. 1985). *See* for a discussion: M.B. KRIZEK, "The Protective Principle of Extraterritorial Jurisdiction: A Brief History and an Application of the Principle to Espionage as an Illustration of Current United States Practice", 6 *B.U. Int'l L.J.* 337, 349-55 (1988).

[624] 388 F.2d at 9.

[625] *See, e.g.*, Article 12*bis* PT Belgian CCP (referring to treaty law, customary international law and EU law); § 6, 9° StGB; Article 689 *et seq.* French CCP.

[626] *See, e.g.*, Article 12*bis* PT Belgian CCP.

[627] Article 10*ter*, 1°-2° PT Belgian CCP.

[628] Article 10*ter*, 3° PT Belgian CCP.

[629] *See, e.g.*, Articles 10*ter* and 10*quater* PT Belgian CCP.

[630] *See, e.g.*, Article 10, 6° PT Belgian CCP (universal jurisdiction over terrorist offences listed in Article 2 of the European Convention against terrorism committed in a State Party to this Convention, if the presumed offender is found in Belgium and is not extradited to another State Party).

[631] § 6, 2° StGB.

of narcotics,[634] distribution of pornography,[635] counterfeiting,[636] and subsidy fraud.[637] Universal jurisdiction over international crimes is often the subject of a specific statute.[638]

182. VICARIOUS JURISDICTION – A jurisdictional ground which resembles universal jurisdiction is vicarious or representational jurisdiction.[639] Under this ground, which is not widely used by States, States act as representatives of other States for the prosecution of an offence, if the act is also an offence in the territorial State and extradition is impossible for reasons not related to the nature of the crime.[640] Petty or political crimes are for instance not eligible for this type of jurisdiction since they are not extraditable offenses. In fact, these States do not represent the territorial State to the fullest extent possible as they apply their own laws and not the laws of the territorial State. In order not to distort the idea of representation too much, it appears warranted that they do not impose punishment in excess of what is allowed by the territorial State.[641]

It has been submitted that vicarious jurisdiction draws upon a Kantian world view, pursuant to which crimes may be considered as attacks on individual interests and not as breaches of a territorially limited 'King's peace'.[642] If an individual is harmed somewhere in the world, he is entitled to have his day in court anywhere in the world, provided that the harm is caused by an act which is a crime under both local and foreign law.

183. DIFFERENCE WITH UNIVERSAL JURISDICTION – Although the Harvard Research on International Law (1935) considered the principle of vicarious

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[632] § 6, 3° StGB.
[633] § 6, 4° StGB.
[634] § 6, 5° StGB. The legality of universal jurisdiction over distribution of narcotics is however controversial. German courts have therefore attempted to identify an additional nexus to Germany in particular cases. *See, e.g.*, BGH, *Dost*, 20 October 1976, *BGHSt* 27, S. 30 f.; BGH, *Dost*, 9 April 1987, *BGHSt* 34, S. 334 f. (arguing that, in a case in which a Dutch national sold drugs to German nationals in the Netherlands, after which the Germans imported the drugs into Germany and sold them there, "der Angeklagte die Voraussetzungen dafür geschaffen hat, dass eine gross Menge Hashisch in der Bundesrepublik vertelt werden können"). *See also* H.D. WOLSWIJK, *Locus delicti en rechtsmacht*, Gouda Quint, Deventer, Willem Pompe Instituut voor Strafrechtswetenschappen (Institute for Criminal Legal Science), Utrecht, 1998, at 48. It may be noted that over the somewhat similar situation of persons conspiring abroad to import narcotics into the U.S., U.S. courts exercise *objective territorial jurisdiction*. Cross-reference
[635] § 6, 6° StGB.
[636] § 6, 7° StGB.
[637] § 6, 8° StGB.
[638] *See* Code of Crimes Against International Law (Germany) and International Crimes Act (Netherlands).
[639] *See* J. MEYER, "The Vicarious Administration of Justice: An Overlooked Basis of Jurisdiction", 31 *Harv. Int'l L.J.* 108, 115-16 (1990).
[640] In a 1958 case, the Supreme Court of Austria defined representational jurisdiction as follows: "The extraditing State also has the right, in the cases where extradition for whatever reason is not possible, although according to the nature of the offence it would be permissible, to carry out a prosecution and impose punishment, instead of such action being taken by the requesting State." 28 *ILR* 341, 342 (1958).
[641] *Id.*, at 116 (although conceding that this view is not generally accepted).
[642] *See* I. CAMERON, "Jurisdiction and Admissibility Issues under the ICC Statute", in D. MCGOLDRICK, P. ROWE & E. DONNELLY (eds.), *The Permanent International Criminal Court. Legal and Policy Issues*, Hart, Oxford, Portland, Oregon, 2004, 78-79.

jurisdiction not as an autonomous jurisdictional ground but as a modality of the universality principle,[643] it may be argued that the two types of jurisdiction have a different rationale. The main difference between universal jurisdiction and representational jurisdiction is that States, when exercising representational jurisdiction, protect the interests of the territorial State, whereas, when exercising universal jurisdiction, they (supposedly) protect the interests of the international community. The rationale of acting on behalf of the territorial State renders the conditions of the exercise of representational jurisdiction by another State both more lenient and stricter. On the one hand, representational jurisdiction also applies to lesser crimes. On the other hand, its exercise is subject to the requirement of double criminality and the requirement that extradition proves impossible (the latter requirement actually implying the pre-eminence of the territorial or national State).[644] The requirement of double criminality may cause States espousing the principle of vicarious jurisdiction to underestimate the strength of sovereignty concerns. As under that principle, they only punish conduct which is also punishable in the territorial State, international conflict may be prevented. For common crimes, this may indeed be true. Yet it may not be for core crimes against international law, which are are usually committed in a politically charged context. They are often committed with the help or support of the territorial State. Their prosecution by a State other than the territorial State is therefore likely to raise sovereignty concerns, as the latter State will not consider the former to be its representative under some sort of representational principle.[645]

184. GERMANY – Vicarious or representational jurisdiction took root in Germany and Austria in the 19th century. § 7 (2), 2° of the German StGB currently sets forth that all offences by foreigners committed abroad may be subject to German penal law, if the conduct is punishable under the legislation of the territorial State (or if no State has authority over the place where the conduct has taken place), if the offender is found in Germany, and – although the Extradition Law permits the extradition on the basis of the nature of the offense – he or she is not extradited because an extradition request has not timely been filed, because it has been refused or because the extradition could not be executed.

185. FRANCE – In 2004, France adopted a law similar to the German law. France now applies its criminal law to any felony or misdemeanor subject to a penalty

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[643] The HARVARD RESEARCH ON INTERNATIONAL LAW, "Draft Convention on Jurisdiction with Respect to Crime", 29 *A.J.I.L.* 439, 573 (1935) (Article 10. *Universality* – other crime: " A State has jurisdiction with respect to any crime committed outside its territory by an alien … (a) When committed in a place not subject to its authority but subject to the authority of another State, if the act or omission which constitutes the crime is also an offence by the law of the place where it was committed, if surrender of the alien for prosecution has been offered to such other State or States and the offer remains unaccepted, and if prosecution is not barred by lapse of time under the law of the place where the crime was committed. The penalty imposed shall in no case be more severe than the penalty prescribed for the same act or omission by the law of the place where the crime was committed.") (emphasis added).

[644] *See* M. INAZUMI, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law*, Antwerp-Oxford, Intersentia, 2005, 111-113; J. MEYER, "The Vicarious Administration of Justice: An Overlooked Basis of Jurisdiction", 31 *Harv. Int'l L.J.* 108, 116 (1990).

[645] *See* I. CAMERON, "Jurisdiction and Admissibility Issues under the ICC Statute", in D. MCGOLDRICK, P. ROWE & E. DONNELLY (eds.), *The Permanent International Criminal Court. Legal and Policy Issues*, Hart, Oxford, Portland, Oregon, 2004, at 79-80.

of at least five years imprisonment committed outside France by an alien whose extradition to the requesting State has been refused by the French authorities because the offence for which the extradition has been requested is subject to a penalty or to a safety measure that is contrary to French public policy, or because the person in question has been tried in the aforesaid State by a court which does not respect the basic procedural guarantees and the rights of the defence, or because the matter in question shows the characteristics of a political offence.[646] The same restrictive conditions as those applying to the operation of the personality principle apply.[647]

4.6. The curse of concurring jurisdiction: towards jurisdictional reasonableness

186. CONFLICT POTENTIAL – Given the variety of jurisdictional grounds that States could rely upon, the odds of normative competency conflicts between States are high. In the case of a citizen of State X committing a crime in State Y against a citizen of State Z, all three States may have jurisdiction, on the basis of the territoriality principle, the active personality principle or the passive personality principle. What is more, if the crime is an international crime that gives rise to universal jurisdiction, every single State may have jurisdiction, irrespective of a nexus with the crime.

187. NO JURISDICTIONAL HIERARCHY – Although the paramountcy of territoriality has been asserted – territoriality being the basic rule and other heads of jurisdiction the exceptions – [648] the international law of jurisdiction does not seem to

[646] Article 113-8-1, para. 1 French CP.
[647] *Id.*, para. 2.
[648] *See, e.g.*, F.A. MANN, "The Doctrine of Jurisdiction in International Law", 111 *R.C.A.D.I.* 1, 90 (1964-I) ("In a large number of cases the local law will have to be allowed to prevail, for every other solution would be destructive of justice and international intercourse."); J.H. BEALE, "The Jurisdiction of a Sovereign State", 36 Harv. L. Rev. 241, 252 (1923) (arguing that "any exercise of [active personality jurisdiction] must be subject to the higher authority of the act of the sovereign within the jurisdiction of whose law it is done"); G. FITZMAURICE, "The General Principles of International Law", *R.C.A.D.I.* 1, 212, vol. 92 (1957-II) ("The territorial and the personal jurisdictions … are concurrent, not mutually exclusive jurisdictions, although there are limits, both natural and formal, to the extent to which they can be simultaneously *exercised* or enforced – and in this respect it is the personal that, in the nature of the case, defers to the territorial."); *Id.*, at 216 (concluding that "the supreme principle of penal jurisdiction is territorial"); A.V. LOWE, "Blocking Extraterritorial Jurisdiction: the British Protection of Trading Interests Act, 1980", 75 *A.J.I.L.* 257, 266 (1981) (noting that while "the notion of "paramountcy" of jurisdiction is difficult to pin down" … "general principles of international law, and to some extent state practice, would suggest that there were a doctrine of "paramountcy" to be accepted, priority would be given to states claiming territorial jurisdiction…" (footnotes omitted); M. INAZUMI, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law*, Antwerp-Oxford, Intersentia, 2005, 179-181 (citing the extradition law practice of requested States refusing to extradite the perpetrator of a crime committed in their territory, while at the same time noting the practice of requested States refusing to extradite their own nationals); G.R. WATSON, "The Passive Personality Principle", 28 *Tex. Int'l L.J.* 1, 17 (1993) (pointing out that "the host state's interest in preserving order at home [under the territoriality principle] outweighs the interests of either the victim's or offender's home state in regulating conduct abroad", while noting that "[w]hen resolving jurisdictional disputes, states sometimes put nationality jurisdiction on a par with territorial jurisdiction"); European Court of Human Rights, *Bankovic and others* v. *Belgium and 16 other Contracting States*, Application No. 52207/99, December 12, 2001, § 60 ("[A] State's competence to exercise jurisdiction over its own nationals abroad is subordinate to that State's and other States' territorial competence."); *Laker Airways Ltd.* v. *Sabena*, 731 F.2d 909, 935-36 (D.C. Cir. 1984) ("The purported principle of paramount nationality is entirely unknown in national and international law. Territoriality, not nationality, is the customary and

prioritize the bases of jurisdiction.[649] There is no rule prohibiting States from establishing concurrent jurisdiction over one and the same situation on the basis of territoriality, nationality or universality.[650] Nor may there appear there to be a rule obliging States to exercise their jurisdiction reasonably,[651] although this will be put in perspective in the next chapter. Clearly, the classical doctrine of international jurisdiction, a doctrine which defines "the legally relevant point of contact" as "indicating the State which has a close, rather than the closest, connection with the facts",[652] and is thus not concerned with exclusivity of jurisdiction, (regrettably) fails to solve normative competency conflicts.[653]

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preferred base of jurisdiction." […] "In fact, international law recognizes that a state with a territorial basis for its prescriptive jurisdiction may establish laws intended to prevent compliance with legislation established under authority of nationality-based jurisdiction" […] "It would be difficult or impossible to determine when the nationality of a corporation is sufficiently strong that legitimate territorial contacts should be nullified.").

A further question is whether objective territoriality prevails over subjective territoriality. It may be argued that States affected by extraterritorial acts have a greater interest in regulation than the State from which territory the harmful effects originate. MAIER has however argued against this reasoning that "[t]he nation that is the *situs* of the acts necessarily has a similar self-interest in determining whether the acts in question should be reprehended. That self-interest is defined by the *situs* state's freedom as an independent sovereign to govern its own society within its territory." H.G. MAIER, "Jurisdictional Rules in Customary International Law", in K.M. MEESSEN (ed.), *Extraterritorial Jurisdiction in Theory and Practice*, London/The Hague/Boston, Kluwer, 1996, 64, 69.

[649] *See Laker Airways Ltd.* v. *Sabena*, 731 F.2d 909, 935 (D.C. Cir. 1984) ("[N]o rule of international law or national law precludes an exercise of jurisdiction solely because another state has jurisdiction", citing Restatement (Third) § 402 comment b); K.M. MEESSEN, "Antitrust Jurisdiction Under Customary International Law", 78 *A.J.I.L.* 783, 801 (1984) (arguing, in the context of extraterritorial antitrust, that "state practice has not yet resulted in consistency on jurisdictional priorities such as "paramount nationality""); A.V. LOWE, "Blocking Extraterritorial Jurisdiction: the British Protection of Trading Interests Act, 1980", 75 *A.J.I.L.* 257, 267 (1981) (arguing that the supposed "paramountcy" of territoriality may be no more than a "principle of comity"); *See* A. BIANCHI, Reply to Professor Maier, in K.M. MEESSEN (ed.), *Extraterritorial Jurisdiction in Theory and Practice*, London/The Hague/Boston, Kluwer, 1996, 74, 84 (arguing that "the presumption of state sovereignty, underlying the *Lotus* case, implies the logical impossibility of setting priorities among conflicting sovereign prerogatives") (footnotes omitted). *Contra* Separate Opinion of Judges Higgins, Kooijmans, and Buergenthal, *Arrest Warrant*, § 59, advocating the primacy of national jurisdiction over universal jurisdiction ("A State contemplating bringing criminal charges based on universal jurisdiction must first offer to the national State of the prospective accused person the opportunity itself to act upon the charges concerned."); M. INAZUMI, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law*, Antwerp-Oxford, Intersentia, 2005, 128; R.S. CLARK, "Offenses of International Concern: Multilateral State Treaty Practice in the Forty Years Since Nuremberg", 57 *Nordic J. Int'l L.* 59 (1988) (arguing that, given the order of the heads of jurisdiction in the conventions providing for universal jurisdiction, nationality or territoriality jurisdiction prevails over universal jurisdiction); C.L. BLAKESLEY, "Extraterritorial Jurisdiction", in M.C. BASSIOUNI (ed.), *International Criminal Law II: Procedural and Enforcement Mechanisms*, 2nd ed., Transnational, Ardsley, NY, 1999, at 82.

[650] *Laker Airways Ltd.* v. *Sabena*, 731 F.2d 952 ("There is no principle of international law which abolishes concurrent jurisdiction").

[651] *Id.* ("There is […] no rule of international law holding that a "more reasonable" assertion of jurisdiction mandatorily displaces a "less reasonable" assertion of jurisdiction as long as both are, in fact, consistent with the limitations on jurisdiction imposed by international law."). The D.C. Circuit in *Laker Airways* did not see "neutral principles on which to distinguish judicially the reasonableness of the concurrent, mutually inconsistent exercises of jurisdiction […]". *Id.*, at 953.

[652] *See* F.A. MANN, "The Doctrine of Jurisdiction in International Law", 111 *R.C.A.D.I.* 1, 46 (1964-I).

[653] *Id.*, at 10. In private suits, courts at times issue antisuit injunctions so as to prevent private parties from filing a parallel lawsuit in another forum having jurisdiction. *See* for a cascade of antisuit injunctions by British and American courts: *Laker Airways Ltd.* v. *Sabena*, 731 F.2d 909 (D.C. Circuit 1984).

188. SOLVING NORMATIVE COMPETENCY CONFLICTS – The risk of normative competency conflicts was already recognized by the P.C.I.J. in *Lotus*. In *Lotus*, the Court – which granted States jurisdictional discretion as a matter of international law – believed that the restraining principles used by States could not prevent the outbreak of conflicts over jurisdiction. Time has proved the court right. Two international law methods to render jurisdictional principles more efficient in delimiting spheres of competence could be conceived of. Either States agree upon a convention that sets out precisely on what ground, for what purpose and under what conditions they could exercise jurisdiction, or States strengthen the principles of jurisdictional restraint under customary international law. In *Lotus*, the first approach was taken:

> "[I]t is in order to remedy the difficulties resulting from [the great variety of rules] that efforts have been made for many years past, both in Europe and America, to prepare conventions the effect of which would be precisely to limit the discretion at present left to States in this respect by international law, thus making good the existing lacunae in respect of jurisdiction or removing the conflicting jurisdictions arising from the diversity of the principles adopted by the various States." [654]

189. Over the ensuing decades, conventions have been signed, but treaty law could never account for all normative competency conflicts. Most notably in tax matters, bilateral and multilateral treaties indeed remedy jurisdictional conflicts. In the fields of criminal law, antitrust law and securities law by contrast, a multilateral framework with clear rules and supervising mechanisms is still largely lacking. A jurisdictional framework based on customary international law may therefore be needed. However, as will be elaborated upon in section 5.4, it is unclear whether customary international law indeed provides guidance. States undeniably exercise jurisdictional restraint, but do they do so as a matter of international law? As MAIER put it, solutions to conflicts of international jurisdiction are not found in international law, but "in an accommodation process operating outside the limits of formal international law … described by the principle of international comity"[655], or in the words of BIANCHI, "by resorting to an equitable balance of equally legitimate claims".[656] In the next chapter, the jurisdictional comity principle and the technique of interest-balancing as methods to ensure a reasonable exercise of jurisdiction will be discussed.

190. TOWARDS THE NEXT CHAPTER: JURISDICTIONAL REASONABLENESS – Emphasis will be put on economic jurisdiction in chapter 5, because the jurisdictional

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[654] *Id.* The P.C.I.J. appears to play down the importance of the classical principles of jurisdiction ("the diversity of the principles") such as the territoriality, nationality, universality and protective principle: these principles would be randomly applied by the various States and would possibly not be anchored in international law. The random application of the principles of jurisdiction may explain why the P.C.I.J. did not rely on the passive personality principle, and did not emphasize the links of the case with Turkey, most notably the fact that Turkish nationals had died as a result of the collision on the high seas. It neglects the said principles and confines itself to stating that "prohibitive rules" (without clarifying which) may limit extraterritorial jurisdiction in certain cases.

[655] *See* H.G. MAIER, "Jurisdictional Rules in Customary International Law", in K.M. MEESSEN (ed.), *Extraterritorial Jurisdiction in Theory and Practice*, London/The Hague/Boston, Kluwer, 1996, 64, 69.

[656] *See* A. BIANCHI, Reply to Professor Maier, in K.M. MEESSEN (ed.), *Extraterritorial Jurisdiction in Theory and Practice*, London/The Hague/Boston, Kluwer, 1996, 74, 84.

rule of reason, set forth in § 403 of the Restatement (Third) of U.S. Foreign Relations Law (1987), has been specifically developed to deal with conflicts of economic laws, conflicts that had been significantly sharpened in the post-war era, especially in a transatlantic context. The jurisdictional rule of reason could, given its generic nature, however also apply to the exercise of criminal jurisdiction. This implies that, while the exceptional grounds of jurisdiction discussed in chapter 4 are *prima facie* valid, jurisdictional assertions based on them should be subject to a reasonableness analysis. In practice, reasonableness has not played a very explicit role in circumscribing the ambit of a State's criminal laws. This is largely attributable to the fact that the historical trail of the criminal law is much longer than the trail of economic law, and that States have, over the centuries, found ways to accommodate each other's sovereign interests. In this chapter, it has been shown how States have clausulated the exercise of active personality, passive personality, protective, and representational jurisdiction by requiring double criminality, intervention of the highest prosecutors, or complaints of the victim or the foreign State, limiting the exercise of jurisdiction to certain (classes of) offences, or excluding civil party petition. None of these limitations probably corresponds to a duty under international law. Because the system of criminal jurisdiction works generally well, a tightening of the international legal framework may not appear a priority. It would however be useful for national courts and prosecutors if they were able to rely on a set of principles (aside from the national jurisdictional requirements they obviously have to comply with) which could guide them to assess the appropriateness of exercising jurisdiction in a given case. National restrictions do indeed not wholly prevent concurrent jurisdiction from arising. As long as concurrent jurisdiction exists, there should be a method of designating the State which has, objectively, the best case for exercising jurisdiction.

191. In chapter 5, it will be argued that the rule of reason, developed in the United States, and which requires the balancing of sovereign and private interests, may provide a solution. This study supports reasonableness. However, because the rule of reason may put too much emphasis on the sovereign interests of States, part III, drawing *inter alia* on insights developed in chapter 5.7, will propose an alternative solution to jurisdictional conflicts. This solution places the interests of the international community center-stage. For the criminal law discussed in this chapter 4, this would imply that, in line with what has been set out in chapters 2 and 3, territoriality is the basic principle of jurisdiction, and that, accordingly, the territorial State should enjoy primacy of criminal jurisdiction. However, as impunity for crimes is not in the interests of humanity, as MATTHAEUS already pointed out three centuries ago[657] - and with whose ideas of substantive justice being meted out without geographical constraints we largely concur – other States, with some link to the offence, should be authorized to exercise jurisdiction on a subsidiary basis if the territorial State fails to adequately do so.

CHAPTER 5: THE JURISDICTIONAL RULE OF REASON

192. The system of international jurisdiction allows the exercise of concurrent jurisdiction by more than one State. Especially in the field of economic law, this system yields unsatisfactorily outcomes, as business-restrictive or fraudulent

[657] *See* chapter 3.1.

practices may wreak worldwide havoc, because it may ignite jurisdiction by any single State over one and the same economic transaction. A multiplicity of jurisdictional assertions by different States ordinarily gives rise to international tension. Rules should therefore be devised on the basis of which jurisdiction is conferred on the State with a strong, or even better, the strongest link with the matter to be regulated.

193. In order to restrain assertions of jurisdiction, courts and regulators typically rely on the principle of international comity. In its jurisdictional version, this principle limits the reach of a State's laws by requiring that States (and their courts and regulators) recognize the laws of States with a stronger link with the case, and thus, that States with a weaker link with the case do not apply their own laws (section 5.1). Comity is however essentially a discretionary concept and not a norm of customary international law. Attempts have therefore been made to elevate comity to an international law status, most notably by making it part of an analysis of jurisdictional reasonableness under § 403 of the U.S. Restatement (Third) of Foreign Relations Law (section 5.2). The actual customary international law status of the jurisdictional rule of reason is however doubtful (sections 5.4 and 5.6). Indeed, in Europe in particular, a standard of reasonableness, and its concomitant balancing of interests, may run counter to basic tenets of the continental system of judicial jurisdiction and private international law (section 5.5).

194. The relationship between the rule of reason and the presumption against extraterritoriality may be equally fraught with problems, as ordinarily, if it is the intent of Congress to apply a statute extraterritorially, courts are not entitled to second-guess it in light of the rule of reason, whether this rule constitutes international law or not (section 5.3). Eventually, some alternative accounts of reasonableness will be presented (section 5.7). While the classical comity-inspired rule of reason draws heavily on the concept of sovereignty, emphasizing links with and interests of *States*, more recent approaches have instead emphasized global economic efficiency, and transnational or global solidarities. These approaches obviously constitute even less customary international law than the rule of reason set forth in § 403 of the Restatement. However, because they emphasize the interests of the international community over the interests of States, they may be the way forward for an equitable system of jurisdiction. In the final part III of this study, a new theory of jurisdiction will be proposed, revolving around the principle of subsidiarity. This theory respects State sovereignty, and grants jurisdiction to the State with the strongest link to a legal situation – in line with the rule of reason set out in this chapter 5 – yet, in the interest of the international community, it grants *subsidiary* jurisdiction to other States with weaker links to the situation.

5.1. Comity

195. PRINCIPLE – Black's Law Dictionary defines comity of nations or *comitas gentium* as "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience and to the rights of its own citizens or of other

persons who are under the protection of its laws."[658] Comity is a traditional diplomatic and international law concept used by States in their dealings with each other. Short of legal obligation, States respect each other's policy choices and interests in a given case,[659] without inquiring into the substance of each others' laws.[660] Comity is widely believed to occupy a place between custom and customary international law.[661]

196. JUDICIAL COMITY AND PRESCRIPTIVE COMITY: U.S. V. EUROPE – In the context of jurisdiction, a useful distinction could be made, in the words of U.S. Supreme Court Justice SCALIA in his dissenting opinion in *Hartford Fire*, between "comity of the courts" (judicial comity) and "prescriptive comity". While the latter refers to "the respect sovereign nations afford each other by limiting the reach of their laws",[662] the former refers to the discretion that the courts enjoy to "decline to exercise jurisdiction over matters more appropriately adjudged elsewhere […]".[663]

When exercising judicial comity, U.S. courts generally rely on the Supreme Court's following characterization of comity in *Hilton* v. *Guyot* (1895): "'Comity,' in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws."[664] In *Hilton*, the Supreme Court held that comity is and must be an uncertain rule, which depends on a variety of circumstances.[665]

In the jurisdictional practice of European States, comity plays only a marginal role. Although comity is not unknown in Europe, it is generally not used by the courts as a

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[658] *Black's Law Dictionary*, 6th ed., St. Paul, West Publishing, 1990, 267. In general, the principle of (judicial) comity refers to courts of one state or jurisdiction giving effect to laws and judicial decisions of another state or jurisdiction, not as a matter of obligation but out of deference and mutual respect.

[659] *See* B. PEARCE, "The Comity Doctrine as a Barrier to Judicial Jurisdiction: A U.S.-E.U. Comparison", 30 *Stan. J. Int'l L.* 525, 529 (1994). Pearce described comity as "a friendly gesture of reciprocity or even unilateral goodwill not required by international law", but he also observed that comity and international law are separated by a "revolving door" in that "a non-binding norm may transcend the jurisprudential purgatory of comity and enter the higher realm of international law; by the same token, disregarding a norm of international law may cause it to descend to comity's less lofty domain." *Id.*, at 529-30.

[660] *See* K.A. FEAGLE, "Extraterritorial Discovery: a Social Contract Perspective", 7 *Duke J. Comp. & Int'l L.* 297, 301 (1996).

[661] *See* J. SCHWARZE, "Die extraterritoriale Anwendbarkeit des EG-Wettbewerbsrechts – Vom Durchführungsprinzip zum Prinzip der qualifizierten Auswirkung", in: J. SCHWARZE (ed.), *Europäisches Wettbewerbsrechts im Zeichen der Globalisierung*, Baden-Baden, Nomos, 2002, 55; G. SCHUSTER, *Die internationale Anwendung des Börsenrechts*, Berlin, Springer, 1996, 677 (arguing that the boundary between comity and customary international law is a thin one); *Contra*: F.A. MANN, "The Doctrine of Jurisdiction Revisited after Twenty Years", 186 *R.C.A.D.I.* 9, 87 (1984-III) ("In truth "comity" is only another word for international law"). In any event, no claim has ever been brought before an international tribunal alleging that a State violated the principle of comity. *See* J.R. PAUL, "Comity in International Law", 32 *Harv. Int'l L.J.* 1, 10 (1991).

[662] *Hartford Fire Insurance Co.* v. *California*, 509 U.S. 764, 817 (1993) (Scalia, J., dissenting).

[663] *Id.*

[664] *Hilton* v. *Guyot*, 159 U.S. 113, 163-64 (1895).

[665] *Id.*, at 164. *See also Saul* v. *His Creditors*, 5 Mar. (n.s.) 569, 596 (La. 1827) (stating that "comity is, and ever must be, uncertain")..

jurisdictional concept in the adjudication of transnational disputes,[666] nor has it been used by European States and regulators to limit the reach of their laws and regulations. Rather, the executive and legislative branches use comity as a concept denoting non-binding diplomatic good manners. In its strict public international law version, comity is known in continental Europe as *comitas gentium*, "courtoisie internationale" or "Völkercourtoisie".[667] If it is used in its judicial version, such happens mostly out of concern "for the consistency of the status of individual nationals and residents", rather than out of respect for foreign sovereigns.[668]

197. RELATION TO CUSTOMARY INTERNATIONAL LAW PRINCIPLES – In spite of its unclear legal status, comity is related to a number of customary international law principles. Firstly, it is closely linked to the jurisdictional principle of non-interference, "according to which where two states have jurisdiction to lay down and enforce rules and the effect of those rules is that a person finds himself subject to contradictory orders as to the conduct he must adopt, each state is obliged to exercise its jurisdiction with moderation."[669] Secondly, comity may be related to the principle of territoriality, the basic principle of international jurisdictional order which some claim has priority over other jurisdictional principles, in that it may require the State with the weaker link to defer to the State with the stronger (territorial) link. And thirdly, comity may be tied to the principle of sovereign equality, because it may ensure that acts done within a given State's territory are not subject to the jurisdiction of a more powerful State.

198. ECONOMIC LIBERALISM – In the contemporary economically interdependent world, comity may have an important role to play in easing jurisdictional tensions caused by socio-economic globalization.[670]. It has been linked to economic liberalism in that "it structures the relationships between domestic and

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[666] PAUL has traced a number of European cases decided on comity grounds. *See* J.R. PAUL, "Comity in International Law", 32 *Harv. Int'l L.J.* 1, 30-31 (1991). These cases typically deal with public international law themes such as foreign sovereign immunity or diplomatic immunity, and not with private disputes. Even in England, a common law country like the U.S., the use of comity is not widespread and not used in private international law cases. Discussing a number of English cases, Paul submits that it is used as "a synonym for tolerance or substantive justice, diplomatic immunity, sovereign immunity, or most commonly, public international law in general", or as a means of "fencing out intrusive U.S. jurisdiction rather than limits [English] jurisdiction". *Id.*, at 42-43 (footnotes omitted). Comity and interest-balancing may not play a great role in the England's practice of jurisdiction, as England is reluctant to assert extraterritorial jurisdiction in the first place. *See* G. SCHUSTER, *Die internationale Anwendung des Börsenrechts*, Berlin, Springer, 1996, 671.

[667] *See* B. PEARCE, "The Comity Doctrine as a Barrier to Judicial Jurisdiction: A U.S.-E.U. Comparison", 30 *Stan. J. Int'l L.* 525, 527 (1994).

[668] *Id.*, at 550.

[669] INTERNATIONAL COURT OF JUSTICE, *Barcelona Traction Light & Power Company*, 6 *ICJ Rep.* (1970), 105, concurring opinion of Judge FITZMAURICE. *See also* M.P. BROBERG, "The European Commission's Extraterritorial Powers in Merger Control: The Court of First Instance's Judgment in *Gencor* v. *Commission*", 49 *I.C.L.Q.* 172, 179 (2000) ("Whether or not one submits to the view that the principle of non-interference and the principle of international comity are distinct, there is no doubt that they are closely related. The principle of non-interference requires that one State shows restraint in interfering the matters of another State, whereas the principle of international comity requires that where there are competing jurisdictions, the authorities show restraint when exercising their respective jurisdictions.").

[670] *Compare Laker Airways* v. *Sabena*, 731 F.2d 909, 937 (D.C. Cir. 1984) (holding that "[c]omity is a necessary outgrowth of our international system of politically independent, socio-economically interdependent nation states".).

foreign actors by providing incentives for pursuing long term interactions with one another."[671] Comity may confer badly needed legal certainty on international commercial transactions, as it ensures that economic actors could interact with each other without unexpected regulatory interference from another State than their home State. Although comity might require a State to defer to another State in a given case, such deference may actually further the interests of all States, as all States have an abstract, reciprocal interest in facilitating international commerce.[672]

199. ORIGINS – Although comity as a judicial doctrine is nowadays almost exclusively applied by U.S. courts, it has its roots in 17th century Dutch conflict of laws thinking. The ideas of the Dutch school, of Ulrik HUBER in particular, traveled first to Scotland – Scottish students usually went to Holland to deepen their legal knowledge – and from there to England[673] and the United States in the second half of the 18th century.[674] Dutch-style comity was first referred to by the U.S. Supreme Court in 1827 in *Ogden* v. *Saunders*.[675] It gained widespread acceptance in the U.S. after being espoused by STORY in his "Commentaries on the Conflict of Laws" in 1834.[676] STORY considered the comity doctrine to be at the roots of the system of conflict of laws:

> "The true foundation on which the administration of international law must rest is that the rules which are to govern are those which arise from mutual interests and utility, from a sense of the inconveniences which would result from a contrary doctrine, and from a spirit of moral necessity to do justice, in order that justice may be done to us in return."[677]

200. Comity fell on fertile soil in the United States and quickly gained ascendancy as a method of adjudicating private disputes, partly because of the federal structure of the U.S. As PEARCE has noted, since American federal judges were "[l]ong accustomed to adjudicating competing jurisdictional demands of the [American] states", they "should be relatively well suited to the type of international interest balancing that comity often requires".[678] U.S. courts traditionally placed limits

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[671] *See* S.E. BURNETT, "U.S. Judicial Imperialism Post "Empagran v. F. Hoffmann-Laroche"?: Conflicts of Jurisdiction and International Comity in Extraterritorial Antitrust", 18 *Emory Int'l L. Rev.* 555, 612-13 (2004))

[672] *See, e.g.*, H.L. BUXBAUM, "The Private Attorney General in a Global Age: Public Interests in Private Antitrust Litigation", 26 *Yale J. Int'l L.* 219, 262 (2001) (arguing, in the context of a U.S. comity-informed interest-balancing test in the antitrust field (see section 6.7) that "[u]sing an unnuanced characterization of antitrust interests as sovereign policies in order to render those interests unweighable [*i.e.*, the extraterritorial application of U.S. laws without taking into account notions of comity] prevents courts in statutory antitrust litigation from considering the full range of U.S. interests at stake.").

[673] *Robinson* v. *Bland*, 1 W.Bl. 234, 256, 96 Eng. Rep. 120, 141, 2 Burr. 1077, 97 Eng. Rep. 717 (K.B. 1760) (citing Huber and a general principle of conflicts law established *ex comitate et jure gentium*)..

[674] *See* K.H. NADELMANN, "Introduction to H.E. Yntema, The Comity Doctrine", 65 *Mich. L. Rev.* 1, 2 (1966) (pointing out that Huber was first quoted in the United States in 1788, in *Camp* v. *Lockwood*, 1 Dall. 393, 398 (Phila. County, Pa, C.P. 1788)).

[675] *Ogden* v. *Saunders*, 25 U.S. (12 Wheat.) 212 (1827).

[676] J. STORY, *Commentaries on the Conflict of Laws, Foreign and Domestic*, Section 33, at 33 (1834) (Chapter II).

[677] *Id.*, Section 35, at 34.

[678] *See* B. PEARCE, "The Comity Doctrine as a Barrier to Judicial Jurisdiction: A U.S.-E.U. Comparison", 30 *Stan. J. Int'l L.* 525, 571-72 (1994).

on the exercise of jurisdiction on the basis of the constitutional principle of due process, which requires weighing the adjudicatory interests of the plaintiff, the defendant and the state. Weighing the interests of a *foreign State* for the purpose of establishing personal jurisdiction as well, *i.e.*, applying comity, then merely stands "on the shoulders of due process".[679]

201. COMITY IN THE 17TH CENTURY DUTCH PROVINCES – The comity doctrine as a method to solve conflicts of laws did not originate in 17th century Holland by chance. As YNTEMA has pointed out, the seven Dutch Provinces that wrested independence from Spain at the end of the 16th century lacked a central authority and provided thus a fertile field for conflicts of laws.[680] At the same time, the needs of commerce made the Netherlands remarkably open to foreigners.[681]

Comity was introduced in an embryonic form by Paulus VOET, a professor at the Academy of Utrecht, who listed it as one of the exceptions to the principle of territoriality of statutes. VOET held that "at times, when a people wishes to observe the customs of a neighboring people in comity and in order that many valid transactions may not be disturbed, it is customary for statutes to apply beyond the territory of the legislator".[682] In VOET's writings, comity appears as a discretionary act of a State giving legal effect to acts done outside its territory. Comity does not so much operate as a constraint on the (extraterritorial) application of a forum State's laws (as it would later become in regulatory cases), but rather as a constraint on the exclusive territorial application of the forum State's laws. Put differently, comity was synonymous with a willingness to apply *ex comitate* a foreign State's laws in the forum State's territory, an application which is 'extraterritorial' from the perspective of the foreign State. Importantly, a State was not to apply a foreign sovereign's laws in its territory "as of right, but on the grounds of utility by custom or treaty."[683] This obviously confers a distinctively discretionary character on the concept of comity, which it still has today.[684]

202. Ulrik HUBER, a professor at the Academy of Franeker in Friesland, elaborated on the comity concept and gave it a foundation in a rational natural law of nations (*jus gentium*), which was developed a few decades earlier by his compatriot Hugo GROTIUS[685]:

> "[E]ven if not required by treaty or by reason of subordination, the reason of the common practice among nations nonetheless compels mutual indulgence in this respect. For if one nation were to refuse to recognize in any way the

[679] *Id.*, at 573.
[680] H.E. YNTEMA, "The Comity Doctrine", 65 *Mich. L. Rev.* 1, 18 (1966).
[681] *Id.*, at 19, noting that the idea of comity may be implicitly discerned in Article XVII of the Union of Utrecht (1579), in which the Provinces undertook "to administer good law and justice to foreigners and citizens alike".
[682] P. VOET, *De Statutis eorumque Concursu* (1661), as translated in H.E. YNTEMA, "The Comity Doctrine", 65 *Mich. L. Rev.* 1, 22 (1966).
[683] *Id.*, at 24.
[684] *Id.*, at 28 (noting that "today as then, it is assumed that it is for each State to determine, as a matter of domestic law, the extent to which effect is given to foreign laws and judgments.").
[685] *See* notably H. GROTIUS, *De Jure Belli ac Pacis Libri Tres*, Indianapolis, Liberty Fund, 2005.

> laws of another, an infinite number of acts and contracts would each day become of no effect, nor could commerce by land and by sea subsist."[686]

The comity doctrine is closely connected to the principle of territorial sovereignty, as HUBER precisely inferred from the absolute sovereignty of a State within its territory that "the laws of each nation exercised within its territory, are effective everywhere, insofar as the interests of another State or its citizens are not prejudiced."[687] This implies that transactions that are done in a State where they are valid ought to be given legal effect in another State, unless there is an overriding interest of the forum (*ordre public*). Conversely, if transactions are null in the State where they are done, a foreign State should not give them legal effect, unless it can assert an overriding interest to do so.[688]

203. *LOTUS*: PROGENY OF 17TH CENTURY DUTCH COMITY – It is a small step from stating, as HUBER did, that territorial laws are effective everywhere, if there are no prohibitive rules to the contrary, to stating that international law leaves States a wide measure of discretion in extending the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, which is only limited in certain cases by prohibitive rules, as the Permanent Court of International Justice did in the *Lotus* case. The outcome of the *Lotus* case, while seemingly at odds with the intuitively felt presumption against extraterritoriality, may therefore be considered to be directly based on HUBER's concept of territorial sovereignty.[689]

For our purposes, it is important to note that HUBER, as did later the P.C.I.J. in *Lotus*, recognized the possible existence of limits to the application of a forum State's laws in another State's territory. Indeed, States are only expected to apply another State's laws *ex comitate*. In HUBER's theory, it is however unclear in what situations States should give effect to a foreign State's law. Put differently, a legal standard that sets out clear limits on the application of a foreign State's law appears to be lacking. As his definition of an overriding interest of the forum – limiting the extraterritorial application of a foreign State's law – is left entirely to the forum invoking it, HUBER's comity remains a discretionary concept.[690]

204. FROM HUBER TO THE 20TH CENTURY JURISDICTIONAL RULE OF REASON – In the field of general private international law, an intricate set of conflict-of-laws

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[686] As translated in H.E. YNTEMA, "The Comity Doctrine", 65 *Mich. L. Rev.* 1, 25-26 (1966).
[687] *Id.*, at 26.
[688] *Id.*, at 26-27. If one were to apply this concept to modern-day extraterritorial antitrust law, this would imply that a State should not apply its own laws to a foreign conspiracy that is legal in the territory where it has been entered into, unless that State can assert overriding public interests, such as the extent of the conspiracy's effects on its domestic economy (the *effects* doctrine).
[689] *See* H.G. MAIER, "Jurisdictional Rules in Customary International Law", in K.M. MEESSEN (ed.), *Extraterritorial Jurisdiction in Theory and Practice*, London/The Hague/Boston, Kluwer, 1996, 64, 69-70 (noting that HUBER's concept "comports with the conclusion, reached centuries later in the *Lotus* case, that there is no compulsion external to the forum to give effect to the laws or decision of the foreign state.").
[690] *Compare* H.E. YNTEMA, "The Comity Doctrine", 65 *Mich. L. Rev.* 1, 30-31 (1966) ("[I]n the last analysis the solution of conflicts of laws is a prerogative of sovereign authority, in the views of some exercised primarily to protect the local governmental interest and, where it seems expedient in this interest, to satisfy the requirements of international commerce", not so much referring to Huber, but rather to the progeny of Hobbes, Pufendorf and Voet).

rules was later developed, not always successful,[691] to make comity less malleable and more systematic and predictable for international actors. Similarly, in the field of criminal law, a rule-based framework of international jurisdiction was put in place, either based on prohibitive rules (*Lotus*) or on permissive rules (the principles of jurisdiction under customary international law). Comity, in its pristine purity, fell nonetheless somewhat into oblivion as a principle of solving jurisdictional conflicts. Toward the end of the 20th century however, it made a remarkable comeback, especially in the United States. Comity was not only rediscovered, but at the same transfigured into a jurisdictional rule of reason *under public international law.*

As pointed out, in HUBER's concept, comity remained discretionary. Nonetheless, in his writings HUBER already referred to the international law foundations of his comity concept. This ought to imply that comity has intersubjective, and not only discretionary, meaning. Comity would have contours which all States could agree on, including the scope of an 'overriding interest of the forum'. HUBER however failed to clarify at the conceptual level the international law character of comity. In the 20th century, courts and legal scholars, especially in the United States, and to a lesser extent in Germany, picked up the thread of comity from where it had been left by HUBER. Challenged by jurisdictional conflict in the field of antitrust law, they objectivized comity, and baptized it 'the jurisdictional rule of reason'. The rule of reason restrains the exercise of jurisdiction through weighing the interests and connections of the case with the States and individuals involved. Unlike comity, the rule of reason is not a subjective rule, but – purportedly – an objective norm of customary international law by which all States have to abide.[692]

5.2. The jurisdictional rule of reason of § 403 of the Restatement (Third) of U.S. Foreign Relations Law (1987)

205. THE ANTITRUST ORIGINS OF THE RULE OF REASON – In 1945, the Supreme Court had held in the *Alcoa* antitrust case, that the United States could exercise its jurisdiction over foreign antitrust violations provided that these violations caused domestic effects.[693] Since foreign nations also started to take a keen interest in antitrust policy after the Second World War, U.S. effects-based jurisdiction over corporations' foreign business restrictive practices was bound to give rise to international tension. As will be discussed in the chapter on antitrust jurisdiction, U.S. antitrust courts soon qualified the effects doctrine by requiring direct, substantial, and reasonably foreseeable effects. In spite of this jurisdictional restraint, conflict potential did not appear to subside. As will also be set out in the next chapter, toward the end of the 1970s, courts superimposed another test of jurisdictional restraint.[694]

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[691] *Compare id.*, at 31 (calling to "resurrect the *jus gentium* of the Seventeenth Century in the guise of transnational law or the general principles of law" and referring to international custom as a source of law).

[692] The difference between comity and the rule of reason lies herein that the former "reflects [- *Lotus*-style -] *the state's freedom* under the law to choose the path most likely to encourage reciprocal action by other states in later situations", whereas the latter reflects "the limitations of *international law*". *See* H.G. MAIER, "Jurisdictional Rules in Customary International Law", in K.M. MEESSEN (ed.), *Extraterritorial Jurisdiction in Theory and Practice*, London/The Hague/Boston, Kluwer, 1996, 64, 72 (emphasis added).

[693] *United States v. Aluminium Corp. of America*, 148 F.2d 416 (2d Cir. 1945).

[694] *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir. 1976); *Mannington Mills v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979). In the context of the enforceability of forum selection

This test required antitrust courts to inquire "whether the interests and the links to the United States - including the magnitude of the effect on American foreign commerce - are sufficiently strong *vis-à-vis* those of other nations, to justify an assertion of extraterritorial authority."[695] This interest-balancing test soon found its way to the jurisdictional provisions of the draft for a new Restatement of U.S. Foreign Relations Law. In 1987, the new Restatement was adopted, and the interest-balancing test featured prominently in § 403 as a general rule of jurisdictional restraint under international law, the application of which admittedly grew out of, but was no longer limited to international antitrust cases.

206. NATURE OF A RESTATEMENT – Before discussing § 403 of the Restatement, it may be useful to remind the reader that a Restatement is not an official document of the United States. It is drawn up by the American Law Institute (ALI), an unofficial influential body of leading legal practitioners and academics, established in 1923 to promote the "clarification and simplification of the law and its better adaptation to social needs",[696] and is thus a doctrinal work. Its content does not necessarily reflect American foreign relations law or general international law, although, as an authoritative document, it might contain the "principles derived from international law, for determining when the United States may properly exercise regulatory (or prescriptive) jurisdiction over activities or persons connected with another state."[697]

207. SECTION 403 – § 403 (1) of the 1987 Restatement (Third) obliges the United States to refrain from exercising prescriptive jurisdiction which it may have under § 402 "with respect to a person or activity having connections with another State when the exercise of such jurisdiction is unreasonable."[698] Drawing on § 6 of the Restatement (Second) of Conflicts and on the Third Circuit's 1979 *Mannington Mills* decision, it set forth in § 403 (2) that:

> "Whether exercise of jurisdiction over a person or activity is unreasonable is determined by evaluating all relevant factors, including, where appropriate:

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clauses by U.S. courts, the U.S. Supreme Court had emphasized jurisdictional reasonableness as early as 1972, when it stated in *M/S Bremen* v. *Zapata Off-Shore Company*, 407 U.S. 1 (1972) that the U.S. "cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws and resolved in our courts.").

[695] *Timberlane*, 549 F.2d 613.

[696] G.C. HAZARD, *Jr.*, foreword to Restatement (Third), at xi.

[697] *See United States* v. *Nippon Paper Indus. Co.*, 109 F.3d 1, 11 (1st Cir. 1997) (Lynch, J., dissenting), *cert. denied*, 522 U.S. 1044 (1998).

[698] The rule of reason may arguably draw on the prohibition of *unreasonable* search and seizure in the American Bill of Rights. *See* remarks by A. LOWENFELD, in Panel Discussion on the Draft Restatement of the Foreign Relations Law of the United States, 76 *Proc. Soc'y Int'l L.* 184, 192 (1982) (citing the use of the rule of reason in the Bill of Rights in support of its being elastic but not meaningless). § 402 states that the U.S. has jurisdiction on the basis of the classical principles of jurisdiction. It has been argued, quite convincingly, that the tradtional theories are only factors to reasonableness, which is the actual basis of jurisdiction. *See* C.L. BLAKESLEY, "Extraterritorial Jurisdiction", in M.C. BASSIOUNI (ed.), *International Criminal Law II: Procedural and Enforcement Mechanisms*, 2nd ed., Ardsley, NY, Transnational, 1999, at 41. The connecting factors (primarily territoriality and nationality) that underpin the classical principles are indeed factors used in the reasonableness analysis conducted under § 403 of the Restatement.

(a) the link of the activity to the territory of the regulating state, i.e., the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;
(b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;
(c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;
(d) the existence of justified expectations that might be protected or hurt by the regulation;
(e) the importance of the regulation to the international political, legal or economic system;
(f) the extent to which regulation is consistent with the traditions of the international system;
(g) the extent to which another state may have an interest in regulating the activity; and
(h) the likelihood of conflict with regulation by another state."

Conspicuously, while § 40 of the Restatement (Second) of American Foreign Relations Law still emphasized States' pre-existing jurisdiction – which States may be required to moderate in case of a direct conflict – § 403 emphasizes that any actual exercise of jurisdiction is subject to the requirement of reasonableness, even when there is only a potential or no conflict at all.[699] Obviously, if any jurisdictional assertion is subject to a reasonableness requirement, private plaintiffs might stand a lower chance of success. This seems however to be the price to pay for international stability.[700]

208. GENERIC CHARACTER OF THE RULE OF REASON – § 403 sets forth a general framework for the application of the rule of reason to all fields of the law by courts, legislatures, as well as administrative agencies. In practice, legislatures are not adepts of the rule of reason, since, as non-repeat-players, they may lack sensitivity about the extraterritorial effects of their legislation.[701] § 403 thus suggests a 'generic' rule of reason that could be applied across-the-board, regardless of the particular field

[699] See Reporters' note 10 to Section 403 (stating that reasonableness is "an essential element in determining whether, as a matter of international law, States may exercise jurisdiction to prescribe."); A. LOWENFELD, in Panel Discussion on the Draft Restatement of the Foreign Relations Law of the United States, 76 *Proc. Soc'y Int'l L.* 184, 194 (1982).
[700] *Contra* D.P. MASSEY, "How the American Law Institute Influences Customary Law: The Reasonableness Requirement of the Restatement of Foreign Relations Law", 22 *Yale J. Int'l L.* 419, 443 (1997) (arguing that the rule of reason is undesirable as it "tilts the playing field [...] in favor of the defendant.").
[701] *See See* A. BIANCHI, Reply to Professor Maier, in K.M. MEESSEN (ed.), *Extraterritorial Jurisdiction in Theory and Practice*, London/The Hague/Boston, Kluwer, 1996, 74, 86. It may also be argued that the legislature need not heed the rule of reason to the same extent as other actors do, as "[n]o really cares before the law is implemented, at which point there is still occasion to call for restraint". *See* K.M. MEESSEN, "Drafting Rules on Extraterritorial Jurisdiction", in K.M. MEESSEN (ed.), *Extraterritorial Jurisdiction in Theory and Practice*, London/The Hague/Boston, Kluwer, 1996, 225, 226.

of substantive law concerned.[702] Its use in selected contexts is however elaborated upon in subsequent sections,[703] although the rule of reason referred to in these sections draws to a large extent on § 403. It may nonetheless be noted that the generic rule of reason is based on the use of the rule of reason in selected contexts, and not *vice versa*. It goes to the Restatement's drafters' credit that they devised a rule of reason from jurisdictional principles that lay scattered over different fields of substantive law.[704]

209. BALANCING – The essence of the rule of reason is that a legitimate U.S. interest does not in itself justify an assertion of jurisdiction.[705] Only after "evaluating all relevant factors" (not all factors may be relevant to any dispute) including foreign interests, and if U.S. interests and contacts eventually outweigh foreign interests and contacts, could U.S. law possibly apply to foreign situations.[706] It should indeed not be forgotten that, as one commentator has forcefully pointed out, "a jurisdictional scheme is valid only insofar as it gives [the principles of comity and predictability] precedence over national interests."[707] Thus, the rule of reason requires that a State balances the interests of any State affected by a possible jurisdictional assertion.[708] This implies, on the one hand, that the exercise of jurisdiction over foreign situations does not of itself run counter to the principle of non-intervention, but, on the other hand, that the asserting States inquires into the strength of a foreign State's policy interests in not having another State dictate what laws ought to govern situations arising in their territory.[709]

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[702] X., Note, "Predictability and Comity: Toward Common Principles of Extraterritorial Jurisdiction", 98 *Harv. L. Rev.* 1310, 1321 (1985).

[703] These sections include tax (§§ 411-413), foreign subsidiaries (§ 414), antitrust (§ 415), securities (§ 416), foreign sovereign compulsion (§ 441) and transnational discovery (§ 442).

[704] *A contrario* X., Note, "Predictability and Comity: Toward Common Principles of Extraterritorial Jurisdiction", 98 *Harv. L. Rev.* 1310 (1985) ("Because the doctrine of extraterritoriality has developed independently within different areas of substantive law, too little attention has been paid to devising a set of common principles that can guide the discussion."). *See also* Section 5.6.

[705] X., Note, "Predictability and Comity: Toward Common Principles of Extraterritorial Jurisdiction", 98 *Harv. L. Rev.* 1310, 1320 (1985) (stating that "[t]he interests of a single country do not in themselves dictate the scope of its legitimate authority").

[706] *See* for a European supportive voice: J.-M. BISCHOFF & R. KOVAR, "L'application du droit communautaire de la concurrence aux entreprises établies à l'extérieur de la Communauté", 102 *J.D.I.* 675, 714 (1975) (stating that « [L]a mise en œuvre [of the principle of jurisdictional restraint imposes] une analyse contextuelle de tous les intérêts impliqués en la cause. »).

[707] X., Note, "Predictability and Comity: Toward Common Principles of Extraterritorial Jurisdiction", 98 *Harv. L. Rev.* 1310, 1323 (1985).

[708] A jurisdictional assertion not only implies a finding that the forum State laws govern a particular situation, but also the remedial or punitive measures imposed after such a finding. It may be reasonable for a State to apply its laws to a situation, but unreasonable to impose certain measures to be executed by the foreign defendant (*e.g.*, industrial reorganization, divestitures, …). *Compare* J.-M. BISCHOFF & R. KOVAR, "L'application du droit communautaire de la concurrence aux entreprises établies à l'extérieur de la Communauté", 102 *J.D.I.* 675, 726 (1975) (stating that in the American judge, in imposing certain measures on foreign defendants in the *I.C.I.* and *Swiss Watchmakers* antitrust cases (105 F. Supp. 215 (S.D.N.Y. 1952) and 1963 Trade Cas. 70,600 (S.D.N.Y. 1962), 1965 Trade Cas. 71,352 (S.D.N.Y. 1965)) « s'immisce dans le fonctionnement d'institutions qui échappent à son pouvoir de juger et de décider »).

[709] *Compare* P.J. KUYPER, "European Community Law and Extraterritoriality: Some Trends and New Developments", 33 *I.C.L.Q.* 1013, 1021 (1984) (arguing that "[i]t is possible … to prescribe conduct in a foreign country which goes against a policy of that country, but much would depend on how firmly that policy is integrated in the socio-economic order of that country as a whole.").

Reporters' note 6 to the § 403 provides guidance for a determination of competing State interests, stating that "[i]n weighing the interests of a foreign state, a court in the United States may take into account indications of national interest by the foreign government, whether made through a diplomatic note, a brief *amicus curiae*, a declaration by government officials in parliamentary debates, press conference, or communiqués."[710] Foreign States need however not explicitly assert their interests by intervening in a given case. It may indeed be argued that courts and regulators have a duty to track foreign States' interests *proprio motu*.[711]

210. PUBLIC V. PRIVATE INTERESTS – What is most interesting about the factors set forth in § 403, is that they are not only aimed at mediating conflicts of jurisdiction *between States*. They are also aimed at providing legal certainty on *private actors*' conduct and transactions.[712] Notably "the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated"[713], and "the existence of justified expectations that might be protected or hurt by the regulation"[714] may be cited in this respect. The rule of reason enshrined in § 403 thus appears as a remarkable hybrid creature that combines the purpose of public international law rules of prescriptive jurisdiction, aimed at delimiting States' sovereign spheres of action, and the purpose of private international law rules of judicial jurisdiction, aimed at conferring legal certainty on private actors conduct and transactions by identifying the proper judicial forum for hearing private claims.

Under public international law, private interests are ordinarily not relevant.[715] This holds all the more true in the law of jurisdiction, which delimits States' spheres of competence with sole regard to States' interests. It appears a travesty that a State may exercise jurisdiction under international law over a situation because such might serve the interests of a particular individual, while at the same time encroaching upon the sovereignty of another State.

In this vein, relying on the public international law principle of non-interference which arguably undergirds the rule of reason, MEESSEN has argued in 1984 that, for purposes of the crystallization of a customary international law norm, only sovereign

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[710] *See also* K.M. MEESSEN, "Antitrust Jurisdiction under Customary International Law", 78 *A.J.I.L.* 783, 806 (1984) (arguing that "[s]pecific statements of the domestic government and the foreign government are helpful, but they are not dispositive from the point of view of international law. They would have to be related to policy trends as laid down, for instance, in statutory enactments or in general pronouncements of policy.").

[711] *See* G. SCHUSTER, *Die internationale Anwendung des Börsenrechts*, Berlin, Springer, 1996, 676.

[712] *See* on the burdens on private actors that may be caused by the exercise of 'extraterritorial' jurisdiction: Policy Statement of the International Chamber of Commerce, "Extraterritoriality and business", 13 July 2006, Document 103-33/5 (on file with the author) ("The extraterritorial application of national laws frequently subjects companies to conflicting or overlapping legal requirements, fosters unpredictability, increases the risks involved in commercial activities, exposes companies to overly burdensome litigation in foreign jurisdictions, and inflates legal and other transactions costs."). *See* for European support for balancing private interests: J.-M. BISCHOFF & R. KOVAR, "L'application du droit communautaire de la concurrence aux entreprises établies à l'extérieur de la Communauté", 102 *J.D.I.* 675, 713 (1975)

[713] § 403 (2) (b) of the Restatement.

[714] § 403 (2) (d).

[715] *See* G. SCHUSTER, *Die internationale Anwendung des Börsenrechts*, Berlin, Springer, 1996, 23, 690.

interests should be taken into account.[716] A child of his time, he argued that "there is little room for individual hardship arguments in antitrust cases at a time when the very basis for human rights in customary international law is still insecure."[717] However, those days are long gone, and international law is nowadays no longer exclusively concerned with narrowly defined rights and obligations of States. Rights and duties under international law are gradually being extended, to other, non-State actors, such as international organizations, non-governmental organizations, corporations and individuals. In the field of human rights, the legality of individual liability for gross human rights violations is now firmly anchored in international law, as the spread of international criminal tribunals and the use of universal jurisdiction by national courts since the 1990s attest to.

It appears that, from a normative point of view, the interests of individuals – the classical concern of private international law – could legitimately be taken into account for purposes of the public international law of jurisdiction, even if their home State has no interest in the matter. No international law norm may prevent States from consensually deciding to attach as much weight to foreign *individual* interests as to foreign *sovereign* interests. It may be noted that this is only to say that private interests should not *a priori* be excluded from the realm of public international law. It is not to say that States have *actually* reached the stage of consensus over *what* private interests should be relevant under the public international law of jurisdiction.

211. A clash between private and public interests is however not the order of day in the law of jurisdiction. Indeed, there is often not much of a dichotomy between private and public interests, as it is not unusual that the interests of governments and individuals *c.q.* corporations coincide, especially in the field of economic law. Corporations may represent an important part of the national economy. Foreign regulation then comes at a cost for corporations and their home States alike. Corporations will have to comply with foreign rules on top of domestic rules, which may reduce their profits, and thereby lower the tax income of their home States. Home States will thus have an incentive to support their corporations in opposing foreign regulation.

Large corporations are moreover often highly skilled in lobbying their governments in order for the latter to take a particular jurisdictional stance beneficial to the former. It may be noted that corporations may even have so much lobbying power that they are able to convince governments to take a particular position, even though, as LOWENFELD has argued, these governments "may well have been sympathetic to the [positions of the State asserting its jurisdiction]."[718] An argument could conceivably, although hardly persuasively, be made that the concept of State sovereignty is endowed with *jus cogens* character, which would render it a concept that States are not allowed to tamper with at will, for instance by subordinating State interests to private interests. A more common sense approach is that, in assessing foreign

[716] *See* K.M. MEESSEN, "Antitrust Jurisdiction under Customary International Law", 78 *A.J.I.L.* 783, 804 (1984). MEESSEN formulates the international law norm as follows: "a state is prohibited from taking measures of antitrust law if the regulatory interests it is pursuing are outweighed by the interests of one or more foreign states likely to be seriously injured by those measures."
[717] *Id.*, at 803.
[718] A.F. LOWENFELD, "Public Law in the International Arena: Conflict of Laws, International Law, and Some Suggestions for Their Interaction", 163 *Recueil des Cours* 311, 397 (1979-II).

governmental protests, it may not be warranted for the State asserting its jurisdiction to deconstruct the opinion of the foreign government: sovereign protest is sovereign protest, even if it vindicates private interests to the detriment of the actual interests of the sovereign which acts as their transmission belt.

212. VOLUNTARY SUBMISSION – Although State interests and the interests of private persons residing in or incorporated in the State concerned are ordinarily aligned, in rare cases, it may nevertheless happen that a corporation welcomes foreign regulation, for instance because this increases its credibility in the eyes of foreign investors, while its home State opposes the regulation for patriotic or economic motives. It appears that under public international law, which is (in spite of the broadening of its sphere of relevant actors) still mainly concerned with State interests, the interest of the home State to be free from foreign regulation thrust upon subjects under its territorial jurisdiction (a legal interest which derives from the historical principles of State sovereignty and non-interference) should prevail over the corporation's interest. Nonetheless, in some circumstances, the private interest may arguably prevail. It could for instance be argued that parties are, under private law, entitled to enter into a private contract featuring a clause stating that the contract will be governed by a foreign State's law, even if that law undermines important policies of one of the parties' home State.[719] Furthermore, it seems that a party is entitled to voluntarily transmit materials for use as evidence in a foreign proceeding, because such action does, legally speaking, not amount to a measure of evidence-*taking* in which the party's home State has an interest.[720]

Whether foreign persons could automatically become subject to the criminal jurisdiction of another State by voluntarily surrendering to that State for trial purposes (ordinarily, the presence of an accused who is present abroad is forcibly brought about by means of extradition) is doubtful. If a State's jurisdictional assertion exceeds what is allowed under public international law, the accused could arguably not justify the overreach. He could not possibly be considered to have waived his home State's sovereign rights of protest against another State's exercise of jurisdiction by his mere act of voluntary submission to the latter State's jurisdiction. Professor TOMUSCHAT's argument that, although the Spanish trial of the Argentine torturer Adolfo Scilingo under the universality principle (2005) appears controversial from the perspective of the international law of jurisdiction over core crimes against international law, Scilingo's "decision of his own volition [to surrender to the Spanish judiciary] ultimately provides a sound jurisdictional basis for his conviction",[721] should therefore probably be rejected.

213. MULTIPLE REASONABLENESS – It may happen that the jurisdictional assertions of several States could be considered reasonable on the basis of the factors set forth in § 403(2) of the Restatement. For these situations, § 403(3) states that each State then "has an obligation to evaluate its own as well as the other state's interests in exercising jurisdiction, in light of all the relevant factors, including those set out in § 403(2)", and that a State should defer "to the other state if that state's interest is

[719] *See* chapter 8.1.4 for submission clauses in the field of export controls.
[720] *See* R.A. TRITTMANN, "Extraterritoriale Beweisaufnahmen und Souveränitätsverletzungen im deutsch-amerikanischen Rechtsverkehr", 27 *Archiv des Völkerrechts* 195 (1989)
[721] C. TOMUSCHAT, "Issues of Universal Jurisdiction in the *Scilingo* Case", 3 *J.I.C.J.* 1074, 1081 (2005).

clearly greater." A comment to § 403(3) adds that the provision only comes into play in case of 'true conflict', *i.e.*, when one State requires what another prohibits, or vice versa.[722] § 403(3) does not seem to contemplate the situation where it would be reasonable for each of two States to exercise jurisdiction, but the prescriptions by the two States are not in direct conflict. This might imply that both States could concurrently exercise their reasonable jurisdiction, which may obviously burden persons and corporations with two layers of, albeit non-contradictory, regulation.[723]

214. Regrettably, if § 403(3) of the Restatement only solves 'true' jurisdictional conflicts, conflicts between jurisdictions rather than between laws remain unsolved, for instance where one State has deliberately chosen not to put in place a regulatory framework, and another State applies its own regulations to activities taking place in the former States. In order to solve such conflicts, it could be argued that the standard of reasonableness in § 403(2) should be applied more strictly. If reasonableness is readily accepted, the purpose of the conflict rule enshrined in § 403 – identifying the State with the most significant relationship to the matter – is indeed not adequately served. Alternatively, one could erase § 403(3)'s restriction of normative competency conflicts to "true conflicts", so that in situations in which it is reasonable for more than one State to exercise jurisdiction without the respective jurisdictional assertions necessarily being in "true" conflict (but nevertheless in conflict), the State with the smaller interests ought nevertheless to defer to the State with the greater interest on the basis of the factors set forth in § 403(2) through application of § 403(3). Either way, while their methodology might somewhat differ, both approaches resort to an application of the interest-balancing factors set forth in § 403(2) in order to identify the State with the greater interest. At any rate, the confusion surrounding the relationship between § 403(2) and § 403(3) may cast doubt on the customary international law character of the specific operation of the rule of reason contemplated by the Restatement.[724]

5.3. Relationship of the jurisdictional rule of reason with the presumption against extraterritoriality

215. RULE OF REASON AND THE LEGISLATURE – § 403 of the Restatement, which sets forth the jurisdictional rule of reason, does not mention the relationship between a clear statement of Congress and the operation of the rule of reason. This is because the rule of reason is a rule which 'the State', which logically includes the courts, the executive branch *and* the legislative branch, ought to comply with. For the drafters, Congress is not infallible if it comes to reasonableness, or, put differently,

[722] § 403, cmt. e.

[723] The Supreme Court in *Hartford Fire* (see subsection 6.7.3) seemed to rely on this 'loophole' in order to justify its true conflict doctrine (509 U.S. 799), without however first ascertaining whether it would be reasonable for the States concerned to exercise their jurisdiction. Justice SCALIA has, in this study's view, in his dissenting opinion, correctly pointed out that § 403(3) comes into play only after § 403(1) and (2) have been complied with, *i.e.*, after it has been determined that the exercise of jurisdiction by both of the two States is not "unreasonable" (509 U.S. 821). The majority replied to this objection that true conflict was "the only substantial issue before the Court" (509 U.S. 799, note 25), implying that it was irrelevant whether the U.S. assertion of jurisdiction was reasonable under § 403(2). This reasoning wholly undermines the operation of the rule of reason.

[724] *See also* G. SCHUSTER, *Die internationale Anwendung des Börsenrechts*, Berlin, Springer, 1996, 687.

the territorial scope of an act is not necessarily reasonable because the act is enacted by the legislature.

216. ROLE OF HIERARCHY – In spite of the apparent across-the-board application of the jurisdictional rule of reason, there are traces of deference to a clear statement of Congress, unreasonable as it may be, discernible in the comments to § 403. Comment c for instance states that "the reasonableness of the exercise of jurisdiction may differ with the level at which the decision is taken". The drafters illustrate that statement with a comparison between a directive of Congress and a decision by the SEC with the same content, pointing out that the directive of Congress may be considered reasonable and the SEC decision not. The drafters may have believed that an organ imbued with a higher measure of democratic legitimacy, such as Congress, is more likely to produce decisions containing reasonable assertions of jurisdiction than an administrative and hierarchically lower organ is. If this were indeed their belief, it is nonetheless often belied by the facts. Administrative agencies such as the SEC deal with foreign actors on a day-to-day basis, which makes them generally more accommodating to foreign concerns. A SEC decision is ordinarily more likely to contain reasonable jurisdictional assertions than a congressional act is. The exemptions granted by the SEC to the requirements of the extremely strict congressional Sarbanes-Oxley Act make such abundantly clear. Thus, somewhat surprisingly, a rule of inverse hierarchy may often go a longer a way in preventing jurisdictional conflict. Under this rule, the lower the hierarchical position of a State actor, the higher the odds of the actor exercising jurisdiction reasonably.

217. CHARMING BETSY – Comment c on the chameleon role of the rule of reason – a rule taking a different color depending on the institutional environment in which it is found – may be linked with comment g, another comment tangentially dealing with the presumption against extraterritoriality. In this comment, the drafters admit that, at times, a "construction of a statute that accommodates the intent of Congress within the limits of [the] international law [rule of reason] is not fairly possible". They deplore this, but in line with a string of precedents, they could only 'restate' that such a statute is valid. Comment c can be squared with comment g in that the drafters seem to believe that there is some international wiggle room for Congress (comment c) but that in spite of the elasticity of the rule of reason, some jurisdictional assertions of Congress are so outrageous that they can impossibly withstand the *Charming Betsy* test (with the rule of reason serving as the international law norm in light of which Congressional acts ought to be reviewed).

It appears that what might be unreasonable in the eyes of the international community might be reasonable from a domestic U.S. perspective just because the act containing the jurisdictional assertion originates from a democratically elected actor, whom other, less-democratic actors, such as a perceived 'international community' or the judiciary, are not allowed to second-guess. Such a reading is obviously anathema to the sanctification of the rule of reason as a rule of international law (comment a to § 403). If the rule of reason is indeed a clearly defined international rule, all State actors should be bound by it to the same extent.

218. REGULATORY CRIMINAL LAW – A final reference to the clear statement rule or presumption against extraterritoriality could be found in comment f to § 403. In this comment, the drafters state that "the presence of substantial foreign elements

will ordinarily weigh against application of [regulatory] criminal law (*i.e.*, antitrust and securities criminal law)" and that, therefore, in such cases, "legislative intent to subject conduct outside the state's territory to its criminal law should be found only on the basis of express statement or clear implication."

By referring to "express statement or clear implication", the drafters did not aim at restricting the three-pronged *Foley Bros.* test to ascertain congressional intent supposedly prevailing at the time of the Restatement in criminal matters. Rather, they believed that in regulatory criminal law matters, courts should await congressional instruction and should not determine reasonableness *proprio motu*. It is unclear from the wording of comment f whether the courts should defer to the legislature in all criminal regulatory law cases, or only when foreign elements outweigh domestic elements.[725] The latter interpretation should probably be rejected, as, if foreign elements outweigh domestic elements, courts should anyway have dismissed the expansion of jurisdiction because the criteria of the rule of reason were not met. As also set forth in comment g, if extraterritorial application is deemed desirable, Congress could overrule the rule of reason by stating clearly that it intends to apply a criminal law extraterritorially even if foreign elements weigh against extraterritorial application. However, it could be argued that the former interpretation is not defensible either. There is no compelling argument to authorize courts to assess the reach of a criminal statute of a general nature pursuant to the rule of reason without ascertaining congressional intent, while prohibiting courts from applying the rule of reason when they assess the reach of a *regulatory* criminal statute. Not surprisingly, the criminal/civil divide was later rejected in antitrust matters.[726] Ever since, all civil and criminal regulation is arguably subject to the same jurisdictional principles, including the rule of reason (although it may be noted that the Supreme Court took a very restrictive view of reasonableness in *Hartford Fire* – see 6.7.3).

219. RULE OF REASON TRUMPING THE PRESUMPTION AGAINST EXTRATERRITORIALITY – While the drafters of the Restatement may not have repudiated the presumption against extraterritoriality as a jurisdictional restraining principle informed by constitutional considerations of the separation of powers, their scarce references to the presumption undercut its normative value. While it is not very plausible that the courts, relying on an *international* rule of reason, will overrule a clear statement of *domestic* congressional intent, one could easily imagine that the courts, in case of doubt, have their assessment of the reach of U.S. laws informed by permissive rules of public international law. As already noted, reliance on the rule of reason instead of on the presumption against extraterritoriality may be a recipe for jurisdictional overreaching, as international jurisdictional rules are not well-defined and thus extremely malleable for domestic purposes. The danger is real that international law, the *Lotus* precedent in particular, is used as a fig-leaf for an otherwise rationally hardly defensible extraterritorial application of U.S. law.

[725] "However, in the case of regulatory statutes that may give rise to both civil and criminal liability, such as United States antitrust and securities laws, the presence of substantial foreign elements will ordinarily weigh against application of criminal law. *In such cases*, legislative intent to subject conduct …" (emphasis added).
[726] *United States v. Nippon Paper Indus.*, 109 F.3d 1, 9 (1st Cir. 1997).

5.4. The problematic character of the jurisdictional rule of reason as a norm of customary international law

220. APPROACHES – The Restatement itself believes that § 403 constitutes customary international law.[727] It is however debatable whether this is indeed the case.[728] And even if it is, it is open to doubt whether the rule of reason could be invoked as a rule of international law by U.S. courts, as customary international law is not necessarily part of U.S. federal common law.[729] Most authors take the view that the rule of reason is not a norm of customary international law (which need obviously not imply that these authors take issue with the rule of reason as a norm of *U.S.* law).[730] Other authors take a middle-of-the-road approach. MEESSEN for instance,

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[727] § 402, cmt. k ("Since international and other foreign relations law are the law of the United States, under the Supremacy Clause of the Constitution, an exercise of jurisdiction by a State that contravenes the limitations of §§ 402-403 is invalid […]"); § 403, cmt. a ("The principle … has emerged as a principle of international law as well. […] Some United States courts have applied the principle of reasonableness as a requirement of comity. […] This section states the principle of reasonableness as a rule of international law.").

[728] To some, it is even unclear whether it actually represents real law. *See* A.F. LOWENFELD, "Public Law in the International Arena: Conflict of Laws, International Law, and Some Suggestions for Their Interaction", 163 *Recueil des Cours* 311, 400 (1979-II) (explaining the lack of success of the propositions of Professor Kingman Brewster, the intellectual father of the rule of reason in the field of antitrust).

[729] *See* C.A. BRADLEY & J.L. GOLDSMITH, "Customary International Law as Federal Common Law: A Critique of the Modern Position", 110 *Harv. L. Rev.* 815, 821 (1997); S.K. MEHRA, "Extrateritorial Antitrust Enforcement and the Myth of International Consensus", 10 *Duke J. Comp. & Int'l L.* 191, 219 (1999) (also adding that applying comity as customary international law may undermine U.S. democracy and threaten the conduct of foreign relations by the executive branch).

[730] *Pro*: L.E. KRUSE & R.H. BENAVIDES, "Federal Subject Matter Jurisdiction in Federal Courts in International Cases", in D.J. LEVY (ed.), *International Litigation*, Chicago, American Bar Association, 2003, 149. *Somewhat pro:* D. VAGTS, Panel Discussion on the Draft Restatement, 76 *Proc. Soc'y Int'l L.* 184, 205 (1982) ("[T]he new Restatement reflect[s] the way the law [is] going, and … it [reflects] at least an emerging consensus."). *Somewhat contra:* H.G. MAIER, "Jurisdictional Rules in Customary International Law", in K.M. MEESSEN (ed.), *Extraterritorial Jurisdiction in Theory and Practice*, London/The Hague/Boston, Kluwer, 1996, 64, 72-73 (arguing that the jurisdictional sections of the Restatement are "a blend of international law and the principle of comity", and that "the exercise of state authority is, as in all international law, conditioned by the requirement that one state may not act in an unreasonable manner toward another", although at the same time pointing out that "[e]vidence of an international legal rule requiring [interest-balancing] is sparse. At best one can argue that the courts of several nations do in fact employ this interest balancing technique, but there is little evidence that they do so because they believe, that this approach is required as a customary practice accepted as law."). *Contra*: W.S. DODGE, "Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism", 39 *Harv. Int'l L.J.* 101, 137, note 224 (1998) ("Section 403's balancing approach is not required by international law."); S.B. BURBANK, "Case Two: Extraterritorial Application of United States Law Against United States and Alien Defendants (Sherman Act)", 29 *New Eng. L. Rev.* 588, 591 (1995) ("[F]ew people other than those who drafted the relevant sections of the Restatement (Third)…believe that section 403 states rules of customary international law."); P.R. TRIMBLE, "The Supreme Court and International Law: The Demise of Restatement Section 403", 89 *A.J.I.L.* 53, 55 (1995) ("[T]here is no such general principle and hence no customary international law like that advanced in section 403…"); C.J. OLMSTEAD, "Jurisdiction", 14 *Yale J. Int'l L.* 468, 472 (1989) ("[I]t seems implausible that section 403 rises to the level of … 'a principle of international law'"); C.J. OLMSTEAD, in Panel Discussion on the Draft Restatement of the Foreign Relations Law of the United States, 76 *Proc. Soc'y Int'l L.* 184, 201 (1982) ("whether this concept has matured into a rule of law seems dubious"); K.M. MEESSEN, "Conflicts of Jurisdiction Under the New Restatement", 50 *Law & Contemp. Probs.* 47, 59 (1987-III) ("No way exists to accept the Restatement's claim for qualifying reasonableness as a rule of international law if the standard of reasonableness is interpreted by reference to an independent international law standard based on the common denominator of a widely diverging state practice."); F.A. MANN, "The Doctrine of Jurisdiction Revisited after Twenty

considered the rule of reason to be "too open a rule to be operable on the level of international law",[731] although, at the same time, he argued that a rule of reason is workable, *de lege ferenda*, if it is limited to the balancing of sovereign interests.[732] Somewhat similarly, SCHUSTER, a fellow German, believed that uniformity and consistency are still lacking for interest-balancing to constitute a norm of customary international law, but that such a norm may be *in statu nascendi*.[733] It does not come as a surprise that German authors such as MEESSEN and SCHUSTER take a more nuanced view of the international law character of the rule of reason, as it is precisely in Germany, as will be seen in chapter 5.5, that interest-balancing has gained traction.

5.4.1. Reasonableness-based international law principles

221. There is only one authorative international law source, apart from the doctrine, that believes that the principle of jurisdictional reasonableness/restraint/moderation, whatever its content, represents international law. In *Barcelona Traction*, Judge FITZMAURICE wrote in his separate opinion

> "that under present conditions, international law does not impose hard and fast rules on States delimiting spheres of national jurisdiction … It does however … involve for every State an obligation to exercise moderation and restraint as to the extent of the jurisdiction assumed by its courts in cases having a foreign element, and to avoid undue encroachment on a jurisdiction more properly appertaining to, or more appropriately exercisable by another State."[734]

222. Judge Fitzmaurice did not cite relevant international law to support his case for restraint. Nonetheless, a number of international legal concepts have been developed that bear resemblance to the interest-balancing-informed rule of reason set forth in § 403.[735] Although these concepts have not been used so as to solve conflicts of international jurisdiction, they may support, the breakthrough of a jurisdictional interest-balancing norm at the dogmatic level by providing an *opinio juris*.[736] It may

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Years", 186 *R.C.A.D.I.* 9, 20 (1984-III) ("There is … outside the United States no support for [the theory of interest-balancing] to be found in any of the traditional sources of international law, and it should be firmly rejected."); J.-M. BISCHOFF & R. KOVAR, "L'application du droit communautaire de la concurrence aux entreprises établies à l'extérieur de la Communauté", 102 *J.D.I.* 675, 696 (1975) (arguing that, as soon there are certain effects of a foreign restrictive business practice within the Community, EC jurisdiction may legitimately obtain under public international law, and that public international law is not concerned with finding solutions to problems of concurrent jurisdiction, such as these put forward under a rule of reason).

[731] K.M. MEESSEN, "Antitrust Jurisdiction Under Customary International Law", 78 *A.J.I.L.* 783, 802 (1984) (considering the *Timberlane* rule of reason as the Restatement (Third) was not yet adopted at the time of writing).

[732] *Id.*, at 803-808.

[733] G. SCHUSTER, *Die internationale Anwendung des Börsenrechts*, Berlin, Springer, 1996, 665.

[734] *Barcelona Traction, Light and Power Company, Ltd.* (Belgium v. Spain), *ICJ Rep.* 1970, 3, 105 (separate opinion Judge FITZMAURICE). *See also* A.F. LOWENFELD, "International Litigation and the Quest for Reasonableness", 245 *Recueil des Cours* 9, 77 (1994-I) (arguing that *moderation* and *restraint*, *undue encroachment* and *appropriate* exercise of jurisdiction "can be summed up in the term reasonableness").

[735] *See* for a legal-philosophical perspective on how *the international judge* should give shape to "reasonableness" (particularly from a French perspective): O. CORTEN, *L'utilisation du "raisonnable" par le juge international*, Brussels, Bruylant, 1997, xxii + 696 p.

[736] *Id.*, at 677 (arguing however that, in the final analysis, the question of whether the rule of reason is a duty under international law may not be that important, in that a specific justification under

moreover be argued that the foreign nations' familiarity with these concepts under international law has informed the absence of foreign protest against the U.S. rule of reason. In this subsection, such international law principles as non-intervention, "genuine connection", equity, proportionality, and abuse of law, all of them somehow bearing resemblance to a rule of reason requiring interest-balancing, will be discussed.

5.4.1.a. Principle of non-intervention

223. Under the principle of non-intervention, States are prohibited from intervening in the domestic affairs of other States. The principle was developed primarily in a *military* context: it precluded States from using force on the territory of another State.[737] If extrapolated to the law of jurisdiction, and strictly applied there, the principle could consider any jurisdictional assertion over a foreign situation to be in violation of international law. Clearly, this is an unsatisfactory outcome. As argued in chapter 2, the P.C.I.J. in *Lotus* nor the customary international law of jurisdiction as developed in the criminal law, has therefore considered the principle of non-intervention as precluding the exercise of 'extraterritorial' prescriptive jurisdiction. Only the exercise of extraterritorial enforcement jurisdiction – the carrying out of certain material acts on another State's territory – has been deemed to infringe upon the principle of non-intervention and, thus, on foreign sovereignty. A solution which gives States quite some discretion to exercise prescriptive jurisdiction, and does not reserve a prominent role for the principle of non-intervention appears as justified from an historical perspective. Indeed, in older times, because inter-State contacts were less frequent than they are today, States hardly felt the need to apply their laws to foreign situations, nor, accordingly, did they feel the need to expand the protective purpose of the principle of non-intervention beyond protecting States' territorial integrity from military, 'material' encroachment by other States.[738]

This is not to say that the principle of non-intervention may not have a role to play in restraining the law of jurisdiction. It surely has. Yet it is a given that a particular jurisdictional assertion does not of itself violate the principle of non-intervention.[739] Only when the assertion affects another State's sovereign regulatory and economic decision-making power may the principle be violated.[740] In the literature on

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international law may at the same time rein in the hitherto unrestrained application of the rule of reason by the courts).

[737] *See, e.g.,* Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United States, United Nations General Assembly Resolution 2625 (XXV), 24 October 1970, principle I ("The principle that States shall refrain in their international relations from *the threat or use of force* against the territorial integrity of political independence of any State, or in any other manner inconsistent with the purposes of the United Nations.") (emphasis added). *See also* INTERNATIONAL COURT OF JUSTICE, *Case concerning Military and Paramilitary Activities in and against Nicaragua*, 27 June 1986, *ICJ Rep.* 1986, 14.

[738] *See* J. KAFFANKE, "Nationales Wirtschaftsrecht und internationaler Sachverhalt", 27 *Archiv des Völkerrechts* 129, 150-52 (1989).

[739] *Compare* Max Planck Institut for Comparative Public Law and International Law, *Encyclopedia of Public International Law,* 1992 - , at 621 ("Concerning economic "interference", the principle of non-intervention reflects the helplessness of international law in general.").

[740] *See* J. KAFFANKE, "Nationales Wirtschaftsrecht und internationaler Sachverhalt", 27 *Archiv des Völkerrechts* 129, 153 (1989) ("Immer dann, wenn die Anwendung der eigenen Regeln durch den handelnden Staat solche auswirkungen auf dem Gebiet des betroffenen Staates hat, dass dieser in seinen ordnungs- oder wirtschaftspolitischen Entscheidungen tangiert wird, immer dann liegt eine

international economic law, especially in Germany, it has been proposed to use an interest-balancing test so as to ascertain whether the principle of non-intervention is respected in a given case.[741] Only if the asserting State's interests in having its laws applied to a foreign situation outweigh the affected State's interests (the interests of the State where the situation originates), will a jurisdictional assertion respect the principle of non-intervention. This is exactly the solution advanced by § 403 of the U.S. Restatement, which advocates interest-balancing to solve conflicts of jurisdiction. Obviously, a doctrinal consensus, if any, on the appropriateness of interest-balancing to solve jurisdictional conflicts does not necessarily constitute international law.

5.4.1.b. Genuine connection

224. In the *Nottebohm* case, a case before the International Court of Justice in 1955, the Court required, in order for a State to exercise diplomatic protection over its nationals abroad, that "the legal bond of nationality accord with the individual's *genuine connection* with the State which assumes the defence."[742] In the 1970 *Barcelona Traction* case, the Court refined this doctrine in the context of diplomatic protection over corporate entities, holding that there, "no absolute test of the "genuine connection" has found general acceptance. Such tests as have been applied are of a relative nature, and sometimes links with one State have had to be weighed against those with another."[743] The jurisdictional rule of reason similarly requires that a significant nexus between the regulated matter and the regulating State be discerned in order for that State to be authorized to exercise its jurisdiction. Moreover, it requires the regulating State to balance its own links and interests with these of other affected States. The law of diplomatic protection and the law of jurisdiction are related in that both govern the operation of the acts of State outside its territory.[744] Solutions in the field of diplomatic protection could therefore possibly be extrapolated to the field of jurisdiction.[745]

5.4.1.c. Equity

225. Another international law concept that might provide support for a jurisdictional rule of reason is "equity", a general principle of law that corrects the

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Einmischung in die Angelegenheiten des betroffenen Staates im Bereich des Möglichen."); K.M. MEESSEN, *Völkerrechtliche Grundsätze des internationalen Kartellrechts*, Baden-Baden, Nomos, 1975, p. 201 *et seq. See also* A.V. LOWE, "The problems of extraterritorial jurisdiction : economic sovereignty and the search for a solution", 34 *I.C.L.Q.* 724 (1985) (arguing that "at the heart of the concept of economic sovereignty is the right of a State to regulate the structure of its own economy").

[741] *See* K.M. MEESSEN, *Völkerrechtliche Grundsätze des internationalen Kartellrechts*, Baden-Baden, Nomos, 1975, 199 ("Das Problem des Schutzes der Souveränität ausländischer Staaten muss durch die Gegenüberstellung der Interessen des handelnden und des betroffenen Staates gelöst werden …"); J. KAFFANKE, "Nationales Wirtschaftsrecht und internationaler Sachverhalt", 27 *Archiv des Völkerrechts* 129, 153 (1989).

[742] ICJ, *Nottebohm* (Liechtenstein v. Guatemala), *ICJ Rep.* 1955, pp. 4 *et seq.* (emphasis added).

[743] ICJ, *Barcelona Traction*, *ICJ Rep.*, p. 42.

[744] *See* G. SCHUSTER, *Die internationale Anwendung des Börsenrechts*, Berlin, Springer, 1996, 41.

[745] Notably B. GROSSFELD & C.P. ROGERS, "A Shared Values Approach to Jurisdictional Conflicts in International Economic Law", 32 *I.C.L.Q.* 931, 945 (1983) consider the genuine link concept to be one of the main limits on the extraterritorial reach of law.

law in the interests of justice.[746] In a number of continental shelf cases, the ICJ pointed out that the equity requires that substantive justice be administered in order to solve a dispute.[747] Continental shelf cases resemble international jurisdiction cases in that both address the basic international law question of how to delimit a State's power. Both use solutions that weigh the connections of a particular situation with the State claiming its rights to that effect, and dismiss jurisdiction when another State's rights are unduly encroached. In the *North Sea Continental Shelf* case for instance, the ICJ held that "the continental shelf of any State must be the natural prolongation of its land territory and must not encroach upon what is the natural prolongation of another State".[748] In order to ensure that that one State's "natural prolongation" does not encroach upon another State's natural prolongation, the ICJ advocated weighing (a possibly indefinite number of) connecting factors: "In fact, there is no legal limit to the considerations which States may take into account for the purpose of making sure that they apply equitable procedures, and more often than not it is the balancing-up of all such considerations that will produce this result rather than reliance on one to the exclusion of all others. The problem of the relative weight to be accorded to different considerations naturally varies with the circumstances of the case."[749]

In the law of international jurisdiction, it is similarly attempted to develop rules that weigh the nexus of a situation with the States involved, through a variety of relevant factors varying with the circumstances of the case. This balancing act prevents States from exercising jurisdiction over situations if such would encroach upon the regulatory prerogatives of another State. Admittedly, it could be objected that it is one thing to confer the application of the principle of equity on an *international court* such as the ICJ, and quite another to confer the application of an equity-informed rule of reason on a *national court* or regulator (the impartiality of which may be in serious doubt).[750] This is no doubt true. Reference to the equity principle here however only serves to illustrate that weighing connections and interests is not an unknown quantity in classical public international law. Besides, in Article 38 (2) of the ICJ Statute, a provision which grants the ICJ the power to decide *equitably* if the parties want to, it is provided that the ICJ may "decide a case *ex aequo et bono*, if the parties agree thereto". This provision arguably means, in the words of a commentator, that "the Court may reach a fair compromise in *balancing the interests of the parties*".[751]

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[746] Equity may arguably be one of "the general principles of equity recognized by civilized nations" applied by the International Court of Justice in accordance with Article 38 (1) (c) of the ICJ Statute. Equity so understood would then be a source of international law. *See E.P.I.L.*, at 110. *See* for a study on equity: C.R. ROSSI, *Equity and International Law. A Legal Realist Approach to International Decisionmaking*, Irvington, NY, Transnational, 1993, xix + 309 p.

[747] In particular ICJ, *North Sea Continental Shelf Cases (Fed. Rep. of Germany* v. *Denmark*; *Fed. Rep. of Germany* v. *the Netherlands), ICJ Rep.* 1969, 3, 47; ICJ, *Case Concerning the Continental Shelf (Tunisia* v. *Libya), ICJ Rep.* 1982, 18, 60 ("Equity as a legal concept is a direct emanation of the idea of justice. The Court whose task is by definition to administer justice is bound to apply it. … Moreover, when applying positive international law, a court may choose among several possible interpretations of the law one which appears, in the light of the circumstances of the case, to be closest to the requirements of justice."). The principle was pioneered by Judge Hudson in P.C.I.J., *Meuse Case*, Belgium v. Netherlands, Series A/B, No. 70, p. 73.

[748] *North Sea Continental Shelf Cases*, *ICJ Rep.* 1969, at 48.

[749] *Id.*, at 50.

[750] *See* G. SCHUSTER, *Die internationale Anwendung des Börsenrechts*, Berlin, Springer, 1996, 55.

[751] *E.P.I.L.*, at 109.

5.4.1.d. Proportionality

226. Under the principle of proportionality, a measure used to achieve an objective should be proportionate, *i.e.*, properly related in size or degree to that objective. In general international law, the principle of proportionality may be invoked in the law of war, pursuant to which States are prohibited from mounting "an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."[752] It may also play a role in the field of countermeasures[753] and the law of the World Trade Organization.[754] The principle of proportionality has not been applied to law of jurisdiction, although it surely lends itself to it. Proportionality may require that one State's jurisdictional assertion does not encroach upon the interests of another State to an extent that is disproportionate to the object or aim of that assertion. In the law of jurisdiction, proportionality may clarify the principle of non-intervention. While construed very strictly, the principle of non-intervention may prohibit a State from asserting its jurisdiction over a situation arising in another State lest it unjustifiably intervene in that State's domestic affairs, the principle of proportionality *allows* interference, yet only if it is not excessive.

227. In European law, the principle of proportionality plays a very important role. As a general principle of European law, it prohibits the European institutions from taking a measure which is not proportionate to the object or aim of that measure.[755] One could argue that the European institutions may also be bound by the principle of proportionality in the field of the EU's external relations.[756] Proportionality would then prohibit the institutions, when exercising jurisdiction, *e.g.*, in international competition matters, from interfering with the interests of a third country to an extent that is disproportionate the object or aim of that measure.[757] BOURGEOIS has applied this rule to the field of merger control and pointed out that it "could justify a Commission decision not to prohibit an international merger, where the aim of such prohibition, *i.e.*, protecting the competitive structure in the Community, could reasonably be achieved by parallel action against such merger by another State."[758]

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[752] *See* in particular Article 51 (5) (b) of Additional Protocol I to the Geneva Conventions (1977).
[753] *See* E. CANNIZZARO, "The Role of Proportionality in the Law of International Countermeasures", 12 *E.J.I.L.* 889 (2001).
[754] *See* A. DESMEDT, "Proportionality in WTO Law", 4 *J. Int'l Econ. L.* 441 (2001).
[755] Article 5, § 3 of the Treaty Establishing the European Community ("Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty."). *See for* discussions of the principle: G. DE BÙRCA, "The Principle of Proportionality and its Application in EC Law", 13 *Yb. Eur. Law* 105 (1993); N. EMILIOU, *The Principle of Proportionality in European Law – a Comparative Study*, London, The Hague, Kluwer, 1996, 288 p.
[756] *See* A. LAYTON & A.M. PARRY, "Extraterritorial jurisdiction – European Responses", 26 *Houston J. Int'l .L.* 309, 322-23 (2004) ("It is possible that various doctrines inherent in E.U. law, particularly proportionality, may be invoked to water down the most extreme examples of extraterritoriality.")
[757] *See* J.H.J. BOURGEOIS, "EEC Control over International Mergers", 10 *Yb. European Law* 103, 126 (1990).
[758] *Id.*

While the Commission may, *inter alia* pursuant to the 1998 U.S.-EU Positive Comity Agreement relating to competition matters,[759] defer to other States in cases in which these have a stronger interest, there is however no evidence that the Commission considers itself to be bound by the European principle of proportionality (or its international law equivalent for that matter) to do so.[760] Neither have the European courts relied on it when determining the reach of Article 81 ECT and of the Merger Control Regulation.[761] Yet because the courts *have* relied on the international law principles of non-intervention and comity, it may only be a small step to also apply the principle of proportionality as a general principle of European law. This may have the advantage of giving more teeth to the rather ill-defined cited principles of international law. Possibly however, European institutions may believe that the principle of proportionality is only designed to protect *European* interests (of governmental or private nature) from excessive regulation by the institutions. Pursuant to the maxim *pacta tertiis non prosunt*, they may submit that foreign governments could not borrow rights from the ECT that could limit the EU's international sphere of action.[762] It appears, however, that, in view of the principle *in foro interno, in foro externo*, European institutions may also be required to apply the principle of proportionality when exercising their powers at the international level.

228. Clearly, the international law principle of proportionality may be a useful principle of jurisdictional restraint. Because its field of application has so far been limited to the law of war, it would be wrong to consider it as a general principle of international law *de lege lata* which States have to abide by when exercising jurisdiction.[763] Nonetheless, like the principle of equity, the principle of proportionality shows that interest-balancing – weighing one State's gain caused by a jurisdictional assertion against the burden imposed on another State by this assertion – is known in public international law. It may boost the credentials of the jurisdictional principle of reasonableness as a principle of international law.

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[759] *See* chapter 6.8.

[760] *See* J.H.J. BOURGEOIS, "EEC Control over International Mergers", 10 *Yb. European Law* 1990, 103, 128 (1990) (noting that "[i]t does not appear possible to use a well known rule of Community law [the rule of proportionality] to give a more precise content to the international law principle of 'non-interference'").

[761] *See* chapters 5.5, 6.4 and 6.12.4.

[762] In one case, however, the ECJ seemed willing to limit the EC's sphere of action when the interests of third States were implicated. In *Poulsen and Diva Navigation*, 24 November 1992, C-286/90, *E.C.R.* 1992, I-6019, the Court applied EC fisheries law to a Danish ship flying a Panamian flag of convenience, holding that Danish authorities could seize the fish caught in violation of EC fisheries law, even though the fish was caught outside EC waters. However, recognizing the importance of the flag State under international law, and, on that basis, the freedom of shipping on the high seas and the exclusive economic zone, and the right of innocent passage in territorial waters, the Court also held that Danish authorities could only do so because the ship had called at a Danish port after catching the fish but before selling it (outside the Community). Because the Court put such a high premium on the rights of the flag State (Panama), it may be said to have respected the sovereignty of a third State when determining the reach of EC fisheries law. *See* J. VANHAMME, *Volkenrechtelijke beginselen in het Europees recht*, Groningen, Europa Law Publishing, 2001, p. 298

[763] *See* J.H.J. BOURGEOIS, "EEC Control over International Mergers", 10 *Yb. European Law* 1990, 103, 127 (1990) (stating that "[t]here is no general rule of international law … which could come into play as a proportionality test", and that "[t]he most that could be said is that non-respect for a third country's legislation or policies may in certain cases be unlawful under international law as violating the principle of non-interference").

5.4.1.e. Abuse of rights

229. Developed national legal systems know a doctrine of abuse of rights (*abus de droit*), pursuant to which legal persons are not to exercise granted rights in a manner detrimental to the rights and interests of other legal persons. The doctrine of abuse of rights is also known in international law,[764] where it assumes a similar function as in national legal systems: it prohibits States from making use of their rights under international law in ways that do not serve a "legitimate social goal",[765] or, put differently, disproportionately encroaches upon the rights of other States.[766] What a legitimate social goals exactly is, is unclear.[767] This should not necessarily subtract from the usefulness of the doctrine of abuse of rights as a doctrine of mediating between various State claims and interests in an interdependent world in which the discretionary exercise of rights is increasingly undesirable.[768]

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[764] *See, e.g.*, ICJ, Case Concerning the Gabcikovo-Nagymaros Project (Hungary v. Slovakia), *I.C.J. Rep.* 7, para. 22 (1997) (Weeramantry, J.) (terming abuse of rights a "well-established area of international law"); WTO Appellate Body, United States – Import Prohibition of Certain Shrimp and Shrimp Products), WTO Doc. WT/DS58/AB/R (1998) ("The chapeau of Article XX [GATT] is, in fact, but one expression of the principle of good faith. This principle, at once a general principle of law and a general principle of international law, controls the exercise of rights by states. One application of this general principle, the application widely known as the doctrine of *abus de droit*, prohibits the abusive exercise of a state's rights and enjoins that whenever the assertion of a rights "impinges on the field covered by [a] treaty obligation, it must be exercised bona fide, that is to say, reasonably." An abusive exercise by a Member of its own treaty rights thus results in a breach of the treaty rights of other Members and, as well, a violation of the treaty obligation of the Member so acting."). *See* on abuse of rights from a doctrinal point of view: N.-S. POLITIS, 'Le problème des limitations de la souveraineté et la théorie de l'abus de droits dans les rapports internationaux', 1 *R.C.A.D.I.* 1 (1925); H.-J. SCHLOCHAUER, "Die Theorie des abus de droit im Völkerrecht", 17 *Zeitschrift für Völkerrecht* 373 (1933); E.R.C. VAN BOGAERT, *Het rechtsmisbruik in het volkenrecht: een rechtstheoretische verhandeling*, Antwerpen, De Sikkel, 1948, 121 p.; A.-C. KISS, *L'abus de droit en droit international*, Paris, L.G.D.J., 1952, 200 p. *See* for a treaty-based prohibition of abuse of rights: Article 300 of the UN Convention on the Law of the Sea, for instance, provides that "States Parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention *in a manner which would not constitute an abuse of right*." (emphasis added).

[765] *See* P.J. KUYPER, "European Community Law and Extraterritoriality: Some Trends and New Developments", 33 *I.C.L.Q.* 1013, 1015 (1984).

[766] *Compare* N.-S. POLITIS, 'Le problème des limitations de la souveraineté et la théorie de l'abus de droits dans les rapports internationaux', 1 *R.C.A.D.I.* 1, 81 (1925) ("[I]l y a abus si l'intérêt général est lésé par le sacrifice d'un intérêt individuel très fort à un autre intérêt individuel plus faible."); L. OPPENHEIM, *International Law: A Treatise*, 8th ed., H. LAUTERPACHT (ed.), London, Longmans, Green & Co., 1955, 345 (stating that there is abuse of rights "when a State avails itself of its rights in an arbitraty manner in such a way as to inflict upon another State an injury which cannot be justified by a legitimate consideration of its own advantage."); P. GUGGENHEIM, "La validité et la nullité des actes juridiques internationaux,", 74 *R.C.A.D.I.* 195, 250 (1949) ("Une règle comme celle qui confère la souveraineté à l'Etat indépendant donne lieu à un abus lorsqu'elle est appliquée dans le but de nuire à autrui ou dans un autre but que pour celui pour lequel le droit international a établi cette règle.").

[767] *See* M. BYERS, "Abuse of Rights: An Old Principle, a New Age", 47 *McGill Law Journal* 389, 404 (2002) (noting that "[t]he principle of abuse of rights has not yet been studied and codified by the ILC; its content and scope of application remain unresolved."). *See however also id.*, at 417 (submitting that "it may be impossible to develop specific rules for every situation in which excessive or abusive exercises of rights might require limitation").

[768] *Compare* H.-J. SCHLOCHAUER, "Die Theorie des abus de droit im Völkerrecht", 17 *Zeitschrift für Völkerrecht* 373, 378-79 (1933) ("Je enger sich die vielmaschigen internationalen Beziehungen knüpfen, desto weniger frei und ungehemmt werden die Staaten ihre "Rechte" nach subjektivem Ermessen ausüben können. Est is eine notwendige Folge der Entwicklung von der "indépendence des états" zur "interdépendence", zum Ausbau der "communauté internationale", dass sich der ursprünglich

230. Assuming that States enjoy a wide margin of discretion in exercising jurisdiction, in keeping with the *Lotus* judgment, or in keeping with an ill-defined territorial effects doctrine, the doctrine of abuse of rights implies for the law of jurisdiction that States may not assert their jurisdictional freedom if such would not actually serve their legitimate interests, but instead disturb the peace of another State. AKEHURST held in this respect that abuse of rights in a State's exercise of prescriptive (legislative) jurisdiction would occur "if the legislation is designed to produce mischief in another country without advancing any legitimate interest of the legislating State", or "if legislation is aimed at advancing the interests of the legislating State illegimately at the expense of other States."[769]

231. The doctrine of abuse of rights appears related to the principle of good faith, a well-known principle of international law,[770] although it actually unclear whether bad faith is actually required for the principle to be relied upon, or whether abuse of discretion (*e.g.*, the wide margin of jurisdictional discretion that States enjoy under the *Lotus* judgment) suffices.[771] Applied to the law of jurisdiction, the doctrine of abuse of rights comes close to the principle of proportionality. They both fine-tune the principle of non-intervention, and allow States to exercise jurisdiction over foreign situations, provided that the exercise of jurisdiction serves a legitimate social goal that does not abrogate other States' legitimate rights to pursue social goals for themselves.

5.4.2. State practice in support of the jurisdictional rule of reason under international law

232. The reasonableness-based international law concepts discussed in subsection 5.4.1 may inform the crystallization of a jurisdictional rule of reason. Reasoning by analogy does however not suffice. Given the peculiarity of the concept of *jurisdiction* under international law, a jurisdictional rule of reason is in need of its own State practice and *opinio juris*. In this subsection, it will be analyzed whether

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rein individualistische Charakter der Völkerrechtsordnung zu einem sozialen wandelt …"); V. LOWE, "The Politics of Law-making: Are the Method and Character of Norm Creation Changing?", in M. BYERS (ed.), *The Role of International Law in International Politics*, Oxford, Oxford University Press, 2000, 207, 212; M. BYERS, "Abuse of Rights: An Old Principle, a New Age", 47 *McGill Law Journal* 389, 431 (2002) ("In an international society that itself continues to experience rapid and far-reaching change, long-standing general principles of law such as abuse of rights help to extend legal controls to previously unregulated areas, and to fill new gaps as they appear.").

[769] M. AKEHURST, "Jurisdiction in International Law", 46 *B.Y.I.L.* 145, 189 (1972-73).

[770] *Compare* M. BYERS, "Abuse of Rights: An Old Principle, a New Age", 47 *McGill Law Journal* 389, 411 (2002) (arguing that the principle of abuse of rights is "supplemental to the principle of good faith: it provides the threshold at which a lack of good faith gives rise to a violation of international law, with all the attendant consequences."). *See* on good faith in international law *inter alia* J.F. O'CONNOR, *Good Faith in International Law*, Aldershot, Dartmouth, 1991, 148 p.; R. KOLB, *La bonne foi en droit international public*, Paris, PUF, 2000, xli + 756 p. The principle of good faith has also been invoked as an international law and European Community law principle by the European Court of First Instance, which linked it to the principle of legitimate expectations. *See* CFI, Case T-115/94 *Opel Austria GmbH* v *Council* [1997] ECR II-39, § 93 ("[T]he principle of good faith is the corollary in public international law of the principle of protection of legitimate expectations which, according to the caselaw, forms part of the Community legal order. Any economic operator to whom an institution has given justified hopes may rely on the principle of protection of egitimate expectations.").

[771] *Pro* the bad faith interpretation: H.J. SCHLOCHAUER (ed.), *Wörterbuch des Völkerrechts*, Berlin, De Gruyter, 1962, 3 vol., 69-70; M. BYERS, "Abuse of Rights: An Old Principle, a New Age", 47 *McGill Law Journal* 389, 412 (2002).

State practice and *opinio juris* indeed point to the existence of such a rule.

233. THE CLAIM OF § 403 – § 403 of the Restatement itself draws on almost no reasonableness-related State practice outside the United States to support its thesis that the § 403 constitutes international law. In reporters' note 3, only a 1983 decision by the German Kammergericht in *Philip Morris/Rothmans* is cited.[772] In this decision, which will also be discussed in chapter 6.12.3, the Kammergericht restricted the effect of an order by the German Cartel Office preventing the merger of international companies from taking place to their German subsidiaries. The Kammergericht's decision was indeed informed by a § 403-like balancing of sovereign interests, and was explicitly based on international law as incorporated into domestic law via Article 25 of the German Constitution. Admittedly, the reporters' note to § 403 of the Restatement also referred to the practice of other States, but it only did so to the effect of supporting its argument that these States had accepted the effects doctrine, rather than the rule of reason.

It can surely not be derived from the German example cited in said reporters' note that there is sufficient practice of States applying any sort of rule of reason, let alone a rule of reason as a requirement of international law.[773] Nonetheless, the crystallization of a norm of customary international law does not require that all States actively *apply* the norm: a consistent pattern of absence of protest against another State's jurisdictional assertion may suffice. There is no hard evidence that foreign States, European States in particular, have denounced the American jurisdictional rule of reason. On the contrary, some States have explicitly recognized it. In its Statement of Interest in the *Hartford Fire Insurance* antitrust case for instance, the Government of the United Kingdom, held: "Under international law and the principles of moderation and restraint as they have been applied in U.S. courts, the extraterritorial exercise of a U.S. court's jurisdiction to prescribe or to enforce must always be reasonable."[774]

234. The rule of reason has certainly appeased foreign nations.[775] European States were most likely all too happy that U.S. courts and regulators finally started to restrain their jurisdictional assertions by taking into account interests and connections of the matter to be regulated with foreign States. Yet the question arises whether they would also have expected the U.S. to go as far as adopting a strict rule of reason, or

[772] Decision of July 1, 1983, Kart 16/82.

[773] Probably, without the advice of Professor MEESSEN (who, as stated *supra*, supported the rule of reason *de lege ferenda*), who served as an adviser to the American Law Institute when the jurisdictional provisions of the Restatement (Third) were drawn up, not even the German example would have featured in the reporters' notes.

[774] Statement of Interest of the United Kingdom, *B.Y.I.L.* 571 (1990). The rule of reason was initially nevertheless not greeted as a major improvement by the United Kingdom, which believed that the even 'reasonable' assertions of jurisdiction remained overbroad. *See* United Kingdom Response to U.S. Diplomatic Note concerning the U.K. Protection of Trading Interest Bill, Nov. 27, 1979, 21 *I.L.M.* 847, 849-850 (1982) ("[T]he U.S. courts claim subject matter jurisdiction over activities of non-U.S. persons outside the U.S.A. to an extent which is quite unacceptable to the U.K. and many other nations. Although in recognition of international objections to the wide reach of anti-trust law enforcement in civil cases, the U.S. courts have begun to devise tests which may limit the circumstances in which the remedy may be available, these tests remain within these wider claims to jurisdiction to which Her Majesty's Government object.").

[775] *See* A. LAYTON & A.M. PARRY, "Extraterritorial Jurisdiction – European Responses", 26 *Houston J. Int'l L.* 309, 313 (2004) ("These refinements may have been influential in keeping critical foreign states at bay.")

whether they might have been happy with less accommodation? MASSEY for instance has pointed out that European States did not take issue with "unreasonable" assertions of jurisdiction, but only with "exorbitant" assertions.[776] Also, European States may have criticized the lack of a jurisdictional nexus with the U.S. rather than the unreasonableness of jurisdiction.[777] Put differently, they may have believed that there was not even jurisdiction under the classical principles of jurisdiction (set forth in § 402 of the Restatement), so that an application of the rule of reason (set forth in § 403 of the Restatement) did not come into play at all. Accordingly, European diplomatic protests against U.S. jurisdictional assertions of extraterritorial jurisdiction would not constitute consistent State practice, accompanied by *opinio juris*, in support of a customary rule of reason.[778]

235. MASSEY's argument that European States tolerated unreasonable assertions of jurisdiction does not seem convincing. For one thing, the distinction between "unreasonable" and "exorbitant" jurisdiction is not explicitly made in the diplomatic protests themselves,[779] and may thus amount to *Hineininterpretierung*. Assuming that European States indeed denounced U.S. jurisdictional assertions for their "exorbitance", there is no evidence that they would have tolerated "unreasonable" assertions. The category of "reasonableness" in the field of the law of jurisdiction was only defined by the Restatement in 1987, so that a semantic discussion about perceived differences between "unreasonableness" and "exorbitance" before 1987 appears inapposite. In addition, while the Restatement itself refers to "exorbitant" jurisdiction, it does so precisely to justify the rule of reason, which lends credence to the thesis that "unreasonable" and "exorbitant" are interchangeable adjectives.

The argument that European States took aim at the very existence of an economic effects doctrine rather than at its scope of application is equally unconvincing. The distinction between the threshold question of whether economic effects jurisdiction actually exists, and the question of whether its modalities of application are satisfied, should such jurisdiction indeed exist, is blurred by the Restatement itself. In § 402(1)(c), the Restatement sets forth, in relevant part, that "[s]ubject to § 403 [*i.e.*, the rule of reason], a state has jurisdiction to prescribe law with respect to … conduct outside its territory that has or is intended to have substantial effect within its territory." § 402 makes any legitimate assertion of effects jurisdiction subject to the rule of reason, of which the first factors to be considered precisely relate to a

[776] D.P. MASSEY, "How the American Law Institute Influences Customary Law: The Reasonableness Requirement of the Restatement of Foreign Relations Law", 22 *Yale J. Int'l L.* 419, 429 (1997).
[777] *Id.*
[778] *Id.*
[779] In their comments on the U.S. Regulations concerning Trade with the U.S.S.R. (Soviet Pipeline Regulations), featuring the only pan-European denouncement of U.S. extraterritorial jurisdiction before the adoption of the Restatement in 1987, the European Communities believed these regulations to contain "*sweeping* extensions of U.S. jurisdiction which are unlawful under international law" (21 *I.L.M.* 891 (1982) (emphasis added)), and to be "*unacceptable* under international law because of their extra-territorial aspects" (*Id.*, at 893 (emphasis added)). The term "exorbitant" appeared to be used only by the United Kingdom (*see* Debates on the British Shipping Contracts and Commercial Documents Bill, 1964, 698 Parl. Deb. H.C. (5th Ser.) 1215 (1961); Debates on the British Protection of Trading Interests Act, 1980, 973 Parl. Deb. H.C. (5th Ser.) 1535 (1979), cited in § 403 of the Restatement, reporters' note 1).

sufficient nexus of the activity with the regulating State.[780] The requirement of a jurisdictional nexus is embedded in the rule of reason, and any criticism leveled at the lack of a jurisdictional nexus thus in effect implies that the critic believes that the reasonableness requirement is not met.

The argument that State practice and *opinio juris* as to the existence of a rule of reason is lacking, carries more weight. It seems granted that, for the development of a customary rule of reason in the field of extraterritorial economic jurisdiction, there is no need for all States to have taken a position on the existence and exact contours of any such norm. Indeed, only a limited number of States have an interest in or are affected by extraterritorial economic jurisdiction, the industrialized Western nations traditionally being the main protagonists. It remains therefore to be determined whether Western States indeed concur on the existence of a rule of reason.[781] It will be examined now whether the rule of reason exists as a rule of international law in the United States and Europe.

236. THE RULE OF REASON AS A NORM OF CUSTOMARY INTERNATIONAL LAW IN THE UNITED STATES – § 403 of the U.S. Restatement may have doctrinal authority, but is not the law of the land in the United States. As will be shown in subsection 6.7.3, in the 1993 *Hartford Fire Insurance* case, the Supreme Court dealt a serious blow to the rule of reason in antitrust cases by only requiring deference pursuant to comity in case a foreign sovereign compels what the United States prohibit, or *vice versa* (although in the 2004 *Empagran* case it might somehow have re-introduced it). Nonetheless, U.S. courts and regulators may cite § 403 as authority to solve jurisdictional conflicts, and thus conduct a reasonableness analysis. Also, the U.S. legislative and executive branches may roll back initially rather broad jurisdictional assertions, possibly after foreign protest. The question may however be asked whether jurisdictional restraint in these instances is based on customary international law grounds. MASSEY for instance has pointed out that in the 1970s and 1980s, when the U.S. seemingly withdrew some U.S. export controls regulations after protests by foreign States,[782] it did not to do so out of a sense of legal obligation.[783] This finding would be reinforced by the later or simultaneous enactment of other export controls regulations with similar extraterritorial effects.[784] If jurisdictional restraint is not

[780] The first two (out of eight) factors of the reasonableness test set forth by § 403 (2) are (a) the link of the activity to the territory of the regulating state, *i.e.*, the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory; (b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect.

[781] *Compare* D.P. MASSEY, "How the American Law Institute Influences Customary Law: The Reasonableness Requirement of the Restatement of Foreign Relations Law", 22 *Yale J. Int'l L.* 419, 430 (1997) (arguing that "[w]ithout the concurrence of the United States, a major power in the field of extraterritorial regulation, it is difficult for a custom in this area to come into being.").

[782] *Id.*, at 431-32 (citing the limitation of the application of the Trading with the Enemy Act to wartime situations (Act of December 28, 1977, Pub. L. No. 95-223, title I, 91 Stat. 1625, 50 U.S.C. §§ 1701-1706 (1994), and the withdrawal of the Soviet Pipeline Regulations).

[783] *Id.*

[784] *Id.* (citing the enactment of the International Emergency Economic Powers Act, upon which the restrictions on foreign activities of U.S. banks in Iran was premised, and the extension of the Export Administration Act of 1969 to prohibit exports from any country of goods or technology exported by foreign subsidiaries of U.S. corporations, by the same Act of Dec. 28, 1977 cited *supra*, effectuated by

informed by a sense of legal obligation, the *opinio juris* required for the crystallization of a norm of customary international law is lacking. As far as the courts' citation of and reliance on § 403 is concerned then, it may be argued that such may be informed by a sense of legal obligation, yet not by a sense of legal obligation under *international law* but rather by a sense of legal obligation under domestic conflict of laws principles.

237. THE RULE OF REASON AS A NORM OF CUSTOMARY INTERNATIONAL LAW IN EUROPE –While the customary international law character of the rule of reason may be problematic in the United States, it is even more so in Europe, since European States are generally uneasy with the very process of interest-balancing as a method of solving jurisdictional conflicts. While protests against U.S. applications of the rule of reason have been largely absent, it surely does not help the crystallization of a norm of customary international law if, as will be set out in the next section 5.5, a legal system such as the (continental-European one) displays an inherent bias against the procedural content of the norm. The argument that the stance that a number of European States and the EC took against U.S. jurisdictional assertions in the field of export controls and antitrust law in the 1970s and 1980s, is evidence of widespread State practice supporting a rule of reason, should therefore not be accepted at face value.

5.5. European reluctance at balancing interests

5.5.1. Ordre public v. comity

238. The use of comity or reasonableness as a principle restraining assertions of jurisdiction is almost unknown in Europe.[785] Admittedly, in deciding private transnational disputes, European courts may use a concept that is related to comity: the private international law concept of *ordre public*. This concept however differs considerably from the comity principle.[786] For one thing, as JUENGER writes, "[w]hile public policy involves the *lex fori* to ward off undesirable foreign law, comity is used to curtail unreasonable impositions of forum law."[787] Comity thus serves as a doctrine of jurisdictional restraint, while *ordre public* serves as a doctrine of jurisdictional expansion. Using ordre public, European courts indeed apply domestic law to transnational disputes if the application of foreign law through conflict-of-laws rules would produce a result inconsistent with the fundamental principles of the political, moral or economic order of the forum State. A second difference between comity and *ordre public* could be directly gathered from this definition: the concept of *ordre public* authorizes a European forum State to apply its laws to a transnational situation with strong and even stronger links to another State. Unlike comity, the concept of *ordre public* leaves no room for weighing links or

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the Iranian Assets Control Regulations, 31 C.F.R. 535.329 (1980), and the Soviet Pipeline Regulations, 47 Fed. Reg. 27,250-52 (1982)).

[785] *See, e.g.*, C.L. BLAKESLEY, "Extraterritorial Jurisdiction", in M.C. BASSIOUNI (ed.), *International Criminal Law II: Procedural and Enforcement Mechanisms*, 2nd ed., Transnational, Ardsley, NY, 1999, at 41 (pointing out that "non-Anglo-American jurists have no historical or theoretical background or frame of reference from which to understand the term").

[786] *Contra*, without further elaboration though: F.A. MANN, "The Doctrine of Jurisdiction Revisited after Twenty Years", 186 *R.C.A.D.I.* 9, 23 (1984-III).

[787] F.K. JUENGER, "Constitutional Control of Extraterritoriality?: A Comment on Professor Brilmayer's Appraisal", 50 *Law & Contemp. Probs.* 39, 45 (1987).

sovereign interests. European laws will be applied to a transnational situation, even if the interests of the foreign State are stronger than these of the forum State. Under comity and the rule of reason however, the interests of the foreign State and these of the forum State are balanced, and (the law of) the State with the stronger interest will prevail over (the law of) the State with the weaker interest.[788] Admittedly, the forum State's courts may suffer from a pro-forum bias and tend to underestimate the weight of the foreign State's interests. Yet such does not subtract from the conceptual point of departure of the rule of reason: the State with the weaker interest ought to defer to the State with the stronger interest.

239. An increased potential for international conflict could be inferred from the application of the European *ordre public* exception, since indeed, resorting to the exception, courts do not weigh sovereign interests but apply the laws of the forum as soon as the forum's interests are jeopardized. Nevertheless, the *ordre public* concept is rather used a defensive legal device so as not to apply another State's (extraterritorial) laws, than as an aggressive tool to expand the scope *ratione loci* of the forum State's laws to foreign situations. As European States shy away from projecting their extraterritorial regulatory power abroad in the first place, and do not grant private plaintiffs the right to bring claims in regulatory cases to the same extent as the U.S. does ("the private attorney-general"), the inflexible concept of *ordre public* will not cause much controversy in typical cases of extraterritoriality.

5.5.2. Explaining European uneasiness with interest-balancing

240. GOUVERNEMENT DES JUGES – European uneasiness with comity is related to the European belief that the courts are no diplomats and ought not to be granted too much discretionary power on the basis of such a fuzzy concept as comity, lest the State become a *gouvernement des juges*.[789] In Europe, courts are not expected to balance sovereign interests, but to apply mechanical and 'certain' jurisdictional rules (such as rules based on the defendant's nationality or domicile).[790] It is in this context that one has to understand Professor BROWNLIE's categorization of jurisdictional reasonableness or interest-balancing as an "unhelpfully vague" concept.[791]

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[788] *Compare* A. BIANCHI, "Extraterritoriality and Export Controls: Some Remarks on the Alleged Antinomy Between European and U.S. Approaches", 35 *G.Y.I.L.* 366, 377 (1992) (arguing that "traditional single-aspect methods of conflict of laws resolution, still prevailing in continental Europe, even if in a better position to provide certainty and predictability, would fall short of doing justice in many cases.").

[789] Although Americans are more at ease with judicial interest-balancing, they may at times also deplore it, but often because it does not confer legal certainty rather than because it gives judges too much power. *See, e.g.*, criticizing the doctrine of *forum non conveniens*, which involves a balancing of private and public interests in order to determine an appropriate adjudicatory forum: *Gilbert*, 330 U.S. at 516 (Black, J., dissenting) (stating that "[t]he broad and indefinite discretion" granted by this doctrine "will inevitably procude a complex of close and indistinguishable decisions from which accurate prediction of the proper forum will become difficult, if not impossible.").

[790] It may be noted that a mechanical reliance on nationality or domicile may, in the absence of any other connecting factor to the forum, at times be even more exorbitant than a U.S. reliance on judicial discretion to establish jurisdiction. *See* B. PEARCE, "The Comity Doctrine as a Barrier to Judicial Jurisdiction: A U.S.-E.U. Comparison", 30 *Stan. J. Int'l L.* 525, 562-65 (1994).

[791] I. BROWNLIE, *Principles of Public International Law*, 4th ed., 1990, at 308. *See also* A. BIANCHI, Reply to Professor Maier, in K.M. MEESSEN (ed.), *Extraterritorial Jurisdiction in Theory and Practice*, London/The Hague/Boston, Kluwer, 1996, 74, 85.

Continental Europe's uneasiness with comity as a discretionary concept may hark back to the French Revolution, an ideological watershed that common law countries never experienced. In the revolutionaries' view, the courts of the *Ancien Régime* had arrogated too much power to themselves, thereby sidelining the (representatives of the) people. Therefore, as PEARCE has described, "[r]evolutionary laws were passed explicitly forbidding the judiciary to take part in the exercise of legislative power, or, at the risk of a judge's forfeiture of office, to interfere in the operation of public administration."[792] The judiciary was supposed to be the "*bouche de la loi"*: it applied the laws enacted and codified by the legislature. For our analysis of jurisdiction, this implies that the courts were not authorized to disregard rules of jurisdiction adopted by the legislature after balancing the different interests involved in a dispute. Taking into account the interests of *foreign sovereigns* in particular was anathema to the nationalistic ethos of the time, an ethos that considered the people united in a territorially delimited 'nation' as the sovereign lawgiver within a given territory.[793] As of today, the revolutionary legacy is discernible in the EC Regulation 44/2001, which sets forth bright-line rules for judicial jurisdiction and does, on its face, not allow judicial comity to play a role as a discretionary concept.[794]

241. BALANCING CONNECTIONS INSTEAD OF INTERESTS – While comity-based interest-balancing may not dovetail well with the mechanical nature of the exercise of jurisdiction in Europe, its underlying aim, neutrally identifying, in the terminology of SAVIGNY, the 'seat' of a transnational legal relationship (*i.e.*, a classical aim of private international law), may a ring a bell with Europeans.[795] The balancing of (territorial or personal) connections in order to identify the proper law may surely be palatable for a European legal mind, although possibly, black-letter law rules will need to embody these connections in Europe.

However, the balancing of inerests as a means of identifing the seat of a transnational legal relationship, as contemplated by § 403 of the Restatement may be off-limits for Europeans. In Savignist theory, the proper law is identified through an analysis of private connections rather than sovereign interests.[796] The emphasis on interests by §

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[792] The unavailability of judicial review for instance attests to the secondary role that the courts were expected to play in the continental State's institutional design. *See* B. PEARCE, "The Comity Doctrine as a Barrier to Judicial Jurisdiction: A U.S.-E.U. Comparison", 30 *Stan. J. Int'l L.* 525, 567 (1994).

[793] *See* B. PEARCE, "The Comity Doctrine as a Barrier to Judicial Jurisdiction: A U.S.-E.U. Comparison", 30 *Stan. J. Int'l L.* 525, 570 (1994) (making a comparison with common law countries).

[794] *Id.*, at 577-78 (arguing that it is "likely that the relatively smooth functioning of [EC Regulation 44/2001] will make European courts and commentators grow ever more wary and weary of the American common-law approach to judicial jurisdiction of which comity is so emblematic", and that European judges may conclude that Regulation 44/2001 "better serve[s] the ends of systematic harmony and fairness that constitute comity's ultimate goal.").

[795] F.C. VON SAVIGNY, *System of Modern Roman Law*, vol. 8, London, 1849 (translated by W. Guthrie, 1869), 89. *Compare* G.B. BORN, "A Reappraisal of the Extraterritorial Reach of U.S. Law", 24 *Law & Pol. Int'l Bus.* 1, 84 (1992) (arguing that European private international law frequently takes similar approaches as the *Restatement (Second) of Conflict of Laws* and the *Restatement (Third) of Foreign Relations Laws*).

[796] *See* J.-M. BISCHOFF & R. KOVAR, "L'application du droit communautaire de la concurrence aux entreprises établies à l'extérieur de la Communauté", 102 *J.D.I.* 675, 713 (1975) (stating that « la règle de conflit classique du type savignien est essentiellement fondée sur la nature du rapport de droit litigieux. Or cette considération, si elle n'est pas négligeable, reste cependant accessoire lorsqu'il s'agit en définitive de délimiter des souverainetés. »).

403 has indeed been considered by Professor MANN to represent a radical departure from the classical European jurisdictional framework of reasonableness based on what he terms a "sufficiently close legal connection", usually territoriality or nationality, and which disregards anything short of genuine contacts,[797] such as "mere political, economic, commercial or social interests".[798] For scholars of classical international law, schooled in the European tradition, interest-balancing is anathema to law, in that it involves political instead of legal arguments.[799]

As MANN put it: "The so-called balancing of interests is nothing but a political consideration: it is not the subjective or political interest, but the objective test of the closeness of connection, of a sufficiently weighty point of contact between the facts and their legal assessment that is relevant. The lawyer balances contacts rather than interests."[800] Under a contact-based conception of jurisdiction, courts and regulators examine whether the contacts of the defendant's conduct with the forum have been sufficient and voluntary. The exercise of jurisdiction over the defendant is then grounded upon the defendant waiving the protection afforded by its own country's laws ("waiver by conduct").[801]

In spite of MANN's repudiation of interest-balancing, the differences between MANN's European concept of jurisdiction and the U.S. concept of jurisdiction should not be overstated. In fact, Europeans may subscribe to the general principles of international jurisdiction enshrined in § 402 of the Restatement, as well as to quite some connecting factors of the rule of reason set forth in § 403. The only thing they may not subscribe to is the balancing of interests included in the U.S.-style rule of reason. For Europeans, the reasonableness and thus the legality of jurisdictional claims are "dependent on the existence of an *effective and significant connection* between the regulating state and the activity to be regulated".[802]

242. The distinction between "connection" and "interest" is at any rate a subtle one. Interest may be defined as "a common concern, especially in politics or business",[803] whereas both connection and contact denote "a link or relationship" (with contact possibly denoting a "physical" relationship).[804] It is difficult to see how

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[797] F.A. MANN, "The Doctrine of Jurisdiction in International Law", 111 *R.C.A.D.I.* 1, 44 (1964-I) ("The problem, properly defined, involves the search for the *State or States whose contact with the facts* is such as to make the allocation of legislative competence just and reasonable.") (emphasis added).

[798] F.A. MANN, "The Doctrine of Jurisdiction Revisited after Twenty Years", 186 *R.C.A.D.I.* 9, 29 (1984-III).

[799] *Id.*, at 30-31.

[800] *Id.*, at 31. *See also* A. BIANCHI, Reply to Professor Maier, in K.M. MEESSEN (ed.), *Extraterritorial Jurisdiction in Theory and Practice*, London/The Hague/Boston, Kluwer, 1996, 74, 91 (stating that "international customary international law makes the legality of extraterritorial jurisdictional claims dependent on the existence of an effective and significant connection between the regulating state and the activity to be regulated").

[801] X., Note, "Predictability and Comity: Toward Common Principles of Extraterritorial Jurisdiction", 98 *Harv. L. Rev.* 1310, 1322-23 (1985). This test of legislative or prescriptive jurisdiction comes close to the test that U.S. courts employ so as to establish personal jurisdiction, be it that the emphasis in the former case lies on the *defendant's activities*' contacts with the forum rather than on the *defendant*'s contacts.

[802] *See* A. BIANCHI, Reply to Professor Maier, in K.M. MEESSEN (ed.), *Extraterritorial Jurisdiction in Theory and Practice*, London/The Hague/Boston, Kluwer, 1996, 74, 90 (original emphasis).

[803] J. PEARSALL, *Oxford Concise English Dictionary*, 10th ed., Oxford, OUP, 2001, at 737.

[804] *Id.*, at 302 and 306.

a State can be concerned about an extraterritorial situation if that situation has no link or relationship with it. As pointed out above, States will refrain from regulating a situation if they are not affected by it, *viz.*, if the situation does not relate to them. Consequently, if a State has an interest in regulating a situation, that situation touches upon the well-being of that State, or put differently, that State has a connection with it. Therefore, more useful than brandishing the divisive words "connection" and "interest" is ascertaining *what* connections and *what* interests ought to be taken into account in a reasonableness analysis.

5.5.3. EC courts and comity in competition cases

243. Cases of extraterritoriality have arisen in Europe, especially in the field of antitrust law and international humanitarian law. In these cases, European courts typically refused to balance the different sovereign and private interests involved in the case. The jurisdictional pecularities in the antitrust realm will be discussed in chapter 6, and the pecularities of universal criminal jurisdiction in chapter 10. This subsection will be devoted to EC antitrust courts' failure to adequately heed comity in *Wood Pulp* (1988) and *Gencor* (1999). It will be shown that EC antitrust regulators nevertheless implicitly apply comity when assessing the appropriateness of initiating proceedings against foreign defendants. In addition, European doctrine seems to be largely in favour of an encompassing antitrust comity test. Comity and reasonableness in the context of universal jurisdiction will not be discussed in this subsection. This is so because the drafters of of the Restatement did not believe the rule of reason of § 403 to be applicable to the exercise of universal jurisidiction. In chapter 10.11, it will be argued that they were mistaken.

244. The issue of comity in antitrust matters will be reconsidered at length in chapter 6.7. As a point of departure, U.S. practice will be set out there, yet the recommendations for a proper antitrust comity test will also apply to EC practice, because since the U.S. Supreme Court's 1993 *Hartford Fire* judgment, the prevailing U.S. view of comity may be as strict as the European one. This subsection's discussion of EC antitrust courts' reluctance to apply comity primarily serves as an illustration of European uneasiness with balancing interests in a field of the law in which important issues of extraterritoriality have arisen. Understandably, in chapter 6.7, this discussion will not be repeated but only be made reference at.

5.5.3.a. Wood Pulp and Gencor

245. WOOD PULP – Especially the European Court of Justice's judgment in *Wood Pulp* (1988), the foundational European extraterritorial antitrust case, aptly displays the European awkwardness with comity, interest-balancing, and jurisdictional reasonableness. In *Wood Pulp*, the ECJ held that heeding concerns of international comity in considering the reach of Article 85 of the EC Treaty (*i.e.*, EC competition law), would "amount[] to calling in question the Community's jurisdiction to apply its competition rules to conduct such as that found in this case and … that argument has already been rejected."[805] ALFORD has argued that the ECJ in *Wood Pulp* actually only examined whether the EC *may* exercise jurisdiction under

[805] *Wood Pulp*, 1988 E.C.R. 5244. *Compare I.B.M.* v. *Commission*, [1981] E.C.R. 2639, *C.M.L.R.* 635, 662 (1981) (ruling that comity should not be considered until after a decision had been made).

principles of international law, the territorial principle in particular, but not whether the EC *ought to* exercise its jurisdiction, as compared to another State concerned.[806] It is precisely a comity analysis that addresses this normative question: in case several States could exercise their (concurrent) jurisdiction, which State ought to defer to the other State, weighing the (sovereign) interests involved?

246. Although the European Court of Justice rebuked comity in *Wood Pulp*, the European Commission had seemed to approve of it in an earlier case. In *Eastern Aluminium* (1985), it held that "[t]he exercise of jurisdiction … does not require any of the undertakings concerned to act in any way contrary to the requirements of their domestic laws, nor would the application of Community law adversely affect important interests of a non-member State. Such an interest would have to be so important as to prevail over the fundamental interest of the Community that competition within the common market is not distorted …".[807] As the Commission inquired into the interests of non-member States, it indeed seemed to espouse comity.[808]

Eastern Aluminium appeared to recognize that the EC is precluded from exercising its antitrust jurisdiction in case so doing would cause a true conflict with territorial legislation, *i.e.*, when one State compels conduct that another States prohibits, or *vice versa* (the *Hartford Fire* approach, *see* chapter 6.7 in particular), but *also* if important interests of a foreign State would be affected *and* these interests outweigh the interests of the EC (the *Timberlane* approach).[809] The EC's two-pronged approach of *Eastern Aluminium* yielded however to the *Wood Pulp* approach, hostile to comity and arguably synonymous with the *Hartford Fire* true-conflict approach.

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[806] *See* R.P. ALFORD, "The Extraterritorial Application of Antitrust Laws: The United States and European Community Approaches", 33 *Va. J. Int'l L.* 1, 43 (1992). J. DUTHEIL DE LA ROCHERE, "Réflexions sur l'application "extra-territoriale" du droit communautaire", in X., *Mélanges M. Virally. Le droit international au service de la paix, de la justice et du développement*, Paris, Pedone, 1991, 282, 293 however argued that the Court did not find a concurring jurisdiction which was better founded than the Commission's jurisdiction ("Dans l'affaire "Pâte de bois", la Cour ne s'est pas attachée a examiner le principe de modération parce qu'elle n'a pas discerné l'existence d'un prétention de compétence concurrente susceptible d'être mieux fondée que la compétence du droit communautaire telle qu'elle l'avait affirmée.").

[807] Commission, *Eastern Aluminium*, *O.J.* L 92/37, 48 (1985).

[808] *See* B. PEARCE, "The Comity Doctrine as a Barrier to Judicial Jurisdiction: A U.S.-E.U. Comparison", 30 *Stan. J. Int'l L.* 525, 576 (1994). It may be noted that in a 1981 case before the ECJ, *I.B.M.* v. *Commission*, IBM, a corporation with headquarters in the United States, maintained that a number of measures taken by the Commission "offend[ed] against the international legal principles of comity between nations and non-interference in internal affairs, principles which ought to have been taken into consideration by the Commission before it adopted the measures in question because the conduct of IBM which is the subject of complaint occurred in the main outside the Community, in particular in the United States of America where it is also the subject of legal proceedings." The U.S. Assistant Attorney General in charge of the Antitrust Division also reportedly denounced the extraterritorial effects of the Commission's order. *See Wall Street Journal*, March 31, 1982, p. 1, cited in D.F. VAGTS, "A Turnabout in Extraterritoriality", 76 *A.J.I.L.* 591, 593 (1982). The ECJ did eventually not pronounce itself on the comity argument, and dismissed the case as inadmissible. Case 60/81, *I.B.M.* v. *Commission*, [1981] ECR, p. 2639.

[809] It has however been noted that if, under *Eastern Aluminium*, "a third country's interest must be 'so important as to prevail over the fundamental interest of the Community that competiton within the Common Market is not distorted', there does not seem to be much room for taking either international law or third country's interests into account.". *See* J.H.J. BOURGEOIS, "EEC Control over International Mergers", 10 *Yb. European Law* 1990, 103, 114 (1990).

247. In *Wood Pulp*, the foreign conspirators in *Wood Pulp* themselves did not rely on a broad concept of comity or reasonableness as a defence, such as the rule of reason in § 403 of the U.S. Restatement, but rather on a rule that resembles the true conflict doctrine, and was premised on the international law principle of non-interference. According to this rule, "where two States have jurisdiction to lay down and enforce rules and the effect of those rules is that a person finds himself subject to contradictory orders as to the conduct he must adopt, each State is obliged to exercise its jurisdiction with moderation."[810] The Court replied, correctly, that there was no need "to enquire into the existence in international law of such a rule since it suffices to observe that the conditions for its application are in any event not satisfied. There is not, in this case, any contradiction between the conduct required by the United States and that required by the Community since the [American] Webb Pomerene Act merely exempts the conclusion of export cartels from the application of United States anti-trust laws but does not require such cartels to be concluded."[811]

248. It would be a rash conclusion to hold that, in so stating, the ECJ rejected comity. Indeed, the Court *approved* of comity as a principle of jurisdictional restraint. However, in the Court's view, comity would *legally* only come into play when foreign laws compelled anticompetitive conduct, where EC laws prohibited such conduct, or *vice versa*. By terminating the comity/reasonableness analysis there, the Court undeniably espoused a very narrow understanding of comity/reasonableness,[812] an understanding which nonetheless dovetails well with traditional European uneasiness with 'political' interest-balancing.[813] Indeed, the presence of a "true" jurisdictional conflict is easy and mechanically identifiable, and does not require the court to genuinely balance the regulatory interests that different States might have in exercising their jurisdiction or not. This approach, which was

[810] ECJ, *Wood Pulp*, § 19.

[811] ECJ, *Wood Pulp*, § 20. *Compare*: European Commission, *Aluminium Imports from Eastern Europe O.J.* L 92/1 (1985), 3 *C.M.L.R.* 894-89 (1987), holding that there was no reason to restrain the exercise of jurisdiction of Eastern European aluminium producers on comity grounds, as the parties were not being required to act contrary to their domestic law and the application of Community law did not adversely affect important interests of a non-member state.

[812] This narrow understanding was criticized by European doctrine. *See, e.g.*, J. DUTHEIL DE LA ROCHERE, "Réflexions sur l'application "extra-territoriale" du droit communautaire", in X., *Mélanges M. Virally. Le droit international au service de la paix, de la justice et du développement*, Paris, Pedone, 1991, 282, 294 (stating that in *Wood Pulp*, the ECJ should have more explicitly balanced the regulatory interests of the EC with the importance of procedures exempting export cartels from U.S. antitrust laws under the U.S. Webb-Pomerene Act); L. IDOT, Note *Wood Pulp*, *Rev. trim. dr. europ.* 345, 355 (1989); J. KAFFANKE, "Nationales Wirtschaftsrecht und internationaler Sachverhalt", 27 *Archiv des Völkerrechts* 129, 134-35 (1989); M. SCHÖDERMEIER, "Die vermiedene Auswirkung", 39 *WuW* 21,28 (1989). *See however* in support of the ECJ's comity-unfriendly approach: H.-W. KNEBEL, "Die Extraterritorialität des Europäischen Kartellrechts", 2 *EuZW* 265, 274 (1991). The need for a genuine comity analysis was already advanced in European doctrine *before* the 1972 *Dyestuffs* case. *See* B. GOLDMAN, "Les effects juridiques extra-territoriaux de la politique de la concurrence", *Rev. Marché Commun* 612, 617 (1972) (stating that « l'application extra-territoriale des règles de fond du droit communautaire de la concurrence peut exiger une coordination avec l'application de règles de ces Etats, elle-même fondée sur la localisation territoriale de certains des effets des ententes internationales. »).

[813] *Compare* I. VAN BAEL & J.-F. BELLIS, *Competition Law of the European Community*, 4th ed., The Hague, Kluwer Law International, 2005, 159 ("Possibly, the Court of Justice regards the argument on comity as a political one, which raises no legal restraints on the Commission's power.").

later also taken by the U.S. Supreme Court in *Hartford Fire*,[814] is a far cry from the broad rule of reason set forth in § 403 of the Restatement.

249. GENCOR – In the 1999 *Gencor* merger case, the European Court of First Instance, did not change tack and stuck to the *Wood Pulp* true conflict doctrine. The Court again held that it was not necessary to consider whether a rule of comity existed in international law, since it would suffice to note "that there was no conflict between the course of action required by the South African Government and that required by the Community, given that […] the South African competition authorities simply concluded that the concentration agreement did not give rise to any competition policy concerns, without required that such an agreement be entered into."[815]

Interestingly however, the *Gencor* Court noted that "neither the applicant nor, indeed, the South African Government […] have shown, beyond making mere statements of principle, in what way the proposed concentration would affect the vital economic and/or commercial interests of the Republic of South Africa."[816] This consideration may point at a less strict application of the true conflict doctrine, and a willingness to conduct a wide-ranging comity analysis.[817] If the proposed concentration would supposedly have affected "the vital economic and/or commercial interests" of another State, the Court might have been willing to balance the interests of the Community and of South Africa.[818] It is however also possible that the Court's consideration merely amounts to a welcome *a fortiori* argument that supports the rejection of the merging companies' claims. It remains to be see whether it will cast aside the true conflict analysis, which requires a legally compulsory conduct and not merely a conduct that furthers the interests of the foreign State.[819]

5.5.3.b. Implicit reasonableness as applied by the European Commission

250. As pointed out in 5.5.3.a, jurisdictional reasonableness came somewhat to the fore in the European Commission's opinion in the *Eastern Aluminium* case. In other cases however, the Commission has not explicitly applied the rule of reason. The fact that the European Commission does not apply European competition laws to

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[814] *See, e.g.*, W. SUGDEN, "Global Antitrust and the Evolution of an International Standard", 35 *Vand. J. Transnat'l L.* 989, 1016 (2002) (stating that "the United States and the European Union have expanded extraterritoriality at the expense of international comity").

[815] CFI, *Gencor*, E.C.R. 1999, II-00753, § 103, citing ECJ, *Wood Pulp*, § 20.

[816] CFI, *Gencor*, § 105.

[817] *See* Y. VAN GERVEN & L. HOET, "*Gencor*: Some Notes on Transnational Competition Law Issues", 28(2) *Legal Issues of Economic Integration* 195, 208-209 (2001); F.E. GONZALEZ-DIAZ, "Recent Developments in EC merger Control Law: The *Gencor* Judgment", 22(3) *W. Comp.* 3, 14 (1999).

[818] It could be argued that, in holding that the proposed concentration would not affect the vital economic and/or commercial interests of South Africa, the Court may have wished to distinguish this case with the *Boeing/McDonnell Douglas* case (*see also* chapter 6.12.5), in which U.S. vital economic and/ or commercial interests may have been at stake. *See* L. IDOT, comment *Gencor*, *J.D.I.* 513, 515 (2000) ("Implicitement, le Tribunal laisse entendre qu'aucune comparaison ne pouvait être faite avec l'affaire Boeing Mac Donnell Douglas à propos de laquelle les Etats-Unis avaient fermement invoqué des intérêts vitaux relatifs à leur stratégie de defense.").

[819] *Compare* A. LAYTON & A.M. PARRY, "Extraterritorial jurisdiction – European Responses", 26 *Houston J.I.L.* 309, 322 (2004), on the *Gencor* judgment ("[I]t is not clear whether the use of the effects doctrine is always to be considered in itself a proportionate response, or whether individual applications of the doctrine would be open to challenge on proportionality grounds.").

all extra-European transactions somehow impinging on European interests, may nonetheless suggest the application of some rule of reason.[820] This could also be collected from Sir Leon BRITTAN's description of the EC approach to international business restrictive practices as "a combination of proper respect for international law, politically responsible exercise of self-restraint and regard for others and comprehensive bilateral treaties between the free market world's trading powers in what is needed to provide a framework for the application of competition law in today's environment."[821] Yet an EC jurisdictional rule of reason is deprived of a legal cloak conferring predictability and legal certainty on it, since there is no principled fall-back position for European regulators who are willing to apply a wider rule of reason than the true conflict rule mandated by the ECJ and the CFI.[822] In the United States by contrast, legality may have more leverage, since the U.S. Department of Justice and the Federal Trade Commission are expected to apply a principled rule of reason set forth in both agencies' 1995 Antitrust Guidelines for International Operations (a rule of reason which draws on § 403 of the U.S. Restatement). In Europe, reasonableness appears to be a matter of economic policy-makers assessing the expediency of the application of competition law to foreign practices and exercising administrative restraint,[823] rather than of lawyers applying well-established jurisdictional rules, or "countervailing principles", as MEESSEN terms them.[824]

251. The legal form with which jurisdictional reasonableness is clothed in the United States is arguably not only attributable to the general tendency in the U.S. to treat all matters impacting society as legal matters, but also to the traditional unavailability of private antitrust enforcement in Europe. In the United States, the rule of reason was precisely developed by federal courts in private antitrust suits, with the government steering a settlement-based course based on non-legal policy considerations.[825] The judiciary, being a legal institution and not an economic

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[820] *See* J.H.J. BOURGEOIS, "EEC Control over International Mergers", 10 *Yb. European Law* 1990, 103, 114 (1990) ("The Commission does consider itself obliged to have regard to comity when exercising its jurisdiction in competition cases with a foreign element and is better equipped to do so than a court of law."); I. VAN BAEL & J.-F. BELLIS, *Competition Law of the European Community*, 4th ed., The Hague, Kluwer Law International, 2005, 158-59 (stating that, although "the Commission has preferred to rely on the effects doctrine in its decisions, this does not mean that the Commission turns a blind eye to considerations of comity"). *See also* K.M. MEESSEN, "Antitrust Jurisdiction Under Customary International Law", 78 *A.J.I.L.* 783, 789-90 (1984) (stating, as a general matter, that "it could very well be concluded that the outcome of most international antitrust conflicts, perhaps of all of them, reflected the multifaceted *Timberlane* approach").

[821] L. BRITTAN, "Jurisdictional Issues in EEC Competition Law", *Competition Policy and Merger Control in the Single European Market*, Cambridge, Grotius, 1991, …, quoted in Bourgeois, 103.

[822] *See also* J.H.J. BOURGEOIS, "EEC Control over International Mergers", 10 *Yb. European Law* 1990, 103, 128 (1990) ("[T]he Commission is bound to give to [the international law principle of non-interference] and to [the balance-of-interests] test a more precise content. It will probably do so on a case by case basis. Apart from the legal undertainty which this approach implies, it is unlikely to prevent conflicts of jurisdiction with third countries.").

[823] *See* K.M. MEESSEN, "Antitrust Jurisdiction Under Customary International Law", 78 *A.J.I.L.* 783, 797 (1984) (arguing that "as an instrument of conflict avoidance, administrative restraint is more important than the choice of connecting factors", citing German, Swiss, EC and U.S. governmental practice).

[824] *Id.*, at 797-98. *Compare* R.P. ALFORD, "The Extraterritorial Application of Antitrust Laws: The United States and European Community Approaches", 33 *Va. J. Int'l L.* 1, 29-30 (1992) (arguing that the European Commission has never actually undertaken a rule-of-reason-informed balancing approach).

[825] *See* K.M. MEESSEN, "Antitrust Jurisdiction Under Customary International Law", 78 *A.J.I.L.* 783, 795 (1984) (describing the complexity of techniques of settlement and diversity of results achieved).

decision-maker, was in need of a legal framework to deal consistently with these suits legally put before them. Almost all attempts at legally defining the contours of extraterritorial antitrust jurisdiction are indeed related to such private suits. The shaping of the rule of reason as a matter of judicial comity by the courts in *Timberlane* and *Mannington Mills*, drawing on conflict of laws principles, is no exception. The 'legalized' rule of reason gradually made its way to the enforcement policy of the U.S. antitrust agencies, with the 1987 Restatement granting it a general scope of application in § 415 (*i.e.*, a scope of application encompassing private and public antitrust enforcement), and the agencies, influenced by the Restatement, inserting it, as a matter of prescriptive comity, into their 1995 Guidelines for International Operations. It may be argued that, without the availability of private antitrust enforcement in the United States, its public jurisdictional antitrust framework would be much less developed, and even as undeveloped as it is in Europe.

5.5.3.c. Interest-balancing by German courts

252. Within Europe, only in Germany is interest-balancing accepted as a legal concept in the field of competition law, at least if it is restricted to weighing *sovereign* interests. Importantly from a conceptual perspective, unlike § 403 of the Restatement, the German *Kammergericht* premised the rule of reason on general international law principles, which it believed to require jurisdictional restraint even where Germany would have jurisdiction under the classical international law principles of jurisdiction, the effects principle in particular.

Admittedly, in the 1983 *Morris/Rothmans* merger case, the German *Kammergericht*, while acknowledging that comity of nations played an important role in U.S. law,[826] pointed out that comity had not reached the status of customary international law,[827] and that the use of comity to solve jurisdictional disputes was not warranted, in that comity would lead to a situation in which no State would be able to act, or in which the interests of the protesting State would be unilaterally heeded.[828] However, as will be further discussed in the part on mergers, the German court approved of the balancing of sovereign interests (which forms part of but is not synonymous with a comity analysis), and of the concomitant requirement of a significant jurisdictional link between the matter to be regulated and the regulating State, a link which it believed to be required under the customary international law principles of non-intervention and abuse of jurisdiction.[829]

5.5.3.d. European doctrine

253. Unlike EC courts, continental European doctrine, influenced by U.S. doctrine and practice, has been remarkably enthusiastic about the balancing of interests or connections so as to solve problemes of concurrent economic jurisdiction.

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[826] Case Kart 16/82, *Philip Morris Inc.* v. *Bundeskartellamt*, [1984] E.C.C. 393 (Kammergericht) (F.R.G.), KG WuW/E OLG 3051, 3059.

[827] *Id.* (holding that "[t]he international law requirement of mutual consideration, which in the Anglo-American legal world plays a special part as 'comity of nations' and in the European sector is also described as 'courtoisie', has particular importance in a conflict situation among the legal systems of different States, but it has not achieved the status of a customary rule of international law.").

[828] *Id.*

[829] *See* chapter 6.12.2..

Notably MEESSEN, KAFFANKE, and SCHUSTER in Germany,[830] and BISCHOFF and KOVAR in France,[831] have advocated a rule of reason (although they may believe, with good reason, that the rule of reason is not a hard and fast rule of international law). BISCHOFF and KOVAR even pointed out that it is "l'essence de la function première du juge, celle de dire le Droit (*jurisdictio*),"[832] and that "[i]l appartient au droit international de s'efforcer de résoudre les conflits susceptibles de naître d'une … pluralité de compétences. »[833] In contrast, English authors, spearheaded by MANN, whose views have been presented in subsection 5.5.2, have been largely hostile to interest-balancing, yet it may be argued that this hostility actually masks a hostility to the effects doctrine rather to a rule of reason. LOWE for instance rejected interest-balancing as a workable method, yet supported it « in proper cases (i.e. cases of concurrent jurisdiction) ».[834] In continental-European doctrine, mechanical solutions to jurisdictional problems are thus doubtless on the retreat. Doctrinal views have influenced German court practice, and, to a lesser extent, the Commission's practice. It may be hoped that EC courts will one day follow suit and require the application of a rule of reason in competition matters.

5.6. The customary international law character of the rule of reason revisited: a way forward

5.6.1. Customary law de lege ferenda ?

254. MASSEY, who was critical of the contemporary customary international law character of the rule of reason, wrote that "[b]y the time the Restatement (Fourth) is published, however, there may be enough state practice supported by *opinio juris*, by the United States and others, to support the reasonableness requirement as customary law."[835] He pointed out that the very adoption of § 403 may contribute to the development of a reasonableness norm, as the writings of learned authors – which the drafters of the Restatement undeniably were – are, in keeping with Article 38 of the Statute of the International Court of Justice, a "subsidiary means for the determination of rules of law".[836]

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[830] See K.M. MEESSEN, *Völkerrechtliche Grundsätze des internationalen Kartellrechts*, Baden-Baden, Nomos, 1975, 288 p.; G. SCHUSTER, Die internationale Anwendung des Börsenrechts, Berlin, Springer, 1996, xxv + 729 p. ; J. KAFFANKE, "Nationales Wirtschaftsrecht und internationaler Sachverhalt", 27 *Archiv des Völkerrechts* 129, 146 (1989) (stating that Section 403 of the Restatement "weist sie doch in die richtige Richtung und lässt sich als Ausgangspunkt der weiteren Entwicklung ansehen").

[831] J.-M. BISCHOFF & R. KOVAR, "L'application du droit communautaire de la concurrence aux entreprises établies à l'extérieur de la Communauté", 102 *J.D.I.* 675 (1975).

[832] *Id.*, at 712.

[833] *Id.*

[834] A.V. LOWE, "The problems of extraterritorial jurisdiction : economic sovereignty and the search for a solution", 34 *I.C.L.Q.* 724, 746 (1985). The rule of reason set forth in Section 403 of the Restatement becomes only operative when jurisdiction has been established under the classical grounds of jurisdiction in Section 402, which include the territoriality principle. Section 403 solves competency conflicts resulting from concurrent jurisdiction based on that principle (conduct- and effects-based jurisdiction). It is the effects doctrine which LOWE takes issue with, rather than interest-balancing. He thus argues that there was not acceptable basis of jurisdiction in the first place under Section 402. *Id.*, at 735.

[835] D.P. MASSEY, Note, "How the American Law Institute Influences Customary Law: The Reasonableness Requirement of the Restatement of Foreign Relations Law", 22 *Yale J. Int'l L.* 419, 445 (1997).

[836] *Id.*, at 442. *See also* Restatement, § 103(2)(c).

255. Since the adoption of the Restatement (Third), § 403 has indeed been cited by U.S. courts[837] and academia and even by the U.S. Government[838], which may lend further credence to the claim that international actors could legitimately consider the reasonableness requirement as reflecting the U.S. view on the customary law of reasonable jurisdiction. The customary international law nature of § 403 may thus prove to be a self-fulfilling prophecy: in spite of there being no evidence that § 403 reflected customary law at the moment the Restatement (Third) was adopted in 1987, its wide-ranging influence may now have vindicated its initially *de lege ferenda* normative claim. Obviously, U.S. application of the rule of reason alone does not suffice to ground a norm of customary international law. However, assuming that most other States have so far refrained from exercising jurisdiction in an unreasonable manner, for one reason or the other, and given the fact that § 403 was precisely adopted because of foreign denunciations of U.S. extraterritorial jurisdiction, it could be argued that the crystallization of a customary rule of reason is not a *non sequitur*.

5.6.2. The workings of power

256. Aside from the objections against the customary international law character of the rule of reason discussed in sections 5.4 and 5.5, most notably European reluctance at balancing interests, the most formidable challenge to the rule of reason as a norm of customary international law is represented by power relationships. The workings of power might reduce the rule to a legal shell, depriving it of its genuine normative content.

257. SLAUGHTER has hailed the breakthrough of the interest-balancing test as a "shift from a focus on power to a focus on interests" in the practice of

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[837] *Id.*,at 438, citing *United States* v. *Vasquez-Valesco*, 15 F.3d 833, 840-41 (9th Cir. 1994) (holding that Section 403 "has emerged as a principle of international law", and using it for purposes of the *Charming Betsy* canon of statutory construction); 170 B.R. 800 (S.D.N.Y. 1994); *United States* v. *Felix-Gutierrez*, 940 F.2d 1200, 1204 (9th Cir. 1991) ("[C]ourts generally look to international law principles to ensure that an extraterritorial application of United States laws is "reasonable."); *United States* v. *Juda*, 46 F.3d 961, 967 ("We look to [international law] principles "to ensure that an extraterritorial application of United States law is 'reasonable'".); *United States* v. *Javino*, 960 F.2d 1137, 1142-43 (2d Cir. 1992) ("Though Congress may prescribe laws concerning conduct outside of the territorial boundaries of the United States "that has or is intended to have substantial effect" within the United States, it may not regulate such conduct "when the exercise of ... jurisdiction is unreasonable," *Restatement* § 403(1).") (citations omitted); *Boureslan* v. *Aramco*, 857 F.2d 1014, 1024 (5th Cir. 1988) (King, J., dissenting) ("[B]ecause section 403 is a principle of international law, a statute may not be construed to violate the principle absent an explicit, affirmative expression of congressional intent compelling that construction."); *Neely* v. *Club Med Management Services, Inc.*, 63 F.3d 166, 183 (3d Cir. 1995) ("[W]e "rely on the Restatement (Third) of Foreign Relations Law [including the jurisdictional provisions] for the relevant principles of international law".). It may be noted, in this context, that the Sections 18 and 40 of the 1965 Restatement of Foreign Relations Law (Second) were the sections of the Restatement mostly frequently cited by the courts (remarks by A. LOWENFELD, in Panel Discussion on the Draft Restatement of the Foreign Relations Law of the United States, 76 *Proc. Soc'y Int'l L.* 184, 191 (1982)).

[838] *See* Department of State, Office of the Legal Adviser, Legal Considerations Regarding Title III of the Libertad Bill, *reprinted* in 141 Cong. Rec. S15106 (Oct. 12, 1995) ("[I]nternational law ... requires a state to apply its laws to extra-territorial conduct only when doing so would be reasonable in view of certain customary factors"). MASSEY however argued that this memorandum does not consitute *opinio juris* as it is not official position of the U.S. Government and was only intended for intragovernmental policymaking. *See* D.P. MASSEY, Note, "How the American Law Institute Influences Customary Law: The Reasonableness Requirement of the Restatement of Foreign Relations Law", 22 *Yale J. Int'l L.* 419, 439 (1997).

extraterritorial jurisdiction.[839] State interests are however multifarious in nature and are hard to capture by formal jurisdictional criteria.[840] Legal grounds, such as factors determining jurisdictional reasonableness that are invoked so as to oppose or justify jurisdictional assertions, often masquerade more mundane concerns of political and economic loss or expansion of power. The problem with the reasonableness factors set forth for instance in § 403 of the Restatement as legal grounds under international law is that they are so malleable as to render them non-criteria in practice. Indeed, almost any jurisdictional assertion could be defended or opposed by invoking one or more reasonableness factors.

258. This may lead us to state, as a general matter, that no established legal rule of reasonableness delimits spheres of jurisdiction, but that "each state's regulatory interests seem to set the minimum requirements for a basis of … jurisdiction", with States choosing certain connecting factors, not as a matter of law, but as a matter of "enlightened self-interest" and "voluntary self-limitation".[841] As regulatory interests differ from case to case, aficionados of legal certainty in matters of extraterritorial jurisdiction will face an uphill battle in formulating rules of reason with a general scope of application. Regrettably, having picked up the thread of comity from where Ulrik HUBER had left it in the 17th century, one may be compelled to admit that the rule of reason remains a discretionary concept rather than a genuine norm of customary international law.[842]

5.6.3. A way forward: tying reasonableness to the matter to be regulated

259. Of course, defeatism is not a satisfactory way forward. Granted, given the intricate workings of power, it is extremely difficult to identify what the international community considers, at a given moment in time, to be connections and interests that are sufficiently strong to justify the exercise of jurisdiction under international law. However, the question may be asked whether *compartmentalizing* the overarching jurisdictional rule of reason may not serve the purpose of identifying a rule of reason as a norm of customary international law.

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[839] *See* A.-M. SLAUGHTER, "Liberal International Relations Theory and International Economic Law", 10 *Am. U. J. Int'l L. & Pol'y* 717, 735-36 (1995) (arguing that "[f]rom a Liberal perspective, this focus on interests is likely to be more fruitful than a straightforward assertion of power at resolving the underlying conflict", while emphasizing the need to untie the rule of reason from territory and physical power).

[840] *See* K.M. MEESSEN, "Antitrust Jurisdiction Under Customary International Law", 78 *A.J.I.L.* 783, 791 (1984) (arguing that "whether [foreign interests] are adversely affected would depend on how the foreign government happens to view its interests at any given moment [is] a matter that surely escapes any prior description in abstract terms.").

[841] *Id.*, at 800-801. *See also* L. IDOT, Note *Wood Pulp, Rev. trim. dr. europ.* 345, 355 (1989) (stating that a "principe d'autolimitation ou de self-restraint … deviendrait d'application générale"); J.-M. BISCHOFF & R. KOVAR, "L'application du droit communautaire de la concurrence aux entreprises établies à l'extérieur de la Communauté", 102 *J.D.I.* 675, 712 (1975) (speaking of « autolimitation ») ; U. DRAETTA, "The International Jurisdiction of the E.U. Commission in the Merger Control Area", *R.D.A.I.* 201, 204 (2000) (stating that public international does not contain unequivocal criteria for determining the extent of the national jurisdictions and that it only requires compliance with good faith principles).

[842] *See also* P.C. MAVROIDIS & D.J. NEVEN, "Some Reflections on Extraterritoriality in International Economic Law: A Law and Economics Analysis", *Mélanges en hommage à Michel Waelbroeck,* II, Brussels, Bruylant, 1999, 1297, 1322.

260. It is important to note that § 403 makes the operation of the reasonableness factors dependent on the activity and the purpose of the regulation, as well as on the regulatory organ.[843] This implies that what is reasonable for one particular activity may be unreasonable for another,[844] and that the requirement of reasonableness is somewhat looser for hierarchically higher – and supposedly democratically more legitimate – State organs. In the field of criminal law, a strong justification for the extraterritorial application of U.S. laws is ordinarily required.[845] The sliding scale of reasonableness illustrates the insight that there is no overarching concept of jurisdiction. There may be common principles, but these are applied and adapted to specific topics,[846] or as BIANCHI put it: "jurisdiction ought to be regarded as a unitary phenomenon characterized by different stage of exercise of authoritative power."[847] While jurisdiction may depend on the particular field of the law, this need nevertheless not imply that solutions could not sometimes be transferred from one field to another.[848] Indeed, the roots of § 403 itself could be traced to the particular field of international antitrust law (although § 415 now deals specifically with antitrust jurisdiction), particularly to the writings of BREWSTER and the court decisions in *Timberlane* and *Mannington Mills* in this context.

261. German doctrine may provide a useful clarification as to the aforementioned sliding scale of jurisdictional reasonableness. In the field of antitrust law, German courts have demanded that a jurisdictional assertion serve the *Schutz*- or *Regelungszweck*, *i.e.*, the protective or regulatory purpose, of a particular law or legal provision.[849] It may be noted that the requirement of *Schutzzweck* is not alien to the

[843] *See* A. LOWENFELD, in Panel Discussion on the Draft Restatement of the Foreign Relations Law of the United States, 76 *Proc. Soc'y Int'l L.* 184, 193 (1982); § 403, comment d.

[844] *Id.*, giving the example of the regulation of different aspects of foreign flag vessels' operations, such as the requirement to take on a pilot, the requirement to produce a cargo manifest, the qualifications of the crew, the wages of the crew and the principles of ratemaking. *See also* on the fact that the extent of jurisdiction is dependent on the field of regulation: F.A. MANN, "The Doctrine of Jurisdiction Revisited after Twenty Years", 186 *R.C.A.D.I.* 9, 29 (1984-III); A. BIANCHI, Reply to Professor Maier, in K.M. MEESSEN (ed.), *Extraterritorial Jurisdiction in Theory and Practice*, London/The Hague/Boston, Kluwer, 1996, 74, 76 (pointing out that "jurisdictional issues deeply diverge from one another depending on the particular field in which they arise"); X., Note, "Predictability and Comity: Toward Common Principles of Extraterritorial Jurisdiction", 98 *Harv. L. Rev.* 1310 (1985) (stating that "extraterritoriality varies considerably according to the category of substantive law at issue").

[845] § 403, reporters' note 8 (" It is generally accepted by enforcement agencies of the United States government that criminal jurisdiction over activity with substantial foreign elements should be exercised more sparingly than civil jurisdiction over the same activity, and only upon strong justification. […] Prosecution for activities committed in a foreign state have generally been limited to serious and universally condemned offenses …").

[846] *See* F.A. MANN, "The Doctrine of Jurisdiction in International Law", 111 *R.C.A.D.I.* 1, 52 (1964-I).

[847] A. BIANCHI, Reply to Professor Maier, in K.M. MEESSEN (ed.), *Extraterritorial Jurisdiction in Theory and Practice*, London/The Hague/Boston, Kluwer, 1996, 74, 78.

[848] *See* G. SCHUSTER, *Die internationale Anwendung des Börsenrechts*, Berlin, Springer, 1996, 8.

[849] *See* chapter 6.5.1 *See also* G. SCHUSTER, *Die internationale Anwendung des Börsenrechts*, Berlin, Springer, 1996, 31 and 652; J. KAFFANKE, "Nationales Wirtschaftsrecht und internationaler Sachverhalt", 27 *Archiv des Völkerrechts* 129, 137 (1989) (stating that "die Gerichte … untersuchen … welche Interessen hinter den eigenen Regelungen stehen, und wie diese Interessen hinter den eigenen Regelungen stehen, und wie diese Interessen angesichts der Konfliktsituation wirksam geschützt werden können."). The *Schutzzweck* doctrine has its roots in German tort law. Under § 823 (2) of the German Civil Code (BGB), the compensation obligation "trifft denjenigen, welcher gegen ein den Schutz eines anderen bezweckendes Gesetz verstösst.", *i.e.*, when a person culpably contravenes an "enactment designed to protect someone else". *See* for a discussion in English: W. VAN GERVEN AND

Restatement, as "the character of the activity to be regulated" and "the importance of regulation to the regulating state" features among the balancing factors set forth in § 403 of the Restatement.[850] Comment e to § 403 even explicitly notes that "[t]he criteria set forth in § 403 … are to be applied in light of the purpose which the law in question is designed to achieve."

262. Any legal rule may thus have its own scope *ratione loci*.[851] In order to determine this scope, courts and regulators are required to ascertain the *ratio legis* of the rule. Only if the *ratio legis* requires that foreign situations be governed by the rule could the rule legitimately be given extraterritorial application. At times, the legislature will itself have elaborated on the need to regulate foreign situations if the rule is to serve its purpose. U.S. courts and regulators are in these situations not allowed to second-guess the legislature's appraisal.[852] However, the legislature may well have given too wide a scope of application *ratione loci* to the rule, and exceed by far what is actually needed to serve its protective or regulatory purpose. For purposes of reasonableness therefore, if some doubt is lingering about the exact reach of a rule, rather than readily deferring to the legislature, courts and regulators need to inquire into the purpose of the law, and only apply the law extraterritorially if the purpose is served. For instance, if the purpose of a capital market law is the protection of investors and the integrity of the capital market, the law could only be given extraterritorial application if that application serves that purpose, and *not* if it might serve other purposes, *e.g.*, employment or fiscal purposes.[853] If the purpose of a secondary boycott is the isolation of a governmental regime deemed dangerous, the boycott should not be informed by the desire to punish foreigners investing, and making profits, in the rogue State. If the purpose of a law concerning grave breaches of international humanitarian law is to prevent impunity, it should not be given extraterritorial (universal) application if the purpose of that application is neo-colonialist tutelage of developing countries. As the protective or regulatory purposes of given laws are often similar in different States, courts and regulators might be willing to consider the purposes of analogous laws in other States so as to ascertain the purpose of the law before them. This might provide an impetus for the crystallization of the *Schutzzweck* doctrine as an objective doctrine of customary international law.[854] Even better of course would be the adoption of a multilateral Restatement, which clarifies the reach of the law in different subject-matter areas, will probably provide sufficient guidance for courts and regulators.[855]

OTHERS, *Cases, Materials and Text on National, Supranational and International Tort Law Scope of Protection*, Oxford, Hart, 1998, 272-73.

[850] § 403 (2) (c) of the Restatement (Third).

[851] *See also* J. STOUFFLET, "La compétence extraterritoriale du droit de la concurrence de la Communauté économique européenne", 98 *J.D.I.* 487, 493 (1971) (stating that, in the field of economic law, "les critères [de rattachement] doivent être définis selon la finalité propre de chaque norme, alors que, dans le procédé des conflits de lois, un ensemble de règles formant une institution donne lieu à un rattachement unique, scientifiquement déterminé.").

[852] *See* chapter 3.3.2 on the presumption against extraterritoriality.

[853] *See* G. SCHUSTER, *Die internationale Anwendung des Börsenrechts*, Berlin, Springer, 1996, 654.

[854] *Compare id.*, at 653.

[855] *See* A. BIANCHI, Reply to Professor Maier, in K.M. MEESSEN (ed.), *Extraterritorial Jurisdiction in Theory and Practice*, London/The Hague/Boston, Kluwer, 1996, 74, 91. Somewhat optimistically, BIANCHI also believes that "[d]igests, scholarly works, codification by institutions of a private nature or affiliated with international organizations, already provide guidance." *Id.*

5.7. Alternative accounts of reasonableness: approaches based on law and economics, transnational solidarities, and global interests

263. AGAINST SOVEREIGNTY – In spite of the multifactor test it sets forth, § 403 may still ooze territoriality, sovereignty and a restrictive view of the State as a closed entity represented by its government. To be true, interest-balancing under § 403 may also take into account the 'needs of the international system'. However, this factor is arguably less important in that it is one of the last factors of the test. Moreover, 'the international system' is likely to be construed as a system composed of nation-States, in line with the traditional understanding of global public order. The 'needs of the international system' then refer to the interests that all States have in the reasonableness of jurisdictional assertions, even if only two States are the protagonists.

Alternative accounts of reasonableness have therefore been put forward, the most important being the law and economics approach – which has as its objective the maximization of global welfare for individuals and deems "traditional choice-of-law concepts such as national interests or comity [to be] relevant only to the extent that they affect global welfare"[856] – and the approach of the legal left – which deconstructs the State and emphasizes transnational solidarities. Reasonableness then becomes a function of either economic efficiency or the leverage of sub-State and cross-border group solidarities, while notions of sovereignty evaporate[857]. It may be noted that the alternative accounts of reasonableness, which were developed in U.S. legal theory, do not represent public international law.

5.7.1. Law and economics

264. The law and economics school of jurisdictional reasonableness, of which GUZMAN is the standard-bearer, is in search of rules that "permit transactions to take place when the total impact on welfare is positive, and prevent transactions from taking place when the total impact on welfare is negative."[858] The emphasis on quantifiable welfare impact obviously makes it useful for assessing the propriety of the reach of economic regulation, and less so for assessing the propriety of exercising jurisdiction over international crimes (which is moreover not driven by the defense of national welfare interests but by the lofty goal of enforcing the common interests of the international community). The law and economics approach has mostly been applied to extraterritorial antitrust jurisdiction.

265. The law and economics approach makes the correct observation that States, when unilaterally regulating a particular economic transaction, only take into account their own interests, and not the interests of other States or the international community.[859] They are only concerned with the maximization of their own national

[856] *See* A.T. GUZMAN, "Choice of Law: New Foundations", 90 *Geo. L.J.* 883, 894 (2002).
[857] *Compare* A.F. LOWENFELD, "International Litigation and the Quest for Reasonableness", 245 *Recueil des Cours* 9, 307 (1994-I) (stating that "talk of "sovereignty" clouds, it does not illuminate").
[858] *Id.*, at 896.
[859] *See, e.g.*, P.C. MAVROIDIS & D.J. NEVEN, "Some Reflections on Extraterritoriality in International Economic Law: A Law and Economics Analysis", *Mélanges en hommage à Michel Waelbroeck,* II, Brussels, Bruylant, 1999, 1297, 1319 (stating that "when government[s] rule on particular activit[i]es, they do not take into account the costs and benefits that accrue to agents outside their constituencies.").

welfare, and not with the maximization of global welfare. This may lead a State to permit certain anticompetitive behavior to take place on its territory, *e.g.*, by condoning export cartels, if so doing yields internal benefits for that State, and externalizes the costs (which are passed on to another State).[860] Put differently, States do not focus on *global* efficiency but only on the domestic distributional effects of allowing or prohibiting a particular transaction.[861]

266. This is not to say that a focus on distributional effects instead of on global efficiency necessarily reduces global welfare. At times, a focus on the national interest may indeed *further* global welfare, if the domestic positive effects of (non-)regulation also translate into net global positive effects, *e.g.*, when a territorial State's condoning of export cartels, *e.g.*, U.S. practice under the 1918 Webb-Pomerene Act,[862] or conversely, another State's dismantling of these very cartels, yields domestic benefits that outweigh aggregate foreign harm.[863] Yet clearly, this will not happen as a matter of course. As long as a country's share of global consumption is different from its share of global production will that country "not adopt the optimal global policy".[864] States will indeed still condone or dismantle export cartels, in the former situation exercising territorial and in the latter extraterritorial jurisdiction, even if the aggregate foreign harm outweighs the domestic benefits.[865] Accordingly, granting States the power to regulate a particular transnational transaction as soon as it affects them, is not an appropriate jurisdictional (or choice-of-law) method.

267. An unqualified effects doctrine is bound to fail if the maximization of global welfare is the ultimate goal of economic regulation. It will only lead to a *suboptimal* level of regulation.[866] This level is a level of *over*regulation, since *any* State that is adversely affected by a foreign business-restrictive practice will tend to assert its jurisdiction over this practice without due regard for global regulatory efficiency.[867] As the applicable laws do usually not have the same content, concurring jurisdiction will lead to a situation in which corporations are subject to the strictest standards of every jurisdictional regime, with any more relaxed standard of one State's law being overridden by a stricter standard of another State's law.[868] From an international law perspective, such cumulative overregulation may be at odds with the

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[860] *See* A.T. GUZMAN, "Is International Antitrust Possible?", 73 *N.Y.U. L. Rev.* 1501, 1514 (1998) ("As long as the welfare loss from anticompetitive activities is borne by foreign consumers, the optimal international antitrust policy, from a national perspective, is no policy at all."); J. STOUFFLET, "La compétence extraterritoriale du droit de la concurrence de la Communauté économique européenne", 98 *J.D.I.* 487, 490 (1971) (pointing out that "on n'imagine guère qu'[un Etat] facilite l'intégration des marches étrangers en exerçant une contrainte sur ses propres entreprises car ses intérêts immédiats sont probablement en sens oppose"); I. SEIDL-HOHENVELDERN, "Völkerrechtliche Grenzen bei der Anwendung des Kartellrechts", 17 *A.W.D.* 53, 55-56 (1971) (speaking of a "nationalistische Inkonsequenz").

[861] *Compare* A.T. GUZMAN, "Choice of Law: New Foundations", 90 *Geo. L.J.* 883, 899 (2002).

[862] Pub. L. No. 65-126, 40 Stat. 516 (1918), codified at 15 U.S.C. §§ 16-66 (1994).

[863] *See* for the latter situation A.T. GUZMAN, "Is International Antitrust Possible?", 73 *N.Y.U. L. Rev.* 1501, 1515 (1998) ("The policy of the importing country is different from the optimal global policy because it fails to take into account the increase in profits earned by producers.").

[864] *Id.*, at 1519-20.

[865] *Id.*, at 1520 (stating that "a country that can apply its laws extraterritorially will underregulate anticompetitive behavior if it is a net exporter and overregulate such behavior if it is a net importer").

[866] *Compare* A.T. GUZMAN, "Choice of Law: New Foundations", 90 *Geo. L.J.* 883, 904-05 (2002).

[867] Taking a law and economics perspective, GUZMAN has therefore condemned the Supreme Court's ruling in *Hartford Fire*. *Id.*, at 919.

[868] *Id.*, at 908.

principle of restricted sovereignty in a modern interdependent world.[869] From a global law and economics perspective, it results in regulatory inefficiency.

268. For the rule of reason set forth in § 403 of the Restatement, the law and economics approach teaches us that its sovereignty-based focus on governmental interests instead of on global regulatory efficiency is not welfare-enhancing. In most cases, courts and regulators will display a pro-forum bias. In effect, they are supposed to represent *only* the national interest. To be true, they may decline to exercise jurisdiction on grounds of comity, if they believe that another State has a stronger nexus to the situation. Yet in so doing, they still act in the national interest, convinced as they are that the long-term interest of the State is jeopardized by souring international relations stemming from overbroad jurisdictional assertions, and as a related argument, that restraint invites beneficial reciprocity (as in future, when the tables are turned, a foreign State might be inclined to condone harmful restrictive practices originating in the former State). They do however not take a bird's eye view of the matter: merely aiming at protecting short- or long-term interests of the State, they do not intervene as regulators acting in the interest of *global efficiency*.

269. Against the law and economics approach, it could nonetheless be argued that the evaluation process under Section 403 is not a mathematical calculus. Not so much the *number* of connections are important, but rather the weight of the interests protected by these connections.[870] Also, a State does not have jurisdiction over a particular situation for the sole reason that such might confer more economic benefits on it than deference to another State would confer benefits on the latter State. Putting a high premium on economic efficiency risks neglecting other, non-economic considerations (*e.g.*, social protection, cultural diversity, …), which are *also* protected by the principle of non-intervention.[871] By virtue of this principle, every State has the right, without interference from abroad, to build the socio-economic order of a State it sees fit (provided it keeps within the boundaries of specific international norms, such as human rights and trade rules).[872] If emphasis is solely laid on economic efficiency, Anglo-Saxon rules might easily become the standard rules in other parts of the world. Moreover, even if all States pursued economic efficiency in their regulation, an economic application of Section 403 might harm the interests of smaller States, as, in absolute terms, harm to their interests will almost invariably be smaller than harm to the interests of larger States.[873] For all its suasion, the law and economics approach to jurisdiction ought therefore to be viewed with some suspicion. Only if its application is limited to particular domains of the law, such as antitrust and securities regulation, and if non-economic considerations could be quantified to the same extent that

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[869] *See, e.g.*, G. SCHUSTER, *Die internationale Anwendung des Börsenrechts*, Berlin, Springer, 1996, 664 and 685.

[870] *See* G. SCHUSTER, *Die internationale Anwendung des Börsenrechts*, Berlin, Springer, 1996, 686.

[871] *Id.*, at 687 (taking issue with R. DEVILLE, *Die Konkretisierung des Abwägungsgebots im internationalen Kartellrecht*, Nomos, Baden-Baden, 1990, 101).

[872] *See* I. SEIDL-HOHENVELDERN, "Völkerrechtliche Grenzen bei der Anwendung des Kartellrechts", 17 *A.W.D.* 53, 57 (1971) ("Im Hinblick darauf aber, dass die einzelnen Staaten der Völkerrechtsgemeinschaft die durch ein bestimmtes Gesetz gesicherter Werte sehr verschieden hoch einschätzen, kann ein solcher Staat [who applies its antitrust law to foreign situations] nicht erwarten, dass die anderen Staaten die Höher-Einschätzung dergestalt nachvollziehen, dass sie infolge dieser von ihm behaupteten Höherwertigkeit ihre sorge um die Wahrung ihrer eigenen Souveränität hintanstellen würden.").

[873] *See* G. SCHUSTER, *Die internationale Anwendung des Börsenrechts*, Berlin, Springer, 1996, 687-88.

economic considerations could, should it be applied by courts and regulators.

5.7.2. Transnational solidarities

270. Another jurisdictional discourse that criticizes the traditional State-centered view of the rule of reason emphasizes transnational instead of purely national solidarities, although its anonymous standard-bearer takes the view that his discourse is merely a new understanding of the *State* "as a discontinuous pattern of jurisdictional assertions".[874]

271. Conducting an extraterritoriality analysis when using the rule of reason or any other interpretive tool, courts indeed usually make an attempt at identifying a certain "national interest",[875] as if there were "one" national interest to be asserted in a particular case. Usually, there will be several "national interests" at play determining the outcome of a case. Therefore, the "national interest" ought to be viewed "not as a repository of some general will, but rather as an arena of contending particular claims."[876] What is more, these "contending particular claims" are often not merely territorial in nature. Instead, they are made by transnational groups whose members may feel stronger solidarity bonds with each other than with a sovereign State. The outcome of a case may then be a function of the power or persuasiveness of particular transnational groups, and not of a national interest outweighing the interest of another State.

272. Environmental or labor activists in one State may for instance connect with such activists in another State, where a harmful activity conducted by corporations of the former State takes place. Bundling their resources, these activists may try to convince a court of the former State to exercise extraterritorial jurisdiction over the activities of the corporations. In so doing, they assert a *transnational* interest. Conversely, the corporations may team up with foreign, possibly illegitimate, governments that draw financial benefits from corporate activities in their territory. This 'elite' group will try to convince the court to dismiss jurisdiction, thereby asserting a *transnational* interest of the same nature as the interest of the activists.[877]

The court will then weigh these *transnational* interests, and it will require quite some

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[874] X., "Constructing the State Extraterritorially, Jurisdictional Discourse, the National Interest, and Transnational Norms", 103 *Harv. L. Rev.* 1273, 1304 (1990).

[875] *Compare* Charles DE GAULLE (« *Toute ma vie, je me suis fait une certaine idée de la France.* »).

[876] X., "Constructing the State Extraterritorially, Jurisdictional Discourse, the National Interest, and Transnational Norms", 103 *Harv. L. Rev.* 1273, 1284 (1990).

[877] *See, e.g.*, *Natural Resources Defense Council, Inc.* v. *Nuclear Regulatory Commission*, 647 F.2d 1345 (D.C. Cir. 1981). In this case, the Philippine Government teamed up with the builder of an American nuclear reactor, stating in an *amicus curiae* brief that "[i]f the United States followed the policy of imposing its own regulatory standards and procedures on all host countries ... such a policy would undoubtedly bode ill for the ability of the United States to maintain military facilities in as many locations around the world as it does now." (*Id.*, at 1356). U.S. environmental groups teamed up with Philippine environmental groups. The court deferred to the Philippine Government's objections, although it could have weighed the interests of the environmental groups against the interests of the builder and the Philippine Government. *See* X., "Constructing the State Extraterritorially, Jurisdictional Discourse, the National Interest, and Transnational Norms", 103 *Harv. L. Rev.* 1273, 1299 (1990). The court conspicuously refused to recognize transnational environmental solidarity, stating that U.S. environmentalists merely "presume that they can represent the Philippine environment" "from non-adjacent America". *Natural Resources Defense Council*, 647 F.2d 1367.

imagination to cloak them in the form of *national* interests. In fact, as all parties somehow invoke a perceived *national* interest, the homogeneity of the State or the "natural" character of the "national interest" evaporates. The court will understand that a solution to issues of extraterritorial jurisdiction is premised on weighing transnational substantive policy choices, and not on formalistically tracing the strongest (territorial) nexus or 'national interest'. Indeed, the latter analysis will often yield a result that is beneficial to those with more political and economic power leverage, while the former analysis may give a voice to the powerless, those without less direct access to governmental decision-making or interest-defining. It may be argued that in some cases, courts have implicitly relied on the former analysis, in the field of human rights in particular.[878]

273. A comparison may be drawn here with public choice theory. Under public choice theory, government – including court – decisions are the product of interest group politics putting consumers at a disadvantage "in their ability to compete with special interests in the political marketplace."[879] Industrial groups having more access to power will usually succeed in having decisions turn out in their favor, to the detriment of the majority of the (consuming) population. Put differently, industrial groups will be better able to convince courts that *their* interest coincides with the national interest, possibly eclipsing other interests that are shaped in a more democratic fashion by consumer groups and activists. While public choice theory is rather defeatist, believing that special interest groups will gain the upper hand as a matter of course (and even dismissing the voting process as ineffective in influencing policy-making), it may be argued that an enlightened and independent judiciary should be able to withstand pressure by these groups, and to make an informed decision after carefully balancing the different interests involved.

274. FROM NATIONAL INTERESTS TO GLOBAL INTERESTS: EXPANDING THE REACH OF DOMESTIC LAW – An approach somewhat related to the transnational solidarities discourse, is a human rights-informed discourse that lays emphasis on the responsibility of the forum State for conduct of its (corporate) citizens and its military abroad. This discourse calls for extension of domestic jurisdiction, in particular when such would serve global interests.

Some authors consider extraterritoriality currently to be 'underinclusive', in that Western corporations operating in foreign, underregulated countries are exempt from their home State's regulations, in particular in the field of human rights, labor rights and environmental law.[880] This would allow such corporations to do abroad what they

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[878] *Compare Filartiga*, 630 F.2d 876 (2d Cir. 1980) (U.S. court exercising universal tort jurisdiction under the Alien Tort Statute over torture offences, thereby weighing universal human rights and Third-World self-determination, and giving greater weight to the former interest, reasoning that such would enhance U.S. interests) and *Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d 774, 821 (D.C. Cir. 1984) (Bork, J., concurring) (U.S. court dismissing jurisdiction under the ATS, possibly attaching greater weight to Third-World self-determination by holding that "[t]he United States would [otherwise] be perceived, and justly so, not as a nation magnanimously refereeing international disputes but as an officious interloper and an international busybody.") *See* X., "Constructing the State Extraterritorially, Jurisdictional Discourse, the National Interest, and Transnational Norms", 103 *Harv. L. Rev.* 1273, 1300 (1990).

[879] *See* A.T. GUZMAN, "Choice of Law: New Foundations", 50 *Geo. L.J.* 883, 901 (2002).

[880] *Id.*, at 316-20 (holding for instance that U.S. nuclear regulatory law should also apply to the sale of a U.S. nuclear reactor to the Philippines, but possibly not the France, a tightly regulated country).

are not allowed to do in their home State.[881] Such might not only harm foreign citizens, but may also cause distributional effects within the home State. As PAUL has argued, if U.S. corporations are allowed to shift their activities to underregulated States, they will increase their profits to the detriment of U.S. workers.[882] A greater margin of profit may admittedly benefit U.S. consumers, but it harms U.S. workers, who see their jobs taken by workers in underregulated low-income countries.[883]

In support of regulation of the conduct of Western corporations abroad, it may be submitted that the requirement of reasonableness in the exercise of extraterritorial jurisdiction, as set forth in § 403 of the Restatement, should not only serve to restrain such exercise, but also, under particular circumstances, to encourage it when it is "not 'reasonable' that U.S. law only seeks to protect those living within this country's territorial borders".[884] Reasonableness is however in the eye of the beholder. It could be argued with equal force that developing countries ought to have the right to underregulate business in order to attract the foreign direct investment necessary for economic progress,[885] and thus, that it would be unreasonable to combat underregulation with § 403 of the Restatement. The existence of double standards need not imply exploitation of the poor. Moreover, calls for enhanced corporate social responsibility might not even serve the long-term interests of the poor, and may even (be designed to) protect Western economic and employment interests. Indeed, Western corporations will no longer have an incentive to invest in developing

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GIBNEY seemed to refer to *Republic of Philippines* v. *Westinghouse Elec. Corp.*, 43 F.3d 65 (3rd Cir. 1994) (court holding that it had the power to address retaliatory conduct of the Philippines relating to breach of contract and tort claims against U.S. corporation, notwithstanding that it transpired abroad, and noting that it should not attempt to inject itself into the internal law enforcement activities of a foreign sovereign.).

[881] U.S. law however prohibits U.S. persons or corporations from engaging in foreign corrupt practices. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (1977), 15 U.S.C. Section 78dd-1(a)(1)(A) ("It shall be unlawful for any [American employee or a U.S. corporation] to … make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to any foreign official for the purposes of influencing any act or decision of such foreign official in his official capacity.").

[882] J.R. PAUL, "Comity in International Law", 32 *Harv. Int'l L.J.* 1, 72 (1991).

[883] *Id.*

[884] *See* M.P. GIBNEY, "The Extraterritorial Application of U.S. Law: The Perversion of Democratic Governance, the Reversal of Institutional Roles, and the Imperative of Establishing Normative Principles", 19 *B.C. Int'l & Comp. L. Rev.* 297, 319-20 (1996) (arguing that a moral obligation should form the basis for a legal obligation to prevent serious harm from occurring). *See also* M.P. GIBNEY & R.D. EMERICK, "The Extraterritorial Application of United States Law and the Protection ofHuman Rights: Holding Multinational Corporations to Domestic and International Standards", 10 *Temple Int'l & Comp. L.J.* 123, 127 and 144 (1996) ("Notwithstanding the degree to which we have applied American law in other countries, our morality has rather conveniently stayed at home" and refuting the objection that sovereignty is violated by pointing out that other U.S. laws are easily applied extraterritorially); C. SCOTT, "Translating Torture into Transnational Tort: Conceptual Divides in the Debate on Corporate Accountability for Human Rights Harms", in C. SCOTT (ed.), *Torture as Tort*, Oxford, Portland, Oregon, Hart, 2001, 55 (arguing, in the context of sex tourism abroad, that international law may not only authorize, but also *require*, the application of U.S. law to U.S. nationals abroad).

[885] *See also* C. SCOTT, "Translating Torture into Transnational Tort: Conceptual Divides in the Debate on Corporate Accountability for Human Rights Harms", in C. SCOTT (ed.), *Torture as Tort*, Oxford, Portland, Oregon, Hart, 2001, 54 (submitting that "[i]t is also the case that economic policy can vary significantly from one jurisdiction to another, such that extraterritorial regulation of corporate conduct abroad is much more likely to interfere with, or pre-empt, policy choices the host state has made or has chosen *not* to make.").

countries if the regulatory framework is as burdensome there as it is in their home countries.

275. In an interesting recent legal evolution in Europe, efforts have been undertaken at expanding the ambit of human rights law in the context of military operations. In a number of cases before the European Court of Human Rights revolving around the interpretation of the term "within the jurisdiction of a member States of the Council of Europe" (Article 1 of the European Convention on Human Rights), the applicants argued that the European Convention of Human Rights should also apply to military operations by member States of the Council of Europe *outside* their territory, and that, when conducting such operations, victims fell under member States' jurisdiction. The Court held that the Convention only applied when these Member States *effectively control* foreign territory, and for instance not when they conduct bombardments in foreign territory short of control over that territory.[886]

276. As of today, there is not much evidence of courts explicitly arguing on the basis of transnational or global solidarities. It may be expected, and this is surely regrettable, that narrowly defined sovereign interests will remain the main staple of interests that courts will take into account in determining reasonable jurisdiction. Only in the field of international crimes has sovereignty collapsed under persistent pressure from international solidarities. Indeed, the universality of (criminal or civil) jurisdiction over atrocities is premised on the very attack on the foundational beliefs of the international community that these crimes represent. In the concept of universal jurisdiction, one then sees a rewriting of the classical theory of jurisdiction: instead of vindicating *State* interests, jurisdiction also serves to vindicate the interests of the *international community*. In chapters 10 and 11, universal jurisdiction will be analyzed in great detail.

5.8. From the general to the specific part of this study: sovereignty as responsibility

277. While global interests may, in current State practice, hardly be taken into account, this study will use the interests of the international community or system as a guiding principle of assessing jurisdictional reasonableness. The interests or traditions of the international community are indeed a factor in the reasonableness analysis under Section 403 (2) (f) of the U.S. Restatement. Heeding the interests of the international community need however not be anathema to heeding the sovereign interests of States. One could surely devise a jurisdictional system in which it is in the global interest to grant jurisdiction to one State on the ground that that State has the strongest regulatory interest in, or the strongest connection to a situation. For solutions to the regulatory problems posed in the specific part of this study (chapters 6 to11), this study will amply draw on global interests approaches based on economic analysis (antitrusts and securities law in particular) or on moral aprioris (universal

[886] *See* European Court of Human Rights, *Bankovic and others* v. *Belgium and 16 other Contracting States*, Application No. 52207/99, December 12, 2001, § 71 ("[T]he case-law of the Court demonstrates that the recognition of the exercise of extra-territorial jurisdiction by a Contracting State is exceptional: it has done so when the respondent State, through the effective control of the relevant territory and its inhabitants abraod as a consequence of military occupation or through the cinsent, invitation or acquiescence of the Government of that territory, exercises all or some of the public powers normally to be exercised by that Government.").

jurisdiction over core crimes against international law in particular). At the same time, this study will see to it that legitimate sovereign interests are adequately taken into account. Yet sovereign interests are only legitimate if other States' sovereign interests are not disproportionately trampled upon, *and* if they somehow transmit the global interest. In the current system of decentralized enforcement of international and cross-border law, States act *de facto* as global regulators of internationally relevant situations, so that it becomes of primary concern that they do not regulate parochially, but always with the global interest in mind. Sovereignty should no longer be an excuse or a shield, but a responsibility: every sovereign nation has a responsibility not to condone or encourage activities that are, from a global perspective, harmful. This insight will guide our analysis of specific fields of the law in part II.

PART II. SPECIFIC PART

278. In Part I (chapters 1 to 5), the general features of the law of jurisdiction have been set out. It has been shown how the law of jurisdiction was traditionally concerned with the ambit of the criminal law, how the P.C.I.J. in *Lotus* held that international law grants a wide measure of discretion in this context, and how, under customary international law, a State's jurisdictional assertions could only be legitimate if they are covered by a specific ground of territorial or extraterritorial jurisdiction. It has been argued that, as a general matter, exercising jurisdiction over a foreign situation can only be lawful if a State has an interest in doing so. Moreover, it could only be legitimate if that State's interest outweighs other States' interests in (non-)regulation. Only then could the exercise of jurisdiction be considered as reasonable.

279. Part II (chapters 6-11) will study some specific fields of the law where the exercise of jurisdiction has been most controversial, especially from a transatlantic perspective. Over the last decades, controverse has arisen in particular in the field of economic law (antitrust law, and to a lesser extent securities law), export controls (economic embargoes), evidence-taking (discovery) and international humanitarian and human rights law (universal jurisdiction). A 'chronological' approach will be followed. Chapter 6 will deal with assertions of 'extraterritorial' jurisdiction in the field of antitrust or competition law, because these hark back to 1945 (at least in the United States), and have remained controversial into the 21st century. Jurisdiction over securities fraud followed in the late 1960s (chapter 7). National export controls were applied to foreign-based corporations since the 1960s, but raised most international protest in the 1980s and 1990s (chapter 8). The unilateral taking of evidence abroad (discovery in the United States) will be dealt with in chapter 9. Although it has been controversial since the late 1950s, it will only be discussed after the chapters on antitrust, securities, and export controls, because discovery is a procedural device that supports the assertions of jurisdiction in substantive law areas such as antitrust or securities. Foreign protest against U.S. discovery orders has especially arisen in antitrust, securities, and product liability cases. Chapter 9 is thus linked to chapters 6 and 7. In chapters 10, the perspective will shift from economic matters to moral values-related matters. It will be examined how, since the late 1990s, (mostly European) States started to investigate and prosecute violations of international humanitarian law committed abroad, *viz.*, started to exercise universal

criminal jurisdiction. In a related chapter 11, the exercise of universal *tort* jurisdiction, *viz.*, *civil* courts hearing private plaintiffs' claims for compensation relating to violations of international law committed abroad. In Part III then, the general theory of jurisdiction presented in Part I will be revisited, drawing on insights from Part II.

CHAPTER 6: INTERNATIONAL ANTITRUST JURISDICTION

280. Outside the field of criminal law, the doctrine of jurisdiction has been developed mainly in economic law, in particuarl in (U.S.) antitrust law or (European) competition law (*i.e.*, the law of business restrictive practices). Jurisdiction over foreign conduct in antitrust matters goes to the heart of antitrust law, especially in an era of economic globalization in which major corporations sell their products worldwide. Price-fixing conspiracies entered into in one State often produce harm in other States that may wish to bring their laws to bear on these conspiracies. Nowadays, the effectiveness of antitrust law would be severely hampered if its scope were restricted to domestic anticompetitive behaviour. In the United States, international antitrust jurisdiction has been standard-setting for other fields of the law, most notably through its influence on § 403 of the U.S. Restatement (Third) of Foreign Relations Law discussed *supra*.[887] Jurisdiction in antitrust matters therefore warrants an in-depth discussion.[888]

281. This chapter will not seek answers to the question of how global antitrust is best regulated. It will not examine whether international institutions such as the WTO or the OECD, or regional institutions, ought to be granted the responsibility of overseeing international antitrust efficiency and equity.[889] It will be assumed that the current decentralized system of unilateral antitrust enforcement by single States will remain, for the time being, the main tool of global antitrust enforcement. This is not to say that in this chapter, the optimalization of the decentralized system will not be contemplated, quite to the contrary. In fact, if this system is not to go broke due to the jurisdictional overreaching which is inherent in it, only genuine comity and a balancing of State interests will prevent normative competency conflicts from poisoning international relations. Put differently, only reasonableness, with States deferring their antitrust enforcement to other States who could assert a stronger regulatory interest, might ensure respect for the public international law principle of non-intervention.

282. Before the Second World War, States did not apply their antitrust laws extraterritorially, either because they did not have antitrust laws (Europe) or because wholly foreign conspiracies were rare in a world which was not as interconnected as

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[887] It is the method of interest-balancing rather than its specific application in the context of antitrust law which has been influential. *See also* A. BIANCHI, "Extraterritoriality and Export Controls: Some Remarks on the Alleged Antinomy Between European and U.S. Approaches", 35 *G.Y.I.L.* 366, 375 (1992) (arguing that "[t]o stretch the application of [rules of international antitrust jurisdiction] to other fields, disregarding the basic differences noted above, might lead to oversimplifying the complex reality of the international law of jurisdiction as it stands today").

[888] *See also* L.E. KRUSE & R.H. BENAVIDES, "Federal Subject Matter Jurisdiction in Federal Courts in International Cases", in D.J. LEVY (ed.), *International Litigation*, Chicago, American Bar Association, 2003, 137. ("A review of the extent to which antitrust laws have been applied to foreign parties and foreign conduct is instructive for other statutes.")

[889] *See, e.g.*, W. SUGDEN, "Global Antitrust and the Evolution of an International Standard", 35 *Vand. J. Transnat'l L.* 989, 1001-1006 (2002).

today's world (part 6.1). In 1945, a U.S. court for the first time held that the Sherman Act, the American antitrust act, applied to foreign conspiracies if their conduct produced effects within the United States (*Alcoa*, part 6.2). European States later also started to assert jurisdiction over foreign-based conspiracies (parts 6.4 and 6.5). Effects-based jurisdiction was increasingly perceived as inevitable to fend off foreign export-based conspiracies preying on domestic markets.

The economic rationale of extraterritorial antitrust need not be at odds with international law, as under the objective territorial principle, the legality of jurisdiction based on domestic effects of foreign conduct is traditionally recognized (part 6.3). Jurisdictional restraint is however warranted, as almost any foreign conspiracy may produce some sort of domestic effect. Mitigating doctrines of substantiality, directness, reasonable foreseeability appear appropriate (part 6.6). These doctrines might in themselves however not ensure that international jurisdictional conflict will be averted. Therefore, a more thorough reasonableness analysis, along the lines of Section 403 of the Restatement (Third) of U.S. Foreign Relations Law, ought to be undertaken (part 6.7). Reasonableness and comity also underlie two antitrust agreements concluded between the United States and Europe (part 6.8).

International law concerns over antitrust extraterritoriality may not only arise in the event of foreign conspiracies causing domestic injury. The question has arisen whether States might, or even should, exercise jurisdiction over domestic conspiracies causing foreign injury, whether they should give standing to private plaintiffs alleging foreign injury caused by a foreign conspiracy which also caused domestic injury (part 6.10), or whether States could use their antitrust laws to gain access to foreign markets for their exporters (part 6.11). States have also started to exercise jurisdiction over concentrations or mergers of foreign corporations having substantial domestic sales, which at times prompted foreign reactions (part 6.12).

283. Woven through this study is, of course, the comparative U.S.-EU perspective. As far as antitrust law is concerned, it is hardly disputed that the long arm of U.S. rather than of European law has traditionally caused headaches. A diffuse idea of U.S. antitrust exceptionalism – antitrust enforcement being uniquely important, more than in other nations, to create economic order in the U.S. – has at times inoculated U.S. antitrust actors against taking into account foreign governmental interests and protests. This record of unilateralism has received an unwelcome boost by the promotion of private plaintiffs to attorney-general (*i.e.*, by granting them the right to sue antitrust conspirators in federal courts), which is actually a logical outgrowth of the emphasis put on efficient antitrust enforcement in the U.S. Private plaintiffs have not failed to heed this call, and were even incentivized to file suit by a number of facilitating features of tort litigation in the United States, such as discovery, class action suits, and treble damages (part 6.13). It may be submitted that, without a private-attorney general system, the arm of U.S. antitrust laws would have been much shorter. Indeed, U.S. antitrust enforcement agencies have traditionally taken a cautious, reasonable approach to claiming jurisdiction over foreign business-restrictive practices.

284. In this chapter, it will be argued that a return to the jurisdictional rule of reason, which was introduced in antitrust matters in U.S. doctrine in the 1950s

(Brewster) and by U.S. courts in the 1970s (*Timberlane, Mannington Mills*), is desirable. Reasonableness should however also guide the EC's competition practice. In 1988, the European Court of Justice stated in *Wood Pulp* that, as a matter of law, the European Commission is not required to heed comity in the absence of foreign sovereign compulsion, a stance reiterated by the European Court of First Instance in the 1999 *Gencor* case. This is exactly the same approach as that taken by the U.S. Supreme Court in the 1993 *Hartford Fire* case, in which the court ruled that U.S. law applies on the basis of the effects doctrine unless a foreign State prohibits what U.S. law compels, or *vice versa*. This chapter's call for enhanced reasonableness in antitrust matters (6.7) will therefore apply to both U.S. and European practice.

6.1. Pre-World War II international antitrust practice

285. RISE OF ANTITRUST LAW – The 19th century industrial revolution spawned giant companies whose conduct could thoroughly influence consumer prices. So as to protect the interests of consumers, States sought to set rules to safeguard competition. Conventional economic wisdom indeed has it that the higher the level of competition is, the lower consumer prices are. As early as 1890, the United States enacted the so-called Sherman Act,[890] which provided the legal framework for safeguarding competition in the U.S.. The Antitrust Division of the Department of Justice and the Bureau of Competition of the Federal Trade Commission were designated as antitrust watchdogs.[891] In Europe, a common market was institutionally created through the 1957 EEC Treaty. In light of the dangers of business restrictive practices for the common market, safeguarding competition became a primary concern of the EEC and was introduced in then Articles 85 and 86 of the EEC Treaty, now Articles 81 and 82 of the EC Treaty. The European Commission was assigned the role of watchdog over pan-European competition and became the counterpart of the American Department of Justice and the Federal Trade Commission.

286. INTERNATIONAL ANTITRUST LAW – As economies were not that entwined as they are today, legislatures did not specifically provide for rules governing foreign anticompetitive arrangements affecting domestic competition. Antitrust laws were aimed at clamping down on domestic business restrictive practices harming domestic consumers. The explosion of trade links during the 20th century however enhanced the risk of distortion of domestic markets. Today, globalisation gradually creates one global market accessible to worldwide economic actors who are vulnerable to attack by global conspirators. The question then arises how and to what extent national regulators could intervene in an era of evaporating State borders.

287. THE SHERMAN ACT AND INTERNATIONAL ANTITRUST – The U.S. Sherman Act does not explicitly address the issue of jurisdiction on the basis of effects of a foreign conspiracy felt in the territory, although its wording is, to say the least, confusing. It states that "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States,

[890] Antitrust act of July 2, 1890 (26 Stat. at L. 209, chap. 647, U.S. Comp. Stat. 1901, p. 3200), 15 U.S.C. §§ 1-7 (1988).

[891] *See* http://www.usdoj.gov/atr/ and http://www.ftc.gov/ftc/antitrust.htm. In order to prevent duplication of effort, the two agencies consult before opening any case. All criminal antitrust enforcement is handled by the Antitrust Division of the Department of Justice.

or with foreign nations, is declared to be illegal."[892] Using the wording "among the several States" instead of "in United States territory", the Sherman Act arguably refers to agreements made in American states. The wording "with foreign nations" is however problematic. Does it justify the exercise of jurisdiction based on territorial conduct that causes effects in foreign nations? Does it justify the exercise of jurisdiction based on territorial effects of conduct in foreign nations? Does it justify the exercise of jurisdiction in both instances? Or does it justify the exercise of jurisdiction in none of these instances?[893]

It could surely be argued that the Sherman Act only contemplated the exercise of jurisdiction based on the subjective territoriality principle, with jurisdiction obtaining as soon as a business restrictive practice is entered into in the United States that restrains trade or commerce with foreign nations. In *American Banana* however, a case discussed in the next paragraph, the Supreme Court rejected this jurisdictional ground, holding that "[a] conspiracy in this country to do acts in another jurisdiction does not draw to itself those acts and make them unlawful, if they are permitted by the local law." [894] However, *American Banana* at the same time refused to exercise jurisdiction over a foreign conspiracy that produced effects within the United States, thus rejecting effects-based jurisdiction as a modality of the objective territoriality principle. As will be shown in part 6.2, the reference to trade or commerce with foreign nations was not entirely deprived of meaningful content, as, in the immediate aftermath of *American Banana*, U.S. courts did not shy away from exercising jurisdiction over foreign corporations trading with the U.S. if the conspiracy they had entered into had its seat in the U.S. because of substantial U.S. participation.

288. EARLY UNITED STATES CASE-LAW: *AMERICAN BANANA* – The international reach of the Sherman Act came before the U.S. Supreme Court as early as 1909, in the *American Banana* antitrust case.[895] Sticking stubbornly to the traditional theory of State sovereignty pursuant to which a State does not have jurisdiction to regulate the conduct outside its borders, Justice WENDELL HOLMES famously held that "the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done."[896] As the anticompetitive acts in *American Banana* had occurred outside the United States, where they were apparently legal, the United States could thus not exercise jurisdiction. HOLMES advocated a strictly territorial application of

[892] Sherman Act, 15 U.S.C. § 1.

[893] *Compare* W.S. GRIMES, "International Antitrust Enforcement Directed at Restrictive Practices and Concentration: The United States' Experience", in: H. ULLRICH (ed.), *Comparative Competition Law: Approaching an International System of Antitrust Law*, Baden-Baden, Nomos, 1998, at 220 (claiming that the language of the Sherman Act indeed suggested application of the Act to trade that touched foreign persons or the territory of foreign nations, admitting that the extent of this application has remained an area for active court interpretation).

[894] *American Banana v. United Fruit Co.*, 213 U.S. 347, 359 (1909). AKEHURST noted that other countries showed similar restraint since application of the subjective territoriality principle could "be contrary to international law because it might constitute an attempt to impose an alien economic policy on the State where the agreement was performed." M. AKEHURST, "Jurisdiction in International Law", 46 *B.Y.I.L.* 145, 193 (1972-73).

[895] *American Banana v. United Fruit Co.*, 213 U.S. 347 (1909).

[896] *Id.*, at 356-357 (1909). *American Banana* did not concern proceedings against a foreign company. It was a dispute between two American banana companies, with the defendant conspiring to drive the plaintiff out of business through acts committed outside the United States with the help of the government of Costa Rica.

U.S. antitrust law and laid the basis for a general presumption against the extraterritorial reach of American antitrust legislation[897]:

> "The foregoing considerations would lead, in case of doubt, to a construction of any statute as intended to be confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power. 'All legislation is prima facie territorial.' Words having universal scope, such as 'every contract in restraint of trade,' 'every person who shall monopolize,' etc., will be taken, as a matter of course, to mean only everyone subject to such legislation, not all that the legislator subsequently may be able to catch."[898]

289. EARLY EUROPEAN PRACTICE – In 1909, when *American Banana* was decided, extraterritoriality was not an issue in Europe, for the simple reason that competition policy or law itself was almost non-existent. Cartels, receiving scholarly support at the end of the 19th century, were not hindered and even promoted.[899] Especially Germany was very cartel-friendly during the first half of the 20th century. The policy shift came only after the United States denounced the lax nature of the European governments and compelled post-war Germany to adopt deconcentration and cartel laws.[900]

290. NO JURISDICTIONAL CONTROVERSY – Before the Second World War, there was no transatlantic rift over antitrust jurisdiction since Europe lacked a conceptual antitrust framework.[901] This rift was likely to emerge after the war. The 1957 Treaty of the European Community included a prohibition of cartels and the abuse of a dominant position, whilst the United States and Europe tightened their trade ties. American and European companies gained considerable interests across the Atlantic, which entailed the danger of dominant market positions and anticompetitive cartels.

291. CRIMINAL EFFECTS-BASED JURISDICTION – In the field of U.S. criminal law, some tentative steps had been taken in the late 19th century to make inroads in the strict application of the territoriality principle, with courts bringing criminal acts

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[897] *See also Environmental Defense Fund, Inc. v. Massey*, 986 F.2d 528, 531 (D.C. Cir. 1993). Citing the Supreme Court's reference to comity (213 U.S. 356 holding that asserting jurisdiction over acts which wholly occurred outside the U.S. "would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent.") some courts construed *America Banana* not as a repudiation of extraterritorial jurisdiction, but rather as a mitigation, albeit an extreme one, of the extraterritorial reach of U.S. antitrust laws. *See e.g. Montreal Trading Ltd.* v. *Amax, Inc.*, 661 F.2d 864, 869 (10th Cir. 1981).

[898] *American Banana*, 213 U.S. 357 (citations omitted).

[899] *See* M. DRAHOS, *Convergence of Competition Laws and Policies in the European Community*, European Monographs, The Hague/London/Boston, Kluwer Law International, 2001, at 3-4.

[900] *Id.*, at 240. Under American influence, Germany was the first European country to embrace effects jurisdiction on the basis of § 130(2) of the German Act Against Restraints of Competition. *See: Ölfeldröhre*, German Federal Supreme Court (BGH) July 12, 1973, WuW/E BGH 1276; *Morris-Rothmans*, Berlin Appeals Court (Kammergericht) July 1, 1983, WuW/E OLG 3051. *See also*: L. RITTER, W.D. BRAUN, F. RAWLINSON (ed.), *EC Competition Law: A Practicioner's Guide* (2d ed.), London/The Hague/Boston, Kluwer Law International, 2000, at 61. *See* on German competition law: subsection 6.5.1.

[901] *Compare* D.J. GERBER, "The Extraterritorial Application of the German Antitrust Laws", 77 *A.J.I.L.* 756 (1983).

within the territorial jurisdiction of a court "either by an immediate effect, or by direct and continuance [sic] causal relationship."[902] Such assertions of jurisdiction did not lead to foreign governmental protests, which, combined with the P.C.I.J.'s rejection of strict territoriality in the *Lotus* case, may have emboldened the U.S. to apply the effects doctrine in other, non-criminal contexts as well.[903] Those later assertions of extraterritorial jurisdiction however met with substantial foreign hostility.

292. *AMERICAN TOBACCO* AND *SISAL SALES* – In the field of antitrust law, as *American Banana* attests to, the effects doctrine was initially rejected. In the immediate aftermath of *American Banana* however, American courts grew more and more willing to recognize U.S. jurisdiction over foreign companies involved in U.S.-based conspiracies. This erosion of strict territoriality was arguably not at odds with *American Banana*, which, on the facts of the case, was only concerned with wholly foreign conspiracies. It nonetheless paved the way for the eventual acceptance of the effects doctrine in the 1945 *Alcoa* case.

The first post-*American Banana* international antitrust case to reach to U.S. Supreme Court was the 1911 *American Tobacco* case, concerning a major tobacco cartel involving 65 American corporations and two English corporations.[904] In this case, jurisdiction was upheld over foreign corporations who took part in a conspiracy with U.S. corporations whose anticompetitive conduct was subject to U.S. antitrust laws.[905]

Under the *American Tobacco* doctrine, jurisdiction obtains over foreign conspirators where the principal conspirators are subject to undisputable territorial jurisdiction because the conspiracy has been entered into in the United States.[906] This is an application of the doctrine of participation which has been discussed *supra* in the context of the territoriality principle (part 3.4.4). MANN put the uncontroversial application of this doctrine to international antitrust law as follows:

> "The test of territoriality also covers those implications of the traditional doctrine which relate to participation in offences. Thus, if one of the principals is subject to the State's jurisdiction, absent accessories or agents are similarly subject; if there exists jurisdiction over one of several conspirators, other conspirators may also be prosecuted."[907]

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[902] See J.B. MOORE, Report on Extraterritorial Crime (1887), in J.B. MOORE, *A Digest of International Law* (1906) (225); G.B. BORN, "A Reappraisal of the Extraterritorial Reach of U.S. Law", 24 *Law & Pol. Int'l Bus.* 1, 23, notes 95-96 (1992); *see also supra* on the scope of the territoriality principle.

[903] *See* G.B. BORN, "A Reappraisal of the Extraterritorial Reach of U.S. Law", 24 *Law & Pol. Int'l Bus.* 1 (1992) (noting that the early effects practice of U.S. courts and states "presaged broader U.S. assertions of extraterritorial jurisdiction later in [the 20th] century").

[904] *United States v. American Tobacco Co.*, 221 U.S. 106 (1911).

[905] *Id.*, at 145-146 (arguing that the foreign corporations were "impleaded either because of their nature and character and the operation and effect of contracts or agreements with the American Tobacco Company, or the power which it exerted over their affairs by stock ownership.")

[906] The fact that the conspirators are U.S. nationals or corporations does of itself not determine jurisdiction, although, as § 415 Restatement (Third) of U.S. Foreign Relations Law (1987), comment a, notes, "in determining whether an exercise of jurisdiction is reasonable, the participation in an activity or agreement by United States nationals or corporations may be a significant element under § 403(2)(b)."

[907] *See* F.A. MANN, "The Doctrine of Jurisdiction in International Law", 111 *R.C.A.D.I.* 1, 98 (1964-I).

293. On the basis of *American Tobacco*, U.S. Supreme Court and lower courts applied the Sherman Act to the monopolization of transportation routes between the U.S. and other nations (shipping conferences[908] and railroad routes) during 1910s. While these cases were not wholly extraterritorial in that they involved U.S. corporations, U.S. courts nevertheless made clear that the Sherman Act could reach extraterritorial conduct, and applied to foreign conspiracies if "the combination affected the foreign commerce of this country and was put into operation here".[909] LOWENFELD has therefore argued that these cases "may be considered the beginning of the "effects doctrine" in respect of economic regulation by the United States".[910]

In 1927, a case which resembled *American Tobacco*, but nonetheless differed considerably, came before the U.S. Supreme Court. *Sisal Sales*[911] concerned a cartel between five American companies and one Mexican corporation conspiring in the hemp business. The Mexican company had become sole purchaser of sisal from producers and an American corporation sole importer into the United States, as a result of which competition would be impeded. Unlike in *American Tobacco*, the cartel production was thus in the hands of one foreign company.

The Supreme Court distinguished *Sisal Sales* however from *American Banana*, and established jurisdiction over the conspiracy. It held that "[t]he circumstances of the present controversy are radically different from those presented in *American Banana Co.* v. *United Fruit Co.*",[912] since "[the conspiring companies] are within the jurisdiction of [United States] courts and may be punished for offenses against [United States] laws."[913] The Court went on to explain: "Here we have a contract, combination and conspiracy entered into by parties within the United States and made effective by acts done therein. The fundamental object was control of both importation and sale of sisal and complete monopoly of both internal and external trade and commerce therein. The United States complain of a violation of their laws within their own territory by parties subject to their jurisdiction."[914] In *Sisal Sales*, the Court appeared to take it for granted that the Mexican corporation, the sole purchaser of goods, was in its sphere of jurisdiction, because (importing) U.S. corporations colluded as well in the conspiracy. The *ratio decidendi* in *Sisal Sales* thus seems to be the same as in *American Tobacco*, although the foreign conspiring corporation had a much more prominent role in the *Sisal Sales* transnational conspiracy.

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[908] Shipping conferences, although initially investigated by the U.S. Government, were legalized by the Shipping Act of 1916, provided that the Federal Maritime Commission did not considered them to be contrary to the public interest. Shipping Act, 39 Stat. 728 (1916), 46 U.S.C. § 814 (1976). At about the same time, shipping conferences were also exempted from the application of UK (and later EC) competition Law. *See* A.V. LOWE, "Blocking Extraterritorial Jurisdiction: the British Protection of Trading Interests Act, 1980", 75 *A.J.I.L.* 257, 258 (1981).

[909] *United States* v. *Pacific & Arctic Ry.*, 228 U.S. 87 (1913); *Thomsen* v. *Cayser*, 243 U.S. 66, 88 (1917). *See also United States* v. *Hamburg-Amerikanischen Packet-Fahrt-Actien-Gesellschaft (HAPAG)*, 200 Fed. 806-07 (C.C. S.D.N.Y. 1911) ("We see nothing to warrant the contention that the [Sherman] Act should be narrowly interpreted as prohibiting only contracts which are to be wholly within the territorial jurisdiction of the United States nor – if it were for us to consider – any reason for concluding that a broader construction would lead to international complications.").

[910] A.F. LOWENFELD, "Public Law in the International Arena: Conflict of Laws, International Law, and Some Suggestions for Their Interaction", 163 *Recueil des Cours* 311, 374 (1979-II).

[911] *United States v. Sisal Sales Corp.*, 274 U.S. 268 (1927).

[912] *Id.*, at 275.

[913] *Id.*, at 276.

[914] *Id.*

Sisal Sales foreshadowed the exclusive reliance on effects which was to follow in 1945. Indeed, the Court pointed out, as an *a fortiori* argument, that the conspirators were "engaged in importing articles from a foreign country and have become parties to a contract, combination and conspiracy intended to restrain trade in those articles and to increase the market price within the United States."[915] In so doing, the Court linked up with the aforementioned judgments reached in the 1910s which set forth an embryonic effects principle, and thus seemed to distance itself from Judge Holmes's opinion in *American Banana*, in spite of its belief to the contrary.[916] *Sisal Sales* created indeed the impression that the intention to restrain trade and affect market prices in United States territory, and the subsequent implementation of that intention, would suffice for the United States to exercise jurisdiction. This is precisely what is contemplated by effects-based jurisdiction.

6.2. The Alcoa case: the breakthrough of the effects doctrine in the United States

294. GOING BEYOND PREVIOUS CASE-LAW – *American Tobacco* nor *Sisal Sales* addressed jurisdiction over conspiracies that where wholly foreign-based but whose agreements nevertheless affected U.S. commerce. This sort of conspiracies continued to fall under the restrictive 1909 *American Banana* doctrine. Admittedly, in 1934, Section 65 of the Restatement of Conflicts (First) seemed to unconditionally recognize effects-based jurisdiction, stating that "[i]f consequences of an act done in one state occur in another state, each state in which any event in the series of act and consequences occurs may exercise legislative jurisdiction …". Also, in *Strassheim v. Daily*, Justice HOLMES, the very justice who had rejected jurisdiction in *American Banana*, held as early as 1911 that "[a]cts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a state in punishing the cause of the harm as if he had been present at the effect, if the state should succeed in getting him within its power."[917] However, unlike later Foreign Relations Restatements, the 1934 Conflicts Restatement may not have been meant to apply to regulatory tort liability such as antitrust liability. *Strassheim* for its part may not be a precedent for antitrust law, because it was a (criminal) *habeas corpus* case. Only with the 1945 judgment of the Second Circuit in the *Alcoa* case[918] did the effects doctrine

[915] *Id.*

[916] *See* A.F. LOWENFELD, "Public Law in the International Arena: Conflict of Laws, International Law, and Some Suggestions for Their Interaction", 163 *Recueil des Cours* 311, 379 (1979-II) (submitting that "the *Sisal* case is important … in reflecting a change in outlook, closer perhaps to the early shipping cases, and removed somewhat from the vertical approach to sovereignty expressed by Justice Holmes"); G.B. BORN, "A Reappraisal of the Extraterritorial Reach of U.S. Law", 24 *Law & Pol. Int'l Bus.* 1, 30 (1992).

[917] *Strassheim v. Daily*, 221 U.S. 280, 285 (1911). *Compare American Banana*, 213 U.S. 356 ("[States] go further, at times, and declare that they will punish any one, subject or not, who shall do certain things, if they can catch him, as in the case of pirates on the high seas. In cases immediately affecting national interests they may go further still and may make, and, if they get a chance, execute similar threats as to acts done within another recognized jurisdiction."). It has been noted that Justice Holmes, writing the opinion in *America Banana*, did not actually disapprove of foreign extraterritorial practices, in light of his upholding extraterritorial jurisdiction in *Strassheim*. *See* G.B. BORN, "A Reappraisal of the Extraterritorial Reach of U.S. Law", 24 *Law & Pol. Int'l Bus.* 1, 22, note 22 (1992).

[918] *United States v. Aluminium Corp. of America*, 148 F.2d 416 (2d Cir. 1945).

gain widespread acceptance in U.S. international antitrust law,[919] although it was already timidly employed by U.S. regulatory authorities.[920] *Alcoa* has almost the weight of a Supreme Court decision, as the Second Circuit sat as a court of last resort since the Supreme Court was unable to muster a quorum of six Justices.[921]

295. In *Alcoa,* foreign companies had formed a cartel in Switzerland by agreeing to pay royalties to each other if their aluminium production exceeded a certain level.[922] This arrangement could have an inflatory effect on aluminium prices and cause aluminium import shortages in the United States. The question posed to the Court of Appeals was: could the U.S. legitimately exercise jurisdiction over a wholly foreign conspiracy affecting the American market?[923] Judge LEARNED HAND, delivering the majority opinion, believed it could, famously holding that "it is settled law […] that any state may impose liabilities [may exercise jurisdiction over], even upon persons not within its allegiance [foreigners], for conduct outside its borders that has consequences [effects] within its borders which the state reprehends, and these liabilities other states will ordinarily recognize."[924]

296. As has been pointed out, there were no clear legal precedents supporting the effects doctrine as set forth in *Alcoa*. Indeed, *American Banana* rejected extraterritorial antitrust jurisdiction, and in international antitrust cases over which jurisdiction was established, foreign corporations participated in a *U.S.* conspiracy. Judge LEARNED HAND however attempted to distinguish *Alcoa* from *American Banana*. The latter would only stand for the principle that "[w]e should not impute to Congress an intent to punish all whom its courts can catch, for conduct which has no consequences within the United States." [925] As the foreign conduct in *Alcoa* produced consequences within the United States, the U.S. could – *a contrario* – impose liability for conduct outside its borders. According to the Court, jurisdiction would obtain over a foreign agreement as soon as this agreement "intended to affect imports [to the United States] and did affect them." [926]

297. EXPLAINING THE JURISDICTIONAL SHIFT – It is unsure whether *American Banana* would indeed have approved of effects jurisdiction.[927] It seems more likely that Judge LEARNED HAND provided an evolving interpretation of the

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[919] *See, e.g.,* § 415, reporters' note 2 of the Restatement (Third) of Foreign Relations Law (1987) (stating that Justice Holmes's statement of the presumption against extraterritoriality in *American Banana*, "though still often quoted, does not reflect the current law").

[920] *See* case references in G.B. BORN, "A Reappraisal of the Extraterritorial Reach of U.S. Law", 24 *Law & Pol. Int'l Bus.* 1, 23, note 90 (1992).

[921] *Alcoa*, 148 F.2d 421.

[922] A Swiss company had entered into an agreement with its share holder aluminium production companies incorporated in France, Germany, Switzerland, Britain and Canada, to set a quota for the production of aluminium.

[923] It is however alleged that the defendants were not entirely foreign: one of them, *Aluminium Ltd. Of Canada*, had its effective business headquarters in New York and was in the same group as the *Aluminium Company of America.* Consequently, *Alcoa* would not raise the question of extraterritoriality. *See* R. WHISH, *Competition Law*, London, Butterworth, 4th ed., 2001, at 395.

[924] 148 F.2d 443.

[925] *Id.*

[926] *Id.*, at 444-45.

[927] *Contra* G.B. BORN, "A Reappraisal of the Extraterritorial Reach of U.S. Law", 24 *Law & Pol. Int'l Bus.* 1, 29, note 121 (1992) (arguing that the Second Circuit's acknowledgment of *American Banana* "was coupled with mischaracterization").

Sherman Act in the light of political and economic developments and the changes in international law rules that accompanied them,[928] although the Court did not explicitly cite international law to that effect.[929] The increasing market access of foreign companies to the American market made the United States increasingly vulnerable to business restrictive practices, particularly if these companies occupied a large share of the market and could easily exploit their dominant position. The Court basically found that in a globalizing world, the place where anticompetitive arrangements were made, but where these arrangements did possibly not produce effects, ought to become subordinate to the place where the effects of the cartel were felt. As will be set out in section 6.3, under international law, effects-based jurisdiction might be acceptable because it may pose as a modality of the objective territoriality principle.

298. The shift from strict territoriality in *American Banana* to the effects doctrine in *Alcoa* may also be attributable to the very different views on the proper conflict-of-laws approach that Justice Holmes and Judge Learned Hand as representatives of different schools of thought entertained throughout their careers (although the shift in views may obviously have been informed by the rapid globalization following the First World War). As DODGE has pointed out, Holmes was a territorial multilateralist who drew upon Justice Story, whereas Learned Hand was more of a unilateralist, in whose view the forum should apply its own law to a transnational situation.[930] In the 1930s, unilateralism in conflict-of-laws was generally on the rise, with the Supreme Court espousing a governmental interest doctrine instead of a strict territoriality analysis, to solve conflicts of laws between U.S. state laws in the context of employment injuries.[931] The present-day across-the-board

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[928] *Compare* W.S. GRIMES, "International Antitrust Enforcement Directed at Restrictive Practices and Concentration: The United States' Experience", in: H. ULLRICH (ed.), *Comparative Competition Law : Approaching an International System of Antitrust Law*, Baden-Baden, Nomos, 1998, 220; G.B. BORN, "A Reappraisal of the Extraterritorial Reach of U.S. Law", 24 *Law & Pol. Int'l Bus.* 1, 31 (1992). The introductory note to the Restatement (Third) of Foreign Relations Law clearly had *Alcoa* in mind where it states: "In the past, the jurisdiction of a state to make its law applicable in a transnational context was determined by formal criteria supposedly derived from concepts of state sovereignty and power [...] Increasingly, the practice of states has reflected conceptions better adapted to the complexities of contemporary international intercourse [...] Territoriality and nationality remain the principal bases of jurisdiction to prescribe, but in determining their meaning rigid concepts have been replaced by broader criteria.").

[929] *See also* K. BREWSTER, *Antitrust and American Business Abroad*, New York, McGraw-Hill, 1958, 286-287 (discussing the effects doctrine introduced by *Alcoa* and stating that "there is no binding external authority to which the United States has submitted these questions", and that therefore "the decision to restrict jurisdiction is a matter of national policy").

[930] Learned Hand nevertheless argued in favor of the application of domestic law *similar to* foreign law, an approach known as the 'local law' theory, which places him in the tradition of Holmes. *See Guinness* v. *Miller*, 291 F. 769 (S.D.N.Y. 1923) ("A foreign sovereign under civilized law imposes an obligation of its own as nearly homologous as possible to that arising in the place where the tort occurs."). His respect for territoriality can also be gleaned from *Scheer* v. *Rockne Motors Corp.*, 68 F.2d 942, 943-44 (1934) ("[I]t is basic in the whole subject that legislative jurisdiction […] is territorial, and that no state can create personal obligations, against those who are neither physically present within its boundaries, nor resident there, nor bound by its allegiance. *See also* W.S. DODGE, "Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism", 39 *Harv. Int'l L.J.* 101, 114 (1998). *See* on the 'local law' theory: D.F. CAVERS, 'The Two "Local Law" Theories", 63 *Harv. L. Rev.* 822 (1950).

[931] *Alaska Packers Association* v. *Industrial Accident Commission*, 294 U.S. 532 (1935); *Pacific Employers Co.* v. *Industrial Accident Commission*, 306 U.S. 493 (1939) (holding that the Full Faith and Credit Clause "does not require one state to substitute for its own statute […] the conflicting statute of

governmental interest analysis was later given its theoretic foundations by CURRIE, who argued that "[i]f the court finds that the forum state has an interest in the application of its policy, it should apply the law of the forum, even though the foreign state also has an interest in the application of its contrary policy. "[932] The shift to a unilateral governmental interest analysis in U.S. conflict-of-laws theory was widely dismissed by Europeans, who saw Savigny's multilateral "legal seat" theory, with its emphasis on uniformity, threatened.[933] European opposition to the governmental interest analysis in general conflict-of-laws theory was bound to increase when the U.S. began to unilaterally apply its *regulatory laws* using this analysis. In so doing, the U.S. impinged on foreign governmental interests to a far greater extent than when it merely applied U.S. law to *private law* relationships. What we glean from this is that the extraterritorial application of U.S. regulatory laws is part of a broader controversial intellectual movement in conflict-of-laws thinking, which shed classical multilateral and territorial thinking in favor of a pro-forum governmental interest analysis.[934]

299. JURISDICTIONAL RESTRAINT – *Alcoa* did initially not provoke foreign opposition, rather on the contrary.[935] Nonetheless, by applying the effects doctrine, developed in the field of criminal law to the field of economic law, *Alcoa* opened a Pandora's box. In a globalized world almost every restrictive agreement entails consequences in the United States, the world's largest economy, and thus possibly ignite U.S. jurisdiction. Jurisdictional restraint therefore appears apt.

Alcoa itself already contains traces of restraint, as jurisdiction would only obtain if the agreement was "intended to affect imports [to the United States] and did affect them."[936] *Alcoa* did indeed not approve of unlimited extraterritorial jurisdiction, even if effects were felt in the United States: "There may be agreements made beyond our borders not intended to affect imports, which do affect them, or which affect exports. Almost any limitation of the supply of goods in Europe, for example, or in South America, may have repercussions in the United States if there is trade between the two. Yet when one considers the international complications likely to arise from an effort in the country to treat such agreements as unlawful, it is safe to assume that Congress certainly did not intend the Act to cover them."[937]

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another state, even though that statute is of controlling force in the courts of the state of its enactment with respect to the same persons and events.").

[932] *See* B. CURRIE, *Selected Essays on the Conflict of Laws*, Durham, NC, Duke University Press, at 184 (1963).

[933] *See* W.S. DODGE, "Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism", 39 *Harv. Int'l L.J.* 101, 118 (1998), citing G. KEGEL, "The Crisis of Conflict of Laws", 112 *R.C.A.D.I.*. 89, 95 (1964-II); O. KAHN-FREUND, "General Problems of Private International Law", 143 *R.C.A.D.I.*, 139, 244 (1974-III).

[934] In the *Restatement (Second) of Conflict of Laws*, the unilateralism of the governmental interests analysis was swapped for a multilateral interest balancing test. A variety of connecting factors, set forth in Section 6 of the Restatement, would guide the courts in identifying the most appropriate law, which would not necessarily be the law of the forum (*i.e.*, U.S. law).

[935] *See* K.M. MEESSEN, "Antitrust Jurisdiction Under Customary International Law", 78 *A.J.I.L.* 783, 789-90 (1984) (arguing that "[f]oreign governments obviously expected their nationals to gain access to the U.S. market as a result of the antitrust proceeding.").

[936] 148 F.2d 444-45.

[937] *Id.*, at 443.

On the basis of *Alcoa's* note of restraint, later courts designed doctrines limiting the exercise of effects-based jurisdiction, in particular so as to prevent jurisdictional conflicts with other nations. These doctrines, which include the rule of reason discussed in chapter 5, will be discussed in 6.6 and 6.7. Their introduction may explain why the principled position of the Second Circuit (the legitimacy of asserting extraterritorial jurisdiction over foreign restrictive practices causing adverse affects in the United States) has never been cast doubt upon. Congress indeed never intervened in the courts' interpretation of the Sherman Act,[938] and the Supreme Court cited *Alcoa* approvingly as early as 1952, and heavily relied on it in the controversial 1993 *Hartford Fire Insurance* case.[939]

6.3. Justifying effects-based antitrust jurisdiction

300. PUBLIC INTERNATIONAL LAW JUSTIFICATION – The most likely ground of international jurisdiction under which effects-based jurisdiction could be justified is the territoriality principle. In *Alcoa,* Judge Learned Hand indeed premised jurisdiction on the *territorial consequences* of foreign anticompetitive conduct. While effects prong of the territoriality principle was classically limited to the field of criminal law, it may be argued that it is economically rational and efficient to employ it in the field of antitrust law as well, in view of the adverse domestic effects of foreign-based conspiracies, and the tendency of the territorial State not to clamp down on conspiracies that are mainly export-oriented. Although the adverse domestic effects of foreign-based conspiracies may be considerable, it will be argued that the protective principle of jurisdiction does not serve as an appropriate justificatory principle, as it is unlikely that the security of the State and its political independence are truly harmed.

301. ROOTS IN CRIMINAL LAW – Under classical criminal jurisdictional theory, jurisdiction based on the effects of a crime is denoted as 'objective' territorial jurisdiction. In *Lotus*, the P.C.I.J. upheld the legality of such jurisdiction in light of existing State practice. It permitted jurisdiction "if one of the constituent elements of the offense and more especially its effects have taken place there."[940] It clarified that these constituent elements should be "legally and entirely inseparable, so much so that

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[938] *See, e.g., Laker Airways, Ltd.* v. *Sabena,* 731 F.2d 909, 946 (D.C. Cir. 1984) ("Congress has been aware of the decades-long controversy accompanying the recurrent assertion of jurisdiction over foreign anticompetitive acts and effects in the United States dating back nearly forty years but has, with limited exceptions, not yet chosen to limit the laws' application or disapprove of the consistent statutory interpretation reached by the courts"). Admittedly, in 1982, Congress enacted the Foreign Trade Antitrust Improvements Act (15 U.S.C. §§ 6a). This Act, which amended the Sherman Act, determined the international reach of the Sherman Act for non-import commerce, but most likely based this reach on the existing case-law for import commerce.

[939] The Supreme Court, influenced by *Alcoa,* eventually overruled *American Banana* in *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 704-05 (1962), after citing *Alcoa* approvingly in *Steele* v. *Bulova Watch Co.*, 344 U.S. 280, 288 note 16 (1952). *See also Zenith Radio Corp.* v. *Hazeltine Research Corp.*, 395 U.S. 100, 113 note 8 (1969); *Hartford Fire Insurance* v. *California*, 509 U.S. 764 (1993).

[940] P.C.I.J., *S.S. Lotus*, P.C.I.J. Reports, Series A, No. 10, at 23 (1927) (arguing that "the courts of may countries, even of countries which have given their criminal legislation a strictly territorial character, interpret criminal law in the sense that offenses, the authors of which at the moment of commission are in the territory of another state, are nevertheless to be regarded as having been committed in the national territory, if one of the constituent elements of the offense, and more especially its effects, have taken place there").

their separation renders the offense non-existent."[941] In a separate opinion to *Lotus*, Judge MOORE added: "In no case has an English or American Court assumed jurisdiction, even under Statutes couched in the most general language, to try and sentence a foreigner for acts done by him abroad, unless they were brought either by immediate effect or by direct and continuous causal relationship, within the territorial jurisdiction of the Court."[942] Doubtless, public international law authorizes criminal jurisdiction by a State over an act of which the effects are felt in the territory of that State.

302. EXTRAPOLATION TO ECONOMIC LAW – The question arises whether criminal effects-based jurisdiction – which was approved by the P.C.I.J. in *Lotus* – could be extrapolated to the field of economic law, such as antitrust law.[943] Two issues may stand in the way of an extrapolation. For one, antitrust violations are not necessarily criminal offences. For another, the effects of antitrust violations, unlike violations of most criminal laws, are economic, rather than physical.

303. If antitrust violations are criminal offences, as some are indeed, it would appear that the *Lotus* effects doctrine would apply, as the P.C.I.J. in *Lotus* did not state that criminal jurisdiction based on *economic* effects would not be authorized under international law. It may even be argued, with AKEHURST, that, *per analogiam*, every assertion of sovereign power in the form of sanctions, such as fines, penalties and confiscation of property, even if these sanctions are strictly speaking non-criminal, may be justifiable under the effects doctrine.[944] On the basis of this argument, the effects doctrine may govern a civil antitrust suit by the U.S. Department of Justice to the same extent as it governs a criminal suit by the Department. Equating criminal and other government procedures for jurisdictional purposes deserves full support, as it is illogical to subject non-criminal antitrust proceedings to a stricter jurisdictional regime than criminal antitrust proceedings, whereas criminal proceedings are generally deemed more intrusive, in particular in terms of their sanctions, than civil proceedings are.[945]

304. The question of how to deal with private antitrust proceedings, which form a considerable part of the caseload of U.S. courts, remains however, as *Lotus* may not have contemplated civil actions brought by private plaintiffs. It appears that the solution here ought to be pragmatic. If private actions are based on the same anticompetitive conduct of the defendant and when the same substantive – public law – antitrust laws apply, it does not make sense to apply a substantially different

[941] *Id.*, at 30.
[942] *Id.*, at 94.
[943] *See* for a strong argument in favor of extrapolation: A. ACEVEDO, "The EEC Dyestuffs Case: Territorial Jurisdiction", 36 *Modern L. Rev.* 317, 318-19 (1973) (arguing that, in competition law, there is "no need to rely upon the juridically suspect "effects" doctrine as a basis for jurisdiction", as the exercise of jurisdiction over domestic injury caused by foreign restrictive practices is covered by the objective territoriality principle"). *See also* J.-M. BISCHOFF & R. KOVAR, "L'application du droit communautaire de la concurrence aux entreprises établies à l'extérieur de la Communauté", 102 *J.D.I.* 675, 699 (1975) (« Si le critère de l'effet se heurte à aucune règle prohibitive en droit pénal international, on peut penser que cette règle n'existe d'une façon générale en droit international public. »).
[944] *See* M. AKEHURST, "Jurisdiction in International Law", 46 *B.Y.I.L.* 145, 190 (1972-73).
[945] *See also* B. GOLDMAN, "Les effects juridiques extra-territoriaux de la politique de la concurrence", *Rev. Marché Commun* 612, 616 (1972) (stating that « il peut paraître moins grave de donner un effet extra-territorial à des dispositions de droit public économique qu'à des règles de droit pénal. »).

jurisdictional standard. When antitrust regulators and private plaintiffs have a concurring competence to sue in a given case, the authorities and the courts may therefore apply roughly the same effects test, although the courts are counselled to exercise appropriate restraint in a privately enforced case if there is evidence that the enforcement authorities deliberately refrained from exercising extraterritorial jurisdiction in that case.

305. The most thorough criticism of the effects doctrine however relates to the nature of antitrust law versus criminal law, rather than to the competency of the different antitrust enforcers. The effects of a *crime* are ordinarily a constitutive element or a part of the crime.[946] They could be perceived directly and physically, as is the case of shooting a man across the frontier. In contrast, the effects of an anticompetitive agreement cannot be considered to be a constitutive element of a crime, not so much because engaging in business restrictive practices is not necessarily a crime, but rather because the effects of such practices can hardly be regarded as constitutive elements of the antitrust violation, but rather as economic repercussions or consequences which are physically not readily identifiable.[947] As the effects of business restrictive practices are effects of an indirect and economic nature, leading European scholars such as JENNINGS and MANN have rejected the effects doctrine.[948] By sticking to the constitutive elements approach, they were intent on

[946] This is however not always the case. Some crimes, such as blackmail, may be complete upon the making of the blackmail demand. The Law Reform Commission of Canada has therefore proposed to expand Canadian jurisdiction over offences of which the constituent elements all occurred outside Canada, "but direct substantial harmful effects were intentionally or knowingly caused in Canada.". 1984 Working Paper on Extraterritorial Jurisdiction, cited in M. HIRST, *Jurisdiction and the Ambit of the Criminal Law*, Oxford, Oxford University Press, 2003, 342.

[947] *Compare* R. WHISH, *Competition Law*, London, Butterworth, 4th ed., 2001, 393-94. *Contra* B. GOLDMAN, "Les champs d'application territoriale des lois sur la concurrence", 128 *R.C.A.D.I.* 631, 699 (1969-III) (stating that the domestic effect of a foreign anticompetitive agreement « est tout aussi direct et immédiat que la mort de la victime atteinte par un coup de feu tiré de l'autre côté de la frontière »). *Id.*, at 700 (wondering whether such effect is not a constitutive element of an offense). It should be noted that in some criminal law cases effects may not be physical either, such as sending a libellous letter from State A to an address in State B, with the latter State claiming jurisdiction. Hence, according to AKEHURST, criminal law analogies do not justify confining the jurisdiction of a State to cases where the defendant has performed some physical act. *See* M. AKEHURST, "Jurisdiction in International Law", 46 *B.Y.I.L.* 145, 190 (1972-73).

[948] *See* R. JENNINGS, "Extraterritorial Jurisdiction in the United States Antitrust Laws", 33 *B.Y.I.L.* 146, 159 (1957) ("In relation to elementary cases of direct physical injury, such as homicide, [the right to exercise effects-based jurisdiction] is unexceptionable, for here the 'effect' which is meant is an essential ingredient of the crime. Once we move out of the sphere of direct physical consequences, however, to employ the formula of 'effects' is to enter upon a very slippery slope … If … it were permissible to found objective territorial jurisdiction upon the territoriality of more or less remote repercussions of an act wholly performed in another country, then there were virtually nolimit to a State's territorial jurisdiction."); F.A. MANN, "The Doctrine of Jurisdiction in International Law", 111 *R.C.A.D.I.* 1, 86-87 (1964-I) ("The effect occurring within the country must be the fact which completes the offence; neither more nor less remote facts which could loosely be described as "effects" are sufficient. What the law considers relevant is, as a rule, the necessary legal effect, not the ulterior effect economically or socially."); *Id.*, at 100 ("[S]uch consequences are too remote, too indirect, too incidental to treat them as so essential a part of the contract in restraint that the latter can be said have occurred outside [the State where the contract is made]"); *Id.*, at 104 ("[I]t is submitted that "effect", whether intended or merely foreseeable or unexpected, does not constitute a sufficiently close connection with the importing country so as to permit the assumption of legislative jurisdiction by the latter; from the point of view of public international law the *Alcoa* decision cannot, therefore, be justified … The type of "effect" which the *Alcoa* ruling has in mind has nothing in common with the effect which by virtue of established principles "); F.A. MANN, "The Doctrine of Jurisdiction Revisited

reversing the U.S. trend in antitrust law "to push the territorial principle to absurd lengths in order to close gaps in their system of law enforcement."[949]

306. Not only is the extrapolation of criminal effects jurisdiction to the field of economic law problematic given the different nature of effects, it is also problematic because of the differing State interests in the economic field. Indeed, SCHUSTER has submitted that the 'extraterritorial' application of *criminal* law might be more acceptable for States than the 'extraterritorial' application of *economic* law. In the former situation, "[d]as Interesse an der Erhaltung der inneren Autorität des Staates ist allen Staaten gemein,"[950] whereas in the latter, the economic orders of States may be diametrically opposed to each other.[951] While different States may have the same economic laws on the books, one State may, for reasons of economic expediency, give quite another interpretation to these laws than another.[952] It would therefore not be self-evident to apply principles of criminal jurisdiction, the effects principle in particular, to economic law.[953]

307. ECONOMIC ANALYSIS – After JENNINGS and MANN, nobody has been so vociferous in his or her opposition against the application of the effects doctrine. It may be argued that JENNINGS's and MANN's criticism turned a blind eye to economic reality. As foreign cartels and mergers might wreck certain sectors of the national economy, it is hard to maintain that States should abide by obsolete international law and wait in vain for other States to take action. Although physically there may have been no anticompetitive acts in the territory, economically the effects happen as if the acts had been performed in the territory.[954] If territorial States were to condone the acts, they would promote safe anticompetitive havens from which corporations could prey on other States' markets. Then, in effect, these territorial States, rather than foreign States, exercise extraterritorial jurisdiction,[955] and abuse their sovereign

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after Twenty Years", 186 *R.C.A.D.I.* 9, 26 (1984-III) ("Mere commercial effect … provides an insufficient link with the legislating State. The persons are outside its territory. The conduct takes place outside its territory. It would accordingly be unreasonable to expect foreign parties to adapt their conduct to the commercial interests of a State with which they have no legally relevant contact."). *See also* M.D. VANCEA, "Exporting U.S. Corporate Governance Standards Through the Sarbanes-Oxley Act: Unilateralism or Cooperation?", 53 *Duke L.J.* 833, 834 (2003-2004) ("[W]hen the foreign conduct that harms U.S. citizens is noncriminal or even encouraged in the foreign country, assertion of U.S. jurisdiction is controversial."); A. LAYTON & A.M. PARRY, "Extraterritorial jurisdiction – European Responses", 26 *Houston J.I.L.* 309, 310 (2004).

[949] *See* M. AKEHURST, "Jurisdiction in International Law", 46 *B.Y.I.L.* 145, 157 (1972-73).

[950] G. SCHUSTER, *Die internationale Anwendung des Börsenrechts*, Berlin, Springer, 1996, 60.

[951] *Id.*, at 64, 66 ("Die unterschiedlichen wirtschaftlichen Interessen der Staaten stehne also einer der Massstäben des internationalen Strafrechts blind folgenden Anknüpfungslehre entgegen.").

[952] *Compare* J. STOUFFLET, "La compétence extraterritoriale du droit de la concurrence de la Communauté économique européenne", 98 *J.D.I.* 487, 489 (1971).

[953] G. SCHUSTER, *Die internationale Anwendung des Börsenrechts*, Berlin, Springer, 1996, at 61-62 (arguing that "[s]ofern … gefordert wird, es müssten direkte und tatbestandliche Inlandsauswirkungen vorlegen, dürfte es sich um eine spezifisch strafrechtliche, mit dem *nullum crimen sine lege*-Verbot zusammenhängende Betrachtungsweise handeln.").

[954] *See* P. DEMARET, "L'extraterritorialité des lois et les relations transatlantiques: une question de droit ou de diplomatie?", 21 *R.T.D.E.* 1, 33 (1985). *See also* H.L. BUXBAUM, "Conflict of Economic Laws: From Sovereignty to Substance", 42 *Va. J. Int'l L.* 931, 940 (2002) ("The primary bases for U.S. assertion of regulatory authority [abroad] derive from the sovereign's power to control the economic landscape within its borders."); W. SUGDEN, "Global Antitrust and the Evolution of an International Standard", 35 *Vand. J. Transnat'l L.* 989, 1016 (2002).

[955] *See* A.F. LOWENFELD, Book Review of Ebb, *International Business, Regulation and Protection*, 78 *Harv. L. Rev.* 1699, 1703-04 (1965) ("[I]n a situation involving more than one country, if country A

rights.[956] It would suffice for American companies to turn themselves into foreign companies and, with the complicity of foreign governments, subsequently engage in anticompetitive agreements producing effects threatening competition on the American market.[957] If one were to rely strictly on the territoriality principle, these practices would go unpunished.[958]

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wishes to regulate and country B does not, it seems to me equally fair to criticize B for attempting to impose its will beyond its borders as it is to criticize A for attempting to exercise its jurisdiction extraterritorially."); U.S. Attorney General Griffin Bell, in A.V. LOWE, *Extraterritorial jurisdiction: an annotated collection of legal materials*, Cambridge, Grotius publ., 1983, p. 4 ("… right from the beginning, our government concluded that if you never applied the antitrust laws to persons or actions located outside your territory, the result will be that the values of others, alien to our own values, will be forced upon us *in our* territory."). *See also* L. IDOT, Note *Wood Pulp*, *Rev. trim. dr. europ.* 345, 356 (1989) (stating that "il est admis que [in a situation of export cartels], les agissements litigieux présentent davantage de points de contact avec l'Etat importateur qu'avec l'Etat exportateur"); B. GOLDMAN, "Les champs d'application territoriale des lois sur la concurrence", 128 *R.C.A.D.I.* 631, 702 (1969-III) (stating that if a State bases its jurisdictional claim on the territorial effect of a foreign anticompetitive agreement, it defends its own social and economic order « selon les conceptions qu'il choisit dans l'exercice de sa souveraineté. »).

[956] *See* P.J. KUYPER, "European Community Law and Extraterritoriality: Some Trends and New Developments", 33 *I.C.L.Q.* 1013, 1015 (1984) (stating that the doctrine of abuse of rights "would also set a limit to a State letting its territory be used freely as a hatching-ground for cartels or similar activities directed at the Community where they are unlawful").

[957] Several authors have indeed argued that extraterritorial jurisdiction is warranted in competition law on the basis of its economic particularities as well as its aims. *See* J.-M. BISCHOFF & R. KOVAR, "L'application du droit communautaire de la concurrence aux entreprises établies à l'extérieur de la Communauté", 102 *J.D.I.* 675, 703 (1975) (« La conjonction des deux éléments qui viennent d'être examinés – le marché et l'ordre public économique – constitue la nature du droit de la concurrence. Ils permettent de justifier l'application de la loi du marché sur lequel sont localisés les effets anticoncurrentiels, en tant que la plus conforme à la nature des faits en cause. ») ; P. TORREMANS, "Extraterritorial Application of E.C. and U.S. Competition Law", 21 *E.L.Rev.*, 280, 286 (1996); M. AKEHURST, "Jurisdiction in International Law", 46 *B.Y.I.L.* 145, 192 (1972-73); P. DEMARET, "L'extraterritorialité des lois et les relations transatlantiques: une question de droit ou de diplomatie?", 21 *R.T.D.E.* 1, 4-5 (1985). *See also* with respect to the German "(Aus)wirkungsprinzip": K.M. MEESSEN, "Zusammenschlusskontrolle in auslandsbezogenen Sachverhalten", *ZHR* 143, 273, 276 (1979)("[…] denn mit dem Instrument des Kartellrechts soll eine bestimmte inländische Wettbewerbsordnung gegen Störungen, ganz gleich woher sie drohen un von wem sie ausgehen, errichtet und verteidigt werden.").

[958] *See for* a compelling defense of effects-based jurisdiction by a U.S. court: *Laker Airways, Ltd.* v. *Sabena*, 731 F.2d 909, 923 (D.C. Circuit 1984) (footnotes omitted):

"Even if invisible, the radiating consequences of anti-competitive activities cause economic injuries no less tangible than the harmful effects of assassins' bullets or thieves' telephonic impulses. Thus, legislation to protect domestic economic interests can legitimately reach conduct occurring outside the legislating territory intended to damage the protected interests within the territory. As long as the territorial effects are not so inconsequential as to exceed the bounds of reasonableness imposed by international law, prescriptive jurisdiction is legitimately exercised.

The territorial effects doctrine is *not* an *extraterritorial* assertion of jurisdiction. Jurisdiction exists only when significant effects were intended within the prescribing territory. Prescriptive jurisdiction is activated only when there is personal jurisdiction, often referred to as "jurisdiction to adjudicate." A foreign corporation doing business within the United States reasonably expects that its United States operations will be regulated by United States law. The only extraterritoriality about the transactions reached under the territorial effects doctrine is that not all of the causative factors producing the proscribed result may have occurred within the territory. Although some of the business decisions affecting United States operations may be made outside the forum state, the entire transaction is not ordinarily immunized.

308. This also holds true in the more real-life case of an *international* cartel with participants from different countries and producing effects in these very countries. In this situation, and reasoning on the basis of territoriality, States will still tend not to regulate this cartel, even if their own consumers are affected. Although the territoriality principle justifies their clamping down on the cartel participants incorporated in their territory, they will not do so since they will distrust another State's willingness to go along with dismantling the international cartel. Thus, facing a prisoners' dilemma, they will assume that the cartel's adverse effects on their domestic markets will persist (or will only be marginally reduced by their throwing out the domestic cartel participants), while the profits enjoyed by the domestic cartel participants (which translate into higher taxes and employment opportunities) will be reduced. The feared absence of a notable increase in domestic consumer welfare combined with the possibility of reduced producer welfare will cause the State not to intervene and leave the international cartel unharmed. Territoriality thus leads to systematic underregulation.[959]

309. While a purely territorial approach may result in systemic *under*regulation, effects-based jurisdiction may result in systematic *over*regulation, if all States in which effects of a restrictive practice are felt were to start exercising jurisdiction. Also, the State where the effects are felt might be called to exercise jurisdiction because the practice decreases its welfare, although it enhances global welfare (this will ordinarily be the case in the field of merger control, and not for hard-core cartels).[960] The fact that effects-based jurisdiction may not guarantee the ideal level of global antitrust regulation need however not subtract from its legality and appropriateness. As argued in subsection 5.7.1, antitrust regulators and courts, when determining jurisdictional reasonablenes, might factor in the impact of a particular jurisdictional assertion on global welfare before actually exercising their effects-based jurisdiction.

310. PROTECTIVE JURISDICTION – The law and economics approach shows how foreign business restrictive practices may undermine domestic consumer welfare, and why jurisdiction over these practices may be appropriate. It has been argued *supra* that the effects principle as a modality of the objective territorial principle may readily relied upon to the effect of justifying the exercise of jurisdiction over these practices. It may however be submitted that the protective principle also lends itself to application in the field of international antitrust law, especially when the (possible)

Certainly the doctrine of territorial sovereignty is not such an artificial limit on the vindication of legitimate sovereign interests that the injured state confronts the wrong side of a one-way glass, powerless to counteract harmful effects originating outside its boundaries which easily pierce its "sovereign" walls, while its own regulatory efforts are reflected back in its face. Unless one admits that there are certain vital interests that can be affected with impunity by careful selection of the decision-making forum, with the result that a country may be forced to rely entirely on the good offices of a foreign state for vindication of the forum's interests--even when vindication of the forum state's own policies--then availability of territorial effects jurisdiction must be recognized. For these reasons territorial effects jurisdiction has been implemented by several European forums. Indeed, the British have vigorously legislated on this principle in the Protection of Trading Interests Act."

[959] *See* A.T. GUZMAN, "Choice of Law: New Foundations", 90 *Geo. L.J.* 883, 909-912 (2002).

[960] *See* chapter 6.12.1 on merger control. A proposed merger may for instance increase global welfare because of the economies of scale which it produces. Yet it may decrease a particular country's individual welfare because it creates a dominant position on its market (unlike on other States' markets).

effects of foreign-based conspiracies may nearly devastate a national economy.[961] Although the protective principle is traditionally applied to crimes of a political nature such as foreign plots to overthrow the government or counterfeiting the national currency in foreign territory, a substantial and sudden disruption of the national economy as the result of foreign business restrictive practices may translate in a considerable threat to the security of the State, *e.g.*, in the event that destitute citizens take violently to the streets. The effects principle may thus be linked to the protective principle,[962] yet the advantage of relying on the latter rather than on the former principle is that effects need not have materialized for jurisdiction to obtain under the latter. Nonetheless, in spite of the theoretical appeal of the protective principle, price-fixing conspiracies will ordinarily not rise to the level of threats to the security of the State.[963] While they might inflate consumer prices, even considerably, they usually cover a limited range of products.Widespread disruption of a State's economy, let alone political instability, will be unlikely.[964]

311. CONCLUDING – The economic analysis of international antitrust teaches as that some sort of effects-based jurisdiction appears warranted.[965] This may have impelled the International Law Association to embrace the effects doctrine, albeit cautiously, in 1972.[966] Obviously, if any State where effects of anticompetitive practices are felt, is authorized to exercise effects-based jurisdiction, normative competency conflicts appear inevitable. Effects jurisdiction may be overinclusive, and its exercise should be restrained. Restraint may reduce the risk of overregulation by all States adversely affected by a cartel by aligning the concerns of the affected States with the concerns of other States involved, or by considering global economic efficiency as the defining principle of antitrust regulation.[967] Methods of jurisdictional

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[961] *See, e.g.*, B. GOLDMAN, "Les champs d'application territoriale des lois sur la concurrence", 128 *R.C.A.D.I.* 631, 702-703 (1969-III) ; A. ACEVEDO, "The EEC Dyestuffs Case: Territorial Jurisdiction", 36 *Modern L. Rev.* 317, 320 (1973).

[962] *Compare* cmt. f to § 402 Restatement (Third) of the Foreign Relations Law of the United States.

[963] *See also* A.Th.S. LEENEN, "Extraterritorial application of the EEC-competition law", 15 *N.Y.I.L.* 139, 147 (1984).

[964] *See* P.M. ROTH, "Reasonable Extraterritoriality: Correcting the 'Balance of Interests'," 41 *I.C.L.Q.* 245, 284 (1992) (considering the protective principle as an exceptional ground of jurisdiction and consequently refusing to extend it to cover a State's wider economic interests). *See also* G. SCHUSTER, "Extraterritoriality of Securities Laws: An Economic Analysis of Jurisdictional Conflicts", 26 *Law & Pol'y Int'l Bus.* 165, 188 (1994) (arguing that the protective principle may not be invoked for purely economic harm, such as harm caused by securities transactions).

[965] *See also* R.E. FALVEY & P.J. LLOYD, "An Economic Analysis of Extraterritoriality", Centre for Research on Globalisation and Labour Markets, School of Economics, University of Nottingham (UK), Research Paper 99/3, p. 1, available at www.nottingham.ac.uk/economics/leverhulme/research_paper/99_3.pdf.

[966] ILA, *Report of the 55th Conference Held at New York*, 1972, at 138-39 ("A State has jurisdiction to prescribe rules of law governing conduct that occurs outside its territory and causes an effect within its territory if: (a) the conduct and its effect are constituent elements of actcivity to which the rule applies, (b) the effect within the territory is substantial, and (c) it occurs as a direct and primarily intended result of the conduct outside the territory."). *See* for a discussion: K.M. MEESSEN, "Die New Yorker Resolution der International Law Association zu den völkerrechtlichen Grundsätzen des internationalen Kartellrechts", *A.W.D.* 560 (1972). *See also* R.P. ALFORD, "The Extraterritorial Application of Antitrust Laws: The United States and European Community Approaches", 33 *Va. J. Int'l L.* 1, 42 (1992) (noting that "the effects doctrine has increasingly been recognized as a legitimate method to respond to the shrinking nature of international business relations, the level and variety of transnational activities, and the anticompetitive activities that arise therefrom.").

[967] In the event of a cartel exclusively preying on foreign markets, the risk of overregulation by every market affected is high. In the event of an international cartel preying on the participants' own markets,

restraint ensuring a 'reasonable' exercise of antitrust jurisdiction will be discussed in sections 6.6 and 6.7.

6.4. The reach of EC competition law (cartels)

312. FROM OPPOSITION TO ACTION – The 'European approach' to antitrust jurisdiction is often considered to be co-terminous with European opposition against assertions of U.S. effects-based jurisdiction.[968] European reactions to U.S. jurisdictional assertions may be indications of violations of a rule or rules of public international law by the United States.[969] An analysis that would limit itself to analyzing European protest against the reach of U.S. law would however obscure the jurisdictional reality. Indeed, although the United States have pioneered the use of the effects doctrine in antitrust law, the European Community and European States have exercised jurisdiction over foreign restrictive business practices affecting the European market since the late 1960s. The European Court of Justice has nevertheless stopped short of recognizing the effects doctrine in the field of cartel law.[970] Unlike U.S. assertions of antitrust jurisdiction, such EC assertions have not proved particularly controversial internationally.

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the risk of overregulation is lower, as any given market will only exercise its jurisdiction over the entire cartel if the loss in local consumer welfare caused by the cartel's activities outweighs the gains in local producer welfare. As GUZMAN has pointed out, the question of whether extraterritorial application of law is efficient in this case, "is impossible to answer without more information about the details of a particular transaction or industry." *See* A.T. GUZMAN, "Choice of Law: New Foundations", 90 *Geo. L.J.* 883, 912 (2002).

[968] *See also* D.J. GERBER, "The Extraterritorial Application of German Antitrust Laws", 77 *A.J.I.L.* 756 (1983) ("Outside the United States, the extraterritoriality issue has been seen largely in a defensive context – namely, how to respond to excessive jurisdictional claims by the United States"); J.-M. BISCHOFF & R. KOVAR, "L'application du droit communautaire de la concurrence aux entreprises établies à l'extérieur de la Communauté", 102 *J.D.I.* 675 (1975). The U.S. cases which have provoked the fiercest European reaction are probably *United States* v. *General Elec. Co.*, 82 F.Supp. 753 (D.N.J. 1949), 115 F.Supp. 835 (D.N.J. 1953) (1953 court inserting "savings" clause after Dutch protest, at 878: "Philips shall not be in contempt of this judgment for doing anything outside of the United States which is required or for no doing anything outside of the United States which is unlawful under the laws of the government, province, country or state in which Philips or any other subsidiaries may be incorporated, chartered or organized in the territory of which Philips or any such subsidiaries may be doing business."); *United States* v. *Imperial Chem. Indus. Ltd.*, 105 F.Supp. 215 (S.D.N.Y. 1952); *In re* Investigation of World Arrangements with relation to the Production, Transportation, Refining & Distribution of Petroleum, 13 F.R.D. 280 (D.D.C. 1952); *In re Grand Jury Investigation in the Shipping Industry*, 186 F.Supp. 298 (D.D.C. 1960); *United States* v. *Watchmakers of Switzerland Information Center*, 133 F.Supp. 40 (S.D.N.Y. 1955); *In re Ocean Shipping Antitrust Litigation*, 500 F.Supp. 1235 (S.D.N.Y. 1980); *Laker Airways* v. *Sabena*, 731 F.2d 909 (D.C. Cir. 1984) (as identified by K.M. MEESSEN, "Antitrust Jurisdiction Under Customary International Law", 78 *A.J.I.L.* 783, 791-92 (1984)); *Hartford Fire Insurance* v. *California*, 509 U.S. 764 (1993).

[969] *See* K.M. MEESSEN, "Antitrust Jurisdiction Under Customary International Law", 78 *A.J.I.L.* 783, 791 (1984).

[970] Europeans may not have resisted the extraterritorial application of U.S. antitrust laws under the effects doctrine as such, but rather the export of substantive notions of U.S. antitrust laws diverging from European notions. Once European substantive antitrust laws came to mirror American antitrust laws, resistance was bound to fade. *See* A.F. LOWENFELD, "International Litigation and the Quest for Reasonableness", 245 *R.C.A.D.I.* 9, 63 (1994-I) (quoting R. JENNINGS, "Extraterritorial Jurisdiction in the United States Antitrust Laws", 33 *B.Y.I.L.* 146, 175 (1957) ("… even allowing a most liberal view of the limits of *extra*territorial jurisdiction, these cases still offend against the ultimate limit because they are an attempt to export into other countries and to make operate there what are after all peculiarly American political notions.").

313. ARTICLES 81-82 EC TREATY – In the European Community, restrictive business practices are dealt with by the European Commission under Articles 81 and 82 (former Articles 85 and 86) of the Treaty establishing the European Community (1957). The international scope of these provisions is however unclear. Article 81 ECT "[prohibits] as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market". The article does not clarify whether it applies only to anticompetitive agreements entered into the EC producing effects, or also to such agreements entered outside the EC but producing effects within the EC (an interpretation pursuant to which agreements entered into within the EC but producing effects outside the EC does not seem possible as only anticompetitive effects "within the common market" may give rise to jurisdiction).[971] By the same token, the terms of Article 82 of the EC Treaty, pursuant to which "[a]ny abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States," does not prohibit the EC from exercising jurisdiction over abuse of dominant position by foreign undertakings, yet nor does it encourage it. [972] It may however be noted that Section 1 of the Sherman Act is on its face more amenable to the exercise of jurisdiction over foreign undertakings causing domestic anticompetitive effects, since this provision explicitly prohibits agreements "in restraint of trade or commerce *with foreign nations*".[973]

314. EC PRACTICE – Because the need was felt to clamp down on foreign restrictive business practices distorting competition within the Common Market, the Commission has not shied away from applying Article 81 (and to a lesser extent Article 82) to foreign corporations on the basis of the U.S.-style effects doctrine since

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[971] *See also* K.M. MEESSEN, "Der räumliche Anwendungsbereich des EWG-Kartellrechts und das allgemeine Völkerrecht", *Europarecht* 18 (1973) (stating that "weder der EWG-Vertrag noch das sonstige geschriebene Gemeinschaftsrecht eine ausdrückliche Kollisionsnorm [enthält]").

[972] The geographical reach of Article 65 of the Treaty establishing the European Coal and Steel Community (ECSC Treaty), a treaty which is no longer in force as of today, is, like the reach of Article 81 of the EC Treaty, not defined in detail. The provision only prohibits agreements "tending directly or directly to prevent, restrict or distort normal competition *within the common market*", a formulation which seems on its face not to exclude its application to *foreign* agreements restricting competition within the Common Market. The reach of Article 66 of the ECSC Treaty may however be more restricted. This provision requires authorization of any transaction « if it has itself the direct or indirect effect of bringing about within the territories referred to in the first paragraph of Article 79 (*i.e.*, on the territories of the European contracting parties) … a concentration of one undertakings at least one of which is covered by Article 80 ». Article 80 defines these undertakings as the undertakings « engaged in production in the coal or the steel industry » and the undertakings « regularly engaged in distribution other than sale to domestic consumers or small craft industries » Under Article 66, a wholly foreign concentration may thus not be amenable to ECSC jurisdiction. *See* on the doctrinal discussion over the reach of Article 66: B. GOLDMAN, "Les champs d'application territoriale des lois sur la concurrence", 128 *R.C.A.D.I.* 631, 672-76 (1969-III) ; J.-M. BISCHOFF & R. KOVAR, "L'application du droit communautaire de la concurrence aux entreprises établies à l'extérieur de la Communauté", 102 *J.D.I.* 675, 680-81 (1975). It may be noted that concentrations, including the concentrations that were dealt with under Article 82 of the EC Treaty ("abuse of dominant position") in the absence of a more specific concentration regime (*e.g.*, ECJ, *Continental Can v. Commission*, *E.C.R.* 1973, 215) now fall under the European Merger Control Regulation, which allows the exercise of jurisdiction over wholly foreign concentrations. *See* chapter 6.12.4.

[973] Emphasis added.

the late 1960s. The European Court of Justice (ECJ), however, has so far managed to avoid explicitly approving of the effects doctrine. On the basis of the fact patterns of the cases put before it, the Court was always in a position to circumvent the application of the doctrine, and purportedly deal with the cases under an uncontested territorial principle. In *Dyestyffs* (1972), (territorial) jurisdiction was based on a foreign corporation having an EC subsidiary, the anticompetitive conduct of which was then imputed to the foreign parent (economic entity doctrine, subsection 6.4.2). In *Wood Pulp* (1988) then, jurisdiction was based on the territorial implementation (within the Community) of a foreign anticompetitive agreement (implementation doctrine, subsection 6.4.3). In both cases, the Court attached great weight to the territoriality principle under public international law, and tried to bring both the anticompetitive conduct and its effects within the Community, so as to justify its jurisdiction. However, as the Court has substantially stretched territoriality,[974] kinship with the effects doctrine is striking. In fact, reliance on other 'territorial' doctrines is a rearguard action. As shown in section 6.3, effects-based jurisdiction is actually justifiable under the objective territorial principle, because foreign anticompetitive agreements may have far-reaching adverse economic effects within a regulating State's territory. The real jurisdictional challenges concern *qualifying* 'effects' and taking into account foreign sovereign interests. The European doctrines, in spite of their professed territorial underpinnings, may fail to rise to this challenge (subsection 6.4.4).

6.4.1. The Béguelin case

315. As early as 1964, the European Commission held, in one of the very first EC competition cases, that the "territorial scope of the competition laws is determined neither by the domicile of the enterprises nor by … where the agreement is concluded or carried out" ("*le seul fait que l'entreprise concédante est située en dehors du marché commun ne fait pas obstacle à l'application de l'article 85, dès lors que l'accord produit ses effects sur le territoire du marché commun*").[975] The Commission thereupon applied (then) Article 85 ECT to exclusivity agreements in which a party located outside the Community participated. While the Commission thus seemingly endorsed effects-based antitrust jurisdiction, it took until 1971 before the ECJ joined the debate. In the 1971 *Béguelin* case, the ECJ had to deal with a Japanese

[974] *See* R.P. ALFORD, "The Extraterritorial Application of Antitrust Laws. The United States and Euroepan Community Approaches", 33 *Va. J. Int'l L.* 1, 1-2 (1992) (arguing that so doing enabled the EC to regulate the anticompetitive activities of foreign undertakings "without sacrificing fidelity to the fundamental principles of international law, among them the principle of sovereign equality of states."). Probably having EC practice in mind, HIGGINS submitted that "[a] broad interpretation of territoriality overlaps in part with what has been defined by others as *extra*territorial." *See* R. HIGGINS, *Problems and Process: International Law and How We Use It*, Oxford, Clarendon Press, 1994, 76 (original emphasis). *See also* M. INAZUMI, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law*, Antwerp-Oxford, Intersentia, 2005, 31 ("It can be observed that States preferred to utilize territorial jurisdiction instead of justifying it as protective jurisdiction or with any other bases, even if it involved widening the notion of territorial jurisdiction.").

[975] *Grossfillex-Fillistorf*, 1964 *J.O.* (58) 915, 3 *C.M.L.R.* 237 (1964), *J.D.I.* 232 (1965) *See also Mertens & Straet-Bendix*, 1964 *J.O.* (92) 1426, *J.D.I.* 234 (1965). The agreements and concentrations which the High Authority and later the Commission of the European Steel and Coal Community addressed under Articles 65 and 66 of the Treaty Establishing the European Steel and Coal Community always had a national character. *See* B. GOLDMAN, "Les effects juridiques extra-territoriaux de la politique de la concurrence", *Rev. Marché Commun* 612-13 (1972).

manufacturer and his French distributor who had compartmentalized the common market along national lines. In a decision which echoes the U.S. pre-World War II international antitrust cases discussed *supra*, the ECJ held that "[t]he fact that one of the undertakings which are parties to the agreement is situated in a third country does not prevent application of [then Article 85 of the Treaty] since the agreement is operative on the territory of the common market ("*le fait pour l'une des entreprises, participant à un accord, d'être située dans un pays tiers, ne fait pas obstacle à l'application de l'article 85, dès lors que l'accord produit ses effects sur le territoire du marché commun*")."[976] The wording of this consideration may be even taken as an implicit approval of effects-based jurisdiction, as the *territorial* operation of an anticompetitive agreement, irrespective of the place where it has been made, is decisive for jurisdictional purposes. It is however more likely that the quoted consideration is an *obiter dictum*, as one of the parties to the agreement was within the Community, and the agreement could be located there,[977] without a reliance on the effects doctrine being required.

6.4.2. The Dyestuffs case

316. Unlike in *Béguelin*, in the 1972 *Dyestuffs* case, all defendants had their registered offices outside the Community, although they had subsidiaries in the Community. Alleging that the foreign defendants fixed the prices of their products sold in the Community, the European Commission imposed fines on them (not on their subsidiaries).[978] In order to uphold the Commission's prohibition of the restrictive agreement, it was expected that the ECJ would have to rely on the effects doctrine. Advocate General MAYRAS indeed advocated the use of the doctrine in the case. Drawing on *Lotus* and the American Restatement of Foreign Relations Law, he argued that the Commission could rightly exercise jurisdiction over the foreign undertakings, as the effects of their anticompetitive agreement were direct, substantial and reasonably foreseeable.[979] In contrast, the United Kingdom, where ICI, one of the defending companies was incorporated, and which was at the time not yet an EU, vehemently opposed the international legality of the Commission's use of the effects doctrine in *Dyestuffs* in an *Aide-Mémoire* which it had filed with the Commission.[980]

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[976] ECJ, Case 22/71, *Béguelin Import Co. v. GL Import Export*, *E.C.R.* 1971, 949, *C.M.L.R.* 1972, 81.

[977] *See* M. MARTINEK, "Das uneingestandene Auswirkungsprinzip des EuGH zur extraterritorialen Anwendbarkeit der EG-Wettbewerbsregeln", *IPRax* 1989, at 350; M. FRIEND, "The long arm of Community law", 14 *E.L. Rev.* 169 (1989) ("[S]ince one of the parties to the agreement under consideration in that case was established in the Community, *Béguelin* cannot be regarded as a strict application of the "effects" doctrine."); J. DUTHEIL DE LA ROCHÈRE, "Réflexions sur l'application "extra-territoriale" du droit communautaire", in X., *Mélanges M. Virally*. *Le droit international au service de la paix, de la justice et du développement*, Paris, Pedone, 1991, 282, 286 (stating that in *Béguelin* "la référence aux effets apparaissait incidente.")

[978] Decisions of the European Commission of July 24, 1969, *O.J.* L 195 (1969); *Rev. trim. dr. européen* 1969, 892. It may have been simpler for the Commission to impose fines on the EC subsidiaries, yet the Commission probably wanted to convey the view that it deemed the foreign-based parents to be the real conspirators, and the EC subsidiaries only the faithful executioners. *See* E. COLMANT, « 14 juillet 1972, une date pour le droit de la concurrence : neuf arrêts règlent trois grandes questions. Affaire des matières colorantes : suite et fin », *Revue du marché commun* 15, 22 (1973).

[979] ECJ, Case 48/69, *Imperial Chemical Industries Ltd. v. Commission* ('Dyestuffs'), E.C.R. 1972, 619, opinion of Advocate General MAYRAS, at 687-694.

[980] This opinion of October 20, 1969 was allegedly confidential, yet it was reproduced in International Law Association, *Report of the Fifty-fourth Conference*, The Hague, 1970, p. 184 *et seq.*; *British Practice in International Law* 1967, at 58; A.V. LOWE, *Extraterritorial jurisdiction: an annotated collection of legal materials*, Cambridge, Grotius publ., 1983, at 144 ("The Commission will be aware

In its judgment in *Dyestuffs*, the ECJ indeed referred to 'effects', holding that "since a concerted practice is involved, it is first necessary to ascertain whether the conduct of the applicant has had effects within the Common Market. It appears from what has already been said that the increases at issue were put into effect within the Common Market and concerned competition between producers operating within it. Therefore the actions for which the fine at issue has been imposed constitute practices carried on directly within the Community".[981] However, the Court only addressed the requirement of effects as a *liability* requirement, applicable to *all* antitrust proceedings, and not as a requirement of international jurisdiction.

In its jurisdictional considerations, the ECJ did not refer to effects as a jurisdictionally relevant issue, thus rebuking both the Commission and the Advocate General. Instead, the Court observed that "[b]y making use of its power to control its subsidiaries in the Community ("*en se prévalant de son pouvoir de direction sur ses filiales*"), the applicant was able to ensure that its decision was implemented on that market."[982] Answering to the objections of the applicants that the anticompetitive conduct is to be imputed to its subsidiaries and not to itself, the Court pierced the corporate veil and ruled that "[t]he fact that a subsidiary has separate legal personality is not sufficient to exclude the possibility of imputing its conduct to the parent company ("*la circonstance que la filiale a une personnalité juridique distincte ne suffit pas à écarter la possibilité que son comportement soit imputé à la société mere*")."[983] Hereupon, the Court listed some factors which indicate the control of the parent company over its subsidiaries, such as the ability to exercise decisive influence over the policy of the subsidiaries, or the holding of the majority of the shares in the subsidiaries.[984] As the subsidiaries in the *Dyestuffs* case did indeed not enjoy real

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that certain claims to exercise extra-territorial jurisdiction in antitrust proceedings have given rise to serious and continuing disputes between Western European Governments (including the Governments of some EEC member-states) and the United States Government, inasmuch as these claims have been based on grounds which the Western European Governments consider to be unsupported by public international law … The territorial principle justifies proceedings against foreigners and foreign companies only in respect of conduct which consists in whole or in part of some activity by them in the territory of the state claiming jurisdiction. A State should not exercise jurisdiction against a foreigner who, or in a foreign company which, has committed no act within its territory. In the case of conspiracies the assumption of jurisdiction is justified: (a) if the entire conspiracy takes place within the territory of the State claiming jurisdiction; (b) if the formation of the conspiracy takes place within the territory of the State claiming jurisdiction even if things are done in pursuance of it outside the territory; (c) if the formation of the conspiracy takes place outside the territory of the State claiming jurisdiction, but the person against whom the proceedings are brought has done things within its territory in pursuance of the conspiracy.").

[981] ECJ, *Dyestuffs*, §§ 126-128.

[982] ECJ, *Dyestuffs*, § 130.

[983] ECJ, *Dyestuffs*, §§ 131-132. This economic entity doctrine was also relied upon in the *Béguelin* case, discussed in chapter 6.4.1. In *Béguelin*, where the fact pattern was entirely different from *Dyestuffs*, the ECJ held that "lorsque la filiale ne jouit pas d'une autonomie réelle dans la determination de sa ligne d'action sur le marché, les interdictions édictées par l'article 85 § 1 peuvent être considérées comme inapplicables dans les rapports entre elle et la société mère, avec laquelle elle forme une unité économique." ECJ, Case 22/71, *Béguelin Import Co. v. GL Import Export*, *E.C.R.* 1971, 949.

[984] According to WHISH, to determine the parent control over the subsidiary, the size of the shareholding, the representation on the board of directors, the ability to influence the latter's affairs and actual evidence of attempts to do so will all be relevant. *See* R. WHISH, *Competition Law*, London, Butterworths, 4th ed., 2001, at 399.

autonomy, but were as mere extensions dependent on their parents-plaintiffs, the Court dismissed the objection of the parent companies.

317. By stating that in reality parent and subsidiary formed one economic entity, and having an economic law approach of "undertakings" prevail over a private law approach,[985] the Court took a seemingly uncontested corporate law approach to the question of jurisdiction,[986] and was able to avoid the application of the effects doctrine, which was far more controversial under international law. [987] If the conduct of subsidiaries incorporated within the Community could be imputed to their foreign parents, the anticompetitive conduct could be brought entirely within the territory of the Community. Because this obviated the need to exercise effects-based jurisdiction,[988] the decision would arguably respect the principle of non-intervention.[989] The Court's decision was generally supported in the doctrine,

[985] *See* M.-P. PIRIOU, "L'affaire des colorants: observations", *Cahiers de droit européen* 50, 63 (1973) ("La reconnaissance de la réalité essentiellement économique se justifie d'autant plus que le droit de la CEE est avant tout un droit économique, pour l'interprétation duquel on ne doit pas systématiquement transposer les concepts du droit privé des Etats membres," adding that this solution was "plus élégante, moins artificielle que celle de la Commission"). *See however* J.-M. BISCHOFF & R. KOVAR, "L'application du droit communautaire de la concurrence aux entreprises établies à l'extérieur de la Communauté", 102 *J.D.I.* 675, 711 (1975) (« Il eût sans doute été à la fois plus simple et moins « aventuré » que la cour suivît dans ces affaires les conclusions de ses avocats généraux et consacrât franchement la théorie de l'effet. »).

[986] *See* B. GOLDMAN, comment *Dyestuffs*, *J.D.I.* 925, 930 (1973); U. DRAETTA, "The International Jurisdiction of the E.U. Commission in the Merger Control Area", *R.D.A.I.* 201, 205 (2000) (stating that in the *Dyestuffs*, "the issue connected was the piercing of the subsidiaries' corporate veil, rather than the extent of the international jurisdiction of the Commission").

[987] This need obviously not imply that the Court *rejected* the effects doctrine. *See, e.g.*, M.-P. PIRIOU, "L'affaire des colorants: observations", *Cahiers de droit européen* 50, 60 (1973); J. ULLMER BAILLY, Comment on *Dyestuffs*, 14 *Harv. Int'l L.J.* 621, 630 (1973); A. ACEVEDO, "The EEC Dyestuffs Case: Territorial Jurisdiction", 36 *Modern L. Rev.* 320 (1973).

[988] *See also* J. DUTHEIL DE LA ROCHÈRE, "Réflexions sur l'application "extra-territoriale" du droit communautaire", in X., *Mélanges M. Virally*. *Le droit international au service de la paix, de la justice et du développement*, Paris, Pedone, 1991, 282, 286 ("Localiser un comportement est dans bien des cas plus commode ou plus facile à faire accepter que de localiser ses effects."). F.A. MANN, "The *Dyestuffs* Case in the Court of Justice of the European Communities", 22 *I.C.L.Q.* 35, 112 (1973) has observed in this context that "the Court succeeded in avoiding the decision of a great problem of international law argued before it, refrained from any pronouncement upon them or upon any question of international law, and travelled its own independent and unexpected road." A court need however not explore the merits of alternative arguments (the effects doctrine) if a case could be decided on the basis of one argument (the economic entity doctrine). *See* B. GOLDMAN, comment *Dyestuffs*, *J.D.I.* 924, 930 (1973) ("On peut … regretter [the fact that the Court did not discuss the merits of the effects doctrine], car son apport à la *disputatio* eût été fort précieux; mais il faut admettre aussi que l'économie de moyens est de bonne méthode, qui conduit le juge, lorsqu'il estime avoir trouvé sur l'un des terrains où la discussion est placée, des motifs suffisants pour decider de ne pas explorer les autres."); J.-M. BISCHOFF & R. KOVAR, "L'application du droit communautaire de la concurrence aux entreprises établies à l'extérieur de la Communauté", 102 *J.D.I.* 675, 684 (1975) (« La Cour préfère, et l'on ne saurait l'en blâmer, asseoir la compétence de la C.E.E. sur le fondement le plus solide possible. »).

[989] *See, e.g.*, M.-P. PIRIOU, "L'affaire des colorants: observations", *Cahiers de droit européen* 50, 60 (1973) ("[I]l résulte de l'arrêt que le Commission peut infliger des amendes à des entreprises relevant d'Etats tiers sans faire un usage abusif de sa competence extraterritoriale, sans mettre en cause la souveraineté de ces Etats."). This observation is surely questionable, as it is not because a foreign corporation has an EC subsidiary, that the State where the parent corporation is incorporated does not have a legitimate sovereign interest in non-regulation. *See* E. STEINDORFF, "Annotation on the Decision of the European Court in the *Dyestuff* Cases of July 14, 1972", *C.M.L.R.* 502, 504 (1972) ("As far as the political impact of this decision is concerned, we only want to raise the question whether it is wise for an authority, which is not only an antitrust division but a Commission with members, responsible

although it was criticized on the ground that the Court failed to conclusively establish that the foreign parents indeed exercised control over their subsidiaries within the Community.[990] Only a minority took issue with the economic entity doctrine as such.[991] However, because jurisdiction obtains under the economic entity doctrine as soon as a foreign parent corporation has directed an EC subsidiary to carry out business restrictive practices, irrespective of the nature of the effects within the Community, it could be argued that the qualified effects doctrine, under which jurisdiction only obtains provided that *direct, substantial, and reasonably foreseeable* effects within the Community could be established, is more likely to ensure jurisdictional restraint, and thus to prevent international tension (which is, however, not to say that, in the case, the adverse effects in the Community of the *Dyestuffs* cartel did not meet the requirements of the qualified effects doctrine).[992]

318. The ECJ restated the economic entity doctrine in a number of cases in the wake of *Dyestuffs*[993]. In *Commercial Solvents* (1974) for instance, it held eloquently that importing the strict notions of corporate personality into competition law would serve only to divorce the law from reality.[994] It may be noted that the non-application of effects-based jurisdiction by the ECJ in *Dyestuffs* did not disserve

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for foreign relations, to demonstrate to non-member countries and their enterprises how little regard is paid to their specific interests in the field of jurisdiction and, thereby, sovereignty. … [T]he Commission's decision, displaying what I am tempted to call a provincial attitude, pays regard to its own rules only, without considering the implications that international law may have.").

[990] *See* R.A.A. DUK & A. MULDER, Comment *Dyestuffs*, *S.E.W.* 689, 694 (1972) ("Het [Hof] moest immers vaststellen, dat I.C.I. het in haar macht heft het handelen van de dochtermaatschappijen te bepalen. Die kwestie was in het geding niet duidelijk uitgezocht."); R.P. ALFORD, "The Extraterritorial Application of Antitrust Laws: The United States and European Community Approaches", 33 *Va. J. Int'l L.* 1 (1992) (arguing that "the decision fails to respect the independent legal personalities of the companies concerned and finds parental control over subsidiaries on remarkably little evidence"); J. ULLMER BAILLY, Comment on *Dyestuffs*, 14 *Harv. Int'l L.J.* 621, 628 (1973) (pointing out that "the long-term relationship of I.C.I. and its subsidiary should have been indicated more fully"); K.M. MEESSEN, "Der räumliche Anwendungsbereich des EWG-Kartellrechts und das allgemeine Völkerrecht", *Europarecht* 18, 37-38 (1973) ("Es wäre daher möglich und wohl besser gewesen, nicht auf die gesellschaftsrechtliche Verbindung, sondern auf die konkreten von den Muttergesellschaften erteilten Weisungen, die Preise zu erhöhen, abzustellen."); D.M. JACOBS, "Extraterritorial Application of Competition Laws: an English View", 13 *Int. Law.* 645, 649 (1979) ("Where, however, the parent company does not use its foreign subsidiary as its agent to carry on business on its behalf, it is important that corporate distinctions should be respected.").

[991] *See* E. STEINDORFF, "Annotation on the Decision of the European Court in the *Dyestuff* Cases of July 14, 1972", *C.M.L.R.* 502, 507 (1972) (opining that "it is improper to simply hold that the agent's (= subsidiary's) behaviour should be imputed to the parent company because the agent does not enjoy real autonomy and because it acted under an order of the parent company in the concrete case"); F.A. MANN, "The Dyestuffs Case in the Court of Justice of the European Communities", 22 *I.C.L.Q.* 35, 49 (1973) (fearing "the disappearance of the group of companies as an institution such as it has developed over the years").

[992] *Compare* J. FRISINGER, "Die Anwendung des EWG-Wettbewerbsrechts auf Unternehmen mit Sitz in Drittstaaten", *A.W.D.* 553, 557 (1972). *See also* n 989 on the Court's lack of consideration for comity. *Compare* the comparison between the *Wood Pulp* implementation doctrine and the *Alcoa* effects doctrine under chapter 6.4.3 (implementation doctrine arguably broader than qualified effects doctrine).

[993] ECJ, *Continental Can v. Commission*, *E.C.R.* 1973, 215; *Commercial Solvents Corp. v. Commission*, *E.C.R.* 1974, 223; *United Brands v. Commission*, *E.C.R.* 1978, 207. The Commission applied it *inter alia* in *Chiquita*, *O.J.* L 95/1 (1976), *Vitamins*, *O.J.* L 223/27 (1976), *Johnson & Johnson*, *O.J.* L 377/16 (1980).

[994] ECJ, *Commercial Solvents*, *E.C.R.* 1974, at 263-264.

European opposition against U.S. assertions of antitrust jurisdiction in the 1970s and 1980s.

6.4.3. The *Wood Pulp* case

319. After *Dyestuffs*, it was only a matter of time before a case come before the ECJ in which jurisdiction over an anticompetitive agreement between foreign undertakings that had no subsidiaries or branches in the Community was at issue. This case was *Wood Pulp*,[995] which may be considered to be the most important decision on the reach of EC competition law.[996] Even more than in *Dyestuffs*, it was expected that the ECJ could no longer circumvent the effects doctrine if it were to uphold jurisdiction. Again however, it resorted to another doctrine, the 'implementation doctrine'.

In *Wood Pulp*, 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. They were either exporting directly to purchasers within the Community or were doing business within the Community through branches, subsidiaries, agencies or other establishments in the Community.

The Commission stated that two-thirds of total shipments and 60% of consumption of wood pulp in the Community had been affected by the concertation. In its 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. The Commission established its jurisdiction over the foreign companies on the basis of the effects doctrine, finding direct, substantial and reasonably foreseeable effects of the cartel agreement on sales to customers in the Common Market.[997]

The wood pulp conspirators filed an action with the ECJ challenging the Commission's jurisdiction in applying Article 85 [now Article 81] ECT extraterritorially. They argued that, as they had no offices or subsidiaries within the EC, did not produce wood pulp within the EC, nor entered into concerted agreements within the EC, there was no adequate territorial nexus of the case with the EC. They added that any exercise of jurisdiction would fly in the face of international law, the

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[995] Joined Cases 89, 104, 114, 116, 117 & 125 to 129/85, *A. Ahlstrom Osakeyhtio v. Commission*, [1988] *E.C.R.* 5193 (hereinafter '*Wood Pulp*').

[996] *See* R.P. ALFORD, "The Extraterritorial Application of Antitrust Laws: The United States and European Community Approaches", 33 *Va. J. Int'l L.* 1, 31 (1992).

[997] *Wood Pulp*, *O.J.* L 85/1 (1985), point 79 ("In this case all the addressees of this Decision were during the period of the infringement exporting directly to or doing business within the Community. Some of them have branches, subsidiaries, agents or other establishments within the Community. The concertation on prices, the exchange of sensitive information relative to prices, and the clauses prohibiting export or resale all concerned shipments made directly to buyers in the EEC or sales made in the EEC to buyers there … The effect of the agreements and practices on prices announced and/or charged to customers and on resale of pulp within the EEC was therefore not only substantial but intended and was the primary and direct result of the agreements and practices.").

principle of non-intervention in particular, as their agreement had only economic repercussions in the common market.[998]

320. The ECJ rejected the applicants' arguments and ruled that the Commission' s decision was not contrary to Article 85 of the Treaty or to the rules of public international law. Yet is also rejected the argument of Advocate General DARMON, who, like Advocate General MAYRAS in *Dyestuffs*, espoused a qualified effects doctrine to support jurisdiction in *Wood Pulp*.[999] Again, the ECJ refused to adopt the effects doctrine. Instead, in order to support jurisdiction, it developed a so-called implementation doctrine, as territorial implementation rather than territorial effects would provide the appropriate territorial nexus with the Community for there to be legitimate jurisdiction.[1000]

The Court noted, as indeed the Commission and the Advocate General also had done, that "[w]here wood pulp producers established in those countries sell directly to purchasers established in the Community and engage in price competition in order to win orders from those customers, that constitutes competition within the common market."[1001] Accordingly, "where those producers concert on the prices to be charged to their customers in the Community and put that concertation into effect by selling at prices which are actually coordinated, they are taking part in concertation which has the object and effect of restricting competition within the common market within the meaning of Article 85 of the Treaty."[1002] Selling at fixed prices would restrict

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[998] *Wood Pulp*, Report for the Hearing, [1988] *E.C.R.* 5203-05.

[999] Opinion of Mr. Advocate General Darmon, [1988] *E.C.R.* 5214.

[1000] The ECJ might have been influenced by a brief of the United Kingdom, appearing as an intervenor. The United Kingdom had always resisted extraterritorial jurisdiction based on effects (*B.Y.I.L.* 507 (1988) ("The United Kingdom points out that the 'effects doctrine', which may be defined as a doctrine allowing a State to claim jurisdiction over conduct occurring outside its territory but causing direct, foreseeable and substantial effects within its territory if those effects are a constituent element of the infringement, is the subject of controversy under international law and has never been accepted as such by the international community"). It urged the ECJ to find a clear territorial nexus (*Id.*) ("The United Kingdom submits that [the holding in *Dyestuffs*] may be extended to cases in which an undertaking established outside the Community employs an agent within the Community. Hence any acts which the agent carries out in accordance with the directions of the undertaking he represents may properly be regarded as acts of that undertaking. That is merely an illustration of the *territoriality principle* … Those agents, who carried on various activities within the Community, have been the essential means by which the agreements and concerted practices prohibitied under Article 85 of the Treaty have been *implemented* within the Community.") (emphasis added). *See* for United Kingdom law and the effects doctrine: M.D. JACOBS, "Extraterritorial Application of Competition Laws: an English View", 13 *Int. Law.* 645 (1979); M. JEFFREY, "The Implications of the Wood Pulp Case for the European Communities", *Leiden J. Int'l L.* 75, 90-94 (1991). British resistance against the effects doctrine is linked to its conflict with the U.S. over shipping cartels. In Britain, cartels of shipowners ('international shipping conferences') were condoned for reasons of rationalization and stabilization of services, and were therefore exempted from the application of competition laws. The U.S., by contrast, only granted such cartels limited antitrust immunity. After *Alcoa*, U.S. maritime regulations also applied if foreign, *in casu* British, cartels caused effects in the United States. *See* A.V. LOWE, "Blocking Extraterritorial Jurisdiction: the British Protection of Trading Interests Act, 1980", 75 *A.J.I.L.* 257, 258-59 (1981).

[1001] ECJ, *Wood Pulp*, § 12.

[1002] ECJ, *Wood Pulp*, § 13. An historical interpretation may counsel against applying Article 85 to foreign undertakings, but the wording and purpose of the article would allow it. *See* M. AKEHURST, "Jurisdiction in International Law", 46 *B.Y.I.L.* 145, 197 (1972-73); M. MARTINEK, "Das uneingestandene Auswirkungsprinzip des EuGH zur extraterritorialen Anwendbarkeit der EG-Wettbewerbsregeln", *IPRax* 1989, at 349. By requiring the concertation to have as "object" *and* "effect" the restriction of competition, the Court refused to exercise jurisdiction over foreign unexecuted agreements. Domestic price-fixing agreements, however, would remain prohibited even if they are not

competition within the common market and entail the applicability of Article 85 ECT, even if the conspiring undertakings have registered offices outside the Community.[1003]

321. However, the conceptual basis on which the ECJ premised jurisdiction over the concertation differed markedly from the conceptual basis which the Commission and the Advocate General relied upon. The Court observed "that an infringement of Article 85 [ECT], such as the conclusion of an agreement which has had the effect of restricting competition within the common market, consists of conduct made up of two elements, the *formation* of the agreement, decision or concerted practice and the *implementation* thereof. If the applicability of prohibitions laid down under competition law were made to depend on the place where the agreement, decision or concerted practice was formed, the result would obviously be to give undertakings an easy means of evading those prohibitions. The decisive factor is therefore the place where it is *implemented*."[1004] The Court thus distinguished between the *extraterritorial* formation of the pricing agreement, and the *territorial* implementation thereof. The Court did not clarify the term 'implementation', which is not based on previous case law or legal doctrine,[1005] but it is clear that it refers to the sales through which the conspirators put their concertation into effect.[1006] As, for jurisdictional purposes, it suffices that the undertakings make sales into 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."[1007] Importantly, from the viewpoint of international law, the Court held that, since the implementation was

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carried out. *See* D.G.F. LANGE & J.B. SANDAGE, "The *Wood Pulp* Decision and Its Implications for the Scope of EC Competition Law", *C.M.L.R.* 1989, at 162-163.

[1003] ECJ, *Wood Pulp*, § 14. Consequently, any adverse effect on competition in the Community, caused territorially or extraterritorially, may provoke Community jurisdiction. *See also:* J. SCHWARZE, "Die extraterritoriale Anwendbarkeit des EG-Wettbewebsrechts – Vom Durchführungsprinzip zum Prinzip der qualifizierten Auswirkung", in: J. SCHWARZE (ed.), *Europäisches Wettbewerbsrecht im Zeichen der Globalisierung*, Baden-Baden, Nomos, 2002, at 38.

[1004] ECJ, *Wood Pulp*, § 16 (emphasis added).

[1005] *See* M. MARTINEK, "Das uneingestandene Auswirkungsprinzip des EuGH zur extraterritorialen Anwendbarkeit der EG-Wettbewerbsregeln", *IPRax* 1989, at 347.

[1006] The ECJ only dealt with implementation through direct sales. It is not clear whether it envisages implementation including more remote consequences. Probably the Court decided no more than it had to. *See* M. JEFFREY, "The Implications of the Woodpulp Case for the European Communities", 4 *Leiden J. Int'l L.* 75, 104-105 (1991). This leaves us to identify implementation with direct sales for the time being. Such interpretation was confirmed by the Court of First Instance in the *Gencor* merger case (1999). *See* subsection 6.12.3.

[1007] ECJ, *Wood Pulp*, § 17. This consideration was severely criticized by former Advocate General VAN GERVEN. VAN GERVEN agreed that implementation may be the proper criterion, if the foreign undertaking has made use of its own market organisation in the regulating state, set up at its own expense, thereby assuming a normal business risk in order to compete on that market. Such extension of the *Dyestuffs* economic entity approach, providing a sufficiently close territorial link between the conduct and the regulating state, would be lawful under public international law. VAN GERVEN however argued that selling directly to purchasers within the Community, without making use of a permanent market organisation, could not be a basis for jurisdiction, as such conduct cannot be attributed to the foreign undertaking as "parent" company and, accordingly, can not constitute a sufficiently close link with the regulating state. *See* W. VAN GERVEN, "EC Jurisdiction in Antitrust Matters: the *Wood Pulp* Judgment", in: B. HAWK (ed.), *International Antitrust Law & Policy*, Annual Proceedings of the Fordham Corporate Law Institute, 1989, at 469-471.

territorial, the anticompetitive conduct "is covered by the territoriality principle as universally recognised in public international law."[1008]

322. On the basis of the implementation requirement, the Court upheld jurisdiction over the wood pulp producers, but rejected jurisdiction over KEA, an American trade association issuing price recommendations. Where the Commission and the Advocate General had claimed effects jurisdiction over KEA, whose conduct had in their view effects as direct, substantial and reasonably foreseeable as the conduct of the individual undertakings, the Court held that "KEA's price recommendations cannot be distinguished from the pricing agreements concluded by undertakings which are members of the Pulp Group and that KEA has not played a separate role in the implementation of those agreements."[1009] As KEA was not involved in the direct sales of wood pulp to EC consumers, its conduct was not implemented in the EC. The Court's refusal to exercise jurisdiction over KEA may however not imply that the Court rejected the effects doctrine.[1010] The Court only stated that KEA's role in the conspiracy was not sufficiently important; KEA only recommended, but the wood pulp producers concerted.[1011]

323. *Wood Pulp* soon became a mainstay of European competition law. A year after *Wood Pulp*, the Commission adopted the ECJ's implementation doctrine in the *PVC* case, concluding that "[i]n so far as the agreements were implemented inside the Community, the applicability of Article 85 (1) of the EEC Treaty to a Norwegian producer [Norway not being a member of the EEC] is not precluded by the free trade agreement between the European Economic Community and Norway."[1012] Defendants in cartel cases have never cast doubt on the validity of the doctrine ever since.

6.4.4. Effects versus implementation

[1008] ECJ, *Wood Pulp*, § 18.

[1009] ECJ, *Wood Pulp*, § 27. In rejecting jurisdiction over KEA, the ECJ may have been influenced by the position of the United Kingdom. *See B.Y.I.L.* 507 (1988).

[1010] *See* T. CHRISTOFOROU & D.B. ROCKWELL, "Recent Developments: European Economic Community Law: the Territorial Scope of Application of EEC Antitrust Law", 30 *Harv. Int'l L. J.* 195, 203 (1989).

[1011] In an interview (August 24, 2006), Luc Gyselen, Arnold & Porter LLP, Brussels, formerly *référendaire* in the cabinet of Judge Joliet of the European Court of Justice, who was judge-rapporteur in the *Wood Pulp* case, told me that KEA indeed presented difficulties for Judge Joliet, who did not want to uphold the effects doctrine nor to reject it in *Wood Pulp*. Gyselen, instructed to "find something", thereupon conjured up the argument that "KEA's price recommendations cannot be distinguished from the pricing agreements". During the deliberations, another judge however managed to convince the Court to add the sentence "and that KEA has not played a separate role in the implementation of those agreements", which, Gyselen argued, could be construed as an implicit rejection of the effects doctrine.

[1012] Decision 89/190, *PVC*, *O.J.* L 74/ 1 (1989). *See also* Decision 89/191, *LdPE*, *O.J* L 74/21 (1989). ALFORD has however argued that the latter case, while paying lip-service to the *Wood Pulp* implementation doctrine, is actually premised on the effects doctrine. He has pointed out that the defendant Repsol, a Spanish company, was targeted over anticompetitive conduct implemented entirely in Spain before Spain acceded to the EC – although Repsol's conduct may have caused effects within the EC. Only the effects doctrine, and not the implementation doctrine, could then provide a legal basis for EC jurisdiction over Repsol. *See* R.P. ALFORD, "The Extraterritorial Application of Antitrust Laws: The United States and European Community Approaches", 33 *Va. J. Int'l L.* 1, 34-35 (1992).

324. BROADER REACH OF THE IMPLEMENTATION DOCTRINE? – Because of its qualifications by U.S. courts and regulators, the effects doctrine has the advantage of limiting jurisdictional excesses. As will be discussed in section 6.6, the doctrine only authorizes jurisdiction provided that foreign conduct has direct, substantial and foreseeable domestic effects. Courts may also apply an additional reasonableness analysis. In contrast, the implementation doctrine has *prima facie* potentially more far-reaching repercussions. Although the facts in *Wood Pulp* could certainly have been governed by the effects doctrine, as has been demonstrated by the Commission and Advocate General Darmon, the ECJ opted for an apparently *unqualified* implementation doctrine.[1013] The implementation doctrine as such would guarantee respect for the principles of non-intervention and comity,[1014] without a consideration of limitations on the exercise of jurisdiction such as direct, substantial and foreseeable effects being required.[1015] The mere fact of sales to customers in the Community, sales constituting the implementation, would suffice for there to be jurisdiction. It remains to be seen however whether this would indeed suffice to prevent normative competency conflicts.

325. BROADER REACH OF THE EFFECTS DOCTRINE – A closer look reveals that it is unlikely that the ECJ intended to adopt a jurisdictional standard that was even more liberal than the U.S. effects standard, by requiring territorial implementation of the anticompetitive agreement, and not merely territorial effects.[1016] The ECJ was arguably cautious to apply the effects doctrine because that doctrine, unlike the implementation doctrine, may not be acceptable under international law.[1017] Surely, one might want to read the Court's decision together

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[1013] *See, e.g.*, J.E. FERRY, "Towards Completing the Charm: The Woodpulp Judgment", *E.I.P.L.R.* 19, 22 (1989) (arguing that "the Judgment may, without saying so, follow in part Advocate-General Darmon and adopt a version of the broader definition of territoriality, but without dealing expressly with the conditions and safeguards").

[1014] However, as argued *supra*, the effects doctrine could as well be justified under international law, namely under the objective territoriality principle. *See also* M. MARTINEK, "Das uneingestandene Auswirkungsprinzip des EuGH zur extraterritorialen Anwendbarkeit der EG-Wettbewerbsregeln", *IPRax* 1989, at 353.

[1015] *See* F.A. MANN, "The Public International Law of Restrictive Practices in the European Court of Justice", 38 *I.C.L.Q.* 375, 376 (1989): "It would appear that so wide a principle has not previously been put forward by anybody." MANN rejected the ECJ's reasoning in Wood Pulp, as it omitted any such qualification nor invoked any authority for what were in his view mere assertions. *See also* W. VAN GERVEN, "EC Jurisdiction in Antitrust Matters: the *Wood Pulp* Judgment", in: B. HAWK (ed.), *International Antitrust Law & Policy*, Annual Proceedings of the Fordham Corporate Law Institute, 1989, at 475 ("[T]he criterion of (the place of) the constituent effects is, if limited to the preservation of the competitive structure of the market […], a more convincing criterion for delineating international jurisdiction as between different States and is thus better able to limit the number of situations of concurring jurisdiction than the criterion of (the place of) implementation of the agreement."); J. DUTHEIL DE LA ROCHÈRE, "Réflexions sur l'application "extra-territoriale" du droit communautaire", in X., *Mélanges M. Virally. Le droit international au service de la paix, de la justice et du développement*, Paris, Pedone, 1991, 282, 292 ("Mais le concept de mise en oeuvre doit être precise par le recours à des critères définis; invoquer la vente sur le territoire pour se référer ensuite au principe de territorialité semble très insuffisant. Les critères avancés par l'avocat général Darmon paraissent infiniment plus rigoureux : ils expriment un rattachement effectif qui autorise l'application du principe de territorialité. »).

[1016] *See, e.g.*, I. VAN BAEL & J.-F. BELLIS, *Competition Law of the European Community*, 4th ed., The Hague, Kluwer Law International, 2005, 158.

[1017] ECJ, Wood Pulp, § 18 arguably *a contrario* ("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.").

with the opinion of Advocate General Darmon, which features the restraining factors of direct, substantial, and reasonably foreseeable, effects. It might be argued that the Court only replaced 'effects' with 'implementation'.[1018]

326. In what sense could the European implementation doctrine be stricter than the U.S. effects doctrine which European States, especially the United Kingdom, had previously taken issue with? Conceptually, the implementation doctrine requires both territorial *conduct* and *effects*, whereas the effects doctrine only requires territorial *effects*. In public international law terms, the implementation doctrine combines both the subjective and objective territoriality principle by bringing all jurisdictionally relevant aspects of the anticompetitive practice within the territory. The effects doctrine by contrast is a modality of the objective territoriality principle; it makes no effort to bring the foreign anticompetitive agreement constructively within the territory.[1019] From a practical point of view, the effects doctrine includes the implementation doctrine, as the ECJ in *Wood Pulp* equated selling with implementation of the anticompetitive agreement, and sales in the territory precisely establish the effects such as price increases or quota for the sold products.[1020] However, the doctrines may not be interchangeable: while the effects doctrine includes the implementation doctrine, the implementation doctrine does not include the effects doctrine.[1021] Indeed, some conspiring companies may not conduct direct

[1018] *See also* ECJ, *Wood Pulp*, at 5243, § 14 ("[I]t must be concluded that by applying the competition rules in the Treaty in the circumstances of this case to undertakings whose registered offices are situated outside the Community, the Commission has not made an incorrect assessment of the territorial scope of Article [81]"). *Compare* D.G.F. LANGE & J.B. SANDAGE, "The *Wood Pulp* Decision and Its Implications for the Scope of EC Competition Law", *C.M.L.R.* 137, 158 (1989) ("Clearly, *Wood Pulp* does not sanction the type of unmoderated effects test articulated by *Alcoa*.").

[1019] The state in which the anticompetitive agreement is concluded, is the state of initiation, whilst the state in which the effects of the agreement are felt, is the state of consummation. The ECJ attempts to equate the state of consummation with the state of initiation by attaching the anticompetitive conduct – the implementation – to EC territory. Direct sales would constitute the implementation and at the same the effects. For the ECJ, both conduct and effect are artificially located in the Community. Of course, the formation of the agreement remains abroad, so that the whole construction can never be entirely territorial.

[1020] *Compare* R.P. ALFORD, "The Extraterritorial Application of Antitrust Laws: The United States and European Community Approaches", 33 *Va. J. Int'l L.* 1, 39-40 (1992) (noting that "even under the facts of *Alcoa*, the case which most dismayed Continental sceptics [because it upheld the effects doctrine], the implementation approach would permit the assertion of jurisdiction over the foreign defendants.").

[1021] *See, e.g.*, J. KAFFANKE, "Nationales Wirtschaftsrecht und internationaler Sachverhalt", 27 *Archiv des Völkerrechts* 129, 133 (1989) ("Es ist ganz deutlich daraufhinzuweisen, dass das Wirkungsprinzip nicht ein tragender Grund der Entscheidung ist …"). Quite some authors have however argued that the implemention doctrine is just another word for the effects doctrine. *See, e.g.*, B. BECK, "Extraterritoriale Anwendung des EG-Kartellrechts. Rechtsvergleichende Anmerkungen zum "Zellstoff"-Urteil des Europäischen Gerichtshofs", *RIW* 1990, 91, at 92; M. MARTINEK, "Das uneingestandene Auswirkungsprinzip des EuGH zur extraterritorialen Anwendbarkeit der EG-Wettbewerbsregeln", *IPRax* 1989, at 348 (stating that "das "Kind" wird nur nicht beim (üblichen) Namen genannt."). *Id.*, at 351 ("Der EuGH "konstruiert" einen begrifflichen-verbalen Unterschied zwischen Durchführung und Auswirkung, den er selbst wieder durch die inhaltliche Ausfüllung seines Durchführungsbegriffs, in den die Auswirkungen einbezogen werden, destruiert; der begrifflichen Unterscheidung entspricht keine sachliche. Lokalisierung der Durchführung und Lokalisierung der Auswirkungen sind nicht unterscheidbar oder gar abgrenzbar, wenn die Durchführung die Auswirkungen umfasst."); M.R.M., Comment to *Wood Pulp*, 11 *S.E.W.* 816, 818-19, nrs. 5-6 (1990) ("Onder implementatie moet hier m.i. het functioneren van het kartel, dus de beperking van de concurrentie, worden verstaan. Nog anders gezegd (zij het niet, met zoveel woorden, door het Hof): beslissend is het *effect* op de marktverhoudingen binnen de Gemeenschap. Zo gezien heeft het Hof hier dus, zonder dat expliciet te zeggen, de effectenleer aanvaard (dan wel, gezien het arrest-Béguelin, zijn

sales in the territory, although their agreements may still cause effects there.[1022] One could think of export boycotts (refusals to buy), refusals to sell to Community purchasers, or agreements to restrict output, or more generally, agreements that are entered into *and* implemented abroad, which nevertheless have economic repercussions within the Community.[1023] While in the case of omissions, the undertakings may previously have made sales in the Community, their boycott intention is not implemented there, as they precisely do no longer sell directly in the Community.[1024] The effects doctrine by contrast reaches omissions, as it reaches *any* effect, irrespective of direct sales.[1025] Possibly, under "constructive presence"

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aanvaarding daarvan bevestigd."); M. FRIEND, "The long arm of Community law", 14 *E.L. Rev.* 169 (1989) (stating that the ECJ's finding "seems difficult to distinguish from saying that the economic effects of the agreement were felt within the Community.").

[1022] *See* M.P. BROBERG, "The European Commission's Extraterritorial Powers in Merger Control: The Court of First Instance's Judgment in *Gencor* v. *Commission*", 49 *I.C.L.Q.* 172, 177 (2000) ("There is no doubt that the difference between the implementation principle and the effects principle is subtle. In my understanding of the implementation principle, this principle is only met where the anti-competitive effect inside the territory of the authority wishing to take jurisdiction. This menas that if the producers of a given good enter into a price fixing agreement concerning the American market (but not concerning the Community) this will not be covered by the implementation principle irrespective of whether it has a direct and advesre on competition in the Community. In contrast the effects principle is only concerned with the effect in the Community – not the place of implementation.").

[1023] *See* R.P. ALFORD, "The Extraterritorial Application of Antitrust Laws: The United States and European Community Approaches", 33 *Va. J. Int'l L.* 1, 35 (1992); M.P. BROBERG, "The European Commission's Extraterritorial Powers in Merger Control: The Court of First Instance's Judgment in *Gencor* v. *Commission*", 49 *I.C.L.Q.* 172, 180 (2000). *See also* W. VAN GERVEN, "EC Jurisdiction in Antitrust Matters: the *Wood Pulp* Judgment", in: B. HAWK (ed.), *International Antitrust Law & Policy*, Annual Proceedings of the Fordham Corporate Law Institute, 1989, at 466 and 471; I. SEIDL-HOHENVELDERN, "Völkerrechtliche Grenzen bei der Anwendung des Kartellrechts", 17 *A.W.D.* 53, 54 (1971) (railing against the exercise of jurisdiction over foreign-organized *refus de vente* as early as 1971).

Contra: T. CHRISTOFOROU & D.B. ROCKWELL, "EEC Law: the Territorial Scope of Application of EEC Antitrust Law – the Wood Pulp Judgment", 30 *Harv. Int'l L.J.* at 204-205 (1989) (believing that, unlike previous case law, omissions seem to fall within the scope of the Court's holding in *Wood Pulp*); W. VAN GERVEN, L. GYSELEN, M. MARESCEAU, J. STUYCK, J. STEENBERGEN, *Beginselen van Belgisch Privaatrecht*, XIII, *Handels- en Economisch Recht*, Deel 2, *Mededingingsrecht*, *B*, *Kartelrecht*, Antwerp, Story-Scientia, 1996, 114 (while admitting that is unclear whether EC jurisdiction obtains over agreements that are entered into *and* implemented abroad, but nevertheless have economic repercussions within the Community, pointing out that it probably will, given the ECJ's judgment in *Béguelin*).

One could *à la limite* argue that the implementation doctrine does not apply to a foreign conspiracy on the basis of which the conspiring undertakings ship goods "free on board" (pursuant to which the supplier pays the shipping (and insurance) costs from the point of manufacture to a specified destination, at which point the buyer takes responsibility) from outside the Community into the Community. While being direct import, their anticompetitive agreement may be said to have been implemented *outside* the Community. *See* interview with J.H.J. BOURGEOIS, Akin Gump, August 8, 2006, transcript on file with the author. *See also* J.E. FERRY, "Towards Completing the Charm: The Woodpulp Judgment", *E.I.P.R..L.* 19, 22 (1989); M. SCHÖDERMEIER, "Die vermiedene Auswirkung", 39 *WuW* 21, 24 (1989).

[1024] *See* R.P. ALFORD, "The Extraterritorial Application of Antitrust Laws: The United States and European Community Approaches", 33 *Va. J. Int'l L.* 1, 35-36 (1992) (arguing that exercising jurisdiction over omissions "would be an unprecedented stretch of the objective territoriality principle", "as such failures to act (*i.e.*, refusal to sell to purchasers within the Community) would not be in any manner physically pursued or conducted within the Common Market.").

[1025] It may be argued that the ECJ did exactly take issue with the qualified effects doctrine as such, but rather with the interpretation of its requirement of direct effects. The ECJ, by adopting the implementation doctrine, may have made clear that, in its view, 'direct effects' mean effects on price,

theories, omissions could be brought within the Community, with the foreign corporation refusing to buy or sell being "constructively present" in Community for purposes of the implementation doctrine.[1026]

327. EFFECTS JURISDICTION IN EC NON-CARTEL CASES – The possible exclusion of omissions or business restrictive practices that do no involve direct sales or import commerce from the reach of EC competition law may have implicitly been repealed by the European Court of First Instance (CFI), when it espoused the effects doctrine in the 1999 *Gencor* case, a case discussed at length in 6.12.4. The effects doctrine was moreover relied upon by the ECJ outside the field of competition law, in regard to the principle of non-discrimination in European law, as early as 1974, in *Walrave and Koch* v. *Union Cycliste Internationale*. In this case, the ECJ stated that "the rule of non-discrimination applies – judging all relationships in so far as these relationships, by reason either of the place where they are entered into or of the place where they take effect, can be located within the territory of the Community."[1027] Yet as *Gencor* was a merger case, and *Walrave* a non-discrimination case, it is doubtful whether one could readily extrapolate the courts' dicta to *Wood Pulp*-like cartel cases.

328. COMMISSION PRACTICE – Although European courts have not conclusively approved of effects jurisdiction in cartel cases, the European Commission considers "effects" in the Community to be sufficient so as to make the effects-causing foreign anticompetitive conduct amenable to EC jurisdiction. Commission practice in the field was from its very beginnings supported by most doctrinal writings,[1028] and businesses may always have believed that the Commission could legitimately exercise effects-based jurisdiction.[1029] In both *Dyestuffs* and *Wood*

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quantity and quality of directly sold products. *Compare* D.G.F. LANGE & J.B. SANDAGE, "The *Wood Pulp* Decision and Its Implications for the Scope of EC Competition Law", *C.M.L.R.* 1989, at 161-162.

[1026] *Compare* E. STEINDORFF, "Annotation on the Decision of the European Court in the *Dyestuff* Cases of July 14, 1972", *C.M.L.R.* 507-508 (1972) (noting that this question "needs further exploration"). *See* on "constructive presence" theory in U.S. criminal law: chapter 3.4.2.

[1027] Case 37/74, [1974] E.C.R. 1405.

[1028] *See, e.g.*, B. GOLDMAN, "Les champs d'application territoriale des lois sur la concurrence", 128 *R.C.A.D.I.* 631, 680-81 (1969-III) ; J. STOUFFLET, "La compétence extraterritoriale du droit de la concurrence de la Communauté économique européenne", 98 *J.D.I.* 487, 495 (1971); E. COLMANT, « 14 juillet 1972, une date pour le droit de la concurrence : neuf arrêts règlent trois grandes questions. Affaire des matières colorantes : suite et fin », *Revue du marché commun* 15, 20 (1973) (« Il n'est pas possible d'admettre que des entreprises puissent restreindre le jeu de la concurrence dans le Marché commun sans pouvoir être inquiétées sous prétexte qu'elles ont leur siège dans un Etat non partie au traité de Rome ; ce serait ruiner l'efficacité du système des articles 85 et suivants qui, rappelons-le sont des règles d'ordre public, vitales pour le Marché commun. ») ; K.M. MEESSEN, "Der räumliche Anwendungsbereich des EWG-Kartellrechts und das allgemeine Völkerrecht", *Europarecht* 18, 38 (1973); J.-M. BISCHOFF & R. KOVAR, "L'application du droit communautaire de la concurrence aux entreprises établies à l'extérieur de la Communauté", 102 *J.D.I.* 675 (1975) (« C'est donc de façon parfaitement légitime que le droit communautaire de la concurrence se fonde sur l'effet anticoncurrentiel à l'intérieur du marché commun pour revendiquer sa compétence. ») ; P.J. KUYPER, "European Community Law and Extraterritoriality: Some Trends and New Developments", 33 *I.C.L.Q.* 1013, 1017 (1984) ("There is little doubt that the Commission can and will restrict [foreign business restrictive practices affecting competition within the Common Market] through application of the effects doctrine, without, however, transgressing the limits set by the prohibitive rules of international law."); A.Th.S. LEENEN, "Extraterritorial Application of the EEC Competition Law", 15 *N.Y.I.L.* 139, 158 (1984).

[1029] *See* J.E. FERRY, "Towards Completing the Charm: The Woodpulp Judgment", *European Intellectual Property Law Review* 19, 20 (1989) (discussing *Wood Pulp* and noting that "[t]here are indications that industry outside the EEC worked on the assumption that the 'effects' doctrine applied",

Pulp, the Commission grounded its jurisdiction on the effects doctrine (in both cases, the Advocate General sided with the Commission). Later, the Commission seemed to backtrack somewhat when in its Eleventh Report on Competition Policy (1981), when it stated, echoing the ECJ *Dyestuffs* decision: "In all cases with which the Commission and the Court of Justice have so far dealt, there has been a link with the Community in the form of subsidiaries or contracting parties situated in the Common Market."[1030] Four years later, in the 1985 *Polypropylene* case, the Commission restated the *Dyestuffs* doctrine.[1031] In the 1981 report, however, support for the effects doctrine is apparent.[1032] As of 2006, the Commission claims jurisdiction as soon as effects are discernible in the Community, on the ground that the plain text of Article 81 ECT entitles it do so.[1033] In its 2004 Guidelines on the effect on trade concept, it endorsed the effects doctrine, holding that "Articles 81 and 82 apply irrespective of where the undertakings are located or where the agreement has been concluded, provided that the agreement or practice is either implemented inside the Community, or produce effects inside the Community".[1034] Caution may however cause the Commission to ground jurisdiction firstly on the economic entity doctrine if possible, on the implementation doctrine if not, and on the effects doctrine only as an *ultimum remedium* where the foreign restrictive practices could not be dealt with under the former doctrines.[1035]

329. IN SUPPORT OF THE EFFECTS DOCTRINE – The European Commission may be said to be right in embracing the effects doctrine in cartel matters. As shown

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but stating that "that *de facto* legal certainty has now been put in question by the [*Wood Pulp*] judgment").

[1030] European Commission, Eleventh Report on Competition Policy (1981), point 35.

[1031] *O.J.* L 230/1 (1986) ("The fact that two undertakings have their head office located outside the Community does not affect their liability in respect of the infringements alleged. Both [undertakings] exported directly to and carried out a substantial business in polypropylene within the EEC which was covered by the cartel to which they were party. They both had local subsidiaries and agents in several Member States to which they gave pricing instructions in accordance with the agreed targets. The quota arrangements included not only their sales outside the EEC but also deliveries in the Community which in fact accounted for the major part of the polypropylene business.").

[1032] European Commission, Eleventh Report on Competition Policy (1981), point 35 ("The EEC Treaty's rules on competition apply to restrictive or abusive practices by undertakings situated in non-member countries where their conduct has an appreciable impact within the Common Market. The Commission was one of the first antitrust authorities to have applied the internal effect theory to foreign companies, both to their advantage and to their detriment. Putting the theory into practice can, it is true, have repercussions outside the Community; but that is not a reason for regarding it as an inadmissible exercise of extra-territorial jurisdiction. To assert the contrary would be tantamount to preventing public or judicial authorities from effectively dealing with competition cases falling within their jurisdiction.").

[1033] *See* interview with Eddy De Smijter, DG-Competition, European Commission, August 8, 2006 (on file with the author). Article 81 ECT prohibits business restrictive practices that "have as their object or effect the prevention, restriction or distortion of competition within the common market". This approach was already criticized by GOLDMAN – who supported effects jurisdiction – in his comments on the *Dyestuffs* case. *See* B. GOLDMAN, comment *Dyestuffs*, *J.D.I.* 925, 932 (1973) ("A vrai dire, les motifs de la décision de la Commission étaient-ils un peu sommaires sur ce point, qui invoquaient le seul texte de l'article 85, pour justifier son application à des entreprises d'Etats tiers.")

[1034] *O.J.* C 101/81 (2004), § 100.

[1035] *See* J.H.J. BOURGEOIS, "EEC Control over International Mergers", 10 *Yb. European Law* 1990, 103, 116 (1990); interview with J.H.J. Bourgeois, Akin Gump, Brussels, August 8, 2006. *Compare* I. VAN BAEL & J.-F. BELLIS, *Competition Law of the European Community*, 4th ed., The Hague, Kluwer Law International, 2005, 160 (noting "that it is not likely that there will be many cases in which the effects doctrine is crucial in jurisdictional terms: in most cases, the economic entity doctrine or the implementation doctrine will be adequate to establish Community law jurisdiction").

in chapter 6.3, effects-based jurisdiction in antitrust matters is justifiable under the (objective) territoriality principle. There is no apparent reason to distinguish between conspiracies and mergers;[1036] there is no need to have recourse to as artificial a construction as the 'implementation doctrine' in cartel matters.[1037] Rather than quarreling over the child's name, courts and regulators should see to it that effects-based jurisdiction is exercised *reasonably*, with due regard for other States' sovereign interests.[1038] The implementation doctrine – which was mainly designed to accommodate the UK's concerns over the principle of territoriality being infringed upon if the effects doctrine were accepted – does at any rate not guarantee in itself that foreign interests are adequately accounted for. In chapter 6.7, this study will elaborate upon comity in antitrust matters.

6.5. The reach of EU Member States' competition laws

330. Most competition laws of EU Member States provide, either explicitly or implicitly, for jurisdiction over agreements concluded abroad but affecting competition within the territory of the Member States.[1039] Germany has been at the forefront of developing doctrines to justify and restrain the exercise of effects-based jurisdiction since the 1970s, *i.e.*, before the ECJ's judgment in *Wood Pulp* (part 6.5.1).[1040] The United Kingdom for its part has been at the forefront of opposing the reach of U.S. antitrust laws, although it has since abandoned a strict reliance on territoriality: its Competition Law now provides for jurisdiction under the *Wood Pulp* implementation doctrine (part 6.5.2). In a last part, an overview of the reach of the competition laws of a number of other European States will be provided (part 6.5.3). It will be shown that all these laws allow effects- or implementation-based jurisdiction over foreign-based conspiracies.

[1036] It could be argued that the reach of an instrument of *secondary* Community competition law (the Merger Control Regulation) should not be broader than the reach of an instrument of *primary* Community competiton law (Articles 81-82 ECT, prohibiting conspiracies).

[1037] *See, e.g.*, interview with K.M. Meessen, August 14, 2006 (transcript on file with the author); M.P. BROBERG, "The European Commission's Extraterritorial Powers in Merger Control: The Court of First Instance's Judgment in *Gencor* v. *Commission*", 49 *I.C.L.Q.* 172, 180 (2000) ("I am of the view that the effects principle must not be limited so as only to apply to the Merger Regulation, but that it equally applies to Articles 81 and 82 [ECT]. This does not mean that the Commission will be able to enforce its decisions against those who are found to infringe these provisions, but it does mean that the law does not prevent the Commission from applying these provisions within the limits formed by the effects principle").

[1038] *See, e.g.*, L. IDOT, Note *Wood Pulp, Rev. trim. dr. europ.* 345, 352 (1989) ("A vrai dire, en droit de la concurrence, le débat est ailleurs. Le temps n'est plus à tergiverser sur le point de savoir si les autorités communautaires doivent affirmer leur compétence à l'encontre de telles pratiques. Il s'agit uniquement de déterminer si elles doivent l'exercer, ce qui relèvent moins du droit que de l'opportunité.").

[1039] It may be noted that the reach of EC competition law need not be based upon the reach of the Member States competition laws, since EC competition law has a special function of political-economic integration which Members States' competition laws do not have. This implies that the Commission could exercise jurisdiction in ways that go further than Member States' practice in the field. *See* K.M. MEESSEN, "Der räumliche Anwendungsbereich des EWG-Kartellrechts und das allgemeine Völkerrecht", *Europarecht* 18, 25 (1973) ("Wegen der besonderen integrationspolitischen Funktion des EWG-Kartellrechts führt die Auslegung aus dem mutmasslichen Willen der Vertragspartner nicht zu dem Ergebnis, dass der räumliche Anwendungsbereich der Art. 85 und 86 an dem Anwendungsbereich mitgliedstaatlicher Kartellrechtsordnungen zu orientieren ist.").

[1040] *See also* B. GOLDMAN, comment *Dyestuffs*, *J.D.I.* 925, 935 (1973) (pointing out that as early as 1973 several EU Member States applied the effects doctrine, and that the EU Member States could thus delegate to the EC their competency to exercise effects-based jurisdiction).

6.5.1 Germany

331. *AUSWIRKUNGSPRINZIP* – The German Competition Act was adopted in 1957 and was based on U.S. antitrust law.[1041] This might explain why Germany was the first European State to assert 'extraterritorial' antitrust jurisdiction. German practice, the conceptual framework of which was shaped in the the 1970s and early 1980s in a joint effort by the doctrine, the Federal Cartel Office and the courts, was heavily influenced by the writings of Professor MEESSEN, in particular his 1975 monograph on international law principles of international cartel law.[1042] The extraterritorial application of German antitrust law has mainly focused on the control of international mergers (*Auslandszusammenschlüsse*). The specifics of extraterritorial merger control will be discussed at length in subsection 6.12.3.

Section 130(2) of the German 1957 Competition Act (*Gesetz Gegen Wettbewerbsbeschränkungen* or GWB)[1043] applies to "all restraints of competition having an effect within the area of application of this Act, also if they were caused outside the area of application of this Act".[1044] GERBER has argued that, under the usual private international law approach taken by civil law countries to allocate disputes involving transnational elements, § 130(2) GWB is a choice-of-law rule which subjects agreements concluded outside Germany to German law, provided that they have an effect within the German territory.[1045] The Act thus pointedly refers to the effects doctrine, in Germany named *"Auswirkungsprinzip"*, as a basis for jurisdiction.[1046] The absence of any limitations on the effects doctrine (intentional, substantial, direct or reasonably foreseeable effects) is notable, which makes the scope of § 130(2) potentially broader than the scope of the Sherman Act as construed by the Second Circuit in *Alcoa*. The absence of limitations might be attributable to Germany's lack of experience with extraterritorial jurisdiction and the lack of resistance against extraterritorial jurisdiction immediately after World War II.[1047] However, as international law prevails over municipal law pursuant to Article 25 of the German Constitution, the choice-of-law rule set forth in § 130 (2) should be construed in the light of the public international law rules on jurisdiction which may

[1041] *See* D.J. GERBER, "The Extraterritorial Application of the German Antitrust Laws", 77 *A.J.I.L.* 756, 757 (1983).
[1042] *See* K.M. MEESSEN, *Völkerrechtliche Grundsätze des internationalen Kartellrechts*, Baden-Baden, Nomos, 1975.
[1043] Act Against Restraints of Competition or Antitrust Act, as amended by the Sixth Act to amend the Act against Restraints of Competition and the act to amend the Law on Public Procurement in the version as published on September 2, 1998 (Federal Law Gazette I p. 2547) and amended as of December 19, 2000.
[1044] § 130 (2) of the German Competition Act ("Dieses Gesetz findet Anwendung auf alle Wettbewerbsbeschränkungen, die sich im Geltungsbereich dieses Gesetzes auswirken, auch wenn sie außerhalb des Geltungsbereichs dieses Gesetzes veranlaßt werden.").
[1045] *See* D.J. GERBER, "The Extraterritorial Application of the German Antitrust Laws", 77 *A.J.I.L.* 756, 759 (1983).
[1046] *See* M. HEIDENHAIN & C. STADLER, "Competition Law in Germany", in F.O.W. VOGELAAR, J. STUYCK & B.L.P. VAN REEKEN (eds.), *Competition Law in the EU, its Member States and Switzerland*, *Competition Law in the EU, its Member States and Switzerland*, Volume II, The Hague, Kluwer Law International, Deventer, W.E.J. Tjeenk Willink, 2002, at 212-13. United States experience with extraterritorial antitrust doubtless influenced the German approach. *See also* G.B. BORN, "A Reappraisal of the Extraterritorial Reach of U.S. Law", 24 *Law & Pol. Int'l Bus.* 1, 67 (1992).
[1047] *See* D.J. GERBER, "The Extraterritorial Application of the German Antitrust Laws", 77 *A.J.I.L.* 756, 761-62 (1983).

require anticompetitive effects to be direct, substantial and reasonably foreseeable effects.[1048]

332. *SCHUTZZWECK* (*ÖLFELDROHRE*) – Initially, the German Federal Cartel Office, which administers the Competition Act, was extremely reluctant to assert its jurisdiction over foreign members of international conspiracies. Instead, it only focused on the German members. German legal authors nevertheless argued that international law authorized the exercise of effects-based jurisdiction over foreign-based conspiracies as early as 1965.[1049] In the 1973 *Ölfeldrohre* judgment, the German Supreme Court (*Bundesgerichtshof*) eventually held that § 130 (2), then § 98 (2), 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."[1050]

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 (*e.g.*, pre-merger notification) could be higher than for another (*e.g.*, 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.[1051] As has been argued *supra*, the doctrine may serve as a useful standard of jurisdictional reasonableness, which is not limited to antitrust law but could apply to any field of the law.

333. INTEREST-BALANCING – Although the *Schutzzweck* doctrine served as a doctrine of jurisdictional restraint, it remained to be seen whether it could actually prevent international conflicts of jurisdiction from arising. In later international merger cases, as will be demonstrated in section 6.12, the interests of foreign States

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[1048] *See* A. BACH, "Deutsche Fusionskontrolle bei inlandswirksamen Auslandszusammenschlüssen", *WuW* 291, 293-94 (1997).
[1049] *See e.g.* E. REHBINDER, *Extraterritoriale Wirkungen des deutschen Kartellrechts*, Baden-Baden, Nomos, 1965, 426 p.
[1050] BGH, July 12, 1973, WuW/E BGH 1276, 1278-79 (Ölfeldrohre), translation available in D.J. GERBER, "The Extraterritorial Application of the German Antitrust Laws", 77 *A.J.I.L.* 756, 765 (1983).
[1051] *See* D.J. GERBER, "The Extraterritorial Application of the German Antitrust Laws", 77 *A.J.I.L.* 756, 781 (1983).

were indeed taken into account by German courts and regulators, along the lines of MEESSEN's opinions. MEESSEN pointed out that not taking into account foreign interests might violate the international law rule of non-intervention, even if the effects principle, itself an accepted principle of international law, were respected.[1052] In MEESSEN's view, the appropriate method to take into account foreign interests would consist of balance domestic and foreign sovereign, not merely as a matter of comity or discretion, but as a matter of law.[1053] As has pointed out in chapter 5, this is exactly the method advocated by § 403 of the Restatement (Third) of U.S. Foreign Relations Law (1987), which was, not surprisingly, influenced by MEESSEN's views on the subject.

6.5.2. United Kingdom

334. RESTRICTIVE VIEW OF ANTITRUST JURISDICTION – The United Kingdom never espoused the *Lotus* view that international law authorized States to exercise their jurisdiction outside their territory, absent any specific prohibition to the contrary.[1054] As far as antitrust law was concerned, the British Government traditionally resisted any extension of jurisdiction beyond the traditional territorial and nationality principles. In an *aide-mémoire* to the European Commission in 1979, it stated:

> "On general principles, substantive jurisdiction in antitrust matters should only be taken on the basis of either
>
> (a) the territorial principle, or
> (b) the nationality principle.
>
> There is nothing in the nature of antitrust proceedings which justifies a wider application of these principles than is generally accepted in other matters; on the contrary, there is much which calls for a narrower interpretation."[1055]

In its *aide-mémoire*, the British Government especially opposed the U.S. effects doctrine, stating "the United Kingdom Government have for their part consistently objected to the assumption of extraterritorial jurisdiction in antitrust matters by the courts or authorities of a foreign state when that jurisdiction is based upon what is termed the 'effects doctrine'."[1056] Accordingly, the territorial principle to which the United Kingdom referred in its *aide-mémoire* does not cover the economic effects prong of the objective territorial principle. In later positions of the late 1970s and the

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[1052] K.M. MEESSEN, "Zusammenschlusskontrolle in auslandsbezogenen Sachverhalten", *ZHR* 143 (1979), 273, 276.
[1053] In his 1979 article, MEESSEN specifically referred to the merger of the Swiss corporations CIBA and Geigy, which was blocked by U.S. authorities since competition between the U.S. subsidiaries of these corporations might be impeded. He held that, in this case, effects jurisdiction could legally be established by the U.S., but that the rule of non-intervention might be violated in view of the central Swiss interests in the merger of the parent companies. *Id.*
[1054] A.V. LOWE, "Blocking Extraterritorial Jurisdiction: the British Protection of Trading Interests Act, 1980", 75 *A.J.I.L.* 257, 263 (1981).
[1055] Reprinted in I. BROWNLIE, *Principles of Public International Law*, 3d ed., Oxford, Clarendon Press, 1979, at 310, note 32.
[1056] *Id.*

early 1980s, the United Kingdom reiterated its opposition against the effects doctrine.[1057]

335. PROTECTION OF TRADING INTERESTS ACT – In 1980, the United Kingdom adopted the British Protection of Trading Interests Act, an act which was primarily aimed at blocking the production of documents ordered by foreign courts or regulators, a thinly disguised warning against U.S. antitrust courts and regulators. This Act will be discussed in the chapter on discovery, but it may be noted here that the Act does on its face not take issue with the antitrust effects doctrine on international law grounds, but rather on the ground that its use by the U.S. affected British interests. In this vein, British authors LAYTON and PARRY have noted that "it is unclear at this juncture [2004] whether it was the concept [of effects-based jurisdiction] in the abstract which was unacceptable, or whether the problem was its detrimental impact on U.K. trading interests".[1058]

336. HARTFORD FIRE INSURANCE – Implicit acknowledgement of the effects doctrine under international law may be gleaned from a 1992 *amicus curiae* brief filed by the UK Government with the U.S. Supreme Court in support of a number of British petitioners in a private insurance antitrust suit initiated against them (*Hartford Fire Insurance Co. et al.* v. *California et al.*). In this brief, the UK Government asserted that "the U.S. courts should not exercise subject matter jurisdiction over those antitrust claims in this case which are directed against business activity being conducted in London by the British insurance and reinsurance industry for a legitimate business purpose in a manner consistent with the British Government's regulatory and competition regime."[1059] Drawing on BROWNLIE, the Government premised its stance on classical international law, notably the sovereignty and equality of States – which represent "the basic constitutional doctrine of the law of nations" – and their corrolary, the "duty of non-intervention in the area of exclusive jurisdiction of other states."[1060]

From the UK Government's *amicus curiae* brief in *Hartford Fire*, it may be inferred that the UK did not oppose effects jurisdiction as exercised by the U.S. as such, but only where the U.S. were to clamp down on business activity which was already governed by a British regulatory framework. It may be submitted that, if the UK had not put in place such a framework, the U.S. could probably have applied its laws to

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[1057] Submission of C.F. Meissner, Deputy Assistant Secretary for International Finance and Development, Department of State, on behalf of the British Embassy, Washington, D.C., to the Antitrust Commission, 28 July 1978 ("HM Government considers that in the present state of international law there is no basis for the extension of one country's antitrust jurisdiction to activities outside of that country of foreign nationals."); speech by UK Trade Minister Peter Rees, made at the Royal Institute for International Affairs on 21 October 1982, reprinted in A.V. LOWE, *Extraterritorial Jurisdiction: an Annotated Collection of Legal Materials*, Cambridge, Grotius publ., 1983, 152-53 ("… we think that the effects doctrine as applied in the antitrust field has been developed by mistaken analogy with the doctrines of personal injury cases (the cases about pistols fired into a country from outside its borders). We follow for our part the classical objective territorial position. Our position implies that the pistol type cases, such as *Regina* v. *Doot* in 1973, which are arguably about where the act takes place or is completed, rather than about effects, should be distinguished from those in the very different sphere of economic activities.").

[1058] A. LAYTON & A.M. PARRY, "Extraterritorial Jurisdiction – European Responses", 26 *Houston J. Int'l L.* 309, 313 (2004).

[1059] Reprinted in *B.Y.I.L.* 1992, 72, 74.

[1060] *Id.*, at 75.

the British activity, using the effects doctrine, without British eyebrows being raised. Against this, it could be argued that, even if the UK had not put in place any regulatory framework, and had not even thought of doing so, such would still amount to a regulatory choice, namely the choice not to regulate. The British reinsurers would then behave "in a manner consistent with" the British Government's regulatory regime: the regulatory regime of non-regulation. The emphasis that the British Government laid on the UK's *active* regulation of the British inurance business may however refute this counter-argument: "Companies carrying on insurance business in the United Kingdom must be authorized by and operate under the supervision of the Department of Trade and Industry."[1061] It appears that, for the British Government, only clashes between two 'active' regulatory regimes may raise sovereignty concerns under international law, although obviously, it remains to be seen where the line between 'active' and 'passive' regulation ought to be drawn. In subsection 6.7.4, this conundrum will be discussed in greater detail.

337. U.S. ANTITRUST ENFORCEMENT GUIDELINES – Another implicit acknowledgement of the effects doctrine could be gleaned fro, the UK Government's 1994 comments on the draft Antitrust Enforcement Guidelines for International Operations issued by the U.S. Department of Justice and the U.S. Federal Trade Commission. In these comments, the UK Government denounced the narrow construction of the comity analysis by the said Guidelines, stating that it was "particularly concerned that insufficient weight is given to these factors in an era of increasing co-operation in enforcement of antitrust cases with international aspects."[1062] As comity serves as a principle restraining the exercise of effects-based subject matter jurisdiction, a State, such as the United Kingdom, which invokes comity as the only defense against a jurisdictional assertion implicitly recognizes the legality of effects-based jurisdiction.[1063]

338. UK COMPETITION ACT – The United Kingdom is the EU Member State that has most vocally denounced the reach of U.S. antitrust laws under the effects doctrine. UK opposition against the effects doctrine is reflected in the reach of the UK's own competition laws. Subsection 2 (1) of the United Kingdom's 1998 Competition Act[1064] provides that are prohibited "agreements between undertakings, decisions by associations of undertakings or concerted practices which may affect trade within the UK and have as their object or effect the prevention, restriction or distortion of competition within the UK". Subsection 2 (3) of the Competition Act adds that "Subsection (1) applies only if the agreement, decision or practice is, or is

[1061] *Id.*, at 74.
[1062] Reprinted in *B.Y.I.L.* 1995, 669.
[1063] In its comments, the UK took mainly issue with the effectiveness of foreign enforcement as a factor in the comity analysis. Clearly, the 1993 *Hartford Fire* debacle, involving an alleged conspiracy of British re-insurance corporations, raised its head. In *Hartford Fire*, the U.S. Supreme Court ruled that, as the UK did not compel or prohibit any particular conduct on the part of the British re-insurance corporations, there was no "true conflict" with U.S. antitrust law. Such an approach, as the UK Government correctly observed, "does not give appropriate recognition in cases falling principally within the jurisdiction of foreign governments which may include a decision not to pursue a particular case." *Id.*, at 670. The Guidelines seem to institutionalize this lack of attention for foreign *laissez-faire* policies. Nonetheless, the effectiveness of a foreign enforcement is but one factor in the interest-balancing test. Moreover, effectiveness may only relate to ill-enforced foreign regulations: the U.S. may in effect act on behalf of the foreign State, and possibly defer to a foreign State's deliberate policy of non-regulation.
[1064] 1998 No. 2750: The Competition Act 1998 (Commencement No. 1) Order 1998.

intended to be, implemented in the United Kingdom". Section 2 thus seems to restate the implementation doctrine as put forward by the ECJ in the 1988 *Wood Pulp* case, the outcome of which was precisely influenced by British territorial views.[1065] In any event, Section 60 of the UK Competition Act reminds that, when a British court determines a question arising under the Act, "it must act with a view to securing that there is no inconsistency between the principles applied, and decision reached, by the court in determining that question; and the principles laid down by the Treaty and the European Court, and any relevant decision of that Court, as applicable at that time in determining any corresponding question arising in Community law." Consequently, the *Wood Pulp* implementation doctrine may also apply in the UK.[1066] In private, as opposed to government, suits however, British courts still seem to apply the more restrictive *Dyestuffs* 'single economic unit' doctrine under the guise of the implementation doctrine. In 2003, in *Provimi v. Aventis*, a case which was part of worldwide effort to clamp down on a vitamins cartel, the English High Court required the plaintiff to prove that a UK affiliate "implemented" and "gave effect" to the foreign cartel in England.[1067]

6.5.3 Other EU Member States

339. IRELAND – Section 4 of the Irish 1991 Competition Act[1068] prohibits "anticompetitive agreements, decisions and concerted practices, which have as their object or effect the prevention, restriction or distortion of competition in trade in any goods or services in the State or in any part of the State." Similarly, Section 5 "prohibits any abuse by one or more undertakings of a dominant position in trade for any goods or services in the State or in a substantial part of the State". The Competition Act only provides that the anticompetitive behaviour must have effects or intend to have effects within the Irish market. It does not state that anticompetitive agreements should be concluded in the Irish territory. Absent any case law, it is not clear if these agreements fall within the scope of the Irish Competition Act.[1069] However, given the similarity of the substantive provisions of the Act with Articles 81 and 82 EC Treaty, the Irish Competition Authority and the courts will tend to heed EC decisions in relation to competition law[1070] and apply the implementation doctrine.

[1065] *Wood Pulp*, Brief of the United Kingdom, *B.Y.I.L.* 507 (1988) ("The United Kingdom submits that [the holding in *Dyestuffs*] may be extended to cases in which an undertaking established outside the Community employs an agent within the Community. Hence any acts which the agent carries out in accordance with the directions of the undertaking he represents may properly be regarded as acts of that undertaking. That is merely an illustration of the *territoriality principle* … Those agents, who carried on various activities within the Community, have been the essential means by which the agreements and concerted practices prohibitied under Article 85 of the Treaty have been *implemented* within the Community.") (emphasis added).

[1066] *See also* M. CUTTING, "Competition Law in the UK", *in:* F.O.W. VOGELAAR, J. STUYCK & B.L.P. VAN REEKEN (ed.), *Competition Law in the EU, its Member States and Switzerland*, *Competition Law in the EU, its Member States and Switzerland*, Volume II, The Hague, Kluwer Law International, Deventer, W.E.J. Tjeenk Willink, 2002, 20.

[1067] High Court UK, *Provimi Limited v. Aventis Animal Nutrition SA & Ors and other cases*, 6 May 2003, [2003] EWHC 961 (Comm), [2003] All ER (D) (59).

[1068] S.I. No. 249/1991: Competition Act 1991 (Commencement) Order.

[1069] *See* G. FITZGERALD, "Competition Law in Ireland", *in:* F.O.W. VOGELAAR, J. STUYCK & B.L.P. VAN REEKEN (ed.), *op. cit.*, at 131.

[1070] *Id.*, at 135.

340. FRANCE – Competition law in France is regulated by the Ordinance of 1 December 1986,[1071] and the implementing Decree of 29 December 1986.[1072] In France, the effects doctrine seems to be established.[1073] But as EC law trumps French competition law, the implementation doctrine may now apply instead, save when the agreement does not prejudice trade between the Member States. In the latter situation, the French Competition Council may refuse to heed EC law.[1074] It should be noted that the Competition Council does not curb export activities having adverse effects outside France.[1075]

341. SPAIN – Articles 1 (relating to cartels) and 6 (relating to abuse of dominant position) of the Spanish Competition Act[1076] reflect Articles 81 and 82 of the EC Treaty and refer to effects in the national market. Apparently, Spanish competition law will apply as soon as anticompetitive agreements affect the Spanish market, even if the agreements have been concluded outside Spain.[1077]

342. PORTUGAL – Article 1(2) of the Portuguese Competition Act expressly provides that "this Act applies to restrictions on competition which occur in the national territory or which may have an effect within it."[1078] The 'extraterritorial' application of Portuguese competition law has been confirmed in a 1991 case.[1079]

343. ITALY – The Italian Competition Act sets forth that as far as agreements, abuse of dominant position and concentrations are concerned, the relevant provisions "shall be interpreted in accordance with the principles of European Community competition law." [1080] Hence, also in Italy, the implementation doctrine should apply, although no case has ever been investigated by the Italian Competition Authority.[1081]

344. NETHERLANDS – According to Dutch competition law,[1082] the decisive factor is the place where the anticompetitive agreement or conduct is implemented,

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[1071] Ordinance no. 86-1243 of 1 December 1986 on the freedom of prices and of competition, as amended.
[1072] Decree no. 86-1309 of 29 December 1986, as amended.
[1073] *See* CA Paris, 1ère Ch. Sect. Con., 15 September 1993, Sté. Brassler et Ass. : BOCCRF 8 April 1994. *See also*: Conseil de Concurrence, Rapport d'activité 2001, 2ème partie, Titre II, Chapitre 1, n° 1 http://www.finances.gouv.fr/conseilconcurrence/activites/2001/rap01p2.htm#p2t2ch11
[1074] D. VOILLEMOT, "Competition law in France", *in:* F.O.W. VOGELAAR, J. STUYCK & B.L.P. VAN REEKEN (ed.), *op. cit.*, at 166-168.
[1075] *Id.*, 163, citing: Déc. Cons. Conc., n° 97-D-01, 15 January 1997, relating to the practices of the GIE "Les Tonnelleries de Bourgogne": BOCCRF 25 March 1997. *See also:* Conseil de Concurrence, Rapport d'activité 2001, 2ème partie, Titre II, Chapitre 1, n° 1 http://www.finances.gouv.fr/conseilconcurrence/activites/2001/rap01p2.htm#p2t2ch11
[1076] Law no. 16/1989 of 17 July 1989, as amended.
[1077] *See* A. CREUS & C. FERNANDEZ, « Competition law in Spain », *in:* F.O.W. VOGELAAR, J. STUYCK & B.L.P. VAN REEKEN (ed.), *op. cit.*, 228-29.
[1078] Decree-Law No. 371/93 of 29 October 1993 on protection and promotion of competition.
[1079] Case 2/91, *Stanley-Mabo* RA 91, p. 71 *et seq.*, cited *in:* M. DE AVILLEZ PEREIRA, "Competition law in Portugal", *in:* F.O.W. VOGELAAR, J. STUYCK & B.L.P. VAN REEKEN (ed.), *op. cit.*, 313.
[1080] Article 1(4) Law no. 287 of 10 October 1990.
[1081] *See* A. FRIGNANI, "Competition law in Italy", *in:* F.O.W. VOGELAAR, J. STUYCK & B.L.P. VAN REEKEN (ed.), *op. cit.*, at 373.
[1082] Law no. 1997/242 of 22 May 1997, as amended.

not where it is made.[1083] The wording of the relevant Article 6 is similar to Article 81 of the EC Treaty.[1084]

345. BELGIUM – The Belgian Competition Act[1085] may also – according to Articles 2 (cartels) and 3 (dominant position) – provide for effects jurisdiction. So far, this has only been settled in the area of merger control.[1086]

346. AUSTRIA – The 1988 Austrian Cartel Act[1087] explicitly provides in its Section 6(1) that it "shall also be applied to a situation […] realized in a foreign country, insofar as it affects the domestic market." Section 6(2) states that the Act "shall not be applied to any situation insofar as it affects the foreign market." The Austrian Cartel Act thus explicitly embraces the effects principle (objective territorial principle), and at the same time rejects the subjective territorial principle.[1088] In the 2005 Cartel Act, the effects doctrine is restated in Section 24, which provides that the Act shall only be applied insofar as a situation affects the domestic market, irrespective of whether it came into being domestically or abroad."[1089]

347. FINLAND – In Finland, the Act on Competition Restrictions[1090] only addresses the subjective territorial principle by stating that "[u]nless otherwise prescribed by the State Council, this Act shall not be applied to a competition restriction which restraints competition outside of Finland insofar as it is not directed against Finnish customers." One could reason *a contrario* that the Finnish Competition Act shall only apply to competition restraints directed against Finnish customers, or in other words competition restraints affecting the Finnish market, even if the conspiracy is foreign-based. In *Ahlström Oy/Kvaerner A/S*, the Finnish Competition Authority held that a non-competition clause that divided the world markets affected Finnish customers as it limited the introduction into Finland of

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[1083] *See* B.L.P. VAN REEKEN & S.B. NOË, "Competition law in the Netherlands", *in:* F.O.W. VOGELAAR, J. STUYCK & B.L.P. VAN REEKEN (ed.), *op. cit.*, 427.

[1084] In the U.S. *Incandescent Lamp* case, *United States* v. *General Electric Co.*, 82 F.Supp. 753 (D.N.J. 1949), the Dutch Government still strongly protested against the assertions of extraterritorial effects-based jurisdiction over the Dutch company Philips, alleging violations of international law: "If the United States Government, acting as Plaintiff in this case, will let itself be guided by the settled rules of international law prescribing that decrees penal or quasi-penal in character, shall not have extraterritorial effect, and thus will give new instructions to its attorney, the Court no doubt will limit the terms of the proposed decree so as to bring them in accordance with these rules, and will take full cognizance of the sovereign rights of the Netherlands over its own nationals, its own trade and commerce, and its own patent system." (Note and Memorandum from the Netherlands Ambassador in Washington to the Secretary of State, quoted in A.F. LOWENFELD, "Public Law in the International Arena: Conflict of Laws, International Law, and Some Suggestions for Their Interaction", 163 *Recueil des Cours* 311, 386 (1979-II). Under Dutch competition law, Dutch regulatory authorities could now do the same thing as the U.S. Government did in the *Incandescent Lamp* case.

[1085] Law on the Protection of Economic Competition of 5 August 1991, as amended.

[1086] Competition Council, decision of 21 June 1993, Morton International/Hoechst, Belgian State Gazette, 24 July 1993; Competition Council, decision of 2 July 1993, Eugen O. Butz/Ieper Industries, Belgian State Gazette, 27 July 1993, cited *in:* K. PLATTEAU, "Competition law in Belgium", *in:* F.O.W. VOGELAAR, J. STUYCK & B.L.P. VAN REEKEN (ed.), *op. cit.*, at 502-503.

[1087] Federal Act on Cartels and Other Restrictions of Competition, Federal Act of 19 October 1998, Federal Law Gazette (BGBl) No 600/1988, on Cartels and other Restraints of Competition, as last amended by BGBl. No 126/1999.

[1088] *See* H. WOLLMANN, "Competition Law in Austria", *in:* : F.O.W. VOGELAAR, J. STUYCK & B.L.P. VAN REEKEN (ed.), *op. cit.*, at 282.

[1089] BGBl. I 2005/61.

[1090] Act on Competition Restrictions, Act No. 480/1992 and last amended by the Act No. 623/1999.

products covered by the clause.[1091] A Government Bill refers to the EC competition law as a basis for interpretation of the domestic competition rules,[1092] so that it is likely that Finnish courts and regulators will also apply the implementation doctrine.

348. SWEDEN – Section 6 of the Swedish Competition Act[1093] paraphrases Article 81 of EC Treaty, stating that "agreements between undertakings shall be prohibited if they have as their object or effect the prevention, restriction or distortion of competition in the market to an appreciable extent." Likewise, pursuant to Section 19, "any abuse by one or more undertakings of a dominant position in the market shall be prohibited." Agreements or conduct situated outside Sweden but producing effects in Sweden may thus be subject to Swedish competition law.[1094]

349. DENMARK – Like the Swedish Competition Act, the Danish Competition Act[1095] provides in Section 6 that "any conclusion of agreements between undertakings etc., which have as their direct or indirect object or effect the restriction of competition shall be prohibited." Section 11, addressing the abuse of dominant position, does not touch upon the geographical scope of application. The wording of the Act, reflecting the EC Treaty, reveals that the implementation doctrine will also hold in Denmark.[1096]

350. GREECE – The Greek Competition Act[1097] prohibits in Article 1 all cartels "which have as their object or effect the prevention, restriction or distortion of competition", without any geographical requirement. Article 2 prohibits "any abuse by one or more undertakings of a dominant position within the national market as a whole or in a substantial part of it." As in Austria and Finland, export cartels are exempted (Article 6). As the Greek Competition Commission and the courts consistently heed EC competition law,[1098] the ECJ's implementation doctrine will apply in Greece as well.[1099]

351. CZECH REPUBLIC – The Czech Competition Act also applies to undertakings having their seat outside the country,[1100] but does not apply to conduct having effects on foreign markets.[1101]

[1091] Decision of Kilpailuneuvosto, 27 January 1994, Case No. 5/359/93, cited *in:* C. WIK & N. ISOKORPI, "Competition Law in Finland", *in:* F.O.W. VOGELAAR, J. STUYCK & B.L.P. VAN REEKEN (ed.), *op. cit.*, at 338-339.

[1092] Government Bill No. 162/1991, p. 6.

[1093] Competition Act, 14 January 1993 (SFS 1993:20), as last amended per 1 January 2001 (SFS 2000:1459).

[1094] *See* L. WIDÉN & S.P. LINDEBORG, "Competition Law in Sweden", *in:* F.O.W. VOGELAAR, J. STUYCK & B.L.P. VAN REEKEN (ed.), *op. cit.*, at 405.

[1095] Consolidated Competition Act No. 687 of 12 July 2000 (Act No. 384 of 10 June 1997 as amended by Act No. 416 of 31 May 2000).

[1096] *See* K. DYEKJAER-HANSEN & C. KARHULA LAURIDSEN, "Competition Law in Denmark", *in:* F.O.W. VOGELAAR, J. STUYCK & B.L.P. VAN REEKEN (ed.), *op. cit.*, at 471.

[1097] Act on the Control of Monopolies and Oligopolies and the Protection of Free Competition, Act of 26 September 1977 (no. 703/1977), as amended by Act of 3 August 2000 (no. 2837/2000).

[1098] *See* K. GR. VOUTERAKOS, "Competition Law in Greece", *in:* F.O.W. VOGELAAR, J. STUYCK & B.L.P. VAN REEKEN (ed.), *op. cit.*, at 585.

[1099] *Ibid.*, at 579.

[1100] Article 1 § 2 Act nr. 143 of 4 April 2001.

[1101] A. SCHWARZ & J.P. TERHECHTE, "Das neue tschechische Kartellrecht", 48 *Recht der Internationalen Wirtschaft* 2002, at 354.

352. SWITZERLAND – The Swiss Competition Act provides that it "applies to restrictive practices whose effects are felt in Switzerland, even if they originate in another country." [1102]As Switzerland is not a member of the EC, EC competition law does not apply. However, due to direct and indirect harmonization of EC and Swiss competition law, (the reach of) EC competition law may be taken into account.[1103]

6.6. Direct, substantial, and reasonably foreseeable effects

353. Foreign States may have protested against the exercise of effects jurisdiction by the United States because of the consequences such exercise entailed for their companies. It may however be argued that they have not questioned the principle itself,[1104] but rather wanted to limit its scope.[1105] It remains to be seen what limits the effects doctrine should be subject to. As AKEHURST warns: "Once we abandon the 'constituent elements' approach in favour of the 'effects' approach, we embark on a slippery slope which leads away from the territorial principle towards universal jurisdiction."[1106] A host of activities having almost no links with the regulating State could enter into its sphere of jurisdiction.[1107] Nearly every economic activity may have some effect in its territory, especially if the regulating State has a large and open economy (such as the U.S. and the EC.[1108] In order for States to avoid jurisdictional conflicts, and to prevent the effects and implementation doctrines from being politicized (a danger which should not be overlooked, especially when the government itself brings the antitrust suit),[1109] limits on the exercise of effects- or implementation-based jurisdiction should somehow be developed.[1110] If jurisdictional

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[1102] Article 2(2) of the Federal Act on Cartels and other Restraints of Competition of 6 October 1995.

[1103] *See* J. DROLSHAMMER, "Competition law in Switzerland", *in:* F.O.W. VOGELAAR, J. STUYCK & B.L.P. VAN REEKEN (ed.), *op. cit.*, 576-77.

[1104] *See* M. COSNARD, "Les lois Helms-Burton et d'Amato-Kennedy, interdiction de commercer avec et d'investir dans certains pays", *A.F.D.I.* 33, 40-41 (1996).

[1105] *See, e.g.*, P. TORREMANS, "Extraterritorial Application of E.C. and U.S. Competition Law", 21 *E. L. Rev.* 286-287 (1996); A.Th.S. LEENEN, "Extraterritorial application of the EEC-competition law", 15 *N.Y.I.L.* 139, 154 (1984) (stating that "it is thinkable that these protests were not directed against extraterritorial application itself or the legal basis thereof, but rather against the balancing of interests in the case in question or against extraterritorial application of enforcement measures").

[1106] *See* M. AKEHURST, "Jurisdiction in International Law", 46 *B.Y.I.L.* 145, 154 (1972-73). *See also* F.A. MANN, "The Doctrine of Jurisdiction in International Law", 111 *R.C.A.D.I.* 1, 85 (1964-I) (arguing that "jurisdiction in the international sense is … lacking, if what occurs within the State is not an essential or constituent element of the crime"); B. GOLDMAN, "Les champs d'application territoriale des lois sur la concurrence", 128 *R.C.A.D.I.* 631, 689 (1969-III).

[1107] *See also* P. DEMARET, "L'extraterritorialité des lois et les relations transatlantiques: une question de droit ou de diplomatie?", 21 *R.T.D.E.* 1, 5-6 (1985).

[1108] *See* E.S. PODGOR, ""Defensive Territoriality": a New Paradigm for the Prosecution of Extraterritorial Business Crimes", 31 *Ga. J. Int'l & Comp. L.* 1, 7 (2002).

[1109] *See, e.g.*, *United States* v. *Nippon Paper Indus. Co.*, 109 F.3d 1, 10 (1st Cir. 1997), Lynch, J., concurring (holding, in the context of the application of the effects doctrine to criminal antitrust law, that "[c]hanging economic conditions, as well as different political agendas, mean that antitrust policies may change from administration to administration").

[1110] K.M. MEESSEN, "Antitrust Jurisdiction Under Customary International Law", 78 *A.J.I.L.* 783, 796 (1984); J.-M. BISCHOFF & R. KOVAR, "L'application du droit communautaire de la concurrence aux entreprises établies à l'extérieur de la Communauté", 102 *J.D.I.* 675, 704 (1975). *See* in the U.S. context: H.L. BUXBAUM, "The Private Attorney General in a Global Age: Public Interests in Private Antitrust Litigation", 26 *Yale J. Int'l L.* 219, 226-27 (2001) ("Congress could not have intended domestic antitrust law to reach every international transaction tangentially implicating U.S. interests.").

restraints are geared to preventing international law from being violated, it could be argued that these restraints do themselves qualify as international law.

The most basic limits on the reach of antitrust laws are encapsulated by the requirement that the domestic effects of a foreign-based conspiracy be direct, substantial, and reasonably foreseeable, as set forth as early as 1965 in the Restatement (Second) of Foreign Relations Law.[1111] This requirement may serve the purpose of comity in that it reduces the odds of upsetting foreign States through broad assertions of jurisdiction, and, as a related matter, avoids the costs of extraterritorial jurisdiction to the asserting State through possible foreign retaliatory action.[1112] The requirement that effects be direct, substantial, and reasonably foreseeable now probably constitutes customary international law,[1113] possibly because it so vague and could easily be met by States[1114]. Because of its vagueness, it has been criticized as being useless for the courts.[1115]

6.6.1. Substantial effects

354. UNITED STATES – In the wake of the Second Circuit's momentous *Alcoa* judgment (1945), U.S. courts swiftly restricted the effects doctrine to effects in United States territory that were not merely trivial (*de minimis not curat praetor*). In 1949, the district court in *General Electric* required direct and *substantial* effects on trade.[1116] In the 1951 *Alfred Bell* case, the Second Circuit held that the Sherman Act did not apply to restraints on production in the United Kingdom when only a small percentage of the goods produced were sold in the United States.[1117] In *Swiss Watches* (1963) then, the district court held that "[a] United States court may exercise its jurisdiction as to acts and contracts abroad if, as in the case at bar, such acts and

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[1111] Section 18 of the Restatement (Second) of Foreign Relations Law:
"A State has jurisdiction to prescribe a rule of law attaching legal consequences to conduct that occurs outside its territory and causes an effect within its territory, if either
(a) the conduct and its effect are generally recognized as constituent elements of a crime or tort under the law of states that have reasonably developed legal systems, or
(b) (i) the conduct and its effect are constituent elements of activity to which the rule applies;
(ii) the effect within the territory is *substantial*;
(iii) it occurs as a *direct and foreseeable* result of the conduct outside the territory; and
(iv) the rule is not inconsistent with the principles of justice generally recognized by states that have reasonably developed legal systems." (emphasis added)

[1112] *See* G. SCHUSTER, "Extraterritoriality of Securities Laws: An Economic Analysis of Jurisdictional Conflicts", 26 *Law & Pol'y Int'l Bus.* 165, 189 (1994).

[1113] *See, e.g.*, K.M. MEESSEN, "Schadensersatz bei weltweiten Kartellen: Folgerungen aus dem Endurteil im Empagran-Fall", 55 *WuW* 1115, 1119 (2005).

[1114] *Compare id.*, at 1120 (arguing "dass es sich bei dem Wirkungsprinzip … um eine eher schwache völkergewohnheitsrechtliche Begrenzung kartellrechtlicher Jurisdiktion handelt").

[1115] *See* D.J. GERBER, "The Extraterritorial Application of the German Antitrust Laws", 77 *A.J.I.L.* 756, 780 (1983); J. KAFFANKE, "Nationales Wirtschaftsrecht und internationaler Sachverhalt", 27 *Archiv des Völkerrechts* 129, 134 (1989).

[1116] *United States v. General Electric Co.*, 82 F. Supp. 753 (D.N.J.1949), 115 F. Supp. 835 (D.N.J. 1953).

[1117] *Alfred Bell & Co. Ltd.* v. *Catalda Fine Arts, Inc.*, (1947) F. Supp. 973, 977; (1951), 191 F.2d 99, 106. The Court did not state that the *primary* effect nor even a *substantial* effect should be felt in the United States, Akehurst notes that it is submitted that jurisdiction on the basis of the objective territorial principle in criminal law can be claimed only by the state where the primary effect is felt (M. AKEHURST, *loc. cit.*, at 154). This is *inter alia* determined by the question whether the effects felt in one state are more substantial than the effects felt in other states.

contracts have a *substantial* and material effect upon our foreign and domestic commerce."[1118]

355. From the early decisions in the wake of *Alcoa*, it was clear that substantial effects were required for an American court to exercise effects-based jurisdiction.[1119] Hence, the 1965 Restatement (Second) set forth that "[t]he effects within the territory must be *substantial* and the direct and foreseeable result of the conduct outside the territory."[1120] The 1987 Restatement (Third) similarly held that effects-based jurisdiction over an agreement or conduct in restraint of U.S. trade should only be exercised "if the agreement or conduct has a *substantial* effect on U.S. commerce."[1121] Furthermore, the 1995 Antitrust Enforcement Guidelines for International Operations, issued by the U.S. Department of Justice (DoJ) and the Federal Trade Commission (FTC),[1122] state that "the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States."[1123]

The drafters of the Third Restatement distinguished between anticompetitive conduct or an anticompetitive agreement purposefully directed at the U.S., and such conduct or such an agreement no so directed. Indeed, if intent is present, "it is presumptively reasonable for the United States to exercise jurisdiction over that conduct or agreement, even if the actual effect proves to be *unsubstantial*."[1124] However, "[w]hen the intent to interfere with the commerce of the United States is not clear, or the purpose to do so is not dominant, United States law may be applied only if it is also shown that the challenged conduct or agreement has had, or is likely to have, *substantial* effect on the commerce of the United States."[1125]

356. It is unclear whether the substantiality test is a jurisdictional test or substantive antitrust liability test. Ordinarily, irrespective of the international character of a conspiracy, liability will only lie if the harmful effects of the conspiracy are not insignificant.[1126]

In antitrust cases involving purely domestic conduct, the Sherman Act applies if "the defendant's activity is itself in interstate commerce or, […] has an effect on some other appreciable activity demonstrably in interstate commerce."[1127] The Supreme

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[1118] *United States v. The Watchmakers of Switzerland Information Center, Inc.*, 1963 *Trade Cases* § 70 600 (S.D.N.Y. 1962), 133 *F. Supp.* 40 (S.D.N.Y. 1965) (emphasis added). *See also United States* v. *Timken Roller Bearing Co.*, 83 F. Supp. 284, 309 (N.D. Ohio 1949).

[1119] *See e.g. Montreal Trading Ltd.* v. *Amax, Inc.*, 661 F.2d 864, 870 (10th Cir. 1981) ("When the contacts with the United States are few, the effects upon American commerce minimal, and the foreign elements overwhelming, however, we do not accept jurisdiction.").

[1120] § 18 Restatement (Second) of American Foreign Relations Law (1965) (emphasis added).

[1121] § 415 (3) Restatement (Third) of American Foreign Relations Law (1987) (emphasis added).

[1122] Available at http://www.usdoj.gov/atr/public/guidelines/internat.htm

[1123] Section 3.1 of the Antitrust Enforcement Guidelines for International Operations.

[1124] *Id.*, comment a (emphasis added).

[1125] *Id.*

[1126] In antitrust cases involving purely domestic conduct, the Sherman Act applies if "the defendant's activity is itself in interstate commerce or, […] has an effect on some other appreciable activity demonstrably in interstate commerce." (*McLain v. Real Estate Board of New Orleans*, 444 U.S. 232, 242 (1980)). The Supreme Court held that there should be a substantial volume of interstate commerce involved in the activities of the conspirators before the Sherman Act applies.

[1127] *McLain v. Real Estate Board of New Orleans*, 444 U.S. 232, 242 (1980)

Court held that there should be a substantial volume of interstate commerce involved in the activities of the conspirators before the Sherman Act applies.[1128] The domestic standard is similar to the extraterritorial standard, although the latter will also apply in the absence of any interstate commerce. A mere effect on U.S. commerce in general suffices.

One may wonder then how the requirement of substantial effects for jurisdiction to obtain relates to the *de minimis* standard for antitrust liability. Most likely, the jurisdictional substantiality threshold is somewhat higher than the liability threshold.[1129] Indeed, as the Ninth Circuit held in the 1976 *Timberlane* case: "A greater showing of burden of restraint may be necessary to demonstrate that the effect is sufficiently large to present a cognizable injury to the plaintiffs and, therefore, a civil violation of antitrust laws."[1130] In clear-cut cases, either jurisdiction obtains, and liability lies as it does in purely domestic cases, or jurisdiction does not obtain and the case is dismissed. In borderline cases by contrast, jurisdiction may *prima facie* be accepted, but, after careful analysis of the merits of the case, liability may be accompanied by less draconian sanctions then had been the case were the violations wholly territorial.[1131]

357. It is also unclear whether 'substantiality' is a relative or absolute concept. Put differently, is substantiality to be determined in light of the significance of effects within the United States *relative to* the significance of the effects outside the United States, or does U.S. jurisdiction obtain as soon as the effects have reached a certain level of substantiality within the United States, irrespective of the impact abroad? Under the first interpretation, the substantiality requirement becomes part of the rule of reason which indeed mandates weighing the interests of the different States involved. The weaker the domestic effects in relation to the foreign effects the smaller the national interest in the assertion of jurisdiction will be.[1132] The 'relative' interpretation of the substantiality requirement may have lost its strength after the Supreme Court's judgment in *Hartford Fire* (1993). In *Hartford Fire*, the Supreme Court restated the substantiality requirement, holding that "it is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and

[1128] *Id.*, at 246 ("To establish federal jurisdiction in this case, there remains only the requirement that respondents' activities which allegedly have been infected by a price-fixing conspiracy be shown "as a matter of practical economics" to have a not insubstantial effect on the interstate commerce involved"). *See also Hospital Building Co. v. Rex Hospital Trustees*, 425 U.S., 738, 745 (1976); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 784, n. 11; *Burke v. Ford*, 389 U.S. 320, 321-322 (1967).

[1129] *Contra Dominicus Americana Bohio* v. *Gulf & Western*, 473 F. Supp. 680, 687 (1979) ("Indeed, it is probably not necessary for the effect on foreign commerce to be both substantial and direct as long as it is not de minimis.").

[1130] *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 613 (9th Cir. 1976).

[1131] *See, e.g.*, reporters' note 3 to Section 403 of the Restatement (Third), illustrating the difference in a typical U.S. procedural context ("The sufficiency effect to support application of United States law, as a *jurisdictional question*, may be raised by motion before trial, sometimes before complete discovery. In some circumstances, where the applicability of United States law was not clear under prevailing precedents, and the expectations of the parties that United States law would not apply might have been justified, it may be reasonable to deny damages (particularly treble damages), but to enjoin the challenged activity for the future. Such a determination is ordinarily made after the evidence is in.").

[1132] *See* P.M. ROTH, "Reasonable Extraterritoriality: Correcting the 'Balance of Interests', 41 *I.C.L.Q.* 245, 273 (1992). *See also Rivendell Forest Products* v. *Canadian Forest Products*, 810 F.Supp. 1116, 1118 (D.C. Colo. 1993) ("When the contacts with the United States are few, the effects upon American commerce minimal, and the foreign elements overwhelming, however, we do not accept jurisdiction."); *Mannington Mills v. Congoleum Corp.*, 595 F.2d 1287, 1297-1298 (3d Cir. 1979).

did in fact produce some substantial effect in the United States."[1133], yet by espousing the "true conflict" doctrine, it made interest-balancing nearly impossible.[1134] Under *Hartford Fire*, the relative amount of domestic adverse effects in relation to foreign adverse effects is not likely to determine the outcome of the substantiality test. This view is also taken by the U.S. Department of Justice.[1135]

358. With respect to non-import commerce, "substantial effects" are statutorily required for jurisdiction to obtain under the Foreign Trade Antitrust Improvements Act of 1982 ("FTAIA").[1136] It remains unclear whether the FTAIA standard amends existing law or merely codified it. In *Hartford Fire*, the Supreme Court refused to address the issue.[1137] BECKLER & KIRTLAND have analysed the requirement of substantial effects under FTAIA case-law.[1138] They pointed out that under the FTAIA courts have held that an injury to individuals or individual firms is insufficient by itself to constitute a substantial effect that creates subject matter jurisdiction.[1139] However, where injury to an individual causes injury to an entire

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[1133] *Hartford Fire Insurance Co. v. California*, 509 U.S. 764, 796 (1993). The Supreme Court's decisions under the Sherman Act as to the substantiality requirement should not be confused with these under the *Foreign Sovereign Immunities Act* (FSIA), 28 U.S.C. § 1605(a)(2). Under the latter, the requisite direct effect need not be substantial or foreseeable. Nevertheless, as far as the commercial exception in FSIA is concerned, the Supreme Court held that "the generally applicable principle de minimis non curat lex ensures that jurisdiction may not be predicated on purely trivial effects in the United States." *See Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 618 (1992). Consequently, conduct having a direct effect in the United States must be legally significant conduct in order for the commercial activity exception to apply. *See Filetech S.A.R.L. v. France Telecom*, 157 F.3d 922 (2d Cir. 1998). *See also Antares Aircraft, L.P. v. Federal Republic of Nigeria*, 999 F.2d 33, 34-35 (2d Cir. 1993).

[1134] *See* subsection 6.7.3.

[1135] Brief for the United States and the Federal Trade Commission as amici curiae, *Dee-K Industries v. Heveafil Std. Brd.*, on petition for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit, 29 May 2003, available on http://www.usdoj.gov/atr/cases/f201000/201042.htm: "In particular, the court of appeals' observation that the domestic links in a given case may be "mere drops in the sea of conduct that occurred" outside the United States is troubling. That statement might be read to mean that the Sherman Act would extend to a $10 million, purely domestic price-fixing cartel, but not extend to the domestic conduct of the same cartel if it expands to involve foreign producers, foreign meetings, and foreign sales to make it a $100 million global cartel. Certainly, conspirators should not be able to immunize the domestic effects of a conspiracy by broadening the conspiracy to include foreign markets."

[1136] Sherman Act, 15 U.S.C. 6(a). The Sherman Act does not apply to conduct involving trade or commerce (other than import trade or commerce) with foreign nations unless "such conduct has a direct, substantial, and reasonably foreseeable effect".

[1137] *Hartford Fire*, at 796, n. 23. In *LSL Biotechnologies*, the Court did not believe that the FTAIA merely codified existing antitrust law, and added the new requirement of "direct effects" (379 F.3d 672). Areeda and Hovenkamp argued it did (P.E. AREEDA & H. HOVENKAMP, *Antitrust Law*, § 277, at 362-63, 2nd ed., 2000), and so did dissenting judge Aldisert in *LSL Biotechnologies*, 379 F.3d 672, 691 ("[T]he promulgation of the statutory language "direct, substantial, and reasonably foreseeable effect", on United States trade or commerce when foreign activity is involved was merely a codification of the direct effects requirement that had been set forth in teachings of ruling case law, the Restatements of Foreign Relations Law, leading treatises of distinguished academics, the Department of Justice's 1977 *Antitrust Guide* and the American Bar Association's 1981 *Antitrust Section Report*.").

[1138] *See* R.W. BECKLER & M.H. KIRTLAND, "Extraterritorial Application of U.S. Antitrust Law: What Is a "Direct, Substantial, and Reasonably Foreseeable Effect" Under the Foreign Trade Antitrust Improvements Act?", 38 *Texas Int'l L. J.*, 1, 18-19 (2003).

[1139] *Id.*, at 18, referring to *McGlincy v. Shell Chemical Co.*, 845 F.2d 802, 812-13 (9th Cir.).

marketplace, jurisdiction may be warranted.[1140] What exactly constitutes a substantial effect appears to be fact-bound and is decided on a case-by-case basis by the courts, which recoil from promulgating a definite test. Courts mostly focus on the size of the affected market.[1141] The modest portion of U.S. effects *vis-à-vis* foreign effects is not likely to play a significant role, although, as argued *supra*, from a reasonableness perspective, it had better be included.[1142]

359. EUROPE – In the 1988 *Wood Pulp* case, the European Court of Justice, applying the implementation doctrine, did not mention the standard of substantial effects.[1143] Advocate General DARMON for his part argued in this opinion that "[a]ccording to the substantive provisions of Community law, the restriction of competition must be 'perceptible' or 'appreciable'."[1144] He was however not sure whether the jurisdictional substantiality test actually differed from the substantiality test used to determine liability, noting that "it is unclear whether the concept of effect provided for in Article [81] of the [EC] Treaty in order to establish the existence of an infringement of the competition rules is identical to that required by Community law, and accepted by international law, in order to determine whether there is jurisdiction over undertakings established outside the Community."[1145]

As far as substantiality as a liability standard is concerned, the ECJ has clarified that Article 81 (1) ECT is not applicable where the impact of the agreement on intra-Community trade or on competition is not appreciable (*i.e.*, the so-called *de minimis* doctrine).[1146] In a "Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) ECT (2001)",[1147] the Commission quantified, with the help of market share thresholds, what is not an appreciable restriction of competition under Article 81 ECT.[1148] This notice is without prejudice to any interpretation of Article 81 ECT which may be given by the Court of Justice or the Court of First Instance of the European Communities.[1149] The Commission's notice will also apply to foreign conspiracies. It has been observed that the European standard of "appreciable effects" is not interchangeable with the U.S. standard of

[1140] *Id.*, at 18 ("This injury can occur where there is a limited number of competitors in a given market and injury to one, by definition, injures the market", referring to *Coors Brewing Co. v. Miller Brewing Co.*, 889 F.Supp. 1394, 1398 (D. Colo. 1995)).
[1141] *Id.*, at 18 (referring to *Access Telecom, Inc. v. MCI Telecommunications Corp.*, 197 F.3d 694, 712 (5th Cir. 1999)).
[1142] *See, e.g.*, C. SPRIGMAN, "Fix Prices Globally, Get Sued Locally? U.S. Jurisdiction Over International Cartels", 72 *U. Chi. L. Rev.* 265, 286 (2005) (stating that, "[w]hile it is impractical to set an absolute threshold for substantiality, it may make sense to inquire whether a cartel's effect on U.S. commerce is substantial relative to its effect abroad. Deference may be warranted when the foreign effect predominates …").
[1143] ECJ, *Wood Pulp*, 1988 *E.C.R.* 5193, 5240-5247.
[1144] ECJ, *Wood Pulp*, at 5226, § 52.
[1145] ECJ, *Wood Pulp*, at 5226, § 51.
[1146] *See also Volk v. Vervaecke*, 5/69 [1969] *ECR* 295; ECJ, *Wood Pulp*, at 5243-44; *Béguelin*, 1971 E.C.R. at 960.
[1147] *O.J.* C 368/07 (2001).
[1148] The Commission observed in Article 2 of its *de minimis* notice however that "[t]his negative definition of appreciability does not imply that agreements between undertakings which exceed the thresholds set out in this notice appreciably restrict competition. Such agreements may still have only a negligible effect on competition and may therefore not be prohibited by Article 81(1)".
[1149] *Id.*, Article 6.

"substantial" or "considerable effects".[1150] It rather denotes "perceptible" or "noticeable" effects, possibly "insubstantial effects". Assuming that the liability and jurisdictional substantiality standard coincide in Europe,[1151] jurisdiction may be more readily established in Europe than in the United States.

360. CUSTOMARY INTERNATIONAL LAW – Both the U.S. and Europe require that the effects of foreign business-restrictive practices be substantial before jurisdiction could be established. There is, however, no consensus on what effects constitute "substantial" effects, uncertainty prevails. This reduces the efficiency of international business transactions and invites the question whether qualifying effects as "substantial" effects actually serves any jurisdictional purpose.[1152] Moreover, as the U.S. and the EC also require that the effects of *domestic* business-restrictive be substantial (substantiality as a liability standard), it is unclear whether the requirement of substantiality constitutes customary international law. Indeed, if States are not convinced that the requirement of substantiality is also an international jurisdictional requirement, and not merely a liability requirement, *opinio juris* might be lacking. Only to the extent that States require a higher substantiality standard for foreign transactions than for domestic transactions, or weigh the substantial effects in different States involved, in short, when they take into account other States' interests, might the substantiality requirement constitute customary international law.

6.6.2. Direct effects

361. UNITED STATES – In order for U.S. courts and regulators to establish jurisdiction under the effects doctrine, it is generally believed that direct effects upon or in U.S. territory are needed.[1153] Under the Restatement (Third) of U.S. Foreign Relations Law however, directness is only one factor to determine the reasonableness

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[1150] *See* R.P. ALFORD, "The Extraterritorial Application of Antitrust Laws: The United States and European Community Approaches", 33 *Va. J. Int'l L.* 1, 40 (1992), citing Panel Discussion on Application of Competition Law to Foreign Conduct, in B.E. HAWK (ed.), *International Antitrust Law & Policy*, Fordham Corp. L. Inst. 311, 322 (1986) (statement of Prof. Lowenfeld).

[1151] In this sense J.-M. BISCHOFF & R. KOVAR, "L'application du droit communautaire de la concurrence aux entreprises établies à l'extérieur de la Communauté", 102 *J.D.I.* 675, 705 (1975) ; J. FRISINGER, "Die Anwendung des EWG-Wettbewerbsrechts auf Unternehmen mit Sitz in Drittstaaten", *A.W.D.* 553, 558 (1972).

[1152] *See, e.g.*, G. SCHUSTER, "Extraterritoriality of Securities Laws: An Economic Analysis of Jurisdictional Conflicts", 26 *Law & Pol'y Int'l Bus.* 165, 190 (1994) (stating that "[u]ntil there is international consensus with respect to the definition of "substantial" effects, utility expectations associated with the unlimited and the limited effects principle [the latter being qualified by the requirement of substantiality, and the former not], utility expectations associated with the unlimited and the limited effects principle will be more or less equal.").

[1153] *See* for some early cases: *United States* v. *Timken Roller Bearing Co.*, 83 F.Supp. 284, 309 (N.D. Ohio 1949) ("[T]he fact that the cartel agreements were made on foreign soil [does not] relieve defendant from responsibility … They had a *direct* and influencing effect on trade in tapered bearings between the United States and foreign countries."); *United States* v. *Gen. Elec. Co.*, 82 F.Supp. 753, 891 (D.N.J. 1949) ("the second requirement for the finding of a violation on the part of Philips [is] that its activities must have had a direct and substantial effect upon trade…"). *See* for two later cases: *Occidental Petroleum Corp.* v. *Buttes Gas & Oil Co.*, 331 F.Supp. 92, 102-103 (C.D. Cal. 1971) (quoting two authorities on extraterritorial antitrust jurisdiction advocating the requirement of "direct effects"); *Todhunter-Mitchell & Co.* v. *Anheuser-Busch, Inc.* 383 F.Supp. 586, 587 (E.D. Pa. 1974) ("Restraints which directly affect the flow of foreign commerce into or out of this country are subject to the provisions of Section 1 of the Sherman Act.").

of a jurisdictional assertion,[1154] which may open up the possibility that jurisdiction may also obtain in the absence of direct effects, provided that other reasonableness factors weigh sufficiently in favour of a finding of U.S. jurisdiction.[1155] In contrast, insubstantial effects could never give rise to jurisdiction, as § 402 of the Restatement (Third) provides that a State only has jurisdiction with respect to "conduct outside its territory that has or is intended to have substantial effect within its territory."[1156] For non-import commerce, direct effects are statutorily required under the FTAIA.[1157]

362. Required or not for import commerce, the "direct effects" criterion may not be very helpful as a tool of jurisdictional restraint. Indeed, according to the 1995 Antitrust Enforcement Guidelines for International Operations, issued by the U.S. DoJ and the FTC,[1158] "imports into the United States by definition affect the U.S. domestic market directly, and will, therefore, almost invariably satisfy the intent part of the *Hartford Fire* test. Whether they in fact produce the requisite substantial effects will depend on the facts of each case."[1159]

In a recent case, the Ninth Circuit held, in accordance with the Restatement, that "the *Alcoa* test does not require the effect to be 'direct'."[1160] The dissenting judge in this case admitted that there are hardly any cases setting forth the requirement of "direct effects", but he believed that this precisely "attest[ed] to the requirement that showing a direct effect on interstate commerce is a *sine qua non* of antitrust liability."[1161] Directness, like substantiality, may thus be a *liability* rather than a *jurisdictional* requirement.

363. However unclear the existence of a "direct effects" requirement, even more unclear is its possible content. In *LSL Biotechnologies* (2004), in order to define "direct effects" for purposes of antitrust jurisdiction, the Ninth Circuit drew inspiration from the Supreme Court's interpretation of "direct effects" in the Foreign

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[1154] § 403 (2) (a) of the Restatement (Third). *Compare* Section 18 of the Restatement (Second) of Foreign Relations Law of the United States (1965), which provides that a State has effects jurisdiction if "(b) (ii) the effect within the territory is substantial; (b) (iii) it occurs as a *direct* and foreseeable result of the conduct outside the territory" (emphasis added).

[1155] *See* § 403 (2) of the Restatement (Third) ("Whether exercise of jurisdiction over a person or activity is unreasonable is determined *by evaluating all relevant factors*, including, *where appropriate*: (a) the link of the activity to the territory of the regulating state, i.e., the extent to which the activity takes place within the territory, *or* has substantial, direct, and foreseeable effect upon or in the territory.") (emphasis added)

[1156] The specific antitrust provision, § 415 (3) of the Restatement (Third), does not even contain a reference to "direct and foreseeable" effects, although directness and foreseeability could obviously be taken into account in a reasonableness analysis. Under § 415 (3), substantial effects may suffice for there to be jurisdiction. Pursuant to § 415, jurisdiction over an agreement or conduct in restraint of U.S. trade is indeed warranted if a principal purpose of the agreement or conduct is to interfere with U.S. commerce, and the agreement has some effect on that commerce [§ 415 (2)]; or if the agreement or conduct has a substantial effect on U.S. commerce and the exercise of jurisdiction is not unreasonable [§ 415 (3)].

[1157] Sherman Act, 15 U.S.C. 6(a). The Sherman Act would not apply to conduct involving trade or commerce (other than import trade or commerce) with foreign nations unless "such conduct has a direct, substantial, and reasonably foreseeable effect".

[1158] *Hartford Fire Insurance Co. v.* California, 509 U.S. 764, 796; http://www.usdoj.gov/atr/public/guidelines/internat.htm

[1159] Section 3.1.1 Antitrust Enforcement Guidelines for International Operations.

[1160] *U.S.* v. *LSL Biotechnologies*, 379 F.3d 672, 679 (9th Cir. 2004).

[1161] *Id.*, at 687.

Sovereign Immunities Act (FSIA)[1162].[1163] In *Republic of Argentina* v. *Weltover, Inc.*, the Supreme Court held that "an effect is "direct" if it follows as an immediate consequence of the defendant's activity".[1164] It added that the FSIA provision containing the requirement of "direct effects" "[did] not [contain] any unexpressed requirement of "substantiality" or "foreseeability."[1165]

In a measure of the immature state of U.S. courts' efforts to define "direct effects", the majority in the cited *LSL Biotechnologies* antitrust case relied on one meaning of "direct" in Webster's Third New International Dictionary ("proceeding from one point to another in time or space without deviation or interruption"),[1166] while the dissenting judge pointed out that "[t]he same dictionary source contains seven main meanings in the adjective form, encompassing 31 more specific subsidiary meanings", and eventually chose a definition of "direct effects" by the Oxford Dictionary of the English Language ("proceeding immediately from consequent to antecedent, from cause to effect").[1167] Quite reasonably, the International Working Group on Antitrust Modernization recently proposed a legislative solution to clarify the scope of the FTAIA with respect to the requirement of "direct effects".[1168] .

364. Whatever the merits of a linguistic discussion, it seems that directness requires that a causal connection be established between the foreign activities and the effects in the State exercising jurisdiction. BECKLER and KIRTLAND have found some indicia of "direct effects" under the FTAIA. After an analysis of relevant case law, they consider "paying higher prices" to be direct harm to customers, as well as "artificial inflation of prices of a given product", "artificial limits on the volume of imported products", "an artificial reduction in prices of a given product" and "artificial limits on the volume of products exported from the U.S."[1169] An agreement between a defendant and another company that barred the other company from distributing as yet undeveloped products in the U.S. may however not have direct effects on U.S. commerce.[1170] In sum, it is of utmost importance that the plaintiff establishes a causal connection between the foreign activities and the elimination or significant reduction of competition in the United States for there to be a direct effect.[1171] Price increases may be an indication.

[1162] 28 U.S.C. § 1605 (a) (2).
[1163] *See U.S.* v. *LSL Biotechnologies*, 379 F.3d 672, 680 (9th Cir. 2004).
[1164] 504 U.S. 607, 618 (1992) (citation omitted).
[1165] *Id.*
[1166] 379 F.3d 680.
[1167] 379 F.3d 692 (Aldisert, J., diss.) (drawing a comparison with "proximate cause" in the law of torts).
[1168] Memorandum, December 21, 2004, p. 4, available at http://www.amc.gov/pdf/meetings/International.pdf.
[1169] *See* R.W. BECKLER & M.H. KIRTLAND, "Extraterritorial Application of U.S. Antitrust Law: What Is a "Direct, Substantial, and Reasonably Foreseeable Effect" Under the Foreign Trade Antitrust Improvements Act?", 38 *Texas Int'l L. J.*, 1, 19-20 (2003).
[1170] *U.S.* v. *LSL Biotechnologies*, 379 F.3d 681 (9th Cir. 2004) (holding that "an effect cannot be "direct" where it depends on such uncertain intervening developments" as the delay of possible and speculative innovations in the development of "long shelf-life" tomato seeds). *Contra*: *id.*, at 695 (Aldisert, J., diss.) ("… I am convinced that there is no persuasive reason why a restraint on selling seeds in Mexico cannot have a "direct" effect on United States domestic commerce in tomatoes").
[1171] *See Eurim-Pharm GmbH v. Pfizer, Inc.*, 593 F. Supp., 1102, 1107 (S.D.N.Y. 1984); *Coors Brewing Co. v. Miller Brewing Co.*, 889 F. Supp. 1394, 1397-1398 (D. Colo. 1995); *Galavan Supplements, Ltd. v. Archer Daniels Midland Co.*, No. C97-3259FMS, 1997 WL 732498, at *3 (N.D. Cal. Nov. 18, 1997); *Crompton Corporation v. Clariant Corp.*, 220 F.Supp.2d 569, 573-74 (M.D.La. 2002).

365. EUROPE – As discussed in section 6.4, the European Court of Justice has not yet upheld the effects doctrine in cartel cases. Nonetheless, in the *Dyestuffs* and *Wood Pulp* cases, the ECJ did not fail to refer to foreign-based conspiracies' direct effects within the common market.

In Europe, direct effects appear to be required for jurisdiction to obtain. Paying higher prices domestically as a result of foreign concerted practices is the most important indication of a direct effect, as it is in the United States as well. In *Dyestuffs*, the ECJ held that "[s]ince a concerted practice is involved, it is first necessary to ascertain whether the conduct of the applicant has had effects within the Common Market",[1172] and found that "[i]t appears … that the increases at issue were put into effect within the Common Market and concerned competition between producers operating within it."[1173] The Court then went on to state "the actions for which the fine at issue has been imposed constitute practices carried on directly within the Common Market,"[1174] and thus, that "direct effects" within the Common Market could be gleaned from sales at increased prices.

366. As in the United States, the question may arise whether the jurisdictional standard of "direct effects" is synonymous with the liability standard of "direct effects". In view of the opinions of the Advocates General in both *Dyestuffs* and *Wood Pulp*, it may be argued that it is not. Advocate General MAYRAS in *Dyestuffs* held that "the agreement or the concerted practice must create a *direct and immediate restriction on competition* on the national market or, as here, on the Community market. In other words, an agreement only having effects at one stage removed by way of economic mechanisms themselves taking place abroad could not justify jurisdiction over participating undertakings whose registered offices are also situated abroad."[1175] Effects caused by the latter agreement could well fall within the scope of substantive (liability-related) Community law, under which "[t]he adverse effect on competition may be either direct or indirect and objectively or reasonably foreseeable."[1176] Like Advocate General Mayras in *Dyestuffs*, Advocate General DARMON in *Wood Pulp* noted that "not all of those characteristics have to be adopted if the effect is taken as the criterion of extraterritorial jurisdiction. The most important reservation in that regard concerns indirect effect."[1177] "Directness" was subsequently tied to selling within the Community at higher prices by the ECJ in *Wood Pulp*, which held that "[w]here wood pulp producers established in those countries sell directly to purchasers established in the Community and engage in price competition in order to win orders from those customers, that constitutes competition within the common market."[1178] In the doctrine of the late 1960s and early 1970s, it was pointed out, rather convincingly, that an effect is indirect if the intermediary event between the

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[1172] *Dyestuffs*, Case 48/69, *Imperial Chemical Industries Ltd. v. Commission of the European Communities*, E.C.R. 1972, 619, 662, § 126.
[1173] *Id.*, § 127.
[1174] *Id.*, § 128. *See also* § 129 ("It follows from what has been said in considering the submission relating to the existence of concerted practices, that the applicant company decided on increases in the selling prices of its products to users in the Common Market, and that these increases were of a uniform nature in line with increases decided upon by the other producers involved.").
[1175] *Dyestuffs*, E.C.R. 1972, at 694 (emphasis added).
[1176] *Wood Pulp*, Opinion of Advocate General DARMON, 5214, at 5226, § 52.
[1177] *Id.*, § 53.
[1178] *Wood Pulp*, at 5242, § 12.

anticompetitive conduct and the restraint of competition occurred outside the Community.[1179] It was argued that, if jurisdiction could obtain on the basis of indirect effects, the international law principle of non-intervention might be violated.[1180]

367. CUSTOMARY INTERNATIONAL LAW – The *Wood Pulp* view, which arguably identified direct effects with direct sales is remarkably similar to the view of the U.S. DoJ and the FTC, which stated in their 1995 Antitrust Guidelines for International operations that "imports [selling directly] into the United States by definition affect the U.S. domestic market directly".[1181] The requirement of "direct effects", if limited to direct sales within the territory of the regulating State, may thus well constitute a norm of customary international law. EC practice may not authorize jurisdiction on the basis of effects caused by non-import commerce, so that it is unlikely that effects that do not stem from direct sales will qualify as direct effects under international law.

6.6.3. Foreseeable effects and intent

368. UNITED STATES – It is often argued that there is a jurisdictional requirement of foreseeable effects alongside the requirement of substantial and direct effects.[1182] For non-import commerce, the FTAIA indeed requires there to be reasonably foreseeable effects.[1183] For import commerce, foreseeability is not strictly required, as, like directness, it is only a factor to be taken into account in a jurisdictional reasonableness analysis.[1184] If it is indeed required, it is however possible that, like substantiality and directness, foreseeability may be a liability requirement rather than a jurisdictional requirement. The Ninth Circuit for instance has recently pointed out that "foreseeability might be a concept inherent in any scheme that seeks to impose liability."[1185]

[1179] *See* B. GOLDMAN, "Les champs d'application territoriale des lois sur la concurrence", 128 *R.C.A.D.I.* 631, 696 (1969-III). *See* for an example of indirect effects over which jurisdiction should not obtain : J.-M. BISCHOFF & R. KOVAR, "L'application du droit communautaire de la concurrence aux entreprises établies à l'extérieur de la Communauté", 102 *J.D.I.* 675, 707 (1975) (Drawing on an 1972 ILA report, the authors give the example of a cartel in State A abusing its dominant position and dumping products on the market of State B, as a result of which corporations in State C who are outprized in on State's B market, increase their prices in State B. The authors argue that State B is authorized to exercise its jurisdiction over the practices of the cartel, because the territorial effects of the cartel agreement are direct, while State C is not authorized to exercise its jurisdiction, because the territorial effects are only indirect.).
Compare J. STOUFFLET, "La compétence extraterritoriale du droit de la concurrence de la Communauté économique européenne", 98 *J.D.I.* 487, 496 (1971) (stating, rather vaguely, that, in order to assess whether an effect is direct, one has conduct "une analyse purement objective des mécanismes économiques.").

[1180] *See* J.-M. BISCHOFF & R. KOVAR, "L'application du droit communautaire de la concurrence aux entreprises établies à l'extérieur de la Communauté", 102 *J.D.I.* 675, 706 (1975). *Compare* J. FRISINGER, "Die Anwendung des EWG-Wettbewerbsrechts auf Unternehmen mit Sitz in Drittstaaten", *A.W.D.* 553, 558 (1972) ("Es handelt sich um kein in Art. 85 oder 86 EWGV selbst enthaltenes Tatbestandsmerkmal, sondern um einen Bestandteil der dort nicht geregelten *äuseren Kollisionsnorm*.") (emphasis added).

[1181] *See supra.*

[1182] *See* for two early decisions setting forth the requirement of foreseeability: *United States* v. *General Elec. Co.*, 82 F. Supp. 753, 889-91 (D.N.J. 1949); *United States* v. *National Lead Co.*, 63 F. Supp. 513, 524-25 (S.D.N.Y. 1945), *aff'd*, 332 U.S. 319 (1947).

[1183] Sherman Act, 15 U.S.C. § 6a.

[1184] § 403 (2) (a) Restatement (Third) of U.S. Foreign Relations Law.

[1185] *See U.S.* v. *LSL Biotechnologies*, 379 F.3d 672, 679 (9th Cir. 2004).

369. U.S. courts and regulators ordinarily require not just reasonable foreseeability, but also intent for jurisdiction to obtain.[1186] Requiring intent may theoretically serve comity,[1187] in that it weeds out quite a number of cases that could set the U.S. on a collision course with other nations. SPRIGMAN has however pointed out that, although "[t]he intent element dutifully has been included in most courts' articulations of the test", it is "in practice usually… ignored … given the difficulty of discerning intent."[1188] It is unclear whether intended or threatened effect without actual effect on the commerce of the United States suffices for jurisdiction to obtain.[1189] If it does, such does not by itself run counter to international law.[1190]

The Department of Justice considers that "imports into the United States by definition affect the U.S. domestic market directly, and will, therefore, almost invariably satisfy the intent part of the *Hartford Fire* test."[1191] For the DoJ, imports have *per se* direct effects, and possible price increases create a presumption of intent,[1192] which is probably not easy to rebut. Intent is generally presumed, and specific intent is not required. Intent can also be inferred from the nature of an agreement, if effects on the U.S. are foreseeable.[1193]

Some U.S. courts wholly forsake the intent requirement. In a 1981 case, the Court of Appeals for the Second Circuit held in *National Bank of Canada v. Interbank Card Association* that the "important question" was whether the conduct "can be *foreseen* to have any appreciable anticompetitive effects on United States commerce."[1194] The Sherman Act was assumed by the Second Circuit to apply to anticompetitive conduct short of intent, provided that the effects on U.S. commerce could be foreseen.[1195] It

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[1186] *See also United States v. Aluminium Corp. of America*, 148 F.2d 416 (2d Cir. 1945); *Laker Airways v. Sabena*, 731 F.2d 909, 924 (1984); *Timberlane Lumber v. Bank of Am*., 549 F.2d 597, 615 (1976*); Zenith Radio v. Matsushita Elec. Indus.*, 494 F. Supp. 1161, 1186 (1980). *Compare:* M. COSNARD, "Les lois Helms-Burton et d'Amato-Kennedy, interdiction de commercer avec et d'investir dans certains pays", 42 *AFDI* 1996 at 40-41 (holding "que l'effet substantiel doit être intentionnel et direct.").

[1187] *See* C. SPRIGMAN, "Fix Prices Globally, Get Sued Locally? U.S. Jurisdiction Over International Cartels", 72 *U. Chi. L. Rev.* 265, 268 (2005).

[1188] *Id.*

[1189] § 415 Restatement (Third) of U.S. Foreign Relations Law (1987), comment d. Compare P. TORREMANS, "Extraterritorial Application of E.C. and U.S. Competition Law", 21 *E. L. Rev.*, 280, 281 (1996) ("U.S. anti-trust law was to be applied to each anti-competitive agreement concluded with the intention to affect U.S. commerce if the agreement did effectively have that effect.").

[1190] *See* § 403 Restatement (Third) of U.S. Foreign Relations Law (1987), comment d ("Cases involving intended but unrealized effect are rare, but international law does not preclude jurisdiction in such instances, subject to the principle of reasonableness,").

[1191] *See supra.*

[1192] *Compare United States v. Watchmakers of Switzerland Information Center Inc.*, 1963 Trade cases CCH, § 70,600, 1963 Trade cases CCH, § 71,352. In *Swiss Watchmakers*, the Court found intentional restraint of U.S. commerce, even though the restraint was directed at Switzerland.

[1193] *See* M. JEFFREY, "The Implications of the Wood Pulp Case for the European Communities", *L.J.I.L.* 75, at 88 (1991).

[1194] *National Bank of Canada v. Interbank Card Association*, 666 F.2d 6, 8-9 (2d Cir. 1981) (emphasis added). *Compare United States v. General Electrical Co.*, 82 F.Supp. 753, 884-885.

[1195] *Compare* § 415 *Restatement*: when there is no intent ["(1) if a principal purpose of the agreement or conduct is to interfere with U.S. commerce and there is some consequent effect on that commerce"], subject matter jurisdiction may still be possible "(2) if the agreement or conduct has a substantial effect on U.S. commerce and the exercise of jurisdiction is not unreasonable." In the reasonableness test, foreseeability arguments may play a role. *National Bank of Canada v. Interbank Card Association* may

may be noted that neither does the 1982 Foreign Trade Antitrust Improvement Act (FTAIA), which governs non-import commerce, and has risen to prominence in recent years in the context of foreign-injured plaintiffs suing in U.S. courts, require intent, satisfying itself with the "direct, substantial, and reasonably foreseeable effect" standard.[1196]

370. EUROPE – In the ECJ *Dyestuffs* and *Wood Pulp* judgments, there is no trace of a requirement of foreseeable effects. However, in *Dyestuffs*, Advocate General MAYRAS held that "the effect of the conduct must be *reasonably foreseeable*, although there is no need to show that the effect was intended."[1197] In the doctrine, reasonable foreseeability, short of intent was also defended.[1198] Part of the doctrine believed that the reasonable foreseeability of effects was not required under international law.[1199] It is unclear whether there have been competition cases in which jurisdiction was premised on mere reasonable foreseeability of territorial effects, in the absence of intent. However, even if intent is not found, it may be argued that it will be difficult to establish jurisdiction as unintentional effects may often be indirect effects which do not satisfy the directness test.

It is unclear whether a mere finding of "intent" or "reasonable foreseeability", short of adverse economic repercussions within the EC, may suffice for a finding of jurisdiction under EC competition law. The majority doctrine seems to support jurisdiction on the basis of virtual effects,[1200] although some doctrine requires intent in that case.[1201] In the field of merger control regulation, as will be discussed in

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after 1982 have been subject to the FTAIA, for which the "foreseeable effects" are a statutory requirement anyway. In that sense, it is not a precedent for import commerce, which was later governed by the *Hartford Fire* standard.

[1196] § 6a(1) of the Sherman Act.

[1197] *Dyestuffs*, E.C.R. 1972, 619, 694.

[1198] *See* B. GOLDMAN, "Les champs d'application territoriale des lois sur la concurrence", 128 *R.C.A.D.I.* 631, 692 (1969-III). *Contra* J. STOUFFLET, "La compétence extraterritoriale du droit de la concurrence de la Communauté économique européenne", 98 *J.D.I.* 487, 494 (1971).

[1199] *See* J.-M. BISCHOFF & R. KOVAR, "L'application du droit communautaire de la concurrence aux entreprises établies à l'extérieur de la Communauté", 102 *J.D.I.* 675, 708 (1975).

[1200] *Pro:* B. GOLDMAN, "Les champs d'application territoriale des lois sur la concurrence", 128 *R.C.A.D.I.* 631, 695, 704-705 (1969-III) ; J.-M. BISCHOFF & R. KOVAR, "L'application du droit communautaire de la concurrence aux entreprises établies à l'extérieur de la Communauté", 102 *J.D.I.* 675, 687 (1975) (stating that « [l]a notion d'objet [used in then Article 85 ECT] renvoie à la nocivité potentielle ou raisonnablement prévisible de la pratique restrictive … Il faut, mais il suffit aussi, que l'effet réel ou virtuel de la pratique restrictive se produise dans le marché commun pour que le droit communautaire de la concurrence trouve à s'appliquer. »); R.P. ALFORD, "The Extraterritorial Application of Antitrust Laws: The United States and European Community Approaches", 33 *Va. J. Int'l L.* 1, 41 (1992) (citing ECJ, *Société Technique Miniere* v. *Maschinenbau Ulm GmbH* (Case 56/65), 166 E.C.R. 235, 5 *C.M.L.R.* 357, 375 (1966) (ECJ ruling that "the agreement in question should ... allow one to expect, with a sufficient degree of probability, that it would exercise a direct or indirect, *actual or potential*, effect on the eddies of trade between member-States.") (emphasis added). *Contra* I. SEIDL-HOHENVELDERN, "Völkerrechtliche Grenzen bei der Anwendung des Kartellrechts", 17 *A.W.D.* 53, 57-59 (1971) (arguing that the presumption of guilt which underlies reliance on reasonable foreseeability short of intent may violate Article 6, § 2, of the European Convention on Human Rights).

[1201] *See* J.-M. BISCHOFF & R. KOVAR, "L'application du droit communautaire de la concurrence aux entreprises établies à l'extérieur de la Communauté", 102 *J.D.I.* 675, 710 (1975) (« [S]i la menace est précise et vise un ou plusieurs pays déterminés, il nous paraît que les Etats ainsi désignés ont un intérêt légitime à agir immédiatement et à prévenir le mal, s'il en est encore temps, plutôt que de le subir. Encore faut-il qu'il n'y ait aucun doute sur l'existence d'une menace précise, et c'est pourquoi dans

section 6.12, *actual* adverse effects are not required. Because merger control is, unlike dismantling cartels, *preventive* regulatory intervention over conduct of which the effects are by definition future, the reasonable foreseeability of hypothetical or potential effects suffices.

371. CUSTOMARY INTERNATIONAL LAW – Like the substantiality and directness standard, the standard of reasonably foreseeable effects may suffer from it being an ordinary antitrust liability requirement, which undercuts its normative value as a requirement of international jurisdiction. Courts, especially in the U.S., may apply a stricter standard of intent, yet it is unclear whether they do so because international law obliges them to. It is similarly unclear whether jurisdiction could be established on the basis of a mere finding of intent or reasonable foreseeability short of actual effects.

6.7. The jurisdictional rule of reason in antitrust cases

372. As set out in the previous chapter, the present-day jurisdictional rule of reason restated in Section 403 of the Restatement (Third) of U.S. Foreign Relations Law derives from U.S. antitrust law. Indeed, the seminal *Timberlane* judgment of the Ninth Circuit (1976) introduced interest-balancing as a method of jurisdictional restraint in international antitrust litigation, a decision which was later hailed by the OECD.[1202] The rule of reason however came under the attack from the U.S. doctrine and U.S. courts alike. In the 1993 *Hartford Fire* case, the Supreme Court confined the rule of reason to situations where there was a true conflict between U.S. and foreign law. This part will argue that this is a mistake, and that only a *Timberlane*-style reasonableness analysis gives due consideration to foreign States' interests. Only *Timberlane* guarantees that the principle of non-intervention is upheld in antitrust matters. The application, or rather non-application, of the rule of reason in Europe, also in the field of antitrust law, has been discussed in chapter 5.5. However, the defense of *Timberlane* and the rejection of *Hartford Fire* will also apply to EC practice, as the ECJ in *Wood Pulp* (1988) and the European Court of First Instance in *Gencor* (1999) took essentially the same – undesirable – true conflict approach to international comity as the U.S. Supreme Court did in *Hartford Fire*.

6.7.1. Timberlane: balancing interests

373. FROM BREWSTER TO *TIMBERLANE* – In a 1958 monograph, titled *Antitrust and American Business Abroad*, Professor Kingman BREWSTER argued that "*[a]d hoc* weighing of conflicting interests at both the level of administration and judicial determination seems better suited to [international] antitrust than would any hard-and-fast jurisdictional rule based on territoriality or nationality."[1203] Brewster

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cette hypothèse nous admettrions volontiers que l'effet virtuel dans le pays considéré, ait dû être *principalement visé* dans l'accord ou la pratique intervenu à l'étranger. »).

[1202] OECD Recommendation for extraterritorial application of competition laws, OECD Doc. No. C (86) 44 (Final) (May 21, 1986) (citing "the need … to give effect to the principles of international law and comity and to use moderation and self-restraint in the interest of cooperation in the field of restrictive business practices").

[1203] K. BREWSTER, *Antitrust and American Business Abroad*, New York, McGraw-Hill, 1958, 445 (1958). Brewster set forth the following factors to be weighed: "(a) the relative significance to the violations charged of the conduct within the United States as compared with conduct abroad; (b) the extent to which there is explicit purpose to harm or affect American consumers or Americans' business

was the first to advocate interest-balancing to solve conflicts of jurisdiction in antitrust cases. Soon after, in 1965, his approach was embraced by the Restatement (Second) of U.S. Foreign Relations Law.[1204]. Calls to conduct an interest-balancing analysis along the lines of Brewster's admonitions or § 40 of the Restatement went unheeded in U.S. court practice until 1976,[1205] when a major breakthrough came about in *Timberlane*, a decision by the Court of Appeals for the Ninth Circuit.[1206] Outside the field of antitrust law however, U.S. courts, deciding transnational discovery cases, were as early as 1960 willing to defer to foreign law on comity grounds, even absent a direct conflict between U.S. and foreign law.[1207] It is not unlikely that the *Timberlane* court, which applied a jurisdictional rule of reason in an international antitrust case, drew upon these discovery cases.[1208]

374. *TIMBERLANE*'S TRIPARTITE TEST – In *Timberlane*, the plaintiff, the American lumber company Timberlane, sued defendants in Honduras and the Bank of America, alleging that the latter conspired to prevent it from exporting to the United States. The case could perfectly be dealt with under the *Alcoa* effects doctrine. Judge CHOY, however, writing for the majority, rejected the application of the effects doctrine in the case "because it failed to consider other nations' interests,"[1209] and pointed out that "at some point the interests of the United States are too weak and the foreign harmony incentive for restraint too strong to justify an extraterritorial assertion of jurisdiction".[1210] In the Ninth Circuit's view, effects, even qualified as direct, substantial, and reasonably foreseeable effects, would not in and of themselves confer jurisdiction. In an oft-quoted paragraph the Court put forward a new analysis of assessing the reach of U.S. antitrust laws:

> "A tripartite analysis seems to be indicated. As acknowledged above, the antitrust laws require in first instance that there be some effect - actual or intended - on American foreign commerce before the federal courts may legitimately exercise subject matter jurisdiction under those statutes. Secondly, a greater showing of burden of restraint may be necessary to demonstrate that

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opportunity; (c) the relative seriousness of effects on the United States as compared with those abroad; (d) the nationality or allegiance of the parties or in the case of business associations, their corporate location, and the fairness of applying our law to them; (e) the degree of conflict with foreign laws and policies; (f) the extent to which conflict can be avoided without serious impairment of the interests of the United States or the foreign country." *Id.*, at 446.

[1204] Section 40 of Restatement (Second) of U.S. Foreign Relations Law.

[1205] LOWENFELD has attributed this to his emphasis on the political process and his inability to "persuade the legal profession either in the United States or abroad that what he was talking about was real law, as contrasted with grace, diplomacy, good manners, prosecutorial discretion, or similar concepts." *See* A.F. LOWENFELD, "Public Law in the International Arena: Conflict of Laws, International Law, and Some Suggestions for Their Interaction", 163 *Recueil des Cours* 311, 400 (1979-II).

[1206] *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir. 1976).

[1207] *INGS* v. *Ferguson*, 282 F.2d 149 (2nd Cir. 1960).

[1208] *See* S.K. MEHRA, "Extrateritorial Antitrust Enforcement and the Myth of International Consensus", 10 *Duke J. Comp. & Int'l L.* 191, 203 (1999).

[1209] *Timberlane*, 549 F.2d, at 611-12.

[1210] *Id.*, at 609. In 1984, *Timberlane* came again before the Ninth Circuit. The claim was dismissed in the absence of a significant or true conflict with the law and policy of Honduras. Performing the interest-balancing test, the court observed that Honduran law regulated private commercial activity thoroughly. As Honduran law condoned and even actively encouraged cartel agreements, the court denied extraterritorial jurisdiction on comity grounds. *See Timberlane Lumber Co. v. Bank of America* 749 F.2d 1378 (9th Cir. 1984), *cert. denied*, 472 U.S. 1032 (1985).

> the effect is sufficiently large to present a cognizable injury to the plaintiffs and, therefore, a civil violation of antitrust laws. Thirdly, there is the additional question which is unique to the international setting of whether the interests and the links to the United States - including the magnitude of the effect on American foreign commerce - are sufficiently strong vis-à-vis those of other nations, to justify an assertion of extraterritorial authority."[1211]

Pursuant to the *Timberlane* doctrine, the jurisdictional test thus comprises three questions: (1) is there some effect on American foreign commerce; (2) is the effect sufficiently large; and (3) do the interests of the United States outweigh these of other countries? Only if an affirmative answer to all three questions could be given, may jurisdiction be established.[1212] Under *Timberlane*, the interest-balancing test is an integral part of the jurisdictional analysis. Interest-balancing does not just mitigate pre-existing effects-based jurisdiction: it is constitutive of such jurisdiction.[1213]

375. INTERNATIONAL LAW – While the drafters of the jurisdictional rule of reason in Section 403 of the Restatement (Third) of U.S. Foreign Relations Law believed that the rule of reason constituted international law, *Timberlane*, on which Section 403 was modelled, believed it did not. Indeed, in the Court's view, while a determination of the reach of the antitrust laws should be informed by "a regard for comity and the prerogatives of other nations",[1214] "[w]hat [the proper extraterritorial reach of the antitrust laws] is or how it is determined *is not defined by international law*."[1215] The Court's refusal to link up with international law – reflecting foreign nations' State practice and legal convictions – may be regrettable but is understandable in the self-sufficient American legal context,[1216] and in light of the classical understanding of comity as a concept sandwiched between international law and international politics. The fact that Judge Choy did not believe his rule of reason

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[1211] *Id.*, at 613.

[1212] *Id.* ("An effect on United States commerce, although necessary to the exercise of jurisdiction under the antitrust laws, is alone not a sufficient basis on which to determine whether American authority should be asserted in a given case as a matter of international comity and fairness.").

[1213] *See however Industrial Inv. Development Corp.* v. *Mitsui & Co., Ltd.*, 671 F.2d 876, 884, n. 7 (5th Cir. 1982) ("[W]e do not read the Timberlane balancing test as a test of subject matter jurisdiction"). In this case, in which an American corporation and its two Hong Kong subsidiaries sued a Japanese corporation, its American subsidiary and an Indonesian corporation, charging an antitrust conspiracy to keep the plaintiffs out of business of harvesting trees in Indonesia and exporting logs and lumber products therefrom to the United States, the Fifth Circuit eventually held, (nominally) applying the *Timberlane* test, that the defendants "ha[d] not demonstrated any "conflict with (the) law or policy" of the Indonesian government or any potential difficulty in enforcing a district court decree" and that U.S. courts could therefore entertain the suit. *Id.*, at 885. SLAUGHTER described this case as "the effects doctrine at its high point", without any reliance on a rule of reason. *See* A.-M. SLAUGHTER, "Liberal International Relations Theory and International Economic Law", 10 *Am. U. J. Int'l L. & Pol'y* 717, 732 (1995).

[1214] *Timberlane,* 549 F.2d at 612 ("As a matter of international comity and fairness, should the extraterritorial jurisdiction of the United States be asserted to cover [particular acts]?").

[1215] *Id.*, at 609 (emphasis added). *See also* G.B. BORN, "A Reappraisal of the Extraterritorial Reach of U.S. Law", 24 *Law & Pol. Int'l Bus.* 1, 36 (1992) ("*Timberlane* and its progeny look to private international law, comity and, albeit less explicitly, principles of public international law to define the reach of the antitrust laws.").

[1216] It may nevertheless be submitted that the international law of jurisdiction and any perceived rule of reason informed by international law may, via the *Charming Betsy* doctrine which states that statutes ought to be construed in accordance with international law *(see supra*), legitimately link up the reach of U.S. statutes, such as the antitrust laws, with the customary practices of other nations. *See* M.D. RAMSEY, "Escaping 'International Comity'", 83 *Iowa L. Rev.* 893, 925 (1998).

to be a rule of international law need not imply that it could not "coincide" with a rule of international law, [1217] as comment a to § 403 of the Restatement (Third) of U.S. Foreign Relations Law later stated.

376. *TIMBERLANE* BALANCING FACTORS – *Timberlane* was the first international antitrust case in which a court applied an interest-balancing test. As pointed out *supra* however, the Ninth Circuit did not "invent" interesting balancing, as it existed as a doctrinal concept since Brewster's 1958 monograph. Moreover, interest-balancing was well-known and well-applied in ordinary conflict-of-laws cases. The *Timberlane* court itself indeed pointed out that "the field of conflict of laws present[ed] the proper approach"[1218] Drawing on Section 6 of the Restatement (Second) of Conflict of Laws,[1219] the *Timberlane* court issued the following guidelines to conduct a proper interest-balancing test:

> "The elements to be weighed include the degree of conflict with foreign law or policy, the nationality or allegiance of the parties and the locations of the principal places of business of corporations, the extent to which enforcement by either state can be expected to achieve compliance, the relative significance of effects on the United States as compared with those elsewhere, the extent to which there is explicit purpose to harm or affect American commerce, the foreseeability of such effect, and the relative importance to the violations charged of conduct within the United States as compared with conduct abroad."[1220]

Three years later, Professor LOWENFELD emphatically endorsed *Timberlane*'s conflict-of-laws approach in his 1979 *Hague Lecture.*[1221] LOWENFELD then started to draw up the influential jurisdictional sections of the Restatement (Third) of Foreign Relations Law, which was published in 1987, and is discussed at length *supra*.

377. *MANNINGTON MILLS* – Three years after *Timberlane*, the Third Circuit similarly rejected the mechanical use of an effects test without interest-balancing informed by comity considerations in *Mannington Mills*.[1222] *Mannington Mills* is most famous for its elaboration on the factors to be used in an interest-balancing analysis:

> "(1) degree of conflict with foreign law or policy;

[1217] K.M. MEESSEN, "Antitrust Jurisdiction Under Customary International Law", 78 *A.J.I.L.* 783, 802 (1984).
[1218] *Timberlane*, 549 F.2d at 609.
[1219] *Id.*, at 614 n 29. The "interest-balancing" or "most significant relationship" test set forth in the Restatement could be traced to an article in the Columbia Law Review (E.E. CHEATHAM & W.L.M. REESE, "Choice of Applicable Law", 52 *Col. L. Rev.* 959, 972 (1952) and two decisions of the New York Court of Appeals in a contract and a torts case (*Auten* v. *Auten*, 124 N.E. 2d 99, 102 (N.Y. 1954); *Babcock* v. *Jackson*, 191 N.E.2d 279, 283-84 (N.Y. 1963)), cited in W.S. DODGE, "Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism", 39 *Harv. Int'l L.J.* 101, 119 (1998).
[1220] *Timberlane*, 549 F.2d at 614.
[1221] A.F. LOWENFELD, "Public Law in the International Arena: Conflict of Laws, International Law, and Some Suggestions for Their Interaction", 163 *Recueil des Cours* 311, 321-29 (1979-II).
[1222] *Mannington Mills v. Congoleum Corp.*, 595 F.2d 1287, 1296 (3d Cir. 1979) ("When foreign nations are involved, however, it is unwise to ignore the fact that foreign policy, reciprocity, comity, and limitations of judicial power are considerations that should have a bearing on the decision to exercise or decline jurisdiction.").

(2) nationality of the parties;

(3) relative importance of the alleged violation of conduct here compared to that abroad;

(4) availability of remedy abroad and the pendency of litigation there;

(5) existence of intent to harm or affect American commerce and its foreseeability;

(6) possible effect upon foreign relations if the court exercises jurisdiction and grants relief;

(7) whether, if relief is granted, a party will be placed in the position of being forced to perform an act illegal in either country or be under conflicting requirements by both countries;

(8) whether the court can make its order effective;

(9) whether an order for relief would be acceptable in this country if made by the foreign nation under similar circumstances; and

(10) whether a treaty with the affected nations has addressed the issue"[1223]

Mannington Mills differed conceptually somewhat from *Timberlane*, as the Third Circuit held there to be jurisdiction as soon as substantial and intended effects on U.S. commerce could be established. In the Court's view, whether that jurisdiction should also be exercised would be another matter, requiring an interest-balancing test.[1224] The *Timberlane* interest-balancing test by contrast was part and parcel of the jurisdictional test.

6.7.2. The Timberlane aftermath and the Laker Airways litigation

378. EARLY 1980S – The interest-balancing test set forth by *Timberlane* (Second Circuit) and *Mannington Mills* (Third Circuit) was soon espoused by the Tenth Circuit in *Montreal Trading* v. *Amax* (1981),[1225] while meeting opposition from the Seventh Circuit, which refused to conduct it in the *Uranium Antitrust Litigation* (1980). In the *Uranium Litigation*, the Seventh Circuit instead decided that its discretionary powers authorized it to assess its jurisdiction on the basis of the complexity of the litigation, the seriousness of the charges and the recalcitrance of the defendants.[1226] As the court did not address the conflicting interests of the governments involved (the United Kingdom, Canada, Australia and South Africa), it seriously watered down the limitations on jurisdiction introduced by *Timberlane* and *Mannington Mills*.[1227] One author regarded the Seventh Circuit's decision as "particularly subversive of the whole idea of a harmonious international order with respect to antitrust" and urged the courts to return to the *Timberlane* rule of reason.[1228]

[1223] *Id.*, at 1297-98 (citing *Timberlane*, 549 F.2d at 614-15).

[1224] *Id.*, at 1291-92, 1294-98.

[1225] *Montreal Trading Ltd.* v. *Amax, Inc.*, 661 F.2d 864, 870-71 (10th Cir. 1981) ("We believe that the analysis set forth in *Timberlane* contains the proper elements for consideration"; "Comity concerns outweigh any effect on United States commerce").

[1226] *In re Uranium Antitrust Litigation*, 617 F.2d 1248, 1255, 1980-1 Trade Cas. §63,183 (7th Cir.).

[1227] *See* M.D. BLECHMAN, "Antitrust Jurisdiction, Discovery and Enforcement in the International Sphere: An Appraisal of American Developments and Foreign Reactions", 49 *Antitrust Law Journal* 1197, 1200 (1980).

[1228] *See* M.D. BLECHMAN, "Antitrust Jurisdiction, Discovery and Enforcement in the International Sphere: An Appraisal of American Developments and Foreign Reactions", 49 *Antitrust Law Journal* 1197, 1204 (1980).

379. Curiously, in 1981, one Circuit, the Second (which had decided *Alcoa* in1945), believed that *Timberlane* actually lowered the jurisdictional standard. In *National Bank of Canada* v. *Interbank Card Association*, it assailed the first two prongs of the *Timberlane* test of jurisdiction (while approving of the third, the arguably more contentious interest-balancing test). It believed "that the separate identification of the first two tests may lead unwarrantedly to an assertion of jurisdiction whenever the challenged conduct is shown to have some effect on American foreign commerce, even though the actionable aspect of the restraint, the anticompetitive effect, is felt only within the foreign market in which the injured plaintiff seeks to compete."[1229] In lieu of the first two prongs of the *Timberlane* test, the Second Circuit proposed an inquiry into "whether the challenged restraint has, or is intended to have, any anticompetitive effect upon United States commerce, either commerce within the United States or export commerce from the United States."[1230]

The Second Circuit accused *Timberlane* of having lowered the jurisdictional threshold in relation to *Alcoa*, although *Timberlane* was precisely praised for heeding other nations' sovereignty concerns through its emphasis on interest-balancing. The Second Circuit's fear of a lower threshold seemed misguided. It was hardly conceivable that the Ninth Circuit in *Timberlane* was more willing to establish jurisdiction under the first two prongs, and at the same time more willing *not* to exercise that jurisdiction under the third prong The Ninth Circuit's reference to "some effect on foreign commerce" could certainly not be taken as a willingness to establish jurisdiction in the absence of substantial domestic effects. The Second Circuit was probably only keen on reclaiming the jurisdictional high ground, which it had claimed in *Alcoa* and believed to be losing to the Ninth Circuit. The Second Circuit's strengthening of the jurisdictional threshold could also be seen as a tactical move to circumvent the thorny interest-balancing test.[1231]

380. *LAKER AIRWAYS* – The most vicious attack on the *Timberlane* rule of reason came about in *Laker Airways* v. *Sabena* (1984). In *Laker*, the D.C. Circuit refused to conduct a *Timberlane*-style interest-balancing test because "there is no evidence that interest-balancing represents a rule of international law".[1232] The importance of *Laker* as a precedent hostile to interest-balancing should however not be overstated, since the Court was invited to balance interests in the very specific situation of courts being "forced to choose between a domestic law which is designed to protect domestic interests, and a foreign law which is calculated to thwart the implementation of the domestic law in order to protect foreign interests allegedly threatened by the objectives of the domestic law."[1233] In *Laker*, a British court had enjoined the plaintiffs before the U.S. court from pursuing their case in U.S. courts. Only in contexts of U.S. laws clashing with incongruent foreign blocking legislation

[1229] *National Bank of Canada* v. *Interbank Card Association*, 666 F.2d 6, 8 (2d Cir. 1981).
[1230] *Id.*
[1231] This may explain the D.C. Circuit's odd citation of *National Bank of Canada* as evidence that "[c]ourts are increasingly refusing to adopt the [interest balancing] approach". *Laker Airways Ltd. v. Sabena*, 731 F.2d 909, 950 (D.C. Cir. 1984). The Second Circuit precisely criticized the separate identification of the first two tests, "[w]ithout questioning the pertinence of the third test [the interest balancing test] in Timberlane" (666 F.2d 8).
[1232] *Laker Airways*, 731 F.2d 950.
[1233] *Laker Airways Ltd. v. Sabena*, 731 F.2d 909, 948 D.C. Cir. (1984) ("Interest balancing *in this context* is hobbled by two primary problems.") (emphasis added). *See also* A.F. LOWENFELD, "International Litigation and the Quest for Reasonableness", 245 *Recueil des Cours* 9, 79 (1994-I).

might *Laker Airways* possibly be controlling. In this sense, this judgment is reminiscent of the 1978 *Uranium Antitrust Litigation*, in which the District Court for the Northern District of Illinois rejected an analysis that would balance of interests of the United States and three other States that enacted blocking laws in response to U.S. antitrust litigation.[1234] In *Laker Airways*, the D.C. Circuit nevertheless couched its intricate reasoning in general terms, which made it a flashing point for crusaders against extensive interest-balancing. It paved the way for a restrictive conception of comity such as the one espoused by the Supreme Court in the *Hartford Fire Insurance* case discussed in subsection 6.7.3.

In tracing the defects in the balancing process, the D.C. Circuit stated that in assessing the existence of a sufficient basis for exercising prescriptive jurisdiction, a court already evaluates many of the contacts taken into account in the interest balancing test as set forth in *Timberlane* and *Mannington Mills*.[1235] To a great extent, interest-balancing factors would therefore be redundant. In addition, while some factors might not be redundant, they would be ill-suited to provide guidance in resolving a jurisdictional conflict, as they would merely point to the *existence* of a possible conflict.[1236] And even if they could indeed provide guidance, they "generally incorporate purely political factors which the court is neither qualified to evaluate comparatively nor capable of properly balancing".[1237] In this context, the Court took especially issue with "the degree to which the desirability of such regulation [of restrictive practices] is generally accepted"[1238], as this factor would require the courts to pronounce themselves on the desirability of the substantive content of U.S. antitrust law, which the American political branches had already determined as desirable.[1239]

In essence, the Court in *Laker Airways* believed that the political branches of the States concerned ought to find a way out of a deadlock caused by contradictory assertions of concurrent prescriptive jurisdiction, particularly when assertions of interdictory jurisdiction through blocking legislation are involved.[1240] The judiciary

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[1234] *In re Uranium Antitrust Litigation*, 480 F.Supp. 1138, 1148 (N.D.Ill. 1978) ("Aside from the fact that the judiciary has little expertise, or perhaps even authority, to evaluate the economic and social policies of a foreign country, such a balancing test is inherently unworkable *in this case*. The competing interests here display an irreconcilable conflict on precisely the same plane of national policy. Westinghouse seeks to enforce this nation's antitrust laws against an alleged international marketing arrangement among uranium producers, and to that end has sought documents located in foreign countries where those producers conduct their business. In specific response to this and other related litigation in the American courts, three foreign governments have enacted nondisclosure legislation which is aimed at nullifying the impact of American antitrust legislation by prohibiting access to those same documents. It is simply impossible to judicially "balance" these totally contradictory and mutually negating actions.") (emphasis added).

[1235] *Id.*, at 948.

[1236] *Id.*, at 948-49 ("Other factors, such as "the extent to which another state may have an interest in regulating the activity," and "the likelihood of conflict with regulation by other states" are essentially neutral in deciding between competing assertions of jurisdiction.").

[1237] *Id.*, at 949.

[1238] Restatement (Third) § 403 (2) (c).

[1239] *Laker Airways*, 731 F.2d at 949. By the same token, the Court denounced any evaluation of "the existence of justified expectations that might be protected or hurt by the regulation in question" (Restatement (Third) § 403(2)(d)), as this would involve passing judgment on the desirability of U.S. antitrust laws.

[1240] *Compare* D.P. MASSEY, "How the American Law Institute Influences Customary Law: The Reasonableness Requirement of the Restatement of Foreign Relations Law", 22 *Yale J. Int'l L.* 419,

would lack the necessary authority and resources to balance the interests of the States concerned.[1241]

A refusal to conduct an interest-balancing test may appear to be co-terminous with a refusal to heed comity. On this point, the Court interestingly held that preferring foreign blocking legislation over legitimately prescribed national law, "would not materially advance the principles of comity and international accommodation which must form the foundation of any international system comprised of coequal nation states."[1242] The bottom-line seens to be that, if a foreign State frustrates the principles of comity by its own conduct, it forfeits its right to comity under the laws of the forum State.

Taking into account the specific situation of the *Laker* litigation, with courts in the United Kingdom and the United States issuing contradictory injunctive orders undermining the other State's jurisdiction, it may be argued that the Court's decision may have been informed by the extremely strong conflict of national regulatory interests in the case. If the Court had been facing a case not involving foreign blocking legislation, the conflict of national interests would have been less intense, and might have been solved by weighing interests. *Laker* should therefore not be considered as a wholesale rejection of the interest-balancing test. In *Timberlane* and *Mannington Mills*, national regulatory interests did indeed not appear particularly strong, which may have made it politically less tricky for the courts to weigh interests. BUXBAUM has pointed out in this respect that the anticompetitive conduct in these cases was primarily directed at the plaintiff (who was excluded from competition) than at the U.S. market, on which the conduct had only a correlative effect.[1243] In *Laker* and the *Uranium* litigation by contrast, competing sovereign interests were directly implicated in the case.[1244]

6.7.3. Hartford Fire Insurance: true conflict doctrine

381. *HARTFORD FIRE INSURANCE* – Despite its specific fact-pattern, *Laker Airways* set the stage for the near death blow that interest-balancing underwent in the 1993 *Hartford Fire Insurance* case, one of the few leading international antitrust cases that reached the U.S. Supreme Court.

In *Hartford Fire Insurance* v. *California*,[1245] a case concerning a London-based reinsurance cartel affecting the U.S. market, the lower court had, *Timberlane*-style,

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443 (1997) ("[T]he reasonableness requirement encourages the legalization of policy disputes that are best addressed on a political-diplomatic level.").

[1241] This objection was already raised by B. CURRIE, *Selected Essays on the Conflict of Laws* at 184 (1963) ("[A]ssessment of the respective values of the competing legitimate interests of two sovereign states, in order to determine which is to prevail, is a political function of a very high order. This is a function that should not be committed to courts in a democracy.").

[1242] *Laker Airways*, 731 F.2d at 954.

[1243] H.L. BUXBAUM, "The Private Attorney General in a Global Age: Public Interests in Private Antitrust Litigation", 26 *Yale J. Int'l L.* 219, 260 (2001)

[1244] *Id.*, at 261.

[1245] *Hartford Fire Insurance Co. v. California*, 509 U.S. 764 (1993).

declined to exercise jurisdiction under the principle of international comity.[1246] 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."[1247] The Supreme Court however held, in a phrase that would become standard-setting for the field of economic jurisdiction, that "the only substantial question […] is whether there is in fact a *true conflict* between domestic and foreign law."[1248] In a controversial reasoning, the Court held that "[s]ince the London reinsurers do not argue that British law requires them to act in some fashion prohibited by the law of the United States, or claim that their compliance with the laws of both countries is otherwise impossible, we see no conflict with British law."[1249] Accordingly, if a foreign country merely allows the anticompetitive conduct, the Sherman Act would apply as there is no "true conflict". A true conflict barring application of the Sherman Act will only arise if the foreign State compels an activity which the U.S. prohibits, or when the foreign State prohibits an activity which the U.S. compels.[1250] The "true conflict" doctrine appears to be interchangeable with the foreign sovereign compulsion defense, under which a State is required to refrain from prohibiting an act which is compelled by a foreign sovereign.[1251] As a government sometimes condones such conduct, but rarely compels it, a true conflict will almost never arise.[1252] The equation of comity with the doctrine of foreign sovereign compulsion in *Hartford Fire* has therefore been described as the

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[1246] In *Hartford Fire*, London based re-insurers stood accused of infringing the Sherman Act. By boycotting American insurers, certain types of insurance coverage come unavailable in the United States, which constituted the effect of the conspiracy in U.S. territory.

[1247] *Hartford Fire*, 509 U.S. at 797-98.

[1248] *Id.*, at 798 (emphasis added).

[1249] *Id.*, at 799 (citation omitted). The Court referred to § 415, comment j of the Restatement (Third) of U.S. Foreign Relations Law, which provided that "the fact that conduct is lawful in the state in which it took place will not, of itself, bar application of the United States antitrust laws, even where the foreign state has strong policy to permit or encourage such conduct." Quoting § 403, comment *e* of the Restatement (Third), the Court went on to say that "no conflict exists for these purposes, where a person subject to regulation by two states can comply with the laws of both." Justice SCALIA, delivering a dissenting opinion on this issue, argued that the Court misinterpreted the relevant provisions (*Hartford Fire*, 509 U.S. at 813-821, Scalia diss.). SCALIA asserted that, firstly, § 403 (1) has to complied with by applying the factors set forth in § 403 (2). Only when it has been determined that the exercise of jurisdiction by both States is not unreasonable, § 403 (3) – which says that a state should defer to another state if that state's interest is clearly greater, on the basis of a true conflict – would come into play. § 415, a specific provision applying to antitrust matters, would follow the same pattern. (*See also* P.M. ROTH, "Reasonable Extraterritoriality: Correcting the 'Balance of Interests', 41 *I.C.L.Q.* 245, 258-59 (1992). The Court retorted that the true conflict issue was "the only substantial issue before the Court … whatever the order of cart and horse." (509 U.S. at 799 n 25).

[1250] *Compare* two earlier cases: *United States* v. *General Electric Co.* (Decree on Relief), 115 F.Supp. 855, 878 (D.N.J. 1953) ("Philips shall not be in contempt of this Judgment for doing anything outside of the United States which is not required or for not doing anything outside of the United States which is unlawful under the laws of the … State in which Philips or any other subsidiaries may be incorporated … or in the territory in which Philips or any such subsidiaries may be doing business."); *United States v. Watchmakers of Switzerland Information Center*, 1963 Trade Cases No 70, 600 (S.D.N.Y. 1962) (holding that "if, of course, the defendants' activities had been required by Swiss law, this court could indeed do nothing. An American court would have under such circumstances no right to condemn the governmental activity of another sovereign entity.").

[1251] § 441 Restatement (Third) of U.S. Foreign Relations Law.

[1252] *See* P. TORREMANS, "Extraterritorial Application of E.C. and U.S. Competition Law", 21 *E. L. Rev.* 280, 282 (1996); W. PENGILLEY, "The Extraterritorial Impact of U.S. Trade Laws – Is it not Time for "ET" to Go Home?", 20 *W. Comp.*, 17, 24 (1997).

end of comity,[1253] in spite of the doctrine having become common currency in lower court cases after *Timberlane*.[1254]

382. The *Hartford Fire* "true conflict" doctrine is related to the "vacuum" theory, pursuant to which, if the law of either State could have dealt with a particular problem, and if the law of the first State did not deal with it, then the law of the second State is entitled to do so.[1255] The vacuum theory justifies concurrent jurisdiction if the territorial State allows certain practices deemed restrictive by another State. It has been argued that the exercise of jurisdiction under the vacuum theory does not create conflict, "but rather serve[s] shared anti-cartel policy by making additional enforcement resources available."[1256]

383. It has been argued that *Hartford Fire* may not be the watershed some commentators believe it is, in that it echoes the older *Uranium* and *Laker* decisions, two decisions in which the court refused to conduct an interest-balancing test in case of an outspoken conflict between governmental interests (thereby rationalizing the assertion of U.S. regulatory interests).[1257] Accordingly, *Hartford Fire* would not necessarily have limited the jurisdictional rule of reason to "true conflicts". Like in *Uranium* and *Laker*, the private plaintiffs partly represented the interests of consumers and of the economy at large, rather than the limited interests of a competitor affected by foreign anticompetitive conduct (although in *Hartford Fire*, the conflict was certainly of a lesser nature than in *Uranium* or *Laker*). The facts of the case would thus warrant the assertion of broad U.S. regulatory interests through the extraterritorial application of U.S. laws.[1258] A 1996 decision by the Ninth Circuit seems to vindicate this analysis. In *Metro Industries, Inc.*, v. *Sammi Corp.*, the Ninth Circuit indeed believed that the in *Hartford Fire*, the Supreme Court "did not question the propriety of the jurisdictional rule of reason or the seven comity factors set forth in *Timberlane*."[1259] This dissertation, alongside the majority of the doctrine and the

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[1253] *See e.g.* S.A. BURR, "The Application of U.S. Antitrust Law to Foreign Conduct: Has *Hartford Fire* Extinguished Considerations of Comity?", 15 *U. Pa. J. Int'l Bus. L.* 221 (1994); H.L. BUXBAUM, "The Private Attorney General in a Global Age: Public Interests in Private Antitrust Litigation", 26 *Yale J. Int'l L.* 219, 234 (2001) (arguing that the Supreme Court "essentially eliminated the use of judicial interest balancing in extraterritorial antitrust cases"); S. WEBER WALLER, "The Twilight of Comity", 38 *Colum. J. Transnat'l L.* 563, 564 (2000) (speaking of "a near death blow").

[1254] *See* S. WEBER WALLER, "The Twilight of Comity", 38 *Colum. J. Transnat'l L.* 563, 569 (2000).

[1255] *Compare* the view of the British Attorney-General during the parliamentary debates on the Shipping Contracts and Commercial Documents Act: 698 Parl. Deb., H.C. (5th ser.) 1282 (1964), quoted in A.V. LOWE, "Blocking Extraterritorial Jurisdiction: the British Protection of Trading Interests Act, 1980", 75 *A.J.I.L.* 257, 265 (1981).

[1256] *See* H.L. BUXBAUM, "Jurisdictional Conflict in Global Antitrust Enforcement", 16 *Loy. Consumer L. Rev.* 365, 369-70 (2004) (noting that such a view ignores regulatory antitrust choices, such as the use of administrative *vis-à-vis* private enforcement, the award of treble damages and the use of leniency programs).

[1257] H.L. BUXBAUM, "The Private Attorney General in a Global Age: Public Interests in Private Antitrust Litigation", 26 *Yale J. Int'l L.* 219, 261 (2001).

[1258] *Id.*

[1259] 82 F.3d 839, 847, n.5 (9th Cir. 1996). *See also Sarei* v. *Rio Tinto*, 221 F.Supp.2d 1116, 1200 (C.D. Cal. 2002) ("Since the "only substantial question" before the Court was whether domestic and foreign laws were in conflict, it is difficult to discern whether the Court intended to establish the existence of such a conflict as a threshold requirement for abstention on international comity grounds. It might, rather, have intended to suggest merely that a conflict in law was the only factor relevant to the comity analysis under the particular facts of the case before it.").

courts, however, take the view that *Hartford Fire did* repudiate the *Timberlane* rule of reason across-the-board.

6.7.4. Against the 'unilateral' true conflict doctrine: pro 'multilateral' interest-balancing

384. AGAINST THE "TRUE CONFLICT" DOCTRINE – It may be submitted, with respect, that the Supreme Court – and the European Court of Justice deciding the *Wood Pulp* competition case in 1988 for that matter (*see* chapter 5.5) – were mistaken in restricting comity to foreign sovereign compulsion, and that the vacuum theory should be rejected.[1260] It may be argued that comity requires deference in case of non-conflicting regulation as well.[1261] Even if a State has put no regulatory framework into place at all, because it espouses a *laissez-faire* policy and possibly relied on professional self-regulation, this should be no argument for another State to impose its legislation on 'fallow land', since a State may be presumed to have an interest in *permitting* conduct.[1262] In this context, PENGILLEY, LOWE, GROSSFELD and ROGERS have even raised the specter of totalitarian regimes benefiting from the *Hartford Fire* standard. Indeed, such regimes may tend to *compel* cartel compliance, whereas democratic free-market regimes do ordinarily not compel but merely *encourage* or *permit* cartel activity.[1263] The *Hartford Fire* standard may thus offer foreign governments an incentive to curb free enterprise and competition, the very values which, ironically, are, alongside the principle of democracy, constitutive of American ideological zeal. As a result, allied Western democracies would be the main victims of *Hartford Fire*.

386. Admittedly, the danger of *Hartford Fire* encouraging the spread of totalitarianism may be overblown, yet it is not far-fetched to state that the true conflict doctrine could encourage States to adopt internationally unwelcome counter-legislation prohibiting compliance with another States' orders[1264] – which has notably

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[1260] *See* A.V. LOWE, "Blocking Extraterritorial Jurisdiction: the British Protection of Trading Interests Act, 1980", 75 *A.J.I.L.* 257, 265 (1981) (stating that the vacuum theory is a mere theory and as such not part of international law). *See also* I. SEIDL-HOHENVELDERN, "Völkerrechtliche Grenzen bei der Anwendung des Kartellrechts", 17 *A.W.D.* 53, 57 (1971).

[1261] *See* A.F. LOWENFELD, "Public Law in the International Arena: Conflict of Laws, International Law, and Some Suggestions for Their Interaction", 163 *Recueil des Cours* 311, 398 (1979-II) (defining true conflicts in the technical sense of that terms as "differing substantive views and inconsistent State interests with respect to problems that have real connections with more than one State").

[1262] *Compare* A.T. GUZMAN, "Choice of Law: New Foundations", 90 *Geo. L.J.* 883, 918-19 (2002) (noting that "[b]ecause it is unusual for a country to enact statutes declaring a particular activity permissible, it is not enough to look simply to the statutes declaring a particular activity permissible, it is not enough to look simply to the statutes of a jurisdiction to determine if there is a conflict with the laws of another jurisdiction."); A.V. LOWE, "Blocking Extraterritorial Jurisdiction: the British Protection of Trading Interests Act, 1980", 75 *A.J.I.L.* 257, 265 (1981) (arguing in the context of shipping conferences that "[t]he supposition that the sovereignty of foreign states demands respect only when it is exercised by the promulgation of laws regulating the matter in question is patently inappropriate where the foreign state consciously implements a laissez-faire policy …").

[1263] W. PENGILLEY, "The Extraterritorial Impact of U.S. Trade Laws – Is it not Time for "ET" to Go Home?", 20 *W. Comp.*, 17, 44 and 53 (1997); A.V. LOWE, "The Problems of Extraterritorial Jurisdiction: Economic Sovereignty and the Search for a Solution", 34 *I.C.L.Q.* 724, 727 (1985); B. GROSSFELD & C.P. ROGERS, "A Shared Values Approach to Jurisdictional Conflicts in International Economic Law", 32 *I.C.L.Q.* 931, 933 (1983).

[1264] *See* J.-M. BISCHOFF & R. KOVAR, "L'application du droit communautaire de la concurrence aux entreprises établies à l'extérieur de la Communauté", 102 *J.D.I.* 675, 719-20 (1975) (arguing that the

happened in the field of transnational evidence-taking.[1265] From an international law point of view, the true conflict doctrine is no less problematic. Sovereignty may indeed be encroached upon even in the absence of a true conflict, because it may hinder a State in implementing its legitimate regulatory policies.[1266] RAMSEY put it succinctly as follows: "friction arises not from conflicting *laws* but from conflicting *legislative jurisdictions*."[1267]

387. There appears to be a continuum of "no conflicts" and "true conflicts", with the former never giving rise to deference and the latter always given rise to deference. In the grey zone between "no conflict" and "true conflict", depending on the (national) interests at stake,[1268] deference to foreign regulation may be granted in some circumstances and not in other circumstances.[1269] In this zone, a high premium may be put on the encouragement of commercial activity, with expectations of the parties and predictability playing a leading role: if the reach of U.S. laws may considerably hamper transnational trade, caution is duly warranted.[1270]

International law does not authorize States to determine what other States' interests are. If a State has deliberately refrained from regulating a particular matter, other States should defer to it, and should not be authorized to impose their views (laws) on the matter if the former State has not authorized them to do so.[1271] For international

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true conflict doctrine should not apply to situations in which a foreign State has enacted counter-legislation, unless such legislation has been enacted « contre un exercice jugé abusif de la part d'une autre Etat de sa compétence d'exécution »).

[1265] *See* chapters 9.3 and 9.5.

[1266] *Compare* K.M. MEESSEN, "Antitrust Jurisdiction under Customary International Law", 78 *A.J.I.L.* 783, 806 (1984) (arguing that policies of regulation and nonregulation "may have equal importance"); G. SCHUSTER, *Die internationale Anwendung des Börsenrechts*, Berlin, Springer, 1996, 592 ("Die Beschränkung der Berücksichtigung fremder Jurisdiktionsansprüche auf strafrechtlich sanktionierte Verwaltungsgebote oder –verbote verengt in unzulässiger Weise die souveränen Steuerungsmöglichkeiten der betroffenen Staaten."). M.D. RAMSEY, "Escaping 'International Comity'", 83 *Iowa L. Rev.* 893, 923 (1998) (stating that "there may be insult to sovereignty felt apart from any actual conflict: in a form of the "none-of-your-business" response, a nation may feel that the exercise of another nation's legislative jurisdiction within its territory qualifies its sovereignty in principle, even without conflict in fact.").

[1267] M.D. RAMSEY, "Escaping 'International Comity'", 83 *Iowa L. Rev.* 893, 923 (1998) (emphasis added).

[1268] *See also* A.F. LOWENFELD, "International Litigation and the Quest for Reasonableness", 245 *Recueil des Cours* 9, 59 (1994-I) (submitting that "by defining "conflict" in terms of black and white, the majority avoided having to say anything about balancing of competing interests, which is most needed – as well as sharply debated – with respect to the gray areas").

[1269] In his influential monograph on the conflict of laws, CURRIE, referring to "true problem[s] of conflicts of interests", *i.e.*, situations where several States have an interest in having their laws applied (B. CURRIE, *Selected Essays on the Conflict of Laws* at 117 (1963)), took a broader view of "true conflicts". He nevertheless argued that in such situations the forum State should apply its law (*Id.*, at 184), arguably even when a *Hartford Fire*-style "true conflict" was present. *See also* W.S. DODGE, "Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism", 39 *Harv. Int'l L.J.* 101, 136 (1998).

[1270] *Compare* M.D. VANCEA, "Exporting U.S. Corporate Governance Standards Through the Sarbanes-Oxley Act: Unilateralism or Cooperation?", 53 *Duke L.J.* 833, 861-64 (2003-2004).

[1271] *See, e.g.*, Note of the British Government No. 187, August 25, 1977, to the U.S. Department of State, reprinted in A.V. LOWE, *Extraterritorial Jurisdiction: an Annotated Collection of Legal Materials*, Cambridge, Grotius publ., 1983, 147-48 ("Her Majesty's Government do no accept any contention that if United Kingdom law is silent upon a particular matter it is not an infringement of its jurisdiction if the United States legislate on that matter with regard to foreign subsidiaries of American companies. It is the view of Her Majesty's Government that it is for them to decide how far they wish

law, it does not matter whether or not a State has regulated a particular matter. What appears relevant is whether regulation or non-regulation stems from a deliberate decision informed by a particular outlook on the political, social or economic order of the State.[1272] If a State deliberately opts for a minimal regulatory framework because it deems deregulation to spur economic growth, another State, considering deregulation to be an inefficient mechanism, should not be allowed to add its own regulatory layer, lest the international law principle of non-intervention be violated.[1273]

The vacuum theory may however have force if a State has not regulated a matter because it has never *thought* of either regulating or deregulating it. In this situation, it appears that the State is indifferent to either regulation or deregulation, and that the factual situation of deregulation is not the product of a particular philosophy. If a regulatory fact does not reflect a regulatory outlook, it might be argued that the international law principle of non-intervention does *not* protect the State from jurisdictional assertions of other States.[1274] Situations of non-deliberate deregulation will however be rare. Possibly, it should be presumed that, in case of a factual situation of deregulation, a State has *deliberately* refrained from regulation,[1275] with the burden of proof that such is not the case incumbent upon the State asserting its regulatory power on an extraterritorial basis.

388. EXPLAINING *HARTFORD FIRE* – In *Hartford Fire*, the U.S. Supreme Court has not chosen the broad rule of reason this study advocates. Instead, it opted to allow U.S. courts to apply U.S. law once (qualified) effects in the U.S. have been established.[1276] The Supreme Court may have believed that declining to exercise jurisdiction under the Sherman Act on the grounds of international comity amounted

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to legislate with regard to persons within their jurisdiction."); G. SCHUSTER, *Die internationale Anwendung des Börsenrechts*, Berlin, Springer, 1996, 32 ("Der zweite Staat mag bewusst oder einer wirtschaftlichen Notwendigkeit gehorchend seine Interessen hintangestellt haben. Dritte Staaten müssen sich eine solche Interessenwahrnemung nicht gefallen lassen, wenn nicht erkennbar ist, dass der zweite Staat das Vorgehen gebilligt hat.").

[1272] *See also* L. IDOT, Note *Wood Pulp, R.T.D.E.* 345, 355-56 (1989) ("En effet, l'exemption en droit de la concurrence implique toujours une décision étatique, motivée par des raisons de politique économique. Qu'il présume l'absence d'effets anticoncurrentiels sur son marché, ou juge que les effets bénéfiques l'emportent sur les effets anticoncurrentiels, l'Etat qui exempte une pratique restrictive manifeste toujours une "volonté de permettre" qui crée un conflict.") (citation omitted); J.-M. BISCHOFF & R. KOVAR, "L'application du droit communautaire de la concurrence aux entreprises établies à l'extérieur de la Communauté", 102 *J.D.I.* 675, 715 (1975) (stating that « un ordre juridique vise nécessairement tous les actes qui s'y produisent, tous les comportements qui s'y déroulent, même ceux qu'il ne réglemente pas expressément, car en ne les réglementant pas, il les permet, et donc leur attribue malgré tout une conséquence juridique. »).

[1273] *Compare* S.E. BURNETT, "U.S. Judicial Imperialism Post "Empagran v. F. Hoffmann-Laroche"?: Conflicts of Jurisdiction and International Comity in Extraterritorial Antitrust", 18 *Emory Int'l L. Rev.* 555, 622 (2004).

[1274] *Compare* G. SCHUSTER, *Die internationale Anwendung des Börsenrechts*, Berlin, Springer, 1996, 593 (arguing that it is "schwieriger, hierin eine im völkerrechtlichen Jurisdiktionsstreit beachtenswerte Rechtsposition zu sehen").

[1275] *See* M. GOTHOT, Book review, *Rev. crit. dr. int. pr.* 179 (1975) (arguing that "la permission ne peut être tenue pour juridique que si, se produisant dans le champ des comportements que le législateur domine, elle résulte d'une volonté de permettre"), cited approvingly by J.-M. BISCHOFF & R. KOVAR, "L'application du droit communautaire de la concurrence aux entreprises établies à l'extérieur de la Communauté", 102 *J.D.I.* 675, 715 (1975).

[1276] *Compare* H.L. BUXBAUM, "The Private Attorney General in a Global Age: Public Interests in Private Antitrust Litigation", 26 *Yale J. Int'l L.* 219, 235 (2001).

to an illegitimate extension of the domestic judicial abstention doctrine.[1277] More likely, it may have reasoned that § 403, while possibly setting forth theoretically the best approach,[1278] did not confer the level of predictability which transnational transactions require.[1279] Indeed, as far as the latter consideration is concerned, "in order to assess the cost of doing business in [the U.S.] and thus to plan their affairs intelligently, foreign and multinational businesses must be able to determine in advance whether their activities are likely to subject them to jurisdiction".[1280] Predictability under a § 403 interest-balancing test is particularly difficult to achieve in that there is no "principled means to assign 'weight' to a foreign sovereign's interest".[1281] Indeed, it may be argued that, if the sovereign equality of States is taken seriously, sovereign interests will necessarily be of equal weight, and one State's national interest could not possibly override another State's interest.[1282] And even if balancing sovereign interests were feasible, it may be submitted that courts are not the appropriate actors to conduct such a delicate analysis, lest they violate the separation of powers.[1283] If interest-balancing is rejected, foreign law could no longer "dictate the scope of U.S. law",[1284] and the exploitation of the principle of comity by foreign cartelists is brought to a halt.[1285]

389. In the doctrine, the approach that the Supreme Court took in *Hartford Fire* has been typified as a *unilateral* conflict-of-laws approach, as contrasted with the *multilateral* conflict-of-laws approach that the *Timberlane* court took. Under a *unilateral* conflict-of-laws approach, a court applies "a statute extraterritorially whenever doing so appears to advance the purposes of the statute and should not worry about resolving conflicts of jurisdiction with other nations."[1286] Under a *multilateral* conflict-of-laws approach, courts seek to identify the legal territory in which a legal relationship has its seat.[1287] Multilateral approaches use a number of connecting factors to tie a legal situation to *one* jurisdiction, often through a balancing

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[1277] *See* J.M. GRIPPANDO, Note, "Declining to Exercise Extraterritorial Antitrust Jurisdiction on the Grounds of International Comity: An Illegitimate Extension of the Judicial Abstention Doctrine", 23 *Va. J. Int'l L.J.* 395 (1983).
[1278] *See* S. WEBER WALLER, "The Twilight of Comity", 38 *Colum. J. Transnat'l L.* 563, 570 (2000).
[1279] *Compare* A.V. LOWE, "Blocking Extraterritorial Jurisdiction: the British Protection of Trading Interests Act, 1980", 75 *A.J.I.L.* 257, 269 (1981) (assailing *Timberlane* because it "proceeds, after the event, on a case-by-case basis", which entails that "foreign businesses could not know the exact circumstances in which a case might be brought against them … and therefore could not predict either the nature or "weight" of the factors to be balanced by the American court …"); A. BIANCHI, Reply to Professor Maier, in K.M. MEESSEN (ed.), *Extraterritorial Jurisdiction in Theory and Practice*, London/The Hague/Boston, Kluwer, 1996, 74, 87 (wondering whether "satisfactory results in terms of fairness and predictability of the law can reasonably be expected" … "when the judges ventured into the uncertain realm of speculation about foreign states' interests").
[1280] X., Note, "Predictability and Comity: Toward Common Principles of Extraterritorial Jurisdiction", 98 *Harv. L. Rev.* 1310, 1320-21 (1985).
[1281] *Id.*, at 1324.
[1282] *See* K.A. FEAGLE, "Extraterritorial Discovery: a Social Contract Perspective", 7 *Duke J. Comp. & Int'l L.* 297, 306 (1996).
[1283] *Id.*, at 307. *See also Laker Airways*, 731 F.2d at 948-49.
[1284] K.A. FEAGLE, "Extraterritorial Discovery: a Social Contract Perspective", 7 *Duke J. Comp. & Int'l L.* 297, 309 (1996).
[1285] *See* S.K. MEHRA, "Extrateritorial Antitrust Enforcement and the Myth of International Consensus", 10 *Duke J. Comp. & Int'l L.* 191, 195 (1999).
[1286] *See* W.S. DODGE, "Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism", 39 *Harv. Int'l L.J.* 101, 104, 107 (1998).
[1287] *Id.*, at 108.

process. Put differently, they aim at exclusive legislative jurisdiction. Unilateral approaches by contrast recognize that *more than one* jurisdiction may want to apply its laws, *i.e.*, they authorize concurrent jurisdiction. While multilateral approaches will generally be in keeping with the broad limits on jurisdiction set by public international law, unilateral approaches do not mind overstepping such limits, as they sanctify the interests of the forum to the detriment of the interests of foreign nations.[1288]

390. JUDICIAL UNILATERALISM LEADING TO POLITICAL MULTILATERALISM – It has been submitted that the aggressive *Hartford Fire judicial* unilateralism is the proper standard of addressing international antitrust law at the level of the courts in that it may lead to *political* multilateralism. The argument, which is especially made by DODGE, goes that the international conflict which the true conflict jurisdictional test gives rise to will precisely make diplomatic negotiations inevitable, negotiations that will ultimately produce outcomes acceptable to all States involved.[1289] In this subsection, it will be argued that this argument is flawed.

DODGE denounces a multilateral *Timberlane*-style balancing test because it is "so malleable that it cannot ensure uniformity",[1290] as well as traditional, "inherently parochial", unilateral "greater governmental interests" approaches that "abandon any pretense of neutrality and pull for the home team".[1291] Instead, he defends unilateral *Hartford Fire*-style effects-based jurisdiction on the ground that it solves the problem of systematic economic underregulation.[1292] Indeed, as States, including the U.S., tend to exempt export cartels from antitrust regulation, because they do not have an incentive to regulate domestic business activity of which the effects are restricted to foreign nations, these nations should be authorized to step in so as to regulate that activity, even when under a multilateral *Timberlane*-style approach, they do not have the most significant relationship with the legal situation at hand allowing them to apply their own laws under the rule of reason.

391. If any State where effects of a business-restrictive practice are felt is entitled to exercise jurisdiction, as the *Hartford Fire* approach arguably geared to

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[1288] A unilateral conflict-of-laws analysis is therefore sometimes dismissed as no conflict-of-laws analysis at all. *See, e.g.*, *Hartford Fire* (Scalia, J., dissenting), 542 U.S. at 821 ("Where applicable foreign and domestic law provide different substantive rules of decision to govern the parties' dispute, a conflict-of-laws analysis is necessary.")

[1289] W.S. DODGE, "Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism", 39 *Harv. Int'l L.J.* 101 (1998). The argument was also made, although perhaps less forcefully, by J. STOUFFLET, "La compétence extraterritoriale du droit de la concurrence de la Communauté économique européenne", 98 *J.D.I.* 487, 500 (1971) ("N'est-il pas contraire à l'esprit qui doit inspirer l'édification du droit économique international, d'admettre que chaque Etat légifère unilatéralement, selon ses intérêts et appliqué ses lois à des actes accomplis à l'étranger sans souci de la réglementation locale? C'est pourtant à une telle position que conduit inéluctablement une analyse réaliste de la legislation de la concurrence qui, ainsi qu'on l'a marqué, est une police définie, non pas en considération d'une conception abstraite et universellement reçue de l'organisation économique, mais selon les données très particulières et circonstancielles de la politique économique. Cette constatation étant faite, il est plus aisé de dégager les points qui pourraient former la matière de conventions internationales.").

[1290] W.S. DODGE, "Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism", 39 *Harv. Int'l L.J.* 101, 147 (1998).

[1291] *Id.*, at 152.

[1292] *Id.*, at 153-54.

combating antitrust underregulation has it, another evil looms large: systematic *over*regulation by several States exercising *concurrent* jurisdiction. DODGE believes however in a spontaneous tendency toward an optimal level of regulation, as concurrent and thus economically inefficient jurisdiction will provide an incentive for States to enter into international negotiations "in which all the relevant interests may be taken into account".[1293] DODGE does not deem courts up to the task of taking these interests into account and create an optimal level of regulation. Drawing on the game theory's 'prisoner's dilemma', he argues that "[f]aced with the risk of defection from the other side, the judges of each state might decide simply to apply their own law in every case, even though this leaves both sides worse off than if they cooperated."[1294] Citing the antitrust agreements which the U.S. entered into with Australia and Canada in the wake of the *Westinghouse Uranium Litigation*, DODGE believes that outright conflict will yield to international negotiations.[1295] Such *political* multilateralism might in turn lead to a more satisfying consensual result than when courts would have conducted a *judicial* multilateral interest-balancing test.[1296]

392. It may be true that jurisdictional conflict is apt to give way to international negotiations leading to interagency memoranda of understanding, and eventually to the creation of a global antitrust enforcer that could authoritatively rule on the economic efficiency of a particular economic transaction without States having the right to interfere by asserting 'extraterritorial' jurisdiction. It is however in doubt whether such international negotiations will yield an equitable outcome. Such negotiations might indeed be forced upon weaker parties by stronger parties, such as, indeed, the United States, whose jurisdictional assertions may have a benchmarking effect on the content of ensuing international agreements. Furthermore, international

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[1293] *Id.*, at 158. *See* on the link between concurrent jurisdiction and economic inefficiency: A.T. GUZMAN, "Is International Antitrust Possible?", 73 *N.Y.U. L. Rev.* 1501, 1510-21 (1998). Concurrent jurisdiction is economically inefficient because national regulators take a parochial rather than a global view on the efficiency of a particular transaction, which results in the possibility of several States exercising extraterritorial jurisdiction over a transaction that may harm their consumers, although it may increase global welfare. *See* A.T. GUZMAN, "Choice of Law: New Foundations", 90 *Geo. L.J.* 883, 907 (2002) ("If every country applies its laws extraterritorially, each country will have the ability to prevent the transaction … This means that for the transaction to be permitted, being globally efficient is not enough, it must improve the welfare of every country. Transactions that increase world welfare but that harm even a single country will be prevented."). DODGE has however argued that concurrent jurisdiction resulting from a unilateral effects approach is in fact economically more efficient than exclusive jurisdiction resulting from a multilateral interest-balancing or most significant relationship approach. The latter approach may be regarded as economically efficient under a Kaldor-Hicks definition, pursuant to which an activity is efficient if it increases net welfare regardless of any change in welfare distribution. Courts may indeed increase overall global welfare by tying the regulatory power to a particular State, after conducting an interest-balancing test, while leaving another State concerned worse off. DODGE however believes that concurrent jurisdiction is more efficient if one were to use a definition of Pareto efficiency, pursuant to which an activity is only efficient if it increases net welfare and leaves no party worse off. This seems to be a misguided argument. DODGE does not seem to argue that concurrent jurisdiction is in itself more Pareto efficient, but that it is merely instrumental in bringing about international negotiations resulting in a global antitrust framework, which could indeed be legitimately termed Pareto efficient, and arguably more efficient than under the Kaldor-Hicks definition. As long as the global framework is not attained, it could be feared that concurrent jurisdiction, possibly resulting in regulatory chaos, is neither Pareto nor Kaldor-Hicks efficient.

[1294] *Id.*, at 161-63.

[1295] *Id.*, at 166.

[1296] *Id.*, at 107 ("It is perfectly consistent to think that multilateral negotiations are the best way to resolve differences over the regulation of international business, and also to think that judicial unilateralism is the best way to get into negotiations.").

negotiations are not a given, as is apparent from the difficulties of concluding a comprehensive international antitrust agreement. DODGE's very analysis makes clear that in the pre-negotiation phase the situation is far from ideal, with courts, facing a prisoner's dilemma, applying their own laws to transnational situations in a pro-forum biased fashion. What makes matters even worse is that the players in the extraterritorial game are not equal, which makes the application of game theory in this context actually a sham. Not only will legal harmony prove elusive, in practice only the strongest State, which can endure punishment by other States, will be able to apply its own laws.[1297]

393. IN SUPPORT OF MULTILATERALISM – This dissertation defends a multilateral rule of reason, and has devoted an entire chapter to it. It supports Justice SCALIA's dissenting opinion in *Hartford Fire* (although it may not support his opinion on the role of international law in U.S. courts as could be gleaned from other opinions), which harshly criticized the *Hartford Fire* majority and advocated a *Timberlane*-like reasonableness inquiry along the lines of § 403 of the Restatement (Third).[1298] SCALIA concluded that "[r]arely would these factors point more clearly against application of United States law" and that the majority's "breathtakingly broad proposition […] will bring the Sherman Act and other laws into sharp and unnecessary conflict with the legitimate interests of other countries – particularly our closest trading partners."[1299]

Although the jurisdictional rule of reason may not amount to a rule of customary international law, it is certainly the best method to solve jurisdictional conflicts. It may require a realignment of the courts' mission, in that, under the rule of reason, courts will be required to balance foreign governmental interests, an analysis that would inevitably have political overtones, and which courts may not conduct on a daily basis.[1300] Yet the political background against which interest-balancing takes place does not necessarily render interest-balancing unworkable or un-legal.[1301] Indeed, courts, notably in the U.S., have traditionally taken a narrow view of the political question doctrine, and ruled that cases that have political overtones do not per se involve nonjusticiable political questions.[1302] Moreover, while the political branches are likely to consider the application of substantive antitrust laws to foreign

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[1297] DODGE seems to acknowledge this. *Id.*, at 161 ("Small States may simply not have enough opportunities to reward big states for cooperation or punish them for defection to influence the behavior of big states.").
[1298] *Hartford Fire*, 509 U.S. 764, 818-19 (1993).
[1299] *Id.*, at 819.
[1300] *See, e.g.*, F.A. MANN, "The Doctrine of Jurisdiction Revisited after Twenty Years", 186 *R.C.A.D.I.* 9, 23 (1984-III).
[1301] *See* J. KAFFANKE, "Nationales Wirtschaftsrecht und internationaler Sachverhalt", 27 *Archiv des Völkerrechts* 129, 138 (1989) ("Die Fragen, die sic him Zusammenhang mit dem Problem der Anwendung des nationalen Rechts ergeben, sind in erster Linie rechtliche bzw. international rechtliche Fragen. Es geht um den Anwendungsbereich und die Art der Anwendung von gesetzlichen Normen, und damit um rechtliche Fragen.").
[1302] *See Baker* v. *Carr*, 369 U.S. 186 (1962) ("[I]t is an error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance"). *See* for a European perspective: J. KAFFANKE, "Nationales Wirtschaftsrecht und internationaler Sachverhalt", 27 *Archiv des Völkerrechts* 129, 137 (1989) ("Betrachtet man die innerstaatlichen Rechtspraxis, so werden von den Gerichten auf anderen Gebieten ebenfalls Entscheidungen verlangt, die in politisch sensible Situationen hineinspielen.").

restrictive practices affecting domestic commerce as desirable,[1303] they are no less likely to oppose across-the-board assertions of U.S. jurisdiction. It is hardly fanciful that they would favor mitigating these assertions in specific cases if foreign nations regard them as undesirable. This holds all the more true in an era in which States are increasingly putting in place elaborate antirust regimes. The force of the rationale underlying *Hartford Fire* – dismantling safe antitrust havens – then seems to be undercut. The international proliferation of antitrust laws has always a main economic policy objective of the United States. The more the world edges closer to that aim, the stronger the case for jurisdictional reasonableness is.[1304]

394. As long as full substantive and enforcement harmonization remains elusive, the need for unilateral assertions of jurisdiction will be felt. A possible way forward could then be for the courts to request the U.S. executive branch and the foreign government for their opinions on the desirability of applying U.S. laws in specific cases. If a requested party does not respond, such may create a presumption that it does not oppose jurisdiction. Only in the rare situation where both parties were to respond, with the forum State's executive branch supporting the exercise of jurisdiction and the foreign government clearly opposing it, should a full-blown and politically risky interest-balancing test be undertaken.[1305] Then, courts should however not shirk their responsibility and leave the solution of the case to the diplomatic level.[1306] From an economic perspective, interest-balancing is preferable over formal negotiations aimed at accommodating the interests of the States involved, in that a timely outcome of the jurisdictional conflict is more assured under an interest-balancing test than under a time-consuming international negotiation process.[1307] States need not await the outcome of negotiations. Courts, especially in private cases, are not supposed to wait at *calendas graecas*, since private actors harmed by other private actors' business-restrictive practices should not be held hostage by governments unwilling to start negotiations. If courts were not to dispense justice in a timely manner, private plaintiffs would be denied justice.[1308]

[1303] *Compare id.*, at 140 (stating that "dem Gesetzgeber, der … die extraterritoriale Anwendung nationalen Rechts vorschreibe, sei gewiss nicht verborgen geblieben, dass Entscheidungen zu fällen seien, die Wirkungen ausserhalb der Staatsgrenzen hervorrufen und die folglich aussenpolitisch erheblich sein können …").

[1304] *See* S.E. BURNETT, "U.S. Judicial Imperialism Post "Empagran v. F. Hoffmann-Laroche"?: Conflicts of Jurisdiction and International Comity in Extraterritorial Antitrust", 18 *Emory Int'l L. Rev.* 555, 612-13 (2004))

[1305] In cases in which the interests of the forum State and the foreign State are not diametrically opposed, *i.e.*, the majority of cases, interest-balancing will ordinarily be not that complicated. *See* K.M. MEESSEN, "Antitrust Jurisdiction under Customary International Law", 78 *A.J.I.L.* 783, 807 (1984) ("Quite often a close analysis of state interests may offer options for solving the jurisdictional conflict in accordance with the interests of all the states involved, though not at a rate of 100 percent, but perhaps 90 percent.").

[1306] *Contra id.*, at 808 .

[1307] *See* G. SCHUSTER, "Extraterritoriality of Securities Laws: An Economic Analysis of Jurisdictional Conflicts", 26 *Law & Pol'y Int'l Bus.* 165, 191 (1994) (arguing that the interest-balancing model "yields results that seem to be clearly superior [to other models], since it approximates a negotiated distribution of property rights [understood as rights of State sovereignty] and, therefore, an optimal allocation of these rights").

[1308] *Compare* K.M. MEESSEN, "Antitrust Jurisdiction under Customary International Law", 78 *A.J.I.L.* 783, 808 (1984). MEESSEN argued that States should conduct negotiations in order to reach a satisfactory solution, in the absence of which domestic jurisdiction should not be upheld. Yet he added that, if serious negotiations fail, courts should be able to assert domestic jurisdiction – although he did not consider this to be a rule of international law, but apparently rather a policy argument. § 403 of the

395. THE *HARTFORD FIRE* AFTERMATH – In the wake of *Hartford Fire*, most courts have applied the true conflict doctrine in private suits.[1309] The regulatory agencies still take a broader view of the rule of reason however, as will be shown in

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Restatement (Third) of U.S. Foreign Relations Law appears to take the same view, as comment a to § 403 states that the principle of reasonableness is a rule of international law, without discussing the legal status of the solution set forth in § 403 (3), *i.e.*, the regime governing situations "[w]hen it would not be unreasonable for each of two states to exercise jurisdiction…".

[1309] S. WEBER WALLER, "The Twilight of Comity", 38 *Colum. J. Transnat'l L.* 563, 569 (2000); C. SPRIGMAN, "Fix Prices Globally, Get Sued Locally? U.S. Jurisdiction Over International Cartels", 72 *U. Chi. L. Rev.* 265, 271 (2005) (noting that "after [the enactment of the Foreign Trade Antitrust Improvement Act in 1982] and *Hartford Fire*, courts weighing subject matter jurisdiction have employed a one-dimensional effects test [*i.e.*, a test that does not take actual comity concerns short of a true conflict into account]"; A. LAYTON & A.M. PARRY, "Extraterritorial jurisdiction – European Responses", 26 *Houston J.I.L.* 309, 314 (2004) (considering *Hartford Fire* to be "the leading American authority on the interpretation of [extraterritorial] antitrust law".). *See for example In re Maxwell Communication Corp.*, 93 F.3d 1036, 1050 (2d Cir. 1996) ("[W]hat [i]s required to establish a true conflict [i]s an allegation that compliance with the regulatory laws of both countries would be impossible."); *In re Simon*, 153 F.3d 991, 999 (9th Cir. 1998) ("general principles of international comity ... [are] limited to cases in which 'there is in fact a true conflict between domestic and foreign law'", quoting quoting *Hartford Fire*, 509 US at 798).

See also the *Filetech* case. In *Filetech S.A.R.L. v. France Telecom*, 978 F. Supp. 464, 478 (S.D.N.Y. 1997), the District Court held that "a party seeking the dismissal of a Sherman case on the ground of international comity must first demonstrate that a true conflict exists between the Sherman Act and relevant foreign law", and that "once the threshold barrier of conflict of law is passed, comity analysis in this circuit looks to the same factors described by the Ninth Circuit in the Timberlane cases and in the Restatement [Third]". In *Filetech*, the District Court concluded that a true conflict was present, ruling that "[t]he most that can be said in the case at bar is that France Telecom has asserted a substantial claim that its conduct gives rise to a conflict between the requirements of the Sherman Act and of French law." (*Id.*) France Telecom had contended that it was precluded by French law from disclosing the names of the subscribers to its telephonic services to Filetech. After establishing a true conflict, instead of automatically applying U.S. law, the court conducted a comity analysis based on *forum non conveniens* grounds and held that "it is more appropriate that the French courts declare the French law in the course of litigation pursued in France." (*Id.*, 481). The Court of Appeals for the Second Circuit vacated the decision of the District Court in *Filetech S.A. v. France Telecom S.A.*, 157 F.3d 922 (2d Cir. 1998). It did not approve or disapprove of the district court's analysis or application of the doctrine of international comity, but noted its disagreement with the court's conclusion that there was a true conflict between French law and United States law: "There is as yet no basis for such a conclusion in the record. [W]hat is required to establish a true conflict [i]s an allegation that compliance with the regulatory laws of both countries would be impossible" *In re Maxwell Communication Corp.*, 93 F.3d 1036, 1050 (2d. Cir. 1996). In the first place, the district court found only that France Telecom had "asserted a substantial claim" of true conflict. A "substantial claim" is insufficient; a conflict must be clearly demonstrated. Secondly, the court's true conflict determination was grounded in findings: (1) that if there were a conflict, it would "go[] to the heart of the case" including the propriety of an injunction violative of French law; and (2) that it would be "more appropriate" for French law to be declared by French courts. These findings are insufficient to demonstrate any apparent conflict of laws. To date, there is nothing in the record in the district court to justify the legal conclusion that compliance with the regulatory laws of both France and the United States would be impossible. In any event, the district court need not address the issue of international comity unless it resolves the question of subject matter jurisdiction in favor of Filetech." *See also* S. WEBER WALLER, "The Twilight of Comity", 38 *Colum. J. Transnat'l L.* 563, 570 (2000) (terming "[b]oth the reasoning and the result of [the District Court's judgment in *Filetech*] particularly disappointing."). On remand, the District Court did not address the thorny true conflict issue, but held instead that Filetech had failed to abrogate the sovereign immunity of France Telecom under the 1976 Foreign Sovereign Immunities Act. *Filetech S.A. v. France Telecom, S.A.*, 212 F. Supp. 2d 183 (S.D.N.Y. 2001). Consequently, the District Court granted France Telecom's motion to dismiss for lack of subject matter jurisdiction. The Second Circuit affirmed this judgment in *Filetech S.A.* v. *France Telecom, S.A*, 304 F.3d 180 (2d Cir. 2002)).

subsection 6.7.5. Some courts have attempted to reconcile the *Hartford Fire* and the *Timberlane* analysis,[1310] arguing that a true conflict between U.S. and foreign law does not automatically entail application of U.S. law, but may result in a dismissal if the interests of the foreign State outweigh these of the United States.[1311] Other courts reject *Hartford Fire* and still apply *Timberlane*.[1312] Still others circumvent *Hartford Fire* by conducting a *forum non conveniens* analysis,[1313] pursuant to which a case might be dismissed because of individual litigants' procedural convenience, if an adequate alternative forum could be found. A *forum non conveniens* analysis may often be just another term for a comity analysis.[1314] Clearly, in spite of its supposedly

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[1310] *See, e.g.*, the *Filetech* case in the previous footnote. *See also United States v. Brodie*, 174 F.Supp. 2d 294, 305-06 (2001) (ruling that the Supreme Court in *Hartford Fire* addressed only one of the seven factors on which the Ninth Circuit had relied in holding that jurisdiction was appropriate, since the Supreme Court noted that it had "no need in this case to address other considerations that might inform a decision to refrain from the exercise of jurisdiction on the grounds of international comity." (*Hartford Fire*, at 509 U.S. at 799)).

[1311] *See, e.g.*, *Metro Industries Inc.* v. *Sammi Corp.*, 82 F.3d 839, 847 (9th Cir.1996).

[1312] *See for example Trugman-Nash v. New Zealand Dairy Board*, 954 F. Supp. 733 (S.D.N.Y. 1997); *United Phosphorus, Ltd.*, v. *Angus Chemical Co.*, 322 F.3d 942, 952 (7th Cir. 2003) (not citing *Timberlane* but stating that "[t]he extraterritorial scope of our antitrust laws touches our relations with foreign governments, and so, it seems, it is prudent to tread softly in this area"). *See also* W.S. GRIMES, "International Antitrust Enforcement Directed at Restrictive Practices and Concentration: The United States' Experience", in: H. ULLRICH (ed.), *Comparative Competition Law: Approaching an International System of Antitrust Law*, Baden-Baden, Nomos, 1998, at 223.

[1313] Although the doctrine of *forum non conveniens* was traditionally not available in transnational public law regulatory cases (*see, e.g.*, *Indus. Inv. Dev. Corp.* v. *Mitsui & Co.*, 671 F.2d 876, 890-91 (5th Cir. 1982); *Laker Airways Ltd.* v. *Pan Am. World Airways*, 568 F. Supp. 811, 818 (D.D.C. 1983)), recent court decisions have nevertheless applied it. *See Capital Currency Exchange, N.V.* v. *Nat'l Westminster Bank PLC*, 155 F.3d 603, 610 (2d Cir. 1998) (antitrust law); *Howe* v. *Goldcorp Inv., Ltd.*, 946 F.2d 944 (1st Cir. 1991); *Allstate Life Ins. Co.* v. *Linter Group Ltd.*, 994 F.2d 996 (2d Cir. 1993); *Alfadda* v. *Fenn*, 159 F.3d 41 (2d Cir. 1998) (securities law); *Transunion Corp.* v. *Pepsico, Inc.*, 811 F.2d 127 (2d Cir. 1987) (RICO); *CSR Ltd.* v. *Fed. Ins. Co.*, 141 F.Supp. 2d 484 (D.N.J. 2001) (antitrust). *See also* H.L. BUXBAUM, "Jurisdictional Conflict in Global Antitrust Enforcement", 16 *Loy. Consumer L. Rev.* 365, 375, n. 38 (2004)).

It may be noted that foreign defendants may benefit from a *forum non conveniens* analysis, but foreign *plaintiffs* not, especially when the defendant is a U.S. corporation. While U.S. complainants suing U.S. defendants are often granted relief, a complaint by foreign plaintiffs may be dismissed on the ground that foreign courts are considered to be more convenient adjudicative fora. *See* R.A. SCHÜTZE, "Zum Stand des deutsch-amerikanischen Justizkonfliktes", *R.I.W.* 2004, 162, 165-166 (citing *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235 (1981); *In re Union Carbide Co. Gas Plant Disaster*, 634 F.Supp. 842 (S.D.N.Y. 1986); *Stangvik* v. *Shiley, Inc.* 54 Cal. 3d 744, 1 Cal. Rptr. 2d 556, 819 P.2d 14 (1991)).

[1314] *See, e.g.*, the ATS case of *Jota v. Texaco, Inc.*, 157 F.3d 153, 160 (2d Cir.1998) ("[w]hen a court dismisses on the ground of comity, it should normally consider whether an adequate forum exists in the objecting nation and whether the defendant sought to be sued in the United States forum is subject to or has consented to the assertion of jurisdiction against it in the foreign forum. That is the approach usually taken with a dismissal on the ground of *forum non conveniens* ... and it is equally pertinent to dismissal on the ground of comity."); *Filetech S.A.R.L. v. France Telecom*, 978 F. Supp. 464, 481 (S.D.N.Y. 1997); *Capital Currency Exchange, N.V. v. Nat'l Westminster Bank Plc*, No. 96 Civ. 6465 (S.D.N.Y. 1997). In the latter case, the Court held, in the context of *forum non conveniens*, that "England's interest appeared greater since most of the conduct took place in England between English parties", and thus that, the conduct of the charged English banks and their employees, although affecting U.S. commerce, was subject to Article 81 and 82 of the E.C. Treaty). The judge also found practical impediments to his court exercising jurisdiction, as all witnesses resided in England and all of the documents were located there. *See also* J. DAVIDOW, "U.S. Antitrust in 1997: The International Implications", 21 *W. Comp.* 30-31 (1998). *Compare* however *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 707 (1996) (Supreme Court stating that "[f]ederal courts abstain [on comity grounds] out of deference to the paramount interests of another sovereign, and the concern is with principles of comity and federalism. Dismissal for *forum non conveniens*, by contrast, has historically reflected a far broader

strong precedential value as a Supreme Court opinion, *Hartford Fire* is considered as unacceptable by quite a number of courts.[1315]

396. PRO-FORUM BIAS – *Timberlane* aficionados may believe that the jurisdictional rule of reason is the appropriate method of solving jurisdictional conflicts, in that it gives due consideration to foreign States' interests beyond so-called "true conflicts". As already hinted at *supra*, this belief is however often belied by reality, since the courts of the forum tend to emphasize the forum's interests over foreign interests. Putting "the fox in charge of the hen house"[1316] may the result in a pro-forum, *i.e.*, pro-U.S., bias.[1317] Writing in 1985, a commentator observed in the *Harvard Law Review* that not a single U.S. appellate court had found jurisdiction wanting in an extraterritorial antitrust case.[1318] Similarly, the D.C. Circuit in *Laker Airways* (1984) asserted that "[a] pragmatic assessment of those decisions adopting an interest-balancing approach indicates none where United States jurisdiction was declined when there was more than a *de minimis* United States interest."[1319] It may be noted that in *Hilton* v. *Guyot*, the seminal 19th century comity case, the Supreme

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range of considerations."); D. KUKOVEC, "International Antitrust – What Law in Action?", 15 *Ind. Int'l & Comp. L. Rev.* 1, 23 (2004) (arguing that a *forum non conveniens* analysis "enables the parties to more easily exercise their (procedural) rights", and "not because parties from one jurisdiction would have a bigger substantive interest in the outcome of the process").

[1315] *Compare* W.S. DODGE, "Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism", 39 *Harv. Int'l L.J.* 101, 169 (1998) (arguing that judicial unilateralism after *Hartford Fire* is not firmly established in the U.S.).

[1316] *See* W. SUGDEN, "Global Antitrust and the Evolution of an International Standard", 35 *Vand. J. Transnat'l L.* 989, 1020 (2002).

[1317] F.A. MANN, "The Doctrine of Jurisdiction Revisited after Twenty Years", 186 *R.C.A.D.I.* 9, 23 (1984-III); A. BIANCHI, Reply to Professor Maier, in K.M. MEESSEN (ed.), *Extraterritorial Jurisdiction in Theory and Practice*, London/The Hague/Boston, Kluwer, 1996, 74, 83 (pointing at the "poor record, in terms of fairness and objectivity, attained by the application of the rule in the U.S."); X., Note, "Predictability and Comity: Toward Common Principles of Extraterritorial Jurisdiction", 98 *Harv. L. Rev.* 1310, 1324 (1985) (observing that "balancing tests almost invariably yield the same result: jurisdiction lies", and "the nod to foreign interests is rarely more than perfunctory"). *See, e.g.*, *Transnor (Bermuda) Ltd.* v. *BP North Am. Petrol.*, 738 F. Supp. 1472, 1476-77 (S.D.N.Y. 1990) (finding that comity principles did not compel the Court to decline to exercise jurisdiction in a case involving violation of U.S. antitrust and commodity laws for a variety of reasons, *inter alia*, "that application of U.S. antitrust and commodity laws [did] not create either an actual or potential conflict with existing British government regulation", that "the parties' ties to the United States [we]re stronger than those to the United Kingdom", and that "the U.S. [was] an important locus, if not the hub, of defendants' alleged manipulation."). *See* for a rare case of deference: *Rivendell Forest Products* v. *Canadian Forest Products*, 810 F.Supp. 1116, 1119-1120 (D.C. Colo. 1993) (finding that the principle of comity required the court to refuse to exercise its jurisdiction over a conspiracy of Canadian softwood lumber products, since entering an order of injunction against the defendant companies "would require them to change established practices in Canada which may conflict with the policies of the Canadian federal and provincial governments"). Interestingly, the *Rivendell* court was criticized because it purportedly "uncritically deferred to Candian interests" and basically "found that the existence of an-going trade dispute between the U.S. and Canada involving [the lumber] industry made jurisdiction inappropriate." *See* S. WEBER WALLER, "The Twilight of Comity", 38 *Colum. J. Transnat'l L.* 563, 570 (2000).

[1318] X., Note, "Predictability and Comity: Toward Common Principles of Extraterritorial Jurisdiction", 98 *Harv. L. Rev.* 1310, 1325 (1985). *See also* F.C. RAZZANO, "Conflicts Between American and Foreign Law: Does the "Balance of the Interests" Test Always Equal America's Interests?", *Int. Law.*, 61, 67 (2003) ("[F]rom a legal perspective, the balance of the interests test is virtually no test at all. In any case where the U.S. government asserts an interest in enforcing its laws overseas, America's interests will be held paramount by an American court.").

[1319] 731 F.2d at 950-51 (attributing this to the fact that "[t]he courts of most developed countries follow international law only to the extent it is not overridden by national law.").

Court already held that "in the conflict of laws it must often be a matter of doubt which should prevail; […] whenever a doubt does exist, the court which decides, will prefer the laws of its own country to that of the stranger."[1320]

If the *Timberlane* test almost invariably leads to the application of U.S. law, in spite of its professed multilateralism, it might be argued that the *Hartford Fire* test is a more reliable safeguard against unwarranted assertions of jurisdiction. Indeed, under the *Hartford Fire* bright-line "true conflict" standard, courts will at least defer to a foreign States if the latter compels conduct which the United States prohibits (or *vice versa*), whereas under the fuzzier *Timberlane* standard, courts might be authorized to exercise jurisdiction even in case of a true conflict, if other factors (conveying a major U.S. interest) weigh in favor of applying U.S. law.

The pro-forum bias from which the rule of reason suffers should however not discredit that very rule, but rather the (disingenuous) application of it by U.S. courts. U.S. courts, famous for their independence and expertise, should be encouraged to apply a truly multilateral rule of reason, as contemplated by *Timberlane*, and to abandon parochial views of the exceptionalism of U.S. antitrust laws in the international arena.

6.7.5. Reasonableness applied by enforcement agencies

397. THE U.S. ANTITRUST REGULATOR'S ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATIONS – The *Timberlane* reasonableness doctrine not only influenced other courts and doctrinal writings. It was also adopted by U.S. antitrust enforcement agencies. The currently applicable *Antitrust Enforcement Guidelines for International Operations* issued by the U.S. Department of Justice and the Federal Trade Commission in April 1995[1321] set forth that both agencies consider international comity in enforcing antitrust laws.[1322] Section 3.2 of these Guidelines refer to the *Timberlane* and *Mannington Mills* interest-balancing test as the proper method of applying comity, stating that "in determining whether to assert jurisdiction to investigate or bring an action, or to seek particular remedies in a given case, each agency takes into account whether significant interests of any foreign sovereign would be affected."[1323]

[1320] *Hilton* v. *Guyot*, 159 U.S. 113, 165 (1895).

[1321] Available at http://www.usdoj.gov/atr/public/guidelines/internat.htm

[1322] Their practical use should not be underestimated, as 25 pct. of DoJ cases since the 1990s involved international operations. *See* S.E. BURNETT, "U.S. Judicial Imperialism Post "Empagran v. F. Hoffmann-Laroche"?: Conflicts of Jurisdiction and International Comity in Extraterritorial Antitrust", 18 *Emory Int'l L. Rev.* 555, 622 (2004))

[1323] In performing a comity analysis, the Agencies take into account all relevant factors. Among others, these may include:

1. the relative significance of the alleged violation of conduct within the United States, as compared to conduct abroad;
2. the nationality of the persons involved in or affected by the conduct;
3. the presence or absence of a purpose to affect U.S. consumers, markets, or exporters;
4. the relative significance and foreseeability of the effects of the conduct on the United States as compared to the effects abroad;
5. the existence of reasonable expectations that would be furthered or defeated by the action;
6. the degree of conflict with foreign law or articulated foreign economic policies;
7. the extent to which the enforcement activities of another country with respect to the same persons, including remedies resulting from those activities, may be affected; and

398. It is not surprising that the DoJ and the FTC put a high premium on jurisdictional reasonableness. From the perspective of game theory, the enforcement agencies are, unlike private plaintiffs and courts, repeat players in the international antitrust game, *i.e.*, they have day-to-day contacts with foreign regulators. Fear of future non-co-operation or retaliation may cause them to regularly defer to foreign governments. This in effect makes the international antitrust game for regulatory agencies a cooperative exercise.[1324] This explains why, in practice, even in the absence of specific reasonableness principles, the European Commission also applies a reasonableness analysis when exercising jurisdiction in competition cases.[1325]

399. Because the courts could undermine the enforcement agencies' policies by dismissing cases on the basis of their own interpretation of reasonableness, the Antitrust Guidelines provide that "[i]n cases where the United States decides to prosecute an antitrust action, such a decision represents a determination by the Executive Branch that the importance of antitrust enforcement outweighs any relevant foreign policy concerns. The Department does not believe that it is the role of the courts to "second-guess the executive branch's judgment as to the proper role of comity concerns under these circumstances."[1326] Curiously, the Guidelines do not address the situation which may be most damaging to U.S. foreign policy interests: the opposite situation of a court establishing jurisdiction over a case which the agencies dismissed, in a suit brought by private plaintiffs.[1327] It may be argued that in this situation, *a fortiori*, the courts should not be allowed to second-guess the agencies' decision not to prosecute. In both situations, a nonjusticiable political question may be discerned, or, put differently, the separation of powers between the Executive Branch and the Judiciary, and the former's prerogative in the conduct of foreign relations in particular, may preclude the court from overruling a determination by the enforcement agencies.

400. In practice, antitrust courts do ordinarily not second-guess the regulatory agencies. In *United States* v. *Baker Hughes* (1990) for instance, the D.C. Circuit held that, whatever the relevance of comity concerns in antitrust disputes between private parties, they are not a factor here ... It is not the Court's role to second-guess the executive branch's judgment as to the proper role of comity concerns under these circumstances.".[1328] In *United States* v. *Brodie* (2001), the District Court for the Eastern District of Pennsylvania stated that factors 3, 4, 6, and 10 of the *Mannington Mills* test were especially within the responsibility of the Executive (the agencies) to evaluate (the other factors being less relevant for the case). It found, not surprisingly, that "comity considerations do not counsel against

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8. the effectiveness of foreign enforcement as compared to U.S. enforcement action.

[1324] *See on* game theory and extraterritoriality (although in the field of securities regulations): G. SCHUSTER, "Extraterritoriality of Securities Laws: An Economic Analysis of Jurisdictional Conflicts", 26 *Law & Pol'y Int'l Bus.* 165, 197-202 (1994).

[1325] *See* chapter 5.5.

[1326] Antitrust Enforcement Guidelines for International Operations, Section 3.2.

[1327] A host of American antitrust cases are not brought by the enforcement agencies, but by private parties. As far as these cases are concerned, the Antitrust Guidelines limit themselves to confirming "that in disputes between private parties, many courts are willing to undertake a comity analysis" on the basis of *Timberlane* (*Id.*, Section 3.2).

[1328] 731 F. Supp. 3, 6 n. 5 (D.C. Cir. 1990).

hearing the case."[1329] Admittedly, as the Antitrust Guidelines do not reflect the law of the United States but constitute only an interpretation of existing antitrust law, the courts are not obliged to defer to the antitrust enforcement agencies. As *Baker Hughes* and *Brodie* show, however, courts tend to heed the opinion of the agencies. WEBER WALLER has observed in this context that "[t]he issue [of a court overruling a regulatory agency] is likely to remain a theoretical, rather than a practical, concern since the government does a good job in considering comity factors and a defendant would be hard pressed to convince the court that the government had botched this job."[1330]

6.8. The antitrust Comity Agreements between the U.S. and the EC

401. The restrictive application of the rule of reason and the ensuing higher risk of regulatory conflicts have led States to conclude antitrust co-operation agreements, especially after the Organization for Economic Cooperation and Development (OECD) recommended its Member States to cooperate on restrictive business practices in 1979.[1331] As early as 1976, the United States and the Federal Republic of Germany concluded an agreement "relating to mutual co-operation regarding restrictive business practices".[1332] In the 1990s, the United States and the European Community entered into two antitrust co-operation agreements.[1333] They also concluded bilateral co-operation agreements with other States.[1334] Hereinafter, only the U.S.-EC agreements (on which the other agreements are modeled) will be discussed in detail. The agreements will be applauded, but some critical observations will be made.

402. 1991 AGREEMENT – In 1991, the U.S. and the EC signed the "Agreement Regarding the Application of Competition Laws".[1335] The Agreement "is

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[1329] 174 F.Supp.2d 294, 306 (E.D. Pa. 2001).

[1330] S. WEBER WALLER, "The Twilight of Comity", 38 *Colum. J. Transnat'l L.* 563, 568 (2000)

[1331] OECD Council, Recommendation of the Council Concerning Co-operation between member Countries on Restrictive Business Practices Affecting International Trade, adopted by the Council at its 501st Meeting on 25 September 1976, reprinted in 15 *N.Y.I.L.* 164-65 (1984).

[1332] *I.L.M.* 1282 (1976).

[1333] *See for example* the prophetic analysis of B. BECK, "Extraterritoriale Anwendung des EG-Kartellrechts. Rechtsvergleichende Anmerkungen zum "Zellstoff"-Urteil des Europäischen Gerichtshofs", *R.I.W.* 91, 95 (1990).

[1334] The U.S. had previously entered into cooperative antitrust agreements with Germany, Australia and Canada. *See* Agreement Relating to Mutual Cooperation Regarding Business Restrictive Practices Between Germany and the U.S., June 23, 1976, 15 *I.L.M.* 1282 (1976); Agreement Between the Government of the United States of America and the Government of Australia Relating to Cooperation on Antitrust Matters, June 29, 1982, 21 *I.L.M.* 702 (1982); Memorandum of Understanding Between the Government of the United States of America and the Government of Canada as to Notification, Consultation and Cooperation with Respect to the Application of National Antitrust Laws", March 9, 1984, 23 *I.L.M.* 275 (1984). *See* for the international agreements which the U.S. entered into: http://www.usdoj.gov/atr/public/international/int_arrangements.htm. The European Union concluded cooperation agreements with Canada (*O.J.* L 175/50 (1999)), and Japan (2003, available at http://ec.europa.eu/comm/competition/international/bilateral/documents/jp3_en.html), which follow a similar pattern. Consultation and dialogue in competition matters also takes place between the EU and Korea and China. Numerous free trade agreements with third States provide for cooperation in competition matters. *See* for an overview http://ec.europa.eu/comm/competition/international/bilateral/

[1335] AGREEMENT REGARDING THE APPLICATION OF COMPETITION LAWS BETWEEN THE GOVERNMENT OF THE UNITED STATES AND THE COMMISSION OF THE EUROPEAN COMMUNITIES, 4 *CMLR*, 1991, 823-831; 30 *I.L.M.* 1487, *O.J.* L 132 (1995). In 1994, the ECJ ruled, in a case brought by France, that the Commission was not competent under EC law to conclude the agreement. *France* v. *Commission*,

to promote cooperation and coordination and lessen the possibility or impact of differences between the Parties in the application of their competition laws."[1336] Competition laws would include cartel as well as concentrations regulations.[1337] An important feature of the Agreement is the notification requirement, according to which "[e]ach Party shall notify the other whenever its competition authorities become aware that their enforcement activities may affect important interests of the other Party."[1338] Furthermore, the enforcement agencies will exchange non-confidential information,[1339] render assistance to each other, coordinate their enforcement activities and consult promptly with each other.[1340] Nothing in the Agreement, however, "shall be interpreted in a manner inconsistent with the existing laws, or as requiring any change in the laws, of the United States of America or the European Communities or of their respective States or Member States."[1341] Accordingly, the Agreement does not limit the reach of U.S. or EC competition laws. It only invites the enforcement agencies to take the interests of the other party into account,[1342] and to co-operate in the enforcement of their respective laws, but it does not compel them to modify their traditional regulatory approach. If one focuses on the provisions facilitating evidence-taking, it may even be submitted that the 1991 Comity Agreement *furthers* the effectiveness of extraterritorial antitrust regulation. Indeed, while courts may theoretically have jurisdiction over foreign conspiracies producing domestic effects, evidentiary hurdles may make it practically impossible to

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E.C.R. I-3641 (1994). The agreement was thereupon approved by a decision of the Council of the EU. Decision of the Council and the Commission of 10 April 1995 concerning the conclusion of the Agreement between the European Communities and the Government of the United States of America regarding the application of their competition laws, *O.J.* L95/45 (1995). This decision declared the agreement applicable as of 1991. *See* on the 1991 agreement: W.K. WALKER, "Extraterritorial Application of U.S. Antitrust Laws: The Effect of the European Community - United States Antitrust Agreement", 33 *Harvard Int'l L.J.* 583-591 (1992); A.J. RILEY, "Nailing the Jellyfish: The Illegality of the EC/US Government Competition Agreement," 13 *E.C.L.R.* 101-109 (1992); P. TORREMANS, "Extraterritorial Application of E.C. and U.S. Competition Law", 21 *E. L. Rev.* 280, 289-292 (1996).

[1336] 1991 Agreement, Article I (1).

[1337] *Id.*, Article I (2) (A).

[1338] *Id.*, Article II (2).

[1339] *Id.*, Articles III and VIII.

[1340] *Id.*, Articles IV-VII.

[1341] *Id.*, Article IX.

[1342] *Id.* Article VI (3) : "Where it appears that one Party's enforcement activities may adversely affect important interests of the other Party, the Parties will consider the following factors, in addition to any other factors that appear relevant in the circumstances, in seeking an appropriate accommodation of the competing interests:

(a) the relative significance to the anticompetitive activities involved of conduct within the enforcing Party's territory as compared to conduct within the other Party's territory;

(b) the presence or absence of a purpose on the part of those engaged in the anticompetitive activities to affect consumers, suppliers, or competitors within the enforcing Party's territory;

(c) the relative significance of the effects of the anticompetitive activities on the enforcing Party's interests as compared to the effects on the other Party's interests;

(d) the existence or absence of reasonable expectations that would be furthered or defeated by the enforcement activities;

(e) the degree of conflict or consistency between the enforcement activities and the other Party's laws or articulated economic policies; and

(f) the extent to which enforcement activities of the other Party with respect to the same persons, including judgments or undertakings resulting from such activities, may be affected."

The Agreement's interest-balancing test, designed to avoid conflicts over enforcement activities, is clearly less restrictive than the "true conflict" test which appeared later in *Hartford Fire* (*see also* A. JONES & B. SUFRIN, *EC Competition Law: text, cases and materials*, Oxford, Oxford University Press, 2001, at 1067).

actually *exercise* this jurisdiction.[1343] Easier access to foreign-located evidence could only enhance the enforcement capabilities of national antitrust enforcement agencies.

403. 1998 AGREEMENT – In 1998, a *Positive Comity Agreement*[1344] supplemented the 1991 Agreement, which already contained a seminal provision on positive comity.[1345] Whereas negative comity refers to the regulating state refraining from exercising jurisdiction because another State's interests may be more important (*i.e.*, the traditional comity concept of jurisdictional restraint also embodied in the 1991 agreement), positive comity refers to the competition authorities of a requesting party "requesting the competition authorities of a requested party to investigate and, if warranted, to remedy anticompetitive activities in accordance with the requested party's competition laws".[1346] Such a request may bring about the deferral or suspension of pending or contemplated enforcement activities by the requesting party.[1347] Like the 1991 Agreement, the 1998 Agreement contains a confidentiality clause and an existing law clause.[1348] Consequently, neither the latter Agreement nor the former amend the reach of U.S. or EC law.

404. ASSESSMENT – The Comity Agreements have clear merits in that they combine the U.S. preference for comity and the European preference for negotiated solutions.[1349] Transatlantic antitrust cooperation between antitrust regulators has indeed been increased thanks to the Agreements.[1350] The Agreements have major drawbacks though. For one thing, they are only *soft* law, since they do not purport to modify U.S. or EC international antitrust practice.[1351] For another, the Agreements do only govern the relations between U.S. and EC enforcement authorities. They do not concern antitrust enforcement by private parties. This make the Agreement look

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[1343] *Compare* S. WEBER WALLER, "The Twilight of Comity", 38 *Colum. J. Transnat'l L.* 563, 573 (2000), citing *United States* v. *General Electric Co.*, 869 F. Supp. 1285, 1293 (S.D. Ohio 1994) ("[T]he government's usual burden of investigating and proving its case was made more difficult because three of the four named defendants, and many potential witnesses, are foreign nationals beyond the jurisdiction of this Court . . . [T]he government attorneys made good faith efforts as zealous advocates to substitute the testimony of available witnesses for those witnesses it ideally would have called. These efforts to compensate for the dearth of supporting evidence, however, were unsuccessful.") (footnote omitted).

[1344] AGREEMENT BETWEEN THE EUROPEAN COMMUNITIES AND THE GOVERNMENT OF THE UNITED STATES OF AMERICA ON THE APPLICATION OF THE POSITIVE COMITY PRINCIPLES IN THE ENFORCEMENT OF THEIR COMPETITION LAWS, O.J. L 173/28, 1998; 4 *C.M.L.R.* 1999, at 502.

[1345] Article V of the 1991 Agreement (provided that one of parties may notified the other and request the initiation of enforcement activities).

[1346] Article III of the 1998 Agreement.. Such a request may be made regardless of whether the activities also violate the Requesting Party's competition laws, and regardless of whether the competition authorities of the Requesting Party have commenced or contemplate taking enforcement activities under their own competition laws.

[1347] *Id.*, Article IV. This Article sets forth some conditions to be met.

[1348] *Id.*, Articles V and VII.

[1349] *See also* B. PEARCE, "The Comity Doctrine as a Barrier to Judicial Jurisdiction: A U.S.-E.U. Comparison", 30 *Stan. J. Int'l L.* 525, 576-77 (1994) (noting the tenor of the 1991 treaty is "on comity in the context of legislative and enforcement jurisdiction", but that they treaty "might also signal the opposite trend" in that it "may evidence the gravitation of the U.S. toward the European preference for negotiated solutions…".

[1350] *See, e.g.*, W. SUGDEN, "Global Antitrust and the Evolution of an International Standard", 35 *Vand. J. Transnat'l L.* 989, 1006 (2002).

[1351] They have therefore been denounced, for failing to meet the needs of the international business community. *See* U. DRAETTA, "Need for Better Trans-atlantic Co-operation in the Field of Merger Control", *R.D.A.I.* 557 (2002).

unproductive, for the majority of the American antitrust cases are now of a private suit type.[1352] Moreover, as ATWOOD has noted, "[i]t is not realistic to expect one government to prosecute its citizens solely for the benefit of another."[1353] The Agreement will therefore only work when the U.S. and Europe have a mutual interest in resolving the dispute.[1354] So far, positive comity has only once been invoked (in 1997, under the 1991 Agreement).[1355] Often, the U.S. and EC authorities bypass the formal provisions of the comity agreements.[1356]

Regrettably, the Agreements do not set forth a conflict resolution mechanism, and thus do not prevent stand-offs from taking place.[1357] In the *Microsoft* case (2005), ten members of the International Relations Committee of the U.S. House of Representatives complained with the European Commission that its antitrust actions against Microsoft violated the Agreements.[1358] And in the politically sensitive mergers of *Boeing/McDonnell Douglas* and *GE/Honeywell*, the co-operation and positive comity requirements set forth in the Agreements did not apply, which 'authorized' the European Commission to block U.S.-approved mergers between U.S. companies.[1359]

405. U.S. INTERNATIONAL ANTITRUST ENFORCEMENT ASSISTANCE ACT – In the United States, a special statute, the U.S. International Antitrust Enforcement Assistance Act of 1994 ("IAEAA"), contains the framework for comity-based antitrust cooperation between the U.S. and other States.[1360] 15 U.S.C. § 6201 provides that if an antitrust mutual assistance agreement has been entered into, "the Attorney

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[1352] *See* P. TORREMANS, "Extraterritorial Application of E.C. and U.S. Competition Law", 21 *E. L. Rev.* 280, 292-93 (1996); J. SCHWARZE, "Die extraterritoriale Anwendbarkeit des EG-Wettbewerbsrechts – Vom Durchführungsprinzip zum Prinzip der qualifizierten Auswirkung", in: J. SCHWARZE (ed.), *Europäisches Wettbewerbsrechts im Zeichen der Globalisierung*, Baden-Baden, Nomos, 2002, at 59. *See also* A.V. LOWE, "The Problems of Extraterritorial Jurisdiction: Economic Sovereignty and the Search for a Solution", 34 *I.C.L.Q.* 724, 729 (1985) (stating that under consultation procedures "[f]oreign governments making representations under these procedures to the United States authorities may [only] hope that the United States Government will address the court hearing the private suit on the questions of international law and policy").

[1353] J.R. ATWOOD, "Positive Comity – Is it a Positive Step?", *Fordham Corp. L. Inst.* 79, 87 (1992).

[1354] *See* OECD Committee on Competition Law and Policy, *CLP Report on Positive Comity*, OECD Doc. DAFFE/CLP (99) 19, Sections 46-49, quoted in S. WHA CHANG, "Interaction Between Trade and Competition: Why a Multilateral Approach for the United States?", 14 *Duke J. Comp. & Int'l L.* 11, fn. 40 (2004).

[1355] DOJ complaint *re* Air France with the European Commission, which started an investigation resulting in Air France agreeing to a code of behavior in 2000. Press release IP(00)835, 25 August 2005, cited in I. VAN BAEL & J.-F. BELLIS, *Competition Law of the European Community*, 4th ed., The Hague, Kluwer Law International, 2005, 171.

[1356] *Id.*, at 172.

[1357] *See also* A. Schaub, Director-General DG Competition, "International cooperation in antitrust matters: making the point in the wake of the Boeing/MDD Proceedings", speech delivered in February 1998 ("Procedures of notification and consultation and the principles of traditional and positive comity allow us to bring our respective approaches closer in cases of common interest, but there exists no mechanism for resolving conflicts in cases of substantial divergence of analysis."), quoted in I. VAN BAEL & J.-F. BELLIS, *Competition Law of the European Community*, 4th ed., The Hague, Kluwer Law International, 2005, 174.

[1358] *See* M. MÜLLER, "The European Commission's Decision Against Microsoft: A Violation of the Antitrust Agreements Between the United States and the European Union?", *E.C.L.R.* 309-315 (2005).

[1359] *See* A.F. BAVASSO, "Boeing/McDonnell Douglas: Did the Commission Fly Too High?", *E.C.L.R.* 243 (1998).

[1360] 15 U.S.C. §§ 6201-12.

General of the United States and the Federal Trade Commission may provide to a foreign antitrust authority with respect to which such agreement is in effect under [chapter 88], antitrust evidence to assist the foreign antitrust authority - (1) in determining whether a person has violated or is about to violate any of the foreign antitrust laws administered or enforced by the foreign antitrust authority, or (2) in enforcing any of such foreign antitrust laws." The Attorney General and the Federal Trade Commission have the authority to conduct investigations to obtain such evidence, even if the conduct investigated does not violate any of the federal antitrust laws.[1361] On the application of the Attorney General, the District Courts may order discovery to assist a foreign antitrust authority.[1362] The IAEAA appears however to be a still-born child, since, as of December 21, 2004, only Australia had entered into a mutual assistance agreement with the United States under the IAEAA.[1363] The co-operation agreements with other States are not based on the statutory conditions of the IAEAA. The International Working Group of the Antitrust Modernization Commission has attributed the lack of success of the IAEAA to an IAEAA provision that permits the use of information obtained under a mutual assistance agreement for non-antitrust criminal enforcement.[1364] It proposes to study elimination of amendment of this provision to ensure that the agreements are more appealing to other States.[1365]

6.9. Personal jurisdiction over defendants in international antitrust cases

406. Where a State may have prescriptive jurisdiction over a foreign business-restrictive practices, efforts at clamping down on such practices will come to nothing if adjudicative jurisdiction cannot be secured. Rules of adjudicative jurisdiction may protect foreign defendants from being hauled before a court even when a State has legitimate prescriptive jurisdiction under public international law over their conduct (for instance because it caused substantial effects within that State's territory). In this part, some issues of personal jurisdiction arising in United States antitrust law will be briefly discussed. In European competition law, issues of judicial jurisdiction are not clearly separated from issues of prescriptive jurisdiction. They have not arisen in cases brought by regulatory agencies. In rare private cases however, they should in principle come to the fore.

407. As pointed out in chapter 1.4.1, United States courts may, pursuant to the U.S. Supreme Court's *International Shoe* standard, exercise personal jurisdiction over a defendant as soon as he or she has minimum contacts with the United States.[1366] The minimum contacts standard also governs the exercise of antitrust jurisdiction. In Section 4 of the Antitrust Enforcement Guidelines for International Operations, the U.S. antitrust enforcement agencies declared that they "will bring suit only if they conclude that personal jurisdiction exists under the due process clause of

[1361] 15 U.S.C. § 6202.
[1362] 15 U.S.C. § 6203.
[1363] Agreement between the Government of the United States of America and the Government of Australia on Mutual Antitrust Enforcement Assistance, April 27, 1999, available at http://www.apeccp.org.tw/doc/USA/Cooperation/usaus7.htm
[1364] 15 U.S.C. § 6211(2)(E)(ii). *See* International Working Group on Antitrust Modernization, Memorandum, p. 6, available at http://www.amc.gov/pdf/meetings/International.pdf.
[1365] *Id.*
[1366] *International Shoe Co.* v. *Washington*, 326 U.S. 310, 315 (1945).

the U.S. Constitution".[1367] In *International Shoe*, "minimum contacts" with the U.S. was held to satisfy the due process clause.[1368]

408. Some controversies still surround the exact application of minimum contacts-based personal jurisdiction. They revolve around the interpretation of Section 12 of the Clayton Act, which states that "[a]ny suit under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant or wherever it may be found."[1369] The enforcement agencies believe they have interpreted the territorial link set forth in Section 12 of the Clayton Act "pragmatically", pointing out that for purposes of personal jurisdiction "a company may transact business in a particular district directly through an agent, or through a related corporation that is actually the "alter ego" of the foreign party."[1370]

409. Firstly, there is some debate over alleged differences between the *International Shoe* and the Clayton Act "minimum contacts" standard.[1371] The Clayton Act standard is supposedly less strict than the "constitutional" *International Shoe* standard, for, under the Clayton Act standard, selling in the United States, possibly through a proxy, may suffice to establish jurisdiction. Mere sales may arguably not constitute "minimum contacts" under *International Shoe* however. There is no clear pattern in judicial decisions regarding the choice between both standards.[1372] It remains actually to be seen whether the content of both standards really differs.

410. Another controversy has focused on venue. The concept "venue" denotes the place where the trial takes place, or where foreign defendants could be sued.[1373] The courts agree that the second part of Section 12 of the Clayton Act ("all process […] may be served in the district of which it is an inhabitant or wherever it may be found") confers nationwide service of process. This provision enables courts

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[1367] Antitrust Enforcement Guidelines for International Operations, Section 4.1.
[1368] *International Shoe Co. v. Washington*, 326 U.S. 310, 315 (1945).
[1369] Section 12 of the Clayton Act, 15 U.S.C. § 22.
[1370] *Id.*, Section 4.1.
[1371] *See* K.L. ADAMS & E. METLIN, Dickstein Shapiro Morin & Oshinsky LLP, Washington D.C., "Procedural Issues Unique to International Cartel Litigation", ABA Antitrust Section International Forum 2002: The International Cartel Workshop, New York City, 2002, at 5-6, at http://www.dicksteinshapiro.com/seeninprint/Presentations/CartelLitigation.pdf
[1372] See *Go-Video, Inc. v. Akai Elec. Co.*, 885 F.2d 1406 (9th Cir. 1989) versus *In re Vitamins Antitrust Litig.*, 94 F. Supp. 2d 26 (D.D.C. 2000); *Texas International Magnetics, Inc. v. Premier Multimedia*, Inc. F.3d 202 (2nd Cir. 2003). In the latter case, the Court assessed the presence of "minimum contacts" in light of effects of the defendant's conduct in the United States. This is precisely the standard used so as to determine prescriptive jurisdiction. The Court held "that the effects test is frequently used in the analysis of specific personal jurisdiction." The Court went on to state that it may "exercise specific personal jurisdiction over a defendant consistent with due process when the defendant is a primary participant in intentional wrongdoing – albeit extraterritorially – expressly directed at the forum." (citing *Calder v. Jones*, 465 U.S. 783, 789-90 (1984) (Supreme Court finding personal jurisdiction of a California court over a Florida newspaper reporter and editor in a libel action by a California resident). If due process is satisfied when a foreign defendant has directly engaged in anticompetitive conduct producing adverse domestic effects, one is left to wonder whether the method of establishing personal jurisdiction differs anyhow from the method of establishing prescriptive jurisdiction.
[1373] *See also* J. DAVIDOW, "International Implications of U.S. Antitrust in the George W. Bush Era", 25 *W. Comp.* 493, 505 (2002).

to extend personal jurisdiction over foreign corporations if they have minimum contacts with the United States. However, it is a matter of dispute whether Section 12's venue provision, its first part, should be satisfied before the nationwide service of process provision, Section 12's second part, could be invoked. Some courts, notably the Ninth Circuit, believe it should not. They argue that venue could alternatively be premised on 28 U.S.C. § 1391(d) (Alien Venue Act), which provides that "[a]n alien may be sued in any district".[1374] They refer in this respect to a patent case, in which the U.S. Supreme Court ruled that since the codification of § 1391 (d) in 1948, "the general venue laws do not control in a suit against an alien defendant".[1375] In practice, minimum contacts with the U.S. as a whole then suffice to establish personal jurisdiction, while any U.S. district court may serve as a venue. Other courts, notably the D.C. Circuit, require that a defendant be an inhabitant of, be found in, or transact business in a forum before being subject to nationwide service of process.[1376] They argue that Section 12's venue provision should be satisfied before its jurisdictional provision can be invoked. Under this doctrine, if a defendant does not meet the requirements of the venue provision, he cannot be sued in the U.S., even if he has sufficient minimum contacts with the U.S. as a whole. Obviously, instances of foreign defendants hauled before U.S. courts are less frequent under the latter doctrine.

6.10. Jurisdiction over foreign antitrust harm

411. In the previous parts of this chapter, the question has been raised of what limits there are to assertions of domestic jurisdiction over foreign conspiracies that cause domestic harm. This part touches upon the question of whether there are limits to assertions of domestic jurisdiction over conspiracies, either foreign or domestic, that cause foreign harm. Traditionally, considerations of national economic interest masquerading as considerations of public international law have impelled States to forsake exercising jurisdiction over their own exporters' business-restrictive practices (exclusively) causing foreign injury, and thus to reject the application of the subjective territorial principle to antitrust law (subsection 6.9.1). More recently, the question has arisen whether, in an era in which cartels are no longer formed along national lines but are increasingly global and produce worldwide effects, foreign-based plaintiffs have standing in domestic courts for foreign injury caused by foreign-based conspirators who also caused domestic injury (subsection 6.9.2). In the 2004 *Empagran* judgment, the U.S. Supreme Court held that they indeed have. Restrictive conditions, informed by comity concerns, may however serve to severely limit the availability of treble-damages remedies in the United States. It will be argued that comity ought to be wed to deterrence, and that the principle of non-intervention ought not to be invoked to dismiss foreign plaintiffs' legitimate claims that stand no chance of being heard in foreign courts.

[1374] *Go-Video Inc.* v. *Akai Elec. Co., Ltd.*, 885 F.2d at 1408-1413 (9th Cir. 1989); *Daniel* v. *Am. Bd. of Emergency Med.*, 988 F. Supp. 127, 198-201 (W.D.N.Y. 1997); *Gen. Elec. Co.* v. *Bucyrus – Erie Co.*, 550 F. Supp. 1037, 1041-42 (S.D.N.Y. 1982)

[1375] *Brunette Machine Works, Ltd. v. Kockum Indus., Inc.*, 406 U.S. 706, 714 (1972).

[1376] *GTE New Media Service Inc. v. Bell South Corp.*, 199 F.3d 1343 (D.C. Cir. 2000), *Michelson* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 709 F. Supp. 1279, 1286-87 (S.D.N.Y. 1989); *Reynolds Metals Co.* v. *Columbia Gas Sys., Inc.*, 694 F. Supp. 1248, 1251 (E.D. Va. 1988), *In Re Vitamins Antitrust Litigation*, 94 F. Supp. 2d 26, 27 n. 3, 30 (D.D.C. 2000). The latter court questioned the reasoning of the D.C. Circuit, but considered itself to be bound by its judgment in *GTE*.

6.10.1. The subjective territorial principle in international antitrust law

412. ABSENCE OF DOMESTIC CONDUCT-BASED TERRITORIAL ANTITRUST JURISDICTION – It may be remarkable that States have been clamping down on anticompetitive behavior abroad adversely affecting their own markets (and studiously sought for conceptual justifications for such regulatory interventions), while condoning domestic anticompetitive behavior directed against foreign markets. In public international law terms, in the field of competiton law, States have resorted to the objective territorial principle, and shunned the subjective territorial principle.

It has been argued that applying competition law to domestic undertakings whose conduct affects foreign markets runs counter to the international rule of non-intervention in the internal affairs of foreign States. States would be prohibited from imposing a foreign economic policy on other States, and from regulating foreign consumer markets.[1377] Different States indeed have different antitrust policies. Some States may condone or even support what other States prohibit. It belongs to the national sovereignty of a State to decide whether or not it will allow anticompetitive conduct to affect its territory.

In spite of the theoretical appeal of this argument, it is however unlikely that an importing State whose consumer market is disrupted by a foreign export cartel will take issue with the exporting State clamping down on the responsible cartel. A stronger reliance on subjective territoriality is actually all the more desirable as not all States have the leverage and resources to apply their antitrust laws extraterritorially so as to clamp down on foreign antitcompetitive activity affecting their own markets on the basis of the effects doctrine.[1378] A broader application of domestic antitrust law to export industries may however prove elusive, as export cartels – which do not harm domestic consumers – confer economic benefits on exporting States.[1379] Because of lack of economic interest, ordinarily, enforcement agencies will therefore not bring their domestic antitrust laws to bear on national exporters.[1380]

[1377] *See* M. AKEHURST, "Jurisdiction in International Law", 46 *B.Y.I.L.* 145, 193 (1972-73). *Compare* M.D. VANCEA, "Exporting U.S. Corporate Governance Standards Through the Sarbanes-Oxley Act: Unilateralism or Cooperation?", 53 *Duke L.J.* 833, 834 (2003-2004).

[1378] It has been argued that the practice of condoning or encouraging export cartels is evidence of the illegality of the effects doctrine: "The practice of nations cannot sanction the legality of export cartels, yet condemn their "effects". The importing State, therefore, is unlikely to enjoy international jurisdiction to legislate against the export cartels of another State." *See* F.A. MANN, "The Doctrine of Jurisdiction in International Law", 111 *R.C.A.D.I.* 1, 105 (1964-I). However, there does not seem to be anything incongruous for a State in believing that it may encourage export cartels, and at the same time conceding that another State may legally take on these cartels using effects jurisdiction if it so desires. States sanction export cartels, not because they believe that foreign nations cannot legally exercise effects jurisdiction over these cartels, but because they believe these cartels will be successful and confer benefits on them in light of the lack of foreign nations' political leverage or resources to exercise their jurisdiction.

[1379] *Compare* F.A. MANN, "The Doctrine of Jurisdiction in International Law", 111 *R.C.A.D.I.* 1, 97-98 (1964-I) (arguing that States will never enforce their competition laws always against their own nationals operating abroad by relying on the nationality principle).

[1380] *See* M.D. VANCEA, "Exporting U.S. Corporate Governance Standards Through the Sarbanes-Oxley Act: Unilateralism or Cooperation?", 53 *Duke L.J.* 833 (2003-2004) ("[S]uch extraterritoriality is rarely used. U.S. courts and enforcement agencies tend to be reluctant to use taxpayer money to punish conduct that only harms foreigners, as this fails to increase the agency's institutional or political capital"); *Zoelsch* v. *Arthur Andersen & Co.* 824 F.2d 27, 32 (D.C. Cir. 1987); W.S. DODGE, "Understanding the Presumption Against Extraterritoriality", 16 *Berkeley J. Int'l L.* 85, 90 (1998).

413. BRIDGING THE ENFORCEMENT GAP – The enforcement deficit stemming from regulatory agencies' unwillingness to apply their laws to domestic conduct mainly affecting foreign markets could possibly be countered by adopting, as GUZMAN has proposed, a choice of law rule that "would give injured plaintiffs a [foreign, *e.g.*, U.S.] remedy against the actions of foreign [*e.g.*, U.S.] firms that target states whose laws do not apply extraterritorially, as long as the conduct was within a state with effective antitrust rules."[1381] Granting foreign plaintiffs a private remedy may ensure that Western corporations' preying on foreign, developing markets would no longer go unpunished. If domestic laws explicitly forbid the application of antitrust law to export cartels, a private remedy will be useless though. More useful would obviously be the adoption of international conventions outlawing export cartels. Under current GATT and GATS rules, however, there are only very limited possibilities for States to file suit against other States condoning or encouraging export cartels, mainly because competition law and policy remains largely outside the scope of the WTO.[1382]

414. UNITED STATES – In the United States, the Supreme Court held as early as the 1909 *American Banana* case that United States antitrust laws do not apply to agreements made in the United States and performed (entirely) abroad.[1383] In *Matsushita* v. *Zenith Radio* (1986), the Supreme Court restated this doctrine, holding that U.S. laws "do not regulate the competitive conditions of other nations' economies."[1384] Thus, in international law terms, the United States only has

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[1381] *See* A.T. GUZMAN, "The Case for International Antitrust", 22 *Berkeley J. Int'l L.* 355, 371 (2004).

[1382] As far as GATT is concerned, the WTO Appellate Body ruled in the case of Canada – Measures relating to exports of wheat and treatment of imported grain (30 August 2004), that it saw "no basis for interpreting [Article XVII GATT, which provides for obligations on Members in respect of the activities of State trading enterprises, *i.e.*, State enterprises or enterprises with special or exclusive privileges] as imposing comprehensive competition-law-type obligations on state trading enterprises …" (§ 145). Possibly, however, export cartels could be dealt with under the principle of national treatment (*e.g.*, Article III GATT), pursuant to which States are prohibited from treating foreign corporations differently from national corporations. It could be argued that States violate this principle by applying their competition laws to foreign conspiracies (affecting their domestic market) but not to their own export cartels. It may be added that as far as GATS is concerned, a WTO Panel ruled in the case of Mexico – Measures affecting telecommunication services (2 April 2004), a case relating to the practices of Telmex, the largest supplier of basic telecommunication serves in Mexico, that Mexico "failed, in violation of Section 1.1 of its Reference Paper [in which it pledged to maintain "appropriate measures" "for the purposes of preventing suppliers who, alone or together, are a major supplier from engaging in or continuing anti-competitive practices] to maintain [such] measures." (§ 7.269) The Panel clarified that "the measures addressed in the case before us are exceptional, and require a major supplier to engage in acts which are tantamount to anti-competitive practices which are condemned in domestic competition laws of most WTO Members, and under instruments of international organizations to which both parties are members." (§ 7.267). *See* further on the Appellate Body's view on competition law: C.D. EHLERMAN & L. EHRING, "WTO Dispute Settlement and Competition Law: a View from the Appellate Body's Perspective", 26 *Fordham Int'l L.J.* 1505 (2003). Thanks to Bart De Meester for some clarification about the subject.

[1383] *American Banana Co. v. United Fruit Co.* (1909), 213 U.S. 347, 359.

[1384] *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582, 106 S.Ct. 1348 (1986). *See also Turcientro, S.A.* v. *American Airlines, Inc.*, 303 F.3d 293 (3d Cir. 2002) (holding that foreign plaintiffs lacked standing due to insufficient domestic impact of U.S. defendants' price-fixing conspiracy and the fact that they sustained their injuries solely in the Caribbean and Latin America). *Compare* the environmental law case of *Amlon Metals, Inc.* v. *FMC Corp.*, 755 F. Supp. 668, 675 (S.D.N.Y. 1991) (holding that "Congress was concerned with hazardous waste problems in the United States, not in foreign countries."). *See* for a critical appraisal of the *Amlon Metals* case: M.P. GIBNEY &

jurisdiction on the basis of the objective territorial principle, *i.e.*, on the basis of effects on competition within the United States.

In *Pfizer Inc.* v. *Government of India, et al.* (1978) however,[1385] the Supreme Court upheld the right of foreign plaintiffs to sue for treble damages in the United States just as any other plaintiff, noting that one purpose of Section 4 of the Clayton Act is "to deter violators and deprive them of 'the fruits of their illegality'".[1386] Accordingly, denying a foreign plaintiff injured by an antitrust violation the right to sue "would permit a price fixer or a monopolist to escape full liability for his illegal actions" and "would lessen the deterrent effect" of the antitrust laws.[1387] The *Pfizer* doctrine may however not apply to foreign plaintiffs that are not foreign governments, as was the case in *Pfizer*. It may be argued that in *Pfizer*, the rationale for not applying the subjective territorial principle – the prohibition of regulating the competitive conditions of other nations as a modality of the international law rule of non-intervention – was not present, since foreign governments may be considered to have waived their right of protest by intervening themselves as plaintiffs in a U.S. antitrust case.[1388]

Some antitrust statutes explicitly prohibit the application of U.S. antitrust law to U.S. exporters. U.S. companies that form associations with the *sole* purpose of engaging in export trade in goods and actually are engaged solely in such export, are exempted from the Sherman Act on the basis of the Webb-Pomerene Act of 1918, the Act which was at issue in the European *Wood Pulp* litigation.[1389] U.S. companies that form associations to export goods and services may also be exempted if their activities do not result in neither a substantial lessening of competition or restraint of trade within the United States or a substantial restraint of the export trade of any competitor.[1390] Under the 1982 Foreign Trade Antitrust Improvements Act (FTAIA), U.S. exporters are similarly exempted from the Sherman Act.[1391] As these exemptions for U.S. exporters cause problems for antitrust diplomacy, the International Working Group of the U.S. Antitrust Modernization Commission recently recommended that the issue be

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R.D. EMERICK, "The Extraterritorial Application of United States Law and the Protection of Human Rights: Holding Multinational Corporations to Domestic and International Standards", 10 *Temple Int'l & Comp. L.J.* 123 (1996) (arguing that "the nationality of a corporation is an important consideration in determining the degree to which domestic laws and standards apply extraterritorially").

[1385] *Pfizer Inc. v. Government of India*, 434 U.S. 308 (1978).

[1386] *Id.*, at 314.

[1387] *Id.*, at 314-15 (citations omitted). *See also id.*, at 315 (considering that "[i]f foreign plaintiffs were not permitted to seek a remedy for their antitrust injuries, persons doing business both in this country and abroad might be tempted to enter into anticompetitive conspiracies affecting American consumers in the expectation that the illegal profits they could safely extort abroad would offset any liability to plaintiffs at home. If, on the other hand, potential antitrust violators must take into account the full costs of their conduct, American consumers are benefited by the maximum deterrent effect of treble damages upon all potential violators.").

[1388] *See* S. FERNANDES, "F. Hoffman-Laroche, Ltd. v. Empagran and the Extraterritorial Limits of United States Antitrust Jurisdiction: where Comity and Deterrence Collide", 20 *Conn. J. Int'l L.* 267, 278 (2005) (arguing that "[a] conflict of international laws is unlikely when a foreign government consents to and actively seeks standing in a U.S. court, as was the case in *Pfizer*").

[1389] 15 U.S.C. §§ 61-65 ('Promotion of Export Trade'), in particular § 62.

[1390] Title III of the Export Trading Company Act, 15 U.S.C. §§ 4001-21, in particular § 4013.

[1391] 15 U.S.C. § 6a (stating that the Sherman Act "shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations" and that the Sherman applies "to such conduct only for injury *to* export business in the United States" (emphasis added), as opposed to injury *caused by* export business in the United States).

studied. The Working Group held in particular that "other countries point to these statutes as notable exceptions to the United States' general policy of open competition, and sometimes use them to justify their own restraints on competition."[1392]

415. EUROPE – Like U.S. antitrust authorities, European competition authorities do not take on agreements intended to adversely affect commerce outside the European Community.[1393] From the wording of Article 81 of the EC Treaty, one may indeed infer that the article only addresses agreements affecting the Common Market, and not territorial agreements affecting foreign markets.[1394] Some competition laws of EU Member States (*e.g.*, Austria, Finland) explicitly exclude applying national competition legislation to situations affecting competition in foreign markets.[1395]

6.10.2. Standing for foreign plaintiffs alleging foreign harm caused by a global cartel: the U.S. experience

6.10.2.a. How to construe the 1982 Foreign Trade Antitrust Improvements Act

416. One of the most fascinating contemporary topics of international antitrust jurisdiction doubtless concerns the question of whether foreign plaintiffs have standing in U.S. (or European) courts for foreign harm caused by a global cartel that also caused domestic harm. This issue came to the fore in U.S. courts in the early 2000s and was, for the time being, settled by the U.S. Supreme Court in *Empagran* (2004), part of the worldwide litigation against a global cartel of vitamins producers. Under U.S. law, the issue revolved around the interpretation of Section 6a of the Sherman Act, inserted by the Foreign Trade Antitrust Improvements Act (FTAIA) in 1982. This Section states that the Sherman Act "shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless:

> (1) such conduct has a direct, substantial, and reasonably foreseeable effect
> (A) on trade or commerce which is not trade or commerce with foreign

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[1392] International Working Group on Antitrust Modernization, Memorandum, p. 5, available at http://www.amc.gov/pdf/meetings/International.pdf.

[1393] Case 174/84, *Bulk Oil v. Sun International*, [1986] E.C.R. 559, [1986] 2 *C.M.L.R.* 732, § 44; *Cartonboard*, [1994] *O.J.* L/243, at 1, 45 § 139; *Rieckermann/AEG-Elotherm* [1968] *O.J.* L/276, at 25; Commission Notice, Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, *O.J.* C 101/81 (2004), § 106, *a contrario* ("In the case of agreements and practices whose object is not to restrict competition inside the Community, it is normally necessary to proceed with a more detailed analysis of whether or not *cross-border economic activity inside the Community, and thus patterns of trade between Member States, are capable of being affected.*") (emphasis added); W. VAN GERVEN, L. GYSELEN, M. MARESCEAU, J. STUYCK, J. STEENBERGEN, *Beginselen van Belgisch Privaatrecht*, XIII, *Handels- en Economisch Recht*, Deel 2, *Mededingingsrecht*, *B*, *Kartelrecht*, Antwerp, Story-Scientia, 1996, 115. *See* in support of subjective territoriality: J. STOUFFLET, "La compétence extraterritoriale du droit de la concurrence de la Communauté économique européenne", 98 *J.D.I.* 487, 496 (1971).

[1394] *See* J. SCHWARZE, "Die extraterritoriale Anwendbarkeit des EG-Wettbewebsrechts – Vom Durchführungsprinzip zum Prinzip der qualifizierten Auswirkung", in: J. SCHWARZE (ed.), *Europäisches Wettbewerbsrecht im Zeichen der Globalisierung*, Baden-Baden, Nomos, 2002, at 47.

[1395] *See* subsection 6.5.3.

nations, or on import trade or import commerce with foreign nations; or (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and

(2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section."

417. The FTAIA authorizes the exercise of U.S. jurisdiction over foreign restrictive practices that do not involve import commerce provided that these practices have effects in the United States. What was unclear though was whether foreign plaintiffs could also rely upon the effects doctrine enshrined in the FTAIA so as to obtain damages resulting from harm caused abroad by anticompetitive conduct which also caused effects in the United States (and thus satisfied the first prong of Section 6a). Put differently, did the second prong of Section 6a require that the U.S. effect give rise to *the* claim of the plaintiff, or only to *a* claim?

The question was not deprived of international law significance, as a determination that *a* claim suffices could boil down to "regulating the competitive conditions of other nations", and could thus possibly violate the international law principle of non-intervention. Indeed, a determination that *a* claim suffices would give foreign-based victims of a wholly foreign conspiracy standing in U.S. courts if only some adverse effect of that conspiracy on U.S. commerce, not necessarily related to the effect on the foreign-based victims, could be found. It goes without saying that foreign States, either the home States of the victims or the home States of the defendants (conspiring corporations), may possibly have a substantial and possibly overriding regulatory interest in clamping down on conspiracies that involve and harm their nationals. If foreign-based plaintiffs were liberally granted standing in U.S. courts, they would be invited to circumvent the application of their own national antitrust regulations by filing a suit in the U.S., where they could benefit from treble damages and enjoy far-ranging discovery powers. As global conspiracies ordinarily cover the U.S. market because of its economic importance and because of the risk of arbitration (exclusion of particular territorities by a global price-fixing conspiracy may doom the conspiracy to failure as customers will tend to purchase their goods in these territories, where the prices will be lower), the requirement of U.S. effects of a global cartel under Section 6a(1) of the Sherman Act could easily be fulfilled. U.S. courts would then become the world's antitrust courts for global conspiracies, and would exercise nearly universal jurisdiction.

6.10.2.b. The Empagran Vitamins litigation

418. In *Empagran* (2004),[1396] the U.S. Supreme Court prevented U.S. courts from being overwhelmed by antitrust suits filed by foreign-based plaintiffs, and from upsetting foreign governments, by giving a restrictive interpretation to Section 6a of the Sherman Act.[1397] The Court held that U.S. courts do not have jurisdiction over significant foreign anticompetitive conduct causing adverse domestic effects and independent foreign harm, where the plaintiff's claim rests solely on the independent foreign harm. In so holding, the Court resolved a Circuit split between the Fifth Circuit (*Den Norske Stats Oljeselskap AS v. HeereMac VOF et al.*),[1398] the Second Circuit (*Kruman v. Christie's Int'l PLC*),[1399] and the D.C. Circuit (*Empagran, S.A. v. F. Hoffman-LaRoche Ltd.*),[1400] and chose a middle way between deciding that the foreign-based plaintiff's claim under the FTAIA ought to be directly based on the U.S. effect, and deciding that *a* claim, which the U.S. effect did not necessarily give

[1396] *F. Hoffman-La Roche Ltd. et al.* v. *Empagran S.A. et al.*, 124 S. Ct. 2359 (2004). *Empagran* concerned a spin-off of worldwide litigation against a global vitamins cartel. Not only did the U.S. Department of Justice and the European Commission impose fines on the cartel by the U.S. Department of Justice and the European Commission (see for the Commission's decision: Case COMP/E-1/37.512 – *Vitamins*, *O.J.* L 6/1 [2001]), a number of private parties also filed suits against cartel members in the United States and Europe. One of the U.S. suits involved plaintiffs from Ukraine, Panama, Ecuador and Australia (*Empagran S.A. et al.).* Other suits have been filed by European companies in the United Kingdom and Germany. The English High Court's decision of 2003 in *Provimi v. Aventis* in particular, a decision which will be discussed in subsection 6.10.2.f, has been a landmark ruling on the possibility of foreign claimants to sue foreign defendants in Europe.

[1397] *See for* an early assessment: C. RYNGAERT, "Foreign-to-Foreign Claims: the U.S. Supreme Court's Decision (2004) v the English High Court's Decision (2003) in the Vitamins Case", *E.C.L.R.* 611 (2004).

[1398] *Den Norske Stats Oljeselskap AS v. HeereMac VOF et al.*, 241 F.3d 420 (5th Cir. 2001), *cert. denied*, 534 U.S. 1127 (2002). In *Statoil*, the Fifth Circuit chose a restrictive interpretation of Section 6a of the Sherman Act, holding that the foreign plaintiff's claim must arise from anticompetitive effects on U.S. commerce. Den Norske, a Norwegian oil company owning and operating oil and gas drilling platforms exclusively in the North Sea, alleged that three providers of heavy-lift barge services in the Gulf of Mexico, the North Sea and the Far East, had conspired to fix bids and allocate consumers, territories, and projects. Den Norske contended that, as a result of this conspiracy, it paid inflated prices for heavy-lift barge services. The Court agreed that the defendants' conduct had a direct, substantial, and reasonably foreseeable effect on the U.S. market, since the agreement forced purchasers of heavy-lift services in the Gulf of Mexico (in U.S. waters) to pay inflated prices and compelled Americans to pay supra-competitive prices for oil. It however ruled that only domestic effects on commerce could give rise to the plaintiff's claim. As Den Norske failed to show that the effect on United States commerce in any way gaves rise to *its* antitrust claim, the Court held that it lacked jurisdiction.

[1399] *Kruman v. Christie's Int'l PLC*, 284 F.3d 384 (2nd Cir. 2002). In *Kruman*, the plaintiffs had filed a class action against a London and a New York auction house. The plaintiffs alleged that the defendants had entered into an agreement to fix the prices they charged their clients for their services as auctioneers. The plaintiffs all made purchases in auctions held outside the United States and claimed that they were injured because they paid inflated commissions to the defendants. The Court of Appeals for the Second Circuit asked the plaintiffs to demonstrate that the agreement to fix prices in foreign auction markets had an "effect" on domestic commerce. As the domestic price-fixing agreement could only have succeeded with the foreign price-fixing agreement, the U.S. and foreign aspects of the conspiracy being interdependent, the plaintiffs were entitled to sue the London auctioneer in the U.S. for injuries sustained abroad. The Court thus ruled that it had subject matter jurisdiction under Section 6a of the FTAIA as long as some domestic effect can be established, even if the plaintiff's injury did not arise from that effect. In *Statoil*, the Court took the opposite view: it would only have jurisdiction if the plaintiff's injury *did* arise from the domestic effect.

[1400] *Empagran, S.A. v. F. Hoffman-LaRoche Ltd.*, 315 F.3d 338 (D.C. Cir. 2003). In *Empagran*, the D.C. Circuit granted damages to five foreign vitamin distributors located abroad (Empagran S.A. et al.) in a class-action suit against foreign and domestic vitamin manufacturers and distributors (Hoffman-La Roche Ltd. et al.), which had engaged in a price-fixing conspiracy which had raised the price of vitamins to U.S. and foreign customers. The Court did not require that the plaintiffs' claim arise from the domestic effect of the conspiracy.

rise to, suffices for jurisdiction to obtain under the FTAIA: foreign-based plaintiffs would have standing in U.S. courts for foreign harm caused by a global cartel, but only if that harm was dependent upon U.S. harm. Foreign harm that is not dependent upon U.S. harm, even if caused by the same anticompetitive conduct, would not fall within the scope of the the FTAIA.

419. In order to reach the desired result – a restrictive reading of Section 6a of the Sherman Act – the Supreme Court, deciding unanimously (8-0), heavily relied on considerations of reasonableness and international comity, which caution jurisdictional restraint. The Court construed the legislative intent underlying the FTAIA not only in light of its language and history, but also in light of international law. Relying on the two centuries old *Charming Betsy* canon of statutory construction, pursuant to which an act of Congress ought never to be construed to violate the law of nations,[1401] it pointed out that it should be assumed that "Congress ordinarily seeks to follow … the principles of customary international law".[1402] It considered in particular the customary international law principle of non-interference in the internal affairs of another State to be relevant to the case, stating that it is to be assumed that Congress takes "the legitimate sovereign interests of other nations into account"[1403] when assessing the reach of U.S. law, and avoids extending this reach when such would create a "serious risk of interference with a foreign nation's ability independently to regulate its own commercial affairs."[1404] In so holding, the Court was doubtless influenced by *amicus curiae* briefs from European countries,[1405] Canada[1406] and Japan[1407], which asserted the interference which the long arm of the FTAIA created. regulations. According to the Court, when enacting the FTAIA, Congress could never have intended to violate customary international law, and thus, could never have reasonably intended to apply the FTAIA to conduct causing independent foreign harm.[1408]

6.10.2.c. Comity v. deterrence

420. U.S. doctrine, a considerable part of which has traditionally been hostile to the use of international law, comity, and the views of foreign governments in determining the reach of U.S. laws, has not failed to criticize the Court's approach

[1401] *Murray v. Schooner Charming Betsy*, 2 Cranch 64, 118 (1804).
[1402] *Empagran*, 124 S. Ct. 2366.
[1403] *Id.*
[1404] *Id.*, at 2367.
[1405] *See* Brief of the United Kingdom of Great Britain and Northern Ireland, Ireland and the Kingdom of the Netherlands as *amici curiae* in support of petitioners, 540 U.S. 1088 (2003) (No. 03-724) (2004 WL 226597), also available at http://www.dti.gov.uk/ccp/topics2/pdf2/amicusbrief.pdf; Brief of the Governments of the Federal Republic of Germany and Belgium, 540 U.S. 1088 (2003) (2004 WL 226388)
[1406] Brief of the Government of Canada, 540 U.S. 1088 (2003) (No. 03-724) (2004 WL 226389).
[1407] Brief of the Government of Japan, 540 U.S. 1088 (2003) (2004 WL 226390), at 2, 6 (asserting that "[g]iving foreign purchasers the right to damages for purely foreign market transactions undermines the important principle of comity [and] respect due to a sovereign nation", and stating that "nation states are equal sovereigns, entitled to mutual respect and deference in the exercise of their sovereignty").
[1408] *Empagran*, 124 S. Ct. 2367. *See also* S.E. BURNETT, "U.S. Judicial Imperialism Post "Empagran v. F. Hoffmann-Laroche"?: Conflicts of Jurisdiction and International Comity in Extraterritorial Antitrust", 18 *Emory Int'l L. Rev.* 555, 614 (2004) (arguing that the FTAIA was meant to prevent market irregularities in the United States, not in Europe, and that, accordingly, the plaintiffs did not suffer injury of the type which the Sherman Act was originally intended to prevent)

in *Empagran*, which, as admitted by the Supreme Court itself, overruled "the more natural reading of the statutory language"[1409] of Section 6a of the Sherman Act, and allegedly the statutory authority of the House Judiciary Committee Reports as well.[1410] From an antitrust policy perspective, it has been argued in particular that the restrictive approach to jurisdiction espoused by the Supreme Court in *Empagran* undercuts the strong deterrent effect that potential antitrust treble-damage liability in the U.S. could have. In the *Empagran* litigation, this policy analysis was put forward by the Court of Appeals, and supported by certain professors of Economics as *amici curiae* before the Supreme Court, who submitted that the deterrent effect of U.S. antitrust law would contribute to the global enforcement of antitrust rules and eventually enhance economic efficiency[1411].

421. The broad view of FTAIA jurisdiction was developed at length by MEHRA in a 2004 publication in the *Temple Law Review*,[1412] before the Supreme Court's reached its judgment in *Empagran*. Bottom-line of this law-and-economics-based approach to antitrust jurisdiction is that the more potential plaintiffs there are the more antitrust deterrence there will be. MEHRA believes that increased deterrence, under a principle which is much more far-reaching than the historically already contested effects principle, and which may even border the universality principle, will as a matter of course reduce the amount of global business-restrictive practices in an era of more and more open economies,[1413] thereby in the final analysis enhancing global and U.S. consumer welfare. Also, increased deterrence will eventually result in less litigation in U.S. courts, because there will be less cartels to break up, and because settlement will be encouraged.[1414]

MEHRA has also countered the argument that giving foreign plaintiffs, victims of foreign harm, standing before U.S. courts might jeopardize the antitrust regulators' Corporate Leniency Policy. In their *amicus curiae* brief, the United States Government and the Federal Trade Commission had asserted that the enlargement of the group of potential plaintiffs to include foreign victims of foreign harm increases the risk of corporations/cartel members being sued privately. This heightened risk may constitute a disincentive for these corporations to apply for leniency or amnesty

[1409] *Empagran*, 124 S. Ct. at 2372.

[1410] *See, e.g.*, S.F. HALABI, "The Comity of *Empagran*: the Supreme Court Decides that Foreign Competition Regulation Limits American Antitrust Jurisdiction over International Cartels", 46 *Harv. Int'l L.J.* 279, 289 (2005).

[1411] Brief for Certain Professors of Economics as Amici Curiae in Support of Respondents, *F. Hoffman-LaRoche* v. *Empagran*, 124 S. Ct. 2359 (No. 3-724).

[1412] S.K. MEHRA, "More is Less: A Law-and-Economics Approach to the International Scope of Private Antitrust Enforcement", 77 *Temp. L. Rev.* 47 (2004).

[1413] *Id.* (arguing that in the absence of a global antitrust enforcement agency, "without global application for national antitrust law antitrust regimes would be significantly weaker than they would be in an era of more closed economies").

[1414] *Id.*, at 57-61. MEHRA asserts that "[b]ecause a legal standard that makes the parties more likely to make similar estimates of the litigated outcome encourages more settlement, the broad view of jurisdiction is likely to yield more settlement that the narrow view." It is however unclear why the broad view of jurisdiction confers a clearer standard of jurisdiction that the narrow view. If the narrow view clearly sets forth that foreign-injured plaintiffs are *not* entitled to recover in U.S. courts for foreign harm, it may be submitted that parties can make "accurate, identical estimates about the expected return from litigation" (to use MEHRA's wording, *see id.*, at 61). As will be argued, however, the Supreme Court's standard that foreign-injured plaintiffs are not entitled to recover in U.S. courts for foreign harm *independent from* domestic harm may be far from clear in the absence of a clear definition of "independent foreign harm".

with antitrust regulators.[1415] MEHRA however submitted that a broad view of jurisdiction need not undermine corporate leniency policies as a matter of course. Firstly, in applying for leniency, a corporation will weigh the costs of a private antitrust suit for treble damages against the benefits of its co-conspirator(s) being prosecuted due to its confession and cooperation.[1416] If the culpability of the conspiring corporation is low and the culpability of the co-conspirators high, increased jurisdictional opportunities for foreign-injured plaintiffs will not dissuade that corporation from applying for leniency. Secondly, it may be argued that a State could "purchase" additional information about global cartels if it allows foreign plaintiffs to file a suit for treble damages with its courts.[1417] Plaintiffs will be more inclined to provide information if they are rewarded, *e.g.*, by the prospect of treble damages granted. The Department of Justice does not grant such rewards. The benefits stemming from increased information about cartels – providing the basis for future prosecution – may then outweigh the costs associated with a possible decrease in the number of corporations applying for leniency. Thirdly, corporate leniency is premised on the idea that conspirators will rather confess their conspiracy to an antitrust regulator than face the risk of being prosecuted to the full extent by that regulator. Obviously, if that risk or the penalties are low, the purpose will not be served. Therefore, instead of shutting the court door for foreign-injured plaintiffs, one could contemplate a system of lower treble damages in private suits and higher criminal penalties in government suits.[1418] Under such a system, conspirators will be encouraged to confess – and the corporate leniency policy will be more successful – because the conspirators' risk of incurring costs from being sued privately is lower and their risk of incurring costs from being sued by the agency which they confess to higher.

422. Jurisdictional claims that are premised on deterrence and global economic efficiency are meritorious, yet they unevitably run up against a wall of sovereignty concerns, transmitted into the legal realm by the public international law principle of non-intervention. The system of international jurisdiction is not devised to maximize economic efficiency, but to protect the legitimate regulatory interests of States. A State is not entitled to exercise its jurisdiction over foreign activities solely because such exercise would purportedly enhance global welfare, especially not when foreign States protest against that State's jurisdictional assertions. If the United States fails to convince other nations that it would be economically efficient to espouse a broad interpretation of the FTAIA – an interpretation under which foreign-based

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.[1415] Brief for the United States and the Federal Trade Commission as Amici Curiae in Support of Respondents, *F. Hoffman-LaRoche* v. *Empagran*, 124 S. Ct. 2359 (2004) (No. 3-724), available at http://www.usdoj.gov/atr/cases/f200800/200866.htm (fearing that "[b]y permitting suits for treble damages by overseas plaintiffs whose injuries arise from overseas conduct, the majority's decision, if allowed to stand, would create a potential disincentive for corporations and individuals to report antitrust violations and seek leniency under the Corporate Leniency Policy or, when amnesty under the policy is unavailable, to cooperate with prosecutors by plea agreement."). It may be noted that the U.S. Government did not invoke public international law arguments. *See* K.M. MEESSEN, "Schadensersatz bei weltweiten Kartellen: Folgerungen aus dem Endurteil im Empagran-Fall", 55 *WuW* 1115, 1119 (2005).

[1416] *See* S.K. MEHRA, "More is Less: A Law-and-Economics Approach to the International Scope of Private Antitrust Enforcement", 77 *Temp. L. Rev.* 47, 54 (2004) (arguing that "the more those fellow violators are hurt relative to oneself, including treble damages, the more likely confession and cooperation are").

[1417] *Id.*

[1418] *Id.*, at 54-55.

plaintiffs would have standing before U.S. courts for independent foreign-based harm – these nations have not waived their sovereignty rights or the principle of non-intervention, and the United States is advised to defer to foreign nations' concerns, unless it could assert an overriding U.S. interest (*quod non*, since a broad assertion of FTAIA jurisdiction would serve idiosyncratically devised *global* interests rather than U.S. interests).

Therefore, from a public international law perspective, which takes the interests of *States* as the point of reference of a jurisdictional analysis, the Supreme Court's judgment is sound.[1419] Jurisdiction should indeed only be exercised reasonably, *i.e.*, when there is a clear nexus between the foreign conduct and the forum,[1420] and when foreign nations do not have stronger regulatory interests[1421]. As the United Kingdom, Ireland and the Netherlands pointed out in their brief as *amici curiae*, the nexus between the U.S. and the plaintiffs' claims is virtually nonexistent.[1422] The Supreme Court itself mainly developed the reasonableness prong which emphasizes foreign sovereign interests, finding that the sort of interference in foreign nations' regulatory activity created by establishing jurisdiction under a broad reading of the FTAIA could not be justified under the principle of reasonableness.

423. By emphasizing the role of customary international law principle of non-intervention and the jurisdictional rule of reason, which the Court cited,[1423] 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, the discontents of which have been highlighted at length in subsection 6.7.3), and returned to the *Timberlane* approach.[1424] Indeed, as one of the proponents of the broad view of FTAIA jurisdiction in *Empagran* has argued, the broad view would be a logical sequence to *Hartford Fire*, as both *Hartford Fire* and the broad, deterrence-based view of FTAIA jurisdiction "virtually foreclose interest-balancing" and do not weigh "the degree of foreign unhappiness versus United States concerns about

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[1419] *See also* S. FERNANDES, "F. Hoffman-Laroche, Ltd. v. Empagran and the Extraterritorial Limits of United States Antitrust Jurisdiction: where Comity and Deterrence Collide", 20 *Conn. J. Int. L.* 267 (2005).

[1420] *See* § 403 (2) (a) and (b) of the Restatement (Third) of U.S. Foreign Relations Law.

[1421] *See* §403 (2) (f), (g) and (h) Restatement (Third).

[1422] Brief of the United Kingdom of Great Britain and Northern Ireland, Ireland and the Kingdom of the Netherlands as *amici curiae* in support of petitioners, 540 U.S. 1088 (2003) (No. 03-724) (2004 WL 226597), at 22.

[1423] *Empagran*, 124 S. Ct. 2367 (citing the rule of reason enshrined in § 403 (2) of the Restatement (Third) of Foreign Relations Law of the United States (Third) (1987), and the principle of comity as applied by the Supreme Court in *Hartford Fire Insurance Co. v. California*, 509 U.S. 764, 797 (1993), and by lower courts in *United States v. Nippon Paper Industries Co.*, 109 F.3d 1, 8 (1st Cir. 1997); *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1294-1295 (3d Cir. 1979)).

[1424] *See also* W. WURMNEST, "Foreign Private Plaintiffs, Global Conspiracies, and the Extraterritorial Application of U.S. Antitrust Law", 28 *Hastings Int'l & Comp. L. Rev.* 205, 219 (2005) (arguing that the Supreme Court "re-animated the reasonable standard as a yardstick to measure the reach of U.S. antitrust law"). *Id.*, at 220 (arguing that it seems that the Court "silently wanted to *correct* the majority's stand in the *Hartford Fire* case"). S. FERNANDES, "F. Hoffman-Laroche, Ltd. v. Empagran and the Extraterritorial Limits of United States Antitrust Jurisdiction: where Comity and Deterrence Collide", 20 *Conn. J. Int. L.* 267, 274 (2005) ("Applying the *Timberlane* balancing test to the facts of *Empagran* would yield the same result the *Empagran* Court reached …"). *Compare* K.M. MEESSEN, "Schadensersatz bei weltweiten Kartellen: Folgerungen aus dem Endurteil im Empagran-Fall", 55 *WuW* 1115, 1122 (2005) (arguing that the Supreme Court in *Empagran* has "die Anwendbarkeit des Grundsatzes [the international law principle of non-intervention] deutlicher als bisher bestätigt").

consumer welfare."[1425] Instead, the Supreme Court seemed to have followed Justice SCALIA's dissenting opinion in *Hartford Fire*, which is based on international law limits to jurisdiction and on genuine reasonableness, and which this dissertation has forcefully endorsed *supra*. In *Empagran*, the Supreme Court indeed repudiated those who want the United States to be the world's "antitrust police force".[1426]

While citing § 403 of the Restatement (Third) of Foreign Relations Law, the Supreme Court nevertheless did not specifically apply the balancing factors set forth in this section. On the contrary, it held that a case-by-case consideration of comity is "too complex to prove workable".[1427] The Court was apparently afraid of lower courts rating the efficiency and adequacy of a foreign regulatory system by conducting an interest-balancing test.[1428] Instead, it set forth a rule which it considered to be sufficiently bright-line: FTAIA jurisdiction would only obtain over foreign harm which is dependent upon domestic harm.

6.10.2.d. Defining "independent harm": "but for" causation or "proximate cause"

424. It remains to be seen whether the Supreme Court's supposedly bright-line standard will guarantee reasonableness. Of course, if the Court had not espoused the middle-of-the-road FTAIA view, but instead the very narrow theory that the domestic harm should give rise to the foreign-based plaintiff's claim, and thus that the foreign plaintiff need not have sustained his injuries in the United States, jurisdictional clarity would be uncontested. However, such a restriction of U.S. jurisdiction might be unreasonable because it may not reflect Congressional intent. In the Court's view, reasonableness, construed in light of international law as well as the remedial purpose of U.S. antitrust law, required that the foreign plaintiff link up the foreign harm that he or she suffered with domestic harm which other hypothetical plaintiffs may have suffered. To its credit, this restriction weeds out most cases of blatant jurisdictional overreaching, and at the same time closes foreign antitrust enforcement gaps.[1429] However, as the Court refused to define when domestic and

[1425] *See* S.K. MEHRA, "More is Less: A Law-and-Economics Approach to the International Scope of Private Antitrust Enforcement", 77 *Temp. L. Rev.* 47, 69 (2004).
[1426] *See* W. WURMNEST, "Foreign Private Plaintiffs, Global Conspiracies, and the Extraterritorial Application of U.S. Antitrust Law", 28 *Hastings Int'l & Comp. L. Rev.* 205, 227 (2005).
[1427] *Empagran*, 124 S. Ct. at 23698. WURMNEST, citing a brief of Amici Curiae of a number of Professors, believed that "the Court did not want to confer upon U.S. courts the burden of comparing solutions of foreign antitrust law with U.S. regulation, which would only lead to "lengthier proceedings, appeals and more proceedings – to the point where procedural costs and delays could themselves threaten interference with a foreign nation's ability to maintain the integrity of its own antitrust enforcement system.". *See* W. WURMNEST, "Foreign Private Plaintiffs, Global Conspiracies, and the Extraterritorial Application of U.S. Antitrust Law", 28 *Hastings Int'l & Comp. L. Rev.* 205, 221 (2005); *Empagran* Brief of Amici Curiae of Professors Darren Bush, John M. Connor, John J. Flynn, et al., 2004 WL 533933, at *2-3 (2004).
[1428] *See* W. WURMNEST, "Foreign Private Plaintiffs, Global Conspiracies, and the Extraterritorial Application of U.S. Antitrust Law", 28 *Hastings Int'l & Comp. L. Rev.* 205, 223-24 (2005) (believing that "it is likely that a state having enacted antitrust laws would protest against U.S. courts decisions openly labeling enforcement mechanisms of that state as "non-efficient"".)
[1429] *Id.*, at 224 (2005) (implying that this requirement may prevent cartel members "from keeping profits in markets with severe enforcement gaps").

foreign effects are dependent,[1430] confusion and impredictability abound. It might even be submitted that by introducing the notion of (in)dependent harm, the Supreme Court merely *appeared* to embrace notions of comity.[1431] Given the interconnectedness of the international economy, one author argued that "it is almost an inevitable conclusion that harm suffered abroad may not have occurred absent a harm suffered from the United States" and that the Supreme Court's standard would thus be meaningless.[1432]

425. THE D.C. CIRCUIT'S "PROXIMATE CAUSE" STANDARD – In view of the uncertainty stemming from the Supreme Court's 'independent effects' standard *Empagran*, its interpretation and application by the lower courts was eagerly awaited. In 2005, the *Empagran* case came again before the D.C. Circuit,[1433] upon remand from the Supreme Court. In a very brief opinion, the D.C. Circuit dispelled commentators' fear that under the Supreme Court's "independent effects" test, "most cases involving claims of foreign plaintiffs [would] proceed."[1434] Under the D.C. Circuit's narrow "proximate cause" standard, which requires direct causation between the plaintiff's foreign injury and domestic effects (instead of the liberal "but for" test commentators often believe to be the test required by the Supreme Court),[1435] most such cases would actually be weeded out. The introduction of this standard relieves pressure off the U.S. court system, and may be said to sufficiently quell foreign nations' sovereignty concerns. It may however be feared that the high standard of "proximate cause" hollows out the FTAIA to an extent that was not contemplated by Congress.

426. In *Empagran*, the victims of the vitamins cartel charged that "because vitamins are fungible and readily transportable, without an adverse domestic effect (*i.e.*, higher prices in the United States) the sellers could not have maintained their international price fixing arrangement and [the victims] would not have suffered their foreign injury."[1436] The argument ran that if the U.S. were to be excluded from the implementation of the cartel agreement, overseas purchasers would have purchased bulk vitamins at lower prices either directly from U.S. sellers or from arbitrageurs selling vitamins imported from the United States. If the cartel agreement would not have been successful *but for* its implementation within the U.S., foreign injury could be considered to be dependent upon (U.S.) domestic injury, which in turn could "give rise to" a claim under the FTAIA.

[1430] This has led the International Working Group of the U.S. Antitrust Modernization Commission to call for legislative guidance. *See* its Memorandum, December 21, 2004, p. 4, available at http://www.amc.gov/pdf/meetings/International.pdf.

[1431] *See* S.E. BURNETT, "U.S. Judicial Imperialism Post "Empagran v. F. Hoffmann-Laroche"?: Conflicts of Jurisdiction and International Comity in Extraterritorial Antitrust", 18 *Emory Int'l L. Rev.* 555, 607 (2004). Most of the author's arguments seem however to take aim at the Circuit Court rather than at the Supreme Court.

[1432] *Id.*, at 608-09.

[1433] *Empagran S.A.* v. *F. Hoffmann-LaRoche, Ltd.*, 417 F.3d 1267 (D.C. Cir. 2005).

[1434] *See, e.g.*, C. SPRIGMAN, "Fix Prices Globally, Get Sued Locally? U.S. Jurisdiction Over International Cartels", 72 *U. Chi. L. Rev.* 265, 266 (2005).

[1435] *Id.*, at 276 (submitting that "[i]n most instances … cartels dealing in products subject to arbitrage will be forced to reach a global agreement. And under these conditions, harm inflicted on U.S. markets cannot be "independent" of foreign harm. The domestic harm simply would not have occurred *but for* the globalization of the cartel.") (emphasis added).

[1436] *F. Hoffmann-LaRoche, Ltd.* v. *Empagran S.A.*, 124 S.Ct. at 2372.

The D.C. Circuit in *Empagran* did not follow the victims' argument. Instead, it held that ""but for" causation between the domestic effects and the foreign injury is simply not sufficient to bring anti-competitive conduct within the FTAIA exception",[1437] and that the FTAIA "indicates a direct causal relationship, that is, *proximate causation*".[1438] The Court believed this standard of "proximate causation" to be required by principles of "prescriptive comity": "To read the FTAIA broadly to permit a more flexible, less direct standard than proximate cause would open the door to just such interference with other nations' prerogative to safeguard their own citizens from anti-competitive activity within their own borders".[1439] Put differently, only a standard of proximate causation could ensure respect for the customary international law principle of non-intervention. In what cases a causal relationship between domestic effects and foreign injury may actually constitute "proximate causation" is unclear from the D.C. Circuit's decision.[1440] It is only clear that "maintaining super-competitive prices in the United States [that merely] facilitated the [cartelists'] scheme to charge comparable prices abroad"[1441] does not establish proximate causation, nor does the cartelists' knowledge or ability to "foresee the effect of their allegedly anti-competitive activities in the United States on the [plaintiffs'] injuries abroad" or their purpose "to manipulate United States trade"[1442].

427. By rejecting "but for" causation in favor of a stricter "proximate causation" standard, the D.C. Circuit did not go as far as excluding foreign plaintiffs from filing antitrust claims for foreign injury in U.S. courts, which, surely, it could not under the Supreme Court's *Empagran* opinion, which allowed plaintiffs to sue for foreign injury if such injury was dependent on domestic injury. Nevertheless, it seems to have closed the floodgates of litigation that could have been opened by a liberal interpretation of "foreign injury dependent on domestic effects", floodgates that might at the same time have been perceived by other nations as an encroachment on their economic sovereignty. The D.C. Circuit's opinion in *Empagran*, like the Supreme Court's opinion in the same case, appears therefore to be justified both under international law and comity, and under principles of judicial economy.[1443] MEESSEN has argued that the rule it sets forth (no jurisdiction for a State over foreign-based harm caused by a global cartel on the sole ground that inflated prices paid in that State were necessary for the cartel's success) represents a rule of instant customary international law,[1444] because six foreign governments, were involved in the *Empagran* proceedings as *amici curiae* and advocated the sort of jurisdictional restraint espoused by the Supreme Court and the D.C. Circuit.[1445]

[1437] 417 F.3d at 1270-71 (adding that "[t]he but-for causation the appellants proffer establishes only an indirect connection between the U.S. prices and the prices they paid when they purchased vitamins abroad.").
[1438] *Id.*, at 1271 (emphasis added).
[1439] *Id.*
[1440] *See also* K.M. MEESSEN, "Schadensersatz bei weltweiten Kartellen: Folgerungen aus dem Endurteil im Empagran-Fall", 55 *WuW* 1115, 1118 (2005).
[1441] 417 F.3d at 1271.
[1442] *Id.*
[1443] *See* S.A. CASEY, "Balancing Deterrence, Comity Considerations, and Judicial Efficiency: The Use of the D.C. Circuit's Proximate Cause Standard for Determining Subject Matter Jurisdiction over Extraterritorial Antitrust Cases", 55 *Am. U. L. Rev.* 585 (2005).
[1444] K.M. MEESSEN, "Schadensersatz bei weltweiten Kartellen: Folgerungen aus dem Endurteil im Empagran-Fall", 55 *WuW* 1115, 1118-1119 (2005).
[1445] *Id.*, at 1121 (admitting nonetheless that these governments have urged jurisdictional restraint only in a diffuse manner).

428. *SNIADO* – The D.C. Circuit's *Empagran* opinion on remand from the Supreme Court need not be standard-setting for the interpretation of "foreign injury dependent on domestic effects".[1446] Although the proximate cause standard was espoused by the District Court for the Northern District in California, as a "direct cause" standard,[1447] the Second Circuit did *not* rely on it in the case of *Sniado* v. *Bank of Austria AG, et al.* (2004).[1448] On the contrary, this court seemed willing to apply the "but for" test, the test that was precisely repudiated by the D.C. Circuit.

In *Sniado*, the plaintiff argued that he paid supra-competitive service fees to exchange Euro-zone currencies, and that these supra-competitive fees – which he paid exclusively in European countries – were the result of an alleged price-fixing conspiracy between European banks.[1449] For there to be subject-matter jurisdiction for the court, the plaintiff ought, in accordance with the Supreme Court's *Empagran* doctrine, to establish that his European injury resulting from the conspiracy was dependent on U.S. injury. In the Second Circuit's view, he had not done so: "Sniado did not allege that currency exchange fees in the United States reached supra-competitive levels, nor that *but for* the European conspiracy's effect on United States commerce, he would not have been injured in Europe."[1450]

Apparently, a "but for" test would suffice for subject-matter jurisdiction to obtain in the Second Circuit. It remains to be seen however, if the complaint had not been as facially insufficient to establish jurisdiction, and U.S. effects of the European price-fixing conspiracy could indeed be discerned, the Court would have applied the liberal "but for" test.[1451] In light of the rather strict standard for subject-matter jurisdiction used by the Second Circuit in securities cases in which jurisdiction is claimed on the basis of U.S. conduct, one should be cautious in inferring too much from the Court's *Sniado* judgment. If push came to shove, it might be assumed that also in antitrust cases in the *Empagran* mould, the Second Circuit would exercise jurisdictional restraint in order not to offend other nations, possibly by using the comity-informed "proximate cause" standard introduced by the D.C. Circuit.[1452]

[1446] *Id.*, at 1118.

[1447] *eMag Solutions LLC* v. *Toda Kogyo Corp.*, WL 1712084, at *8 (N.D. Cal. 2005) (agreeing with defendants that "plaintiffs' proposed theory--pleading a global marketplace where inflated prices in the United States facilitated inflated prices abroad--would effectively nullify the Supreme Court's ruling in *Empagran*, because it would allow any foreign plaintiff who suffered harm abroad as a result of a foreign conspiracy to gain access to the U.S. courts and treble damages by making unsupported allegations of a global marketplace with the possibility of arbitrage pricing, even where there are no allegations of a direct impact on U.S. commerce. This result would run counter to the *Empagran* principle that U.S. courts should avoid unreasonable interference with the sovereign authority of other nations.")

[1448] 378 F.3d 210 (2nd Cir. 2004).

[1449] *Id.*, at 212.

[1450] *Id.*, at 213 (emphasis added).

[1451] *Compare eMag Solutions LLC* v. *Toda Kogyo Corp.*, WL 1712084, (N.D. Cal. 2005) ("It is true that the court in *Sniado* noted that the plaintiff's complaint had not even alleged that "but for the European conspiracy's effect on United States commerce, he would not have been injured in Europe." Nevertheless, the Second Circuit nowhere adopted "but-for" causation as the appropriate standard for antitrust claims involving "purely foreign" commerce.").

[1452] Notably CASEY has strongly advocated the expansion of the "proximate cause" test. *See* S.A. CASEY, "Balancing Deterrence, Comity Considerations, and Judicial Efficiency: The Use of the D.C. Circuit's Proximate Cause Standard for Determining Subject Matter Jurisdiction over Extraterritorial Antitrust Cases", 55 *Am. U. L. Rev.* 585, 617-619 (2005) (arguing that "[o]ne of the central advantages

6.10.2.e. Toward subsidiary FTAIA jurisdiction

429. In due course, the D.C. Circuit's "proximate cause" standard may come to represent *the* standard of reasonableness – a general restraint on jurisdiction set forth in § 403 of the Restatement, and allegedly constituting customary international law – in antitrust cases in which foreign-injured plaintiffs sue in U.S. courts. Reasonableness in assertions of subject-matter jurisdiction over such cases dovetails well with the long-standing desire of the United States to have functioning antitrust regimes worldwide, both as an ideological free-market ploy and as a guarantee against business-restrictive practices directly affecting U.S. interests.[1453] If U.S. courts were to entertain antitrust suits that have a strong foreign nexus, they would give foreign States a free enforcement ride, and disincentivize them from setting up, and enforcing, their own antitrust system.[1454]

430. A genuine return to the *Timberlane* comity legacy however requires more than just the application of a "proximate cause" standard, as under this standard, deference to other States is rather a *consequence* than a stated *aim*. Explicit consideration of the interests of foreign States in every single case ought to be contemplated. Possibly, only if the effects of a worldwide cartel are felt to a greater extent in the United States than elsewhere, say in Europe, should the U.S. apply its laws.[1455] Also, if an appropriate foreign forum could be identified to hear the foreign plaintiff's claim, U.S. courts may arguably apply the doctrine of *forum non conveniens* to dismiss the plaintiff's U.S. claim.[1456] Under this doctrine, U.S. courts might remain a forum for plaintiffs from developing countries (countries with less reliable judicial systems, and thus with more "inadequate fora" for purposes of the *forum non conveniens* analysis), but not from industrialized countries with developed

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of adopting the proximate cause standard is that it provides a framework for courts to make such determinations more efficiently by clarifying the Supreme Court's otherwise vague independent effects test.").

[1453] *Compare* C. SPRIGMAN, "Fix Prices Globally, Get Sued Locally? U.S. Jurisdiction Over International Cartels", 72 *U. Chi. L. Rev.* 265, 279 (2005) (observing that "[u]ltimately, our interest in protecting U.S. markets will be better served if we convince our trading partners to set up both vigorous government enforcement and the provision of private damages," and on the basis, advocating a revival of the jurisdictional rule of reason in *Empagran* look-alikes).

[1454] *See, e.g.*, S. FERNANDES, "F. Hoffman-Laroche, Ltd. v. Empagran and the Extraterritorial Limits of United States Antitrust Jurisdiction: where Comity and Deterrence Collide", 20 *Conn. J. Int. L.* 267, 301 (2005) (arguing that "[h]ad the [*Empagran*] Court decided to broadly interpret extraterritorial U.S. antitrust jurisdiction, there would have been an international backlash, hampering the cooperative atmosphere necessary to promote an effective international antitrust regime").

[1455] *See also* H.L. BUXBAUM, "Jurisdictional Conflict in Global Antitrust Enforcement", 16 *Loy. Consumer L. Rev.* 365, 371 (2004); C. SPRIGMAN, "Fix Prices Globally, Get Sued Locally? U.S. Jurisdiction Over International Cartels", 72 *U. Chi. L. Rev.* 265, 286 (2005).

[1456] *See, e.g.*, C. SPRIGMAN, "Fix Prices Globally, Get Sued Locally? U.S. Jurisdiction Over International Cartels", 72 *U. Chi. L. Rev.* 265, 282 (2005). A case may possibly be dismissed under *forum non conveniens* if the foreign forum does not award multiple damages, but not if the foreign forum does not permit private rights of action. *See Capital Currency Exchange, N.V.* v. *Nat'l Westminster Bank PLC*, 155 F.3d 603, 610 (2d Cir. 1998) (applying *forum non conveniens*, noting that private rights of action were available in England, although treble damages were not). *See* H.L. BUXBAUM, "Jurisdictional Conflict in Global Antitrust Enforcement", 16 *Loy. Consumer L. Rev.* 375 (2004).

antitrust regimes and remedies.[1457] Furthermore, U.S. courts could inquire whether foreign governments would actually take issue with an exercise of jurisdiction over a business-restrictive practice in which they have an interest (an interest in maintaining or clamping down on these practices, as far as the foreign defendants' home State nations are concerned, or an interest in having a adequate antitrust forum, as far as the foreign plaintiffs' home State nations are concerned),[1458] and whether foreign governments would be "able and willing" to enforce their antitrust laws[1459]

431. In the final analysis, the customary international law principle of non-intervention and the P.C.I.J.'s *Lotus* judgment does not prohibit States from exercising jurisdiction over foreign activities if foreign States do not object. In order to counter the current international climate of underdeterrence of hardcore cartels, which is considered to be economically inefficient, it may be argued that foreign States should be entitled to clamp down on such cartels if the home State does not intervene and does not oppose foreign States' regulatory intervention.[1460] This approach, informed by the subsidiarity principle, would boost deterrence (demanded by the law-and-economics school) while not degrading comity (demanded by international lawyers),[1461] and thus wed two jurisdictional approaches that may seem to be diametrically opposed.[1462] MEESSEN has argued that such a selfless contribution of States – opening their courts so as to increase global antitrust deterrence of hardcore cartels – may be authorized under customary international law.[1463]

[1457] *See* C. SPRIGMAN, "Fix Prices Globally, Get Sued Locally? U.S. Jurisdiction Over International Cartels", 72 *U. Chi. L. Rev.* 265, 282-83 (2005).

[1458] It has been argued that "comity considerations [should] place more weight upon the sovereign interests of the harmed foreign nations as opposed to the countries where the defendants reside". *See* S. FERNANDES, "F. Hoffman-Laroche, Ltd. v. Empagran and the Extraterritorial Limits of United States Antitrust Jurisdiction: where Comity and Deterrence Collide", 20 *Conn. J. Int. L.* 267, 314-15 (2005). At any rate, it appears that a triangular comity analysis is required, pursuant to which the interests of the United States, the foreign defendants' home State, and the foreign plaintiffs' home State ought to be balanced.

[1459] *Id.*, at 286.

[1460] Comity may possibly require however that a less drastic remedy than the controversial treble-damages remedy be contemplated. *Compare* S.F. HALABI, "The Comity of *Empagran*: the Supreme Court Decides that Foreign Competition Regulation Limits American Antitrust Jurisdiction over International Cartels", 46 *Harv. Int'l L.J.* 279, 290 (2005).

[1461] It has been argued that the increased likelihood of detection stemming from cartelists turning in other cartelists with U.S. antitrust regulators under the latters' corporate leniency programs, given the decreased possibility of the former being sued by private plaintiffs in U.S. courts under the proximate cause standard, has in itself deterrent effects. *See* S.A. CASEY, "Balancing Deterrence, Comity Considerations, and Judicial Efficiency: The Use of the D.C. Circuit's Proximate Cause Standard for Determining Subject Matter Jurisdiction over Extraterritorial Antitrust Cases", 55 *Am. U. L. Rev.* 585, 608 (2005); S. FERNANDES, "F. Hoffman-Laroche, Ltd. v. Empagran and the Extraterritorial Limits of United States Antitrust Jurisdiction: where Comity and Deterrence Collide", 20 *Conn. J. Int. L.* 267, 305 (2005). It is however unclear whether these deterrent effects are real, and if they are, whether they are substantial.

[1462] *See, e.g.*, S. FERNANDES, "F. Hoffman-Laroche, Ltd. v. Empagran and the Extraterritorial Limits of United States Antitrust Jurisdiction: where Comity and Deterrence Collide", 20 *Conn. J. Int. L.* 267, 268 (2005) ("Embodying the clash between economic theories and the realities of international diplomacy, foreign governments and economists advance conflicting views of what courts should take into account when deciding whether or not to exercise U.S. antitrust laws abroad.").

[1463] K.M. MEESSEN, "Schadensersatz bei weltweiten Kartellen: Folgerungen aus dem Endurteil im Empagran-Fall", 55 *WuW* 1115, 1120 (2005) ("Völkerrechtlich hätte man sich auch im Empagran-Fall … argumentieren können, dass die Vereinigten Staaten durch Gewährung eines Anspruchs auf dreifachen Schadensersatz an nicht-amerikanische Geschädigte gegen nicht-amerikanische Kartellbeteiligte einen selbstlosen Beitrag zur weltweiten Abschreckung von Hardcore-Kartellen

Unfortunately, the *Empagran* Supreme Court rejected the comity/deterrence combinational approach because of the practical complications it might give rise to.[1464] Similarly, the *Empagran* D.C. Circuit (on remand) took the view that, irrespective of foreign nations' dealings with the matter, if the foreign plaintiff's injury is not "proximately caused" by the U.S. effects of the defendant's conduct, U.S. courts would lack jurisdiction over the antitrust violation. In our view, bystander States are authorized under international law to exercise jurisdiction over antitrust violations committed abroad and harming foreign victims provided that the territorial State is unable or unwilling to adequately address the violations itself, and provided that there is a substantial territorial link with the bystander State. Such an approach may moreover encourage the home State to develop its own antitrust regime,[1465] and make future jurisdictional assertions by the bystander State superfluous.

6.10.2.f. The English Provimi litigation

432. Private suits against the vitamin producers that made up the vitamin cartel at issue in *Empagran* have not only been filed in the United States, but also in Europe. In a 2003 case, *Provimi* v. *Aventis*,[1466] the High Court of England and Wales found jurisdiction in a case involving a foreign plaintiff (Trouw Germany), foreign defendants (Swiss companies Roche and Aventis) and wholly foreign transactions. The High Court allowed the plaintiff to recover all losses suffered from the defendants' UK subsidiaries, which, although not directly involved in the transactions, were considered to be an extension of the foreign cartelists, and tortfeasors themselves.[1467]

433. Unlike the Supreme Court's decision in *Empagran*, the English High Court's decision in *Provimi* is not predicated on public international law notions of comity and sovereignty, but, in the best European tradition, wholly on mechanically applied private international law rules. *Provimi* concerned the question of whether it was possible for a foreign plaintiff to tie his UK antitrust claim against a foreign defendant for foreign injury to a UK antitrust claim against a defendant for domestic (UK) injury. The High Court held that, under the Lugano Convention and Article 6

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leisten."). Such 'selfless' jurisdiction, while protecting global public goods, is not exactly universal jurisdiction, but rather territorial jurisdiction, as some domestic injury of the global cartel is still required for there to be jurisdiction.

[1464] *Empagran*, 124 S.Ct. at 2368-69 ("The Sherman Act covers many different kinds of anticompetitive agreements. Courts would have to examine how foreign law, compared with American law, treats not only price fixing but also, say, information-sharing agreements, patent-licensing price conditions, territorial product resale limitations, and various forms of joint venture, in respect to both primary conduct and remedy. The legally and economically technical nature of that enterprise means lengthier proceedings, appeals, and more proceedings--to the point where procedural costs and delays could themselves threaten interference with a foreign nation's ability to maintain the integrity of its own antitrust enforcement system."). *See* for a similar critique: H.L. BUXBAUM, "Transnational Regulatory Litigation", 46 *Va. J. Int'l L.* 251, 281-82 (2006) (stating that "[w]hile [the Supreme Court's] analysis was sensitive to the foreign relations issues raised in the case, it left no room for consideration of the substantive regulatory goals that a broader role for domestic actions might further").

[1465] *Compare* S. FERNANDES, "F. Hoffman-Laroche, Ltd. v. Empagran and the Extraterritorial Limits of United States Antitrust Jurisdiction: where Comity and Deterrence Collide", 20 *Conn. J. Int. L.* 267, 301 (2005) (believing that the Supreme Court's decision in *Empagran* already guarantees this).

[1466] High Court UK, *Provimi Limited v. Aventis Animal Nutrition SA & Ors and other cases*, 6 May 2003, [2003] EWHC 961 (Comm), [2003] All ER (D) (59).

[1467] *Id.*, para. 40.

(1) of EC Regulation 44/2001,[1468] both defendants could be sued in the UK because "the claims [against them] are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings."[1469] The claims were so closely connected because "[t]hey all ar[o]se out of the same alleged infringements of Article 81 [ECT]" and "[t]hey [were] all private law claims for damages for those infringements."[1470] In this scheme, only the issue of interdependent domestic and foreign claims arises and not the issue of interdependent domestic and foreign harm (as it does in the United States). A claim before English courts on the basis of foreign harm ought to be joined to a claim on the basis of domestic harm. It is not required that the foreign harm be dependent upon domestic harm, although this will ordinarily be the case.[1471]

434. Given the fact that the High Court predicated its reasoning partly on European law, which applies in every EU Member State, one could wonder why this case has arisen in the United Kingdom and not in other European Member States.What drives plaintiffs to prefer English courts over other European courts? The reason is that the English legal system is in some respects quite similar to the American legal system: English courts grant U.S.-like discovery and may award punitive damages.[1472] Just like U.S. courts have become a magnet for all kinds of international tort claims, ranging from human rights tort claims under the Alien Tort Claims Act to antitrust tort claims, English courts may become the favorite forum for pan-European antitrust tort claimants. Another reason may be that other European courts are simply not willing to honor such claims. German courts, for instance, have dismissed claims arising out of the vitamins litigation in 2003 and 2004, as the plaintiffs allegedly failed to show that the vitamins cartel was specifically directed at them.[1473] This 'targeted infringement' doctrine, a feature of German tort law, serves

[1468] *O.J.* L 12/1 [2001].
[1469] *Provimi v. Aventis*, para. 43-49.
[1470] *Id.*, para. 47. The theory of "close connection" obviated the need for a departure from the territorial principle on which judicial tort jurisdiction is based in the UK, as elsewhere in Europe. Under this principle, only the courts of the place where the harmful event occurred or may occur have jurisdiction (Article 5 (3) of Regulation 44/2001), in the case the UK courts. *See* on the British reluctance to forgo the territorial principle, *e.g.*, G. GILBERT, "Crimes sans Frontières: Jurisdictional Problems in English law", *B.Y.I.L.* 415 (1992).
[1471] U.S. law, while requiring domestic and foreign harm to be linked, does not require the domestic plaintiff to file a suit against the foreign defendant to which the foreign plaintiff's suit is attached, but only that the domestic plaintiff could *in abstracto* file a suit. This implies that the foreign plaintiff could still sue if the domestic plaintiff is not willing to bandwagon or if his case has already been closed.
[1472] In the UK, punitive damages are known as 'exemplary damages'. Since *Rookes v. Barnard* [1964] AC 1129, [1964] 1 All ER 367, they can be awarded, *inter alia*, in case of wrongful conduct by the defendant which has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff. Further requirements are: "(i) knowledge that what is proposed to be done is against the law or a reckless disregard as to whether what is proposed to be done is illegal or legal; and (ii) a decision to carry on doing it because the prospects of material advantage outweigh the prospects of material loss." *Cassell & Co v. Broome* [1972] AC 1027 at 1079, per Lord Hailsham LC. *See also* A. GRUBB (ed.), *The Law of Tort*, London, Butterworths, 2002, 200-212. Section 47A of the UK Competition Act 1998, as amended by Section 18 of the Enterprise Act 2002, which provides for monetary claims before English tribunals, does not exclude the use of exemplary damages in competition matters. *See* for the text of the Enterprise Act: www.hmso.gov.uk.
[1473] Mainz District Court, decisions of January 15 2004, Cases 12 HK.O 52/02, 12 HK O 55/02 and 12 HK O 56/02, published in NJW-RR 2004, 478; Mannheim District Court, decision of July 11 2003, Case 7 O 326/02, published in GRUR 2004, 182; Karlsruhe Court of Appeal, decision of January 28 2004, Case 6 U 183/03, published in WuW DE-R 1229.

as an important limitation on the possibility of German courts establishing their jurisdiction over international cartels, which are typically directed at all users of certain products.

435. Concluding, the English *Provimi* doctrine provides a forum for 'foreign-to-foreign' claims in case an English defendant is also involved in the proceedings, and the foreign defendant controls an English company (which could then be identified as a territorial tortfeasor). Conspiring multinational companies may easily fulfill these requirements, since they often have a significant number of foreign affiliates. In spite of the conceptual differences of the *Provimi* litigation and the U.S. *Empagran* litigation, the former litigation being based on private international law and the latter rather on public international law, the *Vitamins* litigation has revealed a willingness on both sides of the Atlantic to seek an adequate justification for establishing jurisdiction over 'foreign-to-foreign' claims.

6.10.3. Calculating fines for global antitrust harm: the European experience

436. The sort of international cartels with participants based in different States and causing worldwide harm because of worldwide sales has not only provoked a debate as to whether the objective of global deterrence of antitrust violations allows foreign-based plaintiffs to sue foreign-based defendants for foreign harm. Notably in Europe, in the *Graphite Electrodes* cases (2001-2006), the question has been raised whether this deterrence objective allows competition authorities to impose a fine on an international cartel without taking account of the fines which the cartel members have been subject to in other States. The European Commission, in an apparent effort to stamp out global anticompetitive conduct, relies upon worldwide turnover to calculate the fine for anticompetitive conduct over which it has jurisdiction. It does not take into account the fact that other States may already have imposed fines on cartel members for the same anticompetitive conduct. Defendants in EC antitrust proceedings have understandably argued that the Commission's practice "involves double-counting and is disproportionate to any justifiable deterrent effect,"[1474] and that it violates the principle of *non bis in idem*.

437. It may be noted at the outset that levying fines for anticompetitive conduct for which other States have also levied fines appears to only cause a burden on undertakings, and not to encroach upon the sovereignty of foreign nations.[1475] The issue is therefore not a jurisdictional one, although it could, admittedly, be argued that a State (or group of States) may, under the international law of jurisdiction, only impose effects-based antitrust liabilities through fines to the extent that these liabilities reflect the harm (effects) done within its territory.[1476] The European

[1474] *See* ECJ, *Tokai Carbon and Others* v. *Commission*, Case C-289/04 P, June 29, 2006, para. 48.
[1475] *See also* B. GOLDMAN, "Les effects juridiques extra-territoriaux de la politique de la concurrence", *Rev. Marché Commun* 612, 620 (1972).
[1476] Initially, the Commission appeared to attempt to divide the effects of a global conspiracy according to the territory where they occurred. In the 1971 *Boehringer* case, the Commission refused to set the amount of the fine paid by the German company Boehringer Mannheim in the United States for its anticompetitive conduct against that imposed by the Commission. *See Boehringer Mannheim* v. *Commission*, *O.J.* L 282/46 (1971). Upon appeal by Boehringer, the ECJ ruled in 1972 in favor of the Commission, stating that "[a]lthough the actions on which the two convictions in question are based arise out of the same set of agreements they nevertheless differ essentially as regards both their object and geographical emphasis," that "the conviction incurred in the United States related to a wider body

Commission and the courts, however, believe that the Commission could define the amount of the fine for itself, and need not follow other regulatory agencies' methods, as long as the fine relates to anticompetitive activities of the defendants' within the common market. The objective of deterrence may thus warrant a fine that well exceeds the actual harm done.[1477] This issue somehow rekindles the old debate over U.S. punitive (non-compensatory) damages which plaintiffs could obtain from defendants, including foreign defendants. Nonetheless, in the European cases, the question was rather framed in terms of whether the Commission should not take account of proceedings and penalties to which the defending corporation has been subject outside the EC, and not in terms of whether European penalties should somehow match the harm done within the EC.

438. The ECJ ruled that the *non bis in idem* rule, a fundamental principle of Community law, was not applicable to the case because "there is no principle of public international law that prevents the public authorities, including the courts of different States from trying and convicting the same natural or legal person on the

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of facts", and that "the applicant has put forward nothing capable of confirming the argument that the conviction in the United States was directed against the application or effects of the cartel other than those occurring in that country." *See* ECJ, Case 7/72, E.C.R. 1972, 1281, §§ 4-5. The doctrine largely approved of this holding, arguing that, if effects have been caused in different States, there have been "plusieurs faits répréhensibles, et la condition d'identité des fait nécessaire pour le jeu de la règle "*non bis idem*" .. n'est pas remplie". It was added that, if the financial penalty was only based upon the conspiracy's harmful effects within the territory of the State imposing the penalty, it was not excessive "à cumuler des amendes qui n'étaient chacune que partielle." *See* J.-M. BISCHOFF & R. KOVAR, "L'application du droit communautaire de la concurrence aux entreprises établies à l'extérieur de la Communauté", 102 *J.D.I.* 675, 716 (1975) (stating that there may however be a problem if one State were to exercise jurisdiction on the basis of territorial effects, and another on the basis of territorial conduct, with the latter State not taking into account territorial effects so as determine the penalty, although admitting in n 195 that States are unlikely to exercise jurisdiction on the basis of the subjective territoriality principle). *Id.*, at 724 (« On rappellera … que l'amende infligée par la Commission dans l'affaire de la quinine [*i.e.*, the *Boehringer* case] tient compte des seuls effets de l'entente sur le marché commun. De la sorte, elle ne constitue en rien une ingérence dans la souveraineté d'un Etat tiers. »). *Contra* I. SEIDL-HOHENVELDERN, "Völkerrechtliche Grenzen bei der Anwendung des Kartellrechts", 17 *A.W.D.* 53, 56 (1971) (stating that "[d]ieses Verhalten verstösst gegen den Grundsatz ne bis in idem der einerseits als allgemein anerkannter Rechtsgrund auch im Völkerrecht gilt und überdies im Grundgesetz verankert ist."). Nevertheless, it was pointed out at the time that this division may theoretically be possible, but that one could wonder "s'il est certain que chaque juge ou chaque autorité, saisi dans les limites de sa compétence, adaptera exactement le montant de l'amende à la gravité des effets qui se sont produits sur le territoire d'application de sa propre loi."). *See* B. GOLDMAN, "Les effects juridiques extra-territoriaux de la politique de la concurrence", *Rev. Marché Commun* 612, 618 (1972). Nowadays, the Commission only pays lipservice the division of worldwide effects along geographical lines, and, for deterrence purposes, calculates fines on the basis of worldwide turnover. This shift in practice led to the Court decision discussed in this subsection.

[1477] *Id.*, para. 61 ("The objective of deterrence which the Commission is entitled to pursue when setting the amount of a fine is to ensure compliance by undertakings with the competition rules laid down by the EC Treaty for the conduct of their activities within the common market."). *See also id.*, para. 55 ("[W]hen the Commission imposes sanctions on the unlawful conduct of an undertaking, even conduct originating in an international cartel, it seeks to safeguard the free competition within the common market which constitutes a fundamental objective of the Community under Article 3(1)(g) EC. On account of the specific nature of the legal interests protected at Community level, the Commission's assessments pursuant to its relevant powers may diverge considerably from those by authorities of non-member States). *See also* the parallel Case C-308/04 P SGL Carbon AG/Commission (ECJ, June 29, 2006) (confirming CFI, Joined Cases T-236/01, T-239/01, T-244/01 to T-246/01, T-252/01, *Tokai Carbon and Others* v. *Commission* [2004] ECR II-1181, and Commission Decision 2002/271/EC of July 18, 2001, Case COMP/E-1/36.490 – *Graphite electrodes* (*O.J.* 2002, L 100/1)).

basis of the same facts as those for which that person has already been tried in another State", and that, "[i]n addition, there is no public international law convention under which the Commission could be obliged, upon setting a fine under Article 15(2) of Regulation No 17, to take account of fines imposed by the authorities of non-member States pursuant to their competition law powers."[1478] This is no doubt true. In the related field of criminal law as well, States have always opposed an international principle of *non bis in idem* on the ground that such a principle might curb their sovereign powers to punish those over which they have legitimate jurisdiction. Reasonableness may however demand that proper and objective foreign proceedings and penalties serving adequate deterrent purposes be somehow taken into account so as to ease the burden on defendants. Yet it has hard to identify a legal rule which requires States to defer to other States' penalties. Probably, as the ECJ hinted at, antitrust regulators may take account of foreign penalties only as a matter of discretion.[1479]

[1478] *See* ECJ, *Tokai Carbon and Others* v. *Commission*, Case C-289/04 P, June 29, 2006, para. 58. *See also id.*, para. 59 (noting that the Comity Agreements between the U.S. and the EU "are confined to practical procedural questions like the exchange of information and cooperation between competition authorities are not in the least related to the offsetting or taking into account of penalties imposed by one of the parties to those agreements"). *Compare* J. STOUFFLET, "La compétence extraterritoriale du droit de la concurrence de la Communauté économique européenne", 98 *J.D.I.* 487, 498 (1971) (stating that "en matière de police de la concurrence, chaque droit national sanctionne les atteintes aux intérêts nationaux. Par conséquent, le cumul des sanctions n'est pas juridiquement inacceptable.").

[1479] *Id.*, para. 60 (stating that "it should be observed that any consideration concerning the existence of fines imposed by the authorities of a non-member State can be taken into account only under the Commission's discretion in setting fines for infringements of Community competition law. Accordingly, although it cannot be ruled out that the Commission may take into account fines imposed previously by the authorities of non-member States, it cannot be required to do so."); J. STOUFFLET, "La compétence extraterritoriale du droit de la concurrence de la Communauté économique européenne", 98 *J.D.I.* 487, 498-99 (1971).

With respect to fines imposed by Member States' competition authorities and the European Commission relating to the same anticompetitive conduct, the ECJ held as early as 1969 that "la possibilité d'un cumul de sanctions ne serait pas de nature à exclure l'admissibilité de deux procédures parallèles", but that, nonetheless, "une exigence générale d'équité [but not a general principle of Community law] … implique qu'il soit tenu compte de toute décision répressive antérieure pour la détermination d'une éventuelle sanction." (ECJ, Case 14/68, *Walt Wilhelm, Rec.* 1969, p. 1, § 11). In the 1972 *Boehringer Mannheim* case, however, the ECJ seemed to oblige, in an *obiter dictum*, the Commission to take account of penalties imposed by a Member State for the same anticompetitive conduct, holding that "[i]n fixing the amount of a fine the Commission must take account of penalties which have been imposed for infringements of the cartel law of a Member State and, consequently, have been committed on Community territory." (ECJ, Case 7/72, *Boehringer Mannheim* v. *Commission*, E.C.R. 1972, p. 1281, § 3). In 2003, in the *Italcementi* competition case, Advocate General Ruiz-Jarabo Colomer set out the conditions for the application of the *ne bis in idem* principle in EC law (Opinion delivered on 11 February 2003, case C-213/00, *Italcementi SpA* v. *Commission*). He held that there are "three identities … which must be present in order for the principle to apply: the same facts, the same offender and a single legal right to be protected" (*Id.*, at § 89). In a competition context, this would imply that "[i]f those three identities are present, when conduct contrary to Article 81 EC has been investigated and penalized by the Commission, it cannot then be punished by the competent national competition authority, and vice versa" (*Id.*, at § 95). The Advocate General thereupon clarified *Wilhelm*, and stated that the principle of *ne bis in idem* was not applicable to the case: "In reality, *Wilhelm* did not constitute an application of that principle, since it involved 'two parallel proceedings pursuing different ends", in other words, in which different assets or legal values were being protected". The identity of protected objective required for the application of the *ne bis in idem* rule is missing." (*Id.*, at § 97). If the requirements of the principle of *ne bis in idem* are not met in an intra-EC *Wilhelm*-like constellation, they may *a fortiori* not be met in a constellation involving penalties imposed by a third State and the Commission. It remained to be seen then whether equity or natural justice, as referred to in *Wilhelm*, could also apply to such a constellation. *See* B. GOLDMAN,

6.11. Using antitrust law to secure foreign market access

439. U.S. PRACTICE – Since the late 1960s, the United States has attempted to exercise 'extraterritorial' antitrust jurisdiction over foreign corporations in order to boost U.S. exports (export commerce) and not only to protect U.S. consumers (import commerce), which was the traditional role of antitrust law. In *Pacific Seafarers, Inc.* v. *Pacific Far East line, Inc.* (1968), for instance, the D.C. Circuit established subject-matter jurisdiction over a foreign conspiracy excluding a U.S. shipper from carrying goods between Taiwan and South Vietnam.[1480] Similarly, in the *Dominicus Americana* case (1979), a New York District Court established its subject-matter jurisdiction over the alleged monopolization of tourist facilities in the Dominican Republic.[1481]

440. So as to provide a firm legal basis for the expansion of the scope of the Sherman Act to include non-import commerce, the U.S. Congress passed the Foreign Trade Antitrust Improvements Act (FTAIA)[1482] amending the Sherman Act, in 1982.[1483] Under the FTAIA, jurisdiction obtains over anticompetitive conduct, wherever occurring, that restrains U.S. exports, if

1. the conduct has a direct, substantial, and reasonably foreseeable effect on exports of goods or services from the United States, and
2. the U.S. courts can obtain jurisdiction over persons or corporations engaged in such conduct.

"Les effects juridiques extra-territoriaux de la politique de la concurrence", *Rev. Marché Commun* 612, 618-619 (1972) (suggesting that it could). It could be argued that the Advocate General in *Italcementi* supported the transposition of *Wilhelm* to a constellation involving penalties imposed by third States, as in n 73 of his opinion, he referred to the *Boehringer Mannheim* case (a case which was discussed in n 1476 and which precisely revolved around the legality of the Commission and the United States both imposing penalties) where he held that, in the *Italcementi* case, like in the *Wilhelm* case, « the third of the requisite identities, the objective, is absent », and thus implied that, in *Italcementi, Wilhelm*, as well as in *Boehringer*, the actions by the different authorities had a different objective. Because the Advocate General did not conceptually distinguish between these three cases, his admission, with respect to *Wilhelm*, that, even if the « identity of protected objective required for the application of the *ne bis idem* rule is missing », equity may still play a mitigating role, may be taken as applicable to *Boehringer*-style constellations as well. It is against this background that one probably has to construe the ECJ's decisions in the 2006 *Carbon* and *Graphite Electrodes* cases, where the Court ruled that "there is no principle of public international law that prevents the public authorities, including the courts of different States from trying and convicting the same natural or legal person on the basis of the same facts as those for which that person has already been tried in another State": while there may not be a hard and fast rule of international law which requires mitigation, equity, natural justice, or reasonableness, whatever the name, may nonetheless demand that any previous punitive decision by a third State be taken into account by the Commission.

[1480] 404 F.2d 804 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1093 (1969).

[1481] *Dominicus Americana* v. *Gulf & Western Indus., Inc.*, 473 F. Supp. 680 (S.D.N.Y. 1979).

[1482] 15 U.S.C. Section 6(a).

[1483] It should be noted that before the enactment of the FTAIA, some authors already considered the court-based expansion as an anomaly. *See* M.D. BLECHMAN, "Antitrust Jurisdiction, Discovery and Enforcement in the International Sphere: An Appraisal of American Developments and Foreign Reactions", 49 *Antitrust Law Journal* 1197, 1204 (1980).

441. Although the FTAIA enabled the American competition authorities to curtail foreign anticompetitive conduct that threatened American export trade, the U.S. Department of Justice was initially reluctant to act upon the enforcement authorization contained in the FTAIA. In footnote 159 of its 1988 Antitrust Enforcement Guidelines for International Operations, it noted that it "is concerned only with adverse effects on competition that would harm U.S. consumers by reducing output or raising prices."[1484] "Safeguarding competition" would mean "protecting consumers" and not "protecting American export trade". In 1993 however, the Department announced that it would withdraw footnote 159 and take appropriate enforcement action against foreign anticompetitive conduct that restrained U.S. exports, regardless of whether the conduct resulted in direct harm to U.S. consumers.[1485] The definition of "harm" would henceforth include both consumers and undertakings. The new stance was incorporated in the 1995 Antitrust Enforcement Guidelines for International Operations, jointly issued by the Department of Justice and the Federal Trade Commission. [1486] Ever since, FTAIA effects-based jurisdiction could be resorted to as a trade policy tool to open foreign markets for American undertakings.

442. EUROPEAN PRACTICE – The aggressive use of competition law to pursue market access for domestic companies is typical for United States antitrust practice. It is rooted in the Sherman Act itself, which provides in § 1 that "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce […] with foreign nations, is declared to be illegal."[1487] The Sherman Act does not require effects on the domestic market; any trade restriction that hampers foreign commerce might fall within the scope of application of its § 1. Article 81 § 1 of the EC Treaty by contrast prohibits as incompatible with the Common Market "all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the Common Market." The very formulation of this provision, unlike § 1 of the Sherman Act, makes clear that it applies only to agreements affecting trade between Member States, *i.e.*, within the Common Market, and not between Member States and foreign nations, the latter being a question of trade law.[1488]

443. EC REACTION TO U.S. JURISDICTIONAL ASSERTIONS – The European Commission has vehemently criticized the protection of U.S. exporters by U.S. antitrust law, which blurs the distinction between competition and foreign trade policy. In its comments to the 1995 Antitrust Enforcement Guidelines for

[1484] U.S. Department of Justice, Antitrust Enforcement Guidelines for International Operations, (Nov. 1988), *reprinted in* 4 Trade Reg. Rpt. (CCH), ¶13,109. In its 1977 Antitrust Guide for International Operations, the Department of Justice still viewed its "essential" function as "protecting the competitiveness of U.S. market and export opportunities." *See* U.S. Department of Justice, Antitrust Guide for International Operations 8 (1977).
[1485] U.S. Department of Justice, Foreign Restraints on U.S. Exports under Antitrust Laws (April 3, 1992), *See also*: T. KOJIMA, "International Conflicts over the Extraterritorial Application of Competition Law in a Borderloss Economy", available at http://www.wcfia.harvard.edu/fellows/papers01-02/kojima.pdf, p. 17.
[1486] *See* Section 3.122, and illustrative examples D and E of the Antitrust Guidelines for International Operations.
[1487] Sherman Act, 15 U.S.C. Section 1.
[1488] Articles 131-134 EC Treaty.

International Operations, the European Commission believed "that the accent which the Guidelines lay on unilateral action by the U.S. authorities in fact contradicts on the one hand the commitment to take account of comity principles and on the other hand, the efforts of the U.S. authorities to strengthen international cooperation."[1489] The United Kingdom for its part argued that "the [U.S.] Agencies assert that foreclosure of a foreign market or refusal to adopt U.S. technical standards is sufficient to establish the requisite effect. Such jurisdictional claims show U.S. antitrust law being used as an instrument of trade policy to open markets perceived as closed to U.S. exporters. The U.K. Government regards this as an objectionable and inappropriate use of antitrust powers."[1490]

Negative European foreign reaction against American extraterritorial antitrust enforcement serving U.S. exports may also be informed by the double standard that the United States apply in enforcing their antitrust laws. The United States pay lip-service to the goal of opening markets, if need be through antitrust remedies at the disposal of American exporters, but they fail to address domestic trade-distorting conduct by U.S. companies injuring foreign competitors. Undeniably, the United States use antitrust law as just another tool to advance national interests.[1491]

444. U.S. RECORD – For all the griping, the International Competition Policy Advisory Committee (ICPAC), examining the record of antitrust cases filed by the United States in 2000, identified only 44 cases since 1912 in which the United States claimed that defendants were engaging in conduct that restrained U.S. exports abroad, most of them also affecting domestic commerce.[1492] Initially, competition authorities were indeed not concerned with opening up foreign markets, but rather with breaking up international cartels involving both American companies and foreign subsidiaries. Although in the 1990s, the Department of Justice and the Federal Trade Commission changed their focus to opening up foreign markets, ICPAC was able to find only five export restraint cases since 1978, none of them directed at the typical market access problem where foreign undertakings engage in anticompetitive conduct that bars American firms.[1493] ICPAC attributed this lean record to difficulties of establishing jurisdiction, overcoming potential objections to offshore discovery, conducting the investigation, establishing proof, and enforcing any remedy. Some firms may also have turned to trade officials who are more likely to put pressure on foreign governments to intervene.[1494]

[1489] Comments of the European Commission Services on the U.S. Antitrust Enforcement Guidelines for International Operations 1994 (February 9, 1995). *See for* an early condemnation of U.S. practice in the field: J. FRISINGER, "Die Anwendung des EWG-Wettbewerbsrechts auf Unternehmen mit Sitz in Drittstaaten", *A.W.D.* 553, 559 (1972).

[1490] Comments of the Government of the United Kingdom on the Draft Antitrust Enforcement Guidelines for International Operations (December 19, 1994), reprinted in *B.Y.I.L.* 1995, 670.

[1491] *Compare* S. WEBER WALLER, "Can U.S. Antitrust Laws Open International Markets?", 20 *Nw. J. Int'l L. & Bus.* 207, 229-30 (2000).

[1492] International Competition Policy Advisory Committee (ICPAC), *Final Report*, Annex 5-A, 2000, http://www.usdoj.gov/atr/icpac/finalreport.htm.

[1493] According to the ICPAC report, there would only be one case involving export restraint allegations since the Department of Justice deleted footnote 159: *United States v. Pilkington PLC* [1994-2 Trade Cas. (CCH), 70,842 (D.Ariz. 1994)], but this case was not a pure export case. *Pilkington* dealt with unreasonably restrictive patent and know-how licensing agreements between a British firm and its American competitors allegedly barring access to foreign markets.

[1494] ICPAC, final report, *supra*, Chapter 5.

445. POSITIVE COMITY – To avoid open conflicts between the United States and Europe over export restraints in the future, the 1998 U.S.-EU Positive Comity Agreement might prove helpful.[1495] Under this Agreement, discussed in chapter 6.8, the State where the anticompetitive conduct occurred has the primary responsibility to investigate market access barriers. The State whose export is restrained could defer extraterritorial enforcement when the territorial State is proceeding with an investigation. The exporting State is however not required to do so, if the competition authority investigating a formal positive comity request does not meet the conditions, although it must tell the territorial party why it is pursuing a separate investigation. Since both parties remain empowered to pursue their own investigations, the Positive Comity Agreement does not prevent the outbreak of a major conflict over export restraint. But at least it provides a useful bilateral coordination framework that limits extraterritorial jurisdiction and clarifies the primary responsibility of the territorial party in addressing anticompetitive conduct.[1496] Tensions between U.S. and Europe over the protection of U.S. exporters by U.S. antitrust laws have, at any rate, not arisen recently.

6.12. International merger jurisdiction

6.12.1. General observations

446. MERGER V. CARTEL JURISDICTION – In the previous parts of this chapter on antitrust jurisdiction, emphasis has been laid on cartels or conspiracies. Competition authorities do however also exercise jurisdiction over international merger or concentration activity. Such jurisdiction is possibly more conflict-prone than jurisdiction over cartels in that national policy objectives and even protectionist tendencies play an important role in the review of mergers by national or supranational authorities[1497] - although these authorities may sometimes pretend otherwise.[1498] Unlike with respect to cartel enforcement, substantive standards in merger enforcement differ widely, *e.g.*, in relation to the (speculative) determination of the future effects of a merger. Nonetheless, in both the United States and Europe, the jurisdictional principles developed in the field of cartel law also govern merger law. Hereinafter, merger jurisdiction will be discussed in the context of U.S. antitrust law (part 6.11.2), and German (part 6.11.3) and EC (part 6.11.4) competition law.

447. IMPORTANCE – Merger activity is cyclic in nature. *International* merger activity seems to be generally increasing however. In the United States, in the early

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[1495] Agreement Between The Government of the United States of America and the European Communities on the Application of Positive Comity Principles in the Enforcement of Their Competition Laws (June 4, 1998).

[1496] *See* for an overall assessment of *positive comity*: ICPAC, *supra*, Chapter 5.

[1497] *See* M.C. FRANKER, "Restoration: International Merger Review in the Wake of General Electric/Honeywell and the Triumphant Return of Negative Comity", 36 *Geo. Wash. Int'l L. Rev.* 877, 881-82 (2004) (arguing that policy and political concerns predominate over economic concerns); D. KUKOVEC, "International Antitrust – What Law in Action?", 15 *Ind. Int'l & Comp. L. Rev.* 1, 22 and 32 (2004) (submitting that "[m]erger review deals with probabilities, not certainties, which makes it even more susceptible to discretion, and thus to political and national bias") (footnote omitted).

[1498] *See, e.g.*, the statement of EC Commissioner Mario Monti, IP/01/855, June 18, 2001, quoted in S. STEVENS, "The Increased Aggression of the EC Commission in Extraterritorial Enforcement of the Merger Regulation and Its Impact on Transatlantic Cooperation in Antitrust", 29 *Syracuse J. Int'l L. & Com.* 263, 276 (2002) (stating that the EC's investigation into the merger of Boeing and McDonnell Douglas was "a matter of law and economics, not politics").

2000s, a sheer 31,9 % of all mergers were international.[1499] The higher the number of international mergers, the bigger their impact on multiple antitrust jurisdiction, and thus, the higher the incidence of assertions of extraterritorial jurisdiction by States which are not the home States of the merging corporations.[1500] The incidence of such assertions is even increased in the current climate of proliferation of competition regimes.[1501] The more competition regimes there are, the higher the risk that these regimes want to review international mergers. Clearly, from a public international law perspective, normative competency conflicts between States loom large (part 6.11.5). From the perspective of the corporation, the proliferation of merger jurisdiction is no less unsettling, as corporations may be required to comply with different merger regulations, and, because they have to notify their proposed merger with a host of merger regulators, they may incur increased transaction costs.[1502]

448. LAW AND ECONOMICS – Extraterritorial jurisdiction in international merger review provides a stark example of how extraterritorial jurisdiction could be economically inefficient from a global perspective. Indeed, for merger reviewers, economic self-interest prevails over neutral antitrust principles (assuming that principles geared to maximal economic efficiency could be devised).[1503] A merger increases global welfare if the increase in production efficiency (technological adaptation, economies of scale) outweighs the decrease in consumer welfare. This ought to be the only yardstick in determining whether a merger could go forward. However, as there is no international regulatory agency responsible for merger review, but only national regulatory authorities, this yardstick will usually not be used, especially "when the welfare effects of the merger have opposite signs in different countries."[1504]

National regulators do not take into account the perceived efficiency gains of a merger in other States. They only assess whether the merger serves or disserves national economic interests, by ascertaining whether the increase in *national* production efficiency outweighs the decrease in *national* consumer welfare. This will usually lead an exporting State, State 'A', (where one or more of the merging companies have their production facilities, and which does not have a large consumer population) to approve a merger, and an importing State, State 'B', (which has a large consumer population, but limited or no production facilities of the merging

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[1499] *See* M.C. FRANKER, "Restoration: International Merger Review in the Wake of General Electric/Honeywell and the Triumphant Return of Negative Comity", 36 *Geo. Wash. Int'l L. Rev.* 877, 879 (2004); *see* for Germany: A. BACH, "Deutsche Fusionskontrolle bei inlandswirksamen Auslandszusammenschlüssen", WuW 291 (1997) (pointing out that 1/8 of all mergers were international in the late 1990s).

[1500] *See* S. STEVENS, "The Increased Aggression of the EC Commission in Extraterritorial Enforcement of the Merger Regulation and Its Impact on Transatlantic Cooperation in Antitrust", 29 *Syracuse J. Int'l L. & Com.* 263, 269 (2002).

[1501] *Id.*, at 302.

[1502] *See, e.g.*, U. DRAETTA, "The International Jurisdiction of the E.U. Commission in the Merger Control Area", *Revue de droit des affaires internationales* 201, 209 (2000).

[1503] *See* S. STEVENS, "The Increased Aggression of the EC Commission in Extraterritorial Enforcement of the Merger Regulation and Its Impact on Transatlantic Cooperation in Antitrust", 29 *Syracuse J. Int'l L. & Com.* 263, 275 (2002).

[1504] *See* R.E. FALVEY & P.J. LLOYD, "An Economic Analysis of Extraterritoriality", Centre for Research on Globalisation and Labour Markets, School of Economics, University of Nottingham (UK), Research Paper 99/3, p. 10, available at www.nottingham.ac.uk/economics/leverhulme/reserach_paper/99_3.pdf.

companies) to oppose the merger. Assuming that, from a global perspective, the merger is efficient, as the gains in production efficiency outweigh the losses in consumer welfare, and that State B will assert its jurisdiction extraterritorially if it has the power and resources to do so, an efficient merger may be blocked through extraterritorial jurisdiction.

6.12.2. International merger jurisdiction in the United States

449. RELEVANT STATUTORY INSTRUMENTS – In U.S. antitrust law, mergers are governed by both the Clayton Act and the Sherman Act. Section 7 of the Clayton Act[1505] prohibits mergers that may substantially lessen competition, or tend to create a monopoly. The Clayton Act, as amended by the 1976 Hart-Scott-Rodino Act, also provides for a premerger notification system for mergers having an effect in the U.S.[1506] The Sherman Act declares every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, to be illegal.[1507] Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony.[1508]

450. RELUCTANCE TO EXERCISE JURISDICTION – It is generally believed that the *Alcoa* maxim regarding extraterritorial application of cartel law[1509] holds true for antitrust law in general, including merger control.[1510] Hence, the whole corpus of extraterritorial effects-based jurisdiction as developed in the wake of *Alcoa* may apply to international mergers.[1511] For import commerce, the *Hartford Fire* test will apply, and for non-import commerce, the test of the Foreign Trade Antitrust Improvements Act (direct, substantial and reasonably foreseeable effects) will apply.[1512]

[1505] Clayton Act, 15 U.S.C. § 18 (1994).
[1506] Title II of the Hart-Scott-Rodino Antitrust Improvements Act (1976), Clayton Act, 15 U.S.C. §18a (1994).
[1507] Sherman Act, 15 U.S.C. § 1 (1994).
[1508] Sherman Act, 15 U.S.C. § 2 (1994).
[1509] *United States v. Aluminium Corp. of America*, 148 F.2d 416, 443 (2d Cir. 1945) ("[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.").
[1510] *See* Antitrust Guidelines for International Operations, Section 3.14 ("Section 7 of the Clayton Act applies to mergers and acquisitions between firms that are engaged in commerce or in any activity affecting commerce. The Agencies would apply the same principles regarding their foreign commerce jurisdiction to Clayton Section 7 cases as they would apply in Sherman Act cases."). *See also* D. SNYDER, "Mergers and Acquisitions in the European Community and the United States: A Movement Toward a Uniform Enforcement Body", 29 *Law and Pol'y Int'l Bus.* 115, 117-120 (1997); K.J. HAMNER, "The Globalization of Law: International Merger Control and Competition Law in the United States, the European Union, Latin America and China", 11 *J. Transnational Law & Policy* 385, 390 (2002).
[1511] *See, e.g.*, *Consolidated Gold Fields PLC* v. *Minorco, S.A.*, 698 F. Supp. 487, 497 (S.D.N.Y. 1988) (believing that the district court had jurisdiction over a foreign merger on the sole basis that "the merger directly impacts on American markets.")
[1512] *See* Antitrust Guidelines for International Operations (1995), Illustrative example H ("It is appropriate to do so because the FTAIA sheds light on the type of effects Congress considered necessary for foreign commerce cases, even though the FTAIA did not amend the Clayton Act.").

In spite of authority to exercise merger jurisdiction, the U.S. is ordinarily reluctant to prohibit foreign mergers because of comity concerns and enforcement difficulties,[1513] and probably in the first place, on the basis of different economic conceptions of merger efficiency than in Europe.[1514] The last few decades have seen the rise of the Chicago School of Economics, which believes that highly concentrated markets could increase economic efficiency by maximising the benefits of economies of scale. In this view, allocative efficiency – favoring the protection of small businesses from the economic power of large corporations – is not necessarily a concern of antitrust law, although it has traditionally been the Sherman Act's main thrust.[1515] For this reason, and less for jurisdictional reasons, U.S. antitrust enforcement authorities are rarely willing to prohibit international mergers.[1516] If a prohibition is nonetheless sought, the U.S. Department of Justice and the Federal Trade Commission may put a high premium on international cooperation. In the 1995 Antitrust Guidelines for International Operations, they underscored that "if effective relief is difficult to obtain, the case may be one in which the Agencies would seek to coordinate their efforts with other authorities who are examining the transaction" through concepts such as positive comity.[1517]

6.12.3. International merger jurisdiction in Germany

451. As has been noted in chapter 6.4, 'extraterritorial' jurisdiction in European competition matters has only recently been acquired. In Germany however, concepts of antitrust jurisdiction were developed and applied since the mid-1970s. Also in the field of merger jurisdiction has Germany been at the forefront of conceptual developments. Developments in Germany foreshadowed the European Court of First Instance's upholding of the effects doctrine in the 1999 *Gencor* international merger case.

452. EFFECTS JURISDICTION – In the field of merger law, the 1975 Guidelines of the German Federal Cartel Office (which are also applicable after the last modification of the merger regulations)[1518] stated that the restraint of competition within the meaning of § 98 (2) of the German Competition Act (GWB), *i.e.*, the provision providing for effects-based jurisdiction (*see supra*), is constituted by the

[1513] *See* F.A. MANN, "The Doctrine of Jurisdiction Revisited after Twenty Years", 186 *R.C.A.D.I.* 9, 85 (1984-III).
[1514] *Compare* K.J. HAMNER, "The Globalization of Law: International Merger Control and Competition Law in the United States, the European Union, Latin America and China", 11 *J. Transnational Law & Policy* 385, 392 (2002). *See also* A.F. BAVASSO, "Boeing/McDonnell Douglas: Did the Commission Fly Too High?", *E.C.L.R.* 243 (1998) (arguing that the European Commission and the U.S. Federal Trade Commission may approach the analysis of substantive antitrust law from very different angles, but that, in asserting jurisdiction over foreign mergers, they take a similar approach).
[1515] *See* K.J. HAMNER, "The Globalization of Law: International Merger Control and Competition Law in the United States, the European Union, Latin America and China", 11 *J. Transnational Law & Policy* 385, 390 and 392 (2002).
[1516] Unlike in cartel cases, *private* suits in merger cases are rare. In any event, a takeover target would not be entitled to standing under Clayton Act Section seven, as it is a beneficiary, not a victim, of any antitrust injury. *See Consolidated Gold Field PLC v. Anglo Am. Corp.*, 698 F. Supp. 487, 490 (S.D.N.Y. 1988); *A.D.M. Corp. v. Sigma Instruments, Inc.*, 628 F.2d 753, 754 (1st Cir. 1980); *Carter Hawley Hale Stores v. the Limited* , 587 F. Supp. 246 (C.D. Cal. 1984).
[1517] Antitrust Guidelines for International Operations (1995), Illustrative example H.
[1518] *See* B. RICHTER, "§ 19", in G. WIEDEMANN (ed.), *Handbuch des Kartellrechts*, München, Beck, 1999, 641, n. 25.

merger as such, irrespective of the possible reduction of the intensity of domestic competition.[1519] International mergers do however not automatically fall within the scope of German merger law. Indeed, in the 1979 *Organische Pigmente* judgment, concerning the applicability of § 98 (2) to post-merger notification requirements under then Article 23 GWB, the German Supreme Court, required the effect of a foreign merger to be direct (*unmittelbar*) and substantial (*spürbar*), and thus required proof of a reduction of domestic competition and not only of the size criteria set forth in the relevant provision being met.[1520] Direct effects may be found if a direct causal relationship between the foreign merger and the effects on the German market could be established.[1521] The Federal Cartel Office, backed by the courts, considered the criterion of substantial effects to be met in the event of the acquisition of a market share of less than 1 %.[1522] Relatively modest market shares may thus also meet the substantiality standard. Since international law prevails over domestic law pursuant to Article 25 of the German Constitution (*Grundgesetz*) and domestic law should be construed in the light of international law (*völkerrechtskonforme Auslegung*), the effects should probably also be reasonably foreseeable.[1523] Without effects within Germany, a merger, even involving German corporations, does not fall within the scope of application of the GWB.[1524]

453. PARTLY FOREIGN MERGERS – There is no discussion about the applicability of German merger control regulations to the acquisition of German corporations or parts of German corporations by foreign corporations.[1525] Nor is there any discussion about the applicability of German law to the acquisition of foreign corporations or parts of foreign corporations by German corporations.[1526] The applicability of German law is in these cases premised on the adverse domestic effects of the concentration in German territory (*Inlandsauswirkung*).

454. WHOLLY FOREIGN MERGERS – The applicability of German law in case of wholly foreign mergers is less clear. It may be submitted that under the *Ölfeldrohren* protective purpose doctrine, discussed *supra*, a general purpose underlies the merger provisions of the German Competition Act, namely the protection of domestic competition from adverse effects by mergers of hitherto

[1519] Federal Cartel Office, Tätigkeitsbericht (Annual Report) 45 (1975), translated in D.J. GERBER, "The Extraterritorial Application of the German Antitrust Laws", 77 *A.J.I.L.* 756, 767 (1983).
[1520] Bundesgerichtshof, May 29, 1979, WuW/E BGH 1613 (*Organische Pigmente*). The case concerned the acquisition of division of a U.S. corporation doing business in Germany by another U.S. corporation that was the subsidiary of a German corporation.
[1521] *See* A. BACH, "Deutsche Fusionskontrolle bei inlandswirksamen Auslandszusammenschlüssen", WuW 291, 297-98 (1997). A general reference to the interdependence of markets does not suffice.
[1522] Bundesgerichtshof, May 29, 1979, WuW/E BGH 1613, 1615 (*Organische Pigmente*): market shares of 0,15 % and 0,23 %; Federal Cartel Office (BKartA), WuW/E 1837 (*Bayer/Firestone*): market share of less than 1 %. As the criterion of substantiality is a vague requirement, it may raise constitutional concerns. *See* C. KLAWITTER, comment to *Organische Pigmente*, WuW/E BGH 1617.
[1523] *Compare* A. BACH, "Deutsche Fusionskontrolle bei inlandswirksamen Auslandszusammenschlüssen", WuW 291, 293-94 (1997).
[1524] *See* A. BACH, "Deutsche Fusionskontrolle bei inlandswirksamen Auslandszusammenschlüssen", WuW 291, 292 (1997).
[1525] BGH WuW/E 1501 (*Kfz-Kupplungen*).
[1526] BKarA WuW/E 1875 (*Deutsche Uhrenglasfabrik/Eurotech Mirrors*).

independent "entrepreneurial potential".[1527] The doctrine has equated German "entrepreneurial potential" with German "entrepreneurial assets" (subsidiaries, production capacity, distribution capacity...), and takes the view that effects in German territory (*Inlandsauswirkungen*) could only properly be established if "entrepreneurial assets" are implicated.[1528] A foreign merger that affects Germany, but does not make use of German "entrepreneurial assets", is not subject to German jurisdiction, although a broad interpretation of such assets may possibly cover any foreign merger producing adverse effects within Germany.

455. FULL AND PARTIAL DIVESTITURES– Courts have held that the Federal Cartel Office has jurisdiction over a merger of two foreign corporations if one of these corporations has a German parent and the other corporation does business in Germany.[1529] Conversely, jurisdiction may be found if the merging foreign corporations have German subsidiaries. Then, however, merger dissolutions are often limited to these subsidiaries (*Teiluntersagung*) and do not extend to the foreign part of the merger,[1530] although full divestitures have been ordered if the participating corporations form an economic unity *and* the primary effects of the merger could be felt in Germany.[1531] The legality under international law of partial divestitures has been recognized by the *Kammergericht*.[1532] The legality of full divestitures, in case a partial divestiture proves impossible, is still unclear though. The *Kammergericht* appears to have left the door open for the legality of full divestitures, where it implied that States could legally exercise their jurisdiction over foreign conduct, provided that such conduct has a significant relation with Germany (*Inlandsbezug*) and its German aspects could not reasonably be regulated without regulating its foreign aspects

[1527] *See* B. RICHTER, "§ 19", in G. WIEDEMANN (ed.), *Handbuch des Kartellrechts*, München, Beck, 1999, 641; A. BACH, "Deutsche Fusionskontrolle bei inlandswirksamen Auslandszusammenschlüssen", WuW 291, 298 (1997).

[1528] *Id.* BACH even asserts that conceiving the execution of the merger in Germany *without domestic production facilities* is a rather artificial undertaking. For him, direct sales by the foreign corporations without the use of intermediaries do apparently not suffice for there to be jurisdiction to impose notification or prohibit a merger. *See also* F.A. MANN, "The Doctrine of Jurisdiction Revisited after Twenty Years", 186 *R.C.A.D.I.* 9, 84-85 (1984-III) (arguing that prohibiting a merger of foreign corporations which do not have domestic subsidiaries, may violate international law, and noting that a prohibition of imports could be a remedy, although at the same time conceding that such would "aggravate rather than solve the problem").

[1529] KG WuW/E OLG 1993 and BGH WuW/E 1613 (*Organische Pigmente*). The prohibition by the Federal Cartel Office of a merger involving a French subsidiary of a Canadian holding owned by a German corporation was not upheld by the *Kammergericht*, as the center of gravity of the merger - the sale of the assets, the foreign production - was located abroad, while only a relatively unimportant additional restraint of competition would result from the strengthening of a market-dominating position of the German corporation (KG WuW/E OLG 2419, 2420 (*Synthetischer Kautschuk*) - relevant excerpts translated into English by D.J. GERBER, "The Extraterritorial Application of the German Antitrust Laws", 77 *A.J.I.L.* 756, 774 (1983)).

[1530] BKartA WuW/E 2363 (*Linde/Lansing*). The Federal Cartel Office stated that all advantages for the acquiring corporation could only be undone by a full prohibition of the merger. In view of international law limits, it saw itself however forced to limit the prohibition of the merger to the German parts of the merger. *Id.*, at 2369.

[1531] BKartA, AG 1992, 363 (*Gillette/Wilkinson*); KG WuW/E OLG 2419, 2420 (*Synthetischer Kautschuk*; *Kammergericht* declares full divestiture of foreign merger illegal under international law as center of gravity of merger is outside Germany).

[1532] KG WuW/E 3051, 3059-3063 (*Morris/Rothmans*). In a previous case, the *Kammergericht* also hinted at the principle of a significant nexus (KG WuW/E OLG 2419, 2420 (*Synthetischer Kautschuk*)).

(effects).[1533] In ordering a divestiture, the Federal Cartel Office should however always comply with international law, in particular the principles of non-interference and abuse of jurisdiction.[1534] A case-by-case analysis balancing of governmental interests, as put forward by the influential German scholar MEESSEN, might give substance to these abstract principles.[1535]

456. INTEREST-BALANCING: THE *MORRIS/ROTHMANS* DECISION – The interest-balancing test conducted by the Federal Cartel Office in *Morris/Rothmans* may serve as a model for jurisdictional restraint in international merger cases,[1536] although the Office's decision was later quashed by the *Kammergericht* because the full divestiture of the merger that the Office ordered was considered to be in violation of the international law principle of non-intervention.[1537] Drawing on MEESSEN, the Federal Cartel Office construed the principle of non-intervention, which serves as the main limitation on unbridled effects jurisdiction in Germany, as requiring a balancing of governmental interests.[1538] If found that South Africa, in arguing against the merger, did not assert its own original State interests but only protected the property interests of South African nationals and corporations.[1539] Hence, as State interests were not involved, an interest-balancing test, possibly leading to a finding of foreign governmental interests outweighing German interests, could not be properly conducted, and a violation of the principle of non-intervention could not be found.

By contrast, the Federal Cartel Office construed the prohibition against abuse of jurisdiction, another international law principle serving as a limitation on antitrust jurisdiction, put forward by JENNINGS in 1957,[1540] as requiring a balancing of "the domestic regulatory interests and the disadvantages that the affected foreign enterprises or the corresponding States suffer through the issuance of the sovereign act".[1541] Unlike the principle of non-intervention, the prohibition against abuse of jurisdiction may thus involve a balancing of both State and private interests. On the other hand, the standard for abuse of jurisdiction was set higher than the standard for the principle of non-intervention, in that only "crass disproportionateness" between

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[1533] KG WuW/E 3051, 3057. In *Morris/Rothmans*, the German aspects *could* be reasonably be regulated without regulating the foreign aspects.

[1534] Compare *Id.*, at 3057. BACH argues that the *Kammergericht* seems to take the view that the principle of non-interference is complied with as soon as a concrete significant nexus can be found and the foreign aspects of the foreign merger cannot reasonably be separated from the domestic aspects. BACH believes that the territorial principle requires Germany to limit its jurisdiction to the domestic effects caused by a foreign merger, without touching upon its foreign aspects (*Auslandssachverhalt*) which are subject to foreign jurisdiction. *See* A. BACH, "Deutsche Fusionskontrolle bei inlandswirksamen Auslandszusammenschlüssen", WuW 291, 295-96 (1997).

[1535] K.M. MEESSEN, *Völkerrechtliche Grundsätze des internationalen Kartellrechts*, Baden-Baden, Nomos, 1975, 288 p.

[1536] BKartA, WuW/E 1943 (*Morris/Rothmans*).

[1537] KG WuW/E 3051 (*Morris/Rothmans*).

[1538] BKartA, WuW/E 1943, 1953 (*Morris/Rothmans*).

[1539] *Id.*, at 1954.

[1540] *See* R.Y. JENNINGS, "Extraterritorial Jurisdiction in the United States Antitrust Laws", 33 *B.Y.I.L.* 146, 153 (1957) (arguing that against the international law authorization to apply one's antitrust laws extraterritorially "must be set also the legitimate and reasonable interests of the State whose territory is primarily concerned, for the extraterritorial exercise of jurisdiction must not be permitted to extend to the point where the local law is supplanted: where in fact it becomes an interference by one State in the affairs of another. The position can be expressed in terms of the *doctrine of abuse of rights.*") (emphasis added).

[1541] *Id.*

the interests involved was considered relevant for abuse of jurisdiction. The Federal Cartel Office ruled that there was no crass disproportionateness in the merger under review, as a serious deterioration of the competitive structures of the domestic market could be anticipated.[1542] The high standard for abuse of jurisdiction, with only "crass disproportionateness" leading to dismissal, may make the doctrine inappropriate for conflict-resolution in case the States involved both have a reasonable link with the situation.[1543]

457. GERMAN SENSITIVITY TO FOREIGN CONCERNS – The *Kammergericht* eventually annulled the Federal Cartel Office's decision in *Morris/Rothmans* because it ordered a full dissolution: 'separable' mergers ought to be separated in light of the international law principles of non-intervention or abuse of jurisdiction.[1544] A foreign merger of which the foreign aspects could not reasonably be separated from the domestic aspects could however legitimately be prohibited by the Federal Cartel Office, provided the merging companies have "entrepreneurial assets" (whatever it means) in Germany, and foreign (sovereign) interests do not outweigh German (sovereign) interests. These restrictions, based on physical links and reasonableness, might add up to sufficient guarantees against too broad a sweep of German merger regulations. In the field of pre-merger notification, one witnesses a similar preoccupation with foreign sensivities. In order to prevent international conflicts from arising, the Federal Cartel Office may grant exemptions from merger notification requirements to merging corporations, including foreign corporations.[1545] Yet even if exemptions are not granted, the Federal Cartel Office appears unwilling to issue fines if foreign corporations proceed with the merger even though the Cartel Office has put it under review (*Vollzugsverbot*).[1546]

6.12.4. International merger jurisdiction in the European Community

6.12.4.a. The Merger Control Regulation

458. Under the EC Merger Control Regulation,[1547] the European Commission has the exclusive authority to review all concentrations with a Community dimension in the light of their compatibility with the common market.[1548] Concentrations have a Community dimension if they fulfill either an initial or a supplementary test relating to the turnover of the merging companies.[1549] If the

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[1542] *Id.*
[1543] *Compare* G. SCHUSTER, *Die internationale Anwendung des Börsenrechts*, Berlin, Springer, 1996, 663.
[1544] *Compare* KG WuW/E 3051, 3057 (*Morris/Rothmans*).
[1545] § 41 (2) GWB.
[1546] *See* B. RICHTER, "§ 19", in G. WIEDEMANN (ed.), *Handbuch des Kartellrechts*, München, Beck, 1999, 641.
[1547] Council Regulation (EC) No. 139/2004 of 20 January 2004, *O.J.* L 24/1, 29 January 2004, repealing Council Regulation (EEC) No. 4064/89 of 21 December 1989 on the control of concentrations between undertakings, 1989 *O.J.*, L 257/14, as amended by Council Regulation (EC) No 1310/97, 1997 *O.J.*, L 180/1 [hereinafter Merger Countrol Regulation]. Before the enactment of the Merger Control Regulation, concentrations were dealt with under then Articles 85 and 86 ECT.
[1548] Merger Control Regulation, Article 2.
[1549] *Id.*, Article 1. Under the initial test of Article 1 (2), a concentration has a Community dimension where (a) the combined aggregate worldwide turnover of all the undertakings concerned is more than euro 5 000 million; and (b) the aggregate Community-wide turnover if each of at least two of the undertakings concerned is more than euro 250 million, unless each of the undertakings concerned

merging companies meet the sales thresholds of the Regulation, the merger will be subject to the jurisdiction of the Commission, even without any actual effect in the Community.[1550] Merger control takes place largely through a mechanism of pre-merger notification to the Commission.[1551] Pre-merger notification is preferable over postmerger prosecution, as the notification requirement reduces the costs associated with having to reverse a merger or to seek remedies after a merger is completed.[1552]

459. As the location of the parties is apparently irrelevant for EC merger control,[1553] the Merger Control Regulation creates the possibility of extraterritorial

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achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State. Under the supplementary test of Article 1 (3), a concentration that does not meet the thresholds laid down in paragraph 2 has a Community dimension where: (a) the combined aggregate worldwide turnover of all the undertakings concerned is more than euro 2 500 million; (b) in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than euro 100 million; (c) in each of at least three Member States included for the purpose of point (b), the aggregate turnover of each of at least two of the undertakings concerned is more than euro 25 million; and (d) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than euro 100 million; unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State. *Compare* 15 U.S.C. §18a (1994), which provides that no person shall acquire, directly or indirectly, any voting securities or assets of any other person, unless both persons (or in the case of a tender offer, the acquiring person) file notification and the waiting period has expired, if (1) the acquiring person, or the person whose voting securities or assets are being acquired, is engaged in commerce or in any activity affecting commerce; and (2) as a result of such acquisition, the acquiring person would hold an aggregate total amount of the voting securities and assets of the acquired person in excess of US$ 200.000.000 or in some cases US$ 50.000.000 (emphasizing the acquisition of assets rather than sales). The Commission has alleviated the impact of the Merger Control Regulation in case of insubstantial effects in the European Economic Area. A European Commission notice sets out a simplified procedure under which the Commission intends to treat certain concentrations pursuant to the Merger Control Regulation on the basis that they do not raise competition concerns. Eligible concentrations include joint ventures that have no, or negligible, actual or foreseen activities within the European Economic Area. *See* Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No. 139/2004, *O.J.* C 56/04 (2005), point 5 ("[…](a) two or more undertakings acquire joint control of a joint venture, provided that the joint venture has no, or negligible, actual or foreseen activities within the territory of the European Economic Area (EEA). Such cases occur where: (i) the turnover of the joint venture and/or the turnover of the contributed activities is less than EUR 100 million in the EEA territory; and (ii) the total value of assets transferred to the joint venture is less than EUR 100 million in the EEA territory").

[1550] *See* A. FIEBIG, "The Extraterritorial Application of the European Merger Control Regulation", 5 *Col. J. Eur. L.* 79, 83-84 (1998) (noting that "the Commission entertained suggestions from several companies and trade associations to exclude concentrations from the notification requirement of they have only a de minimis effect on competition within the Community. The Commission took the position that such an exception would create the risk that operations raising certain competition concerns would escape its scrutiny.").

[1551] Pursuant to Article 4 (1) of the Merger Control Regulation, the Commission must be notified of the transaction not more than one week after the conclusion of the agreement, or the announcement of the public bid, or the acquisition of a controlling interest.

[1552] *Compare* K.J. HAMNER, "The Globalization of Law: International Merger Control and Competition Law in the United States, the European Union, Latin America and China", 11 *J. Transnational Law & Policy* 385, 392 (2002); D. SNYDER, "Mergers and Acquisitions in the European Community and the United States: A Movement Toward a Uniform Enforcement Body", 29 *Law and Pol'y Int'l Bus.* 115, 127 (1997).

[1553] The requirement that at least one of the undertakings be established in the Community was removed from the final draft. The Commission has exerted merger control jurisdiction of the acquisition of joint control over non-EU undertakings by an EU undertaking and a non-EU undertaking, the acquisition of sole control of non-EU undertakings by a non-EU undertaking, the acquisition of joint control over non-EU undertakings by non-EU undertakings, and the merger of two

jurisdiction. Indeed, the Merger Control Regulation assumes that any merger between companies which have a substantial turnover in the European Community will have effects on the common market, and that, therefore, the Commission should be able to impose conditions on the merger or even block it if it produce adverse consequences within the Community.[1554] Although the Merger Control Regulation *prima facie* supports the exercise of jurisdiction on the basis of effects within the Community, and thus, the antitrust effects-doctrine,[1555] it remained to be seen however whether the terms of the Regulation would also apply to wholly foreign mergers. It would be too hasty to infer from the substantive law regime of the Merger Control Regulation that it statutorily casts aside the *Wood Pulp* jurisdictional implementation doctrine, and that the Regulation itself embodies the effects doctrine under international law.

460. JURISDICTION OVER INTERNATIONAL MERGERS – Before the Merger Control Regulation was adopted in 1989, concentrations were typically dealt with under then Article 86 ECT, which prohibits the abuse of a dominant position within the Community. The wording of Article 86 ECT seemed to allow the Commission's exercise of jurisdiction over partly or wholly foreign concentrations insofar as the new entity would (abusively) acquire a dominant position within the Common Market, and the Commission indeed imposed conditions on foreign mergers on that basis.[1556] The doctrine, however, was rather hostile to the exercise of jurisdiction over international mergers, or at least to the measures of divestiture taken so as the limit the impact of an international merger within the Community, believing that such would amount to forbidden enforcement jurisdiction.[1557] Under the influence of German merger

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non-EU undertakings. *See* A. FIEBIG, "The Extraterritorial Application of the European Merger Control Regulation", *Col. J. Eur. L.* 79,, 82 (1998); A. FIEBIG, "International Law Limits on the Extraterritorial Application of the European Merger Control Regulation and Suggestions for Reform", *E.C.L.R.*, 323, 325-26 (1998).

[1554] Sales are equated with effects in the Community. The Commission itself recognizes that this exclusive reliance upon sales is an arbitrary way of identifying which concentrations have a (potential) effect in the Community. *See* A. FIEBIG, "International Law Limits on the Extraterritorial Application of the European Merger Control Regulation and Suggestions for Reform", *E.C.L.R.* 323, 325 (1998).

[1555] *See* D. SNYDER, "Mergers and Acquisitions in the European Community and the United States: A Movement Toward a Uniform Enforcement Body", 29 *Law and Pol'y Int'l Bus.* 115, 122 (1997).

[1556] *See, e.g.*, Commission Decision, *Continental Can*, 9 December 1971, *O.J.* L 7 (1972); ECJ, *Continental Can v. Commission*, *E.C.R.* 1973, 215 (applying the *Dyestuffs* economic entity doctrine, the foreign defendant Continental Can having a controlling participation in a Dutch corporation, which the Commission ruled it should abandon if the proposed concentration were to be cleared)

[1557] *See* B. GOLDMAN, "Les champs d'application territoriale des lois sur la concurrence", 128 *R.C.A.D.I.* 631, 716 (1969-III) (when discussing the application of Article 66 of the Treaty establishing the European Coal and Steel Community) ; J. STOUFFLET, "La compétence extraterritoriale du droit de la concurrence de la Communauté économique européenne", 98 *J.D.I.* 487, 496 (1971) (discussing Article 86 ECT, and doubting whether in the case of international mergers, the requirement of direct effects could possibly be met); J. FRISINGER, "Die Anwendung des EWG-Wettbewerbsrechts auf Unternehmen mit Sitz in Drittstaaten", *A.W.D.* 553, 557 (1972) ("Dies aber sind ausserhalb der Gemeinschaft vorzunehmende Handlungen und es erscheint zweifelhaft, ob insoweit ein auch nur mittelbarer hoheitlicher Zwang zulässig ist. Hier ist die Grenze erreicht, deren Uberschreiten gerade die europäischen Staaten den amerikanischen Kartellbehörden und –gerichten wiederholt vorgeworfen haben."); *Id.*, at 559 (« Einigermassen gesichert vor einem möglichen Angriff durch die Kommission scheint allein die Fusion zwischen gebietsfremden Unternehmen und ein entsprechender Beteiligungserwerb ausserhalb des Gemeinsamen Marktes zu sein. ») ; J.-M. BISCHOFF & R. KOVAR, "L'application du droit communautaire de la concurrence aux entreprises établies à l'extérieur de la Communauté", 102 *J.D.I.* 675, 726 (1975) (arguing that ordering the abandonment of a U.S. corporation's controlling participation in an EC corporation « reviendrait à exiger d'une entreprise américaine l'accomplissement aux Etats-Unis d'une obligation imposée par une décision d'une autorité

practice, set out in chapter 6.12.3., however, especially after the adoption of the Merger Control Regulation (which covered mergers irrespective of the nationality of the merging companies, provided that they met a sales threshold), misgivings over the exercise of jurisdiction over foreign mergers subsided. Yet it was only in 1999, in the case of *Gencor* v. *Commission*,[1558] that the European Court of First Instance (CFI) confirmed that the Commission was entitled to exercise jurisdiction over, and possibly prohibit, foreign mergers on the basis of the Merger Regulation provided that substantial, direct and reasonably foreseeable effects of the proposed merger could be identified (the qualification of 'effects' was arguably required under international law)[1559].

6.12.4.b. Gencor

461. In 1996, the Commission had determined that a concentration between the South African platinum mining companies Gencor and Lonrho would be incompatible with the common market.[1560] Although the South African competition authorities did not object to the merger,[1561] 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). Hereupon, 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 not to the concentration at issue, which related to economic activities conducted within South Africa, outside the common market.[1562]

Assessing the territorial scope of the Merger Control Regulation, the Court of First Instance 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

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étrangère. En outre, l'opération, de rétrocession ou de cession de la participation pourrait être considérée comme localisée à l'étranger, là où est situé le siège de la société tenue de l'effectuer. »); A.V. LOWE, "The Problems of Extraterritorial Jurisdiction: Economic Sovereignty and the Search for a Solution", 34 *I.C.L.Q.* 724, 745 (1985).

[1558] CFI, *Gencor Ltd v. Commission*, Case T-102/96, 1999, *E.C.R* .II-753.

[1559] *Compare* J. SCHWARZE, "Die extraterritoriale Anwendbarkeit des EG-Wettbewebsrechts – Vom Durchführungsprinzip zum Prinzip der qualifizierten Auswirkung", in: J. SCHWARZE (ed.), *Europäisches Wettbewerbsrecht im Zeichen der Globalisierung*, Baden-Baden, Nomos, 2002, 37, 54; s*ee also* E.M. FOX, "The Merger Regulation and its Territorial Reach: Gencor Ltd v. Commission", *E.C.L.R.* 334, 335 (1999).

[1560] Case IV/M.619, decision 97/26/EC of April 24, 1996, [1997] *O.J.* L11/30. More precisely, Gencor was a company incorporated under South African law, whereas Lonrho was incorporated under English law. Lonrho was also the parent company of Eastplats and Westplats, both of them incorporated in South Africa and known as Lonrho Platinum Division (LPD). LPD's worldwide sales were carried out through Western Metal Sales, a Belgian subsidiary of Lonrho based in Brussels. Gencor and Lonrho proposed to acquire joint control of Implats, which was controlled by Gencor, and, through that undertaking, of Eastplats and Westplats. Because Lonrho was incorporated in the United Kingdom, the case could be dealt with under the nationality principle. *See* F.E. GONZALEZ-DIAZ, "Recent Developments in EC merger Control Law: The *Gencor* Judgment", 22(3) *W. Comp.* 3 (1999). Eventually, it was decided under the effects principle.

[1561] 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.M. FOX, "The Merger Regulation and its Territorial Reach: Gencor Ltd v. Commission", *E.C.L.R.* 334, 335 (1999). *See also* CFI, *Gencor*, at § 71, addressing the consideration by the Commission that the concentration could be compared to an export cartel.

[1562] CFI, *Gencor*, § 49.

established in the Community or that the production activities covered by the concentration must be carried out within Community territory."[1563] Accordingly, the Regulation could have an extraterritorial scope, and apply to foreign undertakings having sales within the Community, if at least the proposed merger met the substantive turnover criteria of Article 1 (2) of the Regulation (which it did in the case).[1564] The question arose whether such would be in accordance with public international law, and in particular with the European Court of Justice's interpretation of the territoriality principle in the 1988 *Wood Pulp* case.

Defendants Gencor and Lonrho indeed relied, by reference to the judgment in *Wood Pulp*, on the *Wood Pulp* implementation doctrine (which required that a cartel agreement be implemented within the Community for there to be jurisdiction for the Community) to have the Commission's case against them dismissed.[1565] The Court held however that "[f]ar from supporting the applicant's view, that criterion [of implementation] for assessing the link between an agreement and Community territory in fact precludes it. According to *Wood Pulp*, the criterion as to the implementation of an agreement is satisfied by mere sale within the Community, irrespective of the location of the sources of supply and the production plant. It is not disputed that Gencor and Lonrho carried out sales in the Community before the concentration and would have continued to do so thereafter." [1566] In sum, the Court found that the defendants sold in the Community, and as sales amount to implementation, the Commission would have jurisdiction under the *Wood Pulp* jurisdictional standard.

462. EFFECTS-BASED JURISDICTION – In the Court's view, not all proposed concentrations which meet the quantitive standards of the Merger Control Regulation may however fall within the Community's jurisdiction. The Court ruled that "application of the Regulation is [only] justified under public international law when it is foreseeable that a proposed concentration will have an immediate and substantial effect in the Community."[1567] Unmistakably, the Court hereby embraced the American effects doctrine, pursuant to which jurisdiction obtains as soon as substantial, direct and reasonably foreseeable effects on domestic commerce could be established.[1568] This is certainly a watershed. Yet importantly, the effects doctrine serves as a tool of jurisdictional restraint rather than as a tool of jurisdictional overreaching, as, pursuant to the doctrine, the fact that a foreign concentration meets the thresholds of Article 1 of the Regulation does not imply that this concentration also has substantial, direct, and reasonably foreseeable effects, *i.e.*, the requisite effects under international law, within the Community.[1569]

[1563] *Id.*, § 79.
[1564] *Id.*, § 80.
[1565] *Id.*, § 69.
[1566] *Id.*, § 87.
[1567] CFI, *Gencor*, § 90.
[1568] *See* § 403 (2) Restatement (Third) of U.S. Foreign Relations Law; 15 U.S.C. §6a (FTAIA); § 415 (2) and (3) Restatement (Third).
[1569] *See, e.g.*, J. SCHWARZE, "Die extraterritoriale Anwendbarkeit des EG-Wettbewebsrechts – Vom Durchführungsprinzip zum Prinzip der qualifizierten Auswirkung", in: J. SCHWARZE (ed.), *Europäisches Wettbewerbsrecht im Zeichen der Globalisierung*, Baden-Baden, Nomos, 2002, 37, 56; P.J. SLOT, "*Gencor*: note", 38 *C.M.L.R.* 1573-1586 (2001). *Contra* E. NAVARRO VARONA, A. FONT GALARZA, J. FOLGUERA CRESPO & J. BRIONES ALONSO, *Merger Control in the European Union*, 2nd ed., Oxford, Oxford University Press, 2005, 433 (stating that "provided that an operation reaches the

The Court does, however, not provide guidance as to how the criteria of substantiality, directness, and reasonable foreseeability ought to be construed. Most likely, an *ad hoc* analysis ought to be conducted. What is a given, is that future and hypothetical effects – which are inherent in a merger that has not yet taken place – may also qualify as direct and reasonably foreseeable effects.

463. SUBSTANTIAL EFFECTS – As in cartel matters, it is unclear whether the jurisdictional requirement of "substantial effects" in the Community is stricter than the (substantive) substantiality threshold of Article 1 (2) of the Merger Control Regulation. The Court specifically addressed the relative amount of sales, taking into account the market share of the parties, in addition to the 250 million euro turnover requirement set forth by the Regulation.[1570] If this is more than an *a fortiori* argument, the jurisdictional substantiality standard may indeed be stricter than the turnover threshold, and ought to construed in light of the sales of the merging companies within the Community as compared to their sales outside the Community.

464. DIRECT EFFECTS – As far as "direct" or "immediate" effects are concerned, the *Gencor* court stated that "immediate effects" would also cover "medium term effects", referring to the time when it was envisaged that Russian stocks would be exhausted, Russia being at that time the fourth platinum producer. The exhaustion of its stocks would in the medium term create a dominant duopoly on the part of Amplats, controlled by Anglo American, and Implats/LPD, controlled by Gencor/Lonrho.[1571] The Court conceded "that the concentration would not necessarily lead to abuses immediately, since that depends on decisions which the parties to duopoly may or may not take in the future",[1572] as the applicants had asserted. However, "the concentration would have had the direct and immediate effect of creating the conditions in which abuses were not only possible but economically rational, given that the concentration would have significantly impeded effective competition in the market by giving rise to a lasting alteration to the structure of the markets concerned." [1573] In the opinion of the Court, the immediate effect may be equated with the structural modification of the market, even before abuse of the dominant position which the parties to the merger might commit in the near or more distant future.[1574] Accordingly, jurisdiction need not be premised on actual and readily verifiable effects: EC merger jurisdiction is founded "first and foremost, on the need to avoid the establishment of market structures which may create or strengthen a dominant position." This may imply that jurisdiction may also obtain in the absence of actual sales, provided that "the possibility of substantial sales of the new product and/or service is established."[1575]

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threshold of Community dimension established in Article 1 [of the Merger Control Regulation], the entities participating in the operation set up in states that are not members of the EU or the EEA will be subject to the scope of Regulation 139/2004, regardless of whether they have subsidiaries, operations or assets within the territory of the EU or EEA").

[1570] CFI, *Gencor*, § 97.

[1571] *Id.*, § 94.

[1572] *Id.*

[1573] *Id.*

[1574] *Id.*, § 94 and § 95.

[1575] F.E. GONZALEZ-DIAZ, "Recent Developments in EC Merger Control Law: The *Gencor* Judgment", 22(3) *W. Comp.* 3, 12 (1999).

465. REASONABLY FORESEEABLE EFFECTS – With respect to foreseeable effects, the Court found that "it follows from all the foregoing that it was in fact foreseeable that the effect of creating a dominant duopoly position in a world market would also be to impede competition significantly in the Community, an integral part of the market."[1576] The Court does not require intent. If a proposed merger could objectively be foreseen to have effects in the Community, the Commission would have jurisdiction.

6.12.4.c. Gencor v. Wood Pulp

466. In *Gencor*, the CFI leapt creatively from the *Wood Pulp* implementation doctrine in cartel matters to the effects doctrine in merger matters. The Court was probably so at pains to establish a relationship between the two doctrines because it wanted to give the merger effects doctrine sufficient legitimacy in light of existing case-law.[1577] Implementation with respect to concentrations seems however not a proper concept to ground jurisdiction. The notion 'implementation' refers to a wilful act giving effect to an anticompetitive agreement. It is particularly appropriate for cartels, with conspiring companies fixing prices to affect (foreign) markets through their sales – which constitute the implementation of their anticompetitive agreement. The CFI's reference to the implementation doctrine is artificial, as a merger is not *implemented* through sales. The merging companies may have sold into the Community, yet implementing the merger agreement through imposing price increases or quota upon these sales is mostly not an objective of the merger, as most mergers are driven by considerations of economies of scale, at least in the short term.[1578] This does not mean that competition may not be impeded. Mergers may indeed significantly and adversely alter the structure of the market. Where the CFI referred to the possibility of a foreseeable medium term effect in the common market, "creating the conditions in which abuses were not only possible but economically rational",[1579] it actually based its jurisdiction on the effects doctrine rather than on the implementation doctrine.

467. It is one thing to state that the CFI espoused the U.S. antitrust effects doctrine in *Gencor*. It is another to state that the effects doctrine is now the prevailing jurisdictional doctrine in European competition law. Although it has been argued that the CFI swapped, under pressure of a critical doctrine, the *Wood Pulp* implementation doctrine for the *Gencor* effects doctrine,[1580] one should certainly guard against an

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[1576] *Gencor*, § 100.

[1577] It has also been argued that the Court did not elaborate on the legality of the effects doctrine under public international law, because Advocate General had already done so in his opinion in *Wood Pulp* (although the Court adopted the implementation, and not the effects doctrine in that case). *See* F.E. GONZALEZ-DIAZ, "Recent Developments in EC merger Control Law: The *Gencor* Judgment", 22(3) *W. Comp.* 3, 10 (1999).

[1578] *Compare* H.E. AKYÜREK-KIEVITS, "Over concentratiecontrole zonder grenzen en wanneer er sprake is van een collectieve machtspositie", *Nederlands Tijdschrift voor Europees Recht* 219, 221 (1999) (stating that "de concentratie tussen de partijen heft effect op de gemeenschappelijke market, niet omdat er sprake is van enige specifieke gerichtheid op de gemeenschappelijke markt maar omdat er sprake is van effect op een wereldmarkt waarvan de gemeenschappelijke markt nu eenmaal een onderdeel is").

[1579] *Id.*, § 94.

[1580] *See* F.E. GONZALEZ-DIAZ, "Recent Developments in EC merger Control Law: The *Gencor* Judgment", 22(3) *W. Comp.* 3, 10 (1999) ("Concerning the implementation of the agreement theory, the Court was probably influenced by the criticisms levelled against this doctrine in the legal literature

unconditional extrapolation of *Gencor* to the field of international cartels, given the peculiar characteristics of international mergers, which may inevitably have repercussions within the Community which is part of the worldwide market in which the merging companies trade.[1581] Therefore, only if limited to merger control, the effects principle may be an acceptable ground for jurisdiction under customary international law.[1582] Only in that field of the law has the CFI, when deciding *Gencor*, erased the last vestiges of its opposition to the effects doctrine (while only paying lip-service to the implementation doctrine). In the field of cartel law, the implementation doctrine is still pitted against the effects doctrine. Both doctrines may largely overlap, yet they are nevertheless to be distinguished. The cartel law effects doctrine, in its U.S. version, could not yet be said to be a principle of international jurisdiction that is shared by Europeans. Admittedly, the fact that Europeans do not espouse a broad interpretation of the effects doctrine for themselves in cartel matters need not imply that they would oppose one by the United States. Yet as the ECJ in *Wood Pulp* cast its choice for the implementation doctrine in public international law terms, the territoriality principle in particular, *Wood Pulp*, which still constitutes the law of the land in the European Community, could not be cited as supportive of the effects doctrine (which the ECJ may possibly believe runs counter to international law).[1583] While it has been pointed out that the Commission claims its jurisdiction over conspiracies as soon as effects are discernible within the Community, before one could conclusively state that the effects doctrine is also a European *acquis*, the Commission's approach may still need to survive a challenge before the European courts in a cartel situation which may not be covered by the implementation doctrine (*e.g.*, a refusal to buy from or sell to persons within the Community).

468. After *Wood Pulp*, European protests against U.S. antitrust jurisdiction have nonetheless not specifically focused on the breadth of the effects test *vis-à-vis* the implementation test, but on such sovereignty-related issues as "true jurisdictional conflicts" (*Hartford Fire*, 1993), and, most recently, the extent to which foreign-based plaintiffs harmed by global cartels have standing in U.S. courts (*Empagran*, 2004). The perceived differences between effects and implementation slipped into oblivion. This is not surprising: why worry about the cat's color when it catches the mice one

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and by the fact that, in practice, this theory was nothing more than a shy version of the principle of objective territoriality.").

[1581] *See* interview with Luc Gyselen, Arnold & Porter LLP, Brussels (August 24, 2006); A. LAYTON & A.M. PARRY, "Extraterritorial jurisdiction – European Responses", 26 *Houston J.I.L.* 309, 322 (2004) ("It is not clear, though, whether the Court was speaking generally or whether it was referring to the application of the effects doctrine on the facts of the case."); S. STEVENS, "The Increased Aggression of the EC Commission in Extraterritorial Enforcement of the Merger Regulation and Its Impact on Transatlantic Cooperation in Antitrust", 29 *Syracuse J. Int'l L. & Com.* 263, 279 (2002) (arguing that "Woodpulp was potentially distinguishable as applying to international price fixing cartels rather than to mergers"); *Contra* J. SCHWARZE, "Die extraterritoriale Anwendbarkeit des EG-Wettbewebsrechts – Vom Durchführungsprinzip zum Prinzip der qualifizierten Auswirkung", in: J. SCHWARZE (ed.), *Europäisches Wettbewerbsrecht im Zeichen der Globalisierung*, Baden-Baden, Nomos, 2002, at 56.

[1582] Due qualification implies *inter alia* that the Commission, in accordance with the principles of non-intervention and proportionality, should not order complete divestiture (dissolution) when partial divestiture is possible. The scope of divestiture orders should for instance be limited to EC subsidiaries or branches, or a particular product line, if the goal of preventing adverse intra-EC effects could be achieved in so doing. *See* J.H.J. BOURGEOIS, "EEC Control over International Mergers", 10 *Yb. European Law* 1990, 103, 130-31. *See also* chapter 6.12.3. on merger control in Germany.

[1583] This is obviously not to say that the the ECJ will reject the effects doctrine if no other solution to establish jurisdiction over foreign anticompetitive conduct affecting EC interests is left.

allows it to catch? Only when the cat catches mice which are purportedly covered by the veil of sovereignty will protest ensue. Assessments of the legality of jurisdictional assertions have risen above the divisiveness of concepts and are now informed by the rule of reason, a useful translation of the abstract principle of non-intervention which has always been the underlying force shaping global jurisdictional order.

6.12.4.d. Pre-merger notification

469. A final word needs to be said about foreign companies' duty of notification after the *Gencor* judgment. While in *Gencor*, the CFI discarded the Commission's argument that, by notifying a proposed concentration with the Commission, foreign companies voluntarily submitted to the Commission's jurisdiction, it required that foreign companies notify the Commission under all circumstances if the Merger Control Regulation's turnover requirements are met. The CFI indeed opined that "in order for the Commission to judge whether a certain concentration is within its purview, it must be able to examine the agreement, which in its turn requires notification. That obligation does not predetermine the question whether the Commission is competent to rule on the concentration."[1584]

470. Requiring parties to an international merger to notify the merger with the Commission as soon as the merger meets the turnover requirements of the Merger Control Regulations, irrespective of whether or not it will distort competition within the Community, obviously creates a heavy burden on companies. The parties are required to notify, even if the Commission may eventually not have jurisdiction under international law to prohibit the merger.[1585] It may therefore be argued that, if the Commission has no jurisdiction to prohibit a merger, it may not have jurisdiction to require notification under the Merger Control Regulation either. The merging companies may, to be fair, make use of a simplified procedure.[1586] Nonetheless, a simplified procedure is still a procedure, which moreover suspends the merger transaction.[1587] In the doctrine, a system pursuant to which parties are not required to notify a concentration which will not have a substantial, direct, and reasonably foreseeable effect within the Community, along the lines of the U.S. Hart-Scott-Rodino Act, has been advocated,[1588] although it has at the same time been noted

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[1584] *Gencor*, § 76.

[1585] Failure to notify has however not yet translated in penalties imposed by the Commission. *See* U. DRAETTA, "The International Jurisdiction of the E.U. Commission in the Merger Control Area", *Revue de droit des affaires internationales* 201, 212 (2000); interview with J.H.J. Bourgeois, Akin Gump, Brussels, August 8, 2006.

[1586] *See* Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No. 139/2004, *O.J.* C 56/04 (2005)). The four Japanese companies that created a joint venture to provide telecommunication services exclusively in Japan, and were required to notify with the Commission on the ground that they exceeded the Community turnover threshold, could now fall under the simplified procedure. *See* case no. IV/M. 346, *JCAT/SAJAC*; Commission Decision of 30 June 1993, *O.J.* C 219/14 (1993). *See also* Commission Decision of 6 October 1999, case no. IV/M. 1689, *Nestlé/Pillsbury/Häagen Dazs*, *O.J.* C 316/9 (1999): "The envisaged concentration concerns the ice cream business in the USA. There are no affected markets in the EEA. (…) it appears that the notified operation will have no impact on competition in the EEA."

[1587] *See* Y. VAN GERVEN & L. HOET, "*Gencor*: Some Notes on Transnational Competition Law Issues", 28(2) *Legal Issues of Economic Integration* 195, 205 (2001); U. DRAETTA, "Need for Better Trans-atlantic Co-operation in the field of Merger Control", *Revue de droit des affaires internationales* 557, 560 (2000).

[1588] *See* M.P. BROBERG, "The European Commission's Extraterritorial Powers in Merger Control: The Court of First Instance's Judgment in *Gencor* v. *Commission*", 49 *I.C.L.Q.* 172, 181 (2000) (stating that

gloomily that a modification of the Merger Control Regulation with a view to exempting wholly foreign transactions is not be expected.[1589] Jurisdictional reasonableness seems, at any rate, to require such a system, which separates the jurisdictional issue from the notification issue.[1590] It may go a long way in easing the burden on corporations, and may allow economically efficient mergers to be carried out as swiftly as possible. Recently, in 2006, the Austrian Supreme Court (*Oberste Gerichtshof*) subscribed to this view, and ruled that an Austrian bank acquiring a Czech and a Slovak bank was not required to file a pre-merger notification, because the merger would not affect the Austrian market since the acquired banks were not active in Austria.[1591]

6.12.5. Transatlantic tensions over concentrations

471. EC ASSERTIVENESS – In the field of concentrations, transatlantic tensions have occasionally broken out. These tensions were however not based on the perception that one State overstepped its jurisdictional limits, but rather on different conceptions of substantive antitrust law, or on considerations of plain economic nationalism. The European Commission in particular takes a tougher stance on international mergers than its American counterparts, although historically, it has been more lenient.[1592] Since the enactment of the Merger Control Regulation in 1989, the

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"failure to notify neither means the Commission may consider the concentration invalid nor that the Commission may impose fines against the parties"); U. DRAETTA, "The International Jurisdiction of the E.U. Commission in the Merger Control Area", *R.D.A.I.* 201, 212 (2000) ("Il conviendrait de séparer la compétence pour interdire de la compétence pour contraindre à la notification à l'égard des transactions faisant participer des enterprises étrangères.") ; U. DRAETTA, "Need for Better Trans-atlantic Co-operation in the field of Merger Control", *R.D.A.I.* 557, 561 (2002). Under the U.S. Hart-Scott-Rodino Act, purely foreign transactions are exempted from the filing requirement. A transaction is purely foreign if the concentration does not involve U.S. assets. *See* 16 CFR 802.51.

[1589] *See* U. DRAETTA, "Need for Better Trans-atlantic Co-operation in the field of Merger Control", *R.D.A.I.* 557, 567 (2002).

[1590] *Compare id.* , at 560 (stating that "it seems to me that the assertion of the jurisdiction to compel notification from third country companies can be, in not somehow mitigated, *contrary in given instances to the principles of international comity*, as it goes against, among others, the principle of proportionality") (original emphasis).

[1591] OGH-Beschluss, 27 February 2006, 16 Ok 49/05. The Court pointed out that the mere amelioration of the acquirer's resources ("die blosse Verbesserung der Ressourcen des Erwerbers") through the purchase of the foreign targets did not cause domestic effects. It ruled that an international acquisition is not subject to a pre-merger notification requirement if the targeted foreign corporations were active on a geographically delimited foreign market and, in addition, if they were not or would not be potentially active on the Austrian market. These criteria were criticized in the doctrine, *inter alia* because target corporations that are active on a geographically delimited, but neighboring foreign market are ordinarily potential competitors in the domestic market. *See* G. BAUER, ""Effects Doctrine" (Auswirkungsprinzip) im österreichischen Fusionskontrollrecht", *RIW* 665 (2006). The Austrian cartel authorities similarly criticized the Supreme Court's decision and stated that, also in the future, they would critically scrutinize any international merger that could affect the Austrian market. *Id.*, at 668.

[1592] *See* S. STEVENS, "The Increased Aggression of the EC Commission in Extraterritorial Enforcement of the Merger Regulation and Its Impact on Transatlantic Cooperation in Antitrust", 29 *Syracuse J. Int'l L. & Com.* 263 (2002). *Compare* EUROPEAN COMMISSION, *Citizen's Guide to Competition Policy - Control of major cross-border mergers*, http://europa.eu.int/comm/competition/citizen/citizen_mergers.html (stating that "the control of mergers and acquisitions is one of the pillars of European Union competition policy. When companies combine via a merger, an acquisition or the creation of a joint venture, this generally has a positive impact on markets: firms usually become more efficient, competition intensifies and the final consumer will benefit from higher-quality goods at fairer prices.").

increased willingness of the Commission to regulate international mergers has led to open clashes between the EC and the United States.

472. *BOEING/MCDONNELL DOUGLAS* – One of the most eye-catching transatlantic clashes was the merger of two U.S. aerospace companies, Boeing and McDonnell Douglas. The *Boeing/McDonnell Douglas* case was the first major case in which the European Commission intended to apply the new EC Merger Control Regulation to wholly foreign mergers. It led to considerable tension between the United States and Europe, as the U.S. government had been encouraging the merger and the American antitrust authorities had given their clearance for the merger. The U.S. House and the Senate even passed resolutions condemning the Commission's assertions,[1593] with a U.S. senator declaring himself "outraged that the Europeans are asserting antitrust authority in an extraterritorial manner where there is no relevance, other than the fact that we sell airplanes in their market."[1594]

The American Federal Trade Commission had given its clearance for the merger of Boeing and McDonnell Douglas in 1997, yet the European Commission feared that it would lead to a dominant position of the merged company in the market of large commercial jet aircraft, thereby threatening European customers and the European Airbus consortium (it may be noted that none of the merging companies had production facilities within the EC). Aircraft customers complained that they lost one bidder for their orders, whereas Airbus feared predatory pricing by Boeing/McDonnell Douglas (offsetting deals on military aircraft).[1595] To prevent the Commission from blocking the merger, Boeing and McDonnell Douglas agreed to certain concessions, which may be said to have served the interests of the merged company's major competitor, Airbus, rather than the consumers.[1596] Hereupon, the Commission gave its clearance to the merger.[1597]

473. JURISDICTION V. SUBSTANTIVE LAW – At a jurisdictional level, the power of the Commission to apply the Merger Regulation to mergers between companies located outside the Community was not actually contested.[1598] Boeing and McDonnell Douglas kept on negotiating with the Commission. They never denounced the Commission for claiming jurisdiction,[1599] but rather because it dealt with the merger on the basis of its possible effects on competitors, *in casu* the European Airbus consortium, rather than on consumers. Where the EC also pursues non-

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[1593] S. Res. 108, 105th Cong., 143 Cong. Rec. 7609 (1997); H.R. Res. 191, 105th Cong., 143 Cong. Rec. 5550 (1997).

[1594] Quoted in S. STEVENS, "The Increased Aggression of the EC Commission in Extraterritorial Enforcement of the Merger Regulation and Its Impact on Transatlantic Cooperation in Antitrust", 29 *Syracuse J. Int'l L. & Com.* 263, 275 (2002). STEVENS rightly pointed out that this is a "similar reaction to that formerly expressed by many countries in response to U.S. extraterritoriality." *Id.*

[1595] *See* B. BISHOP, "The Boeing/McDonnell Douglas Merger", *E.C.L.R.* 417-419 (1997).

[1596] *See* A.F. BAVASSO, "Boeing/McDonnell Douglas: Did the Commission Fly Too High?", *E.C.L.R.* 243, 246 (1998); J.D. BANKS, "The Development of the Concept of Extraterritoriality under European Merger Law and its Effectiveness under the Merger Regulation following the Boeing/McDonnell Douglas Decision 1997", *E.C.L.R.* 306, 310 (1998).

[1597] IP/97/729, July 30, 1997.

[1598] *See* J.D. BANKS, "The Development of the Concept of Extraterritoriality under European Merger Law and its Effectiveness under the Merger Regulation following the Boeing/McDonnell Douglas Decision 1997", *E.C.L.R.* 306, 310-11 (1998).

[1599] *See* E. TICHADOU, "Internationalrechtliche Aspekte des Wettbewerbsrecht am Beispiel des Boeing-Falles", *ZeuS* 61, 76 (2000).

efficiency related goals, and focuses on single firm dominance instead of on market concentration,[1600] American antitrust laws ordinarily protect competition and consumers rather than competitors to create efficiency.[1601] This is a substantive rather than a jurisdictional difference between European and U.S. merger regulation, although, admittedly, it broadens the EC's jurisdictional basis.[1602] The 1999 CFI judgment in *Gencor*, discussed *supra*, only conceptually legitimized what had already been acquired in *Boeing/Mc Donnell Douglas*.[1603] The CFI brought the law into line with economic realities, and, as STEVENS observed, "provided the foundations for the EU's increasingly self-confident intervention in [later] cases such as AOL/Time Warner, WorldCom/Sprint and GE/Honeywell."[1604] After *Boeing/McDonnell Douglas* and *Gencor*, merging U.S. companies, such as General Electric and Honeywell (2001), have indeed not disputed the jurisdiction of the Commission, but focused on the substantive issues involved in the blocking decisions of the Commission.[1605] It exceeds the scope of this dissertation to elaborate on the divergencies between U.S. and European substantive standards of merger control.

474. BILATERAL MERGER AGREEMENTS AND COOPERATION – In view of the conflict potential of international merger review and its exclusion from the U.S.-EC Comity Agreements, some authors have proposed to expand the Agreements' reach to merger review or to adopt a new bilateral agreement assigning jurisdiction to the party with the most significant interest in, and nexus to, the merger so as to eliminate multi-jurisdictional merger review (negative comity).[1606] Finding objective standards tying a

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[1600] *See* S. STEVENS, "The Increased Aggression of the EC Commission in Extraterritorial Enforcement of the Merger Regulation and Its Impact on Transatlantic Cooperation in Antitrust", 29 *Syracuse J. Int'l L. & Com.* 263, 285-86 (2002) (also observing that EC competition law "is intended to function as a tool to realize the broader social and integration aspirations of the Member States").

[1601] *See* J. SCHWARZE, "Die extraterritoriale Anwendbarkeit des EG-Wettbewerbsrechts - Vom Durchführungsprinzip zum Prinzip der qualifizierten Auswirkung", in: J. SCHWARZE (ed.), *Europäisches Wettbewerbsrechts im Zeichen der Globalisierung*, Baden-Baden, Nomos, 2002, at 58; I. VAN BAEL & J.-F. BELLIS, *Competition Law of the European Community*, 4th ed., The Hague, Kluwer Law International, 2005, 163 ("US antitrust law self-consciously embraces mainstream economic theory, whereas the EC competition rules reflect political and economic goals. In particular, EC competition rules are partly intended to break down barriers between Member States and create an internal market.").

[1602] *See* A.F. BAVASSO, "Boeing/McDonnell Douglas: Did the Commission Fly Too High?", *E.C.L.R.* 243, 246 (1998).

[1603] *See* for other foreign operations notified to the Commission: E. NAVARRO VARONA, A. FONT GALARZA, J. FOLGUERA CRESPO & J. BRIONES ALONSO, *Merger Control in the European Union*, 2nd ed., Oxford, Oxford University Press, 2005, 433, n. 93.

[1604] *See* S. STEVENS, "The Increased Aggression of the EC Commission in Extraterritorial Enforcement of the Merger Regulation and Its Impact on Transatlantic Cooperation in Antitrust", 29 *Syracuse J. Int'l L. & Com.* 263, 281 (2002).

[1605] *General Electric/Honeywell* (CFI, Honeywell v. Commission: T-209/01; General Electric v. Commission: T-210/01). *See also WorldCom/Sprint* (CFI, T-310/00); J. SCHWARZE, "Die extraterritoriale Anwendbarkeit des EG-Wettbewerbsrechts - Vom Durchführungsprinzip zum Prinzip der qualifizierten Auswirkung", in: J. SCHWARZE (ed.), *Europäisches Wettbewerbsrechts im Zeichen der Globalisierung*, Baden-Baden, Nomos, 2002, at 58-59. *See on GE/Honeywell*: M.C. FRANKER, "Restoration: International Merger Review in the Wake of General Electric/Honeywell and the Triumphant Return of Negative Comity", 36 *Geo. Wash. Int'l L. Rev.* 877 (2004).

[1606] *See e.g.* M.C. FRANKER, "Restoration: International Merger Review in the Wake of General Electric/Honeywell and the Triumphant Return of Negative Comity", 36 *Geo. Wash. Int'l L. Rev.* 877, 909-10 (2004) (advocating a bilateral merger comity agreement between the U.S. and the EC); U. DRAETTA, "Need for Better Trans-atlantic Co-operation in the field of Merger Control", *Revue de droit des affaires internationales* 557, 566 (2002).

merger to one jurisdiction will probably prove to be a Herculean task, given the politically sensitive environment in which merger review takes place. If agreement could be reached, location of production facilities, place of incorporation, location of corporate headquarters and obviously domestic sales will probably qualify as adequate connections.[1607]

The rare outbreak of clashes over proposed mergers should however not obscure the fact that, in spite of the absence of specific merger agreements, the U.S. and the EC generally cooperate well in the field of transnational merger control.[1608] Joint review of cross-border mergers is commonplace,[1609] and recently, a U.S.-EU Merger Working Group was even set up.[1610] Its exchange of best practices may ultimately lead to organic convergence of substantive merger control laws, and thus reduce conflict potential.[1611] It may nonetheless be noted that transnational cooperation in matters of merger review has its discontents, since bilateral cooperation does not necessarily yield the best solution in terms of global welfare. Indeed, bilateral cooperation tends to neglect the effects of a merger on weaker third countries.[1612] In the absence of a global merger review mechanism, one can only hope that the U.S. and Europe will, in jointly reviewing a merger, somehow heed the interests of third States, and thus, strive for global economic efficiency.

6.13. Procedural peculiarities of U.S. antitrust litigation upsetting foreign nations

[1607] M.C. FRANKER, "Restoration: International Merger Review in the Wake of General Electric/Honeywell and the Triumphant Return of Negative Comity", 36 *Geo. Wash. Int'l L. Rev.* 877, 911-12 (2004). Against the risk that companies will shift these connections to merger-friendly jurisdictions, it could be argued that States and private parties could still initiate extraterritorial antitrust enforcement proceedings if adverse domestic effects of anticompetitive conduct can be established. *Id.*, at 912-13. *See also* W.S. DODGE, "An Economic Defense of Concurrent Antitrust Jurisdiction", 38 *Tex. Int'l L.J.* 27, 39 (2003) (arguing that concurrent merger jurisdiction could be made more efficient "if countries were to require notification based on factors related to a merger's local effects, such as domestic sales and assets.").

[1608] *See* A. LAYTON & A.M. PARRY, "Extraterritorial jurisdiction – European Responses", 26 *Houston J.I.L.* 309, 323-24 (2004) (noting that U.S.-EC controversy in the field of extraterritorial merger control appears to be dying away); S. STEVENS, "The Increased Aggression of the EC Commission in Extraterritorial Enforcement of the Merger Regulation and Its Impact on Transatlantic Cooperation in Antitrust", 29 *Syracuse J. Int'l L. & Com.* 263, 294-302 (2002). The level of cooperation might surprise, as the investigated corporation provides itself the necessary information to the State in its pre-merger notification. Unlike in cartel investigations, in merger review cases, the State need not rely on other States for enforcement – which serves as a disincentive for cooperation. *See* D. KUKOVEC, "International Antitrust – What Law in Action?", 15 *Ind. Int'l & Comp. L. Rev.* 1, 25 (2004).

[1609] *See* H.L. BUXBAUM, "Conflict of Economic Laws: From Sovereignty to Substance", 42 *Va. J. Int'l L.* 931, 952, n. 113 (2002).

[1610] *See* http://ec.europa.eu/comm/competition/mergers/others/eu_us.pdf

[1611] *See* S. STEVENS, "The Increased Aggression of the EC Commission in Extraterritorial Enforcement of the Merger Regulation and Its Impact on Transatlantic Cooperation in Antitrust", 29 *Syracuse J. Int'l L. & Com.* 263, 302 (2002).

[1612] *See* R.E. FALVEY & P.J. LLOYD, "An Economic Analysis of Extraterritoriality", Centre for Research on Globalisation and Labour Markets, School of Economics, University of Nottingham (UK), Research Paper 99/3, p. 15, available at www.nottingham.ac.uk/economics/leverhulme/reserach_paper/99_3.pdf; A.T. GUZMAN, "The Case for International Antitrust", 22 *Berkeley J. Int'l L.* 355, 362 (2004) (noting that "a decision on whether to bring a case in the United States or the EU may be quite different from what is in the interests of a developing country").

475. The exercise of international antitrust jurisdiction by the United States, has at times met with fierce criticism from foreign States. However, this criticism may be informed less by the perceived international illegality of U.S. jurisdictional assertions, but rather by the procedural peculiarities of U.S. antitrust law enforcement.[1613] Criminal sanctions, antitrust enforcement by private plaintiffs, treble-damages remedies, and far-reaching discovery powers for private parties, do ordinarily not exist in antitrust regimes outside the United States, and may add insult to injury. These procedural features make the U.S. system a uniquely attractive forum for plaintiifs. As the English judge Lord Denning observed: "As a moth is drawn to the light, so is a litigant drawn to the United States. If he can only get his case into their courts, he stands to win a fortune."[1614] Criminal sanctions (subsection 6.13.1), private enforcement (subsection 6.13.2), and treble damages (subsection 6.13.3) will be discussed in this section. A separate chapter 9 will be devoted to transnational discovery.

6.13.1. Criminal sanctions

476. *NIPPON PAPER* – Unlike the European Commission and other law enforcers, the U.S. Department of Justice (DoJ), along with the Canadian Competition Bureau, has used extensive criminal law enforcement powers to deal with international cartels, particularly since 1993.[1615] In *United States* v. *Nippon Paper Industries*,[1616] a 1997 case initiated by the DoJ against a Japanese company engaged in cartel activities fixing the price of fax paper, the First Circuit eventually upheld the legality of criminal liability for antitrust violations under the effects doctrine. The court justified the extraterritorial criminal enforcement of the Sherman Act on the ground that "in both criminal and civil cases, the claim that [the Sherman Act] applies extraterritorially is based on the same language in the same section of the same statute", and that "common sense suggests that courts should interpret the same language in the same section of the same statute uniformly, regardless of whether the impetus for interpretation is criminal or civil."[1617]

477. Outside the antitrust field, criminal sanctions for extraterritorial conduct affecting the United States had previously been applied without engendering much controversy. Yet as assertions of civil jurisdiction in antitrust matters had

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[1613] *See* W.S. GRIMES, "International Antitrust Enforcement Directed at Restrictive Practices and Concentration: The United States' Experience", in: H. ULLRICH (ed.), *Comparative Competition Law : Approaching an International System of Antitrust Law*, Baden-Baden, Nomos, at 231. *Compare Laker Airways, Ltd.* v. *Sabena*, 731 F.2d 909, 946 (D.C. Cir. 1984) ("The British Government objects to the scope of the prescriptive jurisdiction invoked to apply the [U.S.] antitrust laws; the substantive content of those laws, which is much more aggressive than British regulation of restrictive practices; and the procedural vehicles used in the litigation of the antitrust laws, including private treble damage actions, and the widespread use of pretrial discovery. These policies have been most recently and forcefully expressed in the Protection of Trading Interests Act."); B. GOLDMAN, comment *Dyestuffs, J.D.I.* 925, 933-34 (1973) (stating that the transatlantic conflict over extraterritorial jurisdiction is mainly a conflict over the long arm of U.S. discovery laws).

[1614] *Smith Kline & French Labs Ltd.* v. *Bloch*, 1 W.L.R. 730 (C.A. 1982).

[1615] *See* W.S. GRIMES, "International Antitrust Enforcement Directed at Restrictive Practices and Concentration: The United States' Experience", in: H. ULLRICH (ed.), *Comparative Competition Law: Approaching an International System of Antitrust Law*, Baden-Baden, Nomos, at 223-226.

[1616] *United States v. Nippon Paper Industries Co.*, 109 F.3d 1 (1st Cir. 1997); *United States v. Nippon Paper Industries Co.*, 118 S. Ct. 685 (1998), *cert. denied*.

[1617] *Id.*,

already provoked fierce protest, it might have appeared unwise for the U.S. to impose criminal sanctions on antitrust violators on the basis of the same theory of jurisdiction. Criminal liability (possibly resulting in imprisonment) obviously hits violators much harder than the tort liability they incur in civil suits, and may be viewed by other States as a more far-reaching encroachment upon their sovereignty. Foreign reaction to the *Nippon* judgment has nonetheless remained largely mute. This reinforces the argument that SCHUSTER made in 1996, before *Nippon Paper*, that "[a]us der Sicht des Völkerrechts kommt es nicht auf das rechtstechnische Mittel, das den Staaten zur Durchsetzung ihrer Interessen verhilft, an, sondern auf den Erfolg, also auf Art und Ausmass der Beeinträchtigung fremder souveräner Rechte."[1618] Therefore, uniform nexus principles may be applied to regulatory law. They ought not to vary depending on the nature of the legal provision concerned (criminal, administrative or private).[1619]

478. In spite of the availability of criminal sanctions, the DoJ may prefer administrative fines so as to accommodate concerns of foreign governments and businesses. Historically, the DoJ has indeed shied away from bringing criminal prosecutions in international antitrust cases for fear of unsettling international business and international relations,[1620] and possibly because criminal prosecutions under public law do not lend themselves so easily for an interest-balancing test borrowed from private international law.[1621] It remains true, however, that the DoJ has the authority to impose criminal penalties, such as prison terms, on officers of conspiring companies.[1622]

479. EXTRADITION – A criminal prosecution in the U.S. may require foreign-based executives to be extradited to the United States. The use of general extradition treaties in the context of extraterritorial white-collar fraud has proved particularly controversial however. Under the 2003 extradition treaty between the United States and the United Kingdom for instance, the U.S. and the UK have an obligation to extradite persons sought by the authorities in the requesting State for trial or punishment for extraditable offenses.[1623] The extradition treaty only features an exception of non-extradition for political and military offenses,[1624] but not for economic offenses such as antitrust or securities fraud. Executives based in the UK could thus be extradited to the United States for violations of U.S. antitrust laws. On May 16, 2005, a sheer 22 out of the 43 extraditions under the UK-U.S. Extradition Treaty were indeed on fraud charges.[1625]

[1618] G. SCHUSTER, *Die internationale Anwendung des Börsenrechts*, Berlin, Springer, 1996, 67.
[1619] *Id.*
[1620] *See* A.F. LOWENFELD, "Public Law in the International Arena: Conflict of Laws, International Law, and Some Suggestions for Their Interaction", 163 *Recueil des Cours* 311, 423 (1979-II).
[1621] *Id.*, at 424.
[1622] *See* Sherman Act, Section 1 ("[…] shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court."). *See also* Sherman Act, Section 24.
[1623] Article 1, Extradition Treaty between the United States and the United Kingdom, signed in Washington on March 31, 2003, available at http://www.fco.gov.uk/Files/kfile/USExtradition_210503.pdf. An offense is an extraditable offense if the conduct on which the offense is based is punishable under the laws in both States by deprivation of liberty for a period of one year or more or by a more severe penalty (Article 2.1).
[1624] *Id.*, Article 4.
[1625] *See* H. TIMMONS, "Britons challenge extradition to U.S.", *International Herald Tribune*, May 16, 2005.

In 2005, one retired British manufacturing executive challenged the use of the treaty under which his extradition to the U.S. was sought in a price-fixing case over which the U.S. had established extraterritorial jurisdiction. He alleged that the treaty violated his human rights. Three former NatWest bankers who worked with Enron also challenged the treaty. They received the support of a member of the House of Lords who had proposed reviewing the legislation under which the treaty was carried out in the UK: "We are concerned that the American courts are exercising extraterritorial jurisdiction, particularly in financial fraud matters, that goes beyond anything the UK seeks to exercise."[1626]

Under the terms of the U.S.-UK treaty, extradition is not obligatory if U.S. courts are exercising extraterritorial jurisdiction that goes beyond what the United Kingdom seeks to exercise. The treaty indeed provides that if the offense has been committed outside the territory of the Requesting State, extradition shall be granted if the laws in the Requested State provide for the punishment of such conduct committed outside its territory in similar circumstances. If the laws in the Requested State do not provide for the punishment of such conduct committed outside of its territory in similar circumstances, the executive authority of the Requested State, in its discretion, may grant extradition provided that all other requirements of this Treaty are met.[1627] Although extraterritorial fraud may be punishable in the UK, it is not punishable in similar circumstances as in the U.S. The UK therefore seems to be not required to grant extradition. At any rate, in this discussion, sovereignty concerns do not come into play, as, through entering into a treaty that authorizes extradition for extraterritorial crimes, the United Kingdom has waived its potential objections to future extraditions that are granted in accordance with the terms of the treaty. At most, human rights concerns may be raised, although these could be alleviated under the treaty provision that merely *authorizes*, but not *requires* the UK to extradite for certain extraterritorial offences.

6.13.2. Private enforcement of regulatory law

480. PRIVATE ATTORNEY-GENERAL – Regulatory law, such as antitrust and securities law, may not only be enforced by regulatory authorities but also by private plaintiffs alleging harm. This makes regulatory law a hybrid of public and private law, and the international enforcement of regulatory law a concern of public international and private international law. Although regulatory tort avenues are not entirely foreclosed to private plaintiffs in Europe,[1628] private enforcement of regulatory law appears as a distinctly American phenomenon. In the field of antitrust law, private suits vastly outnumber government suits, the ratio of private to government claims being 10 to 1.[1629] Importantly, if private plaintiffs file suit in U.S. federal courts, they

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[1626] *Id.*

[1627] Extradition Treaty between the United States and the United Kingdom, Article 2.4.

[1628] *See on* private antitrust enforcement in Europe: W.J.P. WILS, "Should Private Antitrust Enforcement Be Encouraged in Europe?" 26 *W. Comp.* 1 (2003); C.A. JONES, "Private Antitrust Enforcement in Europe: A Policy Analysis and Reality Check", 27 *W. Comp.* 13 (2004).

[1629] *See* W.S. GRIMES, "International Antitrust Enforcement Directed at Restrictive Practices and Concentration: The United States' Experience", in: H. ULLRICH (ed.), *Comparative Competition Law: Approaching an International System of Antitrust Law*, Baden-Baden, Nomos, 1998, at 232-34 (GRIMES notes that a large number of class actions are no actions brought after a federal agency has initiated an investigation or prosecution of alleged antitrust violations (the so-called 'follow-on' actions). These class action suits are filed without any government involvement. If the defendant has

assert not only their own private interest, but also the public interest as protected by the regulatory laws.[1630] Such a "private attorney-general" system encourages litigation and supplements governmental enforcement efforts,[1631] although recently, the enforcement agencies have signaled concern that private antitrust enforcement may jeopardize their corporate leniency programs (under which conspirators turn in other conspirators in exchange for more lenient punishment).[1632]

Private enforcement of regulatory law is facilitated by a number of features of U.S. litigation practice, the absence of which may explain the lack of private enforcement in Europe. For one thing, under general procedural law applicable in the United States, a member of a class may sue as a representative party on behalf of all parties, under certain conditions (class-action suits).[1633] For another, as discussed in chapter 10, private plaintiffs are entitled to wide-ranging discovery (evidence-taking) powers. Also, as will be discussed in subsection 6.13.3, plaintiffs may obtain treble damages under the regulatory laws. Furthermore, counsels for the plaintiffs may accept contingent fees[1634] and postpone payment until the suit is over. If the suit is lost, the lawyer receives nothing. If he wins, he receives a considerable percentage of the damages awarded to the plaintiffs. Although lawyers will be cautious to accept

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been convicted or pleaded guilty in a government suit, this will constitute *prima facie* evidence of liability in a private action. *See also* J. DAVIDOW, "International Implications of U.S. Antitrust in the George W. Bush Era", 25 *W. Comp.* 495 (2002).

[1630] *See* H.L. BUXBAUM, "The Private Attorney General in a Global Age: Public Interests in Private Antitrust Litigation", 26 *Yale J. Int'l L.* 219, 220 and 223-24 (2001).

[1631] *See, e.g.* the Clayton Act, creating a private cause of action for any violation of federal antitrust laws (stating that a private plaintiff "injured in his business or property by reason of anything forbidden in the antitrust laws may sue.") 15 U.S.C. Section 15(a) (Supp. 1986). Plaintiffs may assert their rights as a pure statutory action, without there being any contractual relationship with the defendant (*quod plerumque fit*), or in the context of a contractual relationship, either defensively (in order to fend off the enforcement of a foreign forum-selection or choice-of-law clause) or offensively (in case of a breach of contract involving antitrust violations). *See* H.L. BUXBAUM, "The Private Attorney General in a Global Age: Public Interests in Private Antitrust Litigation", 26 *Yale J. Int'l L.* 219, 225-26 (2001). *See* for a critique of the additional deterrence rationale of private antitrust enforcement: H.L. BUXBAUM, "Jurisdictional Conflict in Global Antitrust Enforcement", 16 *Loy. Consumer L. Rev.* 365, 373 (2004) (arguing that a policy of deterrence could be satisfied through public regulation rather than through private enforcement, especially private enforcement by foreign plaintiffs acting under the FTAIA).
Private enforcement of regulatory law somehow resembles civil party petition in continental-European criminal law. Private persons harmed by regulatory violations could seize the courts if the regulatory agencies stand idly by, just as victims of crimes could seize an investiging magistrate if the prosecutor does not initiate an investigation. It should however be noted that civil party petition is not private enforcement of criminal law, but in essence a means of more easily obtaining civil redress for crimes, by tapping into the vast resources of the inquisitorial criminal justice system

[1632] *See, e.g.*, Brief for the United States and the Federal Trade Commission as Amici Curiae in Support of Respondents, *F. Hoffman-LaRoche* v. *Empagran*, 124 S. Ct. 2359 (2004) (No. 3-724), available at http://www.usdoj.gov/atr/cases/f200800/200866.htm

[1633] See Rule 23 (1) of the Federal Rules of Civil Procedure: "One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class." To be maintained, a class action still has to meet certain additional conditions laid down in Rule 23 (2) of the Federal Rules of Civil Procedure.

[1634] Clayton Act, 15 U.S.C. Section 15(a) (Supp. 1986).

contingency fees for losing the case may end their business, the threshold for the plaintiffs to start proceedings is much lower, as they have nothing to lose.[1635]

481. INCREASED RISK OF EXTRATERRITORIAL JURISDICTION – The facilitating features of U.S. litigation doubtless increase the number of international trust cases heard by U.S. courts. Most high-profile international antitrust cases, such as *Timberlane* (1976), *Uranium* (1978), *Laker Airways* (1984), *Hartford Fire* (1993), and *Empagran* (2004), were not surprisingly brought by private plaintiffs.[1636] Private enforcement of regulatory law does not only increase the number of international cases in U.S. courts, but also, in a disproportionate fashion, the risk of such courts establishing jurisdiction over international cases. Because the enforcement agencies are repeat-players, having to deal with foreign enforcement agencies on a daily basis, they tend to balance the interests of the U.S. and other States in a given case. [1637] They might refrain from prosecution when a foreign State has an overriding regulatory interest. Private plaintiffs by contrast do not have a long-term incentive to embrace notions of comity,[1638] although their actions serve the same public interests that the regulatory authorities ordinarily serve when filing suit.[1639] Moreover, as under the *Hartford Fire* doctrine, a court may only refuse to exercise jurisdiction if a foreign State compels a particular conduct that violates U.S. laws (*see supra*), a finding of jurisdiction is much more likely. Any such finding may happen without consultation with the political branches, and thus undermine the latters' constitutional monopoly on the conduct of foreign relations, and vex other nations.[1640] While most cases do

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[1635] *See* W.S. GRIMES, "International Antitrust Enforcement Directed at Restrictive Practices and Concentration: The United States' Experience", in: H. ULLRICH (ed.), *Comparative Competition Law: Approaching an International System of Antitrust Law*, Baden-Baden, Nomos, 1998, 234.

[1636] *Compare* S. WEBER WALLER, "The Twilight of Comity", 38 *Colum. J. Transnat'l L.* 563, 566 (2000).

[1637] *See* H.L. BUXBAUM, "Assessing Sovereign Interests in Cross-Border Discovery Disputes: Lessons From *Aérospatiale*", 38 *Texas Int. L. J.* 87, 88 (2003).

[1638] *See, e.g.*, Brief of the Governments of the Federal Republic of Germany and Belgium as *amici curiae* in *F. Hoffman-La Roche Ltd. et al.* v. *Empagran S.A. et al.*, 540 U.S. 1088 (2003) (2004 WL 226388), at 15 (noting that in private suits "there is no opportunity for the executive branch to weigh the foreign relations impact, nor any statement implicit in the filing of the suit that that consideration has been outweighed"); Brief of the Government of Japan as *amicus curiae* in *F. Hoffman-La Roche Ltd. et al.* v. *Empagran S.A. et al.*, 540 U.S. 1088 (2003) (2004 WL 226390), at 10 (asserting that it is "particularly troublesome that this right to, at the least, interfere with Japanese governmental regulation of the Japanese market would be given to private U.S. attorneys with little experience in international diplomacy and cooperation). *See* in a securities context: D.C. LANGEVOORT, "Schoenbaum Revisited: Limiting the Scope of Anti-fraud Protection in an International Securities Marketplace", 55 *Law & Contemp. Probs.* 241, 248 (1992) (arguing that "most cases raising extraterritoriality questions are private actions brought with no reason to care about sound jurisdictional scope"). *See* in the context of extraterritorial discovery: reporters' note 9 to § 442 (1) (c) of the Restatement (Third) of U.S. Foreign Relations Law.

[1639] *See* H.L. BUXBAUM, "The Private Attorney General in a Global Age: Public Interests in Private Antitrust Litigation", 26 *Yale J. Int'l L.* 219, 237 (2001).

[1640] *See* S.E. BURNETT, "U.S. Judicial Imperialism Post "Empagran v. F. Hoffmann-Laroche"?: Conflicts of Jurisdiction and International Comity in Extraterritorial Antitrust", 18 *Emory Int'l L. Rev.* 555, 625 (2004). *See also* H.L. BUXBAUM, "The Private Attorney General in a Global Age: Public Interests in Private Antitrust Litigation", 26 *Yale J. Int'l L.* 219, 237 (2001) (noting that private parties thus have "the power to assert domestic policy even in situations in which a government agency, considering the international implications of such an action might decline to do so."). Notably the United Kingdom has vehemently denounced the "private attorney-general system" in the United States. *See* United Kingdom Response to U.S. Diplomatic Note concerning the U.K. Protection of Trading Interest Bill, Nov. 27, 1979, 21 *I.L.M.* 847, 849 (1982) ("Her Majesty's Government's main objections to the private treble damage action, which is [...] a crucial aspect of U.S. Anti-Trust enforcement, are

not make it into court, but are settled between the parties beforehand, the threat of defeat in court may clearly incite defendants to bow to the demands of plaintiffs during pre-trial negotiations.

6.13.3. Treble damages

482. The concept of "treble damages" is a familiar feature of U.S. law. If statutorily provided, a court may grant the injured party three times the amount he or she would normally be entitled to. For antitrust violations under the Sherman Act, the injured person or the United States shall recover threefold the damages sustained.[1641] Trebling is mandatory in antitrust matters, even when it does not cover the actual damages and the accrued interests. Like the applicability of criminal sanctions, awarding treble damages is believed to be a potent deterrent for potential antitrust violators.[1642]

483. For foreign nations, the availability of treble damages may appear as outrageous: not only may U.S. courts not take into account foreign interests after *Hartford Fire*, the damages awarded to private plaintiffs may not even come close to anything Europeans are accustomed to in their own civil procedure systems, and may be regarded as sheer punitive damages.[1643] Against this backdrop, opposition against extraterritorial jurisdiction by the U.S., even when not contested in principle,[1644] does not come as a surprise. The entitlement of plaintiffs to treble damages in the context of private antitrust law enforcement was for instance cited by the United Kingdom as a reason for its enactment of the British Protection of Trading Interests Act in

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that it has been adopted as a complement to government enforcement, that it provides an incentive to private parties to act as "private attorneys-General", that such a system of enforcement is inappropriate and in many respects objectionable in its application to international trade. Her Majesty's Government believe that two basically undesirable consequences follow from the enforcement of public law in this field by private remedies. First, the usual discretion of a public authority to enforce laws in a way which has regard to the interests of society is replaced by a motive on the part of the plaintiff to pursue defendants for private gain thus excluding international considerations of a public nature. Secondly, where criminal and civil penalties co-exist, those engaged in international trade are exposed to double jeopardy.")

[1641] Clayton Act, 15 U.S.C. Section 15(a) (Supp. 1986). Under the Helms-Burton Act, discussed in section 8.2, American plaintiffs are also entitled to treble damages if the U.S. owner's property claim (with respect to assets confiscated by the Cuban government) has been certified by the Foreign Claims Settlement Commission or if the defendant continues trafficking in confiscated property after having received notice of a claimant. *See* Helms-Burton Act, Section 302(a)(3)(c).

[1642] *Contra* H.L. BUXBAUM, "Jurisdictional Conflict in Global Antitrust Enforcement", 16 *Loy. Consumer L. Rev.* 365, 373 (2004) (stating that "the policy of deterrence would be satisfied if the overall level of penalty imposed on a cartel is sufficient to make price-fixing behavior affecting the U.S. market unprofitable for cartel participants").

[1643] *Compare* H.L. BUXBAUM, "The Private Attorney General in a Global Age: Public Interests in Private Antitrust Litigation", 26 *Yale J. Int'l L.* 219, 253 (2001) (arguing that "the notion that such awards may be granted without consideration of the foreign interests involved may exacerbate the extraterritoriality conflict"); H.L. BUXBAUM, "Jurisdictional Conflict in Global Antitrust Enforcement", 16 *Loy. Consumer L. Rev.* 365, 374 (2004).

[1644] *Contra* K.M. MEESSEN, "Antitrust Jurisdiction Under Customary International Law", 78 *A.J.I.L.* 783, 794 (1984) (implying that foreign protests may have focused on treble damage cases, but that foreign States might also take issue with actual damages claims on the basis that the extraterritorial application of U.S. laws violated international law).

1980.[1645] This Act even provides for a clawback remedy pursuant to which British persons could recover foreign (in practice U.S.) multiple damages awards.[1646]

484. The attractiveness of treble damages to foreign plaintiffs ought nonetheless not to be overestimated. For one thing, "[d]epending on the length of time from injury to judgment … the lack of prejudgment interest [an interest which is ordinarily awarded in Europe] alone can reduce nominally treble damages to single damages or less."[1647] For another, practical hurdles, such as difficulties of establishing personal jurisdiction over the defendant, the risk of *forum non conveniens* being applied to the case, or problems of obtaining discovery abroad (although discovery is usually liberally granted by U.S. courts) may dissuade foreign plaintiffs from actually bringing suit in the United States. One is therefore tempted to subscribe to MEHRA's view that "rational plaintiffs will only bring … a case where the lure of treble damages in the United States compared to alternative remedies in another forum outweighs the increased practical difficulties of bringing the case there."[1648]

6.14. Concluding remarks from a transatlantic perspective

485. Jurisdiction in antitrust matters is the mother area of the law of jurisdiction in regulatory matters. Since 1945, U.S. courts and antitrust regulators have proved willing to exercise prescriptive jurisdiction over foreign undertakings whose conduct affects United States commerce.[1649] To that effect, they relied upon the effects doctrine, a doctrine which draws on the objective territorial principle under international law. In contrast, European States, the United Kingdom in particular, and the European Community initially rejected the use of the 'effects doctrine'. In due course however, they abandoned their opposition. The first crack came about when German antitrust courts and regulators started to rely on the *Auswirkungsprinzip* in the 1970s so as to clamp down on foreign anticompetitive conduct harming German consumers. In 1988 then, the European Court of Justice adopted a doctrine which is almost synonymous with the effects doctrine. On the basis of the *Wood Pulp* 'implementation doctrine', the Commission could exercise jurisdiction over foreign business-restrictive agreements that are 'implemented' or 'given effect' through direct sales within the Community.

[1645] Under Clause 5 of this Act, which is discussed in chapter 10 on transnational discovery, foreign multiple damage awards are non-enforceable in the United Kingdom.

[1646] Clause 6 of the Act confers a right of recovery through UK courts of the non-compensatory portions of multiple damage awards. United Kingdom Response to U.S. Diplomatic Note concerning the U.K. Protection of Trading Interest Bill, Nov. 27, 1979, 21 *I.L.M.* 847, 848-49 (1982) (noting that the United Kingdom regards multiple damage judgments as penal, and thus as non-enforceable in the United Kingdom, and that sovereign States do not accept an obligation to enforce the public economies policies of other sovereign States). The United Kingdom has always been at the forefront of the critics of treble damages. *See also, e.g.*, UK Government, *amicus curiae* brief brought before the U.S. District Court of Arizona, 16 November 1989, *B.Y.I.L.* 566 (1990) ("Substantively, the British Government, as a matter of policy, disagrees with the treble damage antitrust remedy.").

[1647] *See* C.A. JONES, "Exporting Antitrust Courtrooms to the World: Private Enforcement in a Global Market", 16 *Loyola Consumer L. Rev.* 409, 423 (2004) (thus noting that "the vision of windfall treble damages in the United States perceived from abroad falls short of reality").

[1648] *See* S.K. MEHRA, "More is Less: A Law-and-Economics Approach to the International Scope of Private Antitrust Enforcement", 77 *Temp. L. Rev.* 47, 64 (2004).

[1649] *United States v. Aluminium Corp. of America*, 148 F.2d 416, 443 (2d Cir. 1945).

486. In view of the developments in Europe since the 1970s, the antitrust effects doctrine has rightly been termed an international movement.[1650] The use of its criteria rather than its existence is still a matter of debate.[1651] After the European Court of First Instance directly invoked the effects doctrine, including its U.S.-style qualifications of direct, substantial and reasonably foreseeable effects, so as to justify, in terms of public international law, the European Commission's prohibition of a wholly foreign merger in the 1999 *Gencor* judgment, the effects doctrine may even be said to constitute international law,[1652] at least in the field of merger control.[1653]

487. The EC's acceptance of jurisdiction over foreign-based conspiracies and merger activity causing domestic consequences doubtless weakens its arguments against effects-based application of U.S. antitrust laws that harms its interests.[1654] The EC's hostility toward U.S. assertions of antitrust jurisdiction has substantially lessened,[1655] and the transatlantic dialogue of the deaf which governed international antitrust law until the 1990s has now to a great extent subsided.[1656] International law arguments, which could possibly be invoked to denounce specific overbroad applications of the effects doctrine, have even wholly disappeared from the transatlantic antitrust radar screen. On the one hand, this might surprise, since European courts have gone to such great lengths to justify the implementation and effects doctrines in terms of public international law. On the other hand however, it is not surprising: if a State were to invoke public international law, the principle of non-

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[1650] *See* M. MARTINEK, "Das uneingestandene Auswirkungsprinzip des EuGH zur extraterritorialen Anwendbarkeit der EG-Wettbewerbsregeln", *IPRax* 349 (1989).

[1651] *See* M. COSNARD, "Les lois Helms-Burton et d'Amato-Kennedy, interdiction de commercer avec et d'investir dans certains pays", 42 *A.F.D.I.* 40-41 (1996). *See also* ICJ, *Case Concerning the Arrest Warrant of 11 April 2000* (Congo v. Belgium), sep. op. Judges Higgins, Kooijmans and Buergenthal, 14 February 2002, § 47 (" 'Effects' or 'impact' jurisdiction is embraced both by the United States and, with certain qualifications, by the European Union"), available at http://www.icj-cij.org.

[1652] CFI, *Gencor Ltd v. Commission*, Case T-102/96, 1999, *E.C.R* .II-753, § 90 ("[A]pplication of the [Merger Control] 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."). *See also* A. LAYTON & A.M. PARRY, "Extraterritorial jurisdiction – European Responses", 26 *Houston J. Int'l L.* 309, 315 (2004) ("[I]t may constitute recognition by the Court of First Instance of the effects doctrine in this form as an acceptable tenet of international law. This represents a reversal of previous European statements suggesting that such use of extraterritorial prescriptive jurisdiction was contrary to international law.") (pointing to EC statements in the wake of the adoption of the Helms-Burton Act, see supra)); S. STEVENS, "The Increased Aggression of the EC Commission in Extraterritorial Enforcement of the Merger Regulation and Its Impact on Transatlantic Cooperation in Antitrust", 29 *Syracuse J. Int'l L. & Com.* 263, 277 (2002) (stating that "the theories underpinning the evolving European [merger control] case law parallel those recognized in American antitrust doctrine").

[1653] It remains indeed to be seen whether the effects doctrine extends to *Wood Pulp*-style conspiracies. *Compare* C. DAY WALLACE, "'Extraterritorial Discovery: Ongoing Challenges for Antitrust Litigation in an Environment of Global Investment", *J. Int'l Econ. .L.* 353 (2003) (arguing that the effects doctrine is now generally accepted as applicable to all international competition cases).

[1654] *See* A. LAYTON & A.M. PARRY, "Extraterritorial jurisdiction – European Responses", 26 *Houston J.I.L.* 309, 323 (2004) (noting "the inherent contradiction in condemning American antitrust extraterritoriality and extolling the European use of the same tactic").

[1655] *See* H.L. BUXBAUM, "The Private Attorney General in a Global Age: Public Interests in Private Antitrust Litigation", 26 *Yale J. Int'l L.* 219, 250 (2001).

[1656] In 1979, LOWENFELD still believed the U.S. and Europe to be "inadequately equipped with the intellectual tools we have been trying to develop here – the United States in its concentration on "subject-matter jurisdiction", "minimum contacts", and "effects", the Europeans in their concentration on "sovereignty", and "settled principles of international law" …" *See* A.F. LOWENFELD, "Public Law in the International Arena: Conflict of Laws, International Law, and Some Suggestions for Their Interaction", 163 *R.C.A.D.I.* 311, 397 (1979-II).

intervention in particular, as an argument to counter another State' s jurisdictional assertions, it ties its own hands. If it ever wants to extend the reach of its own laws, it will have to live up to the standards which it has proclaimed when formulating its protest,[1657] lest it violates the international estoppel principle, which bars a State from asserting or denying something that contradicts what has already been established as the truth.[1658]

488. Protests against another State's jurisdictional assertions now often taken the shape of *prima facie* non-jurisdictional arguments based on 'the national interest' or on substantive differences of antitrust policy, although it is not excluded that such arguments may piggyback on open-ended factors used in a jurisdictional reasonableness discourse. It may be noted however that only in the United States will arguments of reasonableness carry weight beyond true conflicts of antitrust jurisdiction. Indeed, in both *Wood Pulp* and *Gencor*, implementation- or effects-based jurisdiction was considered to remain within the jurisdictional limits set by public international law in and of itself, without comity or reasonableness arguments being needed to uphold the principle of non-intervention.[1659] Since the U.S. Supreme Court's 1993 judgment in *Hartford Fire*, comity may be similarly circumscribed as in the EC, although quite some U.S. courts have continued to conduct a broader comity analysis. The re-appearance of reasonableness in the Supreme Court's 2004 *Empagran* judgment testifies to the fact that, after all, comity, and even more, the customary international law principle of non-intervention, was never really abandoned in U.S. international antitrust practice.

489. In the United States, jurisdictional reasonableness serves to soften the edges of effects-based assertions of antitrust jurisdiction, assertions which have traditionally been more aggressive given the importance of antitrust policy in the United States and the antitrust enforcement capabilities enjoyed by private plaintiffs. Because the European doctrines of antitrust jurisdiction have traditionally been more conservative, Europe was arguably in no need of a jurisdictional rule of reason.[1660] It might be submitted that, now that a transatlantic conceptual convergence of antitrust jurisdiction has taken place, Europe should rely more on reasonableness (as Germany

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[1657] *See* K.M. MEESSEN, "Schadensersatz bei weltweiten Kartellen: Folgerungen aus dem Endurteil im Empagran-Fall", 55 *WuW* 1115, 1121 (2005).

[1658] ICJ, *Temple of Preah Vihear*, *ICJ Rep.* 143-44 (1962) (Spender, J.,) ("[T]he principle [of estoppel] operates to prevent a State contesting before the Court a situation contrary to a clear and unequivocal representation previously made by it to another State, either expressly or impliedly, on which representation the other State was, in the circumstances, entitled to rely and in fact did rely, and as a result that other State has been prejudiced or the State making it has secured some benefit or advantage for itself.").

[1659] *Compare* A. BIANCHI, Reply to Professor Maier, in K.M. MEESSEN (ed.), *Extraterritorial Jurisdiction in Theory and Practice*, London/The Hague/Boston, Kluwer, 1996, 74, 83 (comparing the U.S. and the EU approach and stating that "'the rule of reasonableness' and the 'principle of territoriality' are perceived as the two distant poles of a legal analysis spectrum in which common grounds for discussion can hardly be discerned.")

[1660] *Compare* R.P. ALFORD, "The Extraterritorial Application of Antitrust Laws: The United States and European Community Approaches", 33 *Va. J. Int'l L.* 1, 92 (1992) ("The effects doctrine is continually being narrowed and qualified to require a showing of stronger jurisdictional nexus through direct, substantial, and reasonably foreseeable effects, while the objective territoriality approach is being reformulated and expanded to encompass certain activities that would fall well outside its traditional ambit. The result is a convergence of application of EC and U.S. antitrust laws vis-à-vis foreign defendants.").

has done since the 1970s). As, at least in the field of cartel law, international jurisdictional tension has been largely absent, the European Commission seems indeed, albeit implicitly, to have balanced its interests in the enforcement of its competition laws and the interests of foreign nations and corporations. Yet as private enforcement of antitrust law is, for the time being, still underdeveloped in Europe, an explicit reasonableness analysis by European courts is still in the waiting room.

CHAPTER 7: JURISDICTION OVER CROSS-BORDER SECURITIES TRANSACTIONS

490. Another major field of economic law where 'extraterritorial' assertions of jurisdiction have arisen is the field of securities law. Securities law, a branch of financial law, governs transactions in certificates attesting the ownernship of stocks. The field of securities law lends itself to broad assertions of jurisdiction. Indeed, an economic activity as global and interconnected as trade in securities almost inevitably entails ripple effects across borders. This may justify willing States to assert jurisdiction either over territorial conduct or effects related to a securities transaction under a liberally construed territoriality principle. As any securities failure may impact a particular national market, authorizing the operation of effects-based jurisdiction, and even just making phone calls or sending mail from a State or having a single meeting in a State could possibly qualify as territorial conduct that authorizes the operation of the conduct test,[1661] the world has witnessed broad assertions of securities jurisdiction, particularly in the United States, a State with has traditionally aggressively tackled securities fraud such as insider-trading.. The absence of a clear idea of what purpose national capital market regulation should serve in a globalized world, and a lack of consideration for foreign States' interests, have doubtless expanded the extraterritorial reach of securities laws, although remarkably, foreign reaction has remained fairly mute.

In this chapter, most attention will be devoted to jurisdiction over securities fraud and misrepresentation (parts 7.1-7.3), yet takeover regulations (part 7.4), foreign corrupt practices rules (part 7.5), and corporate governance requirements under the U.S. Sarbanes-Oxley Act (2002) (part 7.6), will also be examined.

491. In Europe, problems of jurisdiction over cross-border securities misrepresentation are ordinarily solved by applying classical rules of private international law, mostly the rules governing torts.[1662] Jurisdiction over insider-trading is governed by specific provisions of statutory instruments that implement the EC Directives on insider-trading. The application of European laws to securities transactions has not been considered to engender jurisdictional problems under public

[1661] *See* P.K. WILLISON, "*Europe and Overseas Commodity Traders v. Banque Paribas London:* Zero Steps Forward and Two Steps Back", 33 *Vand. J. Transnat'l L.* 469, 499 (2000).

[1662] This mechanical approach has been criticized by KRONKE, who urged "European mainstream conflicts theory" to be more aware of the fact that "there are (usually ascertainable) policies and interests behind the rules" – as U.S. theory is notably aware of. H. KRONKE, "Capital Markets and Conflict of Laws", 286 *R.C.A.D.I.* 245, 380 (2000). A more policy-oriented approach will also be taken in this study. *See* in particular subsection 7.3.5 (defending a primary versus subsidiary exercise of jurisdiction in light of the policies underlying capital markets regulation).

international law,[1663] although the reach of the insider-trading laws is potentially overbroad. (part 7.2)

492. In the United States, jurisdiction over securities misrepresentations is not governed by general private international law or by specific statutory provisions. Instead, in order to determine jurisdiction, U.S. courts rely on the purpose purportedly underlying the 1933 and 1934 securities laws: the protection of U.S. investors and U.S. capital markets. This unilateralism[1664] has caused the U.S. to apply its laws to securities transactions with often only tenuous links with the U.S. Under private international law, which is in essence aimed at identifying the most significant relationship of a situation with a State, these links might not have sufficed for the application of U.S. law. Given the broad reach of U.S. securities regulation, jurisdictional concerns under public international law loom large. Disquietingly, U.S. courts and regulators do usually not rely on comity to limit U.S. jurisdiction over securities transactions. Nonetheless, international conflicts over 'extraterritorial' securities jurisdiction have hitherto remained largely absent, although it may be only a matter of time before they erupt.[1665] (part 7.1)

493. After discussing the U.S. and European approaches to tackling cross-border securities fraud, the effects and the conduct tests (*i.e.*, the dominant jurisdictional tests) will be critically appraised. It will be argued that, in their current form, they are not able to satisfactorily solve problems of jurisdiction. Instead, States should exercise more jurisdictional restraint in applying them. A number of theories that radically depart from traditional international securities regulation will also be discussed. It will eventually be submitted that a middle-of-the-road approach – with an emphasis on the domestic trading of the securities as the relevant jurisdictional nexus – might, for the time being, be the way forward. (part 7.3)

494. The securities antifraud provisions are but a small part of the corpus of securities laws. Securities laws writ large may also impose extensive disclosure requirements, they may protect investors holding securities in targets of a takeover by other investors (takeover law), they may prohibit issuers from engaging in corrupt practices, and they may require issuers to set up corporate governance structures that ensure the transparency and fairness of their corporate dealings. The reach of such securities laws is somewhat more modest than the reach of the securities antifraud provisions. It is conceptually also less developed. As regulators rather than courts supervise the enforcement of non-antifraud-related provisions, a principled framework is often lacking, and solutions are reached on the basis of a case-by-case analysis and on the basis of transnational interagency cooperation. In a second part of this chapter, the reach of U.S. and European takeover laws (part 7.4), and the U.S. Sarbanes-Oxley corporate governance Act (part 7.5) will be assessed in light of the principle of reasonableness. It will be argued that regulators generally keep the long

[1663] *See* F.A. MANN, "The Doctrine of Jurisdiction Revisited after Twenty Years", 186 *R.C.A.D.I.* 9, 79 (1984-III).
[1664] *See also* H. KRONKE, "Capital Markets and Conflict of Laws", 286 *R.C.A.D.I.* 245, 272 (2000).
[1665] *See, e.g.*, D.C. LANGEVOORT, "Schoenbaum Revisited: Limiting the Scope of Anti-fraud Protection in an International Securities Marketplace", 55 *Law & Contemp. Probs.* 241, 24 (1992) (arguing that "it will only be a matter of time before cases arise that more visibly involve standards of fiduciary responsibility and similar conduct restraints where the potential for implicit conflicts in legal cultures is strong").

arm of their takeover and corporate governance laws within reasonable boundaries, yet sometimes only because foreign nations and issuers have urged them to do so.

7.1. Securities fraud jurisdiction in the United States

7.1.1. Introduction

495. COOPERATION BY REGULATORS - In the United States, broad and even overbroad assertions of securities jurisdiction are the preserve of the *courts* in (mostly private) antifraud suits. U.S. securities *regulators* (the Securities Exchange Commission in particular) in contrast rely heavily on international cooperation to enforce the securities laws since the 1980s, using requests under the Hague Evidence Convention, Mutual Legal Assistance Treaties among the U.S. and other States, and Memoranda of Understanding among securities regulators.[1666] Furthermore, they have routinely accommodated foreign issuers by granting exemptions and waivers. They have also succeeded in exporting securities regulations to other States through international negotiations and foreign corrupt practices, thereby obviating the need for extraterritorial jurisdiction.[1667] Admittedly, this so-called benchmarking effect of U.S. securities regulations might partly have been the result of the threat of U.S. extraterritorial jurisdiction.[1668] Nonetheless, the current situation is that the U.S. Securities Exchange Commission (SEC) does no longer act as *parens patriae* for the global marketplace, and instead often defers to foreign regulators.[1669]

496. SARBANES-OXLEY - The enactment of the Sarbanes-Oxley Act, a corporate governance act, in 2002, which will be discussed in subsection 7.6.2, might *prima facie* have brought this deferential tack of the SEC to a halt. The imposition of U.S. home-grown and culturally biased rules of corporate governance on persons incorporated in other States was bound to engender exasperation. The SEC and the PCAOB, the regulatory agencies designated for the implementation and supervision

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[1666] *See* for a detailed overview on international cooperation and assistance in the field of securities law: M.D MANN & W.P. BARRY, "Developments in the Internationalization of Securities Enforcement", Practising Law Institute, Corporate Law and Practice Handbook Series, PLI Order Number 3011, May, 2004, 355, 365 *et seq. See* for the first Memoranda of Understanding: Memorandum of Understanding between the United States and Switzerland, 31 August 1982, and Agreement XVI of Swiss Bankers' Association of 14 July 1982, 22 *I.L.M.* 1 (1983); Memorandum of Understanding between the SEC, the CFTC, and the United Kingdom Department of Trade and Industry on Exchange of Information to support enforcement of U.S. and British securities and commodities laws, 23 September 1986, CCH Sec. Reg. Rptr § 84,027, 25 *I.L.M.* 1431 (1986). *See also* Restatement (Third) of Foreign Relations Law, § 416, reporters' note 3. *See also* K.J. HOPT, "The European Insider Dealing Directive", in K.J. HOPT & E. WYMEERSCH (ed.), *European Insider-dealing*, London, Butterworths, 1991, 129, 147 ("Today much of the international insider law enforcement is based on [international] agreements, particularly as far as the US are concerned.").

[1667] *See* S.J. CHOI & A.T. GUZMAN, "The Dangerous Extraterritoriality of American Securities Law", 17 *Nw. J. Int'l L. & Bus.* 207, 208 (1996); E.S. PODGOR, ""Defensive Territoriality": a New Paradigm for the Prosecution of Extraterritorial Business Crimes", 31 *Ga. J. Int'l & Comp. L.* 1, 27 (2002).

[1668] *See* D.C. LANGEVOORT, "Schoenbaum Revisited: Limiting the Scope of Anti-fraud Protection in an International Securities Marketplace", 55 *Law & Contemp. Probs.* 241, 247 (1992) (noting that the conduct test of jurisdiction is "an important "chip" in negotiating with other countries toward a more cooperative system of international enforcement"; W.S. DODGE, "Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism", 39 *Harv. Int'l L.J.* 101 (1998).

[1669] M.D MANN & W.P. BARRY, "Developments in the Internationalization of Securities Enforcement", Practising Law Institute, Corporate Law and Practice Handbook Series, PLI Order Number 3011, May, 2004, 355, at 542.

of SOX, however duly attempted to soothe the extraterritorial impact of SOX through entering into cooperative arrangements with foreign regulators and States, and granting exemptions to foreign corporations, in keeping with the traditional comity-based approach espoused by the SEC in securities matters.

497. SECURITIES FRAUD - In the *Bersch* v. *Drexel Firestone* case, the Second Circuit dismissed the argument that the reach of the antifraud provisions ought to be construed in light of the SEC's registration requirements.[1670] Liberated from the straitjacket represented by the registration requirements, which worked to the advantage of foreign defendants, the reach of the U.S. antifraud provisions grew so broad that securities transactions that barely affected the United States – but all the more affected other States – were subjected to U.S. law.[1671]

498. ABSENCE OF FOREIGN REACTION - In spite of the broad extraterritorial reach of U.S. securities laws, foreign reactions have remained muted. This stands in stark contrast to the fierce protests with which the reach of U.S. antitrust laws (on which the reach of U.S. securities laws is partly based) met.[1672] The reach of U.S. securities laws does not seem to raise sovereignty concerns under public international law.[1673] Remarkably, foreign States appear to take it for granted that their own securities laws are set aside by stricter U.S. laws, thus in effect "creating an American

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[1670] *Bersch* v. *Drexel Firestone, Inc.*, 519 F.2d 974, 986 (2d Cir. 1975).

[1671] *See, e.g.*, J.G. URQUHART, "Transnational Securities Fraud Regulation: Problems and Solutions", 1 *Chi. J. Int'l L.* 471, 473 (2000) (stating that the United States has become "almost a worldwide forum for many parties seeking redress not offered by their own countries"). The reach of the securities laws is dependent on an interpretation of "interstate commerce", which is defined by Section 3(a)(17) of the Exchange Act as "trade, commerce, transportation, or communication among the several States, or between any foreign country and any State, or between any State and any place or ship outside thereof." Commerce "between any foreign country and any State" is not further defined by the Act or by the SEC. Courts have therefore filled the void, with some courts ruling that the securities laws encompass a broad jurisdictional scope on the basis of the reference to "interstate commerce". *See, e.g.*, *Continental Grain*, 592 F.2d at 421; *Kasser*, 548 F.2d at 114. *See also* J.D. KELLY, "Let There Be Fraud (Abroad): A Proposal for a New U.S. Jurisprudence With Regard to the Extraterritorial Application of the Anti-Fraud Provisions of the 1933 and 1934 Securities Acts", 28 *Law & Pol'y Int'l Bus.* 477, 480 (1997) (pointing out "that the broad definition of commerce in section 3(17) … [may] indicate[ ] that Congress intended to apply these provisions to conduct abroad", but also citing Section 30 of the Exchange Act, pursuant to which "the provisions of this chapter … shall not apply to any person insofar as he transacts a business in securities without the jurisdiction of the United States…").

[1672] *IIT* v. *Cornfeld*, 619 F.2d 909, 921 (2d Cir. 1980) ("The problem of conflict between our laws and that of a foreign government is much less when the issue is the enforcement of the anti-fraud sections of the securities laws."); *Laker Airways, Ltd.* v. *Sabena*, 731 F.2d 909, 947 (D.C. Cir. 1984) ("If Laker [a British corporation] had sued the American defendants for fraud, or on a contract claim for failure of performance, the British would not have been at all interested in intervening, irrespective of the financial condition of Laker at the time it brought the suit."). *Compare* W.B. PATTERSON, "Defining the Reach of the Securities Exchange Act: Extraterritorial Application of the Antifraud Provisions", 74 *Fordham L. Rev.* 213, 227 (2005) (arguing that, while international conflict was practically nonexistent to date, it may not be excluded). In the same vein: J.D. KELLY, "Let There Be Fraud (Abroad): A Proposal for a New U.S. Jurisprudence With Regard to the Extraterritorial Application of the Anti-Fraud Provisions of the 1933 and 1934 Securities Acts", 28 Law & Pol'y Int'l Bus. 477, 496-97 (1997).

[1673] *See* J.D. KELLY, "Let There Be Fraud (Abroad): A Proposal for a New U.S. Jurisprudence With Regard to the Extraterritorial Application of the Anti-Fraud Provisions of the 1933 and 1934 Securities Acts", 28 *Law & Pol'y Int'l Bus.* 477, 491 (1997); A.F. LOWENFELD, "Jurisdiction to Prescribe: Some Contributions From an International Lawyer", 4 *B.U. Int'l L.J.* 91, 95 (1986); P.R. WOLF, "International Securities Fraud: Extraterritorial Subject Matter Jurisdiction", 8 *N.Y. Int'l L. Rev.* 1, 276 (1995).

hegemony in the field of transnational securities regulation".[1674] It has been argued that European States do so because they have themselves resorted to the effects doctrine in antitrust law.[1675]

It is unclear in what situations the interests of foreign States might be substantially harmed by assertions of securities jurisdiction. WOOD has argued that a foreign State will only take issue with a State exercising extraterritorial jurisdiction over securities transactions to "seal off its market from foreign fund-raising, *i.e.*, where securities regulation is used as a restrictive practice or counter-measure against tax-avoidance."[1676] There is however no evidence that States have ever abused their securities jurisdiction to force issuers to return to their home States to pay their taxes there. In the final analysis, the acceptability of extraterritorial jurisdiction depends upon the presence of a reasonable connection with the regulating State. Exercising extraterritorial jurisdiction over securities transactions for reasons of domestic monetary policy (*e.g.*, in order to encourage domestic investors to invest abroad, so that domestic interest-rates could soar) is probably premised on a legitimate interest of the State. Sealing off one's market from foreign-fund-raising by means of extraterritorial jurisdiction over securities transactions certainly serves the interests of the regulating State, but possibly not its *legitimate* interests. Obviously, the distinction between a *legitimate* and an *illegitimate* interest is a fine one. State practice, especially in terms of reactions to another State's jurisdictional assertions, is at present insufficient to categorize State interests as either legitimate or illegitimate under customary international law.

It may be pointed that protests against a particular jurisdictional assertion, may not necessarily be directed at the assertion itself, but rather at the procedural niceties that the plaintiff enjoys, to the detriment of the foreign defendant, in U.S. civil suits, *e.g.*, discovery, the practice of contingent fees, treble damages, and personal jurisdiction on the basis of minimal U.S. contacts.[1677] Unlike in the antitrust field, there are however no instances of States having protested against the procedural burden imposed upon securities fraudsters as defendants in U.S. proceedings.

499. COMITY – The absence of foreign protest has resulted in the concomitant absence of a balancing of sovereign interests or comity analysis in determining subject-matter jurisdiction.[1678] U.S. courts do not consider their

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[1674] *See* J.G. URQUHART, "Transnational Securities Fraud Regulation: Problems and Solutions", 1 *Chi. J. Int'l L.* 471, 473 (2000)

[1675] *See* H. KRONKE, "Capital Markets and Conflict of Laws", 286 *R.C.A.D.I.* 245, 276 (2000).

[1676] *See* P.R. WOOD, *International Loans, Bonds and Securities Regulation*, London, Sweet & Maxwell, 1995, 366.

[1677] *See* P.R. WOOD, *International Loans, Bonds and Securities Regulation*, London, Sweet & Maxwell, 1995, 330 ("In practice, a lie is a lie everywhere and so is a careless fib, so that the potential for conflicts is not that great. The real conflicts arise in relation to the liability of managers and underwriters, and in relation to attitudes to court procedures. This is perhaps a uniquely U.S. risk").

[1678] Restatement (Third) of Foreign Relations Law (1987), § 416, cmt. b. (stating that "[a]s of 1986, however, challenges to exercise of United States jurisdiction under the securities laws (other than in connection with discovery of documents, § 442) had come only from private parties and not from foreign states, so that the need to weigh competing or conflicting state interests is less likely here than in connection with assertions of jurisdiction over other economic activity having transnational significance"). This comment does however not exclude that "appropriate weight is … given to statements and other evidence of national interests, both on behalf of the United States and on behalf of foreign states". *Id. See also* § 416, reporters' note 3. *See also* D.C. LANGEVOORT, "Cross-Border

prescriptive jurisdiction in cases of cross-border securities fraud to be subsidiary to the jurisdiction of other nations: they ordinarily exercise their jurisdiction if U.S. effects or conduct could be discerned, irrespective of foreign nations' ability or willingness to exercise their jurisdiction. They do not heed foreign sovereign interests relating to a foreign State's possibly legitimate inability or unwillingness to exercise jurisdiction either. Admittedly, in a number of cases, courts have referred to comity and interest-balancing, without however applying these doctrines.[1679] Obviously, if foreign States have never actually dug in their heels, U.S. courts do not quite face an incentive to weigh U.S. interests in the protection of their investors and their capital markets, with foreign sovereign interests. Not surprisingly there are hardly securities cases in which U.S. courts have not exercised their subject-matter jurisdiction.[1680] Interest-balancing, a classical tool of jurisdictional restraint in the U.S., may nonetheless be employed in an analysis of personal jurisdiction over the foreign defendant(s).[1681]

500. AN ATTEMPT AT EXPLAINING THE ABSENCE OF FOREIGN REACTION - The question may be raised *why* it is that U.S. assertions of securities jurisdiction have gone largely unnoticed in foreign States. Indeed, broad assertions of U.S. *antitrust* jurisdiction have unnerved European States for decades. The vehemence accompanying foreign reactions to assertions of antitrust jurisdiction may be attributable to the fact that antitrust laws and policies still greatly differ among States,[1682] and that antitrust law expresses an economic policy which is much more closely connected to national interests[1683]. State X may condone restrictive business

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Insider Trading", 19 *Dick. J. Int'l L.* 161, 163, note 11 (2000-2001) (noting that "courts have not pruned the extraterritorial scope of the law to incorporate comity limits, though they could do so").

[1679] *See Consolidated Gold Fields PLC* v. *Minorco, S.A.*, 871 F.2d 252, 261, 263 (2d Cir.) ("It is a settled principle of international and our domestic law, that a court may abstain from exercising enforcement jurisdiction when the extraterritorial effect of a particular remedy is so disproportionate to harm within the United States as to offend principles of comity."); *AVC Nederland B.V.* v. *Atrium Inv. Partnership*, 740 F.2d 148, 154 (2nd Cir. 1984) (citing Section 403 (2) (g) and (h) of the Restatement); *Zoelsch* v. *Arthur Andersen & Co.*, 824 F.2d 27, 31 (D.C. Cir. 1987) (rejecting interest-balancing).

[1680] *See* D.C. LANGEVOORT, "Schoenbaum Revisited: Limiting the Scope of Anti-fraud Protection in an International Securities Marketplace", 55 *Law & Contemp. Probs.* 241, 249 (1992) (observing that "securities fraud cases retain a substantial methodological bias toward finding subject matter jurisdiction").

[1681] *See* G. SCHUSTER, *Die internationale Anwendung des Börsenrechts*, Berlin, Springer, 1996, 50, citing *Consolidated Gold Fields PLC* v. *Minorco, S.A.*, 698 F. Supp. 487, 493 (S.D.N.Y. 1988) (inquiring "whether Minorco has sufficient 'contacts, ties or relations' with the forum to justify the assertion of personal jurisdiction").

[1682] Recently, antitrust laws and policies have however increasingly been harmonized, which ought to result in less foreign protest if a State applies its antitrust laws extraterritorially. *See, e.g.*, S.K. MEHRA, "More is Less: A Law-and-Economics Approach to the International Scope of Private Antitrust Enforcement", 77 *Temp. L. Rev.* 47, 69 (2004) (believing that "[t]he growing revulsion that our trading partners feel for cartel behavior that victimizes their consumers should tend to run counter to foreign pique at United States enforcement against the same cartels. That is, our trading partners might now disagree with our means, but would now cheer our ends."); C. SPRIGMAN, "Fix Prices Globally, Get Sued Locally? U.S. Jurisdiction Over International Cartels", 72 *U. Chi. L. Rev.* 265, 282 (2005) ("[B]ecause there is agreement on illegality, U.S. courts are less likely in cartel cases [as opposed to other antitrust cases] to invade the comity interests arising from foreign nations' commitment to a particular legal policy.").

[1683] *See, e.g.*, S.A. CASEY, "Balancing Deterrence, Comity Considerations, and Judicial Efficiency: The Use of the D.C. Circuit's Proximate Cause Standard for Determining Subject Matter Jurisdiction over Extraterritorial Antitrust Cases", 55 *Am. U. L. Rev.* 585 (2005) (arguing that jurisprudence in the area of international antitrust "may be characterized as a constant struggle to balance the United States'

practices for industrial policy reasons, especially if these practices occur in the export business (and thus do not harm domestic consumption), while State Y may precisely want to clamp down on these practices because they harm consumers within its territory. Securities fraud however, is deemed offensive by most States, and States will ordinarily not condone or encourage securities fraud to create a national champion.[1684] Dual actionability or criminality of securities fraud reduces foreign States' complaining potential. What is more, dual actionability or criminality may, in a perverse manner, impel foreign States to free-ride at the expense of U.S. law-enforcers. Rather than opposing the reach of U.S. securities laws, these States might actually welcome it.

Another explanation of the lack of foreign protest is that foreign States, European States in particular, consider securities fraud, to be just another sort of fraud that does not affect a State's specific socio-economic order. For these States, extensions of the scope *ratione loci* of U.S. securities laws translate into a heavier regulatory burden for foreign private actors, but not necessarily in an encroachment upon State sovereignty. Public international law then has hardly a role to play in restraining securities jurisdiction.[1685]

501. U.S. PROTEST AT EUROPEAN JURISDICTIONAL ASSERTIONS? – While a European reaction to American assertions of jurisdiction over securities fraud has been largely absent, it is not a given that European assertions of such jurisdiction will pass unnoticed in the United States. The U.S. may be satisfied that Europe proves willing to shoulder the burden of international securities enforcement, but it will not condone jurisdictional overreaching to the detriment of its issuers and investors, or, which is more likely, its own securities enforcement capabilities. There is a danger that European courts, believing securities laws to be private laws, consider extensions of their geographical reach as unpleasant for certain private actors, but as unproblematic from the viewpoint of a foreign State's sovereignty. They may fail to understand that in the United States, securities law is perceived as regulatory law, any extension *ratione loci* of which may be viewed as a tightening of the belt that transmits a State's idiosyncratic socio-economic interests.

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interest in protecting its own market against the interests of foreign nations in regulating their own markets."); B. GOLDMAN, "Les effects juridiques extra-territoriaux de la politique de la concurrence", *Rev. Marché Commun* 612 (1972).

[1684] *See* M.D. VANCEA, "Exporting U.S. Corporate Governance Standards Through the Sarbanes-Oxley Act: Unilateralism or Cooperation?", 53 *Duke L.J.* 833, 835 (2003-2004); G.B. BORN, "A Reappraisal of the Extraterritorial Reach of U.S. Law", 24 *Law & Pol. Int'l Bus.* 1, 47 (1992) (pointing out that "every nation shares the basic regulatory objective of preventing fraudulent conduct on world securities markets" and that "compared with the antitrust laws, there are very few instances where foreign states encourage or require conduct prohibited by the anti-fraud provisions of the U.S. securities laws."); K. YOUNG CHANG, "Multinational Enforcement of U.S. Securities Laws: The Need for the Clear and Restrained Scope of Extraterritorial Subject-Matter Jurisdiction", 9 *Fordham J. Corp. & Fin. L.* 89, 100 (2003); P.R. WOOD, *International Loans, Bonds and Securities Regulation*, London, Sweet & Maxwell, 1995, p. 366, nr. 20-9 ("No sensible person objects to the extraterritorial reach of the law in the case of fraud, lies or cheating in the securities field since these are crimes in all civilised states.").

[1685] *See* G. SCHUSTER, *Die internationale Anwendung des Börsenrechts*, Berlin, Springer, 1996, at 67 ("Weist aber der Sachverhalt keinen Bezug zu öffentlich-rechtlichen Ordnungsvorstellungen, etwa vermittels bestimmter Nichtigkeits- oder Anfechtungsgründe, auf, besteht aus der Sicht des Völkerrechts keine Notwendigkeit, Rechts- und Gerichtsstandswahlfreiheiten oder Kollisionsregeln des jeweiligen nationalen International Privatrecht einzuschränken.").

502. JUSTIFICATION OF EXTRATERRITORIAL SECURITIES JURISDICTION - While securities fraud may be deemed offensive by most States, this need not imply that it is always appropriately dealt with. States with less developed capital markets, or with a tradition of less stringent investor protection, may not muster the resources to bring a halt to securities fraud, or may use legal ploys so as to dismiss purportedly legitimate cases with a transnational aspect[1686]. Even when the laws against securities fraud are there, their enforcement is often weak.[1687] This is where the United States steps in. In order to offer investors the protection that the U.S. may believe they are denied abroad, U.S. courts and regulators expand their subject-matter jurisdiction under U.S. securities laws.

The extension of the reach of U.S. securities laws also serves a long-term educational goal, as it may serve as an incentive for other nations to crack down on securities fraud[1688] (which obviously does, by itself, not justify the initial jurisdictional assertion). If other nations start to assume their responsibility, an internationally uncontroversial 're-territorialization' of U.S. securities legislation may eventually ensue. The benchmarking effect of a broad reach of U.S. securities laws is however in doubt. Indeed, if the U.S. polices global securities markets, other States do not quite face an incentive to strengthen their own enforcement policies, and may be all too happy to free-ride.[1689] Moreover, U.S. bullying might not be the appropriate method to convince other States to adopt their regulatory framework along U.S. lines.[1690] Instead, a nationalist and emotional outpouring, which is hardly conducive for co-operation and harmonization, might ensue.

503. FORUM SELECTION – As is usual in international business, parties that enter into a securities contract may insert forum selection and choice-of-law clauses into their contract. Disputes should ordinarily be solved under the chosen law and by the chosen court. It is unclear to what extent courts are however required to abide by such clauses in the field of securities regulation. As securities law is regulatory law which also protects third parties, it might be argued that courts are allowed to cast aside forum selection and choice-of-law clauses. U.S. securities legislation indeed declares "void" any agreement to waive the substantive protections granted by the legislation.[1691] Nonetheless, in cases involving sophisticated economic actors, U.S. courts and regulators tend to respect choice-of-law and forum selection clauses in securities contracts,[1692] probably provided that the non-application of U.S. law does

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[1686] *Compare* G. FITZMAURICE, "The General Principles of International Law", 92 *R.C.A.D.I.* 1, 219 (1957-II) (stating, generally, that "[i]n the field of civil jurisdiction … the danger, or potential danger [is] not that States would try to assume too extensive a jurisdiction, but that, in cases involving a foreign element, their courts would manifest a reluctance to deal with the matter, and that there would be a tendency to decline jurisdiction or refuse to take cognizance of the case.").

[1687] *See* D.C. LANGEVOORT, "Cross-Border Insider Trading", 19 *Dick. J. Int'l L.* 161, 163 (2000-2001) (pointing that, "even as the "law on the books" in most developed countries converges on a common model, the commitment of surveillance and enforcement resources varies considerably").

[1688] *See SEC* v. *Kasser*, 548 F.2d 109, 116 (3d Cir, 1977).

[1689] *See, e.g.*, D.C. LANGEVOORT, "Schoenbaum Revisited: Limiting the Scope of Anti-fraud Protection in an International Securities Marketplace", 55 *Law & Contemp. Probs.* 241, 250 (1992).

[1690] *Compare id.*

[1691] Section 14 of the Securities Act and Section 29 of the Exchange Act.

[1692] *See* K. YOUNG CHANG, "Multinational Enforcement of U.S. Securities Laws: The Need for the Clear and Restrained Scope of Extraterritorial Subject-Matter Jurisdiction", 9 *Fordham J. Corp. & Fin. L.* 89, 110-113 (2003).

not harm third parties. Not surprisingly, an uncertain interpretation of the requirement of what clauses are exactly 'reasonable' in light of public policy might cause headaches to both investors and issuers.[1693]

7.1.2. The conduct and effects tests

504. SETTING ASIDE THE PRESUMPTION AGAINST EXTRATERRITORIALITY - U.S. securities legislation remains silent as to its territorial scope.[1694] Under the presumption against extraterritoriality, in the absence of a clear statement of the Congress as to the extraterritorial application of its acts, securities legislation should therefore not be applied extraterritorially.[1695] In order to deal with the regulatory challenges of the age of economic globalization, U.S. courts have however applied securities laws extraterritorially,[1696] relying on both a "conduct" and an "effects" test.[1697] In so doing, they rejected the presumption against extraterritoriality in securities matters, or, at least, "created a non-existent legislative intent."[1698]

[1693] *Id.*, at 113.

[1694] *See Zoelsch* v. *Arthur Andersen & Co.*, 824 F.2d 27, 30 (D.C. Cir. 1987) (stating that the Exchange Act furnishes "no specific indications of when American federal courts have jurisdiction over securities law claims arising from extraterritorial transactions"); *Bersch* v. *Drexel Firestone, Inc.*, 519 F.2d 974, 993 (2d Cir. 1975) ("We freely acknowledge that if we were asked to point to language in the statutes, or even in the legislative history, that compelled these conclusions [extraterritorial application of these statutes], we would be unable to respond."); *Continental Grain Pty.* v. *Pacific Oilseeds, Inc.*, 592 F.2d 409, 421 (8th Cir. 1979) ("We frankly admit that the finding of subject matter jurisdiction in the present case is largely a policy decision"); *MGC, Inc.* v. *Great W. Energy Corp.*, 896 F.2d 170, 173 (5th Cir. 1990) ("When Congress drafted the securities laws, it did not consider the issue of extraterritorial applicability, [which requires] that the federal courts fill the void."); *Itoba Ltd.* v. *Lep Group PLC*, 54 F.3d 118, 121 (2d Cir. 1995) ("It is well recognized that the Securities Exchange Act is silent as to its territorial application."). *Compare* § 403, comment b, Restatement (Third) of Foreign Relations Law ("Legislation dating from an earlier day, when economic regulation was less ambitious, is unlikely to reflect an intention to reach beyond the nation's frontier.").

[1695] *Compare* M.V. SACHS, "The International Reach of Rule 10b-5: The Myth of Congressional Silence", 28 *Colum. J. Transnat'l L.* 677, 681 (1990) (arguing that Congress actually only intended to apply the securities acts "to those investors whose trades occur in the United States").

[1696] *Bersch*, 519 F.2d at 993 ("The Congress that passed these extraordinary pieces of legislation in the midst of the depression could hardly have been expected to foresee the development of offshore funds thirty years later … Our conclusions rest on … our best judgment as to what Congress would have wished if these problems had occurred to it."); *Continental Grain (Australia) Pty. Ltd.* v. *Pacific Oilseeds, Inc.*, 592 F.2d 409, 416 (8th Cir. 1979) (recognizing that its decision "in favour of finding subject matter jurisdiction is largely based upon policy considerations"); *Robinson* v. *TCI/US West Communications, Inc.*, 117 F.3d 900, 905 (5th Cir. 1997) (courts "'filling the void' created by a combination of congressional silence and the growth of international commerce since the Exchange Act was passed"); *SEC* v. *Kasser*, 548 F.2d 109, 114 (3d Cir. 1977) ("[T]he anti-fraud laws suggest that such [extraterritorial] application is proper. The securities acts expressly apply to 'foreign commerce,' thereby evincing a Congressional intent for a broad jurisdictional scope for the 1933 and 1934 Acts.").

[1697] *See Alfadda* v. *Fenn*, 935 F.2d 475 (2d Cir. 1991); *See also*, P.K. WILLISON, "*Europe and Overseas Commodity Traders v. Banque Paribas London:* Zero Steps Forward and Two Steps Back", 33 *Vand. J. Transnat'l L.* 469, 472 (2000). *Compare* J. HOUCK, in Panel Discussion on the Draft Restatement of the Foreign Relations Law of the United States, 76 *Proc. Soc'y Int'l L.* 184, 197 (1982) ("As the cases have developed the court then decides: "What did Congress probably intend in the application of the particular securities law to the situation at hand?" and the answer usually is: "Well, we don't know, but it seems reasonable that if they had thought of it they would have applied thus and so in the particular situation.").

[1698] J.D. KELLY, "Let There Be Fraud (Abroad): A Proposal for a New U.S. Jurisprudence With Regard to the Extraterritorial Application of the Anti-Fraud Provisions of the 1933 and 1934 Securities Acts",

505. ROOTS OF THE CONDUCT AND EFFECTS TESTS IN INTERNATIONAL CRIMINAL LAW - The conduct and effects tests are applications of the public international law principle of territoriality in the field of securities antifraud regulation. Under the conduct test, jurisdiction obtains when territorial conduct could be discerned. In the criminal law governing cross-border offences, the exercise of such jurisdiction has been justified under the *subjective* territoriality principle. Under the effects test, jurisdiction obtains when territorial effects could be discerned, even if the conduct occurred abroad. Such jurisdiction has been justified under the *objective* territoriality principle in the criminal law.

506. INCONSISTENCY OF APPLICATION - A clear definition of what exactly constitutes territorial "conduct" or territorial "effect" is lacking. This confers inconsistency on court decisions and frustrates the legitimate expectations of market participants. The inconsistency of U.S. courts decisions, especially in extraterritorial fraud cases arising under Rule 10b-5 of the Exchange Act since the late 1960s,[1699] stands in stark contrast with the bright-line standard of SEC Regulation S (1990), which will be discussed in subsection 7.6.1.a. While the SEC attempted to limit the extraterritorial effects of its registration requirements by adopting Regulation S, U.S. courts have stuck to a remarkably liberal interpretation of the reach of the antifraud provisions of the securities laws. Legal uncertainty and a pro-forum bias are its defining characteristics.[1700] In spite of the prevailing inconsistency and even circuit split (as far as the application of the conduct test is concerned), the Supreme Court has not yet granted certiorari[1701] - possibly because "creat[ing] judicial doctrine where Congress has remained silent is improper judicial activism"[1702] – nor has Congress stepped in.

507. ROLE OF THE SECOND CIRCUIT – As will be evidenced by the cases discussed in this section, the Court of Appeals for the Second Circuit, which hears appeals from the U.S. District Court for the Southern District of New York, the U.S. financial capital,[1703] has played a key role in the interpretation of the securities laws by developing the public international law based conceptual underpinnings of

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28 *Law & Pol'y Int'l Bus.* 477, 480 (1997). *Id.*, at 492 (arguing that "the lower courts have defied a fundamental rule of statutory construction as articulated by the Supreme Court").

[1699] The main antifraud provision is Rule 10b-5, 17 C.F.R. § 240-10b-5 (2002), which is based on Section 10(b) of the Exchange Act, a provision that prohibits anyone from using 'any manipulative or deceptive device or contrivance' in the sale or purchase of securities. A plaintiff suing under Section 10(b) and Rule 10b-5 has to prove that a defendant "(1) made a misstatement or omission; (2) of material fact; (3) with scienter; (4) in connection with the purchase or sale of securities; (5) upon which the plaintiff relied; and (6) that reliance proximately caused the plaintiff's injury."

[1700] *See, e.g.*, P.K. WILLISON, "*Europe and Overseas Commodity Traders v. Banque Paribas London:* Zero Steps Forward and Two Steps Back", 33 *Vand. J. Transnat'l L.* 469, 499-501 (2000).

[1701] *Churchill Forest Indus. (Manitoba) Ltd.* v. *SEC*, 518 F.2d 109 (3rd Cir. 1977), *cert. denied*, 431 U.S. 938 (1977); *Bersch* v. *Arthur Andersen & Co.*, 519 F.2d 974 (2nd Cir. 1975), *cert. denied*, 423 U.S. 1018 (1975); *Manley* v. *Schoenbaum*, 405 F.2d 200 (2nd Cir. 1968), *cert. denied*, 395 U.S. 906 (1969).

[1702] *See* K. KASHEF, "Securities Law: Understanding Foreign Subject Matter Jurisdiction Under Section 10(b) of the Exchange Act of 1934", 8 *Tul. J. Int'l & Comp. L.* 533, 555 (2000).

[1703] The Second Circuit has been dubbed the "Mother Court" of securities laws. *See, e.g.*, *Blue Chips Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 762 (1975 (Blackmun, J., dissenting); *Continental Grain (Austl.) Pty Ltd.* v. *Pacific Oilseeds, Inc.*, 592 F.2d 409, 413 (8th Cir. 1979); *SEC* v. *Kasser*, 548 F.2d 109, 115 n. 29 (3d Cir. 1977).

extraterritorial jurisdiction in securities matters throughout the 1970s. The possibilities for U.S. courts to exercise subject-matter jurisdiction in antifraud suits, meticulously set out by the Second Circuit in *Bersch* v. *Drexel Firestone* (1975)[1704] are invariably cited by other circuits, although, inevitably, the words of the *Bersch* ruling have been given a different scope.

7.1.2.a. The Schoenbaum effects test

508. ORIGINS AND PRINCIPLES OF THE EFFECTS TEST - Before 1968, U.S. courts did not apply the antifraud provisions of the Exchange Act extraterritorially.[1705] With the internationalization of capital markets in the 1960s however, the need arose in the United States to expand the reach of the Exchange Act so as to clamp down on foreign securities fraud affecting the United States. To that effect, since 1968, U.S. securities courts routinely apply the effects test, borrowed from the 1945 *Alcoa* antitrust case.

509. SCHOENBAUM - In *Schoenbaum* v. *Firstbrook*, the Court of Appeals for the Second Circuit for the first time held that "Congress intended the Exchange Act to have extraterritorial application in order to protect domestic investors who have purchased foreign securities on American exchanges and to protect the domestic securities market from the effects of improper foreign transactions in American securities."[1706] The Second Circuit argued that "neither the usual presumption against extraterritorial application of legislation nor the specific language of [the Exchange Act] showed Congressional intent to preclude application of the Exchange Act to transactions regarding stocks traded in the United States which are effected outside the United States, when extraterritorial application of the Act is necessary to protect American investors."[1707] Under *Schoenbaum*, all securities transactions, foreign or domestic, involving securities listed in the United States, are subject to U.S. laws.[1708] The restriction of the effects test to securities listed in the United States was later, as will be seen, abandoned by the Second Circuit in the *Bersch* case.

The breakthrough of the effects test in *Schoenbaum* has been attributed to the fact that violations of securities laws, like violations of antitrust laws – the extraterritorial application of which was already recognized in 1945[1709] – may cause widespread harm, unlike violations of other laws.[1710] It is also submitted that, by 1968, international law recognized extraterritorial jurisdiction based on domestic conduct or

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[1704] *Bersch* v. *Drexel Firestone, Inc.*, 519 F.2d 974, 993 (2d Cir. 1975).
[1705] *See Kook* v. *Crang*, 182 F. Supp. 388, 390-91 (S.D.N.Y. 1960) (dismissing jurisdiction because "[a]ll the essentials of [the] transactions occurred without the United States", and "jurisdiction' as used in Section 30(b) [of the Securities Exchange Act] contemplates some necessary and substantial act within the United States").
[1706] *Schoenbaum* v. *Firstbrook*, 405 F.2d 200, 206 (2d Cir. 1968).
[1707] *Id.* The Court rejected the view that Section 30(b) of the Securities Exchange Act was intended to exempt foreign transactions from the reach of the Exchange Act. It held instead that "the presumption must be made that the Act was meant to apply to those foreign transactions not specifically exempted". *Id.*, at 208.
[1708] *See also Continental Grain (Austl.) Pty. Ltd.* v. *Pacific Oilseeds, Inc.*, 592 F.2d 409, 416 (8th Cir. 1979).
[1709] *See United States* v. *Aluminium Co. of Am.*, 148 F.2d 416 (2d Cir. 1945).
[1710] *See* W. ESTEY, "The Five Bases of Extraterritorial Jurisdiction and the Failure of the Presumption Against Extraterritoriality", 21 *Hastings Int'l & Comp. L. Rev.* 177, 187 (1997).

effects.[1711] Nonetheless, the finding of congressional intent by the *Schoenbaum* court has been denounced for its lack of textual support, and has been termed a "purposive interpretation" of the Exchange Act.[1712]

7.1.2.b. Bersch v. Drexel Firestone: setting out the principles of extraterritorial jurisdiction over securities fraud

510. THE BERSCH TEST - In *Bersch* v. *Drexel Firestone* case (1975),[1713] Judge Friendly of the Court of Appeals, for the Second Circuit, after refuting arguments that the securities laws did not contemplate the exercise of extraterritorial jurisdiction,[1714] and that the SEC's strict standard for registration ought also to apply to antifraud cases,[1715] set out the basic principles governing extraterritorial jurisdiction over securities fraud, which have guided other courts ever since, as follows:

> "[T]he anti-fraud provisions of the federal securities laws:
>
> (1) Apply to losses from sales of securities to Americans resident in the United States whether or not acts (or culpable failures to act) of material importance occurred in this country; and
> (2) Apply to losses from sales of securities to Americans resident abroad if, but only if, acts (or culpable failures to act) of material importance in the United States have significantly contributed thereto; but
> (3) Do not apply to losses from sales of securities to foreigners outside the United States unless acts (or culpable failures to act) within the United States directly caused such losses."[1716]

511. THE BERSCH EFFECTS TEST - Clearly, under the *Bersch* standard, not all securities frauds affecting the U.S. are subject to U.S. law. If the fraud occurs abroad, but the effects are felt by U.S. nationals resident in the United States, U.S. laws apply

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[1711] *Id.*, citing Sections 17 and 18 of the Restatement (Second) of the Foreign Relations Law of the United States. This argument appears perfunctory in that foreign State practice and *opinio iuris* concerning the legality of such extraterritorial jurisdiction is almost entirely lacking.

[1712] *See* M.D. VANCEA, "Exporting U.S. Corporate Governance Standards Through the Sarbanes-Oxley Act: Unilateralism or Cooperation?", 53 *Duke L.J.* 833, 850 (2003-2004).

[1713] *Bersch* v. *Drexel Firestone, Inc.*, 519 F.2d 974 (2d Cir. 1975). In *Bersch*, Howard Bersch, a U.S. citizen and resident, alleged that he was a victim of a false and misleading prospectus issued by I.O.S., a Canadian corporation, when it distributed its common stock through a number of primary and secondary offerings under a non-U.S. prospectus. The case revolved around the third (secondary) offering of 3,950,000 shares by I.O.B. Ltd., a Bahamian subsidiary of I.O.S. Mr Bersch had purchased 600 of these shares, although the shares were not offered in the U.S. in order to avoid the reach of U.S. securities laws.

[1714] *Id.*, at 993 (pointing out that "[t]he Congress that passed these extraordinary pieces of legislation in the midst of the depression could hardly have been expected to foresee the development of off-shore funds thirty years later.").

[1715] *Id.*, at 986 (The SEC had disclaimed the applicability of the registration requirements of the Securities Act to public offerings of securities outside the U.S. The defendants therefore argued that the public offering of I.O.S. securities was not subject to U.S. registration. The Second Circuit however drew a distinction between the registration requirements and the antifraud provisions of the U.S. securities regulations, and stated that the latter could apply to many transactions which are not subject to registration).

[1716] *Id.*, at 993.

under the *Bersch* standard, even if no U.S. conduct whatsoever could be discerned.[1717] General adverse effects of the collapse of a corporation in the United States as a result of a securities fraud do not suffice for there to be subject-matter jurisdiction, since "there is subject matter jurisdiction of fraudulent acts relating to securities which are committed abroad only when these result in injury to purchasers or sellers of those securities in whom the United States has an interest, not where acts simply have an adverse affect on the American economy or American investors generally."[1718] Under *Bersch*, the U.S. only has a regulatory interest in protecting U.S. *nationals residing in the United States* from foreign securities fraud, not as abstract a matter as 'the U.S. economy'.

On the face of it, U.S. law does not apply to a foreign securities fraud affecting foreigners resident in the United States. U.S. nationals residing abroad are doubtless not protected, as "Congress surely did not mean the securities laws to protect the many thousands of Americans residing in foreign countries against securities frauds by foreigners acting there, and we see no sufficient reason to believe it would have intended otherwise simply because an American participated as long as he had done nothing in the United States."[1719] Accordingly, as the Second Circuit also held in *IIT* v. *Vencap*, decided on the same day as *Bersch*, the active personality principle of criminal jurisdiction does not apply in a securities context.[1720]

512. EFFECTS ON U.S. INVESTORS - Importantly, *Bersch* expanded the *Schoenbaum* effects test in that it did not require that the securities upon which the fraud is perpetrated are U.S. securities. If a U.S. national who resides in the U.S. purchases foreign securities, and is harmed by foreign fraudulent conduct, she is also entitled to the protection of U.S. securities regulations.[1721] Jurisdiction is however not so much premised on the principle of nationality/residence, but rather on "the presence of significant *deception* (that is, ill-informed investor decisions) occurring in the United States".[1722] The ill-informed investor decision is the territorial *effect* of the fraud engineered abroad, so that jurisdiction falls squarely within the effects doctrine.

513. SCOPE OF THE EFFECTS TEST – The broad effects test of *Bersch* is also espoused by § 416 (1) of the Restatement (Third) of Foreign Relations Law (1987), which states: "The United States may generally exercise jurisdiction to prescribe with

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[1717] Although it was unclear how Bersch and other U.S. residents came to subscribe to 600 I.O.S. shares, as the shares were not offered in the U.S., the Court assumed that the prospectuses were somehow mailed to U.S. residents related to I.O.S. (Bersch was a consultant to I.O.S.), and thus that, along the lines of the *Alcoa* effects test, U.S. courts had subject-matter jurisdiction. It should be pointed out here that the I.O.B. prospectus and a SEC order of 1967 relating to the sale of I.O.S. securities generally excluded the sale of securities to U.S. citizens, but not to U.S. employees of I.O.S. In other words, I.O.S. did not sufficiently close the loophole of the non-applicability of U.S. securities laws. Only if all U.S. citizens were excluded from purchasing foreign securities would U.S. securities laws not have been applied.

[1718] *Bersch*, 519 F.2d 989. If the securities are traded on a U.S. market, general adverse effects may possibly suffice. *See Des Brisay* v. *Goldfield Corp.*, 549 F.2d 133 (9th Cir. 1977).

[1719] *Bersch*, 519 F.2d 992.

[1720] *IIT* v. *Vencap, Ltd.*, 509 F.2d 1001, 1016 (2d Cir. 1975) (rejecting subject matter jurisdiction over situations which have as the sole U.S. nexus the U.S. nationality of the fraudster).

[1721] § 416 Restatement (Third) of Foreign Relations Law, reporters' note 2 (noting that "injury to a resident of the United States presumably comes within the effects principle…").

[1722] D.C. LANGEVOORT, "Schoenbaum Revisited: Limiting the Scope of Anti-fraud Protection in an International Securities Marketplace", 55 *Law & Contemp. Probs.* 241, 245 (1992).

respect to … conduct, regardless of where it occurs, significantly related to a transaction [in securities], if the conduct has, or is intended to have, a substantial effect in the United States."[1723] § 416 does not give a precise definition of 'effects'. However, the nature of effects is borne out by § 416(2) of the Restatement, which sets forth that any exercise of jurisdiction ought to be reasonable in light of § 403 of the Restatement, in particular "(a) whether the transaction or conduct has, or can reasonably be expected to have, a substantial effect on a securities market in the United States for securities of the same issuer or on holdings in such securities by United States nationals or residents." In spite of the reference to the rule of reason enshrined in § 403, this Restatement's effects test has been denounced as "by far the broadest statement of the extraterritorial reach of U.S. securities law".[1724] One commentator has asserted, although not particularly persuasively, that it would allow jurisdiction over foreign activities that produce (substantial) effects that are not harmful, whereas international law would require effects to be harmful.[1725]

Given the vague nature of "substantial effects", the scope of the effects test is as yet unclear,[1726] *inter alia* because of the scarcity of the cases applying the test.[1727] In *IIT* v. *Vencap,* the Second Circuit rejected effects-based jurisdiction over a fraud practiced on a foreign investment trust having a limited number of U.S. shareholders (0,2 % owning 0,5 % of the trust, the shares of which were moreover not intended to be offered to U.S. residents or citizens),[1728] although it did not set forth how substantiality should be exactly assessed. The Seventh Circuit later clarified that solely "foreseeable and substantial harm to interests in the United States" may qualify as a sufficiently adverse domestic effect for purposes of the effects test,[1729] yet also this Circuit failed to provide clear guidelines on foreseeability and substantiality.

514. THE BERSCH CONDUCT TEST - If the securities fraud takes place within the U.S., irrespective of the effects of this conduct, U.S. law applies.[1730] However, if the victim is a foreigner abroad, direct causation need to be established, whereas, if she is a U.S. national abroad, U.S. acts of material importance that significantly contributed to the losses incurred by a securities fraud suffice.[1731] The Second Circuit justified this distinction between foreigners and U.S. nationals abroad for purposes of

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[1723] § 416(1)(c) of the Restatement (Third).
[1724] *See* J. SHIRLEY, "International Law and the Ramifications of the Sarbanes-Oxley Act of 2002", 27 *B.C. Int'l & Comp. L. Rev.* 501, 521 (2004).
[1725] *See* M.D. VANCEA, "Exporting U.S. Corporate Governance Standards Through the Sarbanes-Oxley Act: Unilateralism or Cooperation?", 53 *Duke L.J.* 833 (2003-2004).
[1726] *See* W.B. PATTERSON, "Defining the Reach of the Securities Exchange Act: Extraterritorial Application of the Antifraud Provisions", 74 *Fordham L. Rev.* 213, 223 (2005)
[1727] *See* J.D. KELLY, "Let There Be Fraud (Abroad): A Proposal for a New U.S. Jurisprudence With Regard to the Extraterritorial Application of the Anti-Fraud Provisions of the 1933 and 1934 Securities Acts", 28 *Law & Pol'y Int'l Bus.* 477, 482 (1997).
[1728] *IIT* v. *Vencap, Ltd.*, 509 F.2d 1001, 1016-17 (2d Cir. 1975).
[1729] *Tamari* v. *Bache & Co.* (Leb.), S.A.L., 730 F.2d 1103, 1108 (7th Cir. 1984); *Mak* v. *Wocom Commodities Ltd.*, 112 F.3d 287, 289 (7th Cir. 1997); *Kauthar SDN BHD* v. *Sternberg*, 149 F.3d 659, 665 (7th Cir. 1998); *Koal Industries Corp.* v. *Asland, S.A.*, 808 F. Supp. 1143, 1155 (S.D.N.Y. 1992) (ruling that "under the effects test, a federal court has jurisdiction where illegal activity abroad causes a 'substantial effect' within the United States")
[1730] *Bersch*, 519 F.2d 985.
[1731] *See also id.*, at 992 ("While merely preparatory activities in the United States are not enough to trigger application of the securities laws for injury to foreigners located abroad, they are sufficient when the injury is to Americans so resident.").

applying the conduct test on grounds of judicial economy, holding that "it would be erroneous to assume that the legislature always meant to go the full extent permitted. When, as here, a court is confronted with transactions that on any view are predominantly foreign, it must seek to determine whether Congress would have wished the precious resources of United States courts and law enforcement agencies to be devoted to them rather than leave the problem to foreign countries."[1732] The court however refused to deprive foreigners of the protection of U.S. laws altogether, as "Congress did not mean the United States to be used as a base for fraudulent securities schemes even when the victims are foreigners […]."[1733]

Oddly, in the *Vencap* case, decided by the Second Circuit on the same day as *Bersch*, the court did seemingly not believe that a stricter conduct test ought to performed if the victim were a foreign national. The court indeed held, as a general matter, that it did "not think Congress intended to allow the United States to be used as a base for manufacturing fraudulent securities devices for export, even when these are peddled only to foreigners."[1734]

515. DISTINGUISHING BETWEEN AMERICANS AND FOREIGNERS FOR PURPOSES OF THE CONDUCT TEST - The important distinction between sales to Americans resident abroad and sales to foreigners abroad in terms of the substantial character of the U.S. conduct cannot be premised on the conduct test or the subjective territorial principle alone, as the same effects on persons located in the same foreign State are treated differently. It is instead premised, borrowing the term from international criminal law, on the passive personality principle. The passive personality principle does not support the jurisdictional assertions by its own terms however, as the U.S. considers U.S. investors to be worth of protection wherever they are located only if significant activities causing the harm to these investors take place *in the United States*.[1735] The liberal U.S. conduct test relating to securities fraud of which U.S. nationals are victims thus involves elements of both the subjective territoriality principle and the passive personality principle.

7.1.2.c. A closer look at the conduct test

516. LEASCO - *Bersch* (1975) was not the case that pioneered the conduct test. After the Second Circuit introduced the effects test in *Schoenbaum* (1968), it pioneered the conduct test in *Leasco Data Processing Equipment Corporation* v. *Maxwell* (1972).[1736] In *Leasco*, the court did however not specifically elaborate on the criteria of the conduct test, except possibly by setting forth the requirement that the U.S. conduct represent an essential link in the fraudulent transaction (which may be

[1732] *Id.*, at 985.
[1733] *Id.*, at 987.
[1734] *IIT* v. *Vencap, Ltd.*, 509 F.2d 1001, 117 (2d Cir. 1975). *Compare Bersch*, 519 F.2d 993. *See also* J.D. KELLY, "Let There Be Fraud (Abroad): A Proposal for a New U.S. Jurisprudence With Regard to the Extraterritorial Application of the Anti-Fraud Provisions of the 1933 and 1934 Securities Acts", 28 *Law & Pol'y Int'l Bus.* 477, 488 (1997) (arguing that "the court seemed to have discarded the nationality requirement, ironically, on the same day that it was announced").
[1735] *See also* § 416 Restatement (Third) of Foreign Relations Law, reporters' note 2 (noting that although "injury to a resident of the United States presumably comes within the effects principle, … protection of a United States national residing abroad may not, without some additional factor, warrant exercise of regulatory jurisdiction by the United States").
[1736] 468 F.2d 1326 (2nd Cir 1972).

construed as a requirement that the U.S. conduct itself is fraudulent).[1737] In *Bersch*, decided three years after *Leasco*, the Second Circuit eventually provided clarification.

Leasco was a case involving the fraudulent sale of securities of a corporation listed on the London Stock Exchange by a British national (Maxwell) to an English corporation with its principal place of business in the United States (Leasco). A number of fraudulent misrepresentations (meetings and phone calls) had been made within the United States. At the time, in keeping with the *Schoenbaum* effects test, the fact that a U.S.-based investor was harmed did not suffice to confer jurisdiction, unless the securities were listed in the United States.[1738] In order to establish subject-matter jurisdiction, the Second Circuit therefore had to find another nexus to the United States than effects. It found this nexus in U.S. conduct, and justified the exercise of conduct-based subject-matter jurisdiction on the ground that "[t]he New Yorker who is the object of fraudulent misrepresentations in New York is as much injured if the securities are of a mine in Saskatchewan as in Nevada.".[1739]

The *Leasco* conduct test was not a pure one, since the defrauded corporation was a U.S.-based corporation, and could thus be protected under the effects test. Arguably, the Second Circuit court was still reluctant to adopt a test in which mere U.S. conduct would suffice, so as not to open the floodgates of U.S. securities litigation to foreign plaintiffs suing foreign defendants over a fraudulent transaction causing effects abroad.[1740] In *Bersch* by contrast, as set out *supra*, the Second Circuit espoused a pure conduct test, although it required a stricter causation between domestic conduct and foreign losses if the victims of the fraud were foreigners.

517. RESTATEMENT – Like *Bersch*, § 416 of the Restatement (Third) of Foreign Relations Law (1987), which delimits the jurisdiction of the United States to regulate activities related to securities), gives a broad interpretation to the conduct test. It states that the United States may generally exercise jurisdiction to prescribe with respect to "conduct occurring predominantly in the United States that is related to a transaction in securities, even if the transaction takes place outside the United States."[1741] It does not set forth a jurisdictional bright-line rule, but adds that the

[1737] *Id.*, at 1335 (pointing out that "fraudulent acts in the United States significantly whetted Leasco's interest in acquiring Pergamon shares").
[1738] *Id.*, at 1334 (holding that "the language of § 10(b) of the Securities Exchange Act is much too inconclusive to lead us to believe that Congress meant to impose rules governing conduct throughout the world in every instance where an American company bought or sold a security"). *Id.*, ("If all the misrepresentations here alleged had occurred in England, we would entertain most serious doubt whether, despite United States v. Aluminium Co. of America, 148 F.2d 416, 443-444 (2 Cir. 1945), and *Schoenbaum*, § 10(b) would be applicable simply because of the adverse effect of the fraudulently induced purchases in England of securities of an English corporation, not traded in an organized American securities market, upon an American corporation whose stock is listed on the New York Stock Exchange and its shareholders.").
[1739] *Id.*, at 1336.
[1740] *See* J.D. KELLY, "Let There Be Fraud (Abroad): A Proposal for a New U.S. Jurisprudence With Regard to the Extraterritorial Application of the Anti-Fraud Provisions of the 1933 and 1934 Securities Acts", 28 *Law & Pol'y Int'l Bus.* 477, 486-87 (1997).
[1741] § 416 (1) (d) of the Restatement (Third). *See also* § 416(1)(e) (stating that the U.S. may also exercise jurisdiction over "investment advice or solicitation of proxies or of consents with respect to securities, carried out predominantly in the United States").

reasonable character of conduct-based jurisdiction may depend on the representations being made or the negotiations being conducted in the United States.[1742]

518. CIRCUIT SPLIT – Although both the effects and conduct tests have a potentially broad and uncertain reach, it is the conduct test that has proved to be particularly confusing and controversial in the United States.[1743] The problems of application surrounding the conduct test have been compounded by a split between the different circuits, which pits the liberal Third Circuit against the strict Second and D.C. Circuits, with the Seventh, Eighth and Ninth Circuits somehow occupying the middle ground.[1744] It may be hoped that the Supreme Court, or even Congress, ultimately revolves this split.[1745]

519. RESTRICTIVE APPROACH - As discussed *supra*, in *Bersch* v. *Drexel Firestone*, the Second Circuit ruled that the securities laws applied "to losses from sales of securities to Americans resident abroad if, but only if, acts (or culpable failures to act) of material importance in the United States have significantly contributed thereto; but do not apply to losses from sales of securities to foreigners outside the United States unless acts (or culpable failures to act) within the United States directly caused such losses."[1746]

In *Zoelsch* v. *Arthur Andersen*, the D.C. Circuit seemingly took the same restrictive view. Drawing on the Second Circuit's test, it believed jurisdiction to be "appropriate when the fraudulent statements or misrepresentations originate in the United States, are made with scienter and in connection with the purchase or sale of securities, and "directly cause" the harm to those who claim to be defrauded, even if reliance and damages occur elsewhere."[1747] In the case, this implied that, when a U.S. audit firm makes misrepresentations to a foreign audit firm that conducts an audit of a foreign corporation, U.S. courts cannot establish subject matter jurisdiction over the conduct of the U.S. firm, since these misrepresentations are not made in connection with the purchase or sale of securities, and are therefore "merely preparatory" and do not "directly cause" foreign losses.[1748]

[1742] § 416 (2) of the Restatement. The fact that the representations are made or the negotiations conducted in the United States is not itself decisive to establish or dismiss jurisdiction. *See, e.g.*, *MCG, Inc.* v. *Great W. Energy Corp.*, 896 F.2d 170, 175 (5th Cir. 1990).

[1743] This has led the Seventh Circuit to use the term 'approach' in lieu of the overly inflexible term 'test'. *Kauthar SDN BHD* v. *Sternberg*, 149 F.3d 659, 664-65 (7th Cir. 1998).

[1744] In *In re Cable & Wireless*, the District Court for the Eastern District of Virginia, which belongs to the Fourth Circuit, joined the middle ground position of the Seventh, Eighth, and Ninth Circuits. *See In re Cable & Wireless, PLC, Sec. Litig.*, 321 F. Supp. 2d 749, 757-58 (E.D. Va. 2004).

[1745] The Supreme Court has repeatedly denied certiorari in transnational securities fraud cases. *See Churchill Forest Indus. (Manitoba), Ltd.* v. *SEC*, 518 F.2d 109 (3rd Cir. 1977), cert. denied, 431 U.S. 938 (1977); *Bersch* v. *Arthur Andersen & Co.*, 519 F.2d 974 (2nd Cir. 1975), cert. denied, 423 U.S. 1018 (1975); *Manley* v. *Schoenbaum*, 405 F.2d 200 (2nd Cir. 1968), cert. denied, 395 U.S. 906 (1969); M.J. CALHOUN, "Tension on the High Seas of Transnational Securities Fraud: Broadening the Scope of United States Jurisdiction", 30 Loy. U. Chi. L.J. 679, 723 (1999); K. KASHEF, "Securities Law: Understanding Foreign Subject Matter Jurisdiction under Section 10(b) of the Exchange Act of 1934", 8 *Tul. J. Int'l & Comp. L.* 533, 555 (2000).

[1746] *Bersch*, 519 F.2d at 993.

[1747] *Id.*, at 33.

[1748] The same may hold true under domestic U.S. law. *Id.*, at 34-35

The restrictive approach, the essence of which is captured by the *Leasco* court's observation that "it would be … erroneous to assume that the legislature always means to go to the full extent permitted,"[1749] appears to require that U.S. conduct be more than merely preparatory.[1750] In order for there to be jurisdiction for U.S. courts, the U.S. conduct needs to directly cause foreign losses,[1751] be of material importance to the fraud,[1752] constitute a 'substantial part' of the fraud,[1753] include "the perpetration of fraudulent acts themselves",[1754] or, if these requirements are not met, involve substantial U.S. participation[1755]. The restrictive approach has been variously justified on grounds of international comity, the presumption against extraterritoriality, judicial economy,[1756] and the principle of the separation of powers.[1757] It has also been submitted that it may typically apply to private placements, where the U.S. has not as strong a regulatory interest in having its law applied as with respect to public offerings.[1758]

520. LIBERAL APPROACH - Other circuits, the Third, Eighth and Ninth Circuits in particular, have established jurisdiction when domestic conduct merely furthered a fraudulent scheme, short of constituting all Rule 10b-5 elements.[1759] It may not even be required "that accomplishment of the attempted fraud be a precondition to statutory liability".[1760] For the liberal courts, a federal court may have

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[1749] *Leasco*, 468 F.2d at 1334; *Bersch*, 519 F.2d at 985. *See also United States* v. *Cook*, 573 F.2d 281, 283 (5th Cir. 1978) (declining "to formulate the outer perimeter of American jurisdiction"); *Robinson*, 117 F.3d at 906 (stating that "[t]o broaden our jurisdiction beyond the minimum necessary to achieve [the goals of the securities laws] seems unwarranted in the absence of express legislative command"); *Kauthar SDN BHD* v. *Sternberg*, 149 F.3d 659, 667 (7th Cir. 1998) ("In our view, the absence of all but the most rudimentary Congressional guidance counsels that federal courts should be cautious in determining that transnational securities matters are within the ambit of our antifraud statutes.").

[1750] *Bersch*, 519 F.2d at 987.

[1751] *Bersch*, 519 F.2d at 993; *Psimenos* v. *E.F. Hutton & Co.*, 722 F.2d 1041, 1046 (2d Cir. 1983).

[1752] *Kauthar SDN BHD* v. *Sternberg*, 149 F.3d 659, 667 (7th Cir. 1998) ("When the conduct occurring in the United States is material to the successful completion of the alleged scheme, [subject matter] jurisdiction is asserted."); *Robinson* v. *TCI/US West Cable Telecommunications, Inc.*, 117 F.3d 900, 905-06 (5th Cir. 1997).

[1753] *Psimenos* v. *E.F. Hutton & Co.*, 722 F.2d 1041, 1045 (2d Cir. 1983) ("[Thus], foreign plaintiffs' suits under anti-fraud provisions of the securities laws [will] be heard only when substantial acts in furtherance of the fraud were committed within the United States … activities which are 'merely preparatory' will not support jurisdiction in and of themselves"); *IIT* v. *Vencap, Ltd.*, 519 F.2d 1001, 1018 (2d Cir. 1975) (holding that there is no jurisdiction if the "bulk of the activity was performed in foreign countries").

[1754] *Vencap*, 519 F.2d at 1018 (deeming this restriction necessary if "the securities laws are not to apply in every instance where something has happened in the United States, however large the gap between the something and a consummated fraud and however negligible the effect in the United States or on its citizens").

[1755] *IIT* v. *Cornfeld*, 619 F.2d 909, 920 (2d Cir. 1980) (admitting that the U.S. activities of the defendant "on their face may appear similar to those held in *Bersch* to be 'merely preparatory', and thus insufficient to have 'directly caused' loss to foreigners", but distinguishing *Bersch* on the ground that there was "greater relative American participation" and the securities were "essentially American").

[1756] *Zoelsch* v. *Arthur Andersen & Co.*, 824 F.2d 27, 32 (D.C. Cir. 1987).

[1757] *See* M.J. CALHOUN, "Tension on the High Seas of Transnational Securities Fraud: Broadening the Scope of United States Jurisdiction", 30 *Loy. U. Chi. L.J.* 679, 698-700 (1999).

[1758] *See* H. KRONKE, "Capital Markets and Conflict of Laws", 286 *R.C.A.D.I.* 245, 285 (2000) (discussing the *Zoelsch* case).

[1759] *Continental Grain Pty. Ltd.* v. *Pacific Oilseeds, Inc.*, 592 F.2d 409, 421 (8th Cir. 1979); *SEC* v. *Kasser*, 548 F.2d 109, 114 (3d Cir.).

[1760] *SEC* v. *Kasser*, 548 F.2d 109, 114 (3d Cir.).

jurisdiction "[w]here at least some activity designed to further a fraudulent scheme occurs within" the United States.[1761]

It is doubtful whether the liberal courts would be as brazen to establish jurisdiction over U.S. conduct relating to wholly foreign fraudulent transactions by foreigners that are in the U.S. only transitorily.[1762] In *EOC* v. *Paribas*, the Second Circuit – admittedly one of the stricter circuits – held that U.S. courts can only establish jurisdiction when a relevant interest of the U.S. is implicated. It would be unreasonable to establish jurisdiction under the conduct test on the basis of phone calls to a transient foreign national in the U.S., especially when the transaction concerned is clearly subject to the regulatory jurisdiction of another country with a clear and strong interest in redressing any wrong.[1763] Under a relaxed standard, such U.S. conduct may theoretically give rise to U.S. jurisdiction. Nonetheless, it appears that even the liberal courts would be hard-pressed to effectively exercise their jurisdiction over a fact-pattern involving transitory presence.

7.1.2.d. Combining conduct and effects

521. ITOBA: COMBINING CONDUCT AND EFFECTS - Traditionally, U.S. courts apply either the conduct or the effects test to a cross-border securities fraud with a U.S. nexus. In 1995, in *Itoba Ltd.* v. *Lep Group PLC* however,[1764] the Second Circuit combined the two tests. In this case, the securities "Mother Court" held that the conduct and effects test need not "be applied separately and distinctly from each other".[1765] Instead, "an admixture or combination of the two often gives a better picture of whether there is sufficient United States involvement to justify the exercise of jurisdiction by an American court."[1766] To date, no other court has applied the *Itoba* combination test. No court has rejected it either, and the Seventh Circuit supported it, stating that "[s]ince the aim of [the *Itoba*] inquiry is to measure the degree of United States involvement in the transaction in question, the joint assessment of conduct and effects seems appropriate because it permits a more comprehensive assessment of the overall transactional situation.".[1767]

522. The *Itoba* inquiry goes beyond the classical rigid divide between objective (effects) and subjective (conduct) territoriality. Instead, it tracks, in line with § 403 and § 416 (2) of the Restatement (Third) of U.S. Foreign Relations Law, the

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[1761] *SEC* v. *Kasser*, 548 F.2d at 114. *See also Travis* v. *Anthes Imperial Limited*, 473 F.2d 515, 524 (8th Cir. 1973) ([Subject matter jurisdiction] attaches whenever there has been significant conduct with respect to the alleged violations in the United States. And this is true even though the securities are foreign ones that had not been purchased on an American exchange.").

[1762] Restatement (Third) of Foreign Relations Law, § 416, reporters' note 2 (arguing that in this case, "neither party acted with the expectation that those laws would apply and neither the actors nor the market involved was within the zone of protection of United States securities legislation").

[1763] *Europe and Overseas Commodity Traders* v. *Banque Paribas London*, 147 F.3d 118, 129 (2nd Cir. 1998), contrasting *EOC* with other cases in which there had been a transaction on a U.S. exchange, economic activity in the U.S., harm to a U.S. party, or activity by a U.S. person or entity meriting redress (citing *Alfadda* v. *Fenn*, 935 F.2d 475 (2d Cir. 1991); *Psimenos* v. *E.F. Hutton & Co.*, 722 F.2d 1041, 1046 (2d Cir. 1983); *IIT* v. *Cornfeld*, 619 F.2d 909, 918-21 (2d Cir. 1980); *Arthur Lipper Corp.* v. *SEC*, 547 F.2d 171 , 179 (2d Cir. 1976); *Leasco*, 468 F.2d at 1338).

[1764] 54 F.3d 118 (2d Cir. 1995).

[1765] *Id.*, at 122.

[1766] *Id.*

[1767] *Kauthar SDN BHD* v. *Sternberg*, 149 F.3d 659, 665 n. 8 (7th Cir. 1998).

reasonableness of a particular jurisdictional assertion in light of a variety of factors connecting a securities fraud with the United States. Although the factors in *Itoba* are still based on the traditional territorial principle, the *Itoba* combination nonetheless may open up a space in which more attention might be devoted to other, more interest-based factors of a § 403 jurisdictional analysis.[1768]

7.2. Securities antifraud jurisdiction in Europe

523. INTRODUCTION - The sort of 'extraterritorial' jurisdiction exercised by Member States of the European Union is *prima facie* a far cry from the broad jurisdictional assertions prevalent in the U.S. In Europe, jurisdiction over securities misrepresentations is governed by generally uncontroversial rules of judicial jurisdiction provided for in the EEX Regulation 44/2001,[1769] whereas conflict-of-laws problems are governed by national private international law rules mostly relating to tort or contractual liability. These rules have a general scope and are not specifically tailored to cross-border securities misrepresentations and fraud.[1770] For insider-trading however, a 2003 EC Directive sets forth a special jurisdictional regime, based on territorial conduct and listing.[1771] In this section, securities misrepresentations and insider-trading are dealt with separately, since, unlike in the United States, they are subject to a very different legal regime in Europe. As will be seen, the theoretical reach of European law on the books is broader than the law's reach in practice.

7.2.1. Securities misrepresentation as a tort

7.2.1.a. Judicial jurisdiction over securities misrepresentations

524. EEX-REGULATION – Jurisdiction over securities misrepresentations is governed by Council Regulation 44/2001 (EEX-Regulation), because the Regulation applies to all civil and commercial matters,[1772] and does not exclude the trade in securities from its purview. By virtue of this Regulation, the court of the EU Member State where the defendant has its domicile has jurisdiction over a securities misrepresentation.[1773] If the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall be determined by the law of that Member State.[1774] If the securities misrepresentation constitutes a breach of contract, the person domiciled in a Member State may also be sued in another Member State which is the place of performance of the obligation in question.[1775] If the securities misrepresentation constitutes a tort, the courts for the place where the harmful event occurred or may occur have jurisdiction.[1776] In this subsection, the

[1768] *Contra* W. ESTEY, "The Five Bases of Extraterritorial Jurisdiction and the Failure of the Presumption Against Extraterritoriality", 21 *Hastings Int'l & Comp. L. Rev.* 177, 189 (1997).
[1769] Council Regulation 44/2001, *O.J.* L 12/1 (2001).
[1770] *Contra* Article 114 of Belgian Code of Private International Law (*see* 7.2.1.b).
[1771] EC Directive on Insider-dealing and Market Manipulation of 28 January 2003, *O.J.* L 96/16 (2003).
[1772] Article 1 EEX-Regulation..
[1773] *Id.*, Article 2. For corporations, 'domicile' means the statutory seat, the central administration or the principal place of business (Article 60). If there are several defendants, the plaintiff could sue all of them in the courts for the place where any of them is domiciled (Article 6.1).
[1774] *Id.*, Article 4.1.
[1775] *Id.*, Article 5.1.
[1776] *Id.*, Article 5.3.

law of securities torts will be elaborated upon, as it is there, and not in the law of contracts, that (over)broad assertions of jurisdiction will ordinarily surface.

525. EC DIRECTIVE ON PROSPECTUSES - The 2003 EC Directive on Prospectuses, which sets forth a legal regime for cross-border offers and admission to trading,[1777] does not feature jurisdictional provisions relating to prospectus liability, and is thus not relevant for our purposes. The provisions on cross-borders offers and admission to trading only provide that the prospectus approved by one Member State *shall* be valid for the public offer or the admission to trading in any number of other *Member States*,[1778] and that the prospectus for an offer to the public or for admission to trading on a regulated market, drawn up by an issuer having its registered office in a *third country*, *i.e.*, outside the EU, in accordance with the legislation of that country, *may* be approved by the competent authority of an EU Member State.[1779] It does not clarify what law should apply or what State should have jurisdiction in case of a misrepresentation done in a prospectus of an offering in one State to which persons from another State subscribe. The law governing misrepresentations done in prospectuses thus remains subject to the national law of the EU Member State.

526. JURISDICTION V. APPLICABLE LAW IN SECURITIES CASES: THE EU-U.S. DIVIDE - If a European court has determined that it has (judicial) jurisdiction over the securities misrepresentation on the basis of the EEX-Regulation, it should ascertain the applicable law on the basis of a separate analysis. This two-pronged analysis is the main conceptual difference between European and U.S. exercise of jurisdiction over cross-border securities transactions.

When U.S. courts ascertain the reach of the securities laws, they frame the jurisdictional question in terms of prescriptive or subject-matter jurisdiction rather than in terms of judicial jurisdiction and applicable law. As securities laws are regulatory and thus public laws, there is no separate analysis of the law applicable to securities transactions, and the jurisdiction of the courts. If U.S. courts believe that the U.S. securities laws reach a particular cross-border securities transaction – which they may determine by ascertaining the intent of Congress or the limits posed by the territoriality principle under public international law or rules of comity – they will exercise their 'subject-matter' jurisdiction. If the U.S. securities laws do not extend to the securities transaction, and thus, logically, another State's laws apply, U.S. courts will not exercise their 'subject-matter' jurisdiction, even if they have personal jurisdiction over the defendant (which may more easily be established than in Europe, as minimal contacts suffice for U.S. courts to have judicial jurisdiction), since U.S. courts do not apply the public laws of another State.

In Europe, a court dealing with a cross-border securities misrepresentation will first determine whether it has judicial jurisdiction (in U.S. terms: it will determine

[1777] Directive of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC, *O.J.* L 345/64 (2003).
[1778] *Id.*, Article 18.
[1779] *Id.*, Article 20.

whether it has personal jurisdiction) under either the EEX-Regulation or its own law governing judicial jurisdiction if the Regulation does not apply because of the extra-EU nexus of the misrepresentation. If the court indeed has jurisdiction, it will determine the applicable law (in U.S. terms: it will determine whether it has 'subject-matter' jurisdiction). As securities misrepresentations are not conceived as violations of regulatory, 'public' laws in Europe, and are often governed by the general law of tort (or of contracts), the court will ordinarily not shirk from applying foreign law if this were the law applicable, unless, for instance, treble damages ought to be granted.[1780] Although the analysis of judicial jurisdiction and the analysis of the applicable law are distinguished at a conceptual level, in practice, they overlap to a great extent, since, as far as the law of tort is concerned, the same test applies to both analyses: the place where the tort occurred determines both judicial jurisdiction and the law applicable[1781].

527. *LOCUS* OF THE SECURITIES MISREPRESENTATION – When courts are asked to determine the *locus* of a securities misrepresentation, they are asked to determine *where* the harmful event relating to a cross-border securities misrepresentation precisely occurred (*e.g.*, when a prospectus containing misrepresentations is mailed from one State to another).

U.S. courts, relying on the subjective and objective territorial principles, locate the harmful securities event both in the State where the fraudulent act was initiated, or where acts relating to the fraud occurred (conduct test) *and* where the act was consummated, or where U.S.-based investors were harmed (effects test). Accordingly, U.S. courts exercise subject-matter jurisdiction as soon conduct or effects have occurred in the United States.

528. "PLACE WHERE THE HARM OCCURRED" - In order to determine judicial jurisdiction, European courts basically take the same view as U.S. courts do. Indeed, as early as 1976, the ECJ held in the *Bier* case, that the expression "the place where the harm occurred" in Article 5.3 of the Brussels Convention (which is now Article 5.3 of the EEX-Regulation), must, for purposes of judicial jurisdiction over tort (not specifically over securities tort), "be understood as being intended to cover both the place where the damage occurred and the place of the event giving rise to it".[1782] Accordingly, "the defendant may be sued, at the option of the plaintiff, either in the courts for the place where the damage occurred or in the courts for the place of the event which gives rise to and is at the origin of that damage."[1783]

If territorial jurisdiction could be premised on territorial conduct as well as territorial effects, it remains to be seen *what* conduct and effects may give rise to jurisdiction. Determining the scope of the conduct and effects tests is essentially the

[1780] *See* subsection 7.2.1.b for an overview of the law applicable to securities misrepresentation in some Member States.
[1781] There is no convention governing the law applicable to torts, but all European Member States follow the maxim that the law of the *locus delicti commissi* applies to a tort claim.
[1782] ECJ, *Handelskwekerij G.J. Bier BV* v. *Mines de potasse d'Alsace SA*, [1976] E.C.R. 1735, § 24.
[1783] *Id.*, at § 25.

prerogative of the EU Member States. The ECJ has however provided guidance in a number of preliminary rulings on the scope of Article 5.3 of the Brussels Convention / EEX-Regulation.

529. MARINARI - In the *Marinari* case, the ECJ ruled that "the term "place where the harmful event occurred" in Article 5(3) of the [Brussels Convention] does not on a proper interpretation, cover the place where the victim claims to have suffered financial damage following upon initial damage arising and suffered by him in another Contracting State."[1784] Under *Marinari*, only the courts of the State where the initial damage stemming from securities misrepresentations occurred have jurisdiction, to the exclusion of the courts of the State where subsequent financial damage may have occurred.

In the United States, there is no *Marinari*-like limitation on jurisdiction. To be true, in antitrust matters, subject-matter jurisdiction ordinarily only obtains in case direct and reasonably foreseeable effects within the territory could be identified. This requirement of direct and reasonably foreseeable effects may possibly come close to the *Marinari* requirement. Yet effects thus qualified are not required for subject-matter jurisdiction over securities fraud to obtain: under § 416 (a) of the Restatement (Third) of Foreign Relations Law, U.S. courts have effects-based jurisdiction over securities fraud if "the [fraudulent] transaction or *conduct* has, or can reasonably be expected to have, a *substantial effect* on a securities market in the United States for securities of the same issuer or on holdings of such securities by United States nationals or residents." Financial damage following upon initial damage could surely be substantial, and thus give rise to U.S. jurisdiction.

530. KRONHOFER - In the *Kronhofer* case, the ECJ elaborated on the exclusion of the place where the financial damage occurred. In this case, the ECJ held that "Article 5(3) of the [Brussels Convention] must be interpreted as meaning that the expression 'place where the harmful event occurred' does not refer to the place where the claimant is domiciled or where 'his assets are concentrated' by reason only of the fact that he has suffered financial damage there resulting from the loss of part of his assets which arose and was incurred in another Contracting State."[1785] Consequently, if purely financial damage arises on the investment of part of the injured party's assets, the place where the injured party is domiciled if the investment was made in another Member State is not "the place where the harmful event occurred". Only the Member State where the investment, and the subsequent financial damage, occurred, has judicial jurisdiction.

In the United States by contrast, 'territorial' effects jurisdiction could be exercised over conduct that has an effect "on holdings of … securities by United States nationals or residents".[1786] Jurisdiction could thus be established over foreign conduct that has an effect on securities holdings by U.S.-based persons *outside* the

[1784] ECJ, *Antonio Marinari* v. *Lloyds Bank plc and Zubaidi Trading Company*, [1995] E.C.R. I-02719, § 21.
[1785] *Rudolf Kronhofer* v. *Marianne Maier, Christian Möller, Wirich Hofius, Zeki Karan*, C-168/02, [2004] E.C.R. I-6009.
[1786] § 416 (a) of the Restatement.

United States. Financial damage arising on the investment of part of those persons' assets abroad thus suffices for there to be jurisdiction under the effects doctrine, and U.S. courts have concurrent jurisdiction over such damage together with the courts of the State where the initial damage has occurred.

531. CONDUCT – While *Marinari* and *Kronhofer* have circumscribed the effects test, there is no further ECJ case-law on the conduct test. VAN HOUTTE has argued, relying on U.S. and English case-law, that, in a securities context, "the place of making the misrepresentation (*i.e.*, the place of performance) could be either where the information is originated, was received or was effectively relied on".[1787] Relying on U.S. and English case-law relating to cross-border securities litigation – given the sheer absence of such litigation in civil law countries – and implicitly suggesting that the *Bier* conduct prong of Article 5.3 of the EEX-Regulation ought to be interpreted in light of the experience of common law countries is not entirely warranted. In the absence of ECJ guidance, it appears that every Member State may apply its own rules of conduct-based judicial jurisdiction. The rules employed by one Member State could not always be extrapolated to another Member State, as they are the product of a specific legal culture.

In the absence of precedents as to the conduct test, courts could possibly rely on domestic precedents relating to the law applicable in tort, or on principles of criminal jurisdiction, so as to identify "the place of the event which gives rise to and is at the origin of [the] damage".[1788] Either way, it is unclear whether the European conduct test will be more restrictive than the U.S. conduct test, pursuant to which U.S. jurisdiction obtains over securities fraud as soon as "representations are made or negotiations are conducted in the United States,"[1789] a test which has been construed liberally by some U.S. courts to include even *preparatory* conduct.

532. SUMMARY - As has been demonstrated, in the context of judicial jurisdiction, the term "place of the tort" has been given a broad interpretation by the European Court of Justice (ECJ): both the State where the effects and the conduct of a securities misrepresentation (characterized as a tort) occurred are entitled to exercise jurisdiction. Nonetheless, in a number of decisions, the ECJ has circumscribed the effects test. The conduct test by contrast has not been further defined. One could thus conclude that the tests used to determine European jurisdiction over securities misrepresentations resemble these used to determine U.S. jurisdiction, and are thus rather liberal, be it that the European effects test is likely to be somewhat stricter than the U.S. effects test.

[1787] H. VAN HOUTTE, "Misrepresentation in Securities Transactions in Europe: Jurisdiction and Applicable Law", in H. VAN HOUTTE (ed.), *The Law of Cross-border Securities Transactions*, London, Sweet & Maxwell, 1999, at p. 210, nr. 8.19, citing, in support of the first modality of conduct jurisdiction, the U.S. case of *Psimenos* v. *EF Hutton*, 722 F.2d 1041 (2d Cir. 1983), and in support of the second modality, *Multinational Gas & Petrochemical Co.* v. *Multinational Gas & Petrochemical Services Ltd* 1983 Ch. 258, CA.

[1788] If the securities fraud is tried as an offence, municipal principles of criminal jurisdiction over criminal conduct determine the jurisdiction of the courts, and the rules of judicial jurisdiction in civil and commercial matters do not apply. *See* Article 5.4 EEX-Regulation.

[1789] § 416 (b) Restatement (Third) of Foreign Relations Law.

7.2.1.b. Law applicable to securities misrepresentation

533. APPLICABLE LAW - If the term "the place where the harmful event occurred or may occur" enshrined in Article 5.3 of the EEX-Regulation (the tort provision) is construed liberally, and judicial jurisdiction over securities misrepresentation and fraud may readily be established as soon as domestic conduct or effects could be identified, the hurdle of the applicable law still needs to cleared before a State could entirely apply its procedures and substantive rules, to the exclusion of another State's, to a cross-border securities fraud. Only if a State both claims judicial jurisdiction *and* applies its own law to a situation with a significant nexus to another State will controversy arguably arise.

534. APPLICABLE LAW IN TORT CASES - In Europe, as elsewhere, the law applicable to tort is the law of the State in which the events constituting the tort occurred (*lex loci delicti*).[1790] If the events occurred in several States, most European States will be willing to apply either the law of the place where the events were initiated or the law of the place where the harm occurred, with an apparent preference for the latter law.[1791] Hereinafter, the regime in England, France, Belgium and the Netherlands will be discussed.

535. ENGLAND - In England, a securities misrepresentation is ordinarily considered as a tort.[1792] The applicable law is, where elements of events constituting a tort occur in different countries, to be taken as being "for a cause of action in respect of damage to property, the law of the country where the property was when it was damaged", or "the law of the country in which the most significant element or elements of those events occurred".[1793] In order to determine the law applying to misrepresentations, English courts mostly rely on the latter, flexible, residual rule – which resembles the rule of reason set forth in § 403 of the American Restatement (Third) of Foreign Relations Law.

There is quite some English case-law on the law applying to misrepresentations (some under the common law applicable before the entry into force of the 1995 codification of private international law, and quite some relating to the scope of Article 5(3) of the Brussels/Lugano Convention), most of which seems to point to the law of the country where the misrepresentation was communicated or received

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[1790] *See, e.g.*, United Kingdom: Section 11(1) of the Private International Law (Miscellaneous Provisions) Act 1995 (c.42); France: Cass. fr. (Civ.), *Lautour*, 25 May 1948, *Rev. crit. DIP* 1979.89; Cass. fr. (Civ.), *Luccantoni*, 1 June 1976, *JDI* 1977.91.

[1791] *Compare* INSTITUT DE DROIT INTERNATIONAL, Resolution on « Les obligations délictuelles en droit international privé », 1969 Edinburgh Session, Article 2 (« un délit est considéré avoir été commis dans le lieu auquel la situation est la plus étroitement liée, eu égard à tous les faits reliant le délit à un lieu donné, depuis le commencement du comportement délictuel jusqu'à la réalisation du préjudice »)., *Ann. Inst. Dr. Int.*, 53, II, 372.

[1792] *See* P.R. WOOD, *International Loans, Bonds and Securities Regulation*, London, Sweet & Maxwell, 1995, p. 329, nr. 17-37 (noting that the general rules of tort or delict, which were developed in the context of product liability and motor accident cases, could also apply to securities misrepresentations).

[1793] Section 11(2)(b)-(c) of the Private International Law (Miscellaneous Provisions) Act 1995 (c.42).

and acted upon,[1794] or in COLLINS's words, "where the direct harmful effect which is alleged by the claimant occurs".[1795] Fraudulent or negligent representations by telephone or fax made in one country but received in another country have for instance been subjected to the law of the latter country (in that case England).[1796] In the case of negligent misstatements by contrast, English courts have held that the place where the harmful event giving rise to the damage took place, is the place where the misstatement was made, rather than where the misstatement was received.[1797] The representor's negligent words, rather than the representee's receipt of them, are then considered to constitute the harmful event.

In England, there seem to be only scant room for an independent conduct test, by virtue of which English law would apply to (or subject-matter jurisdiction would obtain over) fraudulent conduct which has occurred in England but which has caused no harm there. In contrast, courts in the United States, even the strict courts, would not shy away from applying the law of the former country to such a situation.

As U.S. courts do not give effect to another State's regulatory laws, they will ordinarily not exercise subject-matter jurisdiction if the applicable law is not U.S. law. In the United Kingdom, courts do *prima facie* not seem to be precluded from applying a foreign State's securities laws. Nonetheless, under current private international law rules, England courts are not authorized to apply the law of a foreign State if such "would conflict with principles of public policy" or "would give effect to such a penal, revenue or other public law as would not otherwise be enforceable under the law of forum".[1798] On the basis of these rules, if the usual application of the conflict rules relating to tort, the effects test in particular, points to the application of U.S. securities laws, English courts will probably not give effect to these laws if they impose treble damages upon violators.[1799] It is unclear

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[1794] *See* P. NORTH & J.J. FAWCETT, *Cheshire and North's Private International Law*, 13th ed., London, Edinburgh, Dublin, Butterworths, 1999, at 635.

[1795] *See* L. COLLINS (gen. ed.), *Dicey and Morris on the Conflict of Laws*, London, Sweet & Maxwell, 2000, pp. 1547-48, nr. 35-086, and cases cited in notes 78-81. *See for* a recent case, *e.g.*, *Alfred Dunhill Ltd* v. *Diffusion Internationale de Maroquinerie de Prestige Sarl* [2002] 1 All E.R. (Comm) 950 (holding, in a case of judicial jurisdiction under Article 5(3) of the Brussels Convention, that the "harmful event" had occurred outside England since the misrepresentations had been made in Italy and France, and the damage had occurred in France, to where the fabric had been delivered, where production delays had occurred and where the cost of obtaining alternative fabric had been incurred).

[1796] *See, e.g.*, *Original Blouse Co.* v. *Bruck Mills Ltd.* (1963) 42 DLR (2d) 1974 (court in British Columbia holding that misrepresentations made by telephone and letter from a defendant in Quebec to a plaintiff in British Columbia, occurred in British Columbia); *Diamond* v. *Bank of London and Montreal Ltd* [1979] QB 333. *See also Metall und Rohstoff AG* v. *Donaldson Lufkin & Jenrette* [1990] 1 QB 391 (stating that, although the acts alleged against the defendants of inducing or procuring a breach of contract had mainly taken place in New York, it was the breaches by a broker in England that caused the plaintiffs' substantial damage in England and so the tort was committed within the jurisdiction); *Armagas Ltd* v. *Mundogas SA* [1986] AC 717, CA (applying Danish law on the ground that the tort of fraudulent misrepresentation occurred in Denmark where the misrepresentation was orally communicated and acted upon).

[1797] *Domicrest Ltd* v. *Swiss Bank Corp* [1999] Q.B. 548 (identifying the harmful event for the purposes of Article 5(3) of the Lugano Convention 1988).

[1798] Section 14 (3) (a) of the Private International Law (Miscellaneous Provisions) Act 1995 (c.42).

[1799] *Compare* § 5 of the Protection of Trading Interest Act 1980 (prohibiting the enforcement of foreign judgments for multiple damages). § 5 will mostly apply to U.S. antitrust actions, but may also apply to

whether English courts will refuse to apply foreign (U.S.) securities laws *as such*.[1800]

536. FRANCE – France, like England, also seems to have a preference for the law of the place where the harmful effect occurred, and not for the law of the place where the fraudulent event was initiated.[1801] If the applicable securities law is a foreign law which grants treble damages to plaintiffs, French courts may possibly refuse to apply it under the exception of *ordre public*.[1802]

537. BELGIUM - Belgium codified the rules of private international law in 2004.[1803] Under Belgian law, as far as tort is concerned, if elements of events constituting a tort occur in different countries, the applicable law is the law of the State which has the closest nexus with the obligation arising from the tort.[1804] This is basically the approach taken by English and American law relating to general torts, which emphasize the most significant relationship of a situation with a State.[1805]

Specific provisions may however apply to securities misrepresentations. One provision of the 2004 Act states that in case of unfair competition or business-restrictive practices, the law of the State on whose territory the harm occurred or whose territory is threatened by such harm, applies.[1806] Securities misrepresentations

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other actions such as securities actions. *See* L. COLLINS (gen. ed.), *Dicey and Morris on the Conflict of Laws*, London, Sweet & Maxwell, 2000, p. 566, nr. 14-246.

[1800] COLLINS lists as "public laws" import and export regulations, trading with the enemy legislation, price control regulations and antitrust legislation, but not securities legislation. *See* L. COLLINS (gen. ed.), *Dicey and Morris on the Conflict of Laws*, London, Sweet & Maxwell, 2000, p. 99, nr. 5-037. It is however arguable that U.S. securities laws, which are 'as regulatory' as antitrust laws, ought not to be applied by English courts.

[1801] *See* P. MAYER & V. HEUZÉ, *Droit international privé*, 7th ed., Paris, L.G.D.J., 2004, at 505. B. AUDIT, *Droit international privé*, Paris, Economica, 2000, at 661-62 (attributing this preference for the « effects doctrine » to the fact that the harm, and not the tortious act, creates tort liability; arguing that a case-by-case solution is probably preferable over a rigid reliance on the place of the harm); Cass. fr. (Civ.) 8 February 1983, *JDI* 1984.123 (ruling that "en droit international privé français ... la loi territoriale compétente pour gouverner la responsabilité civile est la loi du lieu où le dommage a été realisé"); Cass. fr. (Civ.) 11 May 1999, *D.* 1999, 99 (not applying French law to a tort claim because the harm had clearly occurred in another State, although some elements of the initial event had occurred in France). *See* however Cass. fr. (Civ.) 14 January 1997, *D.* 1997.177 (approving of the conduct test, relying on the ECJ's case-law as to Article 5.3 of the Brussels Convention).

[1802] *See* B. AUDIT, *Droit international privé*, Paris, Economica, 2000, 666.

[1803] Loi portant le Code de droit international privé [Act concerning the Private International Law Code], 16 July 2004, *Moniteur belge* 27 July 2004.

[1804] *Id.*, Article 99, § 1, 3°. However, if the person responsible for the tort and the victim have their habitual residence in the same State at the moment the tortious event occurs, the law of that State applies (Article 99, § 1, 1°). If these persons do not have their habitual residence in the same State, but the event that is at the origin of the damage, and the damage, wholly occur in the same State, the law of that State applies (Article 99, § 1, 2°). In genuinely transnational tort situations, in which the initial event and the damage occur in different States, the "closest nexus" test applies.

[1805] *See, e.g.*, *Babcock* v. *Jackson*, 12 NY 2d 473, 240 NYS 2d 743, 191 NE 2d 279 [1963]. The jurisdictional rule of reason set forth in § 403 of the Restatement (Third) of Foreign Relations Law, which applies to jurisdiction in securities matters as well under § 416 of the Restatement, also reflects this approach.

[1806] Article 99, § 2, 2° of the Act concerning the Private International Law Code. *Contra* the regime prior to the enactment of the 2004 Act: G. VAN HECKE & K. LENAERTS, *Internationaal Privaatrecht*, Gent, Story-Scientia, 1989, at 357, citing Tribunal of Commerce Bruges, 4 March 1976, *Rechtskundig*

and fraud restrict the conduct of business, and may therefore arguably fall under this provision, which sets forth an effects test to solve the choice of law problem. More importantly, another provision, Article 114, sets forth that "[l]es droits qui dérivent de l'émission publique de titres sont régis, au choix du porteur de titres, soit par le droit applicable à la personne morale, soit par le droit de l'Etat sur le territoire duquel l'émission publique a eu lieu."[1807] Pursuant to Article 114, which is based on an article of the Swiss Private International Law Code,[1808] an investor may choose as the applicable law either the *lex societatis* or the law where the offering of the securities took place (which is usually the place of the market where the securities will be listed).[1809] The article has however a limited scope in that it only applies to misrepresentations contained in information delivered at the occasion of an initial public offering (mainly in the required prospectus)[1810], and not to misrepresentations related to private offerings or acquisitions.[1811] As far as the former misrepresentations are concerned, Article 114 may be commended because it supplants the uncertain *lex loci delicti.*[1812] As will be seen in subsection 7.3.4, the solutions provided by the article closely match these provided by a number of U.S. authors ('nationality of the issuer' and domestic-traded test in particular, and even portable reciprocity in that it grants the victim a choice of law).

Remarkably, under Belgian private international law, the victim of securities misrepresentations could *choose* the law of another State (the *lex societatis*) than the State where the offering took place. Thus, if a U.S. issuer offers his securities in Belgium, investors, irrespective of their nationality, harmed by misrepresentations contained in the prospectus (which need, under European rules, even not be drawn up

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Weekblad, 1976-77, 2092 (deciding that the applicable law is the law of the place of the initial conduct).

[1807] Article 114 of the Act concerning the Private International Law Code.

[1808] *See* Article 156 of the Federal Law on Private International Law of 18 December 1987 ("Les prétensions qui dérivent de l'émission de titres de participation et d'emprunts au moyen de prospectus, circulaires out autres publications analogues, sont régies soit par le droit applicable à la société, soit par le droit de l'Etat d'émission."). *See* for a judgment based on this article: Tribunal fédéral suisse, 25 September 2002, A. SA/B. SA, *A.T.F.*, 129 III 71, at 2.2 ("Les prétentions qui dérivent de l'émission d'emprunts au moyen d'un prospectus sont régies soit par le droit applicable à la société débitrice, soit par le droit de l'Etat dans lequel l'émission a lieu; le choix entre ces deux droits appartient au demandeur. En l'espèce, la recourante a choisi de fonder son action sur le droit suisse [Switzerland being the place where the offering occurred] ») (footnotes omitted).
See also Article 10 of the Resolution of the Institute of International Law on « Les sociétés anonymes en droit international privé » adopted at its Warsaw Session in 1965 (proposing to subject the public offering of securities to the *lex societatis* as well as the place where the offering took place).

[1809] It may be noted that the *lex contractus* may also apply to the purely contractual rights and obligations deriving from an offering. *See* P. WAUTELET, "Le nouveau droit international privé belge", *Forum financier/Droit bancaire et financier*, 2005/II, p. 122.

[1810] *See* on the scope of prospectus liability: Article 17 of the Belgian Act of 22 April 2003 concerning public offerings, *Moniteur belge* 27 May 2003.

[1811] *See* P. WAUTELET, "Le nouveau droit international privé belge", *Forum financier/Droit bancaire et financier*, 2005/II, pp. 121-122 ; J.-M. GOLLIER, « Droit international privé des émissions publiques de titres », *R.D.C.* 2005/6, p. 634 (« [L]'article 114 du Code droit international privé propose une solution au conflict de loi qui peut naître pour la détermination de la loi applicable en matière de vice de consentement et plus généralement de responsabilité du fait du prospectus ou des autres informations qui ont amené un investisseur à acquérir des titres. »).

[1812] *Id.*, at 122-23.

in accordance with Belgian law[1813]) may invoke U.S. law if they so desire. The fact that 'territorial' rules designating the place where the harm occurred, on the basis of a conduct or effects test, could be set aside by the choice of the investor, bears testimony to the far-reaching *private*, as opposed to regulatory, law character of the law of securities misrepresentations in Belgium.[1814] Instead of bringing territorially anchored State public power to bear on cross-border securities transactions, Belgium addresses the securities misrepresentations as problems of *private* international law, and leaves the choice of what law applies – within certain limits – to the harmed investor. This stands in stark contrast to the United States, where the harmed investor has no such choice: U.S. securities law applies as a matter of regulatory law, and thus State public power, as soon as a nexus (either conduct or effects) of the misrepresentation with U.S. territory could be identified.

Both the Belgian and the U.S. system however, out of concern for the interests of investors, prevent issuers from imposing the laws of their choice through a choice-of-law provision in the prospectus.[1815] In Belgium, investors, however small their stake in an issuer's capital, may *always* rely on Belgian law, provided, of course, that the issuer is a Belgian corporation or offered its securities in Belgium. In the United States, in contrast, investors are required to clear a substantiality hurdle. Only *substantial* U.S. effects may give rise to U.S. jurisdiction,[1816] although it may be assumed that the jurisdictional threshold will be lower, given the weight of U.S. interests, if the issuer is a U.S. corporation (although such a corporation may theoretically decide to offer all its securities outside the United States to non-U.S. citizens, thus only tangentially implicating U.S. interests), and obviously, when the securities are offered *in* the United States (in which case the securities misrepresentation may be assumed to cause *per se* harm to the United States, the U.S. securities laws historically precisely geared to safeguarding the integrity of the U.S. capital market).

As pointed out, the U.S. system of cross-border securities regulation is not wholly territorial, as harm to U.S. investors may also ground jurisdiction. In Belgium, by contrast, in spite of the choice of law left to the investor by Belgian private international law, a Belgian investor may not rely on his nationality so as to invoke Belgian law to a harmful misrepresentation in a prospectus. If a Belgian investor subscribes to a public offering in the Netherlands of securities of a corporation

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[1813] Article 20 of the Directive of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC, *O.J.* L 345/64 (2003) (stating that "[t]he competent authority of the home Member State of issuers having their registered office in a third country may approve a prospectus for an offer to the public or for admission to trading on a regulated market, drawn up in accordance with the legislation of a third country" provided that a number of requirements are met.

[1814] If the applicable securities law is foreign law, Belgian courts may possibly refuse to apply it under the exception of *ordre public*. *Id.*, Article 21 of the Private International Law Code. RIGAUX & FALLON refer to foreign exchange laws, embargo laws, and antitrust laws, but not to securities laws, as foreign 'lois de police' which Belgian courts ought not to give effect. *See* F. RIGAUX & M. FALLON, *Droit international privé*, 3d ed., Brussels, Larcier, 2005, at 140.

[1815] *See, e.g.*, J.-M. GOLLIER, « Droit international privé des émissions publiques de titres », *R.D.C.* 2005/6, p. 636 (arguing that the choice left to the investor by Article 114 of the Belgian Code of Private International Law is informed by 'consumerism', *i.e.*, 'a concern for the protection of the weakest party', which however undermines the logical of the legal system.)

[1816] § 416 (2) (a) of the Restatement (Third) of Foreign Relations Law (1987).

incorporated in the United States, she could only invoke either Dutch law (the law of the place of the public offering) or U.S. law (the *lex societatis*), but not Belgian law.

There is no case-law in Belgium relating to cross-border securities misrepresentations with respect to public offerings. What is more, the case-law relating to misrepresentations with respect to public offerings as such, irrespective of their cross-border aspects, is extremely scarce in Belgium – which is probably attributable to the difficulty of establishing a causal link between the misrepresentation in the prospectus and the investor's harm.[1817]

538. NETHERLANDS - The Netherlands adopted a law specifically tailored to conflict of laws in tort cases.[1818] Under this law, the *lex loci delicti* applies to tort claims, yet if the tortious act causes harm in another State, the law of that State applies (unless the author of the act could not reasonably foresee that he would cause the harm there).[1819] This is a clear application of the effects test, and a rebuke of the conduct test.[1820]

539. CONCLUSION: EFFECTS TRUMPING CONDUCT - It appears that in the examined EU Member States (the United Kingdom, France, Belgium, and the Netherlands), the place where the harm stemming from a misrepresentation occurred, and not the place where the misrepresentation was initially made, is ordinarily decisive for purposes of determining the applicable law (or in U.S. terms: of establishing subject-matter jurisdiction) – an approach which sets Europe clearly apart from the United States. By relying on one test (effects test) instead of on two (effects and conduct tests), the reach of the law is reduced. Consequently, in Europe, jurisdiction over securities misrepresentations is unlikely to engender much international conflict.

7.2.2. Securities misrepresentation as a crime: the case of England

540. SECURITIES MISREPRESENTATION AS A CRIME - A securities misrepresentation is not always considered as a mere tort. Sometimes it may be regarded as harmful to the interests of the community and constitute a criminal offence, such as fraud. Jurisdiction over criminal misrepresentations follows its own rules. Not the rules of judicial jurisdiction and applicable law, but usually the classical jurisdictional principles of the criminal law apply. In a next part, criminal jurisdiction

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[1817] *See* J.-M. GOLLIER, « Droit international privé des émissions publiques de titres », *R.D.C.* 2005/6, pp. 634-35 ; S. DELAEY, "Barrack Mines : Prospectusaansprakelijkheid van de kredietinstelling", Comment to Tribunal of Commerce, Brussels, 17 October 2003, DAOR 2004/69, at p. 96 (pointing out that in Germany, the Netherlands, and England, a causal link could easier be established than in Belgium).

[1818] Wet houdende regeling van het conflictenrecht met betrekking tot verbintenissen uit onrechtmatige daad [Law on conflict of laws relating to tort], 11 April 2001, S. 190.

[1819] *Id.*, Article 3.2. If the author and the victim have their habitual residence in the same State, the law of that State applies, even if harm nor conduct have occurred in that State (*Id.*, Article 3.3)

[1820] Only direct effects are decisive. The place where subsequent financial damage occurs does not determine the applicable law. *See* L. STRIKWERDA, *Inleiding tot het Nederlandse internationaal privaatrecht*, 7th ed., Deventer, Kluwer, 2002, at 189. This is basically the same approach as the one taken by the ECJ in the context of judicial jurisdiction (Article 5.3 of the Brussels Convention) in *Antonio Marinari* v. *Lloyds Bank plc and Zubaidi Trading Company*, [1995] E.C.R. I-02719, § 21.

over a specific modality of securities misrepresentation, insider-trading, will be discussed at length. In this part, the peculiar approach to jurisdiction over ordinary criminal securities misrepresentation (not necessarily relating to securities listed on a regulated market) followed by the English courts will be examined.

541. ENGLISH CRIMINAL JURISDICTION OVER FRAUD - Traditionally, English courts followed an idiosyncratic approach to fraud under the 'terminatory approach', by virtue of which the courts only had jurisdiction over a fraud provided that the last relevant constitutive act of the fraud took place in England. The Criminal Justice Act 1993 supersedes this common law approach for a number of substantive offences of fraud and dishonesty. Under this Act, any relevant event in England may give rise to jurisdiction. Accordingly, English law over cross-frontier fraud moves closer to U.S. law over transnational securities fraud, especially to the interpretation of the strict U.S. circuits.

542. TERMINATORY APPROACH - Under the English terminatory approach, English courts only have jurisdiction over fraud if the last relevant constitutive act of the fraud, *i.e.*, part of the criminal act, takes place in England. As the only controlling factor is the occurrence of the last constitutive act in England, there is no room for an independent conduct or effects test, as is the case in the United States. This is not to say that English law could not apply by virtue of the detrimental effects in England of conduct initiated abroad or by virtue of conduct in England causing effects abroad. English courts *have* jurisdiction on the basis of effects or conduct, but only if they are the last constitutive element of the crime.[1821]

543. The constitutive acts of a fraud are part of the *actus reus* of every specific offense. Accordingly, there is no general rule of when effects or preparatory conduct are actually part of a fraud offense, and could on that basis give rise to jurisdiction. Blackmail for instance, an offence made punishable by § 21 of the Theft Act 1968, is a conduct crime, and complete upon the making of an unwarranted demand with menace, irrespective of the victim acting upon that demand abroad.[1822] In contrast, fraudulent misrepresentation (obtaining property by deception contrary to

[1821] This has given rise to much confusion in the minds of international lawyers, as noted by M. HIRST, *Jurisdiction and the Ambit of the Criminal Law*, Oxford, Oxford University Press, 2003, at 115: "To international lawyers who are not familiar with English criminal law, the approach taken by the English courts … may appear to follow no intelligible pattern, but this is the case only if one attempts to analyze those cases in 'subjective territorial' [*i.e.*, the conduct test] or 'objective territorial' [*i.e.*, the effects test] terms. There may be much to be said for the adoption of a relatively simple approach of that kind, but it does not represent, and has never represented, the approach adopted under English law."

[1822] *R* v. *Treacy* [1971] AC 537, 543 ("We are willing to assume that the last constituent element does determine the place where the offence is committed. Where there is the offence of making a demand completed? The demand is not made when the threatening letter is written, because it may never be sent … but once the letter is posted, the demand is completed and the offence of blackmail is committed."). For there to be jurisdiction over conduct crimes, it is not required that the offender be present in England at the moment he commits his offence. *See R* v. *Baxter* [1972] 1 QB 1 (jurisdiction established over attempt to defraud companies in England by posting fraudulent claims from Northern Ireland).

§ 15 of Theft Act 1968) is a result crime, and is only complete when the fraudster obtains the money.[1823]

544. The English terminatory approach may be exemplified by the 1963 case of *R* v. *Harden*, in which the Queen's Bench ruled that it had no jurisdiction over a person in England who deceived a company in Jersey, because the relevant fraudulent conduct – the 'obtaining of valuable securities by false pretences', *i.e.*, conduct criminalized by former § 32(1) of the Larceny Act 1916 – took place in Jersey, by virtue of the company's posting cheques (securities) to the person in England.[1824] It was considered irrelevant for jurisdictional purposes that the deception actually originated from England nor that the English fraudster received the cheques in England. In a similar case, *R* v. *Manning*, English courts refused to establish jurisdiction over a fraud case in which Greek shipping companies were induced by a person in Essex (England) to draw cheques in favor of the latter. Under English law, the offence of 'dishonestly procuring the execution of a valuable security by deception' (§ 20(2) of the Theft Act 1968) was deemed to have taken place in Greece, even though the deception, as in *Harden*, originated from England and the English fraudster received the cheques in England.[1825]

545. In case the offence itself takes place in England, by contrast, English courts will not hesitate to establish jurisdiction, even if the effects of the offence take place entirely abroad. Indeed, in *R* v. *Treacy*, the House of Lords asserted jurisdiction over a fraud case in which the defendant posted blackmail demands from the English Isle of Wight to a victim in Frankfurt, Germany.[1826] The posting of the demands was deemed to be the relevant conduct, and as it was done in England, English courts would have jurisdiction. In another case, *R* v. *Markus*, the House of Lords ruled that the offense of fraudulently inducing persons (whatever their nationality or place of residence) to take part in an investment arrangement took place in England, and thus gave rise to English jurisdiction, because, in spite of the victims drawing up their cheques abroad, they only took part in the arrangement when the accused's company processed and accepted the victims' applications in England, conduct which was at the same time the last relevant constitutive act of the fraud.[1827] Similarly, in *R* v. *Tirado*, a fraud in which the victims had paid to a bank in Morocco, which then transmitted the payment to England, was deemed to have taken place in England. In contrast, in *R* v. *Stoddart*, the posting of letters by the victims in England was considered to complete the offense in England.[1828] *Tirado* and *Stoddart* were distinguished because in *Stoddart*, using the mail was the only designated method of paying, whereas in *Tirado*, paying to a Moroccan bank was only one possible way of paying the person in England, to whom the victims therefore apparently paid directly.

[1823] *See* M. HIRST, *Jurisdiction and the Ambit of the Criminal Law*, Oxford, Oxford University Press, 2003, 116.
[1824] [1963] 1 QB 8.
[1825] [1998] 4 All ER 876.
[1826] [1971] AC 537.
[1827] [1976] AC 35.
[1828] (1909) 2 Cr App R 217 (court ruling that posting letters containing postal orders in England relating to football betting in Holland conferred jurisdiction on English courts, because the result of the offence, part of the incrimination, took place in England).

546. A CRITIQUE OF THE TERMINATORY APPROACH - In spite of the conceptual clarity of the terminatory approach, it appears that it does not function as an adequate method of predicting a jurisdictional outcome. In some cases, the mere payment by the victims in or from a given territory was constitutive for jurisdictional purposes, whereas in other cases, the offense was only completed upon the fraudster obtaining the payment. Possibly, English courts were in reality balancing interests, as U.S. courts may do under § 403, and cloaked the outcome of the interest-balancing analysis in the form of the classical English terminatory approach to criminal jurisdiction. This sometimes gave the impression of "legal metaphysics of the most obscure kind",[1829] and surely does not confer legal certainty on the transnational transactions of economic actors.

547. CRIMINAL JUSTICE ACT 1993 - In order to provide more predictability in fraud matters, the legislature adopted the Criminal Justice Act 1993, which entered into force on 1 June 1999. Pursuant to § 2 of this act, offences of cross-frontier fraud and dishonesty are subject to English jurisdiction if a relevant event (essential element) of the offence takes place in England or Wales. It is no longer necessary that, in accordance with the terminatory approach, the fraud be completed in England.[1830] Henceforth, English courts have jurisdiction as soon as a constitutive element takes place in England, be it the initiation or the result of the fraud.

548. Now that jurisdiction could be established as soon as a relevant event takes place in England, it remains to be determined what constitutes a 'relevant event'. The Report of the Law Commission which laid the groundwork for the Criminal Justice Act 1993, defines a relevant event as "an element required to be proved for conviction"[1831], and rejected preparatory acts, stating that "[i]t would in our view be excessive, and would also lead to substantial arguments of jurisdiction merely because a preparatory or incidental act or event that happened to form part of the narrative took place here."[1832] Importantly, the Criminal Justice Act 1993 does not abandon the peculiar British offense-specific approach to jurisdiction, as the Act does not create new offences but instead refers to existing offences in its Section 1(2).[1833] English courts may thus have no jurisdiction over offences committed abroad producing harmful effects in England, if the offense is complete absent harmful

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[1829] *See* M. HIRST, *Jurisdiction and the Ambit of the Criminal Law*, Oxford, Oxford University Press, 2003, 125.

[1830] *See* Law Com. No. 180, *Report on Jurisdiction over Offences of Fraud and Dishonesy with a Foreign Element*, 1989, para. 1.4 (arguing that "the present rules of this country about jurisdiction in offences of dishonesty [*i.e.*, the terminatory approach] have become increasingly difficult, complicated and controversial to apply, partly because they have not adapted adequately to fraud itself becoming increasingly complicated. The new rules should be simple and straightforward, in order substantially to reduce the amount of valuable court time take up by technical arguments").

[1831] Law Com. No. 180, para. 2.28. *See also* the explicit wording of § 2 (1) of the Act ("For the purposes of this Part, "relevant event" … means any act or omission or other event (including any result of one or more acts or omissions) proof of which is required for conviction of the offence.").

[1832] *Id.*

[1833] The relevant offences are: obtaining property by deception, obtaining pecuniary advantage by deception, false accounting, false statements by company directors, etc., procuring execution of valuable security by deception, blackmail, handling stolen goods, obtaining services by deception, avoiding liability by deception, forgery, copying a false instrument, using a false instrument, using a copy of a false instrument, offences which relate to money orders, share certificates, passports, etc.

effects. To be true, under § 4 (b) of the Act, "[t]here is a communication in England and Wales of any information, instruction, request, demand, or other matter if it is sent by any means … (ii) from a place elsewhere to a place in England and Wales." It is unclear whether § 4 (b) actually supersedes the classical offence-specific jurisdiction. An argument *contra* is that not for all offences proof of communication is required, and that § 4 (b) only applies to offences of which such proof is traditionally required. An argument *pro* is that, if this were indeed the case, § 4 (b) would be superfluous, which could not have been the intent of Parliament.[1834]

549. In view of the prevailing uncertainty surrounding the influence of § 4 (b) of the 1993 Act, it may be premature to state that English courts rely on the objective territorial principle for purposes of establishing jurisdiction over cross-frontier securities fraud. In contrast, it may be legitimately stated that English courts rely on the subjective territorial principle, as any relevant English conduct (except preparatory conduct) may give rise to English jurisdiction.[1835] As there are no offences that are complete absent harmful conduct, the offence-specificity of the English law of jurisdiction will not constitute a bar to prosecution.

7.2.3. Jurisdiction over cross-border insider-trading

7.2.3.a. The EC Directive on insider-trading

550. THE PROHIBITION OF INSIDER-TRADING IN EUROPE - In the United States, insider-trading was dealt with since the early 1960s.[1836] The SEC dealt with cross-border insider-trading cases since the early 1980s, and, in order to facilitate investigation of these cases, negotiated memoranda of understanding with other States.[1837] In Europe, by contrast, insider-trading, let alone, cross-border insider-trading, was traditionally not dealt with. Only in 1989, did the EC Council, in order to strengthen the prosecution of insider-trading, issue a directive on insider-dealing,[1838] which was replaced and updated by a 2003 directive of the European Parliament and the Council on insider-dealing and market manipulation (market abuse)[1839].

551. The EC Directives explicitly determine the scope *ratione loci* of the prohibition of insider-dealing.[1840] It may be noted that the U.S. Securities and

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[1834] *See* M. HIRST, *Jurisdiction and the Ambit of the Criminal Law*, Oxford, Oxford University Press, 2003, 168-171 (arguing that blackmail, of which proof of the effects is not required for conviction, is probably subject to English jurisdiction under § 4(b) of the Criminal Justice Act 1993, but noting that "[m]ore complex issues may arise in theft cases").

[1835] *See also* § 4 (b) of the Criminal Justice Act 1993 ("There is a communication in England and Wales of any information, instruction, request, demand, or other matter if it is sent by any means … (i) from a place in England and Wales to a place elsewhere.").

[1836] *See* the seminal case of *In re Cady, Roberts & Co.*, 40 SEC 907 (1961).

[1837] *See* D.C. LANGEVOORT, "Cross-Border Insider Trading", 19 *Dick. J. Int'l L.* 161, 162 (2000-2001).

[1838] EC Insider Directive of 13 November 1989, *O.J.* L 334/30 (1989). Zie VOOR 1989: recommendation/code of conduct.

[1839] EC Directive on Insider-dealing and Market Manipulation of 28 January 2003, *O.J.* L 96/16 (2003).

[1840] Article 5 of the 1989 Directive; Article 10 of the 2003 Directive.

Exchange Acts do not contain such a jurisdictional provision. Moreover, the SEC has not even adopted a policy on the reach of the prohibition of insider-trading (a prohibition which was considered to fall under the broad wording of Rule 10b-5, the antifraud provision), although apparently, the SEC ordinarily only undertakes action in the field of insider-trading if the securities are traded on a U.S. market.[1841] As will be seen, the 2003 Directive not only requires Member States to establish jurisdiction if the securities are traded on their markets, but also if actions concerning the securities have been carried out in their territory (even if the securities are listed abroad). The reach of European insider-trading prohibitions, although eminently territorial,[1842] may thus be potentially broader than in the United States. In practice however, it is the reach of U.S. insider-trading prohibitions that remains broader. Indeed, U.S. courts, especially in private actions, including in insider-trading cases, have given a very broad scope *ratione loci* to the securities laws.[1843] Moreover, as the SEC has no stated policy on the reach of the prohibition of insider-trading, it need not be bound by its previous approach. At any rate, it has much more aggressively pursued insider-dealing than its European counterparts, which is, as LANGEVOORT has pointed out, "as much a form of cultural expression as economic regulation."[1844] To that effect, the SEC imposes both civil and criminal remedies. In Europe by contrast, insider-trading is still mainly dealt with by means of criminal law, which may, given the high evidentiary standard in criminal cases, hamper enforcement of the prohibition of insider-trading.[1845] Hereinafter, the potential reach of the prohibition of insider-dealing in European States will be contrasted with the potential reach of U.S. Rule 10b-5 (which, as stated *supra*, encompasses the prohibition of insider-dealing).

552. THE 2003 EC DIRECTIVE - Under Article 10 of the 2003 Directive on insider-dealing and market manipulation,

> "Each Member State shall apply the prohibitions and requirements provided for in this Directive to:
>
> (a) actions carried out on its territory or abroad concerning financial instruments that are admitted to trading on a regulated market situated or operating within its territory or for which a request for admission to trading on such market has been made;

[1841] *See* D.C. LANGEVOORT, "Cross-Border Insider Trading", 19 *Dick. J. Int'l L.* 161, 162 (2000-2001).
[1842] The *domicile of the insider* was however advanced as the decisive jurisdictional criterion in the draft directives leading to the adoption of the 1989 Insider Dealing Directive. Although this criterion had the advantage of precluding concurring jurisdiction, it was later rejected "since otherwise foreigners without a domicile in the Community would not be included." K.J. HOPT, "The European Insider Dealing Directive", in K.J. HOPT & E. WYMEERSCH (ed.), *European Insider-dealing*, London, Butterworths, 1991, 129, 147.
[1843] It may be noted that quite some cases of 'extraterritorial' application of U.S. securities laws were in fact insider-trading cases. *See* H. KRONKE, "Capital Markets and Conflict of Laws", 286 *R.C.A.D.I.* 245, 336 (2000).
[1844] *See* D.C. LANGEVOORT, "Cross-Border Insider Trading", 19 *Dick. J. Int'l L.* 161, 165 (2000-2001).
[1845] *Id.*, at 164 (noting that complex insider-trading cases are based largely on circumstantial evidence).

(b) actions carried out on its territory concerning financial instruments that are admitted to trading on a regulated market in a Member State or for which a request for admission to trading on such market has been made."

553. ARTICLE 10 (A) OF THE DIRECTIVE (REGULATED MARKET)- Article 10 (a) of the Directive confers jurisdiction over insider-trading on a Member State if the security is traded on a regulated market within that State's borders, irrespective of the place where the fraudulent actions have taken place. The EC Directive automatically considers there to be effects in a Member State as soon as the relevant security is traded territorially. Any fraudulent security transaction is considered to adversely affect the exchange on which the security is traded, irrespective of the place of incorporation of the issuer or the parties involved.

The SEC takes an exchange-based approach similar to the approach taken by the EC Directive. Indeed, the SEC only intervenes when the securities are traded on a U.S. market. This approach accords with § 416(2) of the Restatement (Third) of Foreign Relations Law, pursuant to which reasonable effects-based jurisdiction obtains over a "transaction or conduct [that] has, or can reasonably be expected to have, a substantial effect on a securities market in the United States", United States may exercise jurisdiction on the basis of the relevant securities being traded on a regulated market in the United States.[1846]

Securities laws are however also privately enforced in the U.S., and nothing prohibits the SEC from taking a broader approach in accordance with § 416(2) of the Restatement, which, aside from the domestic traded test, also lists as a factor to be taken account in the jurisdictional analysis the effect "on holdings in such securities by United States nationals or residents". As the Second Circuit indeed ruled in *Bersch*, the antifraud provisions of the securities laws apply "to losses from sales of securities to Americans resident in the United States" and "to losses from sales of securities to Americans resident abroad if, but only if, acts (or culpable failures to act) of material importance in the United States have significantly contributed thereto".[1847]

A consideration of the nationality or residence of the victims of securities fraud as a relevant jurisdictional nexus is entirely absent from Article 10 of the EC Directive. This seems to make the ambit of the American securities jurisdiction much

[1846] It is true that, domestic trading being just one factor in the jurisdictional analysis under the reasonableness test of § 416(2), it may not automatically confer jurisdiction. However, given the high premium that U.S. securities law puts on the protection of the integrity of its capital markets, (15 U.S.C. § 78(b) (1995) (Congress stating that the goal of securities legislation is "to remove impediments to and perfect the mechanisms of a national market for securities"); *Continental Grain*, 592 F.2d at 421; *Grunenthal*, 712 F.2d 425 (with respect to the conduct test)) one would be hard-pressed to imagine a situation of fraud in U.S.-listed securities not being subject to U.S. securities laws, even if the parties involved are foreigners not resident in the United States and no fraudulent conduct took place in the U.S. Nonetheless, as LANGEVOORT has argued, there may be situations in which foreign insider-trading in U.S.-listed securities may not significantly impact on U.S. markets and thus not warrant the exercise of effects-based jurisdiction. *See* D.C. LANGEVOORT, "Schoenbaum Revisited: Limiting the Scope of Anti-fraud Protection in an International Securities Marketplace", 55 *Law & Contemp. Probs.* 241, 257 (1992).

[1847] *Bersch*, 519 F.2d 993.

broader.[1848] Nonetheless, it should be noted that Article 10 of the EC Directive does not prevent Member States from more broadly asserting extraterritorial jurisdiction over securities fraud.[1849] As will be seen in subsection 7.2.3.b, the United Kingdom, Germany and France indeed have jurisdictional provisions that enable their courts to exercise jurisdiction in a broad manner, *inter alia* on the basis of the nationality principle. What is more, harm to a Europe-based investor as the result of insider-trading, may qualify as part of the insider-trading action for purposes of Article 10 (a) of the EC Directive, *e.g.*, if she placed an order to sell or purchase securities from the territory of an EU Member State, and European investors abroad may be protected by Article 10 (b) of the Directive, if some territorial conduct could be discerned (see next paragraph). Thus, even under the minimal framework of the EC Directive, European investors may be entitled to a level of protection that does not necessarily go below the level of protection U.S. investors are entitled to under the antifraud provisions of the U.S. securities laws.

554. ARTICLE 10 (B) OF THE DIRECTIVE (TERRITORIAL ACTIONS) - The jurisdictional test set forth by Article 10 (b) of the EC Directive – which confers jurisdiction on a Member State over ”actions carried out on its territory concerning financial instruments that are admitted to trading on a regulated market in a Member State or for which a request for admission to trading on such market has been made” – resembles the U.S. conduct test. However, as Member States are only required to establish jurisdiction over conduct in their territory that adversely affects regulated markets in other Member States, the scope of the conduct test as prescribed by the EC Directive is more restrictive than the U.S. conduct test which applies to any acts (or culpable failures to act) within the United States.[1850] As pointed out above however, the EC Directive does not preclude Member States from more broadly establishing extraterritorial jurisdiction. The United Kingdom, Germany and France do not make a distinction between territorial conduct that affects EC markets and conduct that affects other markets.

7.2.3.b. The exercise of jurisdiction over insider-trading by selected EU Member States

555. In this subsection, the exercise of jurisdiction over insider-trading in the United Kingdom, Germany, France, Belgium, and the Netherlands will be studied. As the prohibition of insider-trading was traditionally criminally enforced in Europe,[1851] quite some attention will be devoted to jurisdictional possibilities under the criminal law. In practice, however, the system of administrative jurisdiction will

[1848] Interestingly, a reliance on the nationality of the victim of a particular extraterritorial act has historically not been part of U.S. criminal law, whereas in European criminal law, the passive personality principle is widely accepted as a legitimate nexus for certain offences. It is then somehow ironic to see passive personality now surfacing in U.S. securities legislation, whilst it is absent from EC law.

[1849] *See, e.g.*, Cass. fr. (Crim.), 26 October 1995, Bull. crim. 1995, n° 324, p. 908 (Pechiney) (« Qu’en effect, dans leur rédaction applicable aux faits de la cause, les dispositions de l’article 10-1 de l’ordonnance du 28 september 1967 modifiée [which makes insider-trading punishable under French law], non contraires à la [insider-trading] directive 89/892/CEE du 13 novembre 1989 qui se borne à prescrire, dans tous les Etats membres de l’Union Européenne, un degré minimal d’incrimination du délit d’initié, ... »).

[1850] *Bersch*, 519 F.2d 993.

[1851] *See* H. KRONKE, “Capital Markets and Conflict of Laws”, 286 *R.C.A.D.I.* 245, 336 (2000).

become more significant after the implementation of the EC Market Abuse Directive. It will be shown that most States have loyally implemented the jurisdictional options of Article 10 of the Directive. Given the fact that the enforcement of the prohibition of insider-trading, and, *a fortiori*, the enforcement of the prohibition of *cross-border* insider-trading, is very recent in Europe, case-law is, obviously, extremely scarce.

United Kingdom

556. CRIMINAL JUSTICE ACT - In the United Kingdom**,** Section 62(1) of the Criminal Justice Act 1993 explicitly sets out the principles of jurisdiction governing insider-trading:

> "An individual is not guilty of an offence falling within subsection (1) of section 52 [the prohibition of insider-trading] unless –
> (a) he was within the United Kingdom at the time when he is alleged to have done an act constituting or forming part of the alleged dealing;
> (b) the regulated market on which the dealing is alleged to have occurred is one which, by an order made by the Treasury, is identified (whether by name or reference to criteria prescribed by the order) as being, for the purposes of this Part, regulated in the United Kingdom; or
> (c) the professional intermediary was within the United Kingdom at the time when he is alleged to have done anything by means of which the offence is alleged to have been committed."

The jurisdictional options of Section 62(1) of the Criminal Justice Act 1993 follow the pattern of the EC Market Abuse Directive: jurisdiction obtains when acts have been carried out in the territory, or when the securities that are the object of the fraud are traded on a UK regulated market.

557. However, unlike under Article 10 of the Market Abuse Directive – which only sets forth minimal jurisdictional requirements – jurisdiction might, under the Criminal Justice Act 1993, also obtain when no territorial act has been performed in the United Kingdom, provided that the securities are traded on a regulated market "identified as being regulated in the United Kingdom." [1852] It may be doubted whether this broad grant of jurisdiction, insofar as it authorizes the exercise of jurisdiction over acts of insider-trading which have no connection whatsoever to the United Kingdom, is in accord with international law. Indeed, as has been argued above, there are no indicia that international law authorizes the exercise of universal jurisdiction over securities fraud.

Nonetheless, one may assume that the exercise of jurisdiction under Section 62(1)(b) of the Criminal Justice Act is co-operative rather than universal, since the Treasury, when making orders to identify a foreign regulated market as being regulated in the United Kingdom, probably consults with other States before adding a regulated market to its list. These States then have actually accepted the exercise of vicarious jurisdiction by the United Kingdom, and could no longer object to it, unless a

[1852] *See* for the list of regulated markets, which also includes non-EC markets http://www.hm-treasury.gov.uk/Consultations_and_Legislation/insider_dealing/consult_insider_index.cfm

particular jurisdictional assertion exceeds the terms agreed upon during the consultations. If no consent or authorization whatsoever could be identified, protest against assertions of English jurisdiction under Section 62(1)(b) appears to be entirely justified under international law.[1853]

Still, even if jurisdiction would be in fact co-operative, one may wonder what interest the United Kingdom has in bringing to bear its scarce judicial resources to clamp down on foreign securities fraud in the absence of any territorial act, and when the securities are not traded in the United Kingdom. Possibly, the United Kingdom might want to add a nexus to Section 62 (1) (b) before actually exercising jurisdiction, such as the British nationality or residence of the insider or of the affected investors or the affected issuer. Notably in the United States, the U.S. residence of the harmed investors is generally deemed sufficient for there to be subject-matter jurisdiction over securities fraud. Whether such should be considered as a legitimate interest under international law remains to be seen. Probably only when the harm to British interests is substantial and outweighs the foreign harm, will primary jurisdiction be justified.[1854]

558. ADMINISTRATIVE JURISDICTION – Section 62(1) was not modified when the United Kingdom adopted the Financial Services and Markets Act 2000 (Market Abuse) 2005 Regulations, which implement the Market Abuse Directive.[1855] The 2005 Regulations set forth a new administrative regime of jurisdiction mirroring Article 10 (a) and (b) of the Directive. Under this regime, jurisdiction only obtains over insider-trading (and market abuse) if the behavior occurs (a) in the United Kingdom, or (b) in relation to (i) qualifying investments which are admitted to trading on a prescribed market situated in, or operating in, the United Kingdom, or (ii) qualifying investments for which a request for admission to trading on such a prescribed market has been made.[1856] The sweep of the Financial Services and Markets Act is somewhat broader than the sweep of the Market Abuse Directive in that the Act also applies to UK conduct concerning securities admitted to trading in a non-Member State – yet it remains eminently territorial.

Germany

559. ADMINISTRATIVE LAW – As far as jurisdiction is concerned, the German securities law (*Wertpapierhandelsgesetz*), which contains a prohibition on insider-trading,[1857] only explicitly provides that it is applicable to acts and omissions carried out in Germany or abroad concerning financial instruments that are traded on a German market.[1858] It may however be assumed that, under a *Richtliniekonforme Auslegung* of the *Wertpapierhandelsgesetz*, at least acts and omissions carried out in

[1853] *See also* G. SCHUSTER, *Die internationale Anwendung des Börsenrechts*, Berlin, Springer, 1996, 497-98.
[1854] *See also* 7.3.5.
[1855] 2005 No. 381.
[1856] New Article 118A of the Financial Services and Markets Act 2000.
[1857] § 14 of the *WertpHG*.
[1858] § 1 (2) *WertpHG*. The law specifically provides, in its chapter on insider surveillance, that "securities admitted to trading on an organised market in another Member State of the European Union or in another of the Contracting States to the Agreement on the European Economic Area", are also considered to be insider securities for purposes of German law. § 12 (1) (2) *WertpHG*. Insider activity in Germany concerning these securities is thus also subject to German surveillance.

Germany, irrespective of the place of trading of the securities, are *also* subject to German jurisdiction, given the fact that the law seems to present the domestic-traded test as an alternative basis of jurisdiction.[1859]

560. CRIMINAL LAW – Under the *Wertpapierhandelsgesetz*, insider-trading is also a criminal offence.[1860] It is unclear whether the jurisdictional provisions of the *Wertpapierhandelsgesetz* set aside the jurisdictional provisions of the general criminal law. Caution is duly warranted because, as pointed out in the previous paragraph, the scope *ratione loci* of the *Wertpapierhandelsgesetz* is unclear. Its minimal jurisdictional reach could only be established on the basis of a *Richtliniekonforme Auslegung*. Hereinafter, it will be assumed that the *Wertpapierhandelsgesetz* does not oppose the criminal law of insider-trading having a broader reach.[1861]

561. TERRITORIALITY-BASED CRIMINAL JURISDICTION - German courts have territorial jurisdiction over insider-trading under § 3 *juncto* § 9 of the German *Strafgesetzbuch* (StGB) provided that the "*Verpflichtungsgeschäft*", *i.e.*, the determination of the price of the insider-deal, has occurred in Germany, because from the moment of this determination, the offence is complete and the price of the listed securities may be influenced.[1862] The transfer of the securities after the deal has been struck, is not relevant for jurisdictional purposes.[1863] German jurisdiction will obtain if a deal has been brokered between an insider in Germany and a purchaser abroad, or between an insider abroad and a purchaser in Germany.[1864] In both situations, part of the offence of insider-trading, either its initiation or its consummation, has occurred in Germany under the ubiquity theory of jurisdiction. Unlike in the U.S., territorial preparatory conduct which is not a constitutive element of the fraud does not suffice for there to be jurisdiction for Germany. If both the insider and the purchaser are located abroad, German jurisdiction will not obtain, even if the transfer of the securities occurred in Germany.

562. PERSONALITY-BASED CRIMINAL JURISDICTION - German courts may also entertain criminal jurisdiction over insider-trading if the victim is a German national, in accordance with Article 7(2) StGB, provided that the insider-trading is also punishable in the territorial State. Theoretically, the jurisdiction of German courts over offences of insider-trading could thus by far exceed what is accepted in the United States, where the exercise of jurisdiction over nationals also requires territorial conduct, unless the victim resides in the United States. If a German citizen holds securities or intends to purchase securities from a foreign-listed issuer whose securities have been subject to speculation as a result of insider-trading, German courts could possibly entertain jurisdiction. The exercise of jurisdiction will depend upon the definition of who actually is a 'victim' of securities fraud.

[1859] The Act does indeed not specifically provide for jurisdiction on the basis of domestic territorial conduct, yet such jurisdiction could be inferred from the formulation of § 1 (2), which provides that the Act *also* applies to foreign conduct, provided that is in relation to securities listed on a German market. Territorial conduct could then fall within the scope of the broadly-framed § 1 (1) *WertpHG*.

[1860] § 38 of the *WertpHG*.

[1861] *See* in particular on German criminal law principles governing jurisdiction over securities fraud: G. SCHUSTER, *Die internationale Anwendung des Börsenrechts*, Berlin, Springer, 1996, 469-479.

[1862] G. SCHUSTER, *Die internationale Anwendung des Börsenrechts*, Berlin, Springer, 1996, 471.

[1863] *Id*.

[1864] *Id.*

Prima facie, indeed, any German national who is put at an informational disadvantage by insider-trading may be considered the victim of insider-trading under German law (assuming that the insider-trading is also punishable abroad). There may be harm as soon as an investor did not benefit from an insider deal. Indeed, if he had had access to the same information as the insider had, he could have bought securities at lower prices.[1865] Under this theory of harm, even *potential* German investors could be protected by German law. If an insider has bought securities for 50 USD, knowing that, if all information were available, the price would soon soar to 100 USD, German potential investors who indeed face a higher price after all information becomes available, are harmed. They have suffered losses, since if they had had access to the information to the same extent as the insider had, they might have paid less.

It has however been argued, particularly in the U.S. literature, that investors are not actually exploited by insiders, and could thus not be considered to be "victims" of insider-trading, since "they independently entered their buy/sell orders, taking the foreseeable risk that there was some undisclosed information that might make their trade unprofitable."[1866] Thus, a German investor who sold to or bought from an insider abroad may possibly not deserve the protection of German laws. However, an *issuer* could well be the victim of insider-trading, especially when a spike in the price of its securities as a result of insider-trading impairs an imminent merger.[1867] In that situation, German passive personality jurisdiction over foreign insider-trading in securities of a German issuer appears more legitimate.

Restraint on the exercise of jurisdiction under § 7(2) StGB may also be derived from the peculiarly German *Schutzzweck* theory, which was first coined by the *Bundesgerichtshof* in 1973 in *Ölfeldrohre*, an international antitrust case.[1868] In this case, the court held that the "unlimited expansion of the international application" of German regulatory law required that its reach be determined "in relation to the general protective purpose of the statute as a whole and the protective purpose of the relevant substantive rules".[1869]

If one applies this doctrine to the aforementioned situation, one might seriously doubt whether jurisdiction could legitimately be established. Indeed, as the exercise of jurisdiction over German investors abroad is not aimed at protecting the German capital market and the investors who are active on that market, *i.e.*, the ordinary *Schutzzweck* of capital markets law, its scope *ratione loci* may not be extended to include German investors abroad.[1870] It might also be doubted whether a German issuer listed abroad but not in Germany may be protected from foreign insider-trading under the *Schutzzweck* theory. The issuer, and even the German economy, may surely be affected if a takeover of a German corporation does not take place, but the functioning of and the trust in the German stock exchanges need not *per se* be affected.

[1865] *See* I. FADLALLAH, "Point de vue sur l'affaire Péchiney. La localisation du délit d'initié", *R.C.D.I.P.* 1996, n° 4, 621, 630.
[1866] *See* D.C. LANGEVOORT, "Cross-Border Insider Trading", 19 *Dick. J. Int'l L.* 161, 167 (2000-2001).
[1867] *Id.*, at 169.
[1868] *Bundesgerichtshof*, July 12, 1973, WuW/E BGH 1276 (*Ölfeldrohre*), translation available in D.J. GERBER, "The Extraterritorial Application of the German Antitrust Laws", 77 *A.J.I.L.* 756, 765 (1983).
[1869] *Bundesgerichtshof*, July 12, 1973, WuW/E BGH 1278-79.
[1870] *See* G. SCHUSTER, *Die internationale Anwendung des Börsenrechts*, Berlin, Springer, 1996, 473.

Aside from jurisdiction under the passive personality principle German courts may also entertain criminal jurisdiction over insider-trading under the active personality principle enshrined in Article 7 (2) StGB, provided that the insider-trading is also punishable abroad. Active personality jurisdiction over securities fraud is however questionable under international law, as there is no indication whatsoever that such jurisdiction serves the *Schutzzweck* of German securities laws.[1871] Still, the mere possibility of German active personality jurisdiction over insider-trading sets it apart from the United States, where the *Bersch* test does not contemplate such jurisdiction.

France

563. ADMINISTRATIVE LAW - In implementation of the EC Market Abuse Directive, the jurisdiction of the *Autorité des marchés financiers* (AMF), the French financial regulator, obtains over insider-trading transactions concerning financial instruments admitted to trading on a French regulated market or on an EC regulated market.[1872] There seems to be no administrative jurisdiction over insider-trading transactions carried out in France concerning securities listed on a non-EC regulated market – which is indeed not required under the Market Abuse Directive.

564. CRIMINAL LAW – The jurisdictional reach of the administrative law prohibition of insider-trading may not be readily transposable to the criminal law prohibition.[1873] The regulations of the AMF, which feature the administrative law prohibition, could indeed possibly not abrogate the jurisdiction of criminal prosecutors. It may nonetheless surely have a clarifying effect on the reach of the criminal prohibition. This reach is not defined under French criminal law, but was addressed by the courts. In 1995, before the AMF regulations came into being, in the famous *Péchiney* case, probably the only criminal law cross-border insider-trading case in Europe, the French Court of Cassation ruled that an insider-trading transaction carried out in France is amenable to French jurisdiction, irrespective of the place where the securities are listed.

565. THE *PECHINEY* CONDUCT TEST - The Court of Cassation held in the *Péchiney* case that the French and European law prohibitions of insider trading "n'exigent pas que l'opération réalisée grâce aux informations privilégiées l'ait été sur le marché boursier français, ni qu'elle porte sur des titres cotés en France, le terme de 'marché' s'appliquant à tout lieu où s'effectue le rapprochement d'une offer et d'une demande portant sur des valeurs mobilières".[1874] The Court of Cassation believed this

[1871] *Id.*

[1872] Article 611-1 *Règlement général de l'autorité des marchés financiers*, as modified by *Arrêté* of 15 April 2005, *J.O.* 22 April 2005, and *Arrêté* of 30 December 2005, *J.O.* 18 January 2006.

[1873] Insider-trading is a criminal offence under French law since 1967. *Délit d'initié*, art. 10.1, ord. 28 Sept. 1967.

[1874] Cass. fr. (Crim.), 26 October 1995, *Bull. crim.* 1995, n° 324, p. 908 (also approving of court of appeal's holding that 'la loi n'a pas limité aux seules bourses françaises la mission de protection de l'épargne et des investisseurs dévolue à la COB, qui n'a de sens que si elle a une portée internationale' and that 'même si elles ont été parachevées sur une place étrangère, ont fait l'objet d'une mise en oeuvre initiale à partir du territoire national, ce qui détermine la compétence de la juridiction française'). *See* for previous judgments in the *Péchiney* case: Cour d'appel Paris, 29 August 1989, *RSC*, 1991, 355; 3 November 1992, *RSC*, 1993, 787, comment G. GIUDICELLI-DELAGE. (approving of court of appeal's holding that 'la loi n'a pas limité aux seules bourses françaises la mission de protection de

to be a logical application of the ubiquity theory of territorial jurisdiction, pursuant to which criminal jurisdiction obtains as soon as a constituent element of the offence took place in French territory.[1875]

Under *Péchiney*, since the prohibition of insider-trading under French law is not exclusively geared to protecting French regulated markets, French territorial jurisdiction obtains if an insider gives, in France, by telephone, an order to buy or sell securities abroad, irrespective of the listing of the securities on a French market. At the time, the doctrine did not fail to criticize this extension of the territoriality principle,[1876] which essentially amounts to the controversial U.S.-style conduct test. FADLALLAH submitted that authorizing jurisdiction over insider-trading concerning securities abroad on the basis of French conduct would run counter to the principle of strict interpretation of criminal laws.[1877] Moreover, it would make French securities regulators "gendarmes du monde",[1878] and violate common sense and the principle of non-intervention.[1879]

French protest against the conduct test may now have largely subsided, since the EC Market Abuse Directive *requires* that States exercise conduct-based jurisdiction. However, echoing the protest raised in the wake of *Péchiney*, the AMF regulations do not provide for conduct-based jurisdiction concerning securities admitted to trading on a regulated market in a non-Member State. Member States are indeed only required under the Market Abuse Directive to exercise conduct-based jurisdiction concerning securities listed in a *Member State*.

566. NATIONALITY-BASED JURISDICTION OVER INSIDER-TRADING OFFENCES – *Péchiney* testifies to French willingness to give a broad interpretation of the conduct test under criminal law. French prosecutors and courts may possibly also be willing to espouse a very broad reading of the investor-friendly *effects* test in criminal securities matters. In the United States, the courts only have effects-based jurisdiction provided that a U.S. national resident in the United States is harmed by a securities fraud. In France by contrast, securities fraud perpetrated against all French nationals, located

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l'épargne et des investisseurs dévolue à la COB, qui n'a de sens que si elle a une portée internationale' and that 'même si elles ont été parachevées sur une place étrangère, ont fait l'objet d'une mise en oeuvre initiale à partir du territoire national, ce qui détermine la compétence de la juridiction française').

[1875] Cass. fr. (Crim.), 26 October 1995, *Bull. crim.* 1995, n° 324, p. 908 ("Que, selon l'article 693 du Code de procédure pénale, dont les dispositions, reprises dans l'article 113-2, alinéa 2, du Code pénal, ne font aucune référence à la loi étrangère, il suffit, pour que l'infraction soit réputée commise sur le territoire de la République et soit punissable en vertu de la loi française, qu'un de ses faits constitutifs ait eu lieu sur ce territoire. »). *See also* Cass. fr. (Crim.), *Péchiney*, 3 November 1992, *Bull. Crim.*, n° 352, *Rev. soc.* 1993, p. 436 (holding "qu'il n'importe que l'opération ait été réalisée sur une place étrangère et qu'il suffit, pour que l'infraction soit réputée constituée sur le territoire de la République, au sens de l'article 693 CPP, qu'un acte caractérisant l'un de ses elements constitutifs ait été accompli en France."). *See* subsection 3.4.3 on the French rules concerning the *locus delicti*.

[1876] *See, e.g.*, P.-Y. GAUTIER, « Sur la localisation de certaines infractions économiques », *R.C.D.I.P.* 669, 672 (1989) (arguing that the 1967 law making insider-trading punishable in France only protects the French market and the French social-economic order); I. FADLALLAH, "Point de vue sur l'affaire Péchiney. La localisation du délit d'initié", *R.C.D.I.P.* 1996, n° 4, 621.

[1877] I. FADLALLAH, "Point de vue sur l'affaire Péchiney. La localisation du délit d'initié", *R.C.D.I.P.* 1996, n° 4, 621, 626.

[1878] *Id.*

[1879] *Id.*, at 636. The long arm of French law could also undermine objections against U.S. extraterritorial jurisdiction. *Id.*, at 637.

either in France or abroad, could theoretically be subject to French (criminal) law, since *any felony* or *misdemeanor* punishable with imprisonment committed against a French national abroad, is subject to French criminal jurisdiction since 1994.[1880] Dual criminality is not required.

A difficult question is *who* is actually a victim of insider-trading for purposes of the application of the passive personality principle to foreign insider-trading cases. Reference may here be made to the subsection on the German law of cross-border insider-trading. German law may indeed also protect German investors from insider-trading abroad under the general criminal law principle of passive personality jurisdiction (albeit subject to a requirement of dual criminality).

Netherlands

567. In the Netherlands, insider-trading is prohibited under administrative and criminal law.[1881] A 2005 law provides that it is prohibited to trade as an insider, in or from the Netherlands or a State that is not an EU Member State, in securities that are admitted to trading on a Dutch regulated market.[1882] It is also prohibited to trade as an insider, in or from the Netherlands, in securities that are admitted to trading on a regulated market in an EU Member State or a non-EU Member State.[1883] It is apparently not prohibited to trade as an insider, in or from a Member State, in securities that are admitted to trading on a Dutch regulated market.[1884] This is remarkable, as in almost any other State, jurisdiction obtains on the basis of domestic trading, irrespective of the place where the insider-trading actions have been carried out. Dutch authorities seem to suppose that foreign authorities will exercise their jurisdiction over insider-trading actions concerning securities listed in another Member State but carried out in their territory – which these authorities may indeed be required to do under Article 10 (b) of the Market Abuse Directive. Cooperation with other Member State regulators[1885] does however not suffice to meet the the requirements of the EC Directive, which casts a wide net and provides that any Member State shall *also* apply the relevant prohibitions and requirements to "actions carried out on its territory or abroad concerning financial instruments that are admitted to trading on a regulated market situated or operating within its territory or for which a request for admission to trading on such market has been made".[1886]

[1880] Article 113-7 French Penal Code. CAFRITZ and TENE in particular have pointed to the possibilities of this principle for jurisdiction over economic offences. *See* E. CAFRITZ & O. TENE, "Article 113-7 of the French Penal Code: the Passive Personality Principle", 41 *Colum. J. Transnat'l L.* 585, 590-91 (2003).

[1881] *See* Articles 45c and 46 of the Act on the Supervision of Securities Transactions 1995, as modified by Act of 23 June 2005, implementing the EC Market Abuse Directive.

[1882] *Id.*, Article 46 (1) (a).

[1883] *Id.*, Article 46 (1) (b).

[1884] Insider-trading became a criminal offence under Dutch law in 1989 (Article 336a of the Dutch Criminal Code). The *Explanation* (*Memorie van Toelichting*) at the time (*Mvt* bij wetsontwerp 19935, at 7) stated that the law also covers orders from other countries (apparently *any* other countries, whether EU Member States or not) for securities listed on a Dutch exchange. *See also* J.J.J. VAN LANSCHOT, "Chapter 11: The Netherlands", in E. GAILLARD (ed.), *Insider-trading: The Laws of Europe, the United States and Japan*, Deventer, Kluwer, 133, 144-45 (1992).

[1885] *Id.*, Article 45b.

[1886] Interview with Felix Flinterman, European Commission, Internal Market and Services DG, Securities Markets, 24 August 2006 (stating that it indeed appeared that Article 46 of the Dutch Act did

Belgium

568. In Belgium, insiders may incur both criminal and administrative liability.[1887] The scope *ratione loci* of the prohibition of insider-trading closely follows the scope of the EC Market Abuse Directive.[1888] In accordance with Article 10 (a) of the Directive, jurisdiction obtains over insider-trading actions concerning financial instruments that are admitted to trading on a regulated market situated or operating within Belgian territory or for which a request for admission to trading on such a market has been made, irrespective of whether the actions have been carried out in Belgium or abroad.[1889] In accordance with Article 10 (b) of the Directive, jurisdiction also obtains over actions carried out in Belgium concerning financial instruments that are admitted to trading on an EC regulated market or for which a request for admission to trading on such market has been made.[1890] The scope of the Belgian provision is somewhat broader than the scope of the Directive, because, like in the United Kingdom, jurisdiction may also obtain over insider-trading actions concerning securities that are listed on a non-EC market, even when no action has been carried out in Belgium, if the executive branch has designated such a market.[1891] The executive branch has however so far not yet done so.[1892]

569. Because the Belgian legislation is very recent, it is unclear whether Belgium will exercise its jurisdiction on the basis of territorial listing *and* on the basis of territorial action, or whether it will instead opt to pass information concerning territorial actions on to the regulators of the foreign market where the securities concerned are listed. International cooperation, either intra-EU under Article 16 of the Directive, or extra-EU under Memoranda of Understanding, is at any rate high.[1893] No administrative or penal fine for cross-border insider-trading has so far been levied in Belgium. In an interview, an official noted that, if one will ever be levied, it will probably be on the basis of territorial listing in Belgium, because the Belgian regulator only supervises the Belgian market, and will ordinarily only be informed of

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not accurately implement the EC Market Abuse Directive, yet that the Commission's review process was still on-going).

[1887] *See* Article 25, § 1, 1° and Article 40 of the Act of August 2, 2002 concerning the supervision of the financial sector and financial services, *Moniteur belge*, September 4, 2002 (ed. 2).

[1888] *See* for the previous regime: Article 185 of the Statute on Financial Operations and Financial Markets, *Moniteur belge*, 22 December 1990; B. HANOTIAU & B. FERON, "Chapter 3: Belgium", in E. GAILLARD (ed.), *Insider-trading: The Laws of Europe, the United States and Japan*, Deventer, Kluwer, 44-45 (1992).

[1889] *Id.*, Article 25, § 3, 1°.

[1890] *Id.*, Article 25, § 3, 2°. In Article 2, 6°, a "foreign regulated market" is defined as an EC regulated market.

[1891] *Id.*, Article 25, § 3, 1°-2°.

[1892] K. GEENS & M. WAUTERS, "Insider trading en andere vormen van marktmisbruik", in J. RONSE INSTITUUT (ED.), *Financiële wetgeving: de tussenstand* 2004, Leuven, Jan Ronse Instituut, 2005, 384, 414. In 2006, an *Arrêté Royal* concerning market abuse was adopted, which elaborated on a number of provisions of the 2002 Act, but it did not provide for jurisdiction over insider-trading in securities listed outside the EC.

[1893] *See* Annual Report 2005 of the Belgian Commission for Banking, Financial Services and Insurance, p. 70, available at http://www.cbfa.be/nl/publications/ver/pdf/cbfa_2005.pdf; Annual Report of the Commission's Directors' Committee, p. 94, available at http://www.cbfa.be/nl/publications/ver/pdf/cbfa_dc_2005.pdf (concerning adherence to the IOSCO Multilateral MoU).

insider-trading actions carried out in its territory when notified by a Belgian broker (Article 6.9 of the EC Directive obliges "any person professionally arranging transactions in financial instruments" to notify his territorial State about suspicious transactions).[1894]

7.3. Restraining antifraud securities jurisdiction under public international law

570. PUBLIC INTERNATIONAL LAW RESTRAINTS - In this subsection, an attempt will be made at developing principles of jurisdiction under public international law that impose limits on States' unilateral exercise of jurisdiction in securities matters.

Public international law leaves States ample room to expand the reach of their securities laws as they see fit. It might however be argued that, if States have no interest or no reasonable connection to a securities transaction, they ought to refrain from exercising their jurisdiction over that transaction. Indeed, under public international law, a State that has no legitimate interest in, or is not significantly affected by, an activity should not exercise its jurisdiction over that activity.[1895] The fact that a particular exercise of jurisdiction over a securities transaction is not met with foreign protest may not matter, as foreign protest only comes into play as a factor to determine the reasonableness under international law of a jurisdictional assertion provided that the regulating State *had already an interest* in asserting its jurisdiction.

In securities matters, there is an appalling lack of theorization about what interests States may have in exercising their jurisdiction over cross-border securities transactions. States are generally deemed to be entitled to exercise jurisdiction under public international law if (part of) a securities transaction occurs on their territory, or produces effects there.[1896] The most appropriate regulator or the applicable law may be designated under rules of private international law, but would not be mandated by public international law. In this part, an economic analysis will be undertaken so as to determine what interests States genuinely have, or rather *not* have, in cross-border securities regulation. As argued, if a State has no legitimate interest in regulation, it has no case under public international law to exercise its jurisdiction

7.3.1. Applying the law of jurisdiction under public international law to international securities regulation

571. THE PRINCIPLE OF NON-INTERVENTION UNDER PUBLIC INTERNATIONAL LAW – The imposition of capital market rules, by the United States in particular,

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[1894] In an interview, Dieter Vandelanotte, *attaché* of the Belgian Commission for Banking, Financial Services and Insurance (*i.e.*, the Belgian financial regulator), stated that it would be logical to base jurisdiction on territorial listing, because the Belgian Banking Commission supervises the *national* financial market in the first place, is usually more familiar with the issuers listed in Belgium, and could better tell what information qualifies as insider-trading information. *See* interview, August 7, 2006, on file with the author.

[1895] *See* chapter 2.2.3.

[1896] *See, e.g.*, H. KRONKE, "Capital Markets and Conflict of Laws", 286 *R.C.A.D.I.* 245, 380 (2000) ("[P]ublic international law does not really say as much as many are reading into it. In particular, it does neither support nor undermine application of domestic law to conduct abroad having effects within the legislator's and the court's own territory.") (footnote omitted).

informed by a conviction of superiority *vis-à-vis* other nations with less developed or less regulated capital markets, could well be at odds with public international law principles of non-intervention and the equality of States (and their respective socio-economic orders) in that they impinge on the sovereignty of another State.[1897] The exercise of 'extraterritorial' jurisdiction over fraudulent securities transactions that harm the regulating State's capital markets or investors, appears however both necessary and legitimate. The question arises how such jurisdiction could be justified under international law.

572. AN EXCEPTION TO THE PRINCIPLE OF NON-INTERVENTION – In order to justify a State's jurisdiction over cross-border or foreign securities transactions, TUNSTALL has attempted to carve out an exception to the principle of non-intervention:[1898] "Under the *proposed* new principle of law, any impinging of a state's sovereignty would only occur in order to correct an event having adverse consequences for *international* securities markets and regulation."[1899]

This principle could be criticized for two reasons. For one thing, it seems to exclude a State's assertions of jurisdiction over acts that only affect its own national securities market. For another, and more fundamentally, however meritorious the attempt at shaping an exception to the principle of non-intervention, it might be argued that not as abstract a principle as the principle of non-intervention but the *ab initio* unfettered jurisdictional freedom of States – which might be tempered if *specific* State practice and *opinio juris* nullifying this freedom in particular areas could be discerned – is the appropriate vehicle to assess the legality of jurisdictional assertions.

573. INTERNATIONAL *VIS-À-VIS* NATIONAL SECURITIES MARKETS - What is conspicuous about the above-mentioned exception is that it only applies to fraudulent acts that affect *international* securities markets and regulation, thereby seemingly excluding fraudulent acts that merely affect *national* securities markets and regulation. This restriction might appear warranted in that it transfigures classical unilateral jurisdiction into multilateral, cooperative jurisdiction. States may want to rely on each other's enforcement mechanisms so as to uproot the "international evil" of elusive securities fraud. When applying its securities laws to a cross-border situation, laws which purportedly mirror a *jus commune* of principles of international securities legislation, a State may be consider to represent the interests of the world community.

If the cross-border situation only affects narrowly defined national interests, the State could, obviously, not represent the world community. Inferring that, in that situation, the State would be precluded from exercising its jurisdiction appears however unwarranted. The law of extraterritorial (criminal) jurisdiction has always been mindful of the regulatory needs of individual States. It has relied upon principles of jurisdiction that were based on a single State's nexus with a situation. Admittedly, the international community may possibly at times have conditioned jurisdiction upon dual criminality, yet it has never required that the situation subject to jurisdiction harm *international* interests rather than *national interests*. Historically, the law of

[1897] *See* G. SCHUSTER, *Die internationale Anwendung des Börsenrechts*, Berlin, Springer, 1996, 12; I. TUNSTALL, *International Securities Regulation*, Sydney, Thomson, Lawbook Co., 2005, 113.
[1898] *See* I. TUNSTALL, *International Securities Regulation*, Sydney, Thomson, Lawbook Co., 2005, 111.
[1899] *Id.*, at 113 (emphasis added).

jurisdiction has served State interests. Only as a subsidiary matter, it has heeded the interests of the international community by authorizing or requiring the exercise of *universal* jurisdiction. *Exclusive* vicarious or even universal jurisdiction over securities fraud should therefore be rejected. Even subsidiary universal jurisdiction over securities fraud ought to be rejected. States should only exercise their jurisdiction in case they can identify a reasonable link of the situation to be regulated with their interests. In subsection 7.3.5, it will be discussed what links are reasonable, and which reasonable links might confer *primary* jurisdiction, and which *subsidiary* jurisdiction.

Although restricting securities jurisdiction to fraudulent activities that affect *international* securities markets and regulation ought to be rejected, one might wonder whether the addition of "international" is not pleonastic in the present securities context. Indeed, with multinational companies cross-listing on several exchanges and investors being able to purchase and sell securities on a particular stock exchange irrespective of their physical location, most securities markets are in fact internationalized. It might therefore be argued that all States may benefit from a single State's enforcement of its securities laws, even if that State justifies its jurisdictional claim on the ground that it protects its own capital markets and investors. Not surprisingly, this phenomenon has given rise to a free-riding attitude of quite a number of States, which, instead of assuming the responsibility of policing their capital markets, wait for other, more aggressive States, in practice the United States, to enforce their securities laws.

574. JURISDICTIONAL FREEDOM OF STATES – A more fundamental objection against TUNSTALL's approach is that he accepts the applicability of the principle of non-intervention to matters of international securities regulation at face value. The principle of non-intervention however appears too vague to apply *as such*, without further elaboration by State practice and *opinio juris* in the very specific area of securities regulation.[1900] Unlike what TUNSTALL argues,[1901] any residual reliance on the general principle because of the absence of a specific rule is unwarranted. As the *Lotus* judgment of the International Court of Justice is still the only authoritative statement by an international tribunal on the issue of jurisdiction, it may be submitted that, in the absence of a *precise* prohibitive rule that restricts States' freedom to regulate securities transactions, a rule which ought to be shaped by a consistent pattern of protest and jurisdictional self-restraint, the possible ambit of a State's securities laws is very wide.

[1900] *See also* A. BIANCHI, "Extraterritoriality and Export Controls: Some Remarks on the Alleged Antinomy Between European and U.S. Approaches", 35 *G.Y.I.L.* 366, 427 (1992) (arguing that an "effort to trace specific jurisdictional rules applicable in concrete cases seems all the more necessary in light of the difficulty of assessing the content of other principles that might be relevant to approach the subject, such as the prohibition of economic intervention"); J. KAFFANKE, "Nationales Wirtschaftsrecht und internationaler Sachverhalt", 27 *Archiv des Völkerrechts* 129, 149 (1989) (stating that a modern version of the principle of non-intervention should be adopted in this context, although admitting that "[b]ei der Lösung des hier behandelten Problems kann man auf altbekannte Ansätze zurückgreifen, die nur den besonderen Anforderungen der neuen Problematik angepasst werden müssen").

[1901] I. TUNSTALL, *International Securities Regulation*, Sydney, Thomson, Lawbook Co., 2005, 113 (arguing that "the principle of non-intervention has not been developed in customary international law to the extent of permitting intervention for economic considerations such as correcting an adverse situation in a country's financial markets.").

As pointed out, the absence of foreign reactions at a State's assertions of securities jurisdiction may seriously undercut the case *against* the legality under public international law of such assertions. Any crystallization of a prohibitive rule under customary international law is moreover hampered by the requirement of *opinio juris*. Indeed, a State's courts and regulators tend to premise their jurisdictional restraint in securities matters – restraint which is doubtless there – on considerations of expediency, procedural economy, and legal certainty,[1902] rather than on deference to other nations and a conviction that restraint is required as a matter of law (with the precedential value attached), let alone *international* law.

575. 'OBJECTIVE' INTERNATIONAL LAW - Is the *Lotus*-based authorization of a nearly unrestrained sweep of a State's securities laws to be taken as the end of the matter? It is certainly arguable that, if States do not take issue with the reach of another State's laws, customary international law could not logically provide restraining principles. It is not up to international law to inform State X that State Y, whose securities laws reach State X, tramples on the sovereign rights of State X. International law is indeed not there to protect, as a grandfatherly figure full of bonhomie, the rights of naïve States.

This is no doubt true. However, the situation is different if one imagines a community of States in which every single member is naïve. All States *believe* that they pursue their own interests, either by applying their laws extraterritorially or by taking the extraterritorial application of another State's laws for granted. *In reality* however, they sabotage them. If they had seriously and scientifically analyzed their behaviour, they would never have chosen it. It might be argued that modern international law ought to come to rescue these States from their ignorance. The underlying dynamic of modern international law should arguably no longer be one of protecting sovereign States' turfs at all costs, but rather one of co-operation aimed at a finding the best solution for the international community. To that end, it might draw on knowledge from different scientific disciplines.[1903]

576. Admittedly, if a solution to a global problem, such as international securities regulation, has been worked out, it may borrow some persuasive force from its scientific rigor, but, in the absence of State practice and *opinio juris*, it does not constitute international law. However, it might be remembered that "teachings of the most highly qualified publicists of the various nations" are a source of law, albeit a subsidiary one, that the International Court of Justice, and domestic courts applying international law, might heed.[1904] More importantly, the conceptual underpinnings of these "teachings" might possibly be supported by generally accepted principles of international law applicable in other substantive areas. In the international law of jurisdiction, for all its vagueness, there is arguably one single principle which all States adhere to: the principle that a State ought to have an *interest* in exercising its

[1902] *See, e.g.*, D.C. LANGEVOORT, "Schoenbaum Revisited: Limiting the Scope of Anti-fraud Protection in an International Securities Marketplace", 55 *Law & Contemp. Probs.* 251 (1992).
[1903] *See also* J. KAFFANKE, "Nationales Wirtschaftsrecht und internationaler Sachverhalt", 27 *Archiv des Völkerrechts* 129, 147-48 (1989) (stating that public international law has often not heeded "die Gedanken, Ansätze und Ergebnisse der anderen sich mit diesem Thema [*i.e.*, nationales Wirtschaftsrecht und international Sachverhalt] auseinandersetzenden Disziplinen", and that "[d]ie Völkerrechtswissenschaft muss … die Behandlung des Problems in den anderen Wissenschaften soweit möglich für die eigenen Uberlegungen nutzbar machen.")
[1904] Article 38 (1) (d) of the Statute of the International Court of Justice.

jurisdiction. This is possibly not more than a principle of common sense, for it does not make sense for a State to harness its resources to enforce its prescriptive jurisdiction if such would not somehow yield a benefit. States would no doubt subscribe in advance to a charter which states that they could never exercise jurisdiction if they do not benefit from it, assuming of course that benefits could be objectively determined.

577. On the basis of this *a priori*-approach, it could be argued that exercising securities jurisdiction is warranted only if a State has an objective interest in doing so. In order to determine what an objective interest is, it is not relevant that the State *assumes* that its jurisdictional assertion serves its interests. Neither is it relevant that another State has not voiced concern over the former State's assertion, *assuming* that its interests are not affected. Both might err. What is relevant is whether the interest of a State is *objectively* served or harmed. *Objective* determination of State interests escapes the legal realm, and belongs to the realm of science. One of the sciences that could prove helpful in determining State interests, and the desired reach of a State's laws, is economics.

578. Hereinafter, an approach that draws on economics will be followed so as to determine the reach of the antifraud provisions of the securities laws under international law. In a first subsection, the primary jurisdictional tests in the field of cross-border securities regulation, the effects and conduct tests, both of which are derived from the classical territoriality principle, will be critically appraised, and restraining principles will be proposed. In a second subsection, more radical proposals for change, such as exclusive reliance on domestic trading, the nationality of the issuer, or the regulatory choice of the issuer ('portable reciprocity') will be discussed. Finally, an attempt will be made at finding a middle way between the existing tests and a complete overhaul of the current regulatory system. It will be argued that, in the absence of a global securities regulator, primary reliance on domestic trading, with the possibility for States of exercising *subsidiary* jurisdiction on the basis of another nexus, is both the most rational and the most feasible approach to international securities regulation.

7.3.2. Limiting the effects test

579. HARM DONE TO THE REGULATING STATE BY A BROAD EFFECTS TEST - A broad interpretation of the effects test may possibly do more harm than good to the regulating State. U.S. investors for instance have been routinely excluded from foreign securities offers lest including them might subject the offer to the long arm of U.S. securities laws.[1905] Hence, restricting the reach of the effects test may allow U.S. investors to diversify their portfolio, which is one of the reasons why the SEC adopted Regulation S (see 7.6.1.a) in 1990. Admittedly, U.S. investors have at times tried to circumvent their exclusion from foreign offerings by using inventive corporate techniques. In *MCG* v. *Great Western Energy*, the Fifth Circuit however held that U.S. investors cannot claim to be defrauded when they have themselves structured a transaction not burdened by the securities laws, by using a foreign conduit so as to be eligible to take part in a foreign offering of which U.S. investors were excluded.[1906]

[1905] *See, e.g.*, J. SHIRLEY, "International Law and the Ramifications of the Sarbanes-Oxley Act of 2002", 27 *B.C. Int'l & Comp. L. Rev.* 501, 522-23 (2004).
[1906] *MCG, Inc.* v. *Great Western Energy Corp.*, 896 F.2d 170 (5th Cir. 1990)

A broad interpretation of the effects test by one State may also allow other States to free-ride at the expense of the former State. Indeed, States do not have an incentive to build up their own securities enforcement capabilities if another State's jurisdiction reaches fraudulent activities done in their territory. The State that expands the reach of its jurisdiction, believing that such serves its own interests, may thus actually overburden its own judicial system with quiet approval and even encouragement of other States, for whom the former State does a job that should reasonably belong to them.

580. U.S. V. EUROPE – The potential reach of the effects test as employed in the United States – with harm to a U.S.-based investor sufficing for an assertion of U.S. subject-matter jurisdiction over a fraudulent transaction – is not necessarily broader than the potential reach of the effects test that European courts could rely on. In Europe, in cases of securities misrepresentation, the effect of a misrepresentation generally determines both jurisdiction and applicable law under classical rules of private international law governing torts. Harm to a Europe-based investor as the result of a prospectus issued abroad, arguably qualifies as a sufficient effect. Under the EU Insider Trading Directive, effects do not seem to determine jurisdiction, as only insider-trading action and listing on a territorial market are sufficient connections. However, the ill-informed decision to purchase or sell securities, taken by an investor present in Europe upon being tricked by an insider may be considered part of the insider-trading action itself. Indeed, under the German theory of the "*Verpflichtungsgeschäft*", jurisdiction obtains as soon as the price of the insider-deal has been determined in Germany, *e.g.*, when the deal is struck between an insider abroad and an investor in Germany. Moreover, jurisdictional provisions in the criminal laws of EU Member States may extend the protection of insider-trading laws to all national investors, irrespective of the place where the transaction occurred or where these investors are based, thus going far beyond the U.S. effects test which is still based on U.S. residence.

The sheer dearth of European cross-border securities cases obviously counsels caution. Although long-arm legal instruments are surely there, it is far from certain whether European States would ever be willing to apply their laws as aggressively as the United States do. Yet as policing and enforcement of securities laws in Europe may in the near future be strengthened, as European capital markets reach the level of maturity of their U.S. counterparts, it is not excluded that European securities laws will be applied routinely and extensively to cross-border securities transactions. Hereinafter, possible limits on the effects test will be discussed in a U.S. context. These limits could be applied *mutatis mutandis* to (future) European practice.

581. BREADTH OF THE EFFECTS TEST - If harm to a single U.S.-based investor by a wholly foreign securities transaction suffices for there to be U.S. subject-matter jurisdiction, the reach of the effects principle becomes overbroad, especially in the current interlinked system of capital markets where U.S. resident investors can sell and purchase securities anywhere in the world. LANGEVOORT has observed in this context: "… U.S. standards become de facto standards for worldwide

behaviour when applied to foreign investments because of their availability to U.S. investors."[1907] Doubtless, jurisdictional restraint is apt.

582. LIMITING THE EFFECTS TEST – Limitations on effects jurisdiction could easily be contemplated. So as to limit jurisdictional excesses, foreign transactions not intended to produce effects in the United States, but actually producing effects in the United States, could be excluded.[1908] It has also been proposed to restrict the reach of the effects test to instances of *core* fraud, and to leave the instances of other fraud to other nations.[1909] As only core fraud is regarded by the international community as an evil, an exercise of U.S. jurisdiction over foreign activities that are not regarded as illegal under foreign law might upset other nations. Drawing on a (nascent) principle of subsidiarity under international law, the U.S. could also defer to other nations if these nations have a stronger connection to the case, at least if they are able and willing to take their enforcement responsibility.

More radically, the securities legislation's rationale of *individual* investor protection could be swapped for a rationale of *general* protection of the U.S. investor public. Such has the advantage of weeding out cases in which a negligible number of U.S.-based investors have been harmed by foreign fraudulent conduct. It might rightfully be argued that the United States, by protecting U.S.-based investors investing abroad through the broad effects test, has taken away the risk assessment responsibility ordinarily incurred by investors (*i.e.*, the so-called 'moral hazard'), and that the time has come for U.S.-based investors, and no longer the U.S. courts, to shoulder the burden of investments turning sour in jurisdictions with a bad regulatory reputation.[1910] This argument is especially compelling for sophisticated U.S.-based investors investing abroad.[1911]

583. EFFECTS-BASED DERIVATIVE SUITS - It is unclear whether the effects test also protects U.S. resident nationals that are only indirectly harmed by a fraud perpetrated abroad upon a foreign corporation in which the U.S. investors have a stake. In *Schoenbaum*, the Second Circuit believed it did – although in that case the defrauded corporation was listed on a U.S. stock exchange. In *IIT* v. *Vencap*, jurisdiction over a fraud upon a foreign trust in which U.S. investors had a stake was dismissed,[1912] but the dismissal was based on the insubstantial stake of these investors rather than on the foreign nationality of the trust.

[1907] D.C. LANGEVOORT, "Schoenbaum Revisited: Limiting the Scope of Anti-fraud Protection in an International Securities Marketplace", 55 *Law & Contemp. Probs.* 241, 246 (1992).
[1908] *See* K. YOUNG CHANG, "Multinational Enforcement of U.S. Securities Laws: The Need for the Clear and Restrained Scope of Extraterritorial Subject-Matter Jurisdiction", 9 *Fordham J. Corp. & Fin. L.* 89, 122 (2003).
[1909] D.C. LANGEVOORT, "Schoenbaum Revisited: Limiting the Scope of Anti-fraud Protection in an International Securities Marketplace", 55 *Law & Contemp. Probs.* 241, 245-246, and 259-60 (1992).
[1910] *Compare id.* at 260.
[1911] *Compare* J.D. KELLY, "Let There Be Fraud (Abroad): A Proposal for a New U.S. Jurisprudence With Regard to the Extraterritorial Application of the Anti-Fraud Provisions of the 1933 and 1934 Securities Acts", 28 *Law & Pol'y Int'l Bus.* 477, 506 (1997)
[1912] *IIT* v. *Vencap, Ltd.*, 509 F.2d 1001 (2d Cir. 1975).

It might be argued that derivative actions by U.S. investors regarding a fraud perpetrated abroad on a foreign corporation ought to be brought in a foreign court.[1913] Possibly, only when the U.S. investors could not obtain relief in the foreign court (for instance of a derivative action is not allowed) should they be allowed, as a subsidiary matter, to sue in the United States. As quite a number of privately enforced securities cases, especially insider-trading cases, are derivative suits, requiring a derivative suit to be primarily filed in the State where the fraud is perpetrated on a corporation may seriously restrict the reach of the potentially overbroad effects test. This is not to say that such would be required under public international law. Indeed, if a foreign investor in which a substantial number of U.S. residents have a stake, is defrauded, the U.S. may have a legitimate interest under public international law in exercising primary subject-matter jurisdiction over the foreign fraud.[1914]

7.3.3. Limiting the conduct test

584. HARM DONE TO THE REGULATING STATE BY A BROAD CONDUCT TEST – Entertaining a broad conduct test may not result in the exclusion of domestic investors from foreign offers. However, it may harm the interests of the regulating State because it may cause economic actors to avoid the United States for fear that any U.S. conduct relating to a securities transaction, even a mere phone call, may subject the entire s transaction to U.S. law. If economic activities move from the United States to other States, such is surely not in the U.S. interest.

585. U.S. V. EUROPE – Like the effects test, the conduct test is not the preserve of the United States. While in the field of securities misrepresentations, European courts seem to have a preference for effects over conduct for purposes of applicable law and jurisdiction, a reliance on conduct is not excluded. Importantly, the 2003 EC Directive on insider-dealing requires EU Member States to exercise their jurisdiction as soon as insider-dealing actions are carried out in their territory. Since the Directive does not define the substantiality of these actions, the reach of the European conduct test is potentially as broad as the U.S. conduct test. The *Péchiney* case, in which the French Court of Cassation found jurisdiction over a case of cross-border insider-trading on the basis of rather insignificant conduct in France, is a clear reminder of the potential reach of the European conduct test. Hereinafter, the conduct test will be discussed from a U.S. perspective, as it is U.S. courts that have pioneered it, and U.S. doctrine that has rung the alarm bell.

586. THE CONTROVERSIAL NATURE OF THE CONDUCT TEST - Most objections against extraterritorial jurisdiction in securities cases are directed at the conduct

[1913] *See* D.C. LANGEVOORT, "Schoenbaum Revisited: Limiting the Scope of Anti-fraud Protection in an International Securities Marketplace", 55 *Law & Contemp. Probs.* 241, 258-59 (1992) ("It is hard to imagine that an U.S. investor who buys the shares of a foreign company reasonably expects the *subsequent* protection of the U.S. securities laws simply because the company was led to make a poor investment decision abroad by the malfeasance of its managers. Intuitively, that is another law's domain.").

[1914] *See* G. SCHUSTER, *Die internationale Anwendung des Börsenrechts*, Berlin, Springer, 1996, 21. Somewhat ironically, while the active personality principle is a generally accepted principle of international criminal jurisdiction, active personality jurisdiction over securities fraud, in contrast, appears not justified, since the foreign activities of nationals or residents abroad do not by themselves affect the regulating State, whose securities laws are only aimed at protecting the domestic market and domestic investors. *Id.*, at 69.

test,[1915] primarily because it is too mechanical and might possibly disserve U.S. interests.[1916] Especially a number of U.S. circuits' predicating of conduct-based jurisdiction on merely preparatory U.S. conduct has been denounced as jurisdictional overreaching that limits international capital mobility.[1917]

Other authors, however, have supported these courts, in particular because they purportedly use a clear jurisdictional test (any U.S. conduct suffices), unlike the restrictive courts which – relying on unclear factors and unduly balancing the remedial purposes of the U.S. securities laws and considerations of judicial economy – purportedly prevent legitimate claims from reaching U.S. courts.[1918]. To the credit of the conduct test also goes that, in keeping with the traditional evidentiary rationale of the subjective territoriality principle, conferring jurisdiction on the conduct State may lower the costs of investigation and enforcement[1919] (although mutual assistance agreements and memoranda of understanding could ensure that the effects State could rely on the investigation and enforcement capabilities of the conduct State so as to prosecute a securities fraud affecting the effects State's capital markets). Finally, and important from the perspective of public international law, the conduct test is the subjective modality of the principle of territoriality, one of the cornerstones of the classical regime of international jurisdiction[1920].

587. POLICY JUSTIFICATIONS OF THE CONDUCT TEST BY U.S. COURTS – U.S. courts have generally predicated the conduct test in the context of securities regulation on three policy considerations:[1921] (1) the desire to avoid creating a safe haven for

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[1915] *See* P.K. WILLISON, "*Europe and Overseas Commodity Traders v. Banque Paribas London:* Zero Steps Forward and Two Steps Back", 33 *Vand. J. Transnat'l L.* 469, 499 (2000).

[1916] *See, e.g.*, D.C. LANGEVOORT, "Schoenbaum Revisited: Limiting the Scope of Anti-fraud Protection in an International Securities Marketplace", 55 *Law & Contemp. Probs.* 241, 247 (1992) (arguing that "outcomes in the conduct cases … seem influenced less by … functional analysis than simplistic, ad hoc judgments of whether the conduct was "substantial enough").

[1917] *See* S.J. CHOI & A.T. GUZMAN, "The Dangerous Extraterritoriality of American Securities Law", 17 *Nw. J. Int'l L. & Bus.* 207, 229 (1996). S.J. CHOI & A.T. GUZMAN, "The Dangerous Extraterritoriality of American Securities Law", 17 *Nw. J. Int'l L. & Bus.* 207, 229 (1996); W.B. PATTERSON, "Defining the Reach of the Securities Exchange Act: Extraterritorial Application of the Antifraud Provisions", 74 *Fordham L. Rev.* 213, 226 (2005) (observing "that it is extraordinarily difficult for corporations to be place on notice of when and how they may be subject to United States securities laws and regulations"). *Id.*, at 236, 244.

[1918] *See, e.g.*, M.J. CALHOUN, "Tension on the High Seas of Transnational Securities Fraud: Broadening the Scope of United States Jurisdiction", 30 *Loy. U. Chi. L.J.* 679, 719-723 (1999).

[1919] *See* D.C. LANGEVOORT, "Schoenbaum Revisited: Limiting the Scope of Anti-fraud Protection in an International Securities Marketplace", 55 *Law & Contemp. Probs.* 241, 247 (1992).

[1920] HARVARD RESEARCH ON INTERNATIONAL LAW, "Draft Convention on Jurisdiction with Respect to Crime", 29 *A.J.I.L.* 439, 487 (1935) ("It is not to be doubted that States are competent internationally to apply an unqualified subjective test."); F.A. MANN, "The Doctrine of Jurisdiction Revisited after Twenty Years", 186 *R.C.A.D.I.* 82 (1984-III) (supporting conduct-based jurisdiction, noting that it is "wholly traditional in character" and is in line with the traditional choice-of-law method of establishing tortious liability, with the court having to answer the question where the material conduct occurred); *Leasco*, 468 F.2d at 1334 (holding that "conduct within the territory alone would seem sufficient from the standpoint of jurisdiction to prescribe a rule"); *Continental Grain*, 592 F.2d at 415-17 (adding that it does not "view the nationality of defendants … as having any independent significance for jurisdictional purposes"); J.G. URQUHART, "Transnational Securities Fraud Regulation: Problems and Solutions", 1 *Chi. J. Int'l L.* 471, 479 (2000) (reasoning that the conduct test is "one of the most revered tenets of international law").

[1921] *MCG, Inc.* v. *Great Western Energy Corp.*, 896 F.2d 174 (5th Cir. 1990).

fraudsters;[1922] (2) the expectation that foreign governments would reciprocate;[1923] and (3) Congress's intent to elevate the standards of conduct in securities transactions (*i.e.*, the protection of the integrity of U.S. capital markets).[1924]

It may be pointed out that, under a more or less broad reading of 'effects', the third purported rationale of the conduct test, the protection of the integrity of U.S. capital markets, is actually premised on effects felt by U.S. residents stemming from their inability "to distinguish between transactions protected by United States law and those that are not so protected."[1925]

588. UNIVERSAL JURISDICTION OVER SECURITIES FRAUD? - The bottom-line of the three rationales of conduct jurisdiction seems to be that U.S. courts believe that the conduct test is justified "on the ground that fraud is essentially a universal evil that the United States, as the leader of the global securities market, has a duty to stamp out".[1926] The territorial conduct requirement – with accidental territorial conduct sufficing to confer jurisdiction – masquerades a more ambitious agenda. If an exceptional nation as the U.S. expects itself to take the lead in clamping down on international securities fraud, conduct-based jurisdiction, although it pays lip-service to the (subjective) territoriality principle, edges awkwardly close to universal jurisdiction.

A threshold requirement for the legality of an exercise of universal jurisdiction is however that the crime over which jurisdiction is exercised be universally considered as reprehensible. As States may tolerate a certain level of fraud in order to lure investors – an observation which partly buttresses CHOI and GUZMAN's theory of portable reciprocity (see subsection 7.3.4) – it appears that securities fraud is not necessarily evil.[1927] Even if all States were to make securities fraud punishable, such would not by itself make it subject to universal jurisdiction, as only international crimes, *i.e.*, crimes that violate *erga omnes* obligations may give rise to universal jurisdiction under customary international law. Doubtless, one would be hard-pressed to make an argument in favour of universal jurisdiction over securities fraud.[1928]

[1922] *Kasser*, 548 F.2d at 116; *Continental Grain*, 592 F.2d at 421-22 ("We do not think Congress intended to allow the United States to be used as a base for manufacturing fraudulent security devices for export, even when these are peddled only to foreigners.") (citing *Vencap*, 519 F.2d at 1017); *Grunenthal GmbH* v. *Hotz*, 712 F.2d 421 (9th Cir. 1983) (citing *Kasser*, 548 F.2d at 116).

[1923] *Vencap*, 519 F.2d at 1017; *Kasser*, 548 F.2d at 116; *Continental Grain*, 592 F.2d at 421-22.

[1924] *Continental Grain*, 592 F.2d at 421; *Grunenthal*, 712 F.2d 425.

[1925] *See* A.T. GUZMAN, "Choice of Law: New Foundations", 90 *Geo. L.J.* 883, 922 (2002).

[1926] *See* J.D. KELLY, "Let There Be Fraud (Abroad): A Proposal for a New U.S. Jurisprudence With Regard to the Extraterritorial Application of the Anti-Fraud Provisions of the 1933 and 1934 Securities Acts", 28 *Law & Pol'y Int'l Bus.* 477, 491 (1997).

[1927] *Id.*, at 494-95. K. YOUNG CHANG, "Multinational Enforcement of U.S. Securities Laws: The Need for the Clear and Restrained Scope of Extraterritorial Subject-Matter Jurisdiction", 9 *Fordham J. Corp. & Fin. L.* 89, 117-18 (2003)

[1928] *See also* I. FADLALLAH, "Point de vue sur l'affaire Péchiney. La localisation du délit d'initié", *R.C.D.I.P.* 1996, n° 4, 621, 631 (« Il faut ici se garder de voir dans le délit d'initié l'une de ces infractions naturelles qui portent atteinte à une valeur morale universellement reconnue »). *See however* G. SCHUSTER, *Die internationale Anwendung des Börsenrechts*, Berlin, Springer, 1996, 36-37 (conceding that there may indeed be no universal jurisdiction over securities fraud *de lege lata*, but noting that States may have a common interest in fighting stock exchange crashes and market volatility stemming from regulatory deficits).

589. CIRCUMSCRIBING THE CONDUCT TEST – The conduct test is in quite a number of cases not appropriate, because securities laws are ordinarily aimed at the protection of domestic capital markets and not at the universal protection of foreign capital markets. It is hard to imagine what genuine governmental interest the U.S. could assert if neither U.S. investors are defrauded, nor are the securities of a U.S. corporation the object of fraud, nor are these securities listed in the U.S.[1929]

It may be argued that conduct that does not affect the functioning of domestic capital markets does not justify the exercise of subject-matter jurisdiction. In the absence of clear substantial harm to domestic capital markets, a State should not be entitled to exercise primary jurisdiction on the mere ground that territorial fraudulent conduct purportedly harmed the reputation of its securities markets.[1930]

Although the importance of a State's reputational interests ought to be acknowledged, refraining from exercising conduct-based jurisdiction need not be equated with allowing the reputation of domestic markets to be undermined. LANGEVOORT has interestingly objectified and circumscribed the conduct test in this context as follows: "there is sufficient conduct to justify jurisdiction if an only *if the investment-related facilities of U.S. commerce have been appropriated in the perpetration of a fraud* in such a way that the U.S. reputation is somehow compromised."[1931] Under this revised test, accidental or insignificant U.S. conduct would not confer U.S. subject-matter jurisdiction; only if the integrity of the U.S. capital markets would be threatened could jurisdiction be established. LANGEVOORT has therefore rejected the exercise of jurisdiction over misrepresentations occurred during trips to the United States, and over foreign misrepresentations relating to insubstantial trade in securities in the United States.[1932]

590. SUBSIDIARY CONDUCT-BASED JURISDICTION - While conduct may not be the most appropriate basis for exercising jurisdiction over international securities transactions, it may possibly be relied upon as a subsidiary basis of jurisdiction, if another State with a stronger nexus to the transaction is not able and willing to exercise its jurisdiction over core fraud.[1933] Such is unlikely to engender exasperation, because core securities fraud is punishable in every State. Even better of course, a

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[1929] *See* K. YOUNG CHANG, "Multinational Enforcement of U.S. Securities Laws: The Need for the Clear and Restrained Scope of Extraterritorial Subject-Matter Jurisdiction", 9 *Fordham J. Corp. & Fin. L.* 89, 122 (2003) (arguing that "it is no longer justifiable for U.S. courts to exercise subject-matter jurisdiction extraterritorially in cases in which no U.S. investors or U.S. markets suffer losses").

[1930] *See* D.C. LANGEVOORT, "Cross-Border Insider Trading", 19 *Dick. J. Int'l L.* 161, 172 (2000-2001) (arguing that "there would be not cause to claim jurisdiction as a matter of securities regulation absent some tie to the domestic markets"). *Compare* A.T. GUZMAN, "Choice of Law: New Foundations", 90 *Geo. L.J.* 883, 921-23 (2002) (conceding, however, that the location of a transaction "may be a useful proxy for effects when the impact of a transaction is likely to be felt by those who are close to the location of the transaction and when a judicial inquiry into the presence of effects is costly or inaccurate").

[1931] D.C. LANGEVOORT, "Schoenbaum Revisited: Limiting the Scope of Anti-fraud Protection in an International Securities Marketplace", 55 *Law & Contemp. Probs.* 256 (1992) (emphasis added).

[1932] *Id.*, at 257, taking issue with *AVC Nederland B.V.* v. *Atrium Inv. Partnership*, 740 F.2d 148 (2nd Cir. 1984), and *Psimenos* v. *EF Hutton*, 722 F.2d 1041 (2d Cir. 1983).

[1933] *Compare a contrario* D.C. LANGEVOORT, "Cross-Border Insider Trading", 19 *Dick. J. Int'l L.* 161, 172 (2000-2001) ("While there may be some cases where that is a form of good citizenship in the world of securities regulation, my sense is that the claim is fairly weak in the insider trading context – *especially if one of the other countries is willing and able to prosecute*.") (emphasis added).

State could explicitly waive its rights of (non-)regulation and request the conduct State to exercise its jurisdiction, so that jurisdiction becomes in fact co-operative.

From the viewpoint of procedural economy, it appears indeed more reasonable to require persons who are harmed by foreign conduct to seek redress in their own courts in the first place,[1934] especially when the securities are also traded in the foreign State, before turning to the courts of the State where the conduct took place. Yet if relief in the former courts is unavailable, the latter courts might step in. Preferably, regulators, and not private plaintiffs, should initiate proceedings in this situation, because regulators are, given the sensitivity of the matter, in a better position to assess a foreign State's willingness and ability to hear the case.[1935]

Consequently, to put the issue in public international law terms, it may be submitted that the objective territorial principle (effects test) trumps the subjective territorial principle (conduct test) in matters of securities fraud, because a securities fraud has a more reasonable connection with the place where its effects occur (disruption of regulated markets in particular) than with the place where conduct associated with the fraud occurs.[1936] Only when a State forsakes its claim under the objective territoriality principle may a State step in under the subjective territoriality principle. In subsection 7.3.5, the concept of primary versus subsidiary jurisdiction in securities law will be further elaborated upon.

7.3.4. Rethinking international securities regulation

591. RADICAL PROPOSALS FOR CHANGE - Although the conduct and effects tests could possibly be circumscribed, they may be too open-ended to provide a satisfactory solution for problems of international securities regulation. More radical proposals and far-reaching systemic ideas have therefore been floated about a 'nationality of the issuer'-based system (somehow reflecting the *lex societatis* principle of the conflict of laws), about a territorial exchange-based system (with the laws of the State where the securities exchange is located applying to fraudulent transactions in securities listed on this exchange), and about "portable reciprocity", a technique by virtue of which parties could simply *choose* their own regulator.

These proposals have in common that they limit assertions of extraterritorial jurisdiction, confer predictability on international securities transactions, and level the

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[1934] *See* D.C. LANGEVOORT, "Schoenbaum Revisited: Limiting the Scope of Anti-fraud Protection in an International Securities Marketplace", 55 *Law & Contemp. Probs.* 241, 247 (1992).

[1935] *Compare* K. YOUNG CHANG, "Multinational Enforcement of U.S. Securities Laws: The Need for the Clear and Restrained Scope of Extraterritorial Subject-Matter Jurisdiction", 9 *Fordham J. Corp. & Fin. L.* 89, 123 (2003).

[1936] *See* J.D. KELLY, "Let There Be Fraud (Abroad): A Proposal for a New U.S. Jurisprudence With Regard to the Extraterritorial Application of the Anti-Fraud Provisions of the 1933 and 1934 Securities Acts", 28 *Law & Pol'y Int'l Bus*. 477, 497-98 (1997) ("Since there is little or no effect on U.S. markets [fraudulent conduct within the U.S.], there is no market-based, economic rationale behind the exercise of jurisdiction over such behavior. The effects test, on the other hand, has a stronger claim for economic justification since it seeks to ensure the integrity of the U.S. markets from fraudulent interference emanating from abroad."). *See also* D. OEHLER, *Internationales Strafrecht*, 2nd ed., Köln, Berlin, Bonn, München, Carl Heymanns Verlag, 1983, p. 208, nr. 244 (justifying the pre-eminence of the effects doctrine (*Erfolgstheorie*) on the basis of the argument that an offence is only realized when the effects arise, that not the territorial order of the State in which the conduct originates, but rather the order of the State in which the effects are felt, is disturbed).

playing field. Issuers in fact choose their own regulatory system, by incorporating in a particular State, listing their securities on a particular exchange, or even just choosing a regulator without incorporation or domestic trading being required. The U.S. no longer serves as *parens patriae* for U.S. investors who 'choose' another regulatory system. Somewhat counter-intuitively, limitations on the reach of U.S. laws might actually further U.S. interests. If U.S. laws do no longer apply in foreign markets, these markets lose their 'imposed' efficiency and are no longer allowed to free-ride at the expense of U.S. courts and regulators.[1937] Issuers and investors may then be drawn to comparatively more efficient markets, such as the U.S. securities market.[1938]

592. NATIONALITY OF THE ISSUER-BASED SYSTEM - A 'nationality of the issuer'-based system has been advanced by LANGEVOORT in the context of insider-trading regulation,[1939] and by Fox in the context of securities disclosure.[1940] Under this approach, the State where the issuer is incorporated or where his principle place of business could be found, has jurisdiction over a securities fraud. The approach has quite some appeal because it dovetails well with the rationale of domestic investor protection underlying capital market regulation. As most investors in a corporation ordinarily have the same 'nationality' as the corporation, the home State of the issuer appears to have a strong jurisdictional claim. Moreover, regulators will usually know more about their own 'national' issuers than about foreign issuers. Thirdly, as far as insider-trading is concerned, issuers have an interest in not being defrauded by insiders. Insider-trading could indeed hamper merger activity: the stock prices of the issuer may rise as the result of the disclosure of confidential information, thereby making the price of the issuer's securities too high to bear for the acquirer.[1941]

If the interests of the issuer are harmed, fraud also becomes of interest for corporate law. As the *lex societatis* is the applicable law in conflicts of corporate law cases, the law of the home State of the issuer may apply to fraud. Similarly, the *judex societatis* may be the proper judge to address cross-border fraud cases. In ordinary securities misrepresentations, represented by the fact pattern of an individual investor being harmed by fraudulent misrepresentations in an issuer's prospectus, the interests of the issuer will usually not be affected though.

[1937] In *Consolidated Gold Fields* for instance, the U.S. exercised jurisdiction over a takeover (by a Luxembourg holding) of a British corporation in which U.S. investors held 2,5 pct. of the capital. In so doing, the U.S. also protected the interests of the non-U.S. investors in the British corporation. These interests ought on the face of it to be protected by the United Kingdom, which was thus given a free ride at the expense of the United States. *See Consolidated Gold Fields PLC* v. *Minorco, S.A.*, 871 F.2d 252 (2nd Cir. 1989), cited in G. SCHUSTER, *Die internationale Anwendung des Börsenrechts*, Berlin, Springer, 1996, 33.

[1938] *See* J.D. KELLY, "Let There Be Fraud (Abroad): A Proposal for a New U.S. Jurisprudence With Regard to the Extraterritorial Application of the Anti-Fraud Provisions of the 1933 and 1934 Securities Acts", 28 *Law & Pol'y Int'l Bus.* 477, 505-06 (1997) (observing "that U.S. courts have effectively made the foreign markets as "efficient" as U.S. markets, at least with regard to U.S. plaintiffs", and that the U.S. judicial system "is effectively subsidizing the efficiency of foreign markets" through entertaining an increasing number of international securities fraud suits).

[1939] D.C. LANGEVOORT, "Cross-Border Insider Trading", 19 *Dick. J. Int'l L.* 161, 176-80 (2000-2001).

[1940] M.B. FOX, "Securities Disclosure in a Globalizing Market", 95 *Mich. L. Rev.* 2498 (1997).

[1941] *Compare* D.C. LANGEVOORT, "Cross-Border Insider Trading", 19 *Dick. J. Int'l L.* 161, 169-70. (2000-2001).

593. DOMESTIC-TRADED TEST - A territorial exchange-based system, or "domestic-traded test", has been proposed by KELLY.[1942] In his proposal, securities purchased on a U.S. exchange would be exclusively subject to U.S. securities laws, and securities traded on a foreign exchange would be exclusively subject to the securities laws of the foreign State, irrespective of the nationality of the investor or the issuer, or the place where the fraud was committed.[1943] Undeniably, a domestic-traded test furthers the interests of comity and predictability. Investors are put on notice of which law applies at the moment they purchase or sell securities. Also, the interests of foreign nations are adequately taken into account when the U.S. refrains from exercising jurisdiction over securities listed on exchanges located in these nations (even when U.S. nationals are involved in the securities transaction). Furthermore, it is more efficient to confer the exercise of jurisdiction on the State that monitors the market, given the availability of useful evidence of fraudulent securities transactions done on that market.[1944]

Against the advantages of a domestic-traded test, it might be argued that the U.S. will not easily give up assertions of jurisdiction harming U.S. nationals[1945] (in particular harming to investments of U.S. institutional investors abroad, which may well translate into substantial harm to savings of U.S. residents). Also, a domestic-traded test may violate the principle of the equality of shareholders, in that it creates special rights for the benefit of shareholders who bought on one exchange, thereby prejudicing shareholders (holding securities of the same issuer) who bought an other exchanges.[1946]

In addition, in an era of rapid electronization of securities markets, it is not always clear where a securities market is territorially located.[1947] One could easily imagine a stock exchange as a virtual trading floor where purchasers and sellers converge. The more the physical trading floor evaporates, the less compelling the argument for a domestic-traded test becomes. If capital could be moved with the click of one button, not only geographical borders, but also territorial markets evaporate, and territoriality thus ought to lose its force as a guiding principle of jurisdictional order.[1948]

[1942] J.D. KELLY, "Let There Be Fraud (Abroad): A Proposal for a New U.S. Jurisprudence With Regard to the Extraterritorial Application of the Anti-Fraud Provisions of the 1933 and 1934 Securities Acts", 28 *Law & Pol'y Int'l Bus.* 477 (1997).

[1943] *Id.*, at 498-99 (adding that the situs for privately traded securities is where the securities are tendered by the seller).

[1944] *See* D.C. LANGEVOORT, "Cross-Border Insider Trading", 19 *Dick. J. Int'l L.* 161, 174 (2000-2001) (submitting that an "exchange-oriented detection system fits well with the exercise of jurisdiction by the exchange's country").

[1945] It may however be submitted that the U.S. securities laws are now already geared to protecting the integrity and efficiency of U.S. capital markets, rather than to protecting the interests of individual U.S. investors. *See* J.D. KELLY, "Let There Be Fraud (Abroad): A Proposal for a New U.S. Jurisprudence With Regard to the Extraterritorial Application of the Anti-Fraud Provisions of the 1933 and 1934 Securities Acts", 28 *Law & Pol'y Int'l Bus.* 477, 502 (1997).

[1946] *See* F.A. MANN, "The Doctrine of Jurisdiction Revisited after Twenty Years", 186 *R.C.A.D.I.* 9, 81 (1984-III).

[1947] *See* D.C. LANGEVOORT, "Cross-Border Insider Trading", 19 *Dick. J. Int'l L.* 161, 175, 176 (2000-2001) (doubting that an exchange-based system is "stable in light of the potential for rapid fragmentation and globalization of trading locations"); H. KRONKE, "Capital Markets and Conflict of Laws", 286 *R.C.A.D.I.* 245, 366-68 (2000) (concluding, *inter alia*, on that basis, that "[f]or the time being, the market – in the sense of one domestic market – has to be questioned").

[1948] *See, e.g.*, P.R. WOOD, *International Loans, Bonds and Securities Regulation*, London, Sweet & Maxwell, 1995, 361 (arguing that problems of establishing (territorial) jurisdiction stem from the fact

594. PORTABLE RECIPROCITY - CHOI and GUZMAN's "portable reciprocity" in transnational securities regulation, and ROMANO's "securities domicile" are probably the most revolutionary proposals,[1949] although they claims to be in line with the underlying assumption behind the current *domestic* securities regime, namely the assumption that investors are aware of the risks they take and the protection they are entitled to when they invest.[1950] In their proposals, they do not only search for the jurisdictional bright-line rule that is sorely lacking in current U.S. securities practice, but actually depart from the traditional jurisdictional principles of territoriality and nationality on which the extraterritorial reach of the antifraud provisions of the U.S. securities laws is largely based, and even from the general conflict of laws concept of searching for the strongest connection of a fraudulent securities transaction with a particular sovereign.

CHOI and GUZMAN start from the observation that "the securities regime governing a transaction of a security impacts the security's price", with a low price reflecting a low level of antifraud protection, and a high price reflecting a high level of protection.[1951] Investors and issuers ought to have the choice of choosing the securities regime they deem most suited to their needs. Some investors might indeed prefer to pay a lower price for a security, and might be willing to take the risk of being defrauded that is associated with the lower price.[1952] In CHOI and GUZMAN's view, issuers ought to be allowed to choose the regulatory regime of their liking – even if this regime differs from the regime of the country where its securities are traded. Knowledgeable about the regime chosen by a particular issuer, investors could then make an informed decision about the benefits of purchasing securities, weighing price and antifraud protection ("optimality").[1953]

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that securities transactions are transactions in intangible assets that could transferred anywhere by email).

[1949] S.J. CHOI & A.T. GUZMAN, "The Dangerous Extraterritoriality of American Securities Law", 17 *Nw. J. Int'l L. & Bus.* 207 (1996), supported by W.B. PATTERSON, "Defining the Reach of the Securities Exchange Act: Extraterritorial Application of the Antifraud Provisions", 74 *Fordham L. Rev.* 213 (2005); R. ROMANO, "The Need for Competition in International Securities Regulation", 2 *Theoretical Inquiries in Law* 387 (2001).

[1950] *See* S.J. CHOI & A.T. GUZMAN, "The Dangerous Extraterritoriality of American Securities Law", 17 *Nw. J. Int'l L. & Bus.* 207, 240 (1996) (pointing out that "the underlying assumption behind the current domestic securities regime is that individuals are able to consider the risks and returns offered by a security in light of the information available and the regulatory regime in place and that the investor is able to identify and pursue his own interests based on that information.").

[1951] S.J. CHOI & A.T. GUZMAN, "The Dangerous Extraterritoriality of American Securities Law", 17 *Nw. J. Int'l L. & Bus.* 207, 222 (1996).

[1952] It may be submitted that investors tend to choose a regulatory regime with a high protection against fraud, such as the United States. A system of portable reciprocity may thus not be neutral and in effect benefit the United States. *See* J.D. KELLY, "Let There Be Fraud (Abroad): A Proposal for a New U.S. Jurisprudence With Regard to the Extraterritorial Application of the Anti-Fraud Provisions of the 1933 and 1934 Securities Acts", 28 *Law & Pol'y Int'l Bus.* 477, 503-505 (1997) (arguing that "[a] global economy in which other countries have less efficient marketplaces is in the interests of the United States", that an influx of capital from foreign markets into the U.S. markets may "lead to a greater demand for U.S. dollars, which will in turn strengthen the dollar in the global currency markets", and that an "increase in U.S. financial, accounting and legal services" might be expected).

[1953] *See, e.g.*, E. TAFARA, "Sarbanes-Oxley: a Race to the Top", *IFLR* 12 (September 2006) ("[I]n order to attract investors and issuers, the best strategy for jurisdictions is to provide investor protections that are cost-justified – no more and no less. That is, the race may not be to the bottom, but rather to what economists call optimality.").

The practice of economic actors choosing the regulatory system they prefer is not unknown in regulatory law. Some issuers are already bonding to the regulations they prefer, even if they are not subject to them as a matter of law. The phenomenon of bonding however only occurs when the issuer is subject to the regulations of a State with a low level of regulation, and wants to be subject to the regulations of a State with a high level of regulation. In practice, issuers tend to bond to the U.S. system. As the law stands now, issuers that are legally subject to high regulation could not bond to a system of low regulation. For instance, Section 14 of the U.S. Securities Act and Section 29 of the Exchange Act declare "void" any agreement to waive the substantive protections granted by the acts, and to bond to another State's regulations. Under portable reciprocity however, such bonding would be legal, as no State would be allowed to extend its laws over activities in securities of an issuer that is registered in another State. If a U.S. issuer registers in a State with a low level of regulation, the U.S. would no longer be allowed to apply its securities regulations to transactions in that issuer's securities.

If issuers and investors could choose their own regulatory regime, without interference of their national regulators or the regulators of the place where the securities are traded, sovereignty-based notions of personality and territoriality are eliminated from the field of cross-border securities regulation.[1954] Portable reciprocity in effect entirely privatizes securities regulation, with regulatory regimes being reduced to competing for issuers and investors.[1955] The underlying idea is that a 'free market' of regulatory regimes adjusting to the needs of economic actors (instead of *vice versa*) furthers capital market mobility, thus eventually increasing global welfare. Foreign issuers of securities for instance will no longer be compelled to exclude U.S. investors from offerings so as to avoid the application of U.S. securities laws,[1956] for, under portable reciprocity, they can do transactions anywhere in the world and continue to be merely subject to the antifraud regime they have (previously) chosen.

If U.S. antifraud laws are no longer applied extraterritorially, U.S. investors could more easily widen their securities portfolio since they are relieved of the transaction costs associated with purchasing securities overseas, which is obviously in the U.S. interest (and was also one of the rationales of the SEC's adoption of Regulation S in the field of securities registration). Foreign issuers for their part will be able to increase the price of their securities, as, given the reduced reach of U.S. laws, they will extend their securities offers to the vast U.S. capital market. This seriously raises

[1954] *See* S.J. CHOI & A.T. GUZMAN, "The Dangerous Extraterritoriality of American Securities Law", 17 *Nw. J. Int'l L. & Bus.* 207, 232 (1996).

[1955] States might be willing to enter the arena of global capital market competition in that it may yield them benefits in terms of increased filing fees and securities volume. As CHOI and GUZMAN point out, since a regulator will usually monitor local securities markets, issuers and investors will tend to trade their securities on the local markets of the chosen regulatory regime. *Id.*, at 232. In order to prevent fraud, it has been argued that privatization ought to be limited to countries "with securities laws that contain at least a moderate level of investor protection", with the old conduct and effects tests applying to parties who chose other countries. *See* W.B. PATTERSON, "Defining the Reach of the Securities Exchange Act: Extraterritorial Application of the Antifraud Provisions", 74 *Fordham L. Rev.* 213, 250-52 (2005).

[1956] The domestic-traded test yields the same result of wider opportunities for U.S. investors. *See* J.D. KELLY, "Let There Be Fraud (Abroad): A Proposal for a New U.S. Jurisprudence With Regard to the Extraterritorial Application of the Anti-Fraud Provisions of the 1933 and 1934 Securities Acts", 28 *Law & Pol'y Int'l Bus.* 477, 504-505 (1997)

the number of potential investors, and may render certain projects fundable which otherwise were not.[1957]

595. ARGUMENTS AGAINST PORTABLE RECIPROCITY – A reliance on portable reciprocity would herald a Copernican revolution in the world of international securities regulation. The problem with Copernican revolutions is that they may run into a wall of conservative beliefs and vested interests. They will have to overcome serious hurdles, and, at then end of the day, the best one could hope for is that they are implemented in a diluted form.[1958] The question arises however whether, for all its suasion, the portable reciprocity revolution is actually workable.

The obvious objection is that portably reciprocity may lead to a regulatory race to the bottom, because issuers will tend to choose the least burdensome regulatory regime. This objection could easily be refuted, because issuers need investors, and quite some investors will not be willing to make investments without adequate legal protection. At any rate, global securities competition, be it not on the basis of portable reciprocity, but on the basis of domestic trading, is already a fact and has not led to a race to the bottom, rather on the contrary.[1959] Other objections than the race-to-bottom argument have, however, also been made, and require some more scrutiny.

KRONKE, for one, fears that, if investors carry highly protective securities regulations to new and less developed capital markets, issuers listing their securities on these markets may not be able to comply with these regulations.[1960] This may ultimately lead to the disappearance of these markets, and thus to a concentration of capital in highly regulated markets. KRONKE's fear may however be misplaced, because it is informed by the *apriori* that investors tend to be risk-averse.[1961] There is no evidence thereof, and it is conceptually not tenable. It is indeed rational for investors to choose a less protective law on the ground that doing so would offer them a discount on the price. U.S. investors may therefore not necessarily want to carry U.S. law with them when they invest in securities listed on, say, a Botswanan stock exchange.

LANGEVOORT has raised four more practical concerns that may render portable reciprocity unworkable.[1962] As will be counter-argued, these concerns are not insurmountable either. First, it is open to doubt whether the higher tax that issuers are probably required to pay so as to bond to a stricter regulatory regime will translate into a widening of the pool of investors.[1963] Bonding however happens already today, and issuers are seemingly convinced that such confers a quality label that is appreciated by investors. Second, regulators may not want to spend precious

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[1957] S.J. CHOI & A.T. GUZMAN, "The Dangerous Extraterritoriality of American Securities Law", 17 *Nw. J. Int'l L. & Bus.* 207, 225 (1996).
[1958] *Compare* D.C. LANGEVOORT, "Schoenbaum Revisited: Limiting the Scope of Anti-fraud Protection in an International Securities Marketplace", 55 *Law & Contemp. Probs.* 241, 261 (1992) (arguing that "it asks much of a legal system to renounce future claims that, in specific instances, would provide remedies for U.S. investors").
[1959] *See* E. TAFARA, "Sarbanes-Oxley: a Race to the Top", *IFLR* 12 (September 2006).
[1960] H. KRONKE, "Capital Markets and Conflict of Laws", 286 *R.C.A.D.I.* 245, 378 (2000).
[1961] *Id.*, at 377.
[1962] D.C. LANGEVOORT, "Cross-Border Insider Trading", 19 *Dick. J. Int'l L.* 161, 178 (2000-2001).
[1963] *Id.* (arguing that "markets would have to be sufficiently efficient to price the added value of the regulation with some degree of precision").

resources to police transactions that take place abroad.[1964] If, however, issuers who are not satisfied with a chosen regulator's enforcement quality could easily switch to another regulator, such would put pressure on regulators to deliver. Third, evidence may be located elsewhere and sanctions may have to be enforced elsewhere, so that cooperation with other States is required.[1965] Although cooperation in the enforcement of securities laws is indeed not a given, it nonetheless takes place smoothly and on a daily basis between the most important stock exchange regulators at present, on the basis of memoranda of understanding and mutual assistance agreements. Fourth, as it is the management that decides to register, it would be foolhardy for it to register with a strict regulator.[1966] Managers would then indeed make life hard for themselves; they could for instance no longer engage in trading, as an insider, in the issuer's securities. Against this, it could be argued that a company's statutes, or the issuer's home state's law, could confer the competence of registration on the board or the shareholders, instead of on the managers, as the former may be assumed to have the interests of the company more in mind than the latter.

7.3.5. Conferring primary jurisdiction on the State where the exchange is based: a feasible approach

596. Although arguments against portable reciprocity could be refuted, as could arguments against the domestic-traded test and the 'nationality of the issuer' test', the success or failure of these proposals, which overhaul the basic tenets of international securities regulation, may depend on 'unknown unknowns',[1967] and on the willingness of securities regulators to adopt the new system in the first place.[1968] It might be argued that an incremental approach that starts from the current principles of securities regulation might be more feasible in the short to middle-long term. Ultimately, this approach may give way to the approaches discussed in subsection 7.3.4, if their time has come (*i.e.*, if they have harnessed sufficient support of the community of States). Even better of course would be to confer far-reaching

[1964] *Id.* (arguing that "regulating nations would have to make a sufficient investment in extraterritorial regulation that the markets would assume the quality of not only the law on the books but also the willingness to devote resources to extraterritorial cases – notwithstanding domestic political pressures to shift those resources secretly in other directions.").
[1965] *Id.* (arguing that "issuer home countries would have to be willing to cooperate with the regulating jurisdiction in order to enable its enforcement").
[1966] *Id.* (arguing that "managers of the issuer must be willing irrevocably to submit to this external jurisdiction to gain the benefits of a better stock price notwithstanding the personal costs associated with moving to a stricter regime.").
[1967] Courtesy U.S. Defence Secretary Donald Rumsfeld, winner of the Plain English Campaign's annual 'Foot in Mouth' award 2003 for his statement that "[r]eports that say that something hasn't happened are always interesting to me, because as we know, there are known knowns; there are things we know we know. We also know there are known unknowns; that is to say we know there are some things we do not know. But there are also *unknown unknowns* - the ones we don't know we don't know" (emphasis added). *See* http://www.plainenglish.co.uk/pressarchive.html#Anchor-Donal-1943. *See also* H. KRONKE, "Capital Markets and Conflict of Laws", 286 *R.C.A.D.I.* 245, 376 (2000) (assessing portable reciprocity, and concluding that "[t]here is as yet no clear evidence, however, whether the worst-case scenario of a "race to the bottom" or the best-case scenario of a legislative "race to the top"would most likely be the consequence").
[1968] *See* with respect to the U.S.: H. KRONKE, "Capital Markets and Conflict of Laws", 286 *R.C.A.D.I.* 245, 287 (2000) (deeming it unlikely that the SEC will "back off in the area of applicability of US anti-fraud provisions" in the absence of congressional intervention). *See* with respect to Europe: *id.*, at 303 (stating that Romano's view "is clearly not in tune and for the foreseeable future not even reconcilable with European mainstream conflicts theory", with its mandatory rules applicable to issues).

supervisory and jurisdictional powers on an international securities regulator, *e.g.*, a revamped IOSCO, and on international securities courts not having the vice of national bias.[1969] Until that has happened, cooperation within IOSCO could be enhanced, and is actually being enhanced as we write. In 2002, IOSCO adopted a multilateral memorandum of understanding (IOSCO MOU) designed to facilitate cross-border enforcement and exchange of information among securities regulators. IOSCO endorsed the MOU in 2005, and set out to rapidly expand the network of IOSCO MOU signatories by 2010.[1970]

597. A sensible proposal could be to rely, for the time being, on domestic trading as the most reasonable jurisdictional ground, because the State on whose markets the securities are traded is ordinarily the State that will be most affected by securities fraud. Other States should then transmit information that could be used in that State's investigations. Fraud concerning securities that are traded on a State's market may indeed harm a State's domestic investors in the first place. One might assume that a substantial amount of these securities are in the hands of the domestic public. Fraud might also scare away potential (foreign) investors and issuers, and cripple a State's capital markets. In addition, it is only economical to confer jurisdiction over fraudulent securities transactions on the regulators that police the markets on which these securities are traded.

598. Unlike under KELLY's domestic-traded test however, under the proposal advocated here, domestic trading is only the *primary* basis of jurisdiction, with other States being allowed to exercise jurisdiction on a *subsidiary* basis.[1971] It is not unlikely that the State where the securities are traded proves unable and unwilling to establish its jurisdiction over a clear case of securities fraud. The fight against impunity for fraud allows and even demands that another State step in, just as in the field of gross human rights violations or violations of international humanitarian law, the International Criminal Court or bystander States may step in if a State with a stronger nexus to the case fails to investigate and prosecute.[1972]

[1969] *See, e.g.*, D.C. LANGEVOORT, "Cross-Border Insider Trading", 19 *Dick. J. Int'l L.* 161, 179 (2000-2001). A revamped IOSCO may arguably counterbalance U.S. dominance of capital markets regulation.

[1970] *See* for the text of the IOSCO multilateral MOU: http://www.iosco.org/library/pubdocs/pdf/IOSCOPD126.pdf. *See* for a country survey of *bilateral* MoUs: http://www.iosco.org/library/index.cfm?section=mou. *See* on international cooperation in insider-trading cases also A. HIRSCH, "International Enforcement and International Assistance in Insider Trading Cases", in K.J. HOPT & E. WYMEERSCH (ed.), *European Insider-dealing*, London, Butterworths, 1991, 377-82.

[1971] In *private international law* terms, one could argue that the rule of the market ought to enjoy primacy, and other rules, *e.g.*, the rule of the company, subsidiary application. This could imply that a forum State – the State that has judicial jurisidiction over a cross-border securities case – may apply another State's law if application of that law is appropriate in the case. The *dedoublement* of jurisdiction and applicable law has notably been advocated by H. KRONKE, "Capital Markets and Conflict of Laws", 286 *R.C.A.D.I.* 245 (2000) (*e.g.*, at 333-34, advocating the application of a third country's mandatory takeover laws by a court), yet, given the ingrained resistance to applying a third State's public laws, prospects for the application of a third State's securities laws are, outside the field of certain securities misrepresentations causing limited private harm (*see* subsection 7.2.1), dim, certainly at the extra-European level. It may be noted that at the intra-European level, the EC Takeover Directive uses the term "applicable law", which implies that a particular (foreign) law ought to be applied irrespective of the territorial forum. The Directive thus separates jurisdiction and applicable law. *See* subsection 7.4.2.a.

[1972] *See* in particular chapter 10.11.3.

599. Although core securities fraud is not an international crime, *i.e.*, it is not a violation of an *erga omnes* obligation, it is no less true, in the words of WOOD, that "a lie is a lie everywhere, and so is a careless fib".[1973] As State practice bears out that States will ordinarily not take issue with another State's assertion of jurisdiction over core fraud if that State could advance a significant (but not necessarily the strongest) nexus to the situation, it could legitimately exercise its jurisdiction provided that another State with a more significant nexus fails to exercise its jurisdiction.

Before a State exercises subsidiary, non-market based, jurisdiction, it ought to ascertain whether the market State is indeed unable and unwilling to investigate the fraud. In doing so, it could take into account protests of other States. Yet it should only defer to such States if their protest is directed against the *practical application* of the subsidiary test by the asserting State, *i.e.*, if they advance that they are, unlike what the asserting State held, not unable or unwilling to pursue the case. As core fraud is arguably prohibited in all States, it is hard to see how a State could justify its protest without reference to an able-and-willing test.

600. If the securities fraud laws in both States have a different content – securities fraud as yet not being an internationally defined crime – the regulating State (with the stricter laws) ought to defer to the State with the stronger nexus to the fraud (but with the more relaxed laws) *to the extent that* the latter State premises its protest against the jurisdictional assertion of the former State on the argument that the fraudulent act would not haven given rise to liability in the latter State, *i.e.*, on the argument that this particular fraud is not core fraud. In that situation, the former State could impossibly exercise, on a subsidiary basis, a jurisdiction which did primarily not even belong to the latter State. Given the increasing international convergence of fraudulent transactions prohibitions, capital markets values will, however, become more and more shared, and possibilities for legitimate protest will gradually diminish.[1974]

601. The approach of primary-subsidiary jurisdiction may logically be inferred from the order of jurisdictional grounds in Article 10 of the 2003 EC Market Abuse Directive. Article 10 of the Directive *firstly* confers jurisdiction on the State where the securities are traded,[1975] and only *secondly*, and arguably subsidiarily, on the State on which territory actions were carried out concerning financial instruments that are admitted to trading on a regulated market in a Member State.[1976] Not only may the structure of Article 10 convey a preference for the place of the exchange, so may the formulation of Article 10 (b). While Article 10 (b) recognizes the conduct test as an acceptable ground of jurisdiction, it does so conditionally, in relation to

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[1973] *See* P.R. WOOD, *International Loans, Bonds and Securities Regulation*, London, Sweet & Maxwell, 1995, 330.

[1974] *Compare* H. KRONKE, "Capital Markets and Conflict of Laws", 286 *R.C.A.D.I.* 245, 339 (2000) ("In the case of insider trading, [internationally typical] policies are more readily identifiable than elsewhere and the values at stake, at least in developed markets, are shared: investor protection and, through investor confidence, market liquidity.").

[1975] Article 10(a) of the Directive.

[1976] Article 10(b) of the Directive.

securities that are traded on a regulated market in the EC. The conduct test in the EC Directive protects the interests of the State where the securities are traded by allowing another Member State to *represent and assist* the former State in the fight against insider-trading. EC preference for the place where the securities are traded could moreover also be gleaned from Article 6.9 of the Market Abuse Directive in conjunction with Article 7 of the Commission's Directive implementing the Market Abuse Directive (2004),[1977] a provision which requires Member States to immediately transmit insider-trading information collected by "any person professionally arranging transactions in financial instruments" to "the competent authorities of the *regulated markets concerned*".[1978] Member States are thus obliged to *transmit* to the State where the exchange is located, insider-trading information collected by brokers operating on their territory, ordinarily relating to insider-trading actions carried out on their territory, rather than immediately exercise jurisdiction over those actions. Quite likely, EU Member States will only exercise jurisdiction over insider-trading in securities listed in a non-EU Member State, on the basis of territorial conduct, if information could not be transmitted to that State, or if it could be transmitted, if that State is unwilling to exercise its jurisdiction.[1979]

602. In the United States, a mechanism that mediates the interests of both the State where the fraudulent act occurred and the State where the securities are traded (and which is thus ordinarily affected the most by a fraudulent act) is entirely lacking. The United States exercises subject-matter jurisdiction as soon as (albeit 'substantial') fraudulent conduct or effects took place in the United States, irrespective of the place where the securities are actually traded. To be true, this approach has its merits if the securities are not publicly traded, as the public law dimension of the fraud is much smaller then, and it is hard to tell which State is affected the most. Yet if the securities are listed on a stock exchange, the interests of the State on whose territory the exchange is located ought to prevail over the interests of any other State. Therefore, U.S. courts should only exercise their jurisdiction if the State where the exchange is based, does not provide an adequate remedy. Some decisions by U.S. courts might have been informed by this approach, but it may be submitted that they ought to make their act more explicit.

603. At times, other States than the State where the securities are traded may substantially, and even primarily be affected by a securities fraud. In these situations, these other States might be entitled to exercise their jurisdiction without ascertaining the ability or willingness to investigate of the State where the securities are traded. Allowing an exception to the rule that domestic trading as a primary basis

[1977] Commission Directive 2004/72/EC implementing Directive 2003/6/EC of the European Parliament and of the Council as regards accepted market practices, the definition of inside information in relation to derivatives on commodities, the drawing up of lists of insiders, the notification of managers' transactions and the notification of suspicious transactions, 29 April 2004, *O.J.* L 162/70 (2004).

[1978] Article 6.9 of the Market Abuse Directive states that "Member States shall require that any person professionally arranging transactions in financial instruments who reasonably suspects that a transaction might constitute insider dealing or market manipulation shall notify the competent authority without delay". Article 7 *in fine* of the implementing Directive states that "Member States shall ensure that competent authorities receiving the notification of suspicious transactions transmit such information immediately to the competent authorities of the regulated markets concerned."

[1979] Interview with Matthias Wauters, Jan Ronse Institute for Company Law, University of Leuven.

of jurisdiction carries, however, the risk that States will unduly erode the general rule, and consistently argue that *their* interests are *primarily* affected. States may indeed easily, and often legitimately, argue that their interests are affected. It is then only a small step to argue that their interests are also *primarily* affected. As SCHUSTER has argued, the more one couches "State interests" in abstract terms, the more interests one will tend to find.[1980]

Clearly, if State interests are so easily discernible, an inflation of *prima facie* legitimate assertions of extraterritorial jurisdiction appears inevitable. Therefore, some method of balancing the interests of the State where the exchange is based with the interests of another State is desirable, and even necessary.[1981] Fortunately, such a method of interest-balancing already exists. Indeed, as discussed extensively in chapter 5, § 403 of the Restatement (Third) of Foreign Relations Law sets forth a rule of reason – which moreover derives from customary international law according to the drafters of the Restatement – pursuant to which a State may only exercise its jurisdiction provided that it has a sufficiently strong interest *vis-à-vis* other States in doing so. For our purposes, the non-market State ought to have a stronger interest in exercising its jurisdiction than the market State. Admittedly, conferring the responsibility of applying the rule of reason on domestic courts and regulators has the obvious pitfalls of pro-forum bias, but in the absence of an international securities regulator, it is the only choice the international community has.

604. Unfortunately, unlike antitrust courts, securities courts hardly draw on the flexible conflict of laws-approach embodied by the rule of reason set forth in § 403 of the Restatement (Third) of Foreign Relations Law, although § 416 of the Restatement explicitly subjects jurisdiction over securities fraud to a reasonableness requirement along the lines of § 403 (albeit with a much more limited number of factors to be taken into account).[1982] Instead of weighing interests and links, securities courts mechanically rely upon classical, rigid notions of territoriality, purportedly borrowed from public international law: the effects test as a modality of the objective territoriality principle, and the conduct test as a modality of the subjective territoriality principle. The only restraint used by the courts seems to be the substantiality of the domestic effect or conduct required. Obviously, it is not too late to reverse course.

605. Writing in *Recueil des Cours* in 1979, Professor LOWENFELD, one of the driving forces behind the rule of reason set forth in § 403 of the 1987 Restatement, has made the commendable attempt to apply a flexible interest-balancing test involving ten factors, with a strong emphasis on governmental interests, legitimate

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[1980] G. SCHUSTER, *Die internationale Anwendung des Börsenrechts*, Berlin, Springer, 1996, 23. Abstract considerations of U.S. monetary policy may for instance support jurisdictional assertions over fraud abroad harming U.S. residents or nationals. By exercising extraterritorial jurisdiction and protecting U.S. investors abroad, the U.S. could encourage investments in States with higher interest-rates for investors, which is especially welcome if the interest-rates in the U.S. are low due to the strong supply of capital in the U.S. If the supply of capital in the U.S. is low, and accordingly, if the interest-rates are high, the U.S. could scale back its jurisdictional assertions, thus deflecting capital to U.S. markets and lowering U.S. interest-rates. *Id.*, at 22.

[1981] *See also* H. KRONKE, "Capital Markets and Conflict of Laws", 286 *R.C.A.D.I.* 245, 288 (2000).

[1982] §416(2)(c) of the Restatement (Third).

expectations and the centre of gravity of the offence, to a number of high-profile cross-border securities cases. He found, not surprisingly, that the most significant relationship test underlying the rule of reason would have pointed to foreign law in the three seminal securities cases decided by the Second Circuit (*Schoenbaum*, *Leasco* and *Bersch*).[1983]

606. It is probably impossible to determine *a priori* which interests could, and which interests could not, override the domestic-traded test as a test of primary jurisdiction. Nonetheless, it may be argued that territorial fraudulent conduct will in itself ordinarily *not* constitute a primary interest. This is obviously not to say that it could not constitute a *subsidiary* interest. The U.S. may thus continue to exercise conduct-based jurisdiction on the basis of its interest in not becoming a safe haven for fraudulent conduct – which may undermine the trust of national investors in its capital markets – provided that the State where the exchange is based fails to assume its responsibility.

The mere residence of a harmed investor in a particular State does not warrant the exercise of primary jurisdiction by that State either. The broad U.S. effects doctrine, which equates harm to a U.S. resident with harm to the United States should be rejected. Only when the domestic effects of a fraud are not only substantial, but outweigh the effects felt in any other State, will a State be entitled to exercise primary effects-based jurisdiction. This is not unimaginable. For instance, if a U.S. insider purchases securities of a German issuer listed in the United States right before a takeover bid for the issuer's securities, Germany may have a legitimate interest in exercising jurisdiction over the insider-trading. Indeed, the price of the securities may have risen as the result of the insider-trading, and may have made the takeover more difficult. If the German issuer is an important economic actor in Germany, and an economically efficient takeover may not have gone forward, German interests may clearly be affected.[1984] This example brings us seamlessly to the next section of this chapter on securities jurisdiction: jurisdiction over takeovers.

7.4. Jurisdiction over takeovers

607. CROSS-BORDER TAKEOVER REGULATION – A specific field of securities law is the law of takeovers. The law of takeovers, a very recent branch of the law, is designed to protect minority shareholders from takeover bids for the securities they hold of a specific company. In part 6.12, it has been pointed out that the increasing number of cross-border concentrations has been matched by an increasing willingness of antitrust regulators to clamp down on such concentrations by applying domestic antitrust law 'extraterritorially', on the ground that cross-border concentrations could have an adverse territorial impact on competition even if none of the concentrating companies is incorporated in the regulating State. National financial regulators have similarly attempted to exercise their jurisdiction over cross-border takeovers. Yet unlike in the field of international merger control, foreign governmental protest has

[1983] *See* A.F. LOWENFELD, "Public Law in the International Arena: Conflict of Laws, International Law, and Some Suggestions for Their Interaction", 163 *Recueil des Cours* 311, 359-63 (1979-II).
[1984] *Compare* G. SCHUSTER, *Die internationale Anwendung des Börsenrechts*, Berlin, Springer, 1996, 69-70.

remained largely absent, as it has in the field of cross-border securities regulation in general.

608. STRUCTURE – At the outset of this part, three conflict-of-laws approaches to cross-border takeover regulation will be discussed (subsection 7.4.1). It will be seen that different States rely on different approaches, often out of economic considerations. Cross-border takeover regulation in the EU, France, Germany, the United Kingdom, Belgium, and the Netherlands (subsection 7.4.2), and the United States (subsection 7.4.3), will be studied in particular. This part will conclude with defending what appears to be a reasonable approach to takeover jurisdiction: granting primary jurisdiction to the State of the exchange on which the securities of the target of the takeover are traded (subsection 7.4.4).

7.4.1. Applying conflict-of-laws theory to cross-border takeover regulation

609. Cross-border takeover law, drawing on classical private international law, typically seeks to identify one applicable law and one regulatory agency having jurisdiction over cross-border takeovers. It espouses a systemic conflict-of-laws analysis aimed at tying the main element of a transaction to one State, which would then be entitled to apply its law to that transaction. As long as the place of the seat of the corporation, the place of listing of the corporation's securities, and the place of nationality of the investors – the main connecting factors of cross-border takeovers – coincide, this does not pose particular problems: the takeover could easily be considered to take place in that place. Thus, if the securities of a German corporation listed in Germany are the subject of a takeover bid by an English investor, German law applies and German financial regulators have jurisdiction. However, with the advent of globalized capital markets, corporations do not merely seek an exclusive domestic securities listing, but apply for foreign listings as well.[1985] Moreover, investor-nationality is diversifying.

610. The question then arises with which State a cross-border takeover has the strongest connection for purposes of applicable law and jurisdiction. A 'strongest connection' cannot easily be discerned though. Much depends on how one categorizes takeover law. If takeover law is considered as company law, the conflict-of-laws rules of company law will govern takeovers. If takeover law is considered as capital markets law, territorial *lois de police* of the securities exchange will govern takeovers. And if takeover law is considered as investor-protection law, the investor's home State law governs takeover. A different categorization thus yields a different outcome in terms of applicable law and, ordinarily, jurisdiction as exercised by national financial regulators.

611. TAKEOVER LAW AS COMPANY LAW – If the place of listing serves as the jurisdictional nexus and the securities of a corporation have a multiple listing, several national regulations might be applied (*lex auctoritatis*), with the obvious danger of the corporation being subject to conflicting demands. This danger could be obviated, even in an era of internationalized capital markets, if one were to focus on the law of the

[1985] The choice of listing depends on the availability of capital, the advantages of a particular securities exchange, including the price of registration, and, not unimportantly, the applicable law. Over the last decades, the growth of securities exchanges has indeed spawned a sort of regulatory competition in the field of securities law ('exchange shopping').

place of incorporation *(lex societatis*) instead of on the law of the place of listing. As a corporation can ordinarily only be incorporated in one State, jurisdictional conflicts can be prevented from arising when the place of incorporation were to serve as the ultimate connecting factor. This is an approach which equates securities law with company law for private international law purposes. The equation has merit because the rationale of takeover is the protection of the minority shareholders, which falls within the traditional purview of company law. Notably the equal treatment of shareholders would demand that all shareholders be subject to the same law, irrespective of the place where the securities are traded.[1986] It might appear as unjustified to deny certain shareholders the protection conferred by the *lex societatis* just because they purchased their securities on a market with relaxed takeover rules. The *lex societatis* rule may moveover not only protect shareholders, but other stakeholders in the company as well, such as employees, local creditors, and the local community.[1987] The *lex societatis* conflict rule is not surprisingly often advocated by States that boast stringent takeover regulations and want to attract investment in domestic corporations on that basis.[1988]

612. TAKOVER LAW AS CAPITAL MARKETS LAW – Although the *lex societatis* approach confers predictability as to the law applicable to cross-border takeovers, a reduction of takeover law to (private) company law may not be warranted. Indeed, takeover law is part of securities law (*droit boursier*), *i.e.*, regulatory (public) law designed to organize a regulated market and protect actors intervening on this market. Unlike company law, takeover law as part of securities law may not be aimed at the well-functioning of corporations, but rather at market transparency and the legal equality of the intervening actors.[1989] If securities law regulates a capital market, there is a compelling case for applying the public law of the capital market and for granting its regulators jurisdiction over takeover bids for securities traded on this market. Capital market regulations then serve as 'police laws' (*lois de police*) which apply even if a transnational element of a transaction points with equal or more strength at the applicability of another law, be it the *lex societatis* or the law of another capital market where the securities are listed.

Police laws reduce the power of a systemic conflict-of-laws analysis by applying as soon as a territorial element of a legal situation can be found – for takeovers the place of listing of the securities. Whereas the *lex societatis* approach may be analyzed in public international law terms as an exclusive application of the personality principle (the law following the corporation wherever it is listed), the *lex auctoritatis* approach is undeniably an application of the territorial principle: the State on whose territory the securities takeover takes place is entitled to apply its law, irrespective of the legitimate jurisdictional connections of other States. If the same takeover takes place in different States, the securities regulators of all these States are entitled to apply their respective regulations. In this context, BOUCOBZA speaks of *"l'offre publique éclatée"*.[1990] It goes without saying that this approach, in spite of its theoretical appeal, is not conducive for a smooth functioning of international capital markets. The

[1986] H. KRONKE, "Capital Markets and Conflict of Laws", 286 *R.C.A.D.I.* 245, 328 (2000).
[1987] *Id.*, at 329.
[1988] X. BOUCOBZA, "La loi applicable à l'offre publique d'acquisition", *Bull. Joly - Bourse et produits financiers*, January/February 1999, 3.
[1989] *Id.*, at 7.
[1990] *Id.*, at 7-8.

risk of a multiple regulatory burden may indeed prevent corporations from seeking investment overseas, and cause them to instead only list domestically.

613. TAKEOVER LAW AS INVESTOR-PROTECTION LAW – The globalization of capital markets has further blurred the picture, as not only could the place of incorporation or the place of listing qualify as connecting factors but so could the nationality of the investor whose securities are the subject of a takeover bid. Over the last decades, shareholder nationality has been diversified because the investor-friendliness of the major securities exchanges has attracted investors from all over the world. It is no longer a given that a listing in a particular State only attracts investors residing in that State. Diversification of shareholder nationality complicates the conflict-of-laws analysis in that the home State of any shareholder may have an interest in applying its takeover regulations. As will be seen in subsection 7.4.3, the United States in particular have taken a effects- and nationality-based approach to takeover regulation, an approach which mirrors the approach taken toward cross-border securities fraud, set out *supra*.

Whilst the multiplicity of regulations is still rather modest in case of application of the *lex auctoritatis,* as triple or quadruple listings are rare, a regulatory approach based on the nationality of the investors opens a veritable Pandora's box. Indeed, in a globalized and liberalized capital market, investors of a variety of States can purchase securities of any corporation listed anywhere. If States require all corporations in which one or more of their nationals invest, to play by *their* takeover rules, regulatory conflicts are bound to arise.

7.4.2. Cross-border takeover regulation in Europe

7.4.2.a. EC Takeover Directive

614. In 2004, the European Parliament and the Council of Ministers adopted the 13th Directive on takeovers.[1991] This Directive harmonizes takeover regulation in the EU Member States. It should have been implemented by the Member States no later than May 20, 2006.[1992] The harmonization itself and the relationship between the takeover laws of the Member States (the special regime of intra-European rules)[1993] will not be examined here. We will focus instead on the relationship of European law

[1991] Directive 2004/25/EC of the European Parliament and the European Council on takeover bids, *O.J.* L 142/12 (2004).

[1992] It is unclear whether the Directive is directly applicable if a Member States has not failed to timely adopt implementing legislation (*e.g.*, Belgium). Under European law, an individual may invoke rights from a provision of a directive that is not (properly) implemented if that provision is unconditional and sufficiently precise. It could however only do so against its Member State, but not against another individual. *See* K. LENAERTS & P. VAN NUFFEL, Robert Bray (ed.), *Constitutional Law of the European Union*, London, Sweet & Maxwell, 2nd ed., 2005, 769-774. While it may be argued that Article 4 of the Directive, which governs the applicable law in transnational takeovers, is unconditional and sufficiently precise, it is unclear whether these rules create rights for individuals against States, or for individuals against other individuals. If Article 4 is construed as a private international law rule, it arguably establishes a horizontal relationship, and the Directive is not directly applicable. If the provision is construed as a public international law or jurisdictional rule, it arguably establishes a vertical relationship, and the Directive *is* directly applicable. The question surely needs further study, yet, being a question of European constitutional law, exceeds the scope of this work.

[1993] *See* Article 4 of the Directive.

and the law of the Member States with the law of other States, such as the United States (extra-European rules).

According to Article 1, § 1 of the Directive, the Directive "lays down measures co-ordinating the laws, regulations, administative provisions, codes of practice or other arrangements of the Member States, including arrangements established by organisations officially authorised to regulate the markets, relating to takeover bids for the securities of a company governed by the law of a Member State, where all or some of those securities are admitted to trading on a regulated market within the meaning of Council Directive 93/22/EC in one or more Member States." This implies that the Directive is applicable to all European companies listed on European stock exchanges that are the target of a takeover. If European companies are listed on stock exchanges in non-Member States, the Directive is not applicable. Nor is the Directive applicable if companies incorporated in a non-Member State are listed on European stock exchanges. The Directive thus applies the *lex societatis* and *lex auctoritatis* approach cumulatively to takeover regulation: European takeover law applies only to takeovers of European corporations insofar they are listed on an European exchange, and only to takeovers of corporations listed on an European exchange insofar as these corporations are incorporated in Europe.

615. While the Directive does not state what law applies to takeovers with an extra-European aspect, importantly, it does state what law applies to *intra*-European takeovers. This illustrates KRONKE's prediction that "the multilateral approach has good chances to prevail for inner-regional conflicts".[1994] Article 4 of the Directive has a preference for the *lex auctoritatis* approach, where it provides that a takeover bid is governed by the law of the Member State where it is admitted to trading, even if the target does not have its registered office in that State.[1995] Exceptionally, the *lex societatis* applies, namely in matters relating to the information to be provided to the employees of the target and in matters relating to company law, in particular the percentage of voting rights which confers control and any derogation from the obligation to launch a bid, as well the conditions under which the board of the target company may undertake any action which might result in the frustration of the bid.[1996]

616. Given the *international* and *transatlantic* perspective of this study, emphasis will not be put on the intra-European, but on the extra-European rules here, *i.e.*, the rules applicable to a cross-border takeover involving non-EC targets or EC targets whose securities are admitted to trading on a non-EC market. These rules are still set *unilaterally*, although, possibly, their content will be influenced by the conflict rules of Article 4 of the Directive. Hereinafter, the cross-border extra-

[1994] H. KRONKE, "Capital Markets and Conflict of Laws", 286 *R.C.A.D.I.* 245, 375 (2000). The same holds true for the EC Market Abuse Directive (Article 10). *See* subsection 7.2.3.a.

[1995] Article 4 (2) (b) of the Directive provides that "[i]f the offeree company's securities are not admitted to trading on a regulated market in the Member State in which the company has its registered office, the authority competent to supervise the bid shall be that of the Member State of the regulated market on which the company's securities are admitted to trading". In an obvious preceding provision, the Directive states that "[t]he authority competent to supervise a bid shall be that of the Member State in which the offeree company has its registered office if that company's securities are admitted to trading on a regulated market in that Member State."

[1996] Article 4 (2) (e) of the Directive.

European application of German, English, French, Dutch and Belgian takeover laws will be discussed.

7.4.2.b. Germany

617. The German Act on Public Offers for the Acquisition of Securities and on Takeovers (*Wertpapiererwerbs- und Übernahmegesetz*, WpÜG*)* was adopted in 2001 and became effective in 2002.[1997] Before its enactment, there was no German statutory law governing takeovers.[1998]

German takeover law applies to offers for the acquisition of securities which were issued by a target company which has its seat in Germany, and are admitted to trading in one or more Member States of the European Economic Area (EEA, *i.e.* the Member of States of the EU, Norway, Iceland and Liechtenstein).[1999] It applies to all public offers, even those not aimed at acquiring control over the target company, and does not apply to securities traded over the counter, *i.e.*, not traded on an organized market. The relevant stock exchanges and the *Bundesanstalt für Finanzdienstleistungsaufsicht* (Federal Agency for the Supervision of Financial Services, or BAFin) should always be notified of the final decision to make a cross-border public offer.[2000] The bidder is required to submit the offer documents within four weeks of publishing its decision to make the offer. This period can be extended in case of cross-border offers.[2001]

618. § 24 of the WpÜG is specifically tailored to cross-border takeover bids where the bidder has also to comply with non-EEA takeover regulations on the basis of shareholder nationality,[2002] in practice U.S. law. In that case, the Bundesanstalt could, at the request of the bidder, authorize him to exclude shareholders resident in the non-EEA State. The bid is then only aimed at the EEA shareholders. The applicability of non-EEA law and the possibility of conflicting demands are prevented. § 24 of the WpÜG illustrates how the long arm of U.S. securities law may work to the detriment of U.S. investors, as it allows bidder to exclude them from takeover offers.

619. The German approach to cross-border takeovers combines aspects of the *lex societatis* and the *lex auctoritatis* approach to takeover regulation. German takeover law applies to all takeovers bids targeting German corporations (*lex societatis*), but only if these German corporations are listed in an EEA Member State (*lex auctoritatis*). If one of the two cumulative conditions for the applicability of the WpÜG – German incorporation and EEA listing – is not satisfied, German law will not apply. German companies listed outside the EEA are thus not subject to German takeover law, nor are foreign (non-EU) companies listed on a German stock exchange. If these companies are not subject to any other takeover law, takeover

[1997] Adopted on December 20, 2001, BGBl I 2001, 3822.
[1998] *See* on the regime before 2001: G. SCHUSTER, *Die internationale Anwendung des Börsenrechts*, Berlin, Springer, 1996, 557-62.
[1999] § 1 WpÜG *jo.* § 2, paras. 3 and 7 WpÜG.
[2000] § 10 WpÜG.
[2001] § 14, para. 1 WpÜG.
[2002] § 24 WpÜG.

protection for all stakeholders may seriously suffer. It has therefore been proposed to apply German law in these situations of takeover evasion.[2003]

7.4.2.c. United Kingdom

620. Under English law, takeovers are regulated by the UK City Code. This Code does not have force of law, but is supervised by the Panel on Takeovers and Mergers, a self-regulatory body that can apply sanctions. Its decisions are subject to judicial review, although the courts mostly defer to the Panel.[2004] The City Code applies to "offers for listed and unlisted public companies (and, where appropriate, statutory and chartered companies) considered by the Panel to be resident in the United Kingdom, the Channel Islands or the Isle of Man",[2005] the place of admission to trading being irrelevant. Accordingly, companies incorporated in the UK but listed abroad are also subject to UK takeover law. However, if the primary listing is abroad, the UK Panel will normally defer to foreign regulatory agencies.[2006] Companies which are incorporated abroad (extra-EU), but are listed on British stock exchanges, are not subject to UK takeover law.

621. The United Kingdom's regulation of cross-border takeovers follows the *lex societatis* approach, although the UK regulator seems loath to exercise jurisdiction over a UK corporation which is primarily listed abroad. It has been pointed out *supra* that the *lex societatis* approach is usually taken by States that are keen to attract investment in their corporations. The choice of the UK to establish jurisdiction solely over UK companies, and not over foreign companies that are listed in the UK, is indeed also premised on this economic view, pursuant to which the impact of the takeover is deemed to be the greatest for the directors, managers and employees, and not the investors, of the target company.[2007] In light of its extraterritorial effect, the possibility of regulatory disputes is real, as UK companies listed on foreign stock exchanges are often subject to foreign takeover regulations under the *lex auctoritatis* approach to cross-border takeover regulation.[2008]

7.4.2.d. France

622. The French *Code monétaire et financier* contains the framework for French takeover regulations.[2009] These regulations are issued and enforced by the

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[2003] *See e.g.*, M. SIEMS, "The Rules on Conflict of Laws in the European Takeover Directive", *E.C.F.R.* 458, 469 (2004).
[2004] *See* C.M. NATHAN, M.R. FISCHER & S. GANGULY, "An Overview of Takeover Regimes in the United Kingdom, France and Germany", *Practising Law Institute, Corporate Law and Practice Course Handbook Series*, PLI Order, No. B0-01PK, 2003, 943, 946.
[2005] UK City Code No. 4(a) para. 2.
[2006] This might change after the implementation of the EU Takeover Directive, at least with respect to primary listing in EU Member States. *See* J. RICKFORD, "The Emerging European Takeover Law From a British Perspective", [2004] *E.B.L.R.* 1379, 1418.
[2007] *See* M. SIEMS, "The Rules on Conflict of Laws in the European Takeover Directive", *E.C.F.R.* 458, 464 (2004).
[2008] An internationalization of the UK approach to takeovers, based upon the *lex societatis* could however exclude any normative competency conflict. Indeed, as noted *supra*, while multiple listings are frequent, there is only one place of incorporation.
[2009] Articles L. 433-1 to L. 433-4 *Code monétaire et financier*.

Autorité des Marchés Financiers (AMF).[2010] French takeover law is characterized by a discretionary and flexible case-by-case approach, which is obviously not particularly conducive to legal certainty.[2011]

623. Under French takeover regulations, any bidder for a company listed on a regulated market needs to obtain AMF approval before launching the bid.[2012] The regulations do not territorially define a 'regulated market', so that theoretically, bidders for French companies listed on a foreign regulated market may also have to comply with French takeover regulations. The French doctrine however considers securities law (*droit de la bourse*) as the law of the place where the securities operation is conducted,[2013] and thus espouses the *lex auctoritatis* approach to cross-border securities regulation. This should imply that the term 'regulated market' refers to 'French regulated market'. If the takeover bid is for a company listed on a foreign (extra-EU) market, French takeover regulations will normally not apply,[2014] as confirmed by the *Commission des Opérations de Bourse*[2015] in its 2001 annual report.[2016] French companies that are seeking investment abroad do not carry French takeover protection with them, although they may have to comply with some limited disclosure requirements.[2017]

624. Under the French *lex auctoritatis* approach to cross-border takeover regulation, bidders for a foreign company that is listed on a French regulated market *and* on foreign markets (primary or secondary listing), *could* – but not *should* – be

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[2010] Livre II, Titre III *Règlement general de l'AMF*. The AMF was previously known as the *Conseil des Marchés Financiers* (CMF) and before that as the *Conseil des Bourses de Valeurs* (CBV).

[2011] *See* C.M. NATHAN, M.R. FISCHER & S. GANGULY, "An Overview of Takeover Regimes in the United Kingdom, France and Germany", *Practising Law Institute, Corporate Law and Practice Course Handbook Series*, PLI Order, No. B0-01PK, 2003, 943, 969.

[2012] Article 231-1, al. 1 of the *Règlement Général de l'AMF*.

[2013] *See* H. DE VAUPLANE & J.-P. BORNET, *Droit des marchés financiers*, 3d ed., Paris, Litec, 2001, 1106, who point out that securities laws are police laws (*lois de police*).

[2014] *See* X. BOUCOBZA, "La loi applicable à l'offre publique d'acquisition", *Bull. Joly - Bourse et produits financiers*, January/February 1999, 6.

[2015] Before 2003, this Commission supervised takeovers. The *Loi 2003-706* of August 1, 2003 merged the *Commission des Opérations de Bourse*, the *Conseil des Marchés Financiers*, and the *Conseil de Discipline de la Gestion financière*, merged into the *Autorité des Marchés Financiers*.

[2016] COB, *Rapport annuel* 2001, 76 (« Une société cotée en France qui lance une offer publique d'achat sur une société étrangère non cotée à Paris n' a pas à établir une note d'information visée par la COB à l'intention des actionnaires français. L'offre n'entre pas dans le champ de compétence du CMF et le règlement n° 89/03 de la Commission ne s'applique pas ... De façon identique, une offre publique d'échange lancée par une société cotée à Paris sur une société cotée sur une place étrangère n'entre pas dans le champ de compétence du CMF et, par conséquent, ne donne pas lieu à l'établissment d'une note d'information. »).

[2017] COB, *Rapport annuel* 2001, 75-76 ("[L'offre publique d'achat sur une société étrangère non cotée à Paris] a une incidence sur le cours de l'action de la société initiatrice. En conséquence, conformément au principe d'équivalence d'information en France et à l'étranger établi par le règlement n° 98-07, la Commission demande que soit publiées des informations sur l'opération elle-même et sur la société cible ... [En ce qui concerne l'offre publique d'échange lancée par une société cotée à Paris sur une société cotée à une place étrangère], pour l'admission des titres émis en rémunération de l'offre, la société initiatrice doit établir une note d'opération, selon les dispositions des règlements n° 98-01 et n° 95-01. Pour garantir une bonne information des actionnaires, cette note devra être complétée par une présentation de l'offre réalisée hors de France. »). *See also* M. SIEMS, "The Rules on Conflict of Laws in the European Takeover Directive", *E.C.F.R.* 458, 463 (2004) (arguing that, in spite of the French territorial approach to securities regulation, at least some provisions of the French takeover regulations may apply 'extraterritorially' in case of foreign listing).

subject to French takeover regulations,[2018] given the economic *ordre public* character of French takeover law, which is thus binding upon any actor intervening on the French stockmarkets.[2019] The decision whether or not to apply French regulations in the latter situation is a discretionary decision by the AMF. The legality of applying French takeover law to takeover bids for foreign corporations listed in France has been recognized by French courts.[2020] Historically however, the precursor of the AMF, the *Conseil des Bourses de Valeurs* (CBV) did not apply French takeover law in this situation.[2021] Only with the adoption of the *Règlement Général* of the *Commission des Marchés Financiers* (CMF, the revamped CBV, now AMF), it does.[2022] The COB for its part traditionally does, as guardian of the regulated market, and makes sure that the *lex societatis* of a foreign corporation requesting a French listing sufficiently (possibly to a level equivalent to French takeover regulation) protects minority shareholders.[2023] The French Minister for the Economy, Finance and Privatization, for his part, stated in the Senate, with respect to takeover regulations, that "les règles applicables sont celles de la bourse à laquelle les actions de la société vise sont inscrites."[2024]

625. Although French takeover laws principally apply as soon as a takeover target is listed on a French regulated market, the AMF will *normally* not exercise its jurisdiction over the takeover bid for the securities of a corporation with a primary foreign listing and a secondary French listing.[2025] Deference does however not take place as a matter of course. An important criterion for the assessment of AMF jurisdiction and applicability of French takeover law is the role and competency of the

[2018] Article 231-1, al. 4 of the *Règlement Général de l'AMF* : « L'AMF peut appliquer ces règles, à l'exception de celles régissant la garantie de cours, l'offre publique obligatoire et le retrait obligatoire, aux offres publiques visant les instruments financiers de sociétés de droit étranger négociés sur un marché réglementé français. » *See also* L. 433-1 of the *Code monétaire et financier*, as modified by *Loi n° 2006-387 relative aux offers publiques d'achat* of 31 March 2006 (implementing the 2004 EC Directive), which sets forth, in accordance with the EC Directive, an elaborate intra-EC regime, but limits itself to stating, regarding the extra-EC regime, that «[l]e règlement général de l'Autorité des marchés financiers fixe les conditions dans lesquelles les règles mentionnées ... s'appliquent aux offres publiques visant des instruments financiers émis par des sociétés dont le siège statutaire est établi hors d'un Etat membre de la Communauté européenne ou d'un autre Etat partie à l'accord sur l'Espace économique européen et qui sont admis aux négociations sur un marché réglementé français. »).

[2019] *See* H. DE VAUPLANE & J.-P. BORNET, *Droit des marchés financiers*, 3d ed., Paris, Litec, 2001, 1107.

[2020] *See* Paris, July 13, 1988, *Holophane*, *D.* 1989, p. 160; *see also* Ord. Paris, 1re Ch., November 19, 1997, Paris, January 13, 1998, *Intek International* v. *CMF*, *Bull. Joly Bourse* 1998, § 65, 256. In the latter case, the court held that the application of French law to any foreign company that is listed on a French regulated market does not imply extraterritorial enforcement measures. *See* for a comment: H. DE VAUPLANE, « Chronique financière et boursière », *Banque et Droit*, n° 32, January/February 1998, pp. 32-33, who points out that in this case, the court held that the *lex auctoritatis* prevailed over the *lex societatis*.

[2021] *See* X. BOUCOBZA, "La loi applicable à l'offre publique d'acquisition", *Bull. Joly - Bourse et produits financiers*, January/February 1999, at 15.

[2022] *See* Article 5-1-1, al. 2 of the *Règlement Général* of the CMF.

[2023] *Id.*, at 16.

[2024] *JO Sénat Q*, 9 May 1988, p. 669, quoted in X. BOUCOBZA, "La loi applicable à l'offre publique d'acquisition", *Bull. Joly - Bourse et produits financiers*, January/February 1999, at 16.

[2025] *See* C.M. NATHAN, M.R. FISCHER & S. GANGULY, *loc. cit.*, 983; Avis SBF n° 95-1254 of May 11, 1995, *Compagnie internationale des wagon-lits*, cited in H. DE VAUPLANE & J.-P. BORNET, *Droit des marchés financiers*, 3d ed., Paris, Litec, 2001, 1110.

foreign supervisory authority.[2026] If there is no takeover law at all in the foreign State of incorporation of a company listed on a French market, French law may apply.[2027] Conversely, if the foreign takeover law offers a better protection than French law does, there is a strong case for deference to foreign regulators.[2028] BOUCOBZA considered this approach as "une nouvelle manifestation de l'américanisation de notre [French] droit,"[2029] because it is not based on a neutral conflict-of-laws analysis, but takes the national interest as its main point of reference. Even when it declares foreign law applicable, it still serves the substantive objectives (*objectifs matériels*) of the *lex auctoritatis*. Nonetheless, the French approach is in line with the principle of subsidiarity, which thwarts the attractiveness of safe havens, such as safe takeover havens, by authorizing bystander States (*i.e.*, States with a weaker link to the transaction than the safe haven) to exercise their jurisdiction if bystander States are unable or unwilling to do so.

If the AMF decides not to exercise its jurisdiction (where it could), the bidder is not required to file disclosure documentation in France if it complies with foreign regulations relating to disclosure documentation. In that case, the bidder and the target are only required to issue a joint or separate press release approved by the COB announcing the main elements of the offer.[2030] That press release ought also to include any information that is not included in the foreign offer documentation.[2031] This approach prevents regulatory clashes from arising, whereas the limited number of disclosure requirements under French law guarantees that minority shareholders are adequately protected.

626. France's choice to apply its takeover laws to all takeover bids for target companies listed on French stock exchanges, informed by the *lex auctoritatis* approach to cross-border takeover regulation, is premised on the idea that takeover law should protect the domestic capital market, and not domestic companies or investors, in the first place.[2032] Conceptually, the takeover of the target company, *i.e.*, the conduct in need of regulation, takes place in France through the territorial nexus of the target company being listed on a French stock exchange. The extraterritorial effects of French takeover law are therefore limited, although normative competency conflicts cannot be excluded, particularly if other States employ another nexus to establish jurisdiction, *e.g.* the nationality of the target or the nationality of the investors. It should be pointed out that the choice of French regulators not to apply French law to specific foreign corporations listed on French stock exchanges, is

[2026] *See* H. DE VAUPLANE & J.-P. BORNET, *Droit des marchés financiers*, 3d ed., Paris, Litec, 2001, 1108.
[2027] *Id.*, at 1109-1110.
[2028] *Id.*, at 1110 (« On peut en effet estimer que la protection des minoritaires justifierait l'application cumulative des réglementations boursières dans le sens des measures les plus protectrices des intérêts des minoritaires. »).
[2029] *See* X. BOUCOBZA, "La loi applicable à l'offre publique d'acquisition", *Bull. Joly - Bourse et produits financiers*, January/February 1999, at 19.
[2030] Article 231-26 of the *Réglement général de l'AMF*. Only Articles 231-35, 232-21 and 232-24 of this *Règlement* are applicable. *See also* Article 3 *Réglement* n° 2002-04 of the COB.
[2031] Articles 231-5, 231-20 and 231-21 of the *Règlement général de l'AMF*.
[2032] *See* M. SIEMS, "The Rules on Conflict of Laws in the European Takeover Directive", *E.C.F.R.* 458, 464 (2004).

generally not premised on considerations of comity, but rather on the desire to attract the listing of foreign securities in France.[2033]

7.4.2.e. Netherlands

627. In 2006, the Netherlands implemented the EC Takeover Directive. In accordance with the EC Directive, the proposed law contains elaborate new intra-European jurisdictional provisions,[2034] which will not be discussed here. As far as the law applicable to takeovers with an extra-European aspect is concerned, Dutch takeover law applies to public offers for acquisition of securities listed on a regulated Dutch market.[2035] The Netherlands thus follows the *lex auctoritatis* approach: Dutch law applies as soon as the securities of the target company are traded on a Dutch stock exchange, irrespective of the nationality of the target company. If the securities of the target company are not traded in the Netherlands, Dutch law will not apply, even if the target company is a Dutch company. The *lex auctoritatis* rule is however not strictly enforced. Dutch authorities are willing to accommodate concerns of the company bidding for the securities of a target company listed in the Netherlands: on request, the authorities may exempt them from all or part of the Dutch takeover regulations, in case the applicant demonstrates that he could reasonably not wholly comply with Dutch law and the purposes of the law could nevertheless be sufficiently achieved.[2036] Bidding companies that are already subject to foreign takeover regulation, for instance because the target's securities are also listed on a foreign regulated market and are accordingly subject to a foreign *lex auctoritatis*, may thus not be required to wholly abide by Dutch law. In its *Explanation* (*Memorie van Toelichting*) to the 2006 Law, the Government indeed stated that the exemption possibility provides a solution for situations of concurrent jurisdiction, and that it may notably apply to public offers for a limited amount of securities listed in the Netherlands.[2037] This undeniably eases the regulatory burden on bidders.

7.4.2.f. Belgium

628. The scope of application *ratione loci* of Belgian takeover law is quite unclear. It may be hoped that the Belgian legislation implementing the EC Takeover Directive will provide some clarification on the law applicable to cross-border takeovers. Under current law, takeover bids as a result of which the control over the target will be changed, are only subject to Belgian takeover law if the target is a publicly listed company incorporated in Belgium.[2038] The law defines publicly listed companies as companies publicly listed on a Belgian regulated market or companies

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[2033] *Compare* X. BOUCOBZA, "La loi applicable à l'offre publique d'acquisition", *Bull. Joly - Bourse et produits financiers*, January/February 1999, at 8.

[2034] Proposed Article 6e (2) (a-d) of the Law on the Supervision of Securities Transactions, Tweede Kamer, 2005-2006, 30 419, nr. 2.

[2035] Article 6e (2) (e) of the 1995 Law on the Supervision of Securities Transactions (*Wet toezicht effectenverkeer*), to be modified by the Law of 2006 implementing the EC Takeover Directive (providing that it applies to a "target company that has its seat in [a State other than an EU Member State] and whose securities are admitted to trading on a regulated market in the Netherlands".)

[2036] *Id.*, Article 6l.

[2037] Tweede Kamer, 2005-2006, 30 419, nr. 3.

[2038] Article 1, § 2 of the *Arrêté Royal* of 8 November 1989 concerning takeover bids and changes in the control over companies.

of which the securities are held by more than 50 people.[2039] For changes in control, Belgian law thus cumulatively applies the *lex auctoritatis* and the *lex societatis*. There seems to be a presumption that foreign target companies listed on a Belgian regulated market will already be subject to the law of their home State, where they presumably have a primary listing.

629. The law does not define its field of application concerning public takeover bids that do *not* change the control over the target company.[2040] In the doctrine, it has been pointed out that one should look for guidance to the practice of the Belgian Banking, Finance and Insurance Commission, which supervises takeovers. From this practice, it could be gleaned that the Banking Commission construes "public bids" as "bids aimed at securities held by Belgian investors".[2041] While this may imply that Belgian law could, in accordance with the U.S.-style effects doctrine, apply as soon as one Belgian investor holds securities of the target company, it may be expected that the Bank Commission will only intervene if a substantial number of Belgian investors holds securities, which will ordinarily be the case if these securities are listed on a Belgian regulated market.[2042] In practice, Belgian law will thus apply as soon as a target company is listed in Belgium, irrespective of its nationality. This is the *lex auctoritatis* approach to conflicts of takeover laws. The impact of the application of the *lex auctoritatis* on takeovers of foreign targets that only have a secondary listing in Belgium may however be soothed by the Bank Commission, which is authorized to grant exemptions,[2043] and which has stated that it intends to act upon this authorization in the context of cross-border takeovers.[2044]

7.4.3. Cross-border takeover regulation in the United States

630. EFFECTS DOCTRINE – Unlike European takeover law, U.S. takeover law is, as is the case in securities law in general, primarily aimed at the protection of U.S.-

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[2039] *Id.*, Article 1 § 2, 1°-2°.

[2040] The law only states that Belgian law applies to "any public bid for securities". *Id.*, Article 1 § 1.

[2041] *See* S. VANDEGINSTE, "Het toepassingsgebied van de Belgische regeling inzake openbare overnameaanbiedingen vanuit grensoverschrijdend perspectief", *Tijdschrift voor Rechtspersoon en Vennootschap* 400, 401 and 404 (1991).

[2042] In the Bank Commission's 2004 Report of the Directors' Committee, a case is however mentioned in which the Commission exercised limited jurisdiction over a Belgian corporation that was *only* listed on a foreign stock exchange. Coil N.V. was a Belgian corporation that was admitted to trading on the New Market of Euronext Paris in June 1996. At that time, its securities were also offered to the public in Belgium. At the last general assembly, 15 individual shareholders with residence in Belgium were present. When Coil N.V. increased its capital, a Belgian prospectus was duly issued. Report, pp. 85-86.

[2043] Article 15, § 3 of the Law of 2 March 1989 concerning publicity of important participations in listed companies, and concerning the regulation of public takeover offers.

[2044] Bank Commission's 1999-2000 Annual Report, pp. 88-89 (Commission stating that the principle of non-discrimination requires that the Belgian public be also informed of a takeover bid for the securities of a target company which has a primary listing on a foreign regulated market, but that it is aware of the problems posed by the simultaneous application of Belgian and foreign takeover laws). In October 2004, Harmony Gold Company Ltd., a South African corporation launched a worldwide takeover bid for the securities of Gold Fields Ltd., another South African corporation. The takeover bid also applied in Belgium, where both Gold Fields and Harmony securities were admitted to trading on Euronext Brussels. The Bank Commission, aware of the regulatory burden on the bidder, who could face conflicting demands, partially exempted the offer from Belgian takeover law in accordance with what it had stated in its 1999-2000 report. *See* the Bank Commission's 2004 Report of the Directors' Committee, pp. 92-93.

based investors. As soon as a takeover affects interstate commerce, U.S. law is applicable. An effect on a U.S.-based investor may qualify as an effect on interstate commerce. The Williams Act, the U.S. statute regulating takeovers, sets forth that it applies to any tender offer made "directly or indirectly, by use of the mail or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise."[2045] The takeover bid need not be aimed at a target company listed on a U.S. stock exchange for U.S. law to be applicable. It suffices for the Williams Act to apply if the shareholders to whom the offer is directed include U.S.-based persons, even if the offer is primarily aimed at foreign persons. Consequently, U.S. takeover law has important extraterritorial effects: a bid for any target corporation, domestic or foreign, listed on a U.S. or foreign exchange, the securities of which are held by at least one U.S.-based investor, is subject to U.S. takeover regulations. Because U.S.-based investors are among the most active worldwide, the long arm of U.S. takeover law becomes nearly inevitable, even for wholly foreign takeover bids

631. JUSTIFICATIONS AND PROBLEMS – The long arm of U.S. takeover law is ordinarily justified by the need to prevent forum-shopping – bidders seeking targets listed outside the U.S. in order to circumvent the application of U.S. law – and the difficulties for U.S. investors in being informed of their rights under foreign takeover laws.[2046] The reach of U.S. takeover law obviously poses compliance problems for foreign bidders and targets. For one thing, they are required to comply with possibly conflicting foreign regulations. For another, they do not always know who their shareholders are, and thus whether U.S. investors own their securities.[2047] What is more, the very rationale of the long arm of U.S. takeover laws, the protection of U.S. investors, may turn against these investors when bidders exclude U.S. investors from their takeover bid for fear of being subject to U.S. takeover regulations.[2048] Aware of this perverse effect on U.S. investors, the SEC proposed exemptions from U.S. tender rules for foreign-listed companies in November 1998. The new rules were adopted in 1999 and are effective since January 24, 2000. Foreign companies previously indeed had to comply with stringent U.S. takeover regulations if they offered a tender to U.S. shareholders, although the SEC granted waivers on a case-by-case basis[2049]. Under the new rules, broad exemptions from U.S. takeover regulations are granted if U.S. investors own less than 10 pct. of the shares of the target company (Tier I exemptions), and more narrow exemptions are granted if U.S. investors own between 10 and 40 pct. of the shares of the target company (Tier II exemptions).[2050] In so doing, the SEC hoped to encourage bidders from including U.S. investors in takeover

[2045] 15 U.S.C. § 78nd1 (1994).
[2046] *See* M. SIEMS, "The Rules on Conflict of Laws in the European Takeover Directive", *E.C.F.R.* 458, at 465 (2004). SIEMS argued that, even if U.S. investors were familiar with the content of foreign takeover laws, they should have the choice to invest in a company regulated by a law that does not adequately protect them. Investors could then legitimately be lured by offering a discount on shares. *See also* subsection 7.3.4 on portable reciprocity.
[2047] *Id.*, at 468.
[2048] The exclusion of U.S. investors by bidders is sometimes even facilitated by foreign takeover regulations. *See e.g.* Germany, § 24 WpÜG (*supra*).
[2049] *See, e.g.*, X. BOUCOBZA, "La loi applicable à l'offre publique d'acquisition", *Bull. Joly - Bourse et produits financiers*, January/February 1999, at 14 (arguing that, although the SEC undeniably attempts to soothe the impact of U.S. takeover regulations on foreign corporations, its policy was not premised on a methodical conflict-of-laws analysis).
[2050] 17 C.F.R. Parts 200, 230, 239, 240, 249 and 260, Release Nos. 33-7759, 34-42054; 39-2378, International Series Release No. 1208, available at http://www.sec.gov/rules/final/33-7759.htm

bids. The exemptions do however not only accommodate private interests (the interests of issuers and investors): they may also reduce regulatory conflicts with European securities regulators who might believe that their sovereignty is encroached upon by the long arm of U.S. takeover law. In that sense, they are a good example of how U.S. regulators exercise their jurisdiction reasonably by designing regulations informed by a balancing of U.S. and foreign interests.[2051] One should however not overstate the importance of comity and sovereign interest-balancing in this respect, as the SEC's policy of partially or wholly deferring to foreign takeover regulations is primarily informed by a nationalistic economic rationale, namely the desire to boost the interests of U.S.-based investors.

The implementation of the EC Takeover Directive by the Member States may add further weight to the need for a SEC's policy of exemptions, as the Directive provides for stricter takeover protection than was previously the case in the individual Member States, and may even come close to the level of takeover protection in the United States. Under the principle of subsidiarity, the case for application of U.S. takeover laws by default is undercut if a State with a stronger nexus with the matter to be regulated is able and willing to apply sufficiently strict takeover laws.

632. TAKEOVER REGULATION IN PRIVATE LAWSUITS: THE BROAD VIEW OF *MINORCO* – In takeover lawsuits brought by private plaintiffs, where the mitigating influence of the SEC is absent, the scope of U.S. takeover law arguably remains considerably broad. In *Consolidated Gold Fields PLC* v. *Minorco SA* (1989),[2052] the leading private case, the Second Circuit, overruling the District Court, pointed out that, as soon as a takeover has substantial effects on U.S. investors, U.S. law applies. The case involved the Luxembourg-based company Minorco (the bidding company) and the UK-based company Consolidated Gold Fields (the target company). Although a mere 2,5 % of Consolidated Gold Fields securities were held by U.S. investors, and Minorco did not mail offering documents to its U.S. shareholders, this did not prevent the U.S. court from granting relief to Consolidated Gold Fields, which had brought suit alleging that Minorco had dissimulated, in violation of U.S. securities laws, that it was controlled by South African shareholders.

Minorco did indeed not send any offering documents to U.S. investors. However, U.S. shareholders indirectly held Gold Fields shares through nominee accounts in the UK. Minorco sent the documents of its offer to the United Kingdom nominees who were required by law to forward the offer to the U.S. shareholders. As U.S. shareholders were not precluded from accepting the tender as long as the acceptance form was sent to Minorco from outside the U.S,[2053] the Court considered the transmission of the documents by the nominees as constituting the direct and foreseeable effect of the conduct outside the territory of the U.S., which would, in keeping with § 402(1) of the Restatement, suffice to establish jurisdiction.[2054] The Court thereupon remanded the

[2051] The exemptions have been hailed as a return to a classical conflict-of-laws approach based on territoriality, with the United States forgoing disclosure requirements and deferring to a State which may have regulations that are very dissimilar to U.S. regulations – at least if the territorial nexus of the tender offer with the United States is weak. The SEC here seems to backtrack from its previous efforts at imposing harmonized substantive standards on the world at large. *See* H.L. BUXBAUM, "Conflict of Economic Laws: From Sovereignty to Substance", 42 *Va. J. Int'l L.* 931, 976 (2002).
[2052] *Consolidated Gold Fields PLC* v. *Minorco SA*, 871 F.2d 252 (2d Cir. 1989).
[2053] *Id.*, at 255-56 and 262.
[2054] *Id.*, at 262.

fraud claims to the District Court for a procedure on the merits, a procedure in which comity principles could in its view also have a role to play. Disregarding a request by the SEC in its *amicus curiae* brief, the court refused to *direct* the District Court to abstain from exercising its jurisdiction on comity grounds.[2055] If anything else, *Minorco* teaches us that, if tender offers could somehow, albeit indirectly, reach the U.S., U.S. securities regulations may apply.

633. TAKEOVER REGULATION IN PRIVATE LAWSUITS: THE NARROW VIEW OF *PLESSEY* – While, in *Minorco*, the Second Circuit established jurisdiction, other courts have dismissed their jurisdiction if the bidder managed to sufficiently exclude U.S. shareholders from the offer. One could in that context not do without an analysis of *Plessey Company PLC* v. *General Electric Company PLC* (1986),[2056] a decision by a Delaware court which balanced the sovereign interests of the United States and the United Kingdom in having their takeover regulations apply, and eventually deferred to the United Kingdom.

In *Plessey*, a case involving a UK-based bidding company (GEC) and target company (Plessey), the Delaware District Court dismissed a suit brought by the target company Plessey for additional tender disclosure under the Williams Act. Although 3,000 U.S. investors held 1,2 million Plessey American Depositary Receipts (ADRs)[2057], *i.e.*, 1,6 % of the relevant shares, GEC argued that it was not subject to U.S. takeover regulations, because its takeover offer excluded U.S. shareholders.[2058] In other words, as GEC did not use an instrument of interstate commerce, U.S. courts would lack subject matter jurisdiction. Plessey for its part argued that publication by the U.S. media of certain information contained in GEC's UK press release triggered the reporting and registration requirements of the U.S. securities laws, in particular the requirement of bidding companies to file the required prospectus and documents.

The Delaware District Court ruled that it was doubtful that GEC transmitted the offer by the means necessary to trigger provisions of the Williams Act, and did not believe that the UK press release, which was published in two U.S. newspapers, amounted to an effort to sell to U.S. shareholders.[2059] In the same vein, the Court held that a mailing by Plessey to U.S. ADR holders did not employ the jurisdictional means of the Williams Act. Under the UK City Code on Takeovers and Mergers, Plessey was required to distribute the press release announcing the takeover to its shareholders of record, in this case only Citibank, which was also the Depositary of Plessey ADRs. Yet Citibank had the press release sent to all ADR holders as well, pursuant to a contractual arrangement between Plessey and Citibank. The District Court held in this respect that "in a case where the complainants initiated the only use of interstate commerce channels, it is proper to respect the integrity of the sovereign with the overwhelming interest and deny application of the federal securities laws"[2060], and

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[2055] *Id.*, at 263.
[2056] 628 F.Supp. 477 (Del. D.C. 1986).
[2057] ADRs are foreign securities that are traded on a U.S. exchange. Normally, an investment bank purchases the foreign securities on foreign exchanges. It then deposits them with a depositary bank, which issues certificates (ADRs) that represent the deposited securities.
[2058] The Offering Circular stated: "The Offer is not being made in, and this document must not be distributed into, the U.S.A.". 628 F.Supp. 484.
[2059] *Id.*, at 491-493.
[2060] *Id.*, at 490, citing *Allied Development Corp.*v. *The First National Bank & Trust Co. of Steubenville*, 496 F.2d 1180 (6th Cir. 1974).

that "activities at issue here have taken place outside the United States, and have had a negligible impact inside the United States …, and that American interference with a transaction of such enormous magnitude to the British economy would contravene traditional notions of non-interference in a matter of strong British interest."[2061] Citing *Bersch* v. *Drexel Firestone, Inc.*[2062] the Court read the Williams Act as not authorizing jurisdiction of U.S. courts over the tender offer, which it considered to be predominantly foreign.[2063] Referring to GEC's efforts to exclude U.S. investors and weighing the U.S. interest, the Court unambiguously held: "[W]here a foreign bidder has steadfastly avoided American channels in its pursuit of a foreign target, the American interest in extensive disclosure appears minimal. Where the only acts within the United States are second hand news accounts not directly attributable to the bidder, the American contact which would justify an exercise of jurisdiction is relatively small and counsels against its use."[2064]

The Court admitted that in a number of cases, the Second Circuit had accepted the extraterritorial effect of the Exchange Act, violations of which were also alleged in *Plessey* v. *GEC*. It pointed out, however, that these were mostly fraud cases. In non-fraud cases, such as takeover offers which merely arouse the interest of U.S. investors, a comity analysis along the lines of Section 403 of the Restatement of Foreign Relations Law would be necessary: "[W]hile the extraterritorial reach of the Exchange Act is undeniable, we find that the language of section 14(d)(1) [the violation of which was alleged] is too inconclusive to lead us to believe that Congress intended to impose rules governing conduct throughout the world in every instance where an American might have an interest."[2065]

634. TAKEOVER V. ANTIFRAUD JURISDICTION – Fear of reciprocal measures arguably played a major role in the *Plessey* Court's decision to defer to the United Kingdom. Requiring foreign bidders to comply with U.S. takeover laws may indeed encourage other States to require U.S. bidders to comply with foreign takeover laws, thus burdening U.S. corporations with additional regulation and harming U.S. policy interests.[2066] Fear of reciprocity plays a much less prominent role in cross-border securities antifraud cases, where the exercise of jurisdiction is driven by the desire to coax other States into adopting and enforcing equally strict antifraud provisions. The benchmarking goal of the U.S. antifraud provisions may then go a long way in explaining the lack of interest-balancing in these cases. Since the United States tends to consider fraud to be an inherent evil it has the duty to stamp out, and even exercises jurisdiction on the basis of mere territorial conduct absent territorial effect, the United States may not mind if foreign States were to (finally) start exercising jurisdiction over fraudulent securities transactions, even if U.S.-based persons were somehow involved (although it might be added that the U.S. might take issue with foreign jurisdictional assertions if the U.S. interest is substantial).

[2061] 628 F.Supp. 477, 496.
[2062] 519 F.2d 974, 985 (2d Cir. 1985), *cert. denied*, 423 U.S. 1018, 96 S.Ct. 453, 46 L.Ed. 2d 389 (1975) (discussed *supra* in the context of securities fraud).
[2063] 628 F.Supp. 477, 491.
[2064] *Id.*, at 495.
[2065] *Id.*, at 494, citing *Leasco Data Processing Equipment Corp.* v. *Maxwell*, 468 F.2d at 1334.
[2066] 628 F.Supp. 477, 496. The possibility of States reciprocally exercising jurisdiction should however not be overstated, as small States may encounter difficulties in enforcing their takeover laws *vis-à-vis* U.S. persons, and weak and dependent States may recoil from exercising takeover jurisdiction for fear of incurring the wrath of the United States.

7.4.4. A reasonable exercise of takeover jurisdiction

635. International State practice shows that the three conflict-of-laws approaches to cross-border takeover regulation co-exist. Germany, France, Belgium and the Netherlands espouse the *lex auctoritatis* approach, pursuant to which the law of the State of the regulated market on which the securities, subject of a takeover bid, are traded. The United Kingdom follows the *lex societatis* approach, pursuant to which the law of the State of incorporation applies to takeovers. The United States for its part embraces the investor-protection approach, under which U.S. takeover laws apply if U.S. investors hold securities of the target corporation. State practice however also shows that only the exchange-based system (*lex auctoritatis* approach) is consistently enforced.[2067] In spite of the UK City Code's professed belief in the *lex societatis* approach, UK regulators ordinarily defer to the State of primary listing of a UK corporation. Thus, in practice, they only exercise jurisdiction if a UK corporation has a primary listing in the UK – which is in effect the *lex auctoritatis* approach. The United States has not shed the effects doctrine, according to which any effect on U.S. commerce (U.S. investors) may lead to the application of U.S. takeover regulations. However, the SEC has granted exemptions for takeover bids if only a limited number of U.S. investors hold securities of the target. Targets usually have a high number of U.S. investors precisely when they are listed on a U.S. regulated market. Accordingly, in practice, U.S. regulators may mainly follow the *lex auctoritatis* approach. In private suits in the U.S., this is less assured, although as the *Plessey* decision showed, interest-balancing may result in non-application of U.S. law if a foreign sovereign has a greater interest in applying its own takeover laws. States have usually a greater regulatory interest if the target's securities are traded on regulated markets located within their territory.

636. The same considerations and recommendations as formulated in the context of jurisdiction over securities fraud (part 7.3.5) may actually apply to cross-border takeover regulation as well. A domestic-trading test (*lex auctoritatis*) seems preferable, because takeover law is in essence public law, with public bodies supervising takeovers, both in Europe and the United States.[2068] It is reasonable and efficient to confer takeover jurisdiction on the regulatory authorities that oversee domestic markets. Admittedly, when takeover targets have multiple listings, the domestic-trading test may give rise to conflict, as it allows any State where the target's securities are traded to exercise its jurisdiction. In this situation, reasonableness counsels that the State of primary listing prevails over the State of secondary listing,[2069] at least if the former State has put in place an adequate

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[2067] *Contra* H. KRONKE, "Capital Markets and Conflict of Laws", 286 *R.C.A.D.I.* 245, 331 (2000) ("[T]he general tendency seems to be in favour of some combination of the target's *lex societatis* and the law of the (or: a) market where the target's shares are traded.").

[2068] The British Panel on Takeovers and Mergers is a self-regulatory body, but performs public duties. *See* C.M. NATHAN, M.R. FISCHER & S. GANGULY, "An Overview of Takeover Regimes in the United Kingdom, France and Germany", *Practising Law Institute, Corporate Law and Practice Course Handbook Series*, PLI Order, No. B0-01PK, 2003, 943, 947, fn. 3.

[2069] *See also* Article 4 (2) (b), al. 2 of the EC Takeover Directive ("If the offeree company's securities are admitted to trading on regulated markets in more than one Member State, the authority competent to supervise the bid shall be that of the Member State on the regulated market of which the securities were first admitted to trading."). In case the target's securities were admitted to trading on several regulated markets, it could be argued that the target may choose the applicable takeover law. *See*

regulatory framework. English, French, Dutch and Belgian State practice shows that takeover regulators ordinarily take this approach. Transnational cooperation between regulators appears high, and successful in averting jurisdictional conflicts over the reach of national takeover regulations.[2070] The more international Memoranda of Understanding national securities regulators will enter into, the less conflict there will be.

637. Subsidiarily, States may be authorized to exercise their jurisdiction on the basis of other approaches than the *lex auctoritatis* approach, subject to the requirement that the State where the target's securities are traded is unable or unwilling to genuinely apply takeover laws. States might then bring their laws to bear so as to protect their own investors (under the effects doctrine) or to protect targets incorporated within their territory (under the *lex societatis* approach).[2071] It might be expected that, as takeover regulations and their effective enforcement spread, and may even be harmonized, the necessity of subsidiary takeover jurisdiction will gradually weaken.

7.5. Foreign Corrupt Practices Act

638. The SEC, the U.S. securities regulator, also administers the Foreign Corrupt Practices Act (FCPA) because that Act's anti-bribery and books and records provisions are part of the Securities Exchange Act.[2072] In supervising the FCPA, the SEC enjoys broad civil enforcement powers (the Department of Justice enjoys criminal enforcement powers) As the FCPA, adopted in 1977, is aimed at bringing a halt to the bribery of foreign officials by U.S. issuers and foreign private issuers,[2073] it has clear extraterritorial effects. Foreign private issuers who have listed their securities on a U.S. exchange are automatically subject to SEC jurisdiction under the FCPA, because the SEC has enforcement powers over all issuers whose securities are

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Article 4 (2) (c), al. 1 of the EC Takeover Directive ("If the offeree company's securities were first admitted to trading on regulated markets in more than one Member State simultaneously, the offeree company shall determine which of the supervisory authorities of those Member States shall be the authority competent to supervise the bid by notifying those regulated markets and their supervisory authorities on the first day of trading.").

[2070] *See* interview with Professor Eddy Wymeersch, Chairman of the Belgian Banking Commission and Co-chair of the Committees of European Securities Regulators, Brussels, September 13, 2006 (recounting his experience with the 2006 takeover of Arcelor by Mittal Steel, a takeover in which several European States had an interest, and for which they jointly sought an acceptable solution).

[2071] As shown in subsection 7.4.2.a, under intra-EC rules of Article 4 of the EC Takeover Directive, some aspects of takeovers are governed *primarily* by the *lex societatis* approach, because they are arguably more closely linked to the functioning of the corporation than to the functioning of the market. It has been submitted, not unreasonably, that this intra-EC *lex societatis* rule, in view of its rational character, could be extrapolated to the extra-EC level. *See* interview with Professor Eddy Wymeersch, Chairman of the Belgian Banking Commission and Co-chair of the Committees of European Securities Regulators, Brussels, September 13, 2006. In this study's view, the *lex societatis* rule should be taken seriously. However, it believes that, if the *lex auctoritatis* proves sufficiently protective of the company law aspects of a takeover, the *lex societatis* need not be applied. Quite a strict standard of "sufficiently protective" may, in the interest of the target company, arguably be used. The *lex auctoritatis* then remains the primarily applicable law, and the *lex societatis* the subsidiarily applicable law. Put in jurisdictional terms, the market regulator may exercise primary jurisdictioun, and the company regulator subsidiary jurisdiction.

[2072] 15 U.S.C. §§ 78dd-1 (Exchange Act § 30A) and 78dd-2; Exchange Act § 13.

[2073] Current through Pub. L. 105-366 (November 10, 1998).

listed on a U.S. securities exchange.[2074] A foreign private issuer's corrupt transactions abroad are thus subjected to the FCPA, even if they are legal in the issuer's home State. This has not led to considerable protest by other States, probably because corruption is hardly defensible.

639. The SEC was originally reluctant to institute FCPA enforcement action against foreign private issuers.[2075] It took its first action in 1996, against the Italian corporation Montedison SpA, alleging violations of the Exchange Act's anti-fraud provision and the FCPA books and records provisions.[2076] Pursuant to the latter provisions, every issuer of a registered security shall file with the SEC such information and documents, and annual or quarterly reports as the Commission shall require.[2077] Every issuer shall "make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer."[2078] It shall also "devise and maintain a system of internal accounting controls"[2079] These internal controls may serve to detect corruption by the issuer's employees. In *Montedison*, a fraudulent scheme was designed to conceal payments that were used to bribe politicians in Italy. According to the SEC, the fraudulent conduct remained undetected because of deficient internal controls. In 2001, the SEC and Montedison reached a settlement agreement, pursuant to which Montedison was ordered to pay a civil penalty of $300,000 for violating U.S. securities laws.[2080] Nonetheless, *Montedison* has been characterized as "only the first volley in what may be increasing assertion of jurisdiction by the SEC against foreign corporations".[2081]

While in *Montedison*, the SEC construed the reach of the books and records provisions of the FCPA broadly, it is unclear whether the SEC would be willing to

[2074] 15 U.S.C. § 78m *juncto* 15 U.S.C. § 78l and § 78o(d) (Exchange Act §§ 12 and 15(d)).
[2075] U.S. issuers are subject to the FCPA, even for bribery by employees of their (foreign) subsidiaries, when they have failed to devise and maintain an adequate system of internal accounting controls to detect and prevent improper payments by the subsidiaries' employees to governmental officials. *See* SEC v. Triton Energy Corporation, et al., Civ. Action No. 1:97, C000401 (RMLT) (D.D.C. February 27, 1997) (U.S. company prosecuted for conduct of U.S. employees in foreign subsidiaries); SEC v. International Business Machines Corporation (00 CV 03040 (U.S.D.C.) (Lit. Rel. No. 16839/December 21, 2000); In the Matter of International Business Machines Corporation, Admin. Proc. File No. 3-10397 (Sec. Ex. Act Rel. No. 43761/AAER Rel. No. 1355/December 21, 2000); In the Matter of Chiquita Brands Int'l, Inc., Admin. Proc. File No. 3-10613 (Sec. Ex. Act Rel. No. 44902/AAER Rel. No. 1463/October 3, 2001); SEC v. Chiquita Brands Int'l, Inc., 01 CV 02079 (D.D.C.) (Lit. Rel. No. 17269/AAER Rel. No. 1464/October 3, 2001); SEC v. BellSouth Corporation, 02-CV-013 (N.D. GA) (Lit. Rel. No. 17310/January 15, 2002) (U.S. parent company liable where foreign subsidiaries actively concealed evidence of illicit payments).
[2076] SEC v. Montedison, Civ. Action No. 1:96 CV 02631 (HHG). *See* for a discussion: M.D MANN & W.P. BARRY, "Developments in the Internationalization of Securities Enforcement", Practising Law Institute, Corporate Law and Practice Handbook Series, PLI Order Number 3011, May 2004, 355, 514-17.
[2077] 15 U.S.C. § 78m (a).
[2078] 15 U.S.C. § 78m (b)(2)(A).
[2079] 15 U.S.C. § 78m (b)(2)(B).
[2080] Lit. Rel. No. 16948/March 30, 2001.
[2081] M.D MANN & W.P. BARRY, "Developments in the Internationalization of Securities Enforcement", Practising Law Institute, Corporate Law and Practice Handbook Series, PLI Order Number 3011, May 2004, 355, 537.

grant the same reach to the anti-bribery provision of the FCPA.[2082] This provision proscribes "any use of the mails or any means of instrumentality of interstate commerce" to make an illegal payment. It remains to be seen whether the use of the U.S. capital markets and the issuance of a report in the U.S. inaccurately reflecting the illegal foreign payment is a sufficient use of the means of interstate commerce for purposes of the anti-bribery provision of the FCPA.[2083] Under the anti-bribery provision, the territorial link between the fraudulent conduct is more tenuous than under the books and records provisions, since under the former, the illegal payment occurs outside the U.S.

7.6. The reach of securities disclosure and corporate governance requirements

640. This section will be mainly devoted to the stringent corporate governance requirements imposed in 2002 by the U.S. Sarbanes-Oxley Act (SOX) on foreign issuers registering with the SEC. The jurisdictional assertions of SOX were the first to meet with considerable foreign (European) opposition in the field of securities law writ large. They seem to break with a long-standing SEC tradition of granting exemptions from U.S. securities registration and disclosure requirements to foreign issuers (7.6.1). Because corporate governance requirements may require a complete overhaul of corporate structures, and culturally impregnated corporate sensitivities were seen as trampled upon, foreign protest against SOX was swift and harsh (7.6.2.a). It will be argued that an unrestrained application of SOX to foreign corporations might indeed unduly intrude upon foreign regulatory sovereignty and cause unjustified burdens for foreign companies. Reasonableness requires that some jurisdictional assertions under SOX be tempered (7.6.2.b). Not surprisingly, the U.S. regulatory agencies implementing SOX have attempted to accommodate foreign nations', issuers', and public accounting firms' concerns over the reach of SOX, in line with the traditional approach of the SEC. Exemptions and other accommodations granted by the agencies go a long in way in aligning the reach of SOX with the principle of jurisdictional reasonableness (7.6.2.c). In a final subsection, the reach of European corporate governance regulations will be discussed (7.6.3).

7.6.1. Accommodation of foreign issuers' concerns over U.S. registration requirements: the traditional SEC approach

641. FOREIGN ISSUERS – When issuers tap into regulated capital markets, they are ordinarily required to register with securities regulators. The aim of registration, with the concomitant requirement of disclosure, is to protect investors by furnishing them adequate information and by preventing fraud from occurring.[2084] The question arises whether foreign issuers who raise money on domestic capital markets should be required to play by the same rules as domestic issuers are. It may be argued that they should, because they may be considered to have waived their objections to domestic regulation by their very conduct: seeking capital on domestic regulated markets. Securities regulators, aware of the possible burdens which host and

[2082] Exchange Act § 30A.
[2083] *See* M.D MANN & W.P. BARRY, "Developments in the Internationalization of Securities Enforcement", Practising Law Institute, Corporate Law and Practice Handbook Series, PLI Order Number 3011, May 2004, 355, 516-17.
[2084] *See* P.K. WILLISON, "*Europe and Overseas Commodity Traders v. Banque Paribas London:* Zero Steps Forward and Two Steps Back", 33 *Vand. J. Transnat'l L.* 469, 485 (2000).

home State regulation could cause for foreign issuers, have however often been willing to accommodate such issuers.

642. SEC EXEMPTIONS AND JURISDICTIONAL REASONABLENESS – The SEC for instance has historically granted foreign private issuers a host of exemptions from U.S. registration requirements.[2085] In so doing, it attempted to strike a balance between the protection of U.S. investors and the U.S. interest in luring foreign issuers to U.S. capital markets. It may be submitted that, by liberally granting exemptions, the SEC gave effect to the rule of reason in the context of securities registration. Admittedly, the accommodation of foreign interests was premised on the direct benefit for U.S. investors and the U.S. economy in general rather than on the acknowledgment of a foreign nation's regulatory links outweighing these of the United States, and the SEC's reasonable exercise of jurisdiction may thus not draw on the comity notions underlying Section 403 of the Restatement (Third) of U.S. Foreign Relations Law. However, as comity is considered to invite reciprocity, and jurisdictional restraint always yields benefits in terms of international goodwill, a realist will concede that forsaking unreasonable jurisdictional assertions is by definition premised on a utility-based calculus geared to the maximization of benefits to the national interest. Whether these benefits can be readily identified as the flipside of jurisdictional restraint, or are rather hypothetically acquired in the long run as the product of smoothly functioning international business relations, may not be that important. What matters is the result of accommodation: respect for foreign nations' economic sovereignty and lighter regulatory burdens for foreign issuers.

7.6.1.a. Exemptions from U.S. registration requirements for foreign issuers

643. Under U.S. law, foreign private issuers seeking a U.S. listing are in principle treated like U.S. issuers seeking a U.S listing. If foreign private issuers enter the U.S. capital markets,[2086] they must be registered with the SEC under the 1933 Securities Act.[2087] Under the Integrated Disclosure System for Foreign Private Issuers, they are largely subject to the same disclosure standards as U.S. issuers. If a foreign private issuer also wants to list his securities on a U.S. national securities exchange such as the New York Stock Exchange or the NASDAQ, it must file an annual report under the 1934 Securities Exchange Act.[2088] Furthermore, under Section 12(g)(1) of the Exchange Act, every issuer who is engaged in interstate commerce, or in a business affecting interstate commerce, or whose securities are traded by use of the mails or any means or instrumentality of interstate commerce, is required to register with the SEC.[2089] The SEC has specified that only foreign private issuers with total assets in excess of $ 10,000,000 and a class of equity securities held of record by 500 or more persons, of which 300 or more reside in the United States, are subject to

[2085] *See, e.g.*, H.T. HOLLISTER, "'Shock Therapy' for *Aktiengesellschaften:* Can the Sarbanes-Oxley Certification Requirements Transform German Corporate Culture, Practice and Prospects?", 25 *Nw. J. Int'l L. & Bus.* 453, 462 (2005) (contrasting this historical stance with the SEC's rule-making under the Sarbanes-Oxley Act).
[2086] *See* from a practical perspective: B. BLACK, "Entering the U.S. Securities Markets: Regulation of Non-U.S. Issuers", 1 *International Journal of Baltic Law*, No. 4, 1 (2004).
[2087] Section 5, 15 U.S.C. §77e. Non-U.S. corporations are not co-terminous with foreign private issuers., as non-U.S. corporations can be considered U.S. issuers if they have important U.S. connections. *See* 17 C.F.R. 230.405.
[2088] Section 12 of the Securities Exchange Act, 15 U.S.C. § 78l(b).
[2089] 15 U.S.C. 78*l*.

registration under Section 12(g) SEA.[2090] A foreign issuer could also be exempted from registration if it furnishes to the SEC whatever information it (A) has made or is required to make public pursuant to the law of the country of its domicile or in which it is incorporated or organized, (B) has filed or is required to file with a stock exchange on which its securities are traded and which was made public by such exchange, or (C) has distributed or is required to distribute to its security holders.[2091] From time to time, the SEC publishes lists of foreign issuers that have claimed such exemptions.[2092]

644. REGULATION S – Exemptions only apply when foreign private issuers are subject to U.S. securities law. If they are not subject to U.S. securities law, they are obviously in no need of exemptions. Foreign private issuers may therefore tend to argue that they have not entered U.S. capital markets, and are thus not subject to U.S. registration requirements, especially these under the 1933 Securities Act. A key provision of this Act is § 5. Under § 5 of the Securities Act, unless a registration statement has been filed with the SEC, "it shall be unlawful for any person, directly or indirectly to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security". While it was clear that § 5 applied to foreign private issuers seeking a U.S. listing, it was unclear how broadly the term 'interstate commerce' should be construed, and more precisely to what extent it covered the sales of securities to U.S. investors abroad.

Because of the prevailing uncertainty, the SEC limited the scope of § 5 of the Securities Act in 1964, when it declared that registration was not required when securities were distributed abroad to foreign nationals only, if these securities "came to rest abroad."[2093] As the goal of U.S. securities legislation was the protection of U.S. investors, there was arguably no need to have securities that are distributed to foreign investors registered in the United States.[2094] The 1964 declaration did however not confer the expected legal certainty on foreign securities transactions. As the exact meaning of "securities coming to rest abroad" was unclear, foreign sellers of securities often excluded U.S. purchasers from taking part in an offering, so as to avoid the application of U.S. securities laws.[2095] Given these adverse effects on U.S. investors, the SEC released another regulation in 1990, the so-called 'Regulation

[2090] 17 CFR § 240.12g3-2.
[2091] 17 CFR 240.12g3-2(b).
[2092] *See, e.g.*, SEC Release No. 34-49846; International Series Release No. 1277, June 10, 2004.
[2093] Registration of Foreign Offerings by Domestic Issuers, Securities Act Release No. 4708 [1982 Transfer Binder] Fed. Sec. L. Rep. (CCH) §§1361-1363 (July 9, 1964).
[2094] *Id.* ("[T]he Commission has traditionally taken the position that the registration requirements of Section 5 of the Act are primarily intended to protect American investors. Accordingly, the Commission has not taken any action for failure to register securities of United States corporations distributed abroad to foreign nationals … [I]t is immaterial whether the offering originates from within or outside the United States, whether domestic or foreign broker-dealers are involved and whether the actual mechanics of the distribution are effected within the United States, so long as the offering is made under circumstances reasonably designed to preclude distribution or redistribution of the securities within, or to nationals of, the United States.").
[2095] Purchases were sometimes made through a purchaser's offshore affiliate without the seller's knowledge. *See, e.g.*, *MCG, Inc.* v. *Great Western Energy Corp.*, 896 F.2d 170 (5th Cir. 1990), comment J.P. TRACHTMAN, 84 *A.J.I.L.* 755-60 (1990).

S'.[2096] Regulation S seems eventually to have brought clarity as to the U.S. registration requirements of foreign securities transactions.

The adoption of Regulation S in 1990 epitomizes the SEC's restrictive approach to the extraterritorial application of the registration requirements of U.S. securities laws, and, accordingly, its respect for traditional notions of international comity. Under Rule 901 of Regulation S, offers and sales occurring outside the United States are not subject to U.S. registration. Because foreign offers of unregistered securities could however flow back to the United States, such offers may be subject to U.S. securities laws. Nonetheless, if the requirements of Rules 903 and 904 of Regulation S are met, the transaction falls into a "safe harbor" and is not subject to registration with the SEC. The basic "safe harbor" requirements are that the offer must be made in an "offshore transaction" (*i.e.*, a transaction in which no offer is made to a "person in the United States") and may not involve a "directed selling effort" in the United States[2097], yet depending on the nature of the issuer and the type of securities, other requirements should be complied with. In adopting Regulation S, the SEC upheld the territoriality principle pursuant to which a State regulates the activities occurring in its territory.[2098] As investors could choose the territorial regulations they deem fit,[2099] Regulation S may be considered to have increased global capital market efficiency.[2100]

645. REGISTRATION V. ANTIFRAUD – Regulation S only applies to registration and does not limit the extraterritorial scope of the antifraud provisions.[2101] In this context, it has been observed that, unlike the antifraud provisions, the registration provisions only apply to those offers of unregistered securities that tend to have the effect of *creating a market* for unregistered securities in the United States.[2102] When these offers do not have such effect, the interests of U.S. investors are not seriously jeopardized. This economic rationale has greatly restricted the reach of U.S. registration requirements. The reach of the antifraud provisions of the U.S. securities laws, provisions which have another rationale, set out *supra*, remains broad by contrast.[2103]

[2096] Offshore Offers and Sales, Securities Act Release No. 33, 6863, [1989-90 Transfer Binder] Fed. Sec. L. Rep. (CCH) § 84,524 (April 24, 1990), 17 C.F.R. §230.901-905.

[2097] 17 CFR § 230.903(a)(1)-(2).

[2098] Release No. 6863, at 80,665 ("The territorial approach recognizes the primacy of the laws in which a market is located.").

[2099] Release No. 6863, at 80,665 ("As investors choose their markets, they choose the laws and regulations applicable in such markets.").

[2100] S.J. CHOI & A.T. GUZMAN, "The Dangerous Extraterritoriality of American Securities Law", 17 *Nw. J. Int'l L. & Bus.* 207, 220 (1996).

[2101] Release No. 6863, at 80,665. Just before the adoption of Regulation S, however, the Fifth Circuit derived the non-applicability of the antifraud provisions from the non-applicability of the registration requirements. *See, MCG, Inc.* v. *Great Western Energy Corp.*, 896 F.2d 170 (5th Cir. 1990), comment J.P. TRACHTMAN, 84 *A.J.I.L.* 755, 760 (1990).

[2102] *Europe and Overseas Commodity Traders* v. *Banque Paribas London*, 147 F.3d 118, 126 (2nd Cir. 1998).

[2103] *See also c*mt. a to § 416 of the Restatement (Third) of U.S. Foreign Relations Law (relying on § 403(2)(c)) (The Restatement (Third) of Foreign Relations Law has attributed the broad reach of the antifraud provisions compared to the reach of the registration requirements to the fact that "[the U.S.]

U.S. courts have indeed largely rejected the assertion that the antifraud jurisdictional test should also apply to determine the reach of the registration provisions.[2104] Using the liberal conduct and effects test, they have given the antifraud provisions a broader reach than the registration provisions.[2105] Only in *EOC* did the Second Circuit use the antifraud conduct and effects test so as to determine the reach of 17 C.F.R. § 230.901 (Regulation S), *i.e.*, the "outside the United States" test. Drawing on a list of factors set forth in an early version of Regulation S, the Second Circuit considered that Regulation S supported the application of an, albeit more limited, conduct and effects test.[2106] The Second Circuit's introduction of the conduct and effects test in the field of securities registration has been criticized, because it unravels the bright-line standard of Regulation S.[2107]

646. DISCLOSURE REQUIREMENTS AND ACCOMMODATIONS – Even where foreign private issuers do not benefit from Regulation S or exemptions from registration, and are thus required to register with the SEC, the SEC has been forthcoming at the level of disclosure requirements which issuers have to abide by. In the U.S., disclosure includes the filing of a registration statement, the delivery of a prospectus, the filing of annual and periodic reports, and the filing of proxy statements.[2108] Traditionally, the SEC required registered foreign private issuers to abide by the same standards of full and fair disclosure as U.S. issuers. Since 1979 however,[2109] the SEC has gone to great lengths in accommodating the disclosure concerns of foreign private issuers, as far as accommodations were consistent with the protection of U.S. investors.[2110] Despite the applicable accommodations, the around

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interest in punishing fraudulent or manipulative conduct is entitled to greater weight than are routine administrative requirements.").

[2104] *Europe and Overseas Commodity Traders* v. *Banque Paribas London*, 147 F.3d 118, 123 (2nd Cir. 1998); *Consolidated Gold Fields PLC* v. *Minorco, S.A.*, 871 F.2d 252, 262 (2d Cir. 1989); *Bersch* v. *Drexel Firestone, Inc.*, 519 F.2d 974, 986 (2d Cir. 1975); *Leasco Data Processing Equip. Corp.* v. *Maxwell*, 468 F.2d 1326, 1335-37 (2d Cir. 1972).

[2105] *See, e.g., Consolidated Gold Fields PLC* v. *Minorco, S.A.*, 871 F.2d 252, 261-262 (2d Cir. 1989).

[2106] *Europe and Overseas Commodity Traders* v. *Banque Paribas London*, 147 F.3d 118, 126 (2nd Cir. 1998). In *EOC*, the court held that alleged conduct was not such as to have the effect of creating a market for securities in the U.S., and that, accordingly, it lacked subject matter jurisdiction over claims relating to the trade in unregistered securities. *Id.*, at 126-27. The Second Circuit did not equate the antifraud test with the registration test ("Of course, we do not attempt in ruling on this case to provide a set of definitive rules to govern future transactions. Nor do we mean to suggest that standards developed under the anti-fraud provisions may be incorporated wholesale into the registration context. The exact contours of the conduct and effects test, as applied to registration cases, must remain to be defined on a case-by-case basis.")

[2107] *See* P.K. WILLISON, "*Europe and Overseas Commodity Traders v. Banque Paribas London:* Zero Steps Forward and Two Steps Back", 33 *Vand. J. Transnat'l L.* 469, 496-98 (2000).

[2108] *See* M.I. STEINBERG & L.E. MICHAELS, "Disclosure in Global Securities Offerings: Analysis of Jurisdictional Approaches, Commonality and Reciprocity", 20 *Mich. J. Int. L.* 207, 210-14 (1999). Proxy rules require the publication and delivery of a proxy statement whenever an issuer is electing directors or taking some other shareholder action. *Id.*, n. 36.

[2109] In 1979, the SEC adopted 17 C.F.R. § 249.220f. *See* in particular Simplification of Registration and Reporting Requirements for Foreign Companies, 59 Fed. Reg. 21,644 (April 19, 1994) (codified at 17 C.F.R. §§ 229-30, 239, 249 (2003)). *See also* R.S. KARMEL, "Living with U.S. Regulations: Complying with the Rules and Avoiding Litigation", 17 *Fordham Int'l L.J.* S152 (1994).

[2110] *See* R.S. KARMEL, "The Securities and Exchange Commission Goes Abroad to Regulate Corporate Governance", 33 *Stetson Law Review* 849, 855 (2004) (listing five factors: (1) the emergence of a competing Euro securities market; (2) privatized British enterprises offering securities in the U.S.; (3) greater cooperation between the SEC and foreign regulators; (4) the emergence of the International

1300 foreign private issuers remain largely subject to national treatment in the United States though. U.S. disclosure requirements for European private issuers remain rather onerous,[2111] since European laws do not require the sort of full and fair disclosure prevalent in the U.S.

An example of an accommodation by the SEC is the SEC's effort to eliminate the U.S. GAAP (Generally Accepted Accounting Principles) reconciliation requirement for foreign private issuers that use International Financial Reporting Standards (IFRS) (typically European issuers) by 2009 for their financial reporting.[2112] The elimination is not only dependent on the faithfulness and consistency of the application and interpretation of IFRS in financial statements across companies and jurisdictions, but also on the progress on a convergence project undertaken jointly by the International Accounting Standards Board (IASB) and the U.S. Financial Accounting Standards Board (FASB).[2113] The possible elimination of U.S. GAAP reconciliation testifies to the SEC's willingness to embrace foreign accounting standards and hence, to its comity-based approach to disclosure.[2114]

Organization of Securities Commissions; (5) foreign governments' own interest in increased disclosure); C.A. FALENCKI, "Sarbanes-Oxley: Ignoring the Presumption Against Extraterritoriality", 36 *Geo. Wash. Int'l L. Rev.* 1211, 1230 (2004).

[2111] *See* M.I. STEINBERG & L.E. MICHAELS, "Disclosure in Global Securities Offerings: Analysis of Jurisdictional Approaches, Commonality and Reciprocity", 20 *Mich. J. Int. L.* 207 (1999); R.S. KARMEL, "The Securities and Exchange Commission Goes Abroad to Regulate Corporate Governance", 33 *Stetson L. Rev.* 849, 853 (2004).

[2112] The European Community for instance requires companies incorporated under the laws of one of its Member States and whose securities are publicly traded within the EU to prepare their consolidated financial statements for each financial year starting on or after January 1, 2005 on the basis of accounting standards issued by the IASB. *See* Regulation (EC) No. 1606/2002 of the European Parliament and of the Council of 19 July 2002 on the application of international accounting standards, *O.J.* L 243/1, September 11, 2002.

[2113] SEC Release 2005-62, April 21, 2005, available at http://www.sec.gov/news/press/2005-62.htm.
On April 12, 2005, the SEC provided an accommodation relating to financial statements prepared under IFRS for foreign private issuers (Release Nos. 33-8567; 34-51535; International Series Release No. 1285; File No. S7-15-04). Under this rule, U.S. GAAP reconciliation is still required, but foreign private issuers are allowed, for their first year of reporting under IFRS, to file two years rather than three years of statements of income, changes in shareholders' equity and cash flows prepared in accordance with IFRS. Release available at http://www.sec.gov/rules/final/33-8567.pdf.
On December 13, 1994, the SEC had already eliminated the requirement to reconcile to U.S. generally accepted accounting principles certain differences attributable to the method of accounting for a business combination or the amortization period of goodwill and negative goodwill, provided the financial statements comply with International Accounting Standard (IAS) No. 22 (Release Nos. 33-7119; 34-35095; FR 45; International Series Release No. 759; File No. S7-13-94). Release available at http://www.sec.gov/rules/final/bcombin.txt. *See also* Release Nos. 33-7118; 34-35094; IC-20766; FR44; International Series No. 758; File No. S7-12-94; amending Regulation S-X, December 13, 1994 (extending accommodations adopted recently with respect to financial statements of foreign issuers to filings by domestic issuers that are required to include financial statements of foreign equity investees or acquired foreign businesses); Release Nos. 33-7117; 34-35093; FR43; International Series Release No. 757, File No. S7-11-94; amending Regulation S-X, December 13, 1994 (allowing foreign issuers flexibility in the selection of the reporting currency used in filings with the Commission, and streamlining financial statement reconciliation requirements for foreign private issuers with operations in countries with hyperinflationary economies), available at http://www.sec.gov/rules/final/fissuer.txt.

[2114] *See* for a harsh criticism of previous clinging to U.S. GAAP by the SEC: C.A. FALENCKI, "Sarbanes-Oxley: Ignoring the Presumption Against Extraterritoriality", 36 *Geo. Wash. Int'l L. Rev.* 1211, 1236-38 (2004); A.J. NAIDU, "Was Its Bite Worse Than Its Bark? The Costs Sarbanes-Oxley Imposes on German Issuers May Translate Into Costs to the United States", 18 *Emory Int'l L. Rev.* 271, 283-290 (2004).

7.6.1.b. Disclosure in Europe

647. In Europe, a system of disclosure accommodation for foreign private issuers similar to the U.S. system exists. Intra-European disclosure rules have been increasingly harmonized since 1979,[2115] and were codified in a 2001 Directive.[2116] For our purposes, the application of European laws to issuers from outside the European Community, only Article 41 of this Directive is relevant. Pursuant to this provision, "[t]he Community may, by means of agreements concluded with one or more non-member countries pursuant to the Treaty, recognize listing particulars[2117] drawn up and checked, in accordance with the rules of the non-member country or countries, as meeting the requirements of this Directive, subject to reciprocity, provided that the rules concerned give investors protection equivalent to that afforded by this Directive, even if those rules differ from the provisions of this Directive." Article 41 extends the concept of mutual recognition, *i.e.*, the cornerstone of intra-European securities listing under the Directive, to foreign private issuers, subject to a number of requirements.

648. UK LISTING REQUIREMENTS – As European listing requirements have so far not raised sovereignty concerns in the United States, because they are ordinarily less strict than U.S. requirements, they will not be extensively discussed here. By way of example, the primary and secondary listing requirements for overseas companies seeking a listing on the London Stock Exchange (LSE) will be sketched.[2118]

Under the UK Listing Rules, if the UK Listing Authority is satisfied that an overseas company's accounts have been prepared to a standard appropriate to protect the interests of investors, different accounting standards may be accepted, subject to a number of requirements.[2119] Also, an overseas company which is subject to public reporting and filing obligations in its country of incorporation (or primary listing if different) may, subject to the UK Listing Authority's consent, incorporate in listing particulars relevant documents published in accordance with those obligations.[2120]

[2115] Council Directive 79/279/EEC of 5 March 1979 coordinating the conditions for the admission of securities to official stock exchange listing, Council Directive 80/390/EEC of 17 March 1980 coordinating the requirements for the drawing up, scrutiny and distribution of the listing particulars to be published for the admission of securities to official stock exchange listing, Council Directive 82/121/EEC of 15 February 1982 on information to be published on a regular basis by companies the shares of which have been admitted to official stock-exchange listing and Council Directive 88/627/EEC of 12 December 1988 on the information to be published when a major holding in a listed company is acquired or disposed of.

[2116] Directive 2001/34/EC of the European Parliament and of the Council of 28 May 2001 on the admission of securities to official stock exchange listing and on information to be published on those securities (*O.J.* L 184/0001-0066, 6 July 2001).

[2117] Pursuant to Article 21 of the Directive, "[t]he listing particulars shall contain the information which, according to the particular nature of the issuer and of the securities for the admission of which application is being made, is necessary to enable investors and their investment advisers to make an informed assessment of the assets and liabilities, financial position, profits and losses, and prospects of the issuer and of the rights attaching to such securities."

[2118] *See also:* I. MACNEIL & A. LAU, "International Corporate Regulation: Listing Rules and Overseas Companies", working paper, Hong Kong Baptist University, School of Business, Business Research Centre, 8 March 2001, available at http://net2.hkbu.edu.hk/~brc/WP200012.pdf

[2119] Rules 3.3 and 17.3 of the UK Listing Authority Rules.

[2120] *Id.*, Rule 17.5.

Importantly, the UK Listing Authority may authorize the omission of certain information otherwise required by the Listing Rules. In considering whether to authorize an omission by an overseas company of information which is not required, the UK Listing Authority will, *inter alia*, have regard to: (a) whether the company is listed on a regulated regularly operating, recognized open market and conducts its business and makes disclosure according to internationally accepted standards; and (b) the nature and extent of the regulation to which the company is subject in its country of incorporation.[2121]

As far as primary listing requirements are concerned, the UK Listing Rules provide that an overseas company must comply so far as (a) the information available to it enables it to do so, and (b) compliance is not contrary to the law in its country of incorporation. An overseas company must, on request by the UK Listing Authority, produce a letter from an independent legal adviser explaining why compliance with a listing rule would be contrary to that law.[2122]

As far as secondary listing requirements are concerned, which are applicable to companies which have a primary listing on a foreign stock exchange, overseas companies are entitled to a large number of exemptions,[2123] although they still have continuing obligations.[2124] The Listing Rules also provide for the mutual recognition of listing particulars document and prospectuses issued by an overseas company and approved by the competent authority of another Member State when a number of conditions are satisfied.[2125]

7.6.2. The Sarbanes-Oxley Act

649. The SEC's policy of accommodating foreign private issuers, sketched in 7.6.1, was overturned by Congress, almost overnight, in the summer of 2002, when it adopted an 'Act to protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws, and for other purposes', an Act that was signed into law by President Bush on July 30, 2002.[2126] The Act is better known as the Sarbanes-Oxley Act (hereinafter 'SOX'), named after its promoters, Congressmen Paul Sarbanes and Michael Oxley, who introduced the SOX bill in Congress so as to ensure that accounting scandals such as Enron and WorldCom

[2121] *Id.*, Rule 17.6.
[2122] *Id.*, Rule 17.12.
[2123] *Id.*, Rules 17.14 – 17.21A.
[2124] *Id.*, Rules 17.22 – 17.67B.
[2125] *Id.*, Rules 17.68-17.79.
[2126] Public law 107-24, July 30, 2002, 116 Stat. 745. The 'overnight' character of SOX is evidenced by the SEC's proposal of a rule on the certification of disclosure in companies' quarterly and annual reports on June 20, 2002, a month before the passage of the Sarbanes-Oxley Act (Certification of Disclosure in Companies' Quarterly and Annual Reports, 67 Fed. Reg. 41877, 41882 (June 20, 2002)). The proposal was a close analogy of Section 302 SOX. Yet while Section 302 SOX treats domestic and foreign issuers on the same footing, the SEC proposed on June 20, 2002 not to apply the certification and procedural requirements to foreign private issuers. The SEC's proposal was in line with its traditional comity-based approach of partial exemption of foreign corporations. Applying the doctrine of foreign sovereign compulsion, the SEC stated: "[M]andatory requirements regarding internal procedures raise several issues, since those requirements may be inconsistent with the laws or practices of the foreign private issuers' home jurisdiction and stock exchange requirements. For these reasons, applying the proposed rules to foreign private issuers would raise additional issues that do not exist for domestic companies." *Id.*

would in future no longer arise. SOX strengthens U.S. disclosure requirements, and importantly, imposes new corporate governance requirements on issuers, including foreign private issuers and public accounting firms[2127]. The application of the latter requirements to foreign private issuers and public accounting firms met with stiff opposition from these corporations and foreign States (part 7.6.2.a). In due course, the SEC and the Public Company Accounting Oversight Board (PCAOB), a non-profit body designated to supervise the accounting provisions of SOX, however granted exemptions from SOX requirements to foreign private issuers and their public accounting firms (part 7.6.2.b).

7.6.2.a. Foreign reactions to the Sarbanes-Oxley Act

650. DISCLOSURE V. CORPORATE GOVERNANCE – It is, at the outset, important to note that SOX does not broaden the jurisdictional basis of U.S. securities laws. The application of SOX is tied to the application of the Securities Act 1933 and the Securities Exchange Act 1934, as clarified by the SEC in Regulation S (1990). This implies that only issuers of securities that are already required to register with the SEC are subject to SOX.[2128] SOX only adds an additional layer of corporate governance and disclosure requirements to the existing registration and disclosure requirements and the anti-fraud provisions.

Given the nature of corporate governance requirements however, SOX was bound to affect the functioning of foreign issuers thoroughly, and thus to provoke serious international controversy. Corporate governance requirements reflect deeply held cultural convictions. When the U.S. enacts a law that requires strict auditor independence and individual CEO/CFO accountability, it not merely asks foreign issuers to divulge additional financial information, but requires them to overhaul existing governance systems that are sanctioned by foreign governments and regulators.[2129] The application of SOX requirements to foreign private issuers has therefore been considered to represent "an unprecedented regulatory expansion in the governance of [foreign private issuers] by the U.S. system."[2130]

651. FOREIGN CONDEMNATION – In view of the intrusive nature of the application of corporate governance requirements to foreign corporations, the reach of SOX has been condemned by foreign issuers and foreign audit firms,[2131] and the

[2127] SOX, like the Securities Act and the Securities Exchange Act, does not specify its geographical scope of application. Section 2 (a) (7) SOX however refers for a definition of the term 'issuer' to the 1934 Securities Exchange Act (15 U.S.C. 78c, defining an 'issuer' as "any person who issues or proposes to issue any security"). The classical understanding of an 'issuer' by the SEC as including foreign private issuers is thus controlling. Public accounting firms, foreign or domestic, are subject to SOX rules pursuant to Section 102 (a) SOX, which states that "[i]t shall be unlawful for any person that is not a registered public accounting firm to prepare or issue, or to participate in the preparation or issuance of, any audit report with respect to any issuer."

[2128] Section 2(a)(7) SOX.

[2129] *See, e.g.*, J. SHIRLEY, "International Law and the Ramifications of the Sarbanes-Oxley Act of 2002", 27 *B.C. Int'l & Comp. L. Rev.* 501, 525-26 (2004).

[2130] *See* H.T. HOLLISTER, "'Shock Therapy' for *Aktiengesellschaften:* Can the Sarbanes-Oxley Certification Requirements Transform German Corporate Culture, Practice and Prospects?", 25 *Nw. J. Int'l L. & Bus.* 453, 463 (2005).

[2131] Approximately 10 % of SEC registrants are foreign issuers, representing 20 % of all registered issuers by capitalization. *See* R.S. KARMEL, "The Securities and Exchange Commission Goes Abroad to Regulate Corporate Governance", 33 *Stetson Law Review* 849, 886 (2004).

European Commission, yet more so by the corporate world (especially by German corporations, Germany being the State where the impact of SOX was supposedly most felt).[2132] Assuming that the legality of a particular jurisdictional assertion under public international law is a measure of the degree of foreign governmental protest against it, the lack of such protest against the application of SOX to foreign private issuers undercuts the public international law case against SOX. It seems that SOX indeed caused hardship for foreign issuers, but instead of drumming up support from their respective governments – who might have considered the issuers' concerns as being outside the realm of governmental interest – these issuers chose to directly seek accommodations from the SEC, with which they routinely dealt anyway. The impression is thus created that the long arm of SOX raises concerns for foreign private actors doing business in the U.S. rather than international law concerns. Nonetheless, as at least the European Commission has been receptive to European issuers' qualms, and transfigured them into European sovereignty concerns over the extraterritorial application of SOX to issuers incorporated in Europe, an international law analysis of SOX makes sense.

652. EU REACTION – The European Commission took primarily issue with the application of SOX rules to Europe-based public accounting (audit) firms rather than its application to foreign private issuers. In early 2003, Internal Market Commissioner BOLKESTEIN sent a letter to SEC chairman Donaldson on behalf of the European Union (EU) concerning the PCAOB's forthcoming rules on foreign auditor registration and oversight, in which he lambasted the indiscriminate treatment of U.S. and foreign public accounting firms. It may be useful to reprint the four European concerns over SOX formulated by BOLKESTEIN, as they may inform a jurisdictional reasonableness analysis of SOX – which will be conducted in part 7.6.2.2 – and may have provided the basis for the exemptions granted by the PCAOB later on (see part 7.6.2.c):

> "1. Since the mid-1980's, on the basis of a European Directive, the European Union's Member States have established effective, equivalent registration requirements in all our 15 Member States for all EU auditors. The public oversight systems in which these registration requirements are embedded may take different forms due to the different legal traditions of our Member States, but they exist, and work. The PCAOB proposals therefore add an unnecessary, expensive second layer of regulatory control for those EU audit firms that will be subject to registration with the PCAOB. We consider that the best way forward in this area is to work towards an effective and efficient approach based on mutual recognition and equivalence. If we cannot move forward on this basis, it will be difficult to avoid calls for reciprocity and requirements whereby U.S audit firms would have to register with all our Member States (15 today, 25 soon with the enlargement of the EU), and be subject, also, to EU oversight mechanisms.

[2132] *See, e.g.*, H.T. HOLLISTER, "'Shock Therapy' for *Aktiengesellschaften:* Can the Sarbanes-Oxley Certification Requirements Transform German Corporate Culture, Practice and Prospects?", 25 *Nw. J. Int'l L. & Bus.* 453 (2005); A.J. NAIDU, "Was Its Bite Worse Than Its Bark? The Costs Sarbanes-Oxley Imposes on German Issuers May Translate Into Costs to the United States", 18 *Emory Int'l L. Rev.* 271 (2004).

2. The present PCAOB draft registration rules will cause serious conflicts of law with existing EU and national laws. In effect, mandating EU audit firms to register with the PCAOB in the manner proposed in order to provide audit services to EU and other companies listed in the United States and their subsidiaries will cause these audit firms to infringe EU and national laws. I enclose in annex a short memorandum highlighting some examples of the legal conflicts which will arise.

3. The PCAOB proposals will tend to concentrate even further the market for audit services, globally and in the EU. Small EU audit firms, with few listed clients in the US may well decide not to register with the PCAOB because of the heavy costs and implications involved. In any event the relative costs for European firms will be higher than for local US firms.

4. Finally, the PCAOB rules, to be adopted formally by the SEC, must fully respect accepted principles of international law. Moreover, the PCAOB should be aware that EU policy making, as in the US, is in the process of change. For example, the European Commission will be tabling a significant new audit and corporate governance policy in the next few months tailored to the EU's legal and cultural environment. In many Member States important policy changes in these areas are also underway building on the existing solid legal basis.

For all these reasons, we request full exemption for EU audit firms from the rules on registration under section 106 (c) of the Sarbanes-Oxley Act … I firmly believe that the right approach is to accept a moratorium (say 1 year) for both registration and oversight and to discuss openly with all international regulators an acceptable and efficient approach based on mutual recognition and equivalence. We would be willing to work constructively and intensively in that direction.

If we are not able to find a common approach to these highly sensitive matters, I see a danger of additional tension which might have a negative impact on confidence and the performance of financial markets which we can ill afford at the moment.

I would be most grateful for an early response to this letter which I underline, contains issues of significant political importance for the European Union."[2133]

7.6.2.b. Assessing the long arm of the Sarbanes-Oxley Act in light of the rule of reason

653. The long arm of SOX has been condemned as being in violation of public international law.[2134] It might nonetheless be submitted that the corporate governance methods of foreign corporations listed on U.S. capital markets affect U.S.

[2133] Letter to W. DONALDSON, April 24, 2003, available at http://www.iasplus.com/resource/letterfbdonaldson.pdf.

[2134] *See, e.g.* the Hong Kong Law Society, arguing that some SOX provisions "appear to conflict with the principles of public international law concerning the basis on which jurisdiction may be exercised", quoted in "Uncle Sam Wants You", *South China Morning Post*, September 6, 2002, at 1.

commerce and U.S. investors,[2135] and that, accordingly, the effects principle as a modality of the objective territoriality principle under public international law may justify U.S. jurisdiction over foreign issuers and public accounting firms. As argued in chapter 5 however, the fact that a jurisdictional assertion is justified under the effects doctrine does in itself not ensure that the assertion is reasonable. A particularized reasonableness analysis, weighing the sovereign and private interests involved, is required. Given the substantial implementation powers conferred upon the SEC and the PCAOB, such an analysis may inform the level of deference these agencies should grant to foreign regulatory regimes. Before conducting a jurisdictional reasonableness analysis, it will first be examined whether SOX is justifiable in light of the U.S. presumption that statutes only apply territorially, absent clearly discernable congressional intent to the contrary (presumption against extraterritoriality), in light of the U.S. Constitution, and in light of the international law principle of estoppel.[2136]

654. THE REACH OF SOX IN LIGHT OF THE PRESUMPTION AGAINST EXTRATERRITORIALITY – Not only may a jurisdictional reasonableness analysis weighing U.S. and foreign interests be useful, and even necessary, to determine the reach of SOX, so may an analysis based on the presumption against extraterritoriality. U.S. authors in particular have denounced the long arm of SOX for not being in keeping with the presumption against extraterritoriality, a long-standing canon of statutory construction in the United States.[2137] As far as this presumption is concerned, the application of SOX to "every reporting company" may not meet the standard of express congressional intent, as this expression may merely qualify as "boilerplate language", which the U.S. Supreme Court found insufficient to rebut the presumption against extraterritoriality in *Aramco*.[2138] Admittedly, in matters of capital markets regulation, a lower threshold for a rebuttal of the presumption against extraterritoriality may apply because of the economic policy interests involved (see part 3.3.2). Yet the extraterritorial application of some SOX provisions, such as § 301 – requiring the establishment of an audit committee, also in States having a system of co-determination involving both representatives of shareholders and labor (such as Germany) – may affect labor standards, for which the threshold for extraterritorial application seems to have been put much higher by the U.S. Supreme Court.[2139]

[2135] *Compare* PCAOB Release No. 2004-005 (June 9, 2004) p. 2 ("Because of the global nature of [capital] markets, the effects of a corporate reporting failure in one country tend to ripple through the financial markets of another, potentially causing substantial economic damage.") (without referring to the effects doctrine under public international law).

[2136] Concerns over the compatibility of SOX with WTO law may also arise. They will not be further discussed here. *See for* an analysis: C. RYNGAERT, "De verenigbaarheid van de Amerikaanse Sarbanes-Oxley Act met internationaal en Belgisch recht" [The Compatibility of the American Sarbanes-Oxley Act with International and Belgian law], *Tijdschrift voor Rechtspersoon en Vennootschap* [Company Law Review] 3, 4, n 9 (2004).

[2137] *See* M.D. VANCEA, "Exporting U.S. Corporate Governance Standards Through the Sarbanes-Oxley Act: Unilateralism or Cooperation?", 53 *Duke L.J.* 833, 852-56 (2003-2004); C.A. FALENCKI, "Sarbanes-Oxley: Ignoring the Presumption Against Extraterritoriality", 36 *Geo. Wash. Int'l L. Rev.* 1211, 1223 (2004) (stating that the text and the legislative history of the SOX demonstrate that Congress did not clearly express its intention that the SOX should apply extraterritorially).

[2138] *EEOC v. Arabian Am. Oil. Co.*, 499 U.S. 244, 251 (1991).

[2139] *See EEOC* v. *Arabian American Oil Co.*, 499 U.S. 244 (1991); M.D. VANCEA, "Exporting U.S. Corporate Governance Standards Through the Sarbanes-Oxley Act: Unilateralism or Cooperation?", 53 *Duke L.J.* 833, 855-56 (2003-2004).

655. THE REACH OF SOX IN LIGHT OF THE U.S. CONSTITUTION – SOX may not only be problematic from a congressional intent perspective, but also from a U.S. constitutional law perspective. Under the Commerce Clause,[2140] Congress has the power to regulate commerce with foreign nations. It is undisputed that Congress could enact regulations governing the transaction of securities between the United States and foreign nations pursuant to this clause. It is however unclear whether the Commerce Clause authorizes Congress to regulate the corporate governance of foreign corporations, as the relation between corporate governance and securities laws may be too attenuated.[2141] Securities laws are in essence disclosure laws, whereas corporate governance laws that for instance prohibit loans to insiders can hardly be considered to affect the disclosure of a foreign issuer's financial information.[2142] Domestic U.S.litigation may eventually clarify whether Congress acted outside its constitutional mandate when passing SOX.

656. ESTOPPEL – As argued in the next paragraph, the reach of SOX may be questionable in light of the international law principle of non-intervention as given shape by a jurisdictional interest-balancing test. The reach of SOX may however also be problematic in light of the international principle of estoppel, pursuant to which a State is not allowed to backtrack on a position it has previously taken.[2143] It may be argued that the long-standing SEC practice of granting exemptions before the enactment of SOX precludes Congress, the SEC and the newly established PCAOB, from enacting rules which are at loggerheads with this practice. Invoking previous SEC practice so as to denounce SOX under the estoppel doctrine is however problematic. For one thing, the SEC may have accommodated foreign private issuers not because it felt obliged to do so under international law, but rather because accommodation served the interests of U.S. investors. For another, SOX differs from traditional securities regulation in that it also sets forth corporate governance requirements, and not only disclosure requirements. Subject to the qualification made in the previous argument, to the extent that SOX strengthens disclosure requirements, the doctrine of estoppel may have some force.

657. REASONABLENESS – A jurisdictional reasonableness analysis requires balancing foreign and domestic interests. Greater weight may be attached to foreign interests if these are conveyed by official declarations of foreign States or other subjects of international law, such as the European Union. As the EU has expressed concern over the long arm of certain provisions of SOX, only a strong countervailing interest of the United States may tip the balance in favor of applying SOX to foreign corporations. It is submitted that such a countervailing interest could not be asserted, [2144] and that hence, exemptions from SOX provisions for European corporations appear appropriate.

[2140] Article I, § 8, Clause 3 of the U.S. Constitution.

[2141] *Compare United States* v. *Lopez*, 514 U.S. 549 (1995) (finding that the relation between gun regulation and commerce is too attenuated).

[2142] *See* M.D. VANCEA, "Exporting U.S. Corporate Governance Standards Through the Sarbanes-Oxley Act: Unilateralism or Cooperation?", 53 *Duke L.J.* 833, 845, n. 61 (2003-2004) (supporting the extraterritorial application of SOX provisions relating to disclosure and audit committees).

[2143] *See* in the context of capital markets law: G. SCHUSTER, *Die internationale Anwendung des Börsenrechts*, Berlin, Springer, 1996, 659.

[2144] C.A. FALENCKI, "Sarbanes-Oxley: Ignoring the Presumption Against Extraterritoriality", 36 *Geo. Wash. Int'l L. Rev.* 1211, 1223-24 (2004) (referring to foreign nations' strong interest in setting

An important consideration is that SOX was enacted with a view to preventing major accounting scandals from again happening in the United States. As the accounting scandals which led to the passing of SOX were precisely scandals involving U.S. corporations, it may be argued that SOX was primarily aimed[2145] and should primarily be aimed at regulating domestic conditions. SOX should not be allowed to punish foreign corporations for typical U.S. accounting scandals. Moreover, assuming that the U.S. has an interest in applying U.S. law to issuers active on U.S. capital markets, it may be observed that foreign nations and the EU have made incremental efforts to establish their own stringent corporate governance regime (in light of their own cultural traditions),[2146] which Bolkestein's brief did not fail to highlight. Home country regulation seems to go a long way in accommodating U.S. concerns over the corporate governance, accounting and disclosure standards that foreign corporations use.

Foreign issuers listing in the United States and foreign public accounting firms performing the audit of any U.S.-registered issuer or subsidiary of such issuer may admittedly have waived, by their very conduct, some of their home country regulations in favor of U.S. regulations. However, a listing on a U.S. regulated market or the auditing of U.S.-listed issuers does not allow the U.S. to apply its laws to all aspects of the corporate structure and activities of foreign corporations. It is for instance unreasonable to require foreign private issuers from complying with U.S. environmental regulations, because the environmental activity of foreign issuers has no or only a remote connection with the proper functioning of U.S. capital markets (*i.e.*, the *Schutzzweck* of U.S. securities regulation). Requiring foreign issuers to abide by the U.S. corporate governance standards set forth by SOX is a more borderline case. *Prima facie*, such may increase the integrity of U.S. capital markets, since it prevents corporate fraud and other improper activities harming U.S.-based investors. Nonetheless, U.S.-based investors may only marginally benefit from the application of SOX to foreign private issuers, given the level of home country regulation of these issuers, whereas foreign nations' economic sovereignty may be considerably encroached upon.

A proper interest-balancing test may thus lead to the inexorable conclusion that the long arm of SOX provisions violates the international law principle of non-intervention if the regulatory purpose of such provisions is already served without the application of SOX. When some sort of home regulation is in place, there is a strong case for deference by U.S. regulators. Deference guarantees that a foreign nation's sovereignty is respected, and reduces duplicative burdens for foreign corporations.[2147] Importantly, an appraisal of the legality of the reach of SOX is not an all-or-nothing

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corporate governance standards for their corporations, and the likelihood of conflict with foreign corporate governance regimes).

[2145] *See supra* for a 'presumption against extraterritoriality' analysis of SOX.

[2146] *See, e.g.*, United Kingdom Combined Code on Corporate Governance (July 2003), available at http://www.frc.org.uk/documents/pagemanager/frc/combinedcodefinal.pdf; A.J. NAIDU, "Was Its Bite Worse Than Its Bark? The Costs Sarbanes-Oxley Imposes On German Issuers May Translate Into Costs To the United States", 18 *Emory Int'l L. Rev.* 271, 273-74 (2004) (arguing that "the Act's purpose in correcting U.S. corporate governance disclosure mechanisms had little application in Germany, where recent reforms were already in place.")

[2147] *See* M.D. VANCEA, "Exporting U.S. Corporate Governance Standards Through the Sarbanes-Oxley Act: Unilateralism or Cooperation?", 53 *Duke L.J.* 833, 837 (2003-2004).

exercise. Instead, it requires a provision-by-provision analysis. When a provision introduces a requirement which is non-existent in the home State of the foreign corporation, the legality of the jurisdictional assertion it contains appears more straightforward than when a requirement is introduced that is analogous to, even if slightly different from, an existing requirement under foreign law. In the latter situation, the harmful effects of foreign conduct on U.S. commerce may not be substantial, as the harm has to a great extent been minimized by pre-existing foreign regulation.[2148]

658. AGAINST THE TRUE CONFLICT DOCTRINE – A true conflict or foreign sovereign compulsion analysis, under which the U.S. should refrain from exercising extraterritorial jurisdiction if U.S. law compels what another State prohibits, or *vice versa*, as suggested by the U.S. Supreme Court in the antitrust case of *Hartford Fire Insurance* v. *California*[2149] (see part 6.7), and often used to assess the extraterritorial reach of U.S. discovery orders (see part 9.3), should not be the controlling jurisdictional rule.[2150] As argued *supra* in part 6.7, a State could legitimately decide *not* to regulate corporate activity, such as corporate governance. Especially if that State takes the view, albeit implicitly, that non-regulation or weak regulation yields economic benefits, its decision not to impose duties should be given critical weight in the process of balancing U.S. and foreign law.[2151] If non-regulation results from oblivion or unjustified lack of regulatory oversight, the argument in favor of deference appears weaker.

659. BURDENS ON PRIVATE ACTORS – Under the reasonableness analysis of § 403 of the Restatement (Third) of U.S. Foreign Relations Law (1987), both sovereign and private interests are balanced. While the SEC and the PCAOB are obviously free to involve private interests in their balancing act as they see fit, they are not required to do so as a matter of international law, a law which mediates sovereign interests. However, if foreign States defend the interests of private parties, such interests may be transfigured into sovereign interests. It is indeed safe to assume that States will defend private interests only in case harm to such interests also results in harm to national economic interests (*e.g.*, in terms of employment), or if a defense of private interests dovetails well with concerns of economic sovereignty (*e.g.*, a State's concern of having its own corporate governance rules applied to corporations incorporated within their territory).

Because the EU stated that "[t]he PCAOB proposals … add an unnecessary, expensive second layer of regulatory control for those EU audit firms that will be subject to registration with the PCAOB", it may be submitted that the PCAOB should, as a matter of international law, take the additional burden of SOX on EU-based

[2148] *Id.*, at 858-860 (arguing that "the Sarbanes-Oxley Act is no better able to deter aberrational individuals than are foreign safeguards").
[2149] 509 U.S. 764 (1993).
[2150] Commissioner Bolkestein hinted at the foreign sovereign compulsion defense in the second consideration of his letter to SEC Chairman Donaldson, yet it may be argued, in light of the other considerations, that this is just one argument against the unwelcome reach of SOX.
[2151] *Compare* A.J. NAIDU, "Was Its Bite Worse Than Its Bark? The Costs Sarbanes-Oxley Imposes on German Issuers May Translate Into Costs to the United States", 18 *Emory Int'l L. Rev.* 271, 316 (2004) (arguing that "[i]t is up to Germany to reform its corporate governance and enforcement mechanisms to jump start its market, not for the United States to impose these via Sarbanes-Oxley.").

public accounting firms, a private interest, into account.[2152] If a high premium is put on this private interest, the provisions requiring the establishment of an audit committee and the prohibition of insider-lending in particular may not pass muster, because they impose substantial additional burdens on foreign corporations.[2153]

660. THE BENCHMARKING EFFECT OF SOX – As in other fields of economic law, the United States may have wished to set regulatory standards for the whole world by enacting SOX, in the arguably mistaken belief, informed by U.S. exceptionalism, that the quality of foreign economic regulation cannot compete with the quality of U.S. economic regulation.[2154] No attention was devoted to foreign legal and non-legal norms (cultural, social) that reduce corporate misconduct.[2155] The crass way of hammering down U.S. corporate norms abroad was bound to provoke a backlash. Foreign issuers protested and some prospective issuers did not seek a U.S. listing, afraid that the costs of complying with SOX would outweigh the benefits of European issuers (cross-)listing on a U.S. exchange.[2156]

Certain issuers might however precisely be attracted by the stringent rules set forth by SOX, reasoning that investors might be more willing to invest in their securities if they subject themselves to a strict disclosure regime.[2157] Such "jurisdictional bonding" may result in the spontaneous spread of the regulatory concepts underlying SOX across the globe, without governmental intervention or guidance by the territorial State ("*Rückwirkung*").[2158] Also, novel concepts of corporate governance may open the eyes of foreign regulators to the benefits of stricter governmental regulation. SOX may be considered as cost-justified by these regulators, and on that basis,[2159] produce a 'benchmarking effect' on foreign regulation. A benchmarking effect of SOX is actually already underway, especially in Europe, where corporate governance regulations are being strengthened along the lines of SOX.[2160] Non-binding

[2152] It might indeed be costlier for foreign issuers to comply with two duplicative sets of rules than with one set of rules. *See* M.D. VANCEA, "Exporting U.S. Corporate Governance Standards Through the Sarbanes-Oxley Act: Unilateralism or Cooperation?", 53 *Duke L.J.* 833, 842-43 (2003-2004).
[2153] *Id.*, at 840-843 (pointing at UK executive certification requirements).
[2154] *Compare* E. Fleischman, former SEC Commissioner, quoted in "Uncle Sam Wants You", *South China Morning Post*, September 6, 2002, at 1 ("It's as though they were saying that in the light of the globalisation of markets, we the Congress and the SEC have no choice but to shoulder the burden of policing the market activities of companies, investment banks and the accounting and legal professionals wherever those activities take place.")
[2155] *See* M.D. VANCEA, "Exporting U.S. Corporate Governance Standards Through the Sarbanes-Oxley Act: Unilateralism or Cooperation?", 53 *Duke L.J.* 833, 870 (2003-2004).
[2156] *See* A.J. NAIDU, "Was Its Bite Worse Than Its Bark? The Costs Sarbanes-Oxley Imposes on German Issuers May Translate Into Costs to the United States", 18 *Emory Int'l L. Rev.* 271, 282 and 315 (2004).
[2157] *Id.*, at 311.
[2158] *See* G. SCHUSTER, *Die internationale Anwendung des Börsenrechts*, Berlin, Springer, 1996, 595-97 (adding that European States need not take this for granted, and might actually prohibit the importation of U.S. standards even in the absence of a true conflict with European regulations).
[2159] *See* Director of SEC's Office of International Affairs E. TAFARA, "Sarbanes-Oxley: a Race to the Top", *IFLR* 12 (September 2006) ("[T]he global adoption of the major provisions of Sox suggests that these provisions (at least, in broad outline) have been deemed to be cost-justified by authorities covering the bulk of the world's market capitalization. That doesn't necessarily imply that they are, in fact, cost justified – but it is an interesting confluence of regulatory opinion.").
[2160] *See, e.g.*, F.R. EHRAT, "Sarbanes-Oxley: a View from Outside", *Int. Bus. Law.* 75, 76 (April 2003) (pointing out that U.S.-style transparency will add to the protection of minority shareholders, a classical objective of European corporate governance law). *See* for a benchmarking effect on Swiss regulations: *Id. See* for a benchmarking effect on French regulations: M. COLLET, "France's Auditor Independence

instruments at the level of the European Community have been particularly instrumental in this process.

7.6.2.c. Exemptions from the Sarbanes-Oxley Act for foreign corporations

661. SEEDS OF EXEMPTION – It has been pointed out *supra* that the indiscriminate language of SOX seemed to reverse the SEC's policy of deference to foreign regulators. This did however not come as a surprise. Unlike the SEC, Congress has no contacts with foreign corporations on a daily basis. This undercuts the alignment of its jurisdictional assertions with foreign nations.[2161] It was expected that the SEC would take a more reasonable position, and it indeed did. SEC Chairman Harvey PITT soon indicated that he would consider concessions for foreign companies affected by SOX.[2162] PITT resigned on November 5, 2002, but was replaced by William DONALDSON, who was expected to heed foreign interests as well, given his tenure as head of the New York Stock Exchange, where he greatly accommodated foreign issuers' concerns.[2163] It may be noted that the SEC was not precluded from taking into account the particular situation of foreign issuers, given the legislative history of the SOX where reference was made to exemptions.[2164] The exemption possibilities surely suggest that some issuers, such as foreign issuers, might actually need exemptions.[2165]

Rules and their Extraterritorial Effects", *Int. Bus. Law*. 197 (2004) (discussing the creation of a French Public Auditor Oversight Board comparable to the U.S. PCAOB, and the strengthening of auditor independence and transparency rules, by the Financial Security Act of August 1, 2003). *See* for a *global* benchmarking effect: E. TAFARA, "Sarbanes-Oxley: a Race to the Top", *IFLR* 12 (September 2006).

[2161] *Compare* G. SCHUSTER, *Die internationale Anwendung des Börsenrechts*, Berlin, Springer, 1996, 651.

[2162] "Foreign Regulators Gird for Tougher Rules", *Financial Times*, November 7, 2002, at 21. *See also* Remarks by Harvey L. PITT, Conference of the Institute of Chartered Accountants of England and Wales, Brussels, Belgium, "A Single Capital Market in Europe: Challenges for Global Companies", October 10, 2002, available at http://www.sec.gov/news/speech/spch589.htm ("[W]e are prepared to consider how we can fulfill the mandate of the Act through our rulemaking and interpretive authority in ways that accommodate the home country requirements and regulatory approaches of the home jurisdiction of our foreign registrants and potential registrants. As we proceed with implementing the Act, we will therefore also seek a better understanding of any conflicts that may exist, as well as their potential resolution. […] In implementing Sarbanes-Oxley, we are mindful of the accommodations that we have made consistently to foreign private issuers in our disclosure regime.")

[2163] *See* C.A. FALENCKI, "Sarbanes-Oxley: Ignoring the Presumption Against Extraterritoriality", 36 *Geo. Wash. Int'l L. Rev.* 1211, 1217 (2004) (with references).

[2164] *See* Statement of Senator Enzi, 148 CONG. REC. S7350, S7356 (2002) ("[…] I believe we need to be clear with respect to the area of foreign issuers and their coverage under the bill's broad definitions. While foreign issuers can be listed and traded in the U.S. if they agree to conform to GAAP and New York Stock Exchange rules, the SEC historically has permitted the home country of the issuer to implement corporate governance standards. Foreign issuers are not part of the current problems being seen in the U.S. capital markets, and I do not believe it was the intent of the conferees to export U.S. standards disregarding the sovereignty of other countries as well as their regulators.") This statement may be used to corroborate Congress's intent not to apply SOX extraterritorially (argument of legislative history). *See* M.D. VANCEA, "Exporting U.S. Corporate Governance Standards Through the Sarbanes-Oxley Act: Unilateralism or Cooperation?", 53 *Duke L.J.* 833, 853 (2003-2004).

[2165] *See* M.D. VANCEA, "Exporting U.S. Corporate Governance Standards Through the Sarbanes-Oxley Act: Unilateralism or Cooperation?", 53 *Duke L.J.* 833, 852 (2003-2004); Letter from the Organization for International Investors to Jonathan Katz on the application of SOX to foreign private issuers (August 19, 2002), at http://www.ofii.org/SEC_Letter_081902.pdf (listing the accommodations previously granted by the SEC:

662. THE CASE FOR EXEMPTIONS – Relying on comments from foreign regulators and business communities, the SEC and the PCAOB took a remarkable effort to accommodate foreign concerns.[2166] Exemptions and waivers granted by these regulators, although characterized as 'conservative', clearly mitigate the blatant extraterritorial impact of SOX.[2167]

The essence of exemptions and waivers is that the regulating State does not abandon its regulations, but that it refrains from applying them to their fullest extent in the international arena, in order to defuse conflicts of jurisdiction and to relieve regulatory burdens for private actors. Granting exemptions or waivers, if such is possible, may not be a hard duty under international law,[2168] yet a reasonableness analysis may build a very compelling case for partial deference to home State regulation. It could be argued in this context that States could have anticipated conflicts of jurisdiction at the time they liberalized their capital markets and allowed foreigners – who are typically already subject to home country regulation – to invest.[2169] Exemption capacity may then be a built-in feature of open capital markets and an interdependent economic system.

Underlying any exemption practice is always the national interest however. For one thing, the effectiveness of foreign benchmarking effects of SOX may depend upon U.S. accommodation of foreign concerns. While plain unilateralism is likely to produce resentment overseas and may even lead to tit-for-tat measures, a comity-based approach oozing respect for the sovereignty of other nations, exemplified by a liberal granting of exemptions, might cause foreign nations to more readily adopt

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- interim reporting on the basis of home country and stock exchange practice rather than mandated quarterly reports;
- exemption from the proxy rules and the insider reporting and short swing profit recovery provisions of Section 16;
- aggregate executive compensation disclosure rather than individual disclosure, if so permitted in an issuer's home country;
- use of home country accounting principles with a reconciliation to U.S. generally accepted accounting principles, with acceptance of certain International Accounting Standards; and
- acquiescence in New York Stock Exchange and National Association of Securities Dealers corporate governance standards that are tailored to the needs of foreign private issuers.)

[2166] *See*, *e.g.*, C.A. GLASSMAN, SEC Commissioner, Remarks before the European Corporate Governance Summit: An SEC Commissioner's View: The Post-Sarbanes-Oxley Environment for Foreign Issuers, London, England, March 2, 2005, available at http://www.sec.gov/news/speech/spch030205cag.htm ("While Sarbanes-Oxley generally made no distinctions between U.S. and foreign issuers, we recognized that we had to accommodate the laws and regulatory regimes of our foreign counterparts in implementing the provisions of the Act – one size would not fit all.")

[2167] Provisions from which foreign private issuers were not exempted, were apparently not subject to a deliberate comity-based policy of non-enforcement by the SEC, as the SEC's application of Section 308(a) SOX to the French conglomerate Vivendi Universal testifies to. The civil fraud action under this provision was settled on December 23, 2003. Case cited in H.T. HOLLISTER, "'Shock Therapy' for *Aktiengesellschaften:* Can the Sarbanes-Oxley Certification Requirements Transform German Corporate Culture, Practice and Prospects?", 25 *Nw. J. Int'l L. & Bus.* 453, 463-64 (2005).

[2168] *See* G. SCHUSTER, *Die internationale Anwendung des Börsenrechts*, Berlin, Springer, 1996, 658-59.

[2169] *Id.*, at 660.

stricter corporate governance standards along the lines of SOX.[2170] Moreover, fear of foreign issuers delisting of U.S. stock exchanges or shying away from listing in the U.S., which partly prompted the enactment of Regulation S in 1990, was always present.[2171] The London Stock Exchange and Euronext in particular had presented themselves as alternatives to U.S. stock exchanges.[2172]

663. WAIVER BY CONDUCT – Addressing foreign nations' and issuers' concerns is walking a fine line for the regulatory agencies, as U.S. companies are likely to claim a competitive disadvantage if the agencies grant too many exemptions to foreign issuers. Here, the argument of fairness comes into play: if foreign issuers list their securities in the U.S. so as to tap the liquid U.S. capital markets, it is only fair for them to be subject to U.S. capital markets regulations to the same extent as U.S. issuers are.[2173] Already in 1984, the SEC advanced this argument with respect to disclosure of relevant materials relating to securities sales and purchases, when it stated that "the act of effecting a purchase or sale of securities within the U.S., whether directly or indirectly, shall constitute an irrevocable consent to the disclosure of relevant evidence in connection with any investigation, court action or administrative proceeding that might arise out of the transaction."[2174] This "waiver by conduct" policy, pursuant to which foreigners were deemed to consent to disclosure if they bought or sold securities in the U.S., was however never fully implemented, most likely because of the argument that under public international law private persons could not waive the sovereign rights of the State of which they are nationals or where they are incorporated.[2175]

664. TAILORED EXEMPTIONS – Unlike under Regulation S, foreign issuers are not generally exempted from SOX registration requirements. As illustrated in this subsection, they only enjoy exemptions from very specific SOX requirements. Transactional costs for foreign issuers are therefore bound to increase with the enactment of SOX, although it is doubtful whether foreign issuers will renounce a U.S. listing because of SOX, given the liquidity of U.S. capital markets. In a final paragraph, a comparative overview of exemptions under the 2006 European Statutory Audit Directive will be given.

[2170] *See* R.S. KARMEL, "The Securities and Exchange Commission Goes Abroad to Regulate Corporate Governance", 33 *Stetson L. Rev.* 849, 886 (2004).

[2171] It has been argued that companies waited to list in the U.S. because the SEC had not yet finalized its SOX implementation rules. *See* J. SHIRLEY, "International Law and the Ramifications of the Sarbanes-Oxley Act of 2002", 27 *B.C. Int'l & Comp. L. Rev.* 501, 527 (2004).

[2172] *See* M.D. VANCEA, "Exporting U.S. Corporate Governance Standards Through the Sarbanes-Oxley Act: Unilateralism or Cooperation?", 53 *Duke L.J.* 833, 836, n. 20 (2003-2004); A.J. NAIDU, "Was Its Bite Worse Than Its Bark? The Costs Sarbanes-Oxley Imposes on German Issuers May Translate Into Costs to the United States", 18 *Emory Int'l L. Rev.* 271, 305-310 (2004).

[2173] This argument is more tenuous than it appears. Not only foreign issuers benefit from access to U.S. capital markets, but U.S. investors as well. They can diversify their portfolios with foreign stock with limited transaction costs. Furthermore, foreign issuers do not specifically aim to tap *U.S.* markets, but merely to tap *foreign* markets so as to hedge domestic market exposure. *See* M.D. VANCEA, "Exporting U.S. Corporate Governance Standards Through the Sarbanes-Oxley Act: Unilateralism or Cooperation?", 53 *Duke L.J.* 833, 865 (2003-2004).

[2174] SEC Release No. 21186, July 30, 1984, 49 F.R. 31300 (August 6, 1984).

[2175] *See* G. SCHUSTER, *Die internationale Anwendung des Börsenrechts*, Berlin, Springer, 1996, 595. In order to soothe sovereignty concerns, the SEC Release however provided that "the existence of a valid consent would be governed by foreign law." (SEC Release No. 21186, 30).

665. PCAOB REGISTRATION EXEMPTIONS – The PCAOB soon heeded the EU's call for an extension of the deadline of registration for foreign public accounting firms until July 19, 2004, where U.S. audit firms have to register before October 22, 2003.[2176] A major accommodation related to foreign public accounting firms' concerns over direct conflicts between U.S. registration requirements and their home State's regulations (privacy laws in particular)[2177]. PCAOB Rule 2105, which reflects the typical position of U.S. courts deciding on extraterritorial discovery requests (see part 9.3), allows foreign public accounting firms to withhold information if submission would cause them to violate their home State's laws, provided that they undertake a good faith effort to obtain a waiver or the consent of the home State.[2178]

666. PCAOB OVERSIGHT ACCOMMODATIONS – Registration may not of itself require companies from being subject to the panoply of U.S. disclosure and inspection requirements. As set out in subsection 7.6.1, the SEC has traditionally accommodated foreign private issuers' concerns over stringent U.S. disclosure requirements. On June 9, 2004, the PCAOB followed suit when it adopted final rules relating to the oversight of non-U.S. public accounting firms.[2179] These rules, concerned with inspections and

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[2176] PCAOB Rule 2100. Effective pursuant to SEC Release 34-49473; File No. PCAOB 2004-01; March 25, 2004 and SEC Release No. 34-48180; File No. PCAOB-2003-03; July 16, 2003. Article 106(a) SOX provides that any foreign public accounting firm that prepares or furnishes an audit report with respect to any issuer, shall be subject to the SOX and the rules of the PCAOB and the SEC issued under the SOX, in the same manner and to the same extent as a public accounting firm that is organized and operates under the laws of the United States. On March 11, 2004, the registration deadline of April 19, 2004 was extended with 90 days. Some commenters suggested that the Board further extend the registration deadline for foreign public accounting firms to allow more time to resolve the special issues associated with the Board's oversight of non-U.S. firms. The Board however believed that 90 days was an adequate amount of time to extend the registration deadline. *See* PCAOB Release No. 2004-003, available at http://www.pcaobus.org/Rules_of_the_Board/Documents/Release2004-003.pdf.

[2177] *See, e.g.*, Articles 226-13 and 14 of the French Criminal Code (requiring or authorizing disclosure of confidential information, but only to French authorities and not to the SEC or the PCAOB). *See for* Belgium: C. RYNGAERT, "De verenigbaarheid van de Amerikaanse Sarbanes-Oxley Act met internationaal en Belgisch recht" [The Compatibility of the U.S. Sarbanes-Oxley Act with International and Belgian Law], *Tijdschrift voor Rechtspersoon en Vennootschap* [Company Law Review], 2004, nr. 1, 3-21.

[2178] PCAOB Rule 2105 ("(a) An applicant may withhold information from its application for registration when submission of such information would cause the applicant to violate a non-U.S. law if that information were submitted to the Board.
(b) An applicant that claims that submitting information as part of its application would cause it to violate non-U.S. laws must –
(1) identify, in accordance with the instructions on Form 1, the information that it claims would cause it to violate non-U.S. laws if submitted; and
(2) include as an exhibit to Form 1 –
(i) a copy of the relevant portion of the conflicting non-U.S. law;
(ii) a legal opinion that submitting the information would cause the applicant to violate the conflicting non-U.S. law; and
(iii) an explanation of the applicant's efforts to seek consents or waivers to eliminate the conflict, if the withheld information could be provided to the Board with a consent or a waiver,and a representation that the applicant was unable to obtain such consents or waivers to eliminate the conflict.")

[2179] PCAOB Release No. 2004-005, June 9, 2004, available at http://www.pcaobus.org/Rules_of_the_Board/Documents/Release2004-005.pdf *See also* PCAOB Release No. 2003-020, Briefing Paper on the Oversight of Non-U.S. Public Accounting Firms (October 28, 2003) (describing the framework) and PCAOB Release No. 2003-024 (December 10, 2003) (proposing the rules).

investigations of such firms, ooze benevolence and comity toward foreign regulators in that they authorize reliance on home-country regulation instead of an U.S. regulation. The PCAOB pointed out that "it is in the interests of the public, investors and the Board's non-U.S. counterparts to develop an efficient and effective cooperative arrangement where reliance may be placed on the home-country system to the maximum extent possible."[2180] The PCAOB seemed to concede that the interests of U.S. investors may not only be protected by a strict application of SOX requirements to foreign public accounting firms, but that strong home-country regulation could also contribute to the objectives of SOX. What is more, a strict application of SOX may not even serve the interests of U.S. investors, as it might scare away foreign issuers to the detriment of U.S. investors wishing to diversify their portfolio. One should however not be mistaken: the PCAOB intends to strike a balance between a cooperative approach respecting the laws of other jurisdictions and the need to protect U.S. capital markets, which implies that the PCAOB will only adhere to a cooperative approach *to the extent that* it does not undermine the objectives of SOX.[2181] Nonetheless, in light of the reasonableness analysis proposed in 7.6.2.2, the 2004 rules seem to balance U.S. and foreign interests adequately. There is no denial that they make the exercise of jurisdiction over foreign-based corporations more reasonable, even if they left some foreign concerns simmer.

The pivotal 2004 rules relating to the inspection and investigation of foreign public accounting firms are Rules 4011 and 4012. Under Rule 4011, foreign public accounting firms may rely on inspections by the home-country system if they submit a statement to that effect:

> "A foreign registered public accounting firm that seeks to have the Board rely, to the extent deemed appropriate by the Board, on a non-U.S. inspection when the Board conducts an inspection of such firm pursuant to Rule 4000 shall submit a written statement signed by an authorized partner or officer of the firm to the Board certifying that the firm seeks such reliance for all Board inspections."

Rule 4012 (a) sets out that the PCAOB may at times rely on a non-U.S. inspection of foreign registered public accounting firms:

> "If a foreign registered public accounting firm has submitted a statement pursuant to Rule 4011, the Board will, at an appropriate time before each inspection of such firm, determine the degree, if any, to which the Board may rely on the non-U.S. inspection. To the extent consistent with the Board's responsibilities under the Act, the Board will conduct its inspection under Rule 4000 in a manner that relies to that degree on the non-U.S. inspection. In making that determination, the Board will evaluate:
>
> > (1) information concerning the level of the non-U.S. system's independence and rigor, including the adequacy and integrity of the system, the independence of the system's operation from the auditing profession, the nature of the system's source of funding, the

[2180] PCAOB Release No. 2004-005, at 3.
[2181] *Id.*

transparency of the system, and the system's historical performance; and

(2) discussions with the appropriate entity or entities within the system concerning an inspection work program."

Rule 4012 (b) proceeds with setting forth detailed, although non-exhaustive factors to be used by the PCAOB in evaluating the adequacy and integrity of the non-U.S. system and its independence from the auditing profession.[2182]

[2182] "The Board's evaluation made pursuant to paragraph (a) may include, but not be limited to, consideration of –

(1) the adequacy and integrity of the system, including –

(i) whether the system has the authority to inspect audit and review engagements, evaluate the sufficiency of the quality control system, and perform such other testing as deemed necessary of foreign public accounting firms; and whether the system can exercise such authority without the approval of, or consultation with, any person affiliated or otherwise connected with a public accounting firm or an association of such persons or firms;

(ii) whether the system has the authority to conduct investigations and disciplinary proceedings of foreign public accounting firms, any persons of such firms, or both, that may have violated the laws and standards relating to the issuance of audit reports, and whether the system can exercise such authority without the approval of, or consultation with, any person affiliated or otherwise connected with a public accounting firm or an association of such persons or firms;

(iii) whether the system has the authority to impose appropriate sanctions for violations of the non-U.S. jurisdiction's laws and standards relating to the issuance of audit reports, and whether the system can exercise such authority without the approval of, or consultation with, any person affiliated or otherwise connected with a public accounting firm or an association of such persons or firms; and

(iv) whether the persons within the system have adequate qualifications and expertise;

(2) the independence of the system from the auditing profession, including –

(i) whether the system has the authority to establish and enforce ethics rules and standards of conduct for the individual or group of individuals who govern the system and its staff and has prohibited conflicts of interest, and whether the system can exercise such authority without the approval of, or consultation with, any person affiliated or otherwise connected with a public accounting firm or an association of such persons or firms;

(ii) whether the person or persons governing the system –
(A) have been appointed, or otherwise selected, by the government of the non-U.S. jurisdiction, without the approval of, or consultation with, any person affiliated or otherwise connected with a public accounting firm or an association of such persons or firms; and
(B) may be removed only by the government of the non-U.S. jurisdiction and may not be removed by any person affiliated or otherwise connected with a public accounting firm or an association of such persons or firms;

PCAOB Rule 4012 provides the framework for an on-going dialogue with foreign regulators. It is however unclear how the PCAOB will assess the level of adequacy and independence of the foreign system in practice, in spite of the factors set forth in Rule 4012, and whether it will continually screen the foreign system. In order order to increase legal certainty for foreign public accounting firms, it would be useful if the PCAOB drew up a list of recognized foreign regulators.

An interesting feature of Rule 4012 is that the PCAOB predicates its cooperation with foreign regulators on a foreign public accounting firm filing a statement, and thus makes deference to foreign laws dependent on the conduct of private corporations. This choice is clearly informed by the expectation of jurisdictional bonding: the PCAOB may have believed, not without reason, that, in order to attract clients, foreign public accounting firms may precisely wish to be subject to stricter disclosure and corporate governance standards.[2183] A wholesale reliance on home-country regulation may have disserved foreign private interests. Under Rule 4011, foreign public accounting firms are therefore allowed to opt for PCAOB inspections instead of for home-country inspections. As pointed out in 7.6.2.2, private interests may be part and parcel of a jurisdictional interest-balancing test under international law, provided that these interests dovetail with the sovereign interests of the home State. There is as yet no evidence of foreign nations having protested against the possibility of jurisdictional bonding provided by Rule 4011. If foreign sovereign protest were to

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> (iii) whether a majority of the individuals with whom the system's decision-making authority resides do not hold licenses or certifications authorizing them to engage in the business of auditing or accounting and did not hold such licenses or certificates for at least the last five years immediately before assuming their position within the system;
>
> (iv) whether a majority of the individuals with whom the system's decision-making authority resides, including the individual who functions as the entity's chief executive or equivalent thereof, are not practicing public accountants; and
>
> (v) whether each entity within the system has the authority to conduct its day-to-day operations without the approval of any person affiliated or otherwise connected with a public accounting firm or an association of such persons or firms;
>
> (3) the source of funding for the system, including whether the system has an appropriate source of funding that is not subject to change, approval or influence by any person affiliated or otherwise connected with a public accounting firm or an association of such persons or firms;
>
> (4) the transparency of the system, including whether the system's rulemaking procedures and periodic reporting to the public are openly visible and accessible; and
>
> (5) the system's historical performance, including whether there is a record of disciplinary proceedings and appropriate sanctions, but only for those systems that have existed for a reasonable period of time.

[2183] It is nonetheless doubtful whether bonding benefits outweigh bonding costs, especially when foreign issuers are already subject to substantial home-country regulation. *See* M.D. VANCEA, "Exporting U.S. Corporate Governance Standards Through the Sarbanes-Oxley Act: Unilateralism or Cooperation?", 53 *Duke L.J.* 833, 866 (2003-2004).

arise, it might be argued that the PCAOB should scrap the bonding possibility and rely in every instance on adequate home-country regulation.

667. AUDIT COMMITTEES – One of the most criticized SOX provisions is undoubtedly Section 301 of SOX, which amends Section 10A(m) of the Exchange Act, and requires any issuer to establish an audit committee. The SEC, which carries the implementation responsibility for Section 301 SOX, duly attempted to accommodate foreign concerns. It realized, after receiving a number of comments by foreign issuers and their representatives, that the requirements set forth in Section 301 SOX "may conflict with legal requirements, corporate governance standards and the methods for providing auditor oversight in the home jurisdictions of some foreign issuers."[2184] On June 9, 2003, the SEC granted tailored exemptions to foreign issuers.[2185] Below, exemptions for employees and controlling shareholders, and wholesale exemptions from Section 301, will be discussed.

The SEC exemptions constitute important accommodations of foreign interests. In the first instance, they are aimed at 'making life easier' for foreign issuers by modifying duplicative or contradictory regulations which place an unnecessary burden on them.[2186] Accordingly, they accommodate private interests rather than governmental interests. Indirectly however, by allowing foreign issuers to continue to play by their home State's rules, the SEC respects the foreign regulatory framework and, thus, the jurisdictional interests of foreign States.[2187]

668. AUDIT COMMITTEE MEMBERS ACCEPTING FEES – German trade unions in particular had taken issue with Section 301 of SOX. Where German law requires that non-management employees serve on the supervisory board or audit committee (the so-called 'co-decision' or 'co-determination),[2188] Section 301 of SOX provides that a member of an audit committee may, other than in his or her capacity as a member of the audit committee, the board of directors, or any other board committee, not accept any fees from the issuer, such as in the capacity of an employee.[2189] After German complaints,[2190] the SEC acknowledged that "having [non-management] employees serve on the board or audit committee can provide an independent check on management, which itself is one of the purposes of the independence requirements

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[2184] SEC Release Nos. 33-8220; 34-47654; IC-26001; File No. S7-02-03; April 9, 2003.
[2185] *Id.*
[2186] *Compare* W.H. DONALDSON, SEC Chairman, "U.S. Capital Markets in the Post-Sarbanes-Oxley World: Why Our Markets Should Matter to Foreign Issuers", London, England, January 25, 2005, available at http://www.sec.gov/news/speech/spch012505whd.htm.
[2187] *Compare* SEC Release Nos. 33-8220; 34-47654; IC-26001; File No. S7-02-03; April 9, 2003, at II.F.3.a.vii ("In adopting these exemptions, we recognize that some foreign jurisdictions continue to have historical structures that may conflict with maintaining audit committees meeting the requirements of Section 10A(m) of the Exchange Act.")
[2188] Under the German Co-Determination Act of 1976 (*Mitbestimmungsgesetz*), May 4, 1976 (BGBl. I S. 1153), supervisory boards of companies are required to have an equal number of shareholders and labor representatives.
[2189] Section 10A(m)(3)(B) SEA ("In order to be considered to be independent for purposes of this paragraph, a member of an audit committee of an issuer may not, other than in his or her capacity as a member of the audit committee, the board of directors, or any other board committee - (i) accept any consulting, advisory, or other compensatory fee from the issuer; or (ii) be an affiliated person of the issuer or any subsidiary thereof.").
[2190] *See, e.g.*, Comments by Deutsches Aktieninstitut, February 18, 2003, available at http://www.sec.gov/rules/proposed/s70203/rvrosen1.htm

under the Sarbanes-Oxley Act".[2191] These employees will therefore enjoy a limited exemption from SOX auditor independence standards: they are not precluded from accepting fees from the issuer as employees.[2192] Only employees of German issuers and not the issuers themselves, benefit from this accommodation. Issuers, having favored a wholesale non-application of § 301 SOX, now face the intrusion of labor's representatives not only in the supervisory board, but also in the audit committee, where these representatives enjoy decision-making power and have access to sensitive information, *i.e.*, privileges they were not entitled to before under German law.[2193] Below, the stringent conditions for wholesale non-application of § 301 SOX will be set out.

669. NATURE OF 'BOARD' – Another accommodation of foreign concerns over § 301 SOX relates to the nature of the board of directors. § 301 SOX requires each member of the audit committee to be a member of the board of directors of the listed issuers and to be otherwise independent.[2194] It does not provide guidance for so-called 'two-tier board systems', consisting of a management board (first tier – *Vorstand* in Germany) and a supervisory or non-management board (two tier – *Aufsichtsrat* in Germany).[2195] The SEC eventually clarified that the term 'board of directors' means the latter board.[2196]

670. CONTROLLING SHAREHOLDERS – Foreign concerns were also voiced over the prohibition of representation of controlling shareholders on audit committees, a common practice in some foreign jurisdictions. Under § 301 of SOX, a member of the audit committee may not be an affiliated person of the issuer, such as a controlling shareholder.[2197] To accommodate foreign concerns, the SEC exempted audit committee members of a foreign private issuer who are affiliate persons of that issuer if those members meet a number of requirements.[2198] By the same token, the SEC exempted audit committee members of foreign governments, who, under a strict

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[2191] SEC Release Nos. 33-8220; 34-47654; IC-26001; File No. S7-02-03; April 9, 2003.

[2192] § 240.10A-3(b)(1)(iv)(C) ("An employee of a foreign private issuer who is not an executive officer of the foreign private issuer is exempt from the requirements of paragraph (b)(1)(ii) of this section if the employee is elected or named to the board of directors or audit committee of the foreign private issuer pursuant to the issuer's governing law or documents, an employee collective bargaining or similar agreement or other home country legal or listing requirements.") The requirements the employees are exempted from are listed in § 240.10A-3 (b)(1)(ii), which implements Section 10A(m)(3)(B) SEA.

[2193] *Compare* M.D. VANCEA, "Exporting U.S. Corporate Governance Standards Through the Sarbanes-Oxley Act: Unilateralism or Cooperation?", 53 *Duke L.J.* 833, 840-42 (2003-2004).

[2194] Section 10A(m)(3)(B) SEA.

[2195] *See for* criticism: H.-G. KAMANN & M. SIMPKINS, "Sarbanes-Oxley Act – Anlass zu verstärkter internationaler Kooperation im Bereich der Corporate Governance?", *R.I.W.* 183, 187 (2003).

[2196] § 229.401, Instructions to Item 401(h).3.

[2197] Section 10A(m)(3)(B)(2) SEA. Under Exchange Act Rule 10A-3(e)(1)(i), an affiliated person is "a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, the person specified".

[2198] § 240.10A-3(b)(1)(iv)(D) ("An audit committee member of a foreign private issuer may be exempt from the requirements of paragraph (b)(1)(ii)(B) of this section if that member meets the following requirements: (1) The member is an affiliate of the foreign private issuer or a representative of such an affiliate; (2) The member has only observer status on, and is not a voting member or the chair of, the audit committee; and (3) Neither the member nor the affiliate is an executive officer of the foreign private issuer."). This rule does not apply to audit committee members of domestic issuers.

reading of SOX, would not be considered independent.[2199] Listed issuers that are themselves foreign governments are automatically exempted.[2200]

671. WHOLESALE EXEMPTION – In probably the most far-reaching accommodation, the SEC exempted boards of auditors or similar bodies in foreign jurisdictions from the SOX auditor independence requirements, provided they meet a number of requirements.[2201] While under SOX, audit committee members are required to be members of the board of directors, several foreign jurisdictions require or permit a board of auditors to be *separate* from the board of directors. If sufficiently

[2199] § 240.10A-3(b)(1)(iv)(E) ("An audit committee member of a foreign private issuer may be exempt from the requirements of paragraph (b)(1)(ii)(B) of this section if that member meets the following requirements: (1) The member is a representative or designee of a foreign government or foreign governmental entity that is an affiliate of the foreign private issuer; and (2) The member is not an executive officer of the foreign private issuer.")

[2200] § 240.10A-3(c)(6)(iii). A 'foreign government' is defined in Exchange Act Rule 3b-4(a).

[2201] The exemption is mainly tailored to Japanese practice (Japanese Law No. 22, 1974, as amended, for Special Exceptions to the Commercial Code Concerning Audits, etc. of Corporations). *See also* SEC Release Nos. 33-8220; 34-47654; IC-26001; File No. S7-02-03; April 9, 2003, n. 160.

independent, such bodies are henceforth exempted without a sunset date.[2202] This accommodation is particularly relevant for French-style audit committees.[2203]

[2202] § 240.10A-3(c)(3) ("The listing of securities of a foreign private issuer is not subject to the requirements of paragraphs (b)(1) through (b)(5) of this section if the foreign private issuer meets the following requirements:

(i) The foreign private issuer has a board of auditors (or similar body), or has statutory auditors, established and selected pursuant to home country legal or listing provisions expressly requiring or permitting such a board or similar body;

(ii) The board or body, or statutory auditors is required under home country legal or listing requirements to be either:

(A) Separate from the board of directors; or

(B) Composed of one or more members of the board of directors and one or more members that are not also members of the board of directors;

(iii) The board or body, or statutory auditors, are not elected by management of such issuer and no executive officer of the foreign private issuer is a member of such board or body, or statutory auditors;

(iv) Home country legal or listing provisions set forth or provide for standards for the independence of such board or body, or statutory auditors, from the foreign private issuer or the management of such issuer;

(v) Such board or body, or statutory auditors, in accordance with any applicable home country legal or listing requirements or the issuer's governing documents, are responsible, to the extent permitted by law, for the appointment, retention and oversight of the work of any registered public accounting firm engaged (including, to the extent permitted by law, the resolution of disagreements between management and the auditor regarding financial reporting) for the purpose of preparing or issuing an audit report or performing other audit, review or attest services for the issuer; and

(vi) The audit committee requirements of paragraphs (b)(3), (b)(4) and (b)(5) of this section apply to such board or body, or statutory auditors, to the extent permitted by law.")

[2203] Under French law, the establishment of audit committees is not required by law. Under Article 90 of a decree of 23 March 1967 (Décret n°67-236 sur les sociétés commerciales, *JORF* 24 March 1967), however, "the board of directors may create and consult committees for the purpose of addressing issues raised by it or by the president of the board. The board of directors appoints the members of the committee and determines the functions of the committees which carry out such functions under the responsibility of the board of directors" The establishment of audit committees was favored by a number of reports and recommendations (*Rapport Vienot I*, July 1995; *Rapport Vienot II*, July 1999; *Rapport Bouton*, 23 September 2002; *Rapport Le Portz*, December 1997, *Bulletin COB*, January 1998; COB recommendation 338, 1999; *Association Nationale des Sociétés par Actions*, No 2846; September-October 1996; February-March 1998, No 2936). The members of French audit committees are not necessarily all independent directors, as required by SOX (the *Rapport Bouton* recommended that at least two-thirds of the members of an audit committee should be independent directors). Also, French audit committees do not have decision-making powers, but issue advisory opinions, to be acted upon by the board of directors. Under Section 301 SOX by contrast, an audit committee "shall be *directly responsible* for the appointment, compensation, and oversight of the work of any registered public accounting firm employed by that issuer" (emphasis added). Furthermore, pursuant to L225-228 of the French Commercial Code, the auditors are proposed for appointment by the general meeting, and not by the audit committee. Finally, a number of French provisions require the auditors to report to the shareholders, and not the audit committee, as required by SOX (Articles L225-240, L225-41 and L225-237 of the Commercial Code). *See also* T. O'NEILL, B. CARDI & S. CHARBIT, "Conflicts between French Law and Practice and the U.S. Sarbanes-Oxley Act of 2002", *Int. Bus. Law.* 59 (April 2003). §

672. EXEMPTIONS FROM INSIDER-LENDING PROHIBITIONS – The SEC granted another accommodation when, on April 26, 2004, it adopted, for qualified foreign banks, an exemption from the insider lending prohibition under Section 402 SOX.[2204] Section 402 SOX prohibits personal loans from issuers to executives, yet it does not apply to any loan made or maintained by a depository institution insured under the Federal Deposit Insurance Act[2205].[2206] As foreign banks are not eligible for such an exemption, they argued that Section 402 SOX ran counter to the principle of national treatment. The SEC thereupon exempted foreign banks provided that the foreign bank's home jurisdiction requires the bank to insure its deposits or that the Federal Reserve System has determined that the foreign bank is subject to comprehensive supervision or regulation on a consolidated basis by the bank supervisor in its home jurisdiction.[2207] French banks for instance, who are exempted from the prohibition of insider lending under Article L225-43 of the French Commercial Code, provided that the loans are made in the ordinary course of business and on the same terms as those proposed to the public, could continue to enjoy this exemption if the bank is considered as being subject to comprehensive French supervision. Foreign corporations that are not banks do not benefit from this accommodation. This implies that, even when a foreign regulatory regime is already in place with respect to insider

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240.10A-3(c)(3) might accommodate the differences between Section 301 SOX and Article 90 of the said French decree.

[2204] Release No. 34-49616, International Series Release No. 1275; File No. S7-15-03. Section 402 SOX added (k) to Section 13 SEA (15 U.S.C. 78*m*). *See also* K. BLACKMAN, « SEC to Exempt Foreign Banks from Insider-Lending Ban », *I.F.L.R.* 19 (October 2003).

[2205] 12 U.S.C. 1813.

[2206] Section 13(k)(3) SEA.

[2207] Release No. 34-49616, International Series Release No. 1275; File No. S7-15-03 – §240.13k-1 – Foreign bank exemption from the insider lending prohibition under section 13(k).

> "(b) An issuer that is a foreign bank or the parent or other affiliate of a foreign bank is exempt from the prohibition of extending, maintaining, arranging for, or renewing credit in the form of a personal loan to or for any of its directors or executive officers under section 13(k) of the Act (15 U.S.C. 78m(k)) with respect to any such loan made by the foreign bank as long as:

(1) Either:

> (i) The laws or regulations of the foreign bank's home jurisdiction require the bank to insure its deposits or be subject to a deposit guarantee or protection scheme; or
>
> (ii) The Board of Governors of the Federal Reserve System has determined that the foreign bank or another bank organized in the foreign bank's home jurisdiction is subject to comprehensive supervision or regulation on a consolidated basis by the bank supervisor in its home jurisdiction under 12 CFR 211.24(c); and

(2) The loan by the foreign bank to any of its directors or executive officers or those of its parent or other affiliate:

> (i) Is on substantially the same terms as those prevailing at the time for comparable transactions by the foreign bank with other persons who are not executive officers, directors or employees of the foreign bank, its parent or other affiliate; or
>
> (ii) Is pursuant to a benefit or compensation program that is widely available to the employees of the foreign bank, its parent or other affiliate and does not give preference to any of the executive officers or directors of the foreign bank, its parent or other affiliate over any other employees of the foreign bank, its parent or other affiliate; or
>
> (iii) Has received express approval by the bank supervisor in the foreign bank's home jurisdiction."

lending, such as in Germany,[2208] foreign corporations subject to SEC registration should comply with the divergent rule of § 402 SOX.

673. INTERNAL CONTROLS – One of the most contentious provisions of SOX is its § 404 on internal controls over financial reporting. Both domestically and internationally, § 404 has been criticized for imposing too heavy a burden on issuers. For foreign private issuers, the SEC extended the compliance date with respect to internal controls under Section 404 SOX on March 2, 2005.[2209] Foreign private issuers are required to comply with Section 404 SOX requirements for their first fiscal year ending on or after July 15, 2006. The SEC premised the extension on the particular challenges that foreign companies face in complying with the internal control over financial reporting and related requirements, notably a different language, a different culture and different organization structures, and the switch of EU companies to International Financial Reporting Standards (IFRS) for the preparation of their consolidated financial statements on January 1, 2005.[2210]

674. CERTIFICATION REQUIREMENTS – The SEC did not grant exemptions to foreign private issuers from stringent SOX CEO/CFO certification requirements under Sections 302[2211] and 906[2212] of SOX, in spite of repeated requests – notably from German companies – to that effect,[2213] possibly because some foreign private issuers, such as Altana AG, smelling bonding opportunities, welcomed the certification requirements.[2214] In the doctrine, it has been argued that, in spite of the costs for foreign private issuers to comply with these requirements,[2215] they "will compel painful, but ultimately beneficial adjustments for [foreign private issuers,

[2208] § 89 Aktiengesetz (the supervisory board should approve loans to directors when they exceed more than one month's salary).

[2209] Release Nos. 33-8545; 34-51293; File Nos. S7-40-02; S7-0603 (March 2, 2005). *See also* Release No. 33-8238 (June 5, 2003) [68 FR 36636], and Release No. 33-8392 (February 24, 2004) [69 FR 9722]. Section 404 SOX provides that the SEC enacts rules requiring each annual report required by section 13(a) or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m or 78o(d)) to contain an internal control report.

[2210] Regulation (EC) No. 1606/2002 of the European Parliament and of the Council of 19 July 2002 on the application of international accounting standards, *O.J.* L 243/1, September 11, 2002.

[2211] Section 302 requires reporting companies' CEO and CFO to certify "in each annual or quarterly report" that "based on the officer's knowledge, the report does not contain any untrue statement of a material fact or omit to state a material fact [and that] the financial statements … fairly present … the financial condition .. of the issuer."

[2212] Section 906 provides that "[e]ach periodic report containing financial statements filed by an issuer with the [SEC] shall be accompanied by a written statement by the [officers certifying that the report] complies with the requirements of section 13(a) or 15(d) of the Securities Exchange Act 1934 … and that information contained … fairly presents … the financial condition and results of operations of the issuer."

[2213] *See* H.T. HOLLISTER, "'Shock Therapy' for *Aktiengesellschaften:* Can the Sarbanes-Oxley Certification Requirements Transform German Corporate Culture, Practice and Prospects?", 25 *Nw. J. Int'l L. & Bus.* 453, 464-65 (2005) (quoting, *inter alia*, a comment letter sent to the SEC by a group of eleven German corporations requesting an exemption for foreign private issuers from the certification requirements, reminding the SEC that its "tradition of extending comity to foreign private issuers was important in convincing [them] to become U.S. registrants in the first place."

[2214] *Id.*, at 466-67.

[2215] *Id.*, at 467-68 (identifying four costs: time loss due to management verification of financial statements, time and money loss due to new disclosures, loss of gains from misrepresentations otherwise made, and costs of preparation for the eventuality of new forms of litigation and enforcement).

notably German *Aktiengesellschaften*] to apply".[2216] Increased investor-friendliness stemming from personal involvement of an issuer's CEO and CFO in the preparation of financial statements may indeed be awarded by investors in the long run, thus boosting German competitiveness.[2217] Increased competitiveness of the German industry to the detriment of the U.S. industry as the ultimate result of tougher U.S. certification requirements was probably not at the forefront of the minds of U.S. legislators and the SEC. One is left to wonder whether, if increased foreign competitiveness may be the consequence of U.S. policing of foreign private issuers, on which foreign regulators free-ride, more U.S. jurisdictional restraint – precisely serving the U.S. interest – should not be contemplated.

675. CONCLUDING REMARKS – The overview of SEC and PCAOB exemption practice given in this subsection testifies to the general willingness of both bodies to accommodate foreign nations and issuers' concerns. Reliance on issuers' home-country regulation insofar as this does not undermine the regulatory objectives of SOX has supplanted the wholesale application of SOX to foreign private issuers. Unilateralism has thus given way to multilateralism. Probably, the financial world is heading for a system of parallel application of corporate governance standards short of mutual recognition, which may eventually lead to regulatory convergence.[2218] As will be shown in subsection 7.6.3, in the EC as well, along the lines of the SOX, exemptions from corporate governance (statutory audit) rules for foreign issuers auditors will be granted, as far as the home-country system that regulates them meets certain quality standards.

SOX still poses international regulatory challenges though. By early 2007, Euronext, the pan-European stock exchange, plans to complete a merger with the New York Stock Exchange. The question has arisen whether corporations listed on a European stock exchange (Brussels, Amsterdam, Lisbon, Paris) belonging to the new Euronext-NYSE holding would be subject to SOX requirements.[2219] It could indeed be argued that such an exchange is, at least partly, a U.S. exchange, in view of the participation of the NYSE in the new holding (probably incorporated in the U.S. state of Delaware). Issuers have not surprisingly voiced their concerns over this threat. Euronext's CEO alleviated fears in August 2006, stating that SOX would "never apply to a Euronext-listed company".[2220] To that effect, a Dutch foundation would be set up as a "protecting structure". Lawyers for the NYSE and for Euronext are, in the meantime, working on ading a clause to the merger contract, pursuant to which companies listed on a Euronext exchange would not be subject to SOX.[2221] Clearly, not all of SOX's dust has yet fallen.

[2216] *Id.*, at 479.
[2217] *Id.*, at 479-81.
[2218] Interview with Professor Eddy Wymeersch, Chairman of the Belgian Banking Commission and Co-chair of the Committees of European Securities Regulators, Brussels, September 13, 2006.
[2219] The same question has arisen in the context of a possible merger between the London Stock Exchange and NASDAQ, a U.S. exchange. *See The Economist*, "Darned SOX", September 16, 2006, p. 86.
[2220] *The Times*, August 31, 2006, available at http://business.timesonline.co.uk/article/0,,13129-2335418,00.html
[2221] *Accountancy Age*, July 26, 2006, available at http://www.accountancyage.com/accountancyage/news/2161247/euronext-seeks-sarbanes-oxley.

7.6.3. The extraterritorial effects of corporate governance regulation in the EC

676. EC CORPORATE GOVERNANCE REGULATION – In the field corporate governance regulation, the EC moved into higher gear after on November 4, 2002, a High Level Group of Company Experts (the Winter Group) presented its final report on the subject to the European Commission.[2222] As a response, the Commission released a communication on corporate governance and the modernization of European company law to the Council and the European Parliament in 2003.[2223] This communication contains an action plan, which sets forth, amongst others, the enhancement of corporate governance disclosure, the modernization of the board of directors and the co-ordination of corporate governance efforts of Member States.[2224] It features an interesting paragraph on the international regulatory environment of corporate governance, in which the Commission denounces the implications of SOX for European corporations and claims that European corporate governance rules may be equivalent to U.S. rules:

> "The EU must define its own European corporate governance approach, tailored to its own cultural and business traditions. Indeed, this is an opportunity for the Union to strengthen its influence in the world with good, sensible corporate governance rules. Corporate governance is indeed an area where standards are increasingly being set at international level, as evidenced by the recent developments observed in the United States. The Sarbanes-Oxley Act, adopted on 30 July 2002 in the wave of a series of scandals, delivered a rapid response. The Act unfortunately creates a series of problems due to its outreach effects on European companies and auditors, and the Commission is engaged in an intense regulatory dialogue with a view to negotiating acceptable solutions with the US authorities (in particular the Securities and Exchange Commission). In many areas, the EU shares the same broad objectives and principles of the Sarbanes-Oxley Act and in some areas robust, equivalent regulatory approaches already exist in the EU. In some other areas, new initiatives are necessary. Earning the right to be recognized as at least "equivalent" alongside other national and international rules is a legitimate and useful end in itself."[2225]

677. EC STATUTORY AUDIT DIRECTIVE – Notably in the field of auditor independence, an aspect of good corporate governance, have the European institutions been particularly active. In a recommendation of May 16, 2002, the Commission set forth a set of fundamental principles on statutory auditors' independence.[2226] On May 21, 2003, it released a communication to the Council and the European Parliament on reinforcing the statutory audit in the EU.[2227] On March 15, 2004 then, the Commission issued a proposal for a directive of the European Parliament and of the

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[2222] Available at http://www.europa.eu.int/comm/internal_market/en/company/company/modern/index.htm
[2223] Available at http://www.europa.eu.int/eur-lex/pri/en/dpi/cnc/doc/2003/com2003_0284en01.doc
[2224] *Id.*, pp. 12-16.
[2225] *Id.*, p. 5.
[2226] Commission Recommendation of 16 May 2002 – Statutory Auditors' Independence in the EU: A Set of Fundamental Principles (Text with EEA relevance) (notified under document number C(2002) 1873), *O.J.* L 191/0022-0057, 19 July 2002.
[2227] COM/2003/0286, *O.J.* C 236/0002-0013, 2 October 2003.

Council on statutory audit of annual accounts and consolidated accounts, which would amend the existing directives 78/660/EEC and 83/349/EEC.[2228] This directive was approved by the Council and the European Parliament on May 17, 2006.[2229] Although limited to auditing and still requiring the implementation of Member States, it constitutes a strong European response to SOX.

Like SOX, the Statutory Audit Directive also governs the audits of third-country auditors, *i.e.*, auditors who carry out audits of the annual or consolidated accounts of a company incorporated in a third country (*i.e.*, in the case of the EU, a country outwith the EU).[2230] If the third-country auditor provides an audit report concerning the accounts of such a company whose securities are admitted to trading on a regulated market of an EU Member State, it is required to register with that Member State, and is subject to their systems of oversight, their quality assurance systems, and their systems of investigation and penalties.[2231] Yet like in the U.S., foreign concerns over the reach of requirements imposed on auditors have been considerably accommodated. If a third-country auditor has furnished proof that he or she complies with qualification requirements equivalent to those laid down in the directive, and also if the audits are carried out in accordance with standards and requirements laid down in the directive (such as the international auditing standards required by the directive), he or she may be approved by the competent authorities of a Member State.[2232] In addition, auditors may be exempted from EU oversight, quality assurance, and investigation and penalties, if they are subject to systems that meet requirements equivalent to the EU requirements.[2233] The directive also contains a provision on cooperation with competent authorities from third countries mirroring PCAOB Rule 4012.[2234] *Prima facie*, the EU exemptions appear to be more encompassing than the U.S. exemptions, although, like in the U.S., it obviously remains to be seen how "equivalence" will be assessed in practice.[2235]

678. EXTRATERRITORIALITY OF EUROPEAN CORPORATE GOVERNANCE RULES: THE FRENCH FINANCIAL SECURITY ACT 2003 – It has been shown how the Statutory Audit Directive seems to sufficiently accommodate foreign nations' regulatory interests. A danger looms however that Member States' corporate governance regulations will not be as forthcoming. The adoption of the French Financial Security Act of August 1, 2003 may serve as an example of a European corporate governance code that may have important, possibly uncontemplated, extraterritorial effects.[2236]

[2228] COM/2004/0177 – COD 2004/0065, available at http://www.europa.eu.int/comm/internal_market/auditing/officialdocs_en.htm

[2229] Directive 2006/43/EC of the European Parliament and of the Council of 17 May 2006 on statutory audits of annual accounts and consolidated accounts, *O.J.* L 157/87 (2006).

[2230] Article 2 *juncto* Article 44 *et seq.* of the Statutory Audit Directive.

[2231] *Id.*, Article 45.

[2232] *Id.*, Article 44 and 45 (5) (the qualification equivalency is subject to reciprocity).

[2233] *Id.*, Article 46.

[2234] *Id.*, Article 47. Largely at the urge of the European Parliament's Social and Economic Committee, the Directive emphasizes confidentiality and data protection in the framework of international cooperation. *Id.*, Article 47 (1) (e) and (2) (b-c). Opinion of the European Economic and Social Committee on the 'Proposal for a Directive of the European Parliament and of the Council on statutory audit of annual accounts and consolidated Accounts, nr. 5.1, C157/118 (2005).

[2235] Equivalence shall be assessed by the Commission in cooperation with the Member States. Member States may assess equivalence as long as the Commission has not taken any decision. *See* Statutory Audit Directive., Article 45 (6) and Article 46 (2).

[2236] Loi nº 2003-706, August 1, 2003, *J.O.* August 2, 2003.

The Financial Security Act inserts a number of new provisions with respect to auditors into the French Commercial Code, without specifying their territorial scope.[2237] All auditors are required to register with a Regional Registration Commission, established at the main facility of a court of appeal.[2238] As in the U.S., they are also required to be independent. However, French-style auditor independence is not co-terminous with U.S.-style independence. Although most provisions on auditor independence are similar to U.S. rules, they are not identical and thus raise concerns if they are applied extraterritorially.

While Section 201 SOX provides a detailed and exhaustive list of prohibited activities of auditors,[2239] Article L822-10 of the Commercial Code – inserted by the Financial Security Act – generally provides that the functions of an auditor are incompatible with *any* activity or *any* act likely to jeopardize his independence, *any* paid employment, and *any* commercial activity, whether conducted directly or through an intermediary. Article L822-11 of the Commercial Code – also inserted by the Financial Security Act – specifies that an auditor shall not directly or indirectly take, receive or retain an interest in an entity whose accounts he audits (or that entity's subsidiary), and that he is prohibited from providing *any* advice or other service to the person who entrusts him with the auditing of their accounts (or that person's subsidiary), which is unrelated to the formalities having direct relevance to his auditing task. Importantly, under Article L822-11.II, when an auditor is affiliated to a national or international network whose members have a common economic interest and which is not exclusively involved in the legal auditing of accounts, he *cannot* audit the accounts of an entity which, by virtue of a contract entered into with that network or with a member of that network, benefits from a provision of services which are not directly linked to the auditor's mission. This implies that a U.S. auditor is prohibited from auditing a French issuer when a member of the auditor's network provides non-audit services to that same issuer. A Code of Ethics will further elaborate on all these prohibitions.

A proposal to extend the French audit prohibitions to non-audit services provided by network members to an audited entity's subsidiaries was rejected in light of its wide-ranging extraterritorial effects.[2240] Under this proposal, a U.S. auditor would have been prohibited from auditing a French issuer when a member of the auditor's network provided non-audit services to a U.S. subsidiary of that issuer. Given the structure of the Big Four public accounting firms – who might be considered as an international network – the latter prohibition would have had devastating effects on their activities. Still, the audit provisions of the Financial Security Act may affect the international audit sector in ways that are similar to the SOX, although the impact of SOX is obviously, given the sheer size of U.S. capital markets, of a different caliber.

7.7. Concluding remarks

[2237] *Id.*, Articles L820-1 – L822-16 (specifically on ethics and auditor independence: L822-9 – L822-16).
[2238] *Id.*, Article L822-2
[2239] Under Section 10-A(g)(9) of the SEA 1934 (15 U.S.C. 78j-1), amended by Section 201 SOX, however, the PCAOB may determine any other service impermissible by regulation.
[2240] *See* M. COLLET, "France's Auditor Independence Rules and their Extraterritorial Effects", *International Business Lawyer* 199 (2004).

679. In this chapter, the reach of national securities laws has been discussed. It has been shown that the application of these laws to foreign or cross-border situations has not caused the amount of international conflict that the application of antitrust laws has. This is attributable to a number of factors. First, while securities regulation certainly reflects a particular economic outlook, it is not aimed at regulating the sort of strong national industrial and consumer interests, and at the international level, export business interests, as antitrust regulation. Second, the territorial nexus of a securities situation over which a State intends to exercise its jurisdiction is ordinarily stronger than the territorial nexus of an antitrust situation. With regard to disclosure and corporate governance laws, for instance, it could be argued that foreign corporations, by listing their securities on a particular regulated market, voluntarily submit to the laws of the State where that market is located (*i.e.*, the "waiver by conduct" argument). It could similarly be argued that the territorial laws of the market ought to govern fraud relating securities listed on that market, irrespective of the place where the fraud was conducted, because the harm to investors will be the greatest in the place of listing. The territorial principle could also be relied upon so as to justify the exercise of jurisdiction over fraudulent conduct (subjective territoriality) and fraudulent effects on investors or issuers (objective territoriality). Third, securities fraud may be considered as reprehensible by every State. No State may arguably benefit from condoning such fraud.[2241] Because it is an offence everywhere, States may not protest against another State's jurisdictional assertion over a securities fraud with which both States have a connection.

680. Nonetheless, normative competency conflicts in the field of securities law may loom. While securities laws have traditionally governed fraud and disclosure, they may now also govern corporations' governance structures (U.S. Sarbanes-Oxley Act and EU Statutory Audit Directive). States may have a stronger interest in having their laws, to the exclusion of other States' laws, apply to such governance structures, *e.g.*, because these structures may guarantee employee representation (the German *Mitbestimmung* approach to corporate law), and are crucial to the balance of capitalists' and workers' interests, an important industrial policy goal. In addition, States may have an interest in putting in place weak securities regulations. Issuers may indeed be interested in such regulations because they lower compliance costs. Investors may also be interested, because they might believe that the rebate they enjoy on the price of securities listed in lax States is well worth running the risk of inaccurate financial reporting or even plain fraud. States may thus not only have an interest in becoming '*Kartellbunkers*' (antitrust safe havens) or tax havens, but also in becoming securities safe havens. It remains obviously to be seen whether they might have a *legitimate* interest in becoming so. Yet it is undeniable that if a State were consciously to put in place weak securities regulations, it may take issue with other regulations that supplant its own regulations on the basis of such connections as listing, conduct, or effects.

681. In order to solve possible jurisdictional conflicts, and to bring legal certainty to economic actors, this study has proposed a rule of reason pursuant to which the State where the securities are listed enjoys primacy of jurisdiction over securities transactions. Other States may enjoy subsidiary jurisdiction if the State

[2241] H.L. BUXBAUM, "Transnational Regulatory Litigation", 46 *Va. J. Int'l L.* 251, 299-300 (2006) (stating that, with respect to the categories of egregious misconduct in international securities regulation, "the trend is toward consensus").

having primary jurisdiction wrongfully fails to exercise its jurisdiction, *e.g.*, because it condones fraudulent action disproportionally harming other States. Exceptionally, States other than the State where the securities are listed may enjoy primary jurisdiction, provided that they establish that their regulatory interests are stronger than these of the State of listing (which will ordinarily not be the case). It may be added that, if securities are listed on regulated markets in different States at the same time (cross-listing), the State of primary listing ought to enjoy primary jurisdiction, with the State of secondary listing enjoying subsidiary jurisdiction, and other States enjoying even more subsidiary jurisdiction. Obviously, States could always waive their right of primary jurisdiction.

682. This implies, for example, that securities that are listed on a German regulated market, held by a U.S. citizen, that are the subject of misrepresentation or fraud in France, are subject to German law. If Germany does not exercise its jurisdiction, France or the United States may step in (in that event, it may require a balancing of French and U.S. interests to designate the State with the 'primary subsidiary' jurisdiction). In another example, securities of a French corporation that has a primary listing in France and a secondary listing in Germany, and that is the target of a takeover bid by a U.S. corporation, are subject to French law (because France is the State of primary listing). Other States may want to impose certain conditions, but they should only do so insofar as their regulatory objectives could not be adequately met by French law, even if this law substantively differs from their own law. In a third example, a German corporation whose securities are cross-listed in the U.S. should only be subject to U.S. disclosure laws insofar as German disclosure laws could not adequately protect U.S. investor interests.[2242] In a fourth example, the corporate governance provisions of the U.S. Sarbanes-Oxley Act should only apply to foreign issuers insofar as the mechanisms required by the foreign issuers' home State regulations would fail to adequately detect inaccuracy and fraud, to the detriment of U.S. investors.[2243]

683. Having discussed the two branches of economic law in which assertions of extraterritorial or cross-border jurisdiction have been most prevalent (antitrust and securities law), this study will in the next chapter turn its gaze toward more 'political' assertions of jurisdiction. In chapter 8, it will be examined how States, the United States in particular, have at times imposed national export control regulations on foreign corporations trading with political regimes which are considered as hostile by these States, and which, thus, arguably, ought to be isolated by as encompassing an economic embargo as possible.

CHAPTER 8: EXTRATERRITORIAL EXPORT CONTROLS (SECONDARY BOYCOTTS)

[2242] It may be noted that U.S. regulators may almost spontaneously grant exemptions to foreign corporations for fear that these corporations abstaing from listing, or de-list. *See, e.g.*, the enactment of Regulation S described in 7.6.1.

[2243] *See, e.g.*, DG Internal Market Director General A. SCHAUB, "Europe and US Must Guard Against Regulatory Clashes", *IFLR* 20, 21 (July 2004) ("[R]egulators and supervisors should follow a rule of reason approach. They should ask themselves whether the other jurisdiction meets, for example, equivalent investor protection standards to those achieved by local rules. If such equivalence already exists, it would not add to the quality of regulatory protection to insist on compliance with local rules.").

684. A field of the law which has seen among the most epic transatlantic conflicts over jurisdiction is the field of export controls and boycott law.[2244] States ordinarily enact export controls and boycotts with a view to isolating a foreign governmental regime deemed hostile, dangerous, or illegitimate. It is believed that such economic sanctions may coax that regime into behaviour that is politically more acceptable for the boycotting State. It will not be examined here whether regimes have indeed succumbed to boycott-based economic pressure. Fact is that States sometimes resort to boycotts, even on a unilateral basis, because they believe they will work. Provided that boycotts do not cover goods of which the free trade is guaranteed by international agreements, a State's decision not to export goods to another State is a sovereign decision which does not violate public international law.

685. A boycott is of limited usefulness if the vast majority of other States does not go along with it. Some States, the United States in particular, have therefore attempted to prohibit exporters incorporated in third States from exporting to the State which is already subject to a 'primary' boycott of the boycotting State. Boycotts which apply to foreign exporters are sometimes referred to as 'secondary' boycotts or boycotts with extraterritorial application. Secondary boycotts are extraterritorial measures in that they intervene in the commercial relations between actors who are not active within the territory of the regulating State. They universalize a primary boycott and reduce the foreign policy discretion that third States can exercise *vis-à-vis* the boycotted State.[2245]

686. It comes as no surprise that secondary boycotts raise serious public international law concerns. They subject corporations which are not incorporated in the boycotting State to the latter's regulations in the absence of a direct and clearly discernable effect on the regulating State. They are thus unlikely to be justifiable under the effects doctrine, and may violate the principle of non-intervention. To obviate the problems posed by the effects doctrine, States have at times invoked an extended nationality principle so as to subject foreign corporations which are owned by domestic corporations, or foreign goods which are manufactured by means of domestic technology, to their laws. Also, the protective principle was sometimes invoked on the ground that export to hostile countries might jeopardize national security. As will be set out, doubts may however equally be expressed as to the international legality of such self-serving reliance on the nationality and protective principles.

687. Over the last decades, the United States has attempted several times to impose U.S. export controls on foreign corporations so as to promote foreign policy

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[2244] *See, e.g.*, H.L. CLARK, "Dealing with U.S. Extraterritorial Sanctions and Foreign Countermeasures", 25 *U. Pa. J. Int'l Econ. L.* 455, 457 (2004).

[2245] *See, e.g.*, European Community: Note and Comments on the Amendments of 22 June 1982 to the Export Administration Act, Presented to the United States Department of State on 12 August 1982, 21 *I.L.M.* 891, 895 ("The practical impact of the Amendments to the Export Administration Regulatoins is that E.C. companies are pressed into service to carry out U.S. trade policy towards the U.S.S.R., even though these companies are incorporated and have their registered office within the Community which has its own trade policy towards the U.S.S.R. The public policy ("ordre public") of the European Community and of its Member States is thus purportedly replaced by U.S. public policy which European companies are forced to carry out within the E.C., if they are not to lose export privileges in the U.S. or to face other sanctions. This is an unacceptable interference in the affairs of the European Community.").

objectives, the fight against communism in particular. Most attempts came to nothing however, as the United States was forced to back down under intense, mainly European, protest. In the 1960s, it attempted to prohibit Fruehauf, a French corporation under U.S. control, from exporting to China under the U.S. Trading with the Enemy Act. In the 1980s then, it prohibited the export to Russia of equipment produced abroad by foreign subsidiaries of U.S. undertakings and by any company using technology licenses granted by U.S. undertakings (section 6.1). In the 1990s, in a last volley of secondary boycotts, the U.S. prohibited foreign corporations, even if not owned by U.S. corporations, from trading in goods confiscated from U.S. nationals by the Cuban government in the 1960s, and from trading with such 'terrorist' States as Iran and Libya (part 6.2). All these secondary boycotts were either repealed or suspended.

688. The last decade, it has been remarkably quiet on the secondary boycott front. One is tempted to assume that the United States has acknowledged that its jurisdictional assertions relating to secondary boycotts are overbroad and may possibly violate the international law principle of non-intervention. It may nonetheless well be that it is just a diplomatic and economic calculus, and not *opinio juris* on the illegality of such assertions, which has led to the current lull.

8.1. 'Control'-based jurisdiction: *Fruehauf* and the *Soviet Pipeline Regulations*

8.1.1. The control theory

689. NATIONALITY PRINCIPLE – States sometimes extend the writ of their laws to foreign situations in which their own nationals are involved. Under the classical jurisdictional principle of nationality, such should not pose problems, provided that jurisdiction is exercised reasonably. Reasonableness is required because nationality-based jurisdiction may clash with territorial jurisdiction.[2246] Especially claims asserting a principle of paramount nationality that would require the territorial State to defer to the national State, have met with considerable hostility.[2247] It has therefore been deemed unreasonable for a State to prohibit what the territorial State compels (or *vice versa*), since, from a practical point of view, it may be presumed that "enforcement action is more likely to be taken by the state of residence."[2248] In the field of economic law, additional difficulties surrounding the application of the nationality principle may arise, since the nationality of a corporation may not always be readily established. Corporations could have different nationalities, as their nationality could be based on the State of incorporation, shareholder nationality or other corporate links to the forum.[2249]

690. CONTROL THEORY – It is one thing to submit that a State could exercise jurisdiction over its own (corporate) nationals abroad, yet it is quite another to state

[2246] *See* J. DAVIDOW, "Extraterritorial Antitrust and the Concept of Comity", 15 *J. World Trade L.* 500, 508 (1981).
[2247] *Laker Airways* v. *Sabena*, 731 F.2d 909, 935 (D.C. Cir. 1984).
[2248] *See* A. BIANCHI, Reply to Professor Maier, in K.M. MEESSEN (ed.), *Extraterritorial Jurisdiction in Theory and Practice*, London/The Hague/Boston, Kluwer, 1996, 74, 93.
[2249] *Laker Airways* v. *Sabena*, 731 F.2d 909, 936 (D.C. Cir. 1984); comment a to § 414 of the Restatement (Third) of U.S. Foreign Relations Law (1987) (stating that "[multinational] enterprises may not be nationals of one state only and their activities are not limited to one state's territory").

that a State could exercise jurisdiction over foreign corporations *controlled* by its nationals. U.S. lawmakers and courts have however not always made this distinction, and subjected foreign undertakings controlled by U.S. persons (ordinarily shareholders) to U.S. laws for reasons related to foreign policy objectives, or out of reputational concerns.[2250] The United States first relied on the control theory in 1942, when the U.S. Treasury included in the category "persons subject to the jurisdiction of the United States" set forth in the Trading with the Enemy Act of 1917 "any corporation or other entity, wherever organized or doing business, owned or controlled by [U.S.] persons."[2251]

691. As liberal an interpretation of the nationality principle as that espoused by the United States is *prima facie* not in line with international law, which considers nationality, and not control, as controlling. Indeed, as the International Court of Justice held in the *Barcelona Traction* case:

> "Separated from the company by numerous barriers the shareholder cannot be identified with it. The concept and structure of the company are founded on and determined by a firm distinction between the separate entity of the company and of the shareholder, each with a distinct set of rights."[2252]

Admittedly, in *Barcelona Traction*, the ICJ only dealt with the issue of diplomatic protection, and not directly with the issue of jurisdiction. It may not have meant to repudiate the jurisdictional control theory. Nonetheless, the ICJ's rejection of the piercing of the corporate veil theory in *Barcelona Traction* is generally considered to be good law in the field of international jurisdiction.[2253] Also from an economic perspective, it appears rational not to accept the control theory, since the costs of identifying and initiating proceedings against U.S.-controlled foreign undertakings (*i.e.*, enforcement costs) may outweigh any perceived benefits.[2254] Control-based jurisdiction may however be acceptable under international law, if limited to foreign branches, as opposed to foreign subsidiaries, of domestic corporations, since foreign branches are legally closer to the State of the parent corporation.[2255]

692. The control theory does not pose significant problems provided that prescriptive jurisdiction could duly be established on the basis of an accepted principle of jurisdiction under international law, such as the territoriality principle.[2256]

[2250] *See* G. SCHUSTER, "Extraterritoriality of Securities Laws: An Economic Analysis of Jurisdictional Conflicts", 26 *Law & Pol'y Int'l Bus.* 165, 185 (1994).

[2251] Section 5(b) of the Trading with the Enemy Act of 1917, 40 Stat. 411. U.S. Treasury Public Circulary No. 18, March 30, 1942, 7 Fed. Reg. 2503 (April 1, 1942).

[2252] Case concerning *Barcelona Traction, Light and Power Co., Ltd.*, *ICJ Rep.* 1970, § 41 (1970). *See also* § 213 of the Restatement (Third) of Foreign Relations Law ("For purposes of international law, a corporation has the nationality of the state under the laws of which the corporation is organized.").

[2253] *See* A. BIANCHI, Reply to Professor Maier, in K.M. MEESSEN (ed.), *Extraterritorial Jurisdiction in Theory and Practice*, London/The Hague/Boston, Kluwer, 1996, 74, 94 (stating that, "for the time being, state practice indicates that there is a strong presumption in favour of the separate entity of foreign subsidiaries," although conceding that "in the future … newly developed criteria [justifying the exercise of control jurisdiction] might be applied as 'generally recognized principles of law'.).

[2254] *See* G. SCHUSTER, "Extraterritoriality of Securities Laws: An Economic Analysis of Jurisdictional Conflicts", 26 *Law & Pol'y Int'l Bus.* 165, 186 (1994).

[2255] *See* comment b to § 414 of the Restatement (Third) of U.S. Foreign Relations Law (1987).

[2256] *See also* comment a to § 414 of the Restatement (Third) of U.S. Foreign Relations Law (1987) (*in fine*).

Jurisdiction could thus obtain over foreign subsidiaries that have actively participated in a conspiracy involving a domestic parent,[2257] if the conduct of the foreign subsidiary causes substantial effects on domestic commerce,[2258] or if the conduct of the foreign subsidiary jeopardizes national security. Hereinafter, two high-profile situations in which the control theory was applied by the United States, the *Fruehauf* case (1960s) and the *Soviet Pipeline Regulations* (1980s), will be reviewed in light of (accepted principles under) public international law.

8.1.2. The Fruehauf case

693. Since the First World War, the U.S. Trading with the Enemy Act reaches undertakings controlled by U.S. citizens or undertakings.[2259] Jurisdiction over foreign subsidiaries of U.S. corporations which trade with States with which the U.S. is at war may be justified under the protective principle, because trading with the enemy clearly threatens U.S. security interests. During the 1950-1953 Korean War, the U.S. extended the scope of application of the Trading with the Enemy Act to cover trade of U.S.-controlled foreign corporations with China and North Korea. The extension was not withdrawn after the war ended.

A few years later, in the early 1960s, the American Treasury Department urged Fruehauf, a French corporation controlled by U.S. nationals, to stop the execution of a sales contract with China.[2260] If they failed to comply with the order, the Treasury Department would enforce the Trading with the Enemy Act against Fruehauf's American parent company. The Treasury Department asserted that it had (control-based) jurisdiction because, although the Fruehauf corporation was incorporated in France, a U.S. company owned the majority of its stock and appointed the majority of its board members.

The three French members on Fruehauf's board thereupon filed a lawsuit in France and requested the court to grant them leave to continue the contract with China. A French lower court and an appeals court heard the case and decided that the contract should indeed be honored, arguing that the needs of the company's employees outweighed the personal interests of the American directors.[2261] The United States abode by the French decision and took no further steps to enforce the Trading with the Enemy Act *vis-à-vis* Fruehauf or its U.S. parent company.[2262]

[2257] *See* G. SCHUSTER, "Extraterritoriality of Securities Laws: An Economic Analysis of Jurisdictional Conflicts", 26 *Law & Pol'y Int'l Bus.* 165, 186 (1994); A. BIANCHI, Reply to Professor Maier, in K.M. MEESSEN (ed.), *Extraterritorial Jurisdiction in Theory and Practice*, London/The Hague/Boston, Kluwer, 1996, 74, 94.

[2258] *See a contrario* A.V. LOWE, "The Problems of Extraterritorial Jurisdiction: Economic Sovereignty and the Search for a Solution", 34 *I.C.L.Q.* 724, 734 (1985) (arguing that jurisdictional assertions on the basis of the control theory "represent a much deeper penetration of municipal laws into the affairs of foreign States than do claims based on the effects doctrine, and it should not be expected that the two kinds of claims would be tolerated on the same conditions").

[2259] Trading With the Enemy Act of 1917, 50 App. U.S.C.A. § 10; Fed. Reg. 2503-04 (1942).

[2260] *See* on the effects of the Trading with the Enemy Act on Canadian corporations in the 1950s and 1960s: reporters' note 3 to § 414 of the Restatement (Third) of U.S. Foreign Relations Law (1987).

[2261] *Société Fruehauf Corp. v. Massardy*, 1968 D.S. Jur. 147, 1965, 5 *I.L.M.* 476 (1966) (Ct. Appel Paris 1965).

[2262] See for further reading A.F. LOWENFELD, *Trade Controls for Political Ends*, New York, Bender, 1983, at 91-105 and 268-306.

694. In *Fruehauf*, the French courts did not seem to reject the assertions of U.S. jurisdiction over Fruehauf out of hand. They arguably considered them to be *prima facie* legal, but, after balancing the interests at stake, to be unreasonable. The jurisdictional analysis, including the balancing process, was however not exactly of the sort contemplated by § 403 of the U.S. Restatement (Third) of Foreign Relations Law, as the French courts did not invoke international law, and balanced *corporate* interests rather than *sovereign regulatory* interests. Nonetheless, from a public international law perspective, the U.S. jurisdictional assertions in the *Fruehauf* case could hardly be justified, given that trading with China did not produce direct, substantial and reasonably foreseeable effects in the United States, and did not seriously threaten U.S. political institutions and independence, since China and the United States were no longer at war. It may thus be submitted that the effects doctrine nor the protective principle could be legitimately invoked by the United States. It is not unlikely that this realization caused the U.S. Treasury Department to eventually renounce the enforcement of the Trading with the Enemy Act in *Fruehauf*.

8.1.3. Soviet Pipeline Regulations

695. In June 1982, after the Polish government declared martial law, allegedly with the connivance of the Soviet Union, the United States invoked the control theory so as to prohibit the export to the Soviet Union of equipment produced abroad by foreign subsidiaries of U.S. undertakings, and the export of equipment produced by a company using technology licenses granted by U.S. undertakings.[2263] If the foreign undertakings did not comply, their access to U.S. equipment and patents could be blocked. The U.S. hoped that the regulations would be instrumental in halting the construction of a natural gas pipeline from Siberia to Western Europe. Apparently, foreign undertakings using U.S. intellectual property were presumed to be as U.S.-controlled as foreign subsidiaries.

696. The foreign protest with which the application of the Trading with the Enemy Act to Fruehauf met pales in comparison with the backlash provoked by the *Soviet Pipeline* Regulations. The European Community, whose corporations were badly hit by the regulations, reacted furiously[2264], and foreign companies brought intense pressure to bear on the U.S. Government to withdraw the Regulations. In September 1982, the extraterritorial application of the Regulations even came before a Dutch court. In the *Sensor* case, a Dutch subsidiary of a U.S. company raised the Regulations as a defense to the claim that it had breached its contract with the Soviet Union. The Dutch court rejected the argument, holding that the export controls violated international law.[2265] The combination of diplomatic protests and internal political pressure caused the U.S. to eventually lift the *Soviet Pipeline* Regulations at the end of 1982.[2266]

[2263] Amendment of Sections 376.12, 379.8 and 385.2 of the Export Administration Act, 21 *I.L.M.* 164 (1982).

[2264] *See* European Community: Note and Comments on the Amendments of 22 June 1982 to the Export Administration Act, Presented to the United States Department of State on 12 August 1982, 21 *I.L.M.* 891, also reproduced in V.G. LOWE, *Extraterritorial jurisdiction: an annotated collection of legal materials*, Cambridge, Grotius publ., 1983, at 197-219.

[2265] *Compagnie européenne des Pétroles S.A. v. Sensor Nederland B.V.*, District Court, The Hague, 17 September 1982, 22 *I.L.M.* 66, 72 (1983).

[2266] For further reading R. ERGEC, *La compétence extraterritoriale à la lumière du contentieux sur le gazoduc euro-sibérien*, Brussels, ULB, Institut de Sociologie, 1984, 113 p. It has been argued that

697. In this subsection, the EC's comments on the *Soviet Pipeline* Regulations will be discussed, because, important for our purposes, they review the jurisdictional assertions made under the Regulations in light of the principles of jurisdiction under international law. The comments are among the few legal documents in which the EC has addressed questions of jurisdiction head-on, and constitute State practice which is most valuable for purposes of assessing the state of the customary international law of jurisdiction (at least as of 1982). The EC's comments denounced the U.S. assertions of jurisdiction as follows:

> "The U.S. measures as they apply in the present case are unacceptable under international law because of their extra-territorial aspects. They seek to regulate companies not of U.S. nationality in respect of their conduct outside the United States and particularly the handling of property and technical data of these companies not within the United States.
>
> They seek to impose on non-U.S. companies the restriction of U.S. law by threatening them with discriminatory sanctions in the field of trade which are inconsistent with the normal commercial practice established between the U.S. and the E.C.
>
> In this way the Amendments of June 22, 1982, run counter to the two generally accepted bases of jurisdiction in international law; the territoriality and the nationality principles.
>
> The *territoriality principle* (i.e. the notion that a state should restrict its rule-making in principle to persons and goods within its territory and that an organization like the European Community should restrict the applicability of its rules to the territory to which the Treaty setting it up applies) is a fundamental notion of international law, in particular insofar as it concerns the regulation of the social and economic activity in a state. The principle that each state – and *mutatis mutandis* the Community insofar as powers have been transferred to it – has the right freely to organize and develop its social and economic system has been confirmed many times in international fora. The American measures clearly infringe the principles of territoriality, since they purport to regulate the activities of companies in the E.C., not under the territorial competence of the U.S.
>
> The *nationality principle* (i.e. the prescription of rules for nationals, wherever they are) cannot serve as a basis for the extension of U.S. jurisdiction resulting from the Amendments, i.e. (i) over companies incorporated in E.C. Member States on the basis of some corporate link (parent-subsidiary) or personal link (e.g. shareholding) to the U.S.; (ii) over companies incorporated in E.C. Member States, either because they have a tie to U.S.-incorporated company, subsidiary or other "U.S. controlled" company through a licencing agreement,

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« internal political pressure was certainly as important as the diplomatic protests of the member states of the European Community » in lifting the Regulations. *See* G. SCHUSTER, "Extraterritoriality of Securities Laws: An Economic Analysis of Jurisdictional Conflicts", 26 *Law & Pol'y Int'l Bus.* 165, 200 (1994).

> royalty payments, or payment of other compensation, or because they have bought certain goods originating in the U.S."[2267]

698. Putting a high premium on the territoriality principle, linked up with the principle of non-intervention ("[t]he principle that each state … has the right freely to organize and develop its social and economic system"), the EC went on to explain why it believed that the nationality principle could not serve as an adequate justification for the jurisdictional assertions based on the control exercised over foreign subsidiaries by U.S. corporations, nor for the assertions based on the U.S. origin of goods and technologies:

> "The Amendments in two places purport to subject to U.S. jurisdiction companies, wherever organized or doing business, which are subsidiaries of U.S. companies or under the control of U.S. citizens, U.S. residents or even persons actually within the U.S. This implies that the United States is seeking to impose its corporate nationality on companies of which the great majority are incorporated and have their registered office elsewhere, notably in E.C. Member States.
>
> Such action is not in conformity with recognized principles of international law. In the Barcelona Traction Case, the International Court of Justice declared that two traditional criteria for determining the nationality of companies; i.e. the place of incorporation and the place of the registered office of the company concerned, had been "confirmed by long practice and by numerous international instruments". The Court also scrutinized other tests of corporate nationality, but concluded that these had not found general acceptance. The Court consequently placed primary emphasis on the traditional place of incorporation and the registered office in deciding the case in point. This decision was taken within the framework of the doctrine of diplomatic protection, but reflects a general principle of international law.
>
> The notion inherent in the subjection to U.S. jurisdiction of companies with no tie to the U.S. whatsoever, except for a technological link to a U.S. company, or through possession of U.S. origin goods, can only be that this technology or such goods should somehow be considered as unalterable "American " (even though many of the patents involved are registered in the Member States of the European Community). This seems the only possible explanation for the U.S. Regulations given the fact that national security is not at stake here.
>
> Goods and technology do not have any nationality and there are no known rules under international law for using goods or technology situated abroad as a basis of establishing jurisdiction over the persons controlling them. Several Court cases confirm that U.S. jurisdiction does not follow U.S. origin goods once they have been discharged in the territory of another country."[2268]

[2267] 21 *I.L.M.* 893-94 (footnotes omitted).
[2268] *Id.*, at 894-95 (footnotes omitted).

699. In arguing against the control theory underlying the *Soviet Pipeline* Regulations, the EC has the majority of the international law doctrine,[2269] and even a former Legal Adviser to the U.S. Department of State,[2270] on its side.[2271] The Restatement (Third) of U.S. Foreign Relations Law (1987), however, permits control-based nationality jurisdiction, albeit only in exceptional cases, such as when "the regulation is essential to implementation of a program to further a major national interest of the state exercising jurisdiction" and "the national program of which the regulation is a part can be carried out effectively only if it is applied also to foreign subsidiaries".[2272] Although purportedly restating international law, the relevant provision in the Restatement is clearly informed by long-standing U.S. practice favoring control-based nationality jurisdiction. Given the open-ended nature of "national interests", on which the permissive exceptions enshrined in this provision are premised, foreign nations are unlikely to wholly subscribe to it.

700. As pointed out in subsection 8.1.1., while the control theory may in itself not be acceptable under international law, secondary boycotts may be justifiable if they could fall under a widely recognized principle of jurisdiction, such as the protective principle, and even the effects doctrine. In the dispute over the *Soviet Pipeline* Regulations, the EC believed, arguably correctly, that the conditions of application of these principles were not met though. The protective principle would indeed be seriously stretched if one were to consider exports of goods from Europe to the Soviet Union as directly threatening U.S. national security or the operation of U.S. governmental functions. It is equally unlikely that such exports would produce effects within the U.S. that would rise to the level of directness, substantiality, and reasonable foreseeability ordinarily required for the exercise of effects-based jurisdiction over violations of the U.S. antitrust laws.[2273]

[2269] *See, e.g.*, C.J. OLMSTEAD, in Panel Discussion on the Draft Restatement of the Foreign Relations Law of the United States, 76 *Proc. Soc'y Int'l L.* 184, 202 (1982) ("I know of no basis in international law for the proposition that a state has jurisdiction over a foreign corporation because its shareholders are nationals of that state."); F.A. MANN, "The Doctrine of Jurisdiction Revisited after Twenty Years", 186 *R.C.A.D.I.* 9, at 25, 57 and 60 (1984-III) (« Goods, once put into circulation, are without nationality. ») ("[T]he control theory of nationality lacks such general recognition as to render it an internationally permissible test."); A. BIANCHI, Reply to Professor Maier, in K.M. MEESSEN (ed.), *Extraterritorial Jurisdiction in Theory and Practice*, London/The Hague/Boston, Kluwer, 1996, 74, 95; X., Note, "Predictability and Comity: Toward Common Principles of Extraterritorial Jurisdiction", 98 *Harv. L. Rev.* 1310, 1317-18 (1985) (pointing out that "the claim that a nation's jurisdiction runs with that nation's goods, regardless of how many times they change hands, is not even acknowledged under United States domestic law.") (footnotes omitted). *See also* statement of Lord Cockfield, Secretary of State for Trade, in the House of Lords on 2 August 1982 ("This purported application of U.S. law outside U.S. jurisdiction is unacceptable to the UK Government, and in the Government's view is unacceptable in international law" because "[g]oods have no national identity which overrides changes of ownership of these goods").

[2270] Statement of Monroe Leigh, *A.J.I.L.* 627 (1983) (pointing out that it was "apparent that neither of the traditional principles of jurisdiction – territoriality and nationality – justified the extension of United States export regulations to [a foreign national].").

[2271] The European Commission's own assertions of extraterritorial jurisdiction in the field of competition law may however undercut the European case under public international law against the U.S. control theory as applied in the Soviet Pipeline Regulations. *See* J. DUTHEIL DE LA ROCHERE, "Réflexions sur l'application "extra-territoriale" du droit communautaire", in X., *Mélanges M. Virally. Le droit international au service de la paix, de la justice et du développement*, Paris, Pedone, 1991, 282, 295.

[2272] § 414 (2) (b) (i)-(ii) of the Restatement (Third) of U.S. Foreign Relations Law.

[2273] EC Comments, 21 *I.L.M.* 897 ("The "protective principle" has not been invoked by the U.S. Government, since the Amendments are based on Section 6 (Foreign Policy Controls) and not on

8.1.4. Voluntary submission

701. As long as the territorial State does not enact contrary legislation, corporations could decide to submit voluntarily to U.S. export controls. Accordingly, U.S. parent corporations could, as a matter of corporate law, impose on their foreign subsidiaries measures giving effect to U.S. export control regulations so as to avoid liability under U.S. law, unless these measures violate the law (possibly blocking legislation) of the State where the foreign subsidiaries are incorporated.[2274] Furthermore, U.S. corporations could enter into re-export contracts with foreign corporations which feature a clause that requires the latter to respect U.S. law, again unless this clause violates the law of the territorial State.[2275]

702. In its comments, the EC argued that voluntary submission is "reprehensible" and "is misused in order to circumvent the limits imposed on national jurisdiction by international law."[2276] This argument, which was also forcefully made by LOWE and BIANCHI,[2277] is misconceived. There is no rule of international law which prohibits private parties from "bonding" to higher regulatory standards, a phenomenon which is even frequent in the field of international financial regulation where some financial actors tend to "bond" to such standards so as to increase their credibility in the eyes of the financial markets. If States do not like their citizens to submit voluntarily to foreign regulation, they have to intervene actively and enact legislation which prohibits their citizens from complying with specific foreign regulation.[2278] The EC seemed to have understood this when in 1996, as will be shown in subsection 8.2.5, it enacted blocking legislation prohibiting European

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Section 5 (National Security Controls) of the Export Administration Act. The U.S. Government itself, therefore, has not sought to base the Amendments on considerations of national security. The "effects doctrine" is not applicable. It cannot conceivably be argued that exports from the European Community to the U.S.S.R for the Siberian gas pipeline have within the U.S.A. direct, foreseeable and substantial effects which are not merely undesirable, but which constitute an element of a crime or tort proscribed by U.S. law. It is more than likely that they have no direct effects on U.S. trade.")

[2274] *See* F.A. MANN, "The Doctrine of Jurisdiction Revisited after Twenty Years", 186 *R.C.A.D.I.* 9, 60-62 (1984-III).

[2275] *Id.*, at 62.

[2276] EC Comments, 21 *I.L.M.* 896 (« [I]t must have been evident to the U.S. Government that the statutory encouragement of voluntary submission to U.S. public policy in trade matters *within* the E.C. is strongly condemned by the European Community. Private agreements should not be used in this way as instruments of foreign policy. If a Government in law and in fact systematically encourages the inclusion of such submission clauses in private contracts the freedom of contract is misused in order to circumvent the limits imposed on national jurisdiction by international law"); UK Diplomatic Note of 18 October 1982, *B.Y.I.L.* 1982, at 455 ("Any attempt by a State to further the use of such clauses in private contracts concluded by its nationals for the purpose of extending the jurisdiction of the State would be objectionable.").

[2277] A.V. LOWE, "Public International Law and the Conflict of Laws: the European Response to the United States Export Administration Regulations", *I.C.L.Q.* 515, 519-27 (1984) ("The fact that submission clauses are couched in the language of contract cannot disguise the fact that they deal with matters of public and not private law, and are to be judged according to the standards of public international law."); A. BIANCHI, "Extraterritoriality and Export Controls: Some Remarks on the Alleged Antinomy Between European and U.S. Approaches", 35 *G.Y.I.L.* 366, 394-95 (1992) (arguing that "private parties are not in the position to waive a right that belongs to their national States, that is the rights to exercise jurisdiction when they are allowed to do so under public international law and to resist unlawful claims of jurisdiction by other States.").

[2278] *Compare* comment c to § 414 of the Restatement (Third) of U.S. Foreign Relations Law (1987).

corporations from complying with extraterritorial U.S. laws, notably the Helms-Burton Act, which provided for a secondary Cuba boycott.

8.2. The Helms-Burton and Iran Libya Sanctions Acts: secondary boycotts beyond the control theory

703. In the late 1980s and early 1990s, secondary boycotts disappeared from the forefront of U.S. and European minds,[2279] until in 1996, the Cuban air force shot down two American Cessna's belonging to an anticastrist organization based in Florida, whereupon the U.S. Congress adopted the Cuban Liberty and Solidarity Act (LIBERTAD).[2280] In due course, the Act was signed into law by President Clinton and became popularly known as the Helms-Burton Act, named after the Congressmen Jesse Helms and Dan Burton. The Helms-Burton Act strengthened[2281] and codified by statute the sanctions against the Cuban Castro government, which were already contained in the Cuban Assets Control Regulations. Importantly, it also creates a private right of action for U.S. citizens to recover damages for "trafficking" in confiscated U.S. property (Title III of the Act), and it excludes from the U.S. any person trafficking in U.S. property (Title IV of the Act). The Helms-Burton Act constitutes secondary boycott legislation in that it requires that corporations located in a foreign State comply with U.S. export controls in their dealings with another foreign State (Cuba). In the same year, the U.S. adopted similar legislation aimed at reducing the threat of weapons of mass destruction posed by Iran and Libya (Iran Libya Sanctions Act).[2282] Both acts move beyond the control theory and require foreign-

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[2279] *See* A. BIANCHI, "Extraterritoriality and Export Controls: Some Remarks on the Alleged Antinomy Between European and U.S. Approaches", 35 *G.Y.I.L.* 366, 367 (1992) (writing that "the practical issue [of extraterritorial export controls] has lain dormant since the 1980s Siberian pipeline dispute", and that "[s]cholars have also neglected it for some time, probably in light of the relative paucity of litigation stemming from it").

[2280] Cuban Liberty and Democratic Solidarity Act, Public law 104th-114, 12 March 1996, 110 Stat. 785, 22 U.S.C. §§ 6021-6091.

[2281] 22 U.S.C. §§ 6031-6046.

[2282] There has been a host of publications on these acts, and on the Helms-Burton Act in particular. Most publications dismiss the Helms-Burton Act as being in violation of international law. *See, e.g.*, J. ANDERSON, "U.S. Economic Sanctions on Cuba, Iran & Libya: Helms-Burton and the Iran and Libya Sanctions Act", *R.D.A.I* 1007 (1996); K. CAMPBELL, "Helms-Burton: The Canadian View", 20 *Hastings Int'l & Comp. L. Rev.* 799 (1997); B.M. CLAGETT, "Title III of the Helms-Burton Act Is Consistent With International Law", 90 *A.J.I.L.* 434 (1996); B.M. CLAGETT, "The Cuban Liberty and Democratic Solidarity (Libertad) Act, Continued: A Reply to Professor Lowenfeld", 90 *A.J.I.L.* 641 (1996); B.M. CLAGETT, "The Controversy Over Title III of the Helms-Burton Act: Who Is Breaking International Law – The United States, or the States That Have Made Themselves Co-conspirators with Cuba in Its Unlawful Confiscations?", 30 *Geo. Wash. J. Int'l L. & Econ.*, 271 (1996-97); M. COSNARD, "Les lois Helms-Burton et d'Amato-Kennedy, interdiction de commercer avec et d'investir dans certains pays", 42 *A.F.D.I.* 33 (1996); W.S. DODGE, "The Helms-Burton Act and Transnational Legal Process", 20 *Hastings Int'l & Comp. L. Rev.* 713 (1997); C. FLINTERMAN & N. LAVRANOS, "'Helms-Burton' en de Europese Unie" ["'Helms-Burton' and the European Union"], 51 *Internationale Spectator* 563 (1997); C.T. GRAVES, "Extraterritoriality and its Limits: The Iran and Libya Sanctions Act of 1996", 21 *Hastings Int'l & Comp. L. Rev.* 715 (1998); D. KAYE, "The Helms-Burton Act: Title III and International Claims", 20 *Hastings Int'l & Comp. L. Rev.* 729 (1997); K.J. KUILWIJK, "Castro's Cuba and the U.S. Helms-Burton Act. An Interpretation of the GATT Security Exemption", 31 *J.W.T.* 49 (1997); A.F. LOWENFELD, "Congress and Cuba: The Helms-Burton Act", 90 *A.J.I.L.* 419 (1996); R.L. MUSE, "A Public International Law Critique of the Extraterritorial Jurisdiction of the Helms-Burton Act (Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996)", 30 *Geo. Wash. J. Int'l L. & Econ.* 207 (1996-1997); R.L. MUSE, "The Nationality of Claims Principle of Public International Law and the Helms-Burton Act", 20 *Hastings Int'l & Comp. L. Rev.* 777 (1997); J.L. SNYDER & S.

based corporations to comply with their provisions, even if they are not controlled by U.S. persons.

8.2.1. The Cuba Boycott

704. The Helms-Burton Act is another step in the tightening of the leash on Cuba, a communist State off the southern tip of the U.S. state of Florida. In 1959, the U.S.-backed Cuban government was overthrown by communist rebels led by Fidel Castro, after which the new Cuban government confiscated all American property in Cuba. As a reaction, the United States imposed an embargo against Cuba in 1962. Under the Cuba embargo, as a reprisal against the illegal nationalization of American property, American corporations are no longer allowed to do business with Cuba.[2283]

705. The Cuba boycott was initially a primary export boycott that only applied to U.S. exporters. In the 1990s, after the implosion of communism in Central and Eastern Europe, the U.S. thought the moment ripe to extend the Cuba boycott so as to squeeze one of the last communist States in the world. In the aftermath of the Cuban Democracy Act 1992,[2284] it adopted the Cuban Asset Control Regulations (CACR) in 1993.[2285] The CACR not only prohibit almost all property transactions with Cuba by U.S. persons, "if such transactions involve property in which [Cuba] or any national thereof" has any direct or indirect interests,[2286] yet, like the 1982 *Soviet Pipeline* Regulations, they also provide for a secondary boycott based on the control theory. Among the persons subject to U.S. jurisdiction under the CACR are indeed not only U.S. citizens, residents, or corporations, but also "[a]ny corporation, partnership, or association, wherever organized or doing business, that is owned or controlled by [the former] persons."[2287] In addition, the CACR forbid the issuance of trade licenses to foreign subsidiaries of U.S. companies located in countries that have a policy of encouraging trade with Cuba, and prohibit vessels that have called in Cuban ports from entering U.S. waters for 180 days.[2288] Civil and criminal penalties may be imposed in accordance with the Trading with the Enemy Act.[2289]

AGOSTINI, "New U.S. Legislation to Deter Investment in Cuba", 30 *J.W.T.* 37 (1996/3); R.G. STEINHARDT, "Foreword: Helms-Burton and the Virtues of a Good Course in Pathology", 30 *Geo. Wash. J. Int'l L. & Econ.* 201 (1996-97); B. STERN, "Can the United States Set Rules for the World? A French View", 31 *J.W.T.* 5 (1997/4); B. STERN, "Vers la mondialisation juridique? Les lois Helms-Burton et d'Amato-Kennedy", *R.G.D.I.P.* 979 (1996); B. STERN, "De simples "Commentaires" à une "action commune": la naissance d'une politique juridique communautaire en matière d'extraterritorialité", *Europe*, 1997, No. 2, 8-9; J.M.E. TRAMHEL, "Helms-Burton Invites a Closer Look at Counter-measures", 30 *Geo. Wash. J. Int'l L. & Econ.* 317 (1996-97); E. VERMULST & B. DRIESSEN, "The Choice of a Switch: The European Reaction to the Helms-Burton Act", 11 *L.J.I.L.* 81 (1998).

[2283] 22 U.S.C. Sections 6001-6010.

[2284] Pub.L 102-484.

[2285] 31 C.F.R. § 515.

[2286] § 515.201(b) CACR. According to the Treasury Department, even an attenuated connection to Cuba, such as an aircraft lease to a third-country airline if some of the subject aircraft will be used, in part, for routes to and from Cuba. *See* H.L. CLARK, "Dealing with U.S. Extraterritorial Sanctions and Foreign Countermeasures", 25 *U. Pa. J. Int. Econ. L.* 455, at 459-460 (2004).

[2287] § 505.329 (d) CACR.

[2288] *Id.*, § 515.207.

[2289] *Id.*, § 515.701 *io.* 50 U.S.C. App. 16.

706. The Office of Foreign Assets Control (OFAC) of the U.S. Treasury, the institution designated to enforce the CACR,[2290] has generally been reluctant to enforce the CACR against foreign corporations. In early 2004 however, it temporarily stepped up its enforcement efforts, fining four Italian corporations and the Spanish Airline Iberia through its U.S. subsidiary, although the fines imposed were very low.[2291] It is unclear on what legal basis these foreign corporations were fined. It may be that their use of U.S. bank accounts or U.S. transportation hubs as a means of trading in Cuban goods provided a sufficient territorial nexus for jurisdiction to obtain under the CACR. Two years later, on February 3, 2006, in a move which caused quite some exasperation, OFAC forced Mexico City's Sheraton Hotel, a Mexican company and subsidiary of a U.S. corporation (Starwood Hotels and Resorts Worldwide, Inc.), to expel a group of Cuban citizens out of the premises of the said hotel. The group of Cubans was staying at the hotel attending business meetings with executives of American companies.[2292] This move was clearly premised on the control theory.

707. It may be submitted that the U.S., when enacting the CACR, believed that control-based jurisdiction was justified under the Restatement's statement that such jurisdiction is admissible in "exceptional cases". European States for their part arguably believed that it was not. The Secretary of State of the United Kingdom for instance, in exercise of his powers under Section 1(1) of the Protection of Trading Interests Act 1980, swiftly enacted an order pursuant to which he may require persons carrying business in the United Kingdom not to comply with the CACR.[2293] The great transatlantic clash over Cuba was however to follow with the enactment of the Helms-Burton Act in 1996.

8.2.2. The 1996 Helms-Burton and Iran Libya Sanctions Acts

708. HELMS-BURTON ACT – Under the Helms-Burton Act 1996, no person, whatever his nationality, is allowed to 'traffic' in confiscated property belonging to Americans or Cubans who later acquired American citizenship. The definition of prohibited activities is very wide and includes both trade and investment opportunities in Cuba.[2294] The Helms-Burton Act does not apply to American citizens and corporations – who were already prevented from doing business with Cuba under the U.S. embargo against Cuba – but only to persons from third countries.[2295] The Helms-Burton Act is thus a secondary boycott act or a boycott act with extraterritorial application.

[2290] 22 U.S.C. § 6009. *See* for a discussion of OFAC's role in international finance, with special regard to extraterritoriality problems: J. LEE & J. SLEAR, "Beware of Ofac", *IFLR* 58 (September 2006).
[2291] Financial Times, September 2, 2004.
[2292] *See* Letter dated 8 February 2006 from the Permanent Representative of Cuba to the United Nations addressed to the Secretary-General, available at http://www.cubavsbloqueo.cu/portals/0/Doc%20Oficial%20AGNU%20denuncia%20sucesos%20Sheraton-ingl%C3%A9s.doc
[2293] UK Protection of Trading Interests (US Cuban Assets Control Regulations) Order 1992, Statutory Instrument 1992 No. 2449, available at http://www.opsi.gov.uk/s/si1992/Uksi_19922449_en_1.htm.
[2294] *See* Helms-Burton Act Section 4 (13).
[2295] By virtue of Section 4 (8) of the Helms-Burton Act, the term 'foreign national' means: "(a) an alien; or (b) any corporation, trust, partnership or other juridical entity not organized under the laws of the United States, or of any State, the District of Columbia, or any commonwealth territory, or possession of the United States."

709. LIABILITY UNDER HELMS-BURTON – Violators of the substantive provisions of the Helms-Burton Act could be held liable in a private action in the U.S. for the value of the property in question, and if the trafficking continued, for three times the value of the property (treble damages).[2296] Title III of the Act gives U.S. citizens whose property was confiscated the right to sue foreigners who engage in 'trafficking'.[2297] Under Title IV, the officers or controlling shareholders (as well as their spouses and children under 18) of companies that 'traffic' in property formerly owned or claimed to be owned by American nationals, can be denied entrance in the U.S.[2298] The U.S. President however has the possibility to grant a renewable six-month waiver to suspend Title III. Successive presidents have made use of this possibility and suspended Title III every six months, noting "that it is necessary for the national interest of the U.S. and will expedite the transition to democracy in Cuba".[2299] By granting the waivers, the U.S. avoided disputes with European nations whose firms 'trafficked in stolen property' in Cuba. The Cuban Government however estimates that the Helms-Burton Act has cost Cuba $82 billion in potential investments,[2300] although possibly it included the costs of the strengthening of the Cuban Assets Control Regulations.

710. IRAN LIBYA SANCTIONS ACT – The year 1996 not only saw the adoption of the Helms-Burton Act, but also of the Iran Libya Sanctions Act (ILSA), a secondary boycott act aimed at isolating Iran and Libya. Like the Helms-Burton Act, ILSA was preceded by other U.S. boycott legislation with less far-reaching repercussions on foreign corporations. In light of Iran's efforts to acquire nuclear expertise and support terrorist attacks by the Iran-funded Palestine Hamas and Jihad movements, President Clinton banned all U.S. trade with Iran and Libya in 1995.[2301]

[2296] *See* Helms-Burton Act Section 302(a).

[2297] Title III Helms-Burton Act repealed the act of State doctrine. Under the act of State doctrine, U.S. courts cannot pass judgment on the international legality of a foreign State's sovereign act (*See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964), ruling that the *Act of State*-doctrine has constitutional underpinnings). The Helms-Burton Act may violate the act of State doctrine in that it authorizes U.S. courts to indirectly pass judgment on the legality of the expropriation of U.S. assets by the Cuban government by providing for a U.S. remedy for the former U.S. owners of 'trafficked goods', goods which were allegedly wrongfully confiscated in the 1960s by the Cuban government The act of State doctrine may however be statutorily overruled. Section 302(a)(6) of the Helms-Burton Act therefore sets forth that "[n]o court of the United States shall decline, based on the Act of State-doctrine, to make a determination on the merits in an action brought under § 1." *Compare* Section 620(e)(2) of the Foreign Assistance Act of 1961, as amended, 22 U.S.C. § 2370(e)(2)(1994) ("As an exception, American courts consider that they can apply the American public order rules - including international law standards of compensation in case of nationalization - to a nationalization that occurred abroad, if the nationalized assets happen to end up on U.S. territory."). On the question whether the Helms-Burton Act repealed the act of State doctrine altogether, *see* A.F. LOWENFELD, "Congress and Cuba: The Helms-Burton Act", 90 *A.J.I.L.* 419, n 42-48 (1996); B.M. CLAGETT, "Title III of the Helms-Burton Act Is Consistent With International Law", *90 A.J.I.L.* 440 (1996).

[2298] Shortly after the adoption of the Helms-Burton Act, the State Department notified major shareholders and senior executives of a Canadian mining company, a Mexican telecommunications and executives of an Israeli citrus company that they and their families were barred from entry into the United States. See H.L. CLARK, "Dealing with U.S. Extraterritorial Sanctions and Foreign Countermeasures", 20 *U. Pa. J. Int'l Bus. L.* 470-71 (1999).

[2299] *See for example:* VOA News, "Bush Again Suspends Action Against Foreign Firms Using Confiscated US Property in Cuba", 17 January 2003, at http://www.rose-hulman.edu/~delacova/us-cuba/helms-burton-03.htm

[2300] Miami Herald, March 18, 2006.

[2301] *See* Executive Order 12957 (March 15, 1995), Executive Order 12959 (May 6, 1995) and the consolidating Executive Order 13059 (August 19, 1997).

The President's Executive Orders were intended to deal with "the unusual and extraordinary threat to the national security, foreign policy, and economy of the United States" posed by the Government of Iran.[2302] They prohibit the importation of any goods or services of Iranian origin[2303] and the exportation of any goods, technology or services to Iran.[2304] The prohibition of exportation to Iran under the Executive Orders has a clear extraterritorial aspect in that it not only applies to exportation from the U.S., but also to exportation by a U.S. person, wherever located,[2305] and to the re-exportation from a third country by a person other than a U.S. person.[2306]

In the year after the Executive Orders, in 1996, the U.S. House of Representatives adopted the Iran and Libya Sanctions Act (ILSA) for a five years' period.[2307] ILSA was renewed in 2001. ILSA, also named D'Amato-Kennedy Act after its promoters, was meant to deprive the 'rogue states' Libya and Iran of their financial resources to support international terrorism and develop its arms industry.[2308] The U.S. also wanted to exert pressure on Libya to extradite two men suspected of being involved in the 1988 Lockerbie bombing. Libya eventually extradited the two, who were put on trial in the Netherlands. ILSA prohibits any corporation, wherever it is incorporated,[2309] from investing more than $20 million in one year in Iran's energy sector or $40 million in one year in Libya's energy sector.[2310] If the corporations do not comply with this rule, they can be denied certain economic advantages, out of which the President should choose at least two.[2311] The sanctions are not applied if they run counter to American interests.[2312] The ILSA provisions are clearly extraterritorial in that they require that foreign corporations comply with U.S. law in their dealings with countries other than the U.S. According to GRAVES, ILSA provides for the most radical extension of extraterritorial jurisdiction yet attempted by Congress.[2313] Hereinafter, the international law focus will mainly be on the Helms-Burton Act, as it this act which has engendered most international exasperation.

8.2.3. Double standards: U.S. opposition against the Arab boycott of Israel

711. The Helms-Burton and Iran Libya Sanctions Acts were the first full-blown secondary boycott acts enacted by the United States which were not based on the control theory. They were not the very first secondary boycotts however. After Israel came into being in 1948, the Arab League imposed a secondary boycott on

[2302] Executive Order 13059, preamble.
[2303] *Id.*, Section 1.
[2304] *Id.*, Section 2.
[2305] *Id.*, Section 2 (a).
[2306] *Id.*, Section 2 (b). Under certain circumstances, this prohibition shall not apply.
[2307] Pub. L. 104-172, Aug. 5, 1996, 110 Stat. 1541 (50 U.S.C. 1701).
[2308] ILSA Section 2.
[2309] By virtue of ILSA Section 14 (7), the term 'foreign person' means: "(a) an individual who is not a U.S. person or an alien lawfully admitted for permanent residence into the United States; or (b) a corporation, partnership, or other nongovernmental entity which is not a U.S. person."
[2310] The export of certain technology to Libya had already been banned by Security Council Resolutions 731, 748 and 883. *See* ILSA Section 5(b)(1). To that extent, ILSA merely implementats the Resolutions.
[2311] ILSA Section 6.
[2312] ILSA Section 9 (c).
[2313] *See* C.T. GRAVES, "Extraterritoriality and its Limits: The Iran and Libya Sanctions Act of 1996", 21 *Hastings Int'l & Comp. L. Rev.* 715-16 (1998).

Israel, which prohibited companies from doing business with that State, and blacklists firms that traded with other companies that did business with it. The Arab League believed that the boycott would isolate Israel and weaken its military and economic strength.[2314] The United States fiercely opposed the Arab League's secondary boycott of Israel, and prohibited U.S. companies from complying with it in 1977. U.S. opposition could undermine the credibility of the Helms-Burton Act under international law, in light of the international principle of estoppel; or as ANDERSON held upon the enactment of the U.S. acts adopted in 1996: "The U.S. now has come full circle from the 1970s and 1980s, when it universally decried secondary boycotts, by erecting secondary sanctions of its own."[2315]

712. On 22 June 1977, the United States amended the Export Administration Act to counteract Arab League's secondary boycott against Israel secondary boycotts.[2316] Section 502 of the Act, which is drawn up in general terms, counteracts restrictive trade practices or boycotts fostered or imposed by foreign countries against other countries friendly to the United States or against any United States person by encouraging, and, in specified cases, requiring United States persons engaged in the export of items to refuse to take actions, including furnishing information or entering into or implementing agreements, which have the effect of furthering or supporting the restrictive trade practices or boycotts fostered or imposed by any foreign country against a country friendly to the United States or against any United States person.

On the basis of the U.S. anti-boycott legislation, several firms were sued by the United States for complying with the Arab League secondary boycott. In *United States* v. *Baxter International Inc.*, the United States sued Baxter, a large American medical supply company, for improperly providing information to Syrian and Saudi officials. Baxter wanted to have its name removed from the Arab blacklist of companies doing business with Israel. Upon conclusion of the investigation, begun in 1990, Baxter agreed in 1993 with the Office of Anti-Boycott Compliance of the U.S. Department of Commerce to enter a plea of guilty to criminal charges. It also agreed to pay civil penalties and fines amounting to $6.5 million, and to accept certain restrictions on its business dealings in the Middle East.[2317] In 1995, in *United States* v. *L'Oréal*, the international cosmetics firm L'Oréal reached an agreement with the Department of Commerce. It paid $1.4 million to the U.S. Treasury as a result of its former participation in the Arab boycott.[2318]

[2314] Although the Arab secondary boycott remains technically in force, it has hardly enforced since the mid-1990s. In 1994, the members of the Gulf Cooperation Council announced they would no longer support the secondary boycott. In 1995, Egypt, Jordan and Palestine followed suit. Bahrein, Qatar, Morocco, Kuwait, Dubai and Oman, far from supporting a secondary boycott, even directly trade with Israel. Only Syria still wholeheartedly supports the secondary boycott, and banned as late as 2004 a Greek, a Danish and two Maltese ships from its ports because they had made stops in Israeli ports. *See* http://www.jewishvirtuallibrary.org/jsource/History/Arab_boycott.html

[2315] *See* J. ANDERSON, "U.S. Economic Sanctions on Cuba, Iran & Libya: Helms-Burton and the Iran and Libya Sanctions Act", *R.D.A.I.* 1008 (1996).

[2316] Pub. L. No. 95-52, 91 Stat. 235.

[2317] *See* http://www.bxa.doc.gov/AntiboycottCompliance/CaseHistories/OACCaseHistories3.html; *See also Time Magazine*, "Caught in The Act**.** Baxter pleads guilty to complicity with the Arab boycott of Israel", 5 April 1993. http://www.time.com/time/archive/preview/from_redirect/0,10987,1101930405-161375,00.html.

[2318] *See* http://www.bxa.doc.gov/AntiboycottCompliance/CaseHistories/OACCaseHistories3.html; *See also* www.jewishsf.com/bk950901/usarab.htm and http://www.proislam.com/boycott_loreal.htm

713. The United States have also brought cases under the Sherman Act against American citizens complying with a secondary boycott, alleging that the Act would be violated because it restrained U.S. exports. In 1976, in *United States* v. *Bechtel*, the U.S. brought a civil antitrust case against Bechtel and three of its affiliated construction firms. Since 1971, the defendants would have refused to award subcontracts for its Middle East projects to U.S. companies blacklisted by Arab League countries because of doing business with Israel. The United States asserted that this restrained U.S. exports by the boycotted firms to Arab countries. In 1977, Bechtel settled the matter with the government, pledging not to comply with the Arab boycott.[2319]

714. In view of the U.S. opposition against secondary boycotts in the 1977 Export Administration Act, it may be argued that the principle of estoppel prohibits it from enacting a secondary boycott itself. One should however be cautious to equate the introduction of anti-boycott legislation with a U.S. *opinio juris* that secondary boycotts are illegal under international law. CLAGETT, an ardent advocate of the Helms-Burton Act, has for instance submitted that the 1977 condemnation of secondary boycotts was expressly on the ground of U.S. policy, not international law: "One will search in vain through the Export administration Amendments of 1977, […] and I believe, their legislative history for any claim by the United States that the Arab boycott violates international law."[2320] Section 502 of the Export Administration Act would only reflect a congressional declaration of policy and would not challenge the legality of a secondary boycott under international law. Through invoking the Export Administration Act and the Sherman Act against the Arab boycott, the United States may have wanted to counteract the repercussions of foreign boycotts on U.S. firms, but may have stopped short of plainly condemning these boycotts as violations of international law, lest a condemnation under international law may have weakened the case for secondary boycotts proclaimed by the American government itself.

8.2.4. Justifying the Helms-Burton Act under international law

715. While the argument based on international law principle of estoppel may indeed not be entirely convincing, an alternative analysis, based on the international law of jurisdiction, could prove more potent. In this subsection, it will be ascertained whether the jurisdictional assertions set forth by the Helms-Burton Act are justified under four relevant classical principles of jurisdiction: the protective principle, the universality principle, the passive personality principle, and the effects doctrine (objective territoriality principle).

716. PROTECTIVE PRINCIPLE – The Helms-Burton Act itself seemed to justify its jurisdictional assertions under the protective principle where it considered Cuba to be posing a national security threat to the U.S.[2321] Former U.S. Trade

[2319] Bechtel argued that the Arab boycott was beyond the scope of the Sherman Act. The argument was rejected. *See United States* v. *Bechtel Corp.*, 1979-1 Trade Cas. (CCH), 62,649, 62,430 (N.D. Cal. 1979), *affirmed*, 648 F.2d 660 (9th Cir.), *cert. denied*, 454 U.S. 1083 (1981).

[2320] B.M. CLAGETT, "The Cuban Liberty and Democratic Solidarity (Libertad) Act, Continued: A Reply to Professor Lowenfeld", 90 *A.J.I.L.* 642 (1996).

[2321] According to Helms-Burton Act Section 2 (28), "[f]or the past 36 years, the Cuban government has posed and continued to pose a national security threat to the U.S." Therefore, the purposes of the Act

Representative Mickey Kantor did not doubt the legality of this principle, which is codified as national security exemption in the GATT and NAFTA agreements and allows for trade restraints on the basis of national security, when stating: "I believe we're well within the obligations under NAFTA and the Uruguay Round".[2322] The United States did however not provide proof of terrorist activity sponsored by the Cuban government nor did it specify the security threat posed by mass migration of Cubans to the United States.[2323] It is difficult to sustain that a vaguely defined threat to the political independence or territorial integrity of the United States falls within the scope of the protective principle.[2324]

It may be noted that ILSA is more likely to be justifiable in light of the protective principle, as it is aimed at counteracting the threat of weapons of mass destruction purportedly being developed by Iran and Libya. Nevertheless, on closer inspection, because ILSA's principal effects are on third party States rather than sponsors of terrorism, it is doubtful whether protective jurisdicition is actually warranted.

717. PASSIVE PERSONALITY PRINCIPLE – As U.S. citizens were, allegedly, victims of expropriation by the Cuban government, the United States may have believed it could invoke the passive personality principle. Difficulties as to the application of this principle to the fact-pattern at hand abound however. For one thing, the passive personality principle is far from generally recognized in international law. For another, the principle may only authorize the exercise of jurisdiction over Cuban officials, as they, and not foreign corporations dealing with Cuba, engaged in the confiscation of foreign, including U.S., property which led to harm to U.S. nationals. It is not evident to hold foreign corporations liable in the U.S. on the sole ground that they took the investment opportunities which Cuba offered them from the early 1990s on. CLAGETT has argued that "[i]t can be presumed that the culpability of dealing in stolen goods is a familiar concept to ['traffickers'] from their own legal systems. Traffickers are knowingly taking the risk that the dispossessed owners or aggrieved states might take action against them."[2325] It nonetheless requires quite a stretch of passive personality jurisdiction to resort to it so as to deal with dealing in stolen goods, and even more so, to deal with a sort of after-the-fact complicity in acts of expropriation which occurred in the early 1960s.

718. EFFECTS DOCTRINE – In order to justify the Helms-Burton Act under international law, the United States mainly relied on the controversial effects doctrine, holding in the act itself that "[i]nternational law recognizes that a nation has the

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are pursuant to Section 3 (3) "to provide for the continued national security of the United States in the face of continuing threats from the Castro government of terrorism, theft of property from United States nationals by the Castro government, and the politicial manipulation by the Castro government of the desire of Cubans to escape that results in mass migration to the United States."

[2322] Quoted *in:* J.L. SNYDER & S. AGOSTINI, "New U.S. Legislation to Deter Investment in Cuba", 30 *JWT*, 1996/3, at 43, footnotes 37-38.

[2323] *See also* M. COSNARD, "Les lois Helms-Burton et d'Amato-Kennedy, interdiction de commercer avec et d'investir dans certains pays", 42 *A.F.D.I.* 40 (1996).

[2324] *See however U.S.* v. *Evans et al.*, 667 F.Supp. 974 (S.D.N.Y. 1987) (relying on the protective principle so as to exercise jurisdiction over defendants who had conspired to violate the Arms Control Act by re-exporting U.S. made defense articles).

[2325] *See* B.M. CLAGETT, "Title III of the Helms-Burton Act Is Consistent With International Law", 90 *A.J.I.L.* 437 (1996).

ability to provide for the rules of law with respect to conduct outside its territory that has or is intended to have substantial effect within its territory."[2326] The application of the effects doctrine is linked with the application of the passive personality principle in that it takes the effects of the Cuban expropriation on U.S. citizens/residents and thus, derivatively, on U.S. territory into account.

LOWENFELD has argued that it would be unreasonable to rely on the effects doctrine so as to justify the Helms-Burton Act, because a 36-year interval elapsed between conduct (expropriation) and effect.[2327] CLAGETT however considered the Cuban program of seeking foreign investment after the fall of the Soviet Union in 1991 to be the relevant point of reference to assess the time of conduct. In CLAGETT's view, the economic liberalization program adopted by Cuba constitutes the conduct, whilst the complicated restitution of American property caused by the multiple ownership stemming from the liberalization constitutes the effect.[2328] The Helms-Burton Act would then be a timely response to a new situation.[2329] This argument appears far-fetched. MUSE even considered it to be "merely silly".[2330] The Inter-American Juridical Committee formulated it more politely: "A prescribing State does not have the right to exercise jurisdiction over acts of 'trafficking' abroad by aliens unless specific conditions are fulfilled which do not appear to be satisfied in this situation."[2331]

719. UNIVERSALITY PRINCIPLE – Referring to terrorist activities[2332], violations of human rights[2333] and the violation of the right to democratic governance,[2334] the U.S. appeared to bolster its case for jurisdiction under the universality principle. However, even if proof of such activities and violations were

[2326] *See* Helms-Burton Act Section 301 (9).
[2327] *See* A.F. LOWENFELD, "Congress and Cuba: The Helms-Burton Act", *90 A.J.I.L.* 431 (1996).
[2328] *See* B.M. CLAGETT, "Title III of the Helms-Burton Act Is Consistent With International Law", 90 *A.J.I.L.* 435 (1996) ("If the property remains exclusively in the hands of the Cuban state, it will be readily available for restitution or substitution. If clouds on title have been created by purported transfers to traffickers of other nationalities who claim to be holders in due course, the problem becomes, in Secretary of State Warren Christopher's words, "far more difficult". […] To the extent they are citizens, the prejudice to them has a substantial effect on the U.S.").
[2329] *See* B.M. CLAGETT, "The Cuban Liberty and Democratic Solidarity (Libertad) Act, Continued: A Reply to Professor Lowenfeld", 90 *A.J.I.L.* 641-44 (1996).
[2330] *See* R.L. MUSE, "A Public International Law Critique of the Extraterritorial Jurisdiction of the Helms-Burton Act (Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996)", 30 *Geo. Wash. J. Int'l L. & Econ.* 207, 262 (1996-97).
[2331] *Opinion of the Inter-American Juridical Committee on Resolution,* AG/DOC.3375/96, "Freedom of Trade and Investment in the Hemisphere", OEA/Ser.g, CP/doc.2803/96, 27 August 1996; UN Doc. A/51/394, 23 September 1996; 35 *I.L.M*, 1322 (1996).
[2332] Helms-Burton Section 2 (14): "The Castro government threatens international peace and security by engaging in acts of armed subversion and terrorism such as the training and supplying of groups dedicated to international violence." See also Section 101 (1), according to which "the acts of the Castro government, including its massive, systematic and extraordinary violations of human rights, are a threat to international peace."
[2333] *See* Helms-Burton Act Section 2 (15) (torture), Section 2 (17) (hostage-taking), Section 2 (18) violation of the Inter-American Convention on Asylum and the International Convention on Civil and Political Rights) and Section 2 (20 and 21) (referring to reports of the UN Commission on Human Rights and the Special Rapporteur).
[2334] *See* Helms-Burton Act Sections 2 (25 and 26) and 101 (2), drawing a parallel between the situations in Cuba and Haïti after the overthrow of the democratically elected president Aristide. It may be noted however that Security Council Resolution 940 allowed states to use all necessary means to restore democratic governance in Haïti.

provided, universal jurisdiction could not obtain over them, as terrorist activities, if not specifically defined by treaties, do not give rise to universal jurisdiction, nor do violations of democratic and human rights, if they do not rise to the level of violations of peremptory norms of international law.[2335]

Linked somewhat to the argument based on universal jurisdiction, is the argument that violations of international law should, in light of the absence of a central enforcer of international law, be heard in domestic courts. The Helms-Burton Act indeed asserted that "the U.S. Government has an obligation to its citizens to provide protection against wrongful confiscations by foreign nations," because the international judicial system because it, "as currently structured, lacks fully effective remedies for the wrongful confiscation of property."[2336] A secondary boycott would, in CLAGETT's view, be all the more justified because Cuba purportedly violated basic human rights at will, without any international institution holding it to account.[2337] The argument that States should step in by extending their jurisdiction because the international legal system does not function properly, and international law thus suffers from underdeterrence, appears tenuous at best.

Assuming that the compensation paid by Cuba upon expropriation did indeed not meet international law standards, and that Cuba violated the human rights of its citizens, which is disputed, it may be argued that States *ut singuli* are not authorized to provide plaintiffs with a judicial forum to bring their claims concerning internationally wrongful acts. In the absence of a reasonable link with the forum State – which, as argued *supra* is indeed the case with the Helms-Burton Act – such extension of jurisdiction appears to be authorized only in case of violations of *jus cogens*. States are not entitled to exercise their jurisdiction over other alleged violations of international law on the sole ground that the international system does not adequately deal with them, lest they violate the international law principle of non-intervention. Indeed, in the *Corfu Channel* case, the International Court of Justice held that the deficiencies of international law are no excuse for its violation.[2338] Unlike what the Helms-Burton Act asserts, the absence of effective international remedies does not authorize the U.S to do justice to itself.[2339]

[2335] *See also* M. COSNARD, "Les lois Helms-Burton et d'Amato-Kennedy, interdiction de commercer avec et d'investir dans certains pays", 42 *A.F.D.I.* 40 (1996).

[2336] Helms-Burton Act Section 301.

[2337] B.M. CLAGETT, "Title III of the Helms-Burton Act Is Consistent With International Law", 90 *A.J.I.L.* 1996, 436-37 and 440 (submitting that the Helms-Burton Act "furthers both the development and the implementation of international law in an area where the rudimentary state of enforcement mechanisms allows rogue states to ignore that law and to violate the most elementary human rights of their own citizens and of foreigners with impunity" and that "[b]ecause the jurisdiction of international tribunals is consensual, it is only rarely that a confiscation case can be brought in such a forum. […] There is every reason for an aggrieved state to supply effective remedies on its own if it can. […] Creation of such a remedy, far from violating international law, works toward rescuing that law from relative impotence.").

[2338] See ICJ, Corfu Channel, ICJ Reports 1949, at 35: "The Court cannot accept this line of defence. The Court can only regard the alleged right of intervention as a policy of force, such as has, in the past, given rise to the most serious abuses and such as cannot, whatever be the present defects in international organisation, find a place in international law. Intervention is perhaps still less admissible in the particular form it would take here, for, from the nature of things, it would be reserved to the most powerful states." *See also* B. STERN, "How to Regulate Globalization?", in: M. BYERS (ed.), The Role of Law in International Politics, Oxford/New York, Oxford University Press, 2000, 247, at 261.

[2339] *See* Helms-Burton Act Section 301(8)-(11).

720. AN ACT ILLEGAL UNDER INTERNATIONAL LAW – Clearly, the United States faces difficulties in justifying the Helms-Burton Act under the international law of jurisdiction. What is more, discombobulated by so much congressional unreasonableness, the U.S. State Department pointed out during the congressional hearings, to no avail, that the exercise of jurisdiction under the Act would violate international law: "The Libertad Bill [the Helms-Burton Act] would represent an unprecedented application of U.S. Law. […] The principles behind Title III are not consistent with the traditions of the international system. […] Under international law and established state practice, there are widely-accepted limits on the jurisdictional authority of a state to 'prescribe', *i.e.*, to make its law applicable to the [extraterritorial] conduct of persons."[2340] The contradictory views on the legality of the Helms-Burton Act by the different branches of the U.S. government do surely weaken the claim that the jurisdictional assertions based on the Act are legal under international law.

8.2.5. Foreign (in particular European) reaction

721. In the international law of jurisdiction, which often sets forth only vague standards, the legality of a particular jurisdictional assertion is ordinarily not only dependent upon an objective assessment of jurisdictional criteria being fulfilled, but also upon the foreign reactions with which the assertion is met. If foreign reaction is mute, the legality of the assertion is boosted. If foreign reaction is hostile, the legality of the assertion may be questionable, all the more so if an objective analysis has also resulted in a *prima facie* finding of absence of prescriptive jurisdiction. As it happened, foreign reactions against the Helms-Burton have been overwhelmingly negative. Mexico, Canada, and the European Union, even adopted legislation to counteract the effects of the Helms-Burton Act on their corporations.

722. MEXICO – In 1996, soon after the enactment of the Helms-Burton Act, Mexico passed a Law of Protection of Commerce and Investments from Foreign Policies that Contravene International Law (*Ley de Protección al Comercio y la Inversión de Normas Extranjeras que Contravengan el Derecho Internacional*),[2341] which prohibits individuals or organizations, whether public or private, that are within the borders of Mexico from participating in any action that affects commerce or investment if those acts correspond to the application of laws of foreign countries.[2342]

723. CANADA – Canada adopted a similar law in 1996, which amended the Foreign Extraterritorial Measures Act. The law allows for the making of orders prohibiting or restricting the production of records and the giving of information in respect of proceedings related to the enforcement of the Helms-Burton Act, and expands the rights of recovery in respect of foreign judgments given in proceedings under the Act.[2343] A bill was even introduced in the Canadian Parliament which

[2340] Legal Considerations on Title III of Libertad Act, 141 Cong. Rec., S 15106-8, 12 October 1995.
[2341] Full text available at http://www.cddhcu.gob.mx/leyinfo/doc/63.doc
[2342] *Id.*, Article 1.
[2343] Bill C-54, 45 Elizabeth II, Ch. 28, available at http://www.parl.gc.ca/35/2/parlbus/chambus/house/bills/government/C-54/C-54_4/17995bE.html. The Bill specifically refers to the Helms-Burton Act in its Article 7.1 ("Any judgment given under the law

called, along the lines of the Helms-Burton Act, for descendants of United Empire Loyalists who fled the American Revolution (1776) to be able to reclaim land and property that was confiscated by the American government. The bill would also have allowed the Canadian government to exclude corporate officers, or controlling shareholders of companies that possess property formerly owned by Loyalists, as well as the spouse and minor child of such persons from entering Canada.[2344] The bill, a parody on the Helms-Burton Act, was obviously not adopted, but its very introduction is testimony to Canadian *opinio juris* that the jurisdictional assertions it contained were totally unreasonable from an international law perspective.

724. EU – In light of the transatlantic perspective of this study, and the fact that EU trade amounted to 45 % of Cuba's foreign commerce, the European reaction will be discussed at greater length here. In November 1996, upon stating that the Helms-Burton Act and ILSA were contrary to international law, the Council of the EU adopted Regulation 2271/96, a blocking and clawback regulation similar in scope to the Canadian Act, in order to counteract the effects of Helms-Burton and ILSA, on European corporations.[2345] Aside from adopting this regulation, the EC also filed a lawsuit with the WTO against the United States, alleging that the Helms-Burton Act and ILSA were incompatible with the GATT agreement.

Regulation 2271/96 was not adopted out of the blue. Its structure drew on the 1980 British Protection of Trading Interests Act,[2346] a UK act primarily aimed at counteracting the effects within the UK of assertions of U.S. antitrust jurisdiction, but which the United Kingdom also relied upon as a response to the Helms-Burton Act and ILSA[2347]. Moreover, legislation aimed at blocking the reach of U.S. secondary boycotts at the EU/EC level had already been contemplated by the EC when the Mack Amendment was pending in the U.S. Congress in 1991-92.[2348] This Amendment to the U.S. Export Administration Act (EAA) of 1979, which was to result in the Cuban

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of the United States entitled *Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996* shall not be recognized or enforceable in any manner in Canada.").

[2344] Godfrey-Milliken Bill, Bill C-339, first reading October 22, 1996, available at http://web.textfiles.com/politics/NWO/nwo_0012.txt. The promotors of the bill were themselves descendants of the Loyalists.

[2345] *See* the EU statement on the Helms-Burton Act, Dec. 15, 1997, available at http://europa.eu.int/comm/external_relations/us/extraterritoriality/statement_15_12_97.htm ("The European Union […] is opposed to the use of extraterritorial legislation, both on legal and policy grounds. […] Such laws represent an unwarranted interference by the U.S. with the sovereign right of the EU to legislate over its own citizens and companies, and are, in the opinion of the EU, contrary to international law.").

[2346] Council Regulation (EC) No. 2271/96, Protecting Against the Effects of the Extraterritorial Application of Legislation Adopted by a Third Country, 36 *I.L.M.* 125 (1997). The United Kingdom applied the the British Protection of Trading Interests Act 1980 as a response to the Helms-Burton Act and the Iran Libya Sanctions Act.

[2347] Extraterritorial US Legislation (Sanctions against Cuba, Iran and Libya) (Protection of Trading Interests) Order, (1996), SI 1996/3171. *See also* A. LAYTON & A.M. PARRY, "Extraterritorial jurisdiction – European Responses", 26 *Houston J. Int'l L.* 309, 313 (2004).

[2348] Letter, dated 7 February 1992, addressed to U.S. Senator Jack Garn by the UN Delegation of the EC Commission, reprinted in *B.Y.I.L.* 1992, at 728 ("Measures such as the Mack amendment are also prompting debate within the Community about whether it would be desirable to have a blocking statute at Community level in order to defend the interests of companies lawfully established in Europe."). Several aspects of the Mack amendment had previously been considered as having no basis in international law by the UN Delegation of the EC Commission to the U.S. Congress (Letter, 27 April 1990, *B.Y.I.L.* 1992, 725).

Assets Control Regulations (1993), prohibited U.S.-owned subsidiary companies domiciled outside the U.S., such as in Europe, from trading with Cuba. While in 1991-92, blocking legislation was still considered to be inopportune or unreasonable, the extension of U.S. secondary boycott legislation beyond the control theory in the 1996 Helms-Burton Act changed the matter.

Considering that, when "a third country has enacted certain laws, regulations, and other legislative instruments which purport to regulate the activities of natural and legal persons under the jurisdiction of the Member States of the European Union", "by their extraterritorial application such laws, regulations and other legislative instruments violate international law", Council Regulation 2271/96 both blocked the European effects of the Helms-Burton Act and the Iran Libya Sanctions Act, and 'clawed back' at the acts. For one thing, the Regulation provides that "no judgment of a court or tribunal and no decision of an administrative authority located outside the Community giving effect, directly, or indirectly [to the American laws] shall be recognised or be enforceable in any manner."[2349] EC undertakings are not allowed to comply with any requirement or prohibition, including requests of foreign courts, based on the acts.[2350] For another, any EC undertaking shall be entitled to recover any damages caused to it by the application of the acts.[2351] Such recovery may be obtained from the natural or legal person or any other entity causing the damages. It could take the form of seizure and sale of assets held by those persons within the Community. Regulation 2271/96 is mainly of symbolic relevance, as there have been no cases under it.

725. WTO LAWSUIT – Apart from enacting Regulation 2271/96, the EC filed a lawsuit with the WTO Dispute Settlement Mechanism to declare the Helms-Burton Act and ILSA illegal under the security exemption of Article XXI of GATT. This article allows a WTO Member to take any action which it considers necessary for the protection of its essential security interests taken in time of war or other emergency in international relations. The WTO Dispute Settlement Mechanism was thus invited to review the acts in light of the protective principle of jurisdiction under international law.[2352] It may be noted that, if the WTO were to strike down the Helms-Burton Act and ILSA on the ground of Article XXI of GATT, such need not imply that the Acts would also be illegal under the general law of international jurisdiction, as the Acts could possibly be justified on the basis of, *e.g.*, the effects doctrine (*quod non* in this case however, as argued in 8.2.4).

The EC however dropped the WTO case against the U.S. after concluding an Understanding with the United States on U.S. extraterritorial legislation on 11 April 1997.[2353] The Understanding establishes a Transatlantic Partnership on Political Co-operation under which the U.S. will "not seek or propose, and will resist, the passage of" secondary boycotts. Nonetheless, the EC reserved all rights to resume the panel procedure, or begin new proceedings, if action is taken against EU companies or

[2349] Council Regulation 2271/96, Article 4.
[2350] *Id.*, Article 5.
[2351] *Id.*, Article 6.
[2352] *See also* K.J. KUILWIJK, "Castro's Cuba and the U.S. Helms-Burton Act. An Interpretation of the GATT Security Exemption", 31 *J.W.T.* 49-61 (1997).
[2353] Available at http://ec.europa.eu/comm/external_relations/us/extraterritoriality/understanding_04_97.htm

individuals under Title III or Title IV of the Helms-Burton Act or if the waivers under the Iran Libya Sanctions Act (ILSA) are not granted or are withdrawn. The U.S. took the position that the present Understanding conveys no legal commitment that waivers will be granted under the ILSA. The WTO proceedings are currently still suspended, while the U.S. has not started proceedings under ILSA. It has renewed the waivers under Title III of the Helms-Burton Act every six months. These formal or informal waivers do however not exclude a revival of ILSA and the Helms-Burton Act in case the U.S. decide to step up efforts to further isolate Cuba and Iran, and the EU does not follow suit.

8.2.6. The Helms-Burton and Iran Libya Sanctions ActS after 1997

726. In spite of the 1997 Understanding, the European Commission continued to rebuke the U.S. over the Helms-Burton Act and ILSA in its 2004 Report on U.S. Barriers to Trade and Investment.[2354] It pointed out that the U.S. Congress had failed to take the necessary measures for a full implementation of the 1997 Understanding. While admitting that "waivers under Title III of Helms-Burton have been continuously granted on a six-monthly basis and no action has been taken, so far, against EU citizens or companies under Title IV", the Commission took issue with the apparent continuation of investigations by the United States into certain EU companies' investments in Cuba. The EC therefore considered "the existence of Helms-Burton and the lack of permanent waivers under Titles III and IV to constitute an on-going threat to EU companies doing or intending to do legitimate business in Cuba." As far as ILSA was concerned, the Report deplored that the EU was not granted a multilateral regime waiver as foreseen by the 1997 Understanding and that waivers were only granted on an *ad hoc* basis, such as for the EU investment project in the South Pars Field in Iran.

727. The Clinton Administration had indeed announced to waive ILSA sanctions on a project by the French company Total which developed the Iranian South Pars gas field on May 18, 1998.[2355] After the South Pars case, several projects have been placed under review for sanctions, but no determinations have been announced.[2356] This may not surprise: penalizing non-U.S. firms would, apart from igniting a costly trade war, probably weaken the necessary support of U.S. allies in combating terrorism and the development of weapons of mass destruction (WMD). This has led to a situation in which, in practice, only U.S. firms are penalized by the U.S. embargo against Iran and Libya, a consequence which has boosted claims to drop ILSA, which – due to its lack of enforcement – is considered to be a bad piece of

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[2354] European Commission, *Report on U.S. Barriers to Trade and Investment*, Brussels, December 2004, available at http://europa.eu.int/comm/trade/issues/bilateral/countries/usa/pr231204_en.htm, 11-14.

[2355] UNDERSTANDING WITH RESPECT TO DISCIPLINES FOR THE STRENGTHENING OF INVESTMENT PROTECTION, U.S.-EU Summit, 18 May 1998, available at http://www.eurunion.org/partner/summit/Summit9805/invest.htm; *See also* http://europa.eu.int/comm/external_relations/us/extraterritoriality/eu_statement_18_05_98.htm; M. VAN LEEUWEN, "Het zwaard van Damocles. De Transatlantische overeenkomst van mei 1998 over Amerikaanse extraterritoriale wetgeving" ["The Sword of Damocles. The Transatlantic Agreement of May 1998 on American extraterritorial legislation"], *Internationale Spectator* 52, 1998, 459-461.

[2356] *See* K. KATZMAN, "The Iran-Libya Sanctions Act (ILSA)", *CRS Report for Congress*, RS20871, updated July 20, 2001, CRS-4, available at http://www.au.af.mil/au/awc/awcgate/crs/rs20871.pdf.

legislation.[2357] In spite of its non-application, the mere existence of ILSA, and its system of *ad hoc* waivers, may nevertheless have a dissuasive effect on investors.

728. After the failure of ILSA, the United States did not back down in its efforts to isolate Iran through extraterritorial legislation. In 2000, Congress adopted the Iran Non-Proliferation Act (INPA),[2358] the aim and instruments of which were specifically tailored to Iran's threat of weapons of mass destruction. INPA applies to all foreign persons who transfer goods, services or technology having the potential to make a material contribution to the development of nuclear, biological, or chemical weapons, or of ballistic or cruise missile systems. If foreign persons do not comply, the U.S. could apply certain measures, such as the prohibition of U.S. government procurement,[2359] arms export prohibition[2360] or dual use export prohibition.[2361] Every six months, the President submits to the Committee on International Relations of the House of Representatives and the Committee on Foreign Relations of the Senate a report identifying every suspected foreign person.[2362]

729. Before the adoption of INPA, the EU repeatedly expressed concerns over the extraterritorial effects of INPA. European exports to Iran are indeed subject to EU Member State and EU export control regimes as well. U.S. sanctions have not been taken against EU companies. However, the EU considers the mere threat of extraterritorial sanctions against EU companies to be incompatible with the 1997 Understanding between the EU and the U.S. The European Commission therefore urged the Bush Administration in a 2004 Report to take appropriate steps to repeal that threat. The reluctance of U.S. regulators to apply INPA to EU companies is tied to President Clinton's statement when signing INPA on March 14, 2000. In that statement, the President held: "The expansive reporting requirements in this bill in many ways duplicate existing laws, and my Administration will work with the Congress to rationalize these overlapping reporting requirements. We will also seek to rationalize the reporting requirements relating to certain transfers in instances where those transfers are legal under the applicable foreign laws and consistent with the guidelines of the applicable multilateral export control regime."[2363] That pledge does

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[2357] *See for example*: E.D.K. MELBY, "ILSA – Let It Lapse?", Forum for International Policy, 23 July 2001, available at: http://ffip.com/issuebriefs072301.htm STERN contends that business pressure resulted in the adoption of ILSA, as the French company Total was awarded a major Iranian contract instead of the American bidder Conoco. *See* B. STERN, *Les lois Helms-Burton et D'Amato: une analyse politique et juridique*, Europa-Institut der Universität des Saarlandes, nr. 363, 1997, at 9. It is true that Total defeated Conoco, but that was before the adoption of the U.S. embargo in 1995. After 1995, U.S. companies were in any event prevented from doing energy business with Iran.

[2358] Pub. L. 106-178, Mar. 14, 2000, 114 Stat. 38 (50 U.S.C. 1701).

[2359] Iran Nonproliferation Act, Section 3 (b)(1) *juncto* Section 4 (b) and (c) of Executive Order 12938 (November 14, 1994) on weapons of mass destruction. Executive Order 12938 imposes sanctions on a foreign person with respect to chemical and biological weapons proliferation if the Secretary of State determines that the foreign person on or after the effective date of the order or its predecessor, Executive Order No. 12735 of November 16, 1990, knowingly and materially contributed to the efforts of any foreign country, project, or entity to use, develop, produce, stockpile, or otherwise acquire chemical or biological weapons.

[2360] Iran Nonproliferation Act, Section 3 (b)(2).

[2361] *Id.*, Section 3 (b)(3).

[2362] *Id.*, Section 2. *See e.g.* New York Times, "Bush Puts Penalties on Nuclear Suppliers", 2 April 2004.

[2363] The text of the statement is available at http://usinfo.org/usia/usinfo.state.gov/topical/pol/arms/stories/00031501.htm

not grant a waiver to EU companies, but greatly reduces the threat of EU companies being subject to multiple regulatory regimes.

730. In spite of its extraterritorial character, the Iran Nonproliferation Act did not meet with the sort of criticism that the Helms-Burton Act and ILSA met with. This might be attributable to the fact that, unlike in ILSA, the prohibited activities are tailored to the target, *i.e.*, the nonproliferation of WMD. Under ILSA, investing in the energy industry was prohibited because such was presumed to increase Iran's WMD capacities, although there was no actual proof of this claim. As far as the Iran Proliferation Act is concerned, there is no doubt that WMD trade might increase Iran's WMD capacities. Therefore, it seems that the requirement of reasonableness, which tempers the exercise of extraterritorial jurisdiction, *in casu* on the basis of the protective principle, is actually met. There is widespread international consensus on the danger of WMD proliferation,[2364] so that, short of an effective encompassing United Nations regime, most States arguably tolerate and even support the non-proliferation activities of the United States.

8.3. Concluding remarks

731. In view of foreign nations' repeated and unisonous rejections of extraterritorial jurisdiction used as a (U.S.) foreign policy tool boosting the efficiency of U.S. economic boycotts, it might be argued that secondary boycotts are illegal under international law. Foreign protests may indeed be considered as objections to the crystallization of a norm of customary international law which would allow States to exercise their jurisdiction extraterritorially for foreign policy objectives. It may be noted that, as in other fields of the law, foreign protest against secondary boycotts is not entirely based on a belief that the customary international law of jurisdiction is violated, but also on a non-reciprocal defense of national economic sovereignty, differences of substantive law, and, in this specific case in particular, on irreconcilable policy differences. Underlying the conflict over secondary boycotts is surely a European wariness of economic sanctions as a foreign policy tool. [2365]

732. Secondary boycotts that are not based on the tenuous link of domestic corporate control, a link which has at times served as a justification for the exercise of jurisdiction, have obviously caused quite some controversy and foreign protest. It comes as no surprise that such boycotts have largely come to nothing, with the United States being forced by the European Community to withdraw the 1982 Soviet Pipeline Regulations (which were purportedly justified by the U.S. 'nationality of technology'), and to suspend the 1996 Helms-Burton and Iran Libya Sanctions Acts. The two latter acts even caused the EU Council to adopt legislation aimed at blocking their effects on European corporations and 'clawing back' at them, and to an EU-U.S. Understanding which contains, unlike the transatlantic antitrust cooperation

[2364] The Iran Nonproliferation Act particularly refers to goods, services, or technology listed on multilaterally agreed lists (*Id.*, Section 2 (a)(1)).

[2365] *See* K. KATZMAN, "The Iran-Libya Sanctions Act (ILSA)", *CRS Report for Congress*, RS20871, updated July 20, 2001, CRS-3, available at http://www.au.af.mil/au/awc/awcgate/crs/rs20871.pdf. *See also* the EU statement on the Helms-Burton Act, Dec. 15, 1997, available at http://europa.eu.int/comm/external_relations/us/extraterritoriality/statement_15_12_97.htm: "The European Union […] is opposed to the use of extraterritorial legislation, both on legal *and policy* grounds." (emphasis added).

agreements, no substantive rights for the U.S., and thus constitutes a painful political defeat for the U.S.[2366] Yet even the legality of secondary boycotts justified by the control exercised by a domestic corporation over a foreign corporation is highly questionable, although the U.S. has continuously relied on this justification – the control theory – since 1942. The Cuban Assets Control Regulations (1993), currently in force, are but one of the latest example of secondary boycotts based on that theory that have given rise to international tension, tension which is, admittedly, not of the sort with which the adoption of the Helms-Burton Act met. Sovereign protest has, however, not impelled the U.S. to abandon the control theory. As a result, foreign subsidiaries of U.S. corporations have tended to comply with U.S. regulations (even if they could possibly be exempted under administrative requirements of the U.S. Office of Foreign Assets Control).[2367]

It may be noted that international tension may also ensue when States exercise jurisdiction over the investments of their own nationals abroad. One could think of the U.S. practice of declaring it unlawful for U.S. investors to invest in third-country companies that are "predominantly dedicated to investments, projects or other economic activities" in which a U.S. person is prohibited from engaging under U.S. export control regulations.[2368] This practice does *prima facie* not run afoul of international law because it is directed at the conduct of a State's own nationals, and not at the conduct of a foreign (although domestically controlled) corporation. However, it could be argued that it undermines the foreign State's sovereign interests in that it impedes it to develop its own economic policy – of which giving broad investments opportunities for foreign investors may be an integral part – without foreign interference.

733. Foreign, especially European, reactions to the adoption of secondary boycotts are among the few official foreign governmental protests against the exercise of 'extraterritorial' jurisdiction by a State. The rejection of the sort of extraterritorial jurisdiction underlying secondary boycotts should however not be seen as an across-the-board rejection of extraterritorial jurisdiction. In the field of export controls, sovereign interests are usually stronger than in other fields of the law where assertions of extraterritorial jurisdiction have surfaced.[2369] In these other fields, European States and the European Community have indeed often been more accommodating, have believed that private rather than sovereign interests were implicated, and have even engaged in 'extraterritorial' jurisdiction themselves. In 1972 for instance, the European Court of Justice adopted a variant of the piercing of the corporate veil doctrine in the context of competition law, when it established jurisdiction over a foreign corporation on the ground that it control a domestic corporation in the *Dyestuffs* case.[2370] A European-style reliance on control jurisdiction when domestic

[2366] *See also* W.S. DODGE, "Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism", 39 *Harv. Int'l L.J.* 101, 167-68 (1998) (submitting that the sheer impossibility of justifying the acts in international law terms has greatly hampered U.S. negotiations).
[2367] *See* J. LEE & J. SLEAR, "Beware of Ofac", *IFLR* 58, 59 (September 2006).
[2368] *See* J. LEE & J. SLEAR, "Beware of Ofac: a Little-known Agency Poses Challenges to International Finance", *IFLR* 58 (September 2006).
[2369] *See* A. BIANCHI, "Extraterritoriality and Export Controls: Some Remarks on the Alleged Antinomy Between European and U.S. Approaches", 35 *G.Y.I.L.* 366, 374 (1992).
[2370] ECJ, Case 48/69, *Imperial Chemical Industries Ltd. v. Commission* ('Dyestuffs'), E.C.R. 1972, 619. *See also* reporters' note 1 to § 414 of the Restatement (Third) of U.S. Foreign Relations Law (1987).

effects of the controlling corporation's price-fixing conspiracy could be discerned is however quite different from a U.S.-style reliance on control jurisdiction over a controlled corporation on the sole basis that control furnishes nationality-based jurisdiction, irrespective of the presence of clearly discernible territorial effects.[2371] The *Dyestuffs* economic entity doctrine, as applied in the field of competition law, should therefore not be invoked as European State practice as far as piercing the corporate veil for extraterritorial export controls is concerned.

734. Secondary boycotts may violate the international law principle of non-intervention in that they impose a foreign economic policy on third States. A single powerful State's idiosyncratic views on the legitimacy and desirability of another State's political regime could not be allowed to dictate global boycott legislation.[2372] Boycotts are only legitimate if they are chosen by, and not imposed on States (primary boycotts), or if they have a multilateral legal basis (international boycotts, *e.g.*, on the basis of a UN Security Council Resolution under Chapter VII of the UN Charter).[2373] Unlike with respect to other fields of the law, there is no need for developing a workable theory of unilateral jurisdiction which States may rely upon in the absence of a multilateral boycott framework.[2374]

735. At most, it may be argued that, given the continuing reliance on the control theory by the United States, which foreign pressure has not managed to dismantle, possibly because such pressure was too weak, States may be deemed to acquiesce or have acquiesced in certain control-based jurisdictional assertions, and thus to contribute to the emerging recognition of the jurisdictional control theory as a norm of customary international law. A State's reliance on the control theory appears certainly as justified in the situation of domestic parents deliberately setting up subsidiaries and branches in foreign safe havens in order to escape the writ of domestic legislation. Also, in times of war, control jurisdiction may be justified, as an exercise of protective jurisdiction.

CHAPTER 9: EXTRATERRITORIAL DISCOVERY

[2371] *See also* A. BIANCHI, "Extraterritoriality and Export Controls: Some Remarks on the Alleged Antinomy between European and U.S. Approaches", 35 *G.Y.I.L.* 366, 417 (1992).

[2372] An overview of all U.S. extraterritorial sanctions regimes (notably against Cuba, North Korea, Iran and Sudan) can be found in H.L. CLARK, "Dealing with U.S. Extraterritorial Sanctions and Foreign Countermeasures", 20 *U. Pa. J. Int'l Bus. L.* 61 (1999) and 25 *U. Pa. J. Int'l Econ. L.* 455 (2004).

[2373] When multilaterally agreed upon, economic boycotts may have certain extraterritorial effects. In 1993 for instance, the EC Council prohibited vessels, in accordance with a Security Council resolution, from entering the territorial waters of the former Yugoslavia. *See* Council Regulation nr. 990/93 of 26 April 1993, *O.J.* L 102/14 (1993). Vessels that violated the Regulation, even if they belonged to nationals of third States or were flying the flag of third States could be seized and forfeited as soon as they could be found in the territory of a Member State. *See* ECJ, *Ebony Maritime and Loten Navigation*, 27 February 1997, C-177/95, E.C.R. 1997, I-1111, paras. 18-19. *See also* J. VANHAMME, *Volkenrechtelijke beginselen in het Europees recht*, Groningen, Europa Law Publishing, 2001, 138.

[2374] While multilaterally agreed international sanctions regimes may often prove elusive, an international dispute settlement mechanism so as to resolve conflicts over the unilateral exercise of jurisdiction by States enacting secondary boycott legislation may prove no less so. *See* D.F. VAGTS, « The Pipeline Controversy: an American Viewpoint », 27 *G.Y.I.L.* 38, 53 (1984). Nonetheless, as the dispute over the Helms-Burton Act and ILSA have illustrated, the WTO Dispute Settlement Mechanism may prove a limited, albeit useful forum for mediating jurisdictional assertions at a multilateral level.

736. In transnational disputes over which States exercise substantive 'extraterritorial' jurisdiction, valuable documents that could serve as evidence are often located abroad. In order to bring the truth to light before the court hearing the dispute, a mere exercise of prescriptive jurisdiction over the subject-matter of the dispute does not suffice: courts may have to order, usually at the request of one of the parties, the production of documents held by one party abroad, or the deposition of witnesses residing abroad.

737. The traditional method of getting hold of foreign-based evidence is international judicial cooperation. To that effect, the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters was concluded in 1970.[2375] Another method consists of ordering a defendant over which a State has personal jurisdiction, possibly by means of a subpoena, to produce documents held abroad by that person, his employer, or a person controlled by the former. While the former method, based on international cooperation, does not raise issues of extraterritorial jurisdiction, the latter clearly does: court orders to produce foreign-based documents subject such documents to the laws and procedures of a State other than the State where they are located.[2376]

738. European States appear to rely exclusively on international cooperation so as to get hold of foreign-based evidence. Their position does not give rise to extraterritoriality concerns.[2377] U.S. courts by contrast have often considered international cooperation to be too cumbersome and disadvantageous to plaintiffs. Instead, they have applied the domestic rules of discovery (evidence-taking) to transnational litigation, and unilaterally ordered defendants to produce foreign-based materials under threat of a subpoena. As document disclosure is subject to territorial legislation as well, and even more, as the disclosure of certain documents is sometimes prohibited under foreign law, discovery orders by U.S. courts with extraterritorial effect have regularly met with stiff foreign opposition, especially from European States. This has occurred most notably in international antitrust proceedings, where the outcome often depended on evidence of business restrictive practices located abroad,[2378] and where the underlying assertions of prescriptive jurisdiction were also contested.[2379] It is against this backdrop that one ought to understand reporter's note 1 to § 442 of the Restatement (Third) of the Foreign Relations Law of the United States (1987), which states that "[n]o aspect of the

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[2375] Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters, March 18, 1970, 847 *U.N.T.S.* 231.

[2376] *See* H.L. BUXBAUM, "Assessing Sovereign Interests in Cross-Border Discovery Disputes: Lessons From *Aérospatiale*", 38 *Texas Int. L. J.* 87 (2003). *See however* C. DAY WALLACE, "'Extraterritorial Discovery: Ongoing Challenges for Antitrust Litigation in an Environment of Global Investment", *J. Int'l Econ. L.* 353, 355 (2003) (arguing that "these procedures are by no means universally agreed to be 'extraterritorial' in fact"). *Compare* cmt. a to § 442 of the Restatement (Third) of U.S. Foreign Relations Law (stating that "[d]iscovery … is an exercise of jurisdiction").

[2377] *See* R.A. TRITTMANN, "Extraterritoriale Beweisaufnahmen und Souveränitätsverletzungen im deutsch-amerikanischen Rechtsverkehr", 27 *Archiv des Völkerrechts* 195 (1989)

[2378] *See* C. DAY WALLACE, "'Extraterritorial Discovery: Ongoing Challenges for Antitrust Litigation in an Environment of Global Investment", *J. Int'l Econ. L.* 353 (2003).

[2379] *See, e.g.*, United Kingdom, brief as *amicus curiae* in litigation between *Westinghouse Electric Corp.* and *Rio Algom Limited et al.*, July 1979, *B.Y.I.L.* 355 (1979) ("Because of the basic disagreement over the international legality of assertions in antitrust cases of jurisdiction based on the 'effects' test there have been well known disagreements over the proper scope of discovery requests and remedy orders issued by U.S. courts in international antitrust cases.")

extension of the American legal system beyond the territorial frontier of the United States has given rise to so much friction as the request for documents associated with investigation and litigation in the United States."

739. This chapter will start with a comparative law analysis of the rules of evidence-taking (discovery) in the United States and Europe (section 9.1), as deep-rooted procedural predilections may go a long way in explaining the climate of mutual incomprehension and international tension regarding the long arm of U.S. discovery rules (section 9.2). The controversy over the extraterritorial application of U.S. discovery rules has mainly focused on two issues: whether U.S. courts ought to dismiss discovery requests relating to foreign-based materials which are subject to secrecy laws in the State where they are located (section 9.3), and whether the Hague Evidence Convention rather than unilateral U.S. discovery orders should be the primary avenue to get hold of foreign-based materials (section 9.4). The majority of U.S. courts have answered in the negative to both questions. This has obviously led to fierce foreign protests, including the enactment of blocking legislation by foreign States, *i.e.*, legislation which prohibits foreign persons from complying with extraterritorial U.S. discovery orders (section 9.5). Clearly, the reach of U.S. discovery rules is considered as too broad by foreign nations, even by common law nations such as the United Kingdom, which also resorts to transnational discovery, albeit very conservatively (section 9.6). While the long-standing conflict over U.S. extraterritorial discovery has somewhat subsided of late, a new controversy has emerged, concerning the question of whether parties in a foreign litigation could request discovery in the United States, even though they could not do so in the State where the underlying litigation was pending. In 2004, the U.S. Supreme Court ruled that they could, but attached a number of qualifications, which may possibly accommodate foreign nations (section 9.7). In a final part, a framework for the exercise of discovery jurisdiction informed by the jurisdictional rule of reason will be proposed (section 9.8).

9.1. Rules of evidence-taking in the United States and in Europe

740. It is not the aim of this study to provide a comparative overview of the law of evidence-taking in the U.S. and Europe. It might however prove useful for a proper understanding of the transatlantic conflict over U.S. discovery to briefly sketch the basic features of U.S. common law and European civil law evidence-taking procedures.

741. U.S. DISCOVERY – Under U.S. law, evidence-taking in private litigation is mainly secured through discovery. Discovery refers to the pre-trial methods that parties can use to obtain information held by the other party. Discovery not only serves to preserve evidence, but also to reveal facts and to aid in formulating the legal issues.[2380] Through discovery, factual controversies might be eliminated, which can pave the way for summary judgment on the legal issues, *i.e.*, adjudication focused on the law without the need for a full trial.[2381]

[2380] *See* M.K. KANE, *Civil Procedure*, St Paul, MN, Thomson West, 2003, at 129.
[2381] *See* on summary judgments: *Id.*, at 160-167.

Subject to certain limitations, the Federal Rules of Civil Procedure provide that "[p]arties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party".[2382] The parties may obtain discovery of any matter relevant to the subject matter involved in the action on an extrajudicial basis, *i.e.*, without needing a discovery order made by a judge.[2383] The Federal Rules specifically set forth that "[r]elevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence."[2384] This implies that information could be discovered which might be relevant for the case, but turns out not to be.

Disputes concerning discovery can always be brought before the courts, which usually grant discovery in a very liberal way: the party opposing discovery bears the burden of proof that the sought discovery is too extensive.[2385] If the judge indeed considers the sought discovery to be too extensive, he may issue a protective order. A failure to comply with any court order relating to discovery may be considered as contempt of court. Also, the court might consider the facts of which discovery was sought to be established.[2386]

Discovery is essentially a pre-trial method. This may require some explanation. The nature of the U.S. is such that while a professional judge applies the *law* to the case, a lay jury determines the issues of *fact* in a separate proceeding. Given the presence of the lay jury, the trial is continuous. Accordingly, unlike in civil law countries, where a professional judge controls the entire trial, there is barely room for evidence-taking *during* the trial in the United States. Attorneys therefore obtain discovery *before* the actual trial, in a 'pre-trial' phase. An important part of European opposition against international judicial assistance with regard to U.S. discovery requests may be attributable to the fact that discovery is not part of the trial (although it certainly is part of the litigation process).[2387]

742. The most salient bone of contention surrounding discovery is, both domestically and internationally, probably the almost unlimited access to facts favored by the U.S. legal system, which was upheld in *Hickman* v. *Taylor*, a 1947 U.S. Supreme Court opinion: "[M]utual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession."[2388] When U.S. courts order discovery in transnational litigation to the same extent as they do in domestic litigation, clashes are inevitable, for in no other State do the parties enjoy similar far-reaching fact-finding powers with minimal judicial supervision. Possibly, it is the

[2382] Rule 26(b)(1) F.R.C.P.
[2383] Several discovery techniques may be used, such as depositions (Rules 27-30 F.R.C.P.), depositions upon written questions (Rule 31 F.R.C.P.), interrogatories (Rule 33 F.R.C.P.), the production of documents and things (Rule 34 F.R.C.P.) and physical and mental examinations (Rule 35 F.R.C.P.).
[2384] Rule 26(b)(1) F.R.C.P.
[2385] *See U.S.* v. *International Business Machines*, 81 F.R.D. 628 (D.C.N.Y. 1979).
[2386] Rule 37(b) F.R.C.P.
[2387] *See* D.J. GERBER, "Extraterritorial Discovery and the Conflict of Procedural Systems: Germany and the United States", 34 *Am. J. Comp. L.* 745, 749-50 (1986).
[2388] *Hickman* v. *Taylor*, 329 U.S. 495, 507 (1947).

"fishing expeditions" authorized under U.S. discovery rules rather than the extraterritorial reach of these rules that have upset foreign nations.[2389]

743. THE LAW OF EVIDENCE-TAKING IN EUROPE – U.S.-style discovery is much more liberal than in European countries, especially civil law countries. Even discovery in common law England, from which U.S. discovery developed, is much more limited than in its U.S. counterpart.[2390] In England, discovery is obligatory only when the pleadings are closed, and only documents held by the parties to the dispute are discoverable.[2391] Discovery from non-parties, pre-trial interrogations and depositions, which are admissible in the United States, are almost non-existent.[2392] An English author pointed out that English lawyers and judges have a "negative view of, if not […] outright hostility to, American-style discovery."[2393] This negative view materialized in the United Kingdom making a reservation to the Hague Evidence Convention with respect to the execution of letters of request issued for the purpose of obtaining pre-trial discovery of documents.[2394]

In civil law countries, the taking of evidence is ordered by the courts, mainly at the request of the parties and sometimes *proprio motu*. The broad out-of-court discovery powers which parties are entitled to in the U.S. is not known in Europe. In Europe, both the jury and a pre-trial phase under attorneys' control are almost non-existent. The judge is the sole actor in the process of determining facts and applicable law. Unlike in the U.S., the civil law trial is drawn out over a longer period of time, which allows the judge to conduct hearings. During these hearings, the judge, and not the attorney, questions witnesses. In between these hearings, evidence can still be gathered under judicial supervision. This implies that an order compelling the

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[2389] *See, e.g.*, Lord Diplock's hardly neutral description of U.S. discovery as a "wide-roving search for any information that might be helpful". *British Airways Board* v. *Laker Airways Ltd.*, [1984] 3 WLR 410, 413; [1985] A.C. 58, 78. *See* for the first use of the term: *Radio Corp. of America* v. *Rauland Corp.*, [1956] 1 Q.B. 618, 649 (Goddard, C.J.); *Rio Tinto Zinc Corporation* v. *Westinghouse Electric Corporation*, [1978] A.C. 547, 609, [1978] 2 WLR 81, 87 (Lord Diplock).

[2390] *See* D. MCCLEAN, *International Co-operation in Civil and Criminal Matters*, Oxford, Oxford University Press, 2002, 90.

[2391] R.S.C. Order 24 r.2 (Eng.) ("[T]his paragraph shall not apply in third party proceeding, including proceedings under that Order involving fourth or subsequent parties.").

[2392] *See* L. COLLINS, « Opportunities for and Obstacles to Obtaining Evidence in England for Use in Litigation in the United States », 13 *Int'l Law.* 27, 29 (1979). Also, under R.S.C. Order 24 r.2 (Eng.), a court may order discovery "of such documents or classes of documents only, or as to such only of the matters in question, as may be specified in the order."

[2393] *Id. See, e.g., British Airways Board* v. *Laker Airways Ltd.*, [1984] 3 WLR 419; [1985] A.C. 78 (stating that U.S. discovery "seems to any English lawyer strange and, indeed, oppressive upon defendants").

[2394] Pursuant to Article 23 of the Hague Evidence Convention, a contracting State may declare that it will not execute letters of request "issued for the purpose of obtaining pre-trial discovery of documents as known in common-law countries." Civil law countries, notably France and Germany, also made a reservation. While the English reservation allows qualified pre-trial discovery (relevancy requirement, no third-party discovery), the French and German reservations were almost blanket. While, after a Special Commission urged the contracting States of the Hague Evidence Convention to review their declarations (1978), France allowed discovery subject to a relevancy requirement, Germany remains adamant in its opposition against U.S. discovery. Although German implementing legislation provided for the possibility of ministerial regulations permitting limited document production (BGBl 1997 I S. 3105), any such regulations have proved elusive. *See* C.D. WALLACE, "'Extraterritorial Discovery: Ongoing Challenges for Antitrust Litigation in an Environment of Global Investment", *J .Int'l. Econ. L.* 353, 368 (2003).

production of documents is only made after a discussion on the merits and never in the pre-trial phase.[2395]

744. Civil law procedural codes are adamant about the central role of the judge and the subsidiary role of the parties.[2396] In France, the *Nouveau Code de Procédure Civile* provides that, if a party wants to obtain a document from either a party to the dispute or a third party, it should seize the *judge*.[2397] She cannot request discovery directly from another party. The judge can order document production in relation to factual circumstances only where the party lacks the necessary means to prove these circumstances.[2398] Similarly, under the Belgian *Code de Procédure Civile*, it is the *judge* who orders parties to produce the evidence they possess.[2399] As far as the questioning of witnesses is concerned – which in the U.S. usually takes place by the attorneys without judicial supervision – the German *Zivilprozessordnung* provides that the *judge* always supervises the questioning in case he does not question the witnesses himself.[2400]

745. The parties to a European dispute do not have the sort of inquisitorial or "fishing" powers that the parties in U.S. proceedings enjoy. European courts see to it that only information that is relevant for the trial is discovered. In Germany for instance, the judge could, at the request of a party, compel the production of documents only if the documents can be reasonably expected to influence the case and the plaintiff is able to describe the facts that the evidence is intended to prove.[2401] Yet still, the opponent can only be compelled to produce documents if he has previously referred to them or if he is obligated to do so under provisions of substantive law.[2402] Under Belgian law, the judge can compel a party to produce documents only in case of grave and precise presumptions that a certain document that proves a relevant fact is in the possession of a party to the dispute or a third party.[2403] In England, discovery should be restricted to matters that are relevant for the

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[2395] *See* P. VAN LEYNSEELE & M. DAL, "Pour un modèle belge de la procédure de discovery ?", *Journal des Tribunaux* (Belgique) 225, 231 (1997). These authors urge the Belgian courts to draw lessons from the – in their view more efficient – U.S. *pre-trial* discovery experience.

[2396] GERBER attributes this to Europeans' trust in professional judges and mistrust of attorneys "gathering […] immense quantities of information" and who are free "to manipulate [the] presentation [of the information] to serve their own ends." *See* D.J. GERBER, "Extraterritorial Discovery and the Conflict of Procedural Systems: Germany and the United States", 34 *Am. J. Comp. L.* 745, 768-69 (1986).

[2397] Article 138 of the *Nouveau Code de Procédure Civile* provides: "Where, during the course of the proceedings, a party wishes to rely on an authentic instrument of record or an instrument under private signature to which he was not a party or a document held by a third party, he may request the judge seized of the matter to order that a certified copy of the same be delivered or that the instrument or document be produced." English translation available at www.legifrance.gouv.fr

[2398] *Id.*, Article 146.

[2399] Article 815 of the *Code de Procédure Civile* provides that "le juge peut [...] ordonner à toute partie litigante de produire les éléments de preuve dont elle dispose."

[2400] § 397 of the *Zivilprozessordnung* (ZPO).

[2401] *See* D.J. GERBER, "Extraterritorial Discovery and the Conflict of Procedural Systems: Germany and the United States", 34 *Am. J. Comp. L.* 745, 762-63 (1986).

[2402] § 422-423 ZPO.

[2403] Article 877 of the *Code de Procédure Civile* ("Lorsqu'il existe des presumptions graves, précises et concordantes de la detention par une partie ou un tiers, d'un document contenant la preuve d'un fait pertinent, le juge peut ordonner que ce document ou une copie de celui-ci certifiée conforme, soit déposé au dossier de la procédure.").

trial. Questions that might "lead to a train of inquiry which may of itself lead to relevant material", or "fishing expeditions", are principally not allowed.[2404]

746. Stricter European relevancy requirements reflect the emphasis that Europeans lay on individual freedom and privacy protection.[2405] In the European view, procedural law should protect individuals from too ready an encroachment upon their basic liberties by litigants or the State. Only if knowledge of facts in the possession of a party will unmistakably contribute to the resolution of a conflict is encroachment allowed. The French *Nouveau Code de Procédure Civile* is clear about this. The French judge can order document production in relation to factual circumstances only where the party lacks the necessary means to prove these circumstances.[2406] Importantly, the judge must limit his choice as to what shall be sufficient for the resolution of the dispute by endeavouring to select the simplest and least onerous ones.[2407] His decision cannot bring the matter out of his cognizance,[2408] and all the directions he orders shall be carried out under his supervision.[2409]

9.2. The transatlantic conflict over extraterritorial discovery: different conceptions of judicial sovereignty

747. U.S. V. EUROPE – The transatlantic dispute over extraterritorial discovery orders relates to the extraterritoriality of U.S. discovery orders. Indeed, whereas European courts obtain evidence abroad through international judicial assistance, namely on the basis of the mandatory rules of the Hague Evidence Convention, bilateral agreements or discretionary decisions by other States, U.S. courts do usually not resort to international procedures but apply instead, at times outrageously, their own domestic discovery rules. The conflict over discovery is therefore exclusively cast in terms of U.S. assertions of jurisdiction being opposed by European States.

9.2.1. Explaining the broad reach of U.S. discovery rules

748. The broad reach of U.S. discovery rules may be attributed to a number of factors.[2410] Firstly, U.S. discovery rules do not specify their geographical scope of application and do not refer to international evidence issues. This may have emboldened U.S. courts to extend the scope of the discovery rules as they saw fit. Secondly, once U.S. courts have secured personal jurisdiction over a person, they can order the production of documents, even if held abroad by a foreign parent or subsidiary corporation or by the person's foreign employer. This implies for instance that U.S. courts, if they succeed in serving an employee of a foreign employer, who is

[2404] *Radio Corp. of America* v. *Rauland Corp.*, [1956] 1 Q.B. 618 (C.A.), at 643-4, 649, concerning the deposition of witnesses in England, as requested by a U.S. District Court. *Compare Re Westinghouse Elec. Corp. Uranium Contract Litigation M.D.L.*, Docket No. 234 (No. 1) (No. 2), [1978] 2 W.L.R. 81, 86-8, 100-101 and 117-18.
[2405] *See* D.J. GERBER, "Extraterritorial Discovery and the Conflict of Procedural Systems: Germany and the United States", 34 *Am. J. Comp. L.* 745, 763 and 769 (1986).
[2406] Article 146 of the *Nouveau Code de Procédure Civile.*
[2407] *Id.*, Article 147.
[2408] *Id.*, Article 153.
[2409] *Id.*, Article 155.
[2410] *See* D.J. GERBER, "Extraterritorial Discovery and the Conflict of Procedural Systems: Germany and the United States", 34 *Am. J. Comp. L.* 745, 771 (1986).

even only temporarily present on U.S. soil, with a subpoena, they can order both the employee and the employer to produce any desired documents. In Europe, this kind of jurisdiction is unknown. Europeans courts have jurisdiction over persons pursuant to strict rules governing certain disputes pursuant to the EEX-Regulation, but they do not enjoy the kind of unlimited powers, *e.g.*, for purposes of discovery, that U.S. courts enjoy once a person is in their power through minimum contacts with the forum.[2411] Thirdly, courts may believe that, if foreign litigants have the right to obtain discovery in U.S. proceedings, they should also have the duty to bear the burden of U.S. discovery. Put differently, if foreigners choose to do business in the United States, they are entitled to the procedural conveniences of this choice but they have also to suffer its procedural drawbacks.

9.2.2. Explaining the transatlantic conflict over extraterritorial discovery

749. Although the transatlantic controversy over discovery is a long-standing issue,[2412] it has turned more and more sour since the 1960s. The controversy may be attributed to a divergent interpretation of the Hague Evidence Convention 1970 on either side of the Atlantic, the influence of economic globalization, and the European confidentiality of business information subject to mandatory disclosure under U.S. discovery rules.[2413]

750. When the Hague Convention was adopted in 1970, most European States made a declaration under Article 23 of the Convention, pursuant to which they will not honour U.S. requests for the production of documents for use in pre-trial discovery, because such assistance is purportedly not trial-related. Article 23 declarations thus deprived such requests of their usefulness. It comes as no surprise then that U.S. courts have tended to put aside the Hague Convention and relied instead on the unilateral application of the U.S. Federal Rules of Civil Procedure,[2414]

[2411] *Id.*, 774.

[2412] *See e.g.* Letter of the British Government to the Anglo-Iranian Oil Company, involved in a 1952 U.S. discovery dispute ("Her Majesty's Government consider it contrary to international comity that you or your officers should be required, in answer to a subpoena couched in the widest terms, to produce documents which are not only not in the United States of America, but which do no even relate to business in that country."). *See* INTERNATIONAL LAW ASSOCIATION, Report of the 51st Conference, 569 (1964). *See* generally F.A. MANN, *Anglo-American Conflict of International Jurisdiction*, 13 *I.C.L.Q.* 1460 (1964).

[2413] *See* D.J. GERBER, "Extraterritorial Discovery and the Conflict of Procedural Systems: Germany and the United States", 34 *Am. J. Comp. L.* 745, 746-47, 764-67 (1986).

[2414] *See* A.F. LOWENFELD, "International Litigation and the Quest for Reasonableness", 245 *R.C.A.D.I.* 9, 240 (1994-I) (observing that "the Hague Evidence Convention had turned out, from the United States point of view, to be less a bridge than a hindrance to fact-finding in international litigation."); C.D. WALLACE, "'Extraterritorial Discovery: Ongoing Challenges for Antitrust Litigation in an Environment of Global Investment", *J. Int'l .Econ. L.* 353, 372 (2003); R.A. TRITTMANN, "Extraterritoriale Beweisaufnahmen und Souveränitätsverletzungen im deutsch-amerikanischen Rechtsverkehr", 27 *Archiv des Völkerrechts* 195, 216 (1989). *Contra Volkswagenwerk Aktiengesellschaft* v. *Superior Court Alameda County*, 123 Cal. App. 3d 840, 858-59 (Ct. App. 1st Dist. 1981) (suggesting that the Article 23 limitation "be tested, in this action, by a specific request that West Germany permit inspection of documents in light of the manifest need for full disclosure of evidence in the pending California actions"); *Pierburg GmbH & Co. KG* v. *Superior Court of Los Angeles*, 137 Cal. App. 3d 238, 244-45 (Ct. App. 2d Dist. 1982) ("The foundation of the Convention is to avoid international friction where a domestic state court orders civil discovery to be conducted within the territory of a civil law nation that views such unilateral conduct as an intrusion upon its judicial sovereignty. The failure of one litigant in the domestic action to demand compliance with the

as will be discussed in part 9.4. They may have believed that they did not harm the multilateral framework by doing so, because discovery is only aimed at clarifying the factual issues, and may thus represent a less far-reaching intrusion of foreign sovereignty than the extraterritorial application of substantive law in the underlying proceeding.[2415] At any rate, the uncompromising stand of European States, informed by a misunderstanding of how pre-trial discovery works (well) in the United States,[2416] has greatly contributed to the current practice of U.S. courts bypassing (useless) international cooperation mechanisms for discovery purposes.

Far from facilitating transatlantic cooperation in matters of evidence-taking, the Hague Evidence Convention has actually worsened it, especially since the number of transnational discovery requests has grown exponentially due to economic globalization and the concomitant fanning out of evidence across the globe. Moreover, in a globalized world of which the United States is the epicenter, most major businesses have the minimal contacts with the United States necessary to subject them to U.S. personal jurisdiction. Given the propensity of U.S. courts not to differentiate between domestic and extraterritorial discovery requests, corporations will face an uphill battle to evade compliance with U.S. discovery rules.

751. Since the early days of transnational discovery, quite a number of U.S. discovery cases have revolved around the question of whether U.S. courts should respect the confidentiality of business information under the laws of the State where the information is located.[2417] As a number of European States prohibit the disclosure of certain information, persons subject to U.S. personal jurisdiction may be caught between the rock of a U.S. discovery order, and the hard stone of European confidentiality laws. If they comply with the discovery order, they incur criminal or civil liability under European laws. If they do not, they risk being subpoenaed by U.S. courts. U.S. courts have shown themselves willing to dismiss a discovery request in this situation of foreign sovereign compulsion (*i.e.*, in the situation where compliance with an extraterritorial U.S. discovery order might lead to liability abroad). However, as will be discussed in part 9.3, they have given a narrow interpretation to the doctrine of foreign sovereign compulsion, sometimes in effect casting it aside. Not only does the foreign party who does business in the U.S. bear the burden of proof of foreign

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Convention cannot divest the foreign nation of its sovereign judicial rights under the Convention. The Convention may be waived only by the nation whose judicial sovereignty would thereby be infringed upon.").

[2415] *See however Mackinnon* v. *Donaldson Lufkin Corp.*, [1986] 2 W.L.R. 453, 463 (Ch. D.) ("In the United States there is a general right to discovery from third parties but the fact that this process is characterized as discovery does not alter its nature for the purposes of international jurisdiction.").

[2416] *See, e.g.*, L. COLLINS, "The Hague Convention and Discovery: A Serious Misunderstanding?", 35 *I.C.L.Q.* 765 (1986).

[2417] In the U.S., business information is not as protected as it is in Europe *See* D.J. GERBER, "Extraterritorial Discovery and the Conflict of Procedural Systems: Germany and the United States", 34 *Am. J. Comp. L.* 745, 764-67 (1986). *See however* Rule 26(c) of the Federal Rules of Civil Procedure, according to which a court may issue a protective order "that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way." *Compare* Section 384(3) of the German ZPO, which grants a witness the right to refuse to answer questions that she would not be able to answer without revealing an art or business secret.

sovereign compulsion,[2418] in order to obtain dismissal of a discovery request, he also ought to establish that he has attempted, in good faith, to secure an exemption from foreign statutory provisions setting forth criminal liability in case of violation. Moreover, foreign 'blocking' laws that are adopted with a specific view to deprive U.S. discovery rules of their effectiveness, and which certainly give rise to a situation of foreign sovereign compulsion, are ordinarily not taken into account in the analysis.

9.2.3. Judicial sovereignty: private v. public international law

752. FENDING OFF EXTRATERRITORIAL U.S. DISCOVERY ORDERS – When a U.S. court orders the production of documents located abroad or the deposition of persons residing abroad, foreign States who perceive their sovereign interests to be jeopardized, are almost powerless. They can issue an injunction ordering their nationals not to comply with the U.S. orders, possibly through blocking statutes.[2419] They could also confiscate the documents their nationals intend to produce so as to comply with U.S. discovery orders.[2420] If they want to spare their nationals, the only limited possibility for foreign States to react is the non-recognition of any U.S. judgment based on an extraterritorial discovery order because of a violation of their *ordre public*, a private international law concept denoting the basic principles of a legal system.[2421]

753. JUDICIAL SOVEREIGNTY UNDER PUBLIC INTERNATIONAL LAW – As practically speaking, foreign States could hardly fend off extraterritorial U.S. discovery orders without harming their own nationals, they have to make sure that their arguments are heard in court before the U.S. court decides. Foreign States have premised their arguments against extraterritorial U.S. discovery mainly on the concept of judicial sovereignty, a concept which may be considered to be an application of the customary international law principle of non-intervention in the context of evidence-taking. Judicial sovereignty refers to the general sovereign interest of States to shape the judicial system and apply evidence-taking rules as they consider appropriate. Curiously, as has happened in other fields of the law where extraterritorial jurisdiction became an issue as well, sovereignty has also been relied upon by the regulating State (the United States in this case, the State ordering discovery) as an argument to *support* its jurisdictional assertion.

754. A PRIVATE INTERNATIONAL LAW VIEW ON JUDICIAL SOVEREIGNTY: THE UNITED STATES VIEW – Judicial sovereignty and the principle of non-intervention have been construed by U.S. courts as merely prohibiting the U.S. from ordering

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[2418] *See, e.g.*, in a securities context: M.D MANN & W.P. BARRY, "Developments in the Internationalization of Securities Enforcement", Practising Law Institute, Corporate Law and Practice Handbook Series, PLI Order Number 3011, May 2004, 355, 427.

[2419] *See e.g.* Regional Court, OLG Kiel, June 30, 1982, *R.I.W.* 206 (1983) (issuing an injunction ordering a German bank not to comply with a U.S. District Court Order to produce documents in an antitrust proceeding, protected by German bank secrecy). *See* part 9.5 on blocking statutes.

[2420] *See e.g. Marc Rich & Co., AG* v. *United States*, 736 F.2d 864 (2d Cir. 1984) (Swiss Government seizing various documents held by Swiss corporation responsive to a U.S. subpoena and arguing that the United States could obtain the documents upon application under the Swiss Federal Act on Mutual Assistance in Criminal Matters (1981)).

[2421] *See* D.J. GERBER, "Extraterritorial Discovery and the Conflict of Procedural Systems: Germany and the United States", 34 *Am. J. Comp. L.* 745, 774-75 (1986) (nonetheless admitting that there are no reported cases). *See* for a statutory provision in this sense: § 328 (4) ZPO (Germany).

discovery *within foreign territory*,[2422] such as ordering the inspection of a plant located abroad, without the consent of the foreign State. In contrast, judicial sovereignty would not prohibit U.S. courts from ordering the production of documents located abroad or the presence of foreign parties or witnesses to present themselves before U.S. courts, if need be by issuing a subpoena. As the foreign acts to give effect to such a U.S. discovery order are merely preparatory, whilst the main acts (the document production in a U.S. courts, a deposition in the U.S….) take place *within U.S. territory*, the territoriality principle would be respected.[2423] In the U.S. view, the application of U.S. discovery orders to foreign documents or witnesses is thus considered to be an aspect of territorial indirect enforcement jurisdiction,[2424] and an aspect of U.S. territorial judicial sovereignty which foreign States are expected to respect.[2425] Requiring recourse to international judicial assistance (instead of to the Federal Rules) would indeed "make foreign authorities the final arbiters of what evidence may be taken from their nationals, even when those nationals are parties properly within the jurisdiction of an American court."[2426] This is the typical private international law view pursuant to which the law of the forum, and no other law, governs procedure and evidence-taking.[2427]

The conflict potential of this strict private international law view on U.S. discovery was nevertheless already recognized by the United States during the preparation of the Hague Evidence Convention in 1969:

[2422] *See* D.J. GERBER, "Extraterritorial Discovery and the Conflict of Procedural Systems: Germany and the United States", 34 *Am. J. Comp. L.* 745, 776 (1986).

[2423] *See e.g. Adidas Canada* v. *SS Seatrain Bennington*, F. Supp. 1984 WL 423, 2 (S.D.N.Y. 1984), with respect to a U.S. discovery order relating to French witnesses and documents ("The discovery here sought does not involve any such intrusion on French sovereignty or judicial custom. No adverse party will enter on French soil to gather evidence (or otherwise). No oath need be administered on French soil or by a French judicial authority. What is required of Les Toles on French soil is certain acts preparatory to the giving of evidence. It must select appropriate employees to give depositions in the forum state: likewise it must select the relevant documents which it will reveal to its adversaries in the forum state. These acts do not call for French judicial participation. If Les Toles were preparing to bring litigation against United States adversaries in the United States courts, it would perform the same acts of selecting employee witnesses and evidentiary documents from its files without participation by any French judicial authority. In no way do those acts affront or intrude on French sovereignty."); *In re Anschuetz & Co.*, 754 F.2d 602, 611 (5th Cir. 1985) (with respect to a U.S. discovery order relating to a German corporation); *Graco, Inc.* v. *Kremlin, Inc.*, 101 F.R.D. 503 (N.D. Ill. 1984) (with respect to a U.S. discovery order relating to a French corporation).

[2424] *Compare* F.A. MANN, "The Doctrine of Jurisdiction Revisited after Twenty Years", 186 *R.C.A.D.I.* 9, 49 (1984-III).

[2425] *See, e.g.*, *United States* v. *Bank of Nova Scotia I*, 619 F.2d 1384, 1391 (11th Cir. 1982) ("The judicial assistance procedure does not afford due deference tot the United States' interests. In essence, the Bank asks the court to require our government to ask the courts of the Bahamas to do something lawful under United States law. We conclude such a procedure to be contrary to the interests of our nation and outweigh the interests of the Bahamas."). *Compare* H.L. BUXBAUM, "Assessing Sovereign Interests in Cross-Border Discovery Disputes: Lessons From *Aérospatiale*", 38 *Texas Int. L. J.* 87, 93 (2002), who only defines the general sovereign interest of civil law countries in limited discovery as "judicial sovereignty".

[2426] *In re Anschuetz & Co.*, 754 F.2d 602, 612 (5th Cir. 1985). *See also* reporters' note 1 to § 442 (1) (c) of the Restatement (Third) of U.S. Foreign Relations Law.

[2427] *See* A.F. LOWENFELD, "International Litigation and the Quest for Reasonableness", 245 *Recueil des Cours* 9, 254 (1994-I). *See also SEC* v. *Banca della Svizzera Italiana*, 92 F.R.D. 111 (1981) ("It would be a travesty of justice to permit a foreign company to invade American markets, violate American laws if they were indeed violated, withdraw profits and resist accountability for itself and its principals for the illegality by claiming their anonymity under foreign law.").

> "The act of taking evidence in a common law country from a willing witness, without compulsion and without a breach of the peace, in aid of a foreign proceeding, is a purely private matter, in which the host country has no interest and in which its judicial authorities have normally no wish to participate. To the contrary, the same act in a civil-law country may be a public matter, and may constitute the performance of a public judicial act by an unauthorized foreign person. It may violate the "judicial sovereignty" of the host country, unless its authorities participate or give their consent."[2428]

755. A PUBLIC INTERNATIONAL LAW VIEW ON JUDICIAL SOVEREIGNTY: THE EUROPEAN VIEW – The foregoing quotation illustrates that even before the adoption of the Hague Evidence Convention, Americans seemed to be aware of the encroachment on another State's judicial sovereignty that transnational U.S. discovery might cause. Foreign States, European States in particular, have, after the adoption of the Convention, not surprisingly often argued that the execution of U.S. discovery orders for the production of documents located within their territory violated their judicial sovereignty, if their consent was not previously obtained.[2429] This narrower, European view on judicial sovereignty takes into account the sovereignty of States other than the forum State deciding on a discovery request, and may be said to represent a view on sovereignty informed by public international law.[2430] The discussion about the precise characterization of judicial sovereignty, as either a public or private international law concept somehow resembles the long-standing discussion about sovereignty in the context of prescriptive jurisdiction, namely whether sovereignty allows States to exercise their jurisdiction as they see fit, absent a prohibitive rule to the contrary (the *Lotus* view), or whether sovereignty requires that other States' interests be taken into account, and that 'extraterritorial' jurisdiction only be exercised when expressly permitted by public international law (the customary international law view on criminal jurisdiction).

In the context of evidence-taking and discovery, under the European approach to judicial sovereignty, absent consent by the territorial State, any U.S. order for the production of documents or the deposition of witnesses located abroad violates the basic principles of the foreign legal system (*ordre public*)[2431] and hence, the sovereignty of the foreign State and the international law principle of non-intervention,[2432] even if the documents are only disclosed or the witnesses only deposed in the U.S.[2433] Europeans argue that only voluntary bilateral assistance requests, and not unilateral discovery orders, will duly respect foreign States'

[2428] Report of the U.S. Delegation to the 11th Session of the Hague Evidence Convention, 8 *I.L.M.* 785 (1969).
[2429] *See also* cmt. c to § 442 (1) (c) of the Restatement (Third) of U.S. Foreign Relations Law.
[2430] *See* A.F. LOWENFELD, "International Litigation and the Quest for Reasonableness", 245 *Recueil des Cours* 9, 254 (1994-I) (stating that "[p]ublic international law teaches that judicial functions can be carried out in a State only by officials of that State and with the State's consent.").
[2431] *See* D.J. GERBER, "Extraterritorial Discovery and the Conflict of Procedural Systems: Germany and the United States", 34 *Am. J. Comp. L.* 745, 778 (1986).
[2432] *See* R.A. TRITTMANN, "Extraterritoriale Beweisaufnahmen und Souveränitätsverletzungen im deutsch-amerikanischen Rechtsverkehr", 27 *Archiv des Völkerrechts* 195 (1989).
[2433] *See* F.A. MANN, "The Doctrine of Jurisdiction in International Law", 111 *R.C.A.D.I.* 1, 137 (1964-I) (arguing that enforcing "the attendance of a foreign witness [by a State] before its own tribunals by threatening him with penalties in case of non-compliance … runs contrary to the practice of States in regard to the taking of evidence as it has developed over a long period of time").

sovereignty, or as Professor MANN, the great European jurisdictional theorist wrote in 1964: "If, for the purpose of civil litigation pending in the forum State, it is necessary to *take evidence* in a foreign country, this cannot normally be done otherwise than with the assistance of the competent authorities of the foreign State."[2434] More moderate European voices may at times approve of unilateral discovery by the U.S., but none will be found who does not take issue with discovery in case of foreign sovereign compulsion, notably when a European State has enacted legislation blocking the execution of U.S. discovery orders, or when European courts otherwise prohibit the transmission of evidence.[2435]

756. European State practice, as evidenced by a number of *amicus curiae* briefs filed by European governments in cases of transnational discovery pending in U.S. federal courts, is unambiguous as to the primacy and even exclusivity of multilateral procedures of judicial assistance. In its *amicus curiae* brief in *In re Anschuetz & Co.*, a case decided by the Fifth Circuit in 1985, for instance, the Federal Republic of Germany argued, in respect of the production of documents located abroad:

> "Compliance in Germany with the order of the U.S. District Court mandating the taking of oral depositions in Kiel, Germany, and the production of documents located in Kiel, Germany, would be a violation of Germany sovereignty unless the order is transmitted and executed by the method of the Letter of Request under the Evidence Convention".[2436]

757. In the *Aérospatiale* case (1986), in which the U.S. Supreme Court ruled that the U.S. Federal Rules of Civil Procedure may prevail over the rules of judicial assistance under the Hague Evidence Convention, the French Government took issue with the U.S. view on judicial sovereignty, and in particular with the Eighth Circuit's characterization of foreign evidence-taking acts as merely "preparatory". In its *amicus curiae* brief, it submitted that this view violated international comity and the territoriality principle:

> "The court based this determination on an artificial distinction between matters "preparatory" to compliance with discovery orders, such as identifying documents and gathering information, and the "actual" production of documents or interrogatory answers in the United States. […] The Eighth Circuit's reasoning and holding misconceive the 1980 [French blocking] law, defy settled notions of international law and significantly offend the sovereignty of the Republic of France. […] The theory that the jurisdiction of a court over a witness places all of the witnesses' property and information, wherever located, under the control of that court without regard to the interest of the discovered party's sovereign transgresses the most elementary notions of international comity. […] International law requires that United States

[2434] *Id.*, at 136.
[2435] *See, e.g.*, G. SCHUSTER, *Die internationale Anwendung des Börsenrechts*, Berlin, Springer, 1996, 591.
[2436] Brief of Amicus Curiae of the Federal Republic of Germany, in *In re Anschuetz & Co.*, 754 F.2d 602 (5th Cir. 1985).

courts refrain from ordering [discovery] without the consent of the Republic of France."[2437]

758. By the same token, without explicitly mentioning the distinction between "matters preparatory" and "actual production", the United Kingdom acknowledged in its *amicus curiae* brief in *Aérospatiale* that France had a vital interest in having its own evidence-taking laws applied within its territory:

> "The interest of a foreign sovereign in what its residents are directed to do within its territory is strong and indisputable even when the forum state [*i.e.*, the U.S.] attempts to enforce its orders solely by sanctions within the forum state and not by actually sending in its police."[2438]

759. Germany for its part considered in its *amicus curiae* brief in *Aérospatiale* the Eighth Circuit's holding to be in violation of the treaty law principle of good faith:

> "The distinction between preparatory acts abroad and the actual production of evidence in the United States is an artificial one. Signatory nations have repeatedly protested that such discovery orders violate their sovereignty. These protestations have for the most part been disregarded by U.S. courts. The attempts to circumvent the Convention constitute a violation of the principle that treaties are to be interpreted in good faith."[2439]

9.2.4. Controversy over discovery of foreign non-parties and foreign subsidiaries

760. Extraterritorial discovery has been most controversial when directed at persons that were not parties to the underlying dispute, because in civil law countries such persons may sometimes not be subject to mandatory disclosure orders.[2440]

[2437] Brief of Amicus Curiae of the Republic of France in Support of Petitioners, at 14-16, *Aérospatiale* (No. 85-1695), *reprinted in* 25 *I.L.M.* 1527-28 (citing *The Schooner Exchange* v. *McFaddon*, 11 U.S. (7 Cranch 116 (1812) ("It is a basic tenet of international law that each state has sovereignty over all activities within its territory. […] A nation may not, therefore, conduct official activities in the territory of another nation without the latter's consent.")). *See also* Brief of the Government of Switzerland as Amicus Curiae in Support of Petitioners, at 12-13, *Aérospatiale* (No. 85-1695), *reprinted in* 25 *I.L.M.* 1555-56 (1986) (arguing that seeking evidence in a foreign country for use in the U.S. is "irreconcilable with the principle of territorial jurisdiction", also citing *The Schooner Exchange*).

[2438] Brief of the Government of the United Kingdom of Great Britain and Northern Ireland as Amicus Curiae in Support of Petitioners, at 17, *Aérospatiale* (No. 85-1695), *reprinted in* 25 *I.L.M.* 1566 (1986).

[2439] Brief for the Federal Republic of Germany as Amicus Curiae, at 14, *Aérospatiale* (No. 85-1695), *reprinted in* 25 *I.L.M.* 1547 (1986). *Compare* Brief of the Government of Switzerland as Amicus Curiae in Support of Petitioners, at 13-14, *Aérospatiale* (No. 85-1695), *reprinted in* 25 *I.L.M.* 1556 (1986) (arguing that the fundamental rule of *pacta sunt servanda* was at stake).

[2440] *See* R.A. TRITTMANN, "Extraterritoriale Beweisaufnahmen und Souveränitätsverletzungen im deutsch-amerikanischen Rechtsverkehr", 27 *Archiv des Völkerrechts* 195 (1989) (stating that "interrogatories und document requests sind gegenüber Dritten nicht zulässig"); *Orlich* v. *Helm Bros.*, 560 N.Y.S.2d 10, 15 (N.Y. App. Div. 1990) ("Since fact gathering is a judicially controlled process in civil law nations such as West Germany, the non-judicial taking of evidence located within their territory is regarded as an affront to their sovereignty. Such an exercise would be particularly offensive where, as here, the entity being subjected to the court-ordered fact gathering, *i.e.*, Daimler-Benz AG/Mercedes-Benz AG, is not even a party to the litigation"); *Intercontinental Credit Corporation Division of Pan American Trade Development Corp.* v. *Henry A. Roth*, 595 N.Y.S.2d 602 (Sup Ct.N.Y.Co.1991) ("[W]hen discovery is sought from a nonparty in a foreign jurisdiction, application of

Controversy has also arisen when U.S. courts required a U.S.-based parent corporation to produce documents held by its foreign subsidiary or branch,[2441] or *vice versa*,[2442] under threat of a subpoena. An English court for instance characterized a U.S. order requiring the production of documents held by the London branch of a New York bank as "the exercise by the United States court in London of powers which, by English standards, would be regarded as excessive," and enjoined the London branch from producing the documents.[2443] In a similar case, the German *Landgericht* of Kiel enjoined a German bank from complying with a U.S. grand jury subpoena.[2444] Although the practice of piercing the corporate veil is firmly entrenched in U.S. law, also in other fields of the law such as in the field of export controls (chapter 8), European doctrine has argued that it is illegal under international law ("the sovereign controlling the branch does not thereby control the head office").[2445] As will be seen in section 9.3, U.S. courts will at most defer to the foreign sovereign in case a 'true conflict' with foreign law arises.[2446]

9.2.5. A customary international law of extraterritorial evidence-taking?

761. While European States may premise their approach to discovery on public international law, this need not imply that it actually constitutes customary international law. In reality, since the U.S. and Europe have taken positions "based on assumptions which derive from [their own] domestic legal system and correspond to

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the Hague Convention […] which encompasses principles of international comity, is virtually compulsory"); *Matter of Agusta*, 171 A.D.2d 595, 567 N.Y.S.2d 664 (1st Dept. 1991); *Bank of Tokyo-Mitsubishi* v. *Kvaerner*, 671 N.Y.S.2d 902, 903 (N.Y. Sup. Ct. 1998) ("Obviously the only method to compel a deposition […] would have to be by means of the Hague Convention since the entity whose deposition was sought was not under the jurisdiction of the New York court"). *Compare First American Corp.* v. *Price Waterhouse LLP*, 154 F.3d 16, 21 (2d Cir. 1998) ("Rule 45 draws no distinction between parties and non-parties concerning the scope of discovery"; "PW-UK is on firmer ground in urging that its non-party status is a consideration in the comity analysis").

[2441] *See U.S. v. Vetco* 644 F.2d (9th Cir.), *cert. denied* 454 U.S. 1098 (1981). *Marc Rich & Co. AG v. U.S.*, 707 F.2d 663 (2d. Cir. 1982), *cert. denied* 463 U.S. 1215 (1983); *See, e.g.*, *Bank of Tokyo-Mitsubishi* v. *Kvaerner*, 671 N.Y.S.2d 902, 904-05 (N.Y. Sup. Ct. 1998) ("The court concludes that if a party subject to the court's *in personam* jurisdiction controls a foreign corporate entity the party, by virtue of its control, should be obligated to produce any and all appropriate discovery under its aegis, including that under the control of its subsidiary, wherever the subsidiary may be located."; "Resort to the Hague Convention, which would effectively shield the documents from production, should not be required where the court has jurisdiction over a party and that party has control over its subsidiaries whose documents are sought pursuant to the usual CPLR procedures."); *Texas International Magnetics, Inc. v. Premier Multimedia, Inc.*, 334 F.3d 204, 207-208 (2nd Cir. 2003).

[2442] *See* however on the latter situation: reporters' note 10 to § 442 of the Restatement (Third) of U.S. Foreign Relations Law (noting that it is not settled whether records of a parent corporation may be reached through an order directed to a subsidiary is not settled).

[2443] *X A.G.* v. *A Bank* [1983] 2 All. E.R. 464, 480.

[2444] *Krupp Mak Maschinenbau GmbH* v. *Deutsche Bank AG* (Landgericht Kiel June 30, 1982), 22 *I.L.M.* 740 (1983), enjoining Deutsche Bank from complying with subpoena issued by *In re Grand Jury* 81-2, 550 F. Supp. 24 (W.D. Mich. 1982).

[2445] *See* F.A. MANN, "The Doctrine of Jurisdiction Revisited after Twenty Years", 186 *R.C.A.D.I.* 9, 54 (1984-III); I. SEIDL-HOHENVELDERN, "Völkerrechtliche Grenzen bei der Anwendung des Kartellrechts", 17 *A.W.D.* 53, 59 (1971).

[2446] *See, e.g.*, *U.S.* v. *Bank of Nova Scotia*, 691 F.2d 1384 (1982) (true conflict not considered as decisive in a case in which a Canadian corporation with a U.S. branch upon which a subpoena was served, was ordered to disclose its documents and those of its Bahamas branch relating to the bank accounts of a customer, thereby exposing that branch to criminal prosecution in the Bahamas).

[their] own interests,"[2447] a public international law perspective on extraterritorial discovery is conceptually not very developed.[2448] Europeans consider the protection of their own interests as based on the international law principle of non-interference and the prohibition of extraterritorial enforcement jurisdiction as set forth in the P.C.I.J.'s *Lotus* case.[2449] Americans retort that foreign nations' concerns are accommodated by ordering documents to be produced in the U.S., and not abroad, and by flying foreign residents to the United States to testify in a U.S. court. They add that it would be unfair to U.S. persons to exempt foreign persons benefiting from doing business in the United States from the application of U.S. discovery laws (*i.e.*, the argument of equal treatment or waiver by conduct).[2450] Whereas, among European States, there may be a norm of customary international law pursuant to which courts cannot order extraterritorial evidence-taking in an entirely unilateral manner, but are required to rely on multilateral judicial assistance mechanisms, such does not hold true at the transatlantic level, where the United States may be considered as a persistent objector to a rule which narrows or even excludes States' discretion to order discovery under their own domestic rules of evidence.

762. It may be noted that considerations of reciprocity, which often sponteously lead to a convergence of State interests and to the crystallization of a norm of customary international law, may play a smaller role in the international law debate over discovery. Only the United States engage in the sort of liberal discovery conducted by private attorneys, for domestic reasons related to the emphasis put on full disclosure of facts in the U.S. litigation process. Because of the narrow view on evidence-taking taken by European States, who subject evidence-taking by parties to stringent relevancy requirements and reserve a prominent role for the judge, the odds of European courts upsetting the United States by ordering the production of U.S.-based materials are doubtless lower than in the situation of U.S. courts ordering the production of Europe-based materials. Nonetheless, one would be hard-pressed to deny that the traditional European preference for multilateral solutions to international problems does not underlie European reliance on international judicial assistance with

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[2447] *See* D.J. GERBER, "Extraterritorial Discovery and the Conflict of Procedural Systems: Germany and the United States", 34 *Am. J. Comp. L.* 745, 779 (1986).

[2448] *See* C.D. WALLACE, "'Extraterritorial Discovery: Ongoing Challenges for Antitrust Litigation in an Environment of Global Investment", *J. Int'l Econ. L.* 353, 391 (2003) ("The present state of international law is inadequate to fully cope with disputes of this nature or to provide international judicial or alternative dispute settlement procedures"). The International Law Association addressed the issue in 1964, arguing that there was no international law providing authority for extraterritorial discovery. It did however not cite any international law authority *prohibiting* extraterritorial discovery. In fact, it merely described the divergent views of the U.S. and other States: "It is difficult to find any authority under international law for the issuance of orders compelling the production of documents from abroad. The documents are admittedly located in the territory of another State. To assume jurisdiction over documents located abroad in advance of a finding of effect upon commerce raises the greatest doubts among non-Americans as to the validity of such orders." (International Law Association, Report of the Fifty-First Conference (1964) at 407).

[2449] *See* C.D. WALLACE, "'Extraterritorial Discovery: Ongoing Challenges for Antitrust Litigation in an Environment of Global Investment", *J. Int'l Econ. L.* 353, 356-57 (2003).

[2450] *United States* v. *The Bank of Nova Scotia II*, 740 F.2d 817 (11th Cir. 1983). *See also* K.A. FEAGLE, "Extraterritorial Discovery : a Social Contract Perspective", 7 *Duke J. Comp. & Int'l L.* 297, 302 and 311 (1996) (noting that, "[w]hile use of the comity analysis did quell international complaints about U.S. discovery, it ultimately created just as many domestic ones", and complaining that "the United States has guaranteed to all litigants in U.S. courts an opportunity for broad discovery, but routinely denies litigants this opportunity if they are unfortunate enough to sue or be sued by a party with relevant evidence located in a foreign country").

respect to evidence-taking. Europeans may indeed reason that arguments of reciprocity counsel against unilateral assertions of jurisdiction in the field of the law of evidence. Although such assertions may confer short-term litigation benefits, such benefits may be outweighed by the burdens of future unilateral assertions of jurisdiction by other States.[2451]

9.3. Discovery and the foreign sovereign compulsion doctrine

763. FOREIGN SOVEREIGN COMPULSION – As pointed out, U.S. courts traditionally consider themselves to be empowered to require the production of documents located in foreign countries as soon as they have personal jurisdiction over the person in possession or control of the material.[2452] This implies that as soon as a person has sufficient minimum contacts with the U.S., a U.S. court can order her to produce documents, even when she is not a party to the underlying litigation.

Documents located abroad, such as bank records maintained by a foreign subsidiary of a U.S. bank, may however be shielded from disclosure under foreign secrecy laws.[2453] If U.S. courts were to require persons over which they have personal jurisdiction to disclose such documents, such persons may find themselves caught between conflicting demands. Moreover, from a sovereignty perspective, U.S. discovery orders requiring the production of protected foreign-based documents may seriously upset foreign States, because the U.S. court issuing the order in effect casts aside foreign imperative law prohibiting disclosure in favor of broad U.S. disclosure rules. U.S. courts have therefore at times dismissed discovery requests when granting them would have required the person to which the order was directed to violate a foreign State's law. This doctrine of jurisdictional restraint, usually denoted as the doctrine of foreign sovereign compulsion or the true conflict doctrine (a term borrowed from the 1993 *Hartford Fire* international antitrust case,[2454] discussed at length *supra*), has however been construed restrictively by U.S. courts, so much so that courts have sometimes even honoured discovery requests when a true conflict with foreign law was apparent. It has in this respect been observed that there is no U.S. rule that requires courts to automatically dismiss discovery requests when foreign States prohibit disclosure of certain materials.[2455] As U.S. practice and *opinio juris* in the field of extraterritorial discovery are obviously vital for the crystallization

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[2451] *See* however also cmt. c to § 442 of the Restatement (Third) of U.S. Foreign Relations Law (1987) ("In making the necessary determination of the interests of the United States … the court or agency should take into account not merely the interest of the prosecuting or investigating agency in the particular case, but the long-term interests of the United States generally in international cooperation in law enforcement and judicial assistance, in joint approach to problems of common concern, in giving effect to formal or informal international agreements, and in orderly international relations.").

[2452] *See also U.S.* v. *First National City Bank*, 396 F.2d, 897, 900-901 (1968), citing *First National City Bank of New York* v. *Internal Revenue Service etc.*, 271 F.2d 616 (2nd Cir. 1959), cert. denied, 361 U.S. 948, 80 S.Ct. 402, 4 L.Ed.2d 381 (1960).

[2453] This could be either civil or criminal law. *See U.S.* v. *First National City Bank*, 396 F.2d, 897, 902 (1968) (stating that "[t]he vital national interests of a foreign nation, especially in matters relating to economic affairs, can be expressed in ways other than through the criminal law"and that "a sharp dichotomy between criminal and civil penalties is an imprecise means of measuring the hardship for requiring compliance with a subpoena.").

[2454] *Hartford Fire Insurance Co.* v. *California*, 509 U.S. 764 (1993).

[2455] *See* C.D. WALLACE, "'Extraterritorial Discovery: Ongoing Challenges for Antitrust Litigation in an Environment of Global Investment", *J. Int'l Econ. L.* 353, 391 (2003).

of a norm of customary international law, there may be no hard rule of foreign sovereign compulsion under international law.[2456]

764. *SOCIÉTÉ INTERNATIONALE* – The seminal judgment involving the doctrine of foreign sovereign compulsion is doubtless the U.S. Supreme Court's decision in *Société Internationale* v. *Rogers* (1958), also named the *Interhandel* case.[2457] In this case, a defense of foreign sovereign compulsion was only deemed acceptable in case the defendant acted in good faith, and did not court foreign legal impediments. Although some Second Circuit judgments in the early years after *Société Internationale* seemed to imply that the production of documents abroad should not be ordered if such would violate the laws of a foreign State, regardless of the good or bad faith on the part of the defendant,[2458] the majority of courts have consistently relied upon *Société Internationale*.[2459]

In *Société Internationale,* a case under the Trading with the Enemy Act, the Swiss defendant company argued that it could impossibly comply with an order for the production of documents located in Switzerland, since Swiss criminal law prohibited it from doing so. A Special Master appointed by the District Court found that the company had not been in collusion with the Swiss authorities to block inspection of the records, that it had in good faith made diligent efforts to execute the production order,[2460] and that it was not apparent that the company deliberately courted legal impediments to production of the records.[2461] The Supreme Court eventually decided "that fear of criminal prosecution constitutes a weighty excuse for nonproduction, and that this excuse is not weakened because the laws preventing compliance are those of a foreign sovereign,"[2462] and thus that foreign sovereign compulsion prevented defendant from complying with a U.S. discovery order. Yet although the request was dismissed in the case, the Court left the door ajar for non-dismissal in case if bad faith on the part of the defendant: "In view of the findings in this case, the position in which petitioner stands in this litigation, and the serious constitutional questions we have noted, we think that Rule 37 [a discovery rule] should not be construed to authorize dismissal of this complaint because of petitioner's noncompliance with a pretrial production order *when it has been established that failure to comply has been due to inability, and not to willfulness, bad faith, or any fault of petitioner*."[2463]

765. *SOCIÉTÉ INTERNATIONALE* PROGENY – The Supreme Court's nuanced holding *Société Internationale,* which in *Société Internationale* itself resulted in dismissal of the discovery request, has been construed by later courts as requiring

[2456] *See also United States* v. *First National City Bank,* 396 F.2d 897, 901 (2d Cir. 1968).
[2457] 357 U.S. 197, 78 S.Ct. 1087, 2 L.Ed.2d 1255 (1958).
[2458] *See e.g. First National City Bank of New York* v. *International Revenue Service* 271 F.2d 616 (2nd Cir. 1959) (holding that, if the production of documents would violate Panamian law, "we should agree that the production of the Panama records should not be ordered"); *INGS* v. *Ferguson,* 282 F.2d 149, 152 (2nd Cir. 1960) ("Upon fundamental principles of international comity, our courts dedicated to the enforcement of our laws should not take such action as may cause a violation of the laws of a friendly neighbor or, at the least, an unnecessary circumvention of its procedures.")
[2459] The Court in the controversial *Westinghouse Uranium* Litigation (1979) for instance drew extensively upon this Supreme Court case.
[2460] 100 U.S. App. D.C. 148, 243 F.2d 254.
[2461] 357 U.S. 197, 208-209 (1958). *Compare SEC* v. *Banca Della Svizzera Italiana,* 92 F.R.D. 111, 119 (S.D.N.Y.1981).
[2462] 357 U.S. 210.
[2463] *Id.*, at 212 (emphasis added).

"that when there are foreign legal barriers to the production of documents, the courts in the United States must balance the interests and needs of the parties in light of the nature of the foreign law and the party's efforts to comply in good faith with the demanded production."[2464] An interest-balancing test implies that the fact that an order will subject a party to criminal prosecution in his country of residence does not *of itself* prohibit a discovery request from being honoured or a subpoena from being enforced.[2465] The interest-balancing analysis set forth by *Société Internationale* did not always result in a pro-forum bias and the application of the Federal Rules (pro-forum bias being one of the main critiques of interest-balancing in international antitrust cases).[2466] Some courts have indeed held that U.S. interests outweighed the interests of the foreign nation in having its secrecy laws upheld.[2467] In other cases

[2464] *See, e.g., Cochran Consulting, Inc.* v. *Utawec USA, Inc.*, 102 F.3d 1224, 1227 (Fed. Cir. 1996). The Restatement has held in this context that "guidance" or "informal communications" issued by the foreign country do not necessarily render the production of documents impossible, and may thus not support the defense of foreign sovereign compulsion. Restatement (Third) of U.S. Foreign Relations Law (1987), § 441 cmt. c.

[2465] *See In re Grand Jury Proceedings*, 532 F.2d 404, 407 (5th Cir. 1976); *United States* v. *Davis*, 767 F.2d 1025, 1034-35 (2d Cir.1985); *United States* v. *First National Bank of Chicago*, 699 F.2d 341, 345 (7th Cir. 1983); *United States* v. *Bank of Nova Scotia*, 691 F.2d 1384, 1389 n. 7 (11th Cir. 1982), *cert. denied*, 462 U.S. 1119, 103 S.Ct. 3086, 77 L.Ed.2d 1348 (1983); *United States* v. *Vetco*, 691 F.2d 1281, 1288 (9th Cir. 1981), *cert. denied*, 454 U.S. 1098, 102 S.Ct. 671, 70 L.Ed.2d 639 (1981); *Trade Development Bank* v. *Continental Insurance Co.*, 469 F.2d .35, 40-41 (2d Cir. 1972) (concluding that the trial court was "entitled in its discretion, after balancing the interests involved, to defer to Swiss law", but not as a matter of course); *United States* v. *First National City Bank*, 396 F.2d 897, 901 (2d Cir. 1968); *Compagnie Francaise D'Assurance Pour Le Commerce Extérieur* v. *Phillips Petroleum Co.*, 105 F.R.D. 16, 29 (S.D.N.Y.1984); *Banca SEC* v. *Banca Della Svizzera Italiana*, 92 F.R.D. 111, 117-18 (S.D.N.Y.1981) (recognizing that "the strength of the United States interest in enforcing its securities laws to ensure the integrity of its financial markets cannot seriously be doubted" and that the bank could, although it may "be subject to fines and its officers to imprisonment" under Swiss law, avoid prosecution).

[2466] *Contra* S. APRIL & J. FRIED, "Compelling Discovery and Disclosure in Transnational Criminal Litigation – a Canadian View", 16 *N.Y.U. J. Int'l L. & Pol.* 961, 967-68 (1984) ("We expect a U.S. court, whether under the Restatement or otherwise, would always find the U.S. interest in enforcement of its criminal law must take priority over the interest of a small state in ensuring for its own public policy reasons, the confidentiality of a banking transaction …").

[2467] *See, e.g., United States* v. *First National City Bank*, 396 F.2d 897, 901 (2d Cir. 1968) (In this case, the court recognized that under international law "each nation should make an effort to minimize the potential conflict flowing from their joint concern with the prescribed behavior", yet that international law did not necessarily preclude a State from exercising its jurisdiction solely because such exercise requires a person to violate the laws of another State. It ruled nonetheless that a careful interest-balancing test would be required in order not to impinge upon the prerogatives and responsibilities of the political branches of government in the area of foreign affairs. In the case, balancing of the importance of U.S. antitrust enforcement and of German bank secrecy was at issue. As the U.S. antitrust laws had long been considered cornerstones of U.S. economic policies and German bank secrecy was simply a privilege that can be waived by the customer and is not even required by statute, the greater importance of the U.S. interests was clear for the court. The court also pointed out that the Department of State nor the German Government had expressed any view that enforcement of the subpoena would violate German public policy or embarrass German-American relations.); *In re Grand Jury Proceedings*, 532 F.2d 404 (5th Cir. 1976) (ruling that the interest of the United States in obtaining information concerning the violation of its tax laws prevailed over the interest of the Cayman Islands in its bank secrecy laws, the violation of which is criminally prosecuted); *United Nuclear Corp. v. General Atomic Co.*, 1980-1 Trade Cases 63639 Supreme Court of New Mexico ("There is substantial evidence to support the Court's finding that Gulf followed a deliberate policy of storing cartel documents in Canada [which had legislation prohibiting the production of documents for use in a U.S. proceeding], and that this policy amounted to courting legal impediments to their production […] These findings alone may be the basis for the imposition of such a discovery sanction as a default judgment."); *United States* v. *Vetco*, 691 F.2d 1281 (9th Cir. 1981); *United States* v. *Bank of Nova*

however, foreign secrecy laws were held to prevail over the application of the Federal Rules.[2468]

The outcome of an interesting-balancing analysis in the field of extraterritorial discovery is uncertain, because "it is unclear exactly what level of hardship a litigant must face in order to justify deference for the sake of comity".[2469] The Supreme Court in *Société Internationale* indeed failed to set forth a clear standard of when production of documents located abroad is actually impossible in light of conflicting foreign laws.[2470] One writer has even argued that conflicting foreign laws or blocking statutes never make production impossible but "merely more inconvenient", in that "something is impossible only if it physically cannot be done,"[2471] thus implying that the balance should almost invariably tip in favor of application of the Federal Rules

766. BLOCKING STATUTES – It may happen that compliance with a U.S. discovery order is impossible because the home State has adopted a statute which is specifically designed to block U.S. discovery requests, rather than because of a foreign secrecy law. Foreign blocking statutes principally qualify for a foreign sovereign compulsion defense under *Société Internationale*, at least if the defendant has not deliberately courted the blocking statute. Especially since the *Uranium Litigation* (late 1970s) and even more so since the U.S. Supreme Court's decision in *Aérospatiale* (1987), which will be discussed in subsection 9.4.1, U.S. courts have, however, tended to view blocking statutes as illegitimate efforts to deprive them of

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Scotia, 691 F.2d 1384 (11th Cir. 1982); *Compagnie Francaise D'Assurance Pour Le Commerce Extérieur* v. *Phillips Petroleum Co.*, 105 F.R.D. 16, 29 (S.D.N.Y.1984); *Richmark Corp.* v. *Timber Falling Consultants*, 959 F.2d 1468, 1479 (9th Cir. 1992) ("where the [People's Republic of China, PRC] has not demonstrated a strong interest in keeping the requested information confidential, and where Beijing has options open to it which violate neither United States nor PRC law, Beijing cannot escape compliance with the district court's discovery orders" and "Beijing does not appear to have made a good faith effort to clarify PRC law or to seek a waiver of the secrecy statutes before refusing to comply with the district court order. For these reasons, the district court acted within its discretion in sanctioning Beijing for its noncompliance"); *In re Grand Jury Subpoena*, 218 F. Supp. 2d 544, 558-59 (S.D.N.Y. 2002).

[2468] *Trade Development Bank* v. *Continental Insurance Co.*, 469 F.2d .35 (2d Cir. 1972); *United States* v. *First National Bank of Chicago*, 699 F.2d 341 (7th Cir. 1983); *United States* v. *Davis*, 767 F.2d 1025 (2d Cir.1985); *In re Sealed* Cases, 825 F.2d 494 (D.C. Cir. 1987); *Minpeco, S.A.* v. *Conticommodity Services, Inc.* 116 F.R.D. 517, 524 (S.D.N.Y. 1987); *Reinsurance Co. of America, Inc.* v. *Administratia Asigurarilor de Stat*, 902 F.2d 1275, 1280-81 (7th Cir. 1990) ("Unlike a blocking statute, Romania's law appears to be directed at domestic affairs rather than merely protecting Romanian corporations from foreign discovery requests." […] "Given this choice between the relative interests of Romania in its national secrecy and the American interest in enforcing its judicial decisions, we have determined that Romania's, at least on the facts before us, appears to be the more immediate and compelling."). *Cochran Consulting Inc.* v. *Uwatec USA, Inc.*, 102 F.3d 1224, 1226-27 (Fed. Cir. 1996). *Compare* Brief of the Government of Switzerland as *Amicus Curiae* in Support of Petitioners at 10, *Aérospatiale* (No. 85-1695), *reprinted* in 25 *I.L.M.* 1554 (1986) ("Swiss judicial sovereignty, and the laws that protect it, should not be viewed as "blocking statutes" designed to frustrate United States discovery procedures. Rather, they are a reflection of a national political tradition that places great value on the sovereign independence of the nation and the individual autonomy of its citizens.")

[2469] *See* S.K. MEHRA, "Extraterritorial Antitrust Enforcement and the Myth of International Consensus", 10 *Duke J. Comp. & Int'l L.* 191, 202 (1999).

[2470] *See* D. BREWER, "Obtaining Discovery Abroad: the Utility of the Comity Analysis in Determining Whether to Order Production of Documents Protected by Foreign Blocking Statutes", 22 *Houston J. Int'l L.* 525, 538 (2000).

[2471] *See* K.A. FEAGLE, "Extraterritorial Discovery: a Social Contract Perspective", 7 *Duke J. Comp. & Int'l L.* 297, 315 (1996).

jurisdiction.[2472] Not many post-*Aérospatiale* court decisions have indeed given effect to foreign blocking statutes.[2473] The logical argument goes that, if they had done so, they might precisely have encouraged foreign States to enact blocking statutes.[2474] European Governments have not surprisingly denounced these decisions for violating the foreign sovereign compulsion doctrine.[2475]

767. FOREIGN SOVEREIGN COMPULSION AND EVIDENCE-TAKING IN EUROPE: THE *VAN DER WEDUWE* CASE – In Europe, like in the United States, defendants or witnesses may also invoke one State's secrecy laws in the course of another State's judicial proceedings. It will not be examined here how European States have solved the tension between one State's secrecy laws and another State's desire to bring the truth to light, because the question has so far not given rise to transatlantic tension. Reference will only be made here to the *van der Weduwe* case, a case before the European Court of Justice in 2002 concerning the relation of a Member State's professional secrecy laws to another Member State's criminal evidence laws.[2476]

[2472] *See* H.L. BUXBAUM, "Assessing Sovereign Interests in Cross-Border Discovery Disputes: Lessons From *Aérospatiale*", 38 *Texas Int. L. J.* 87, 98 (2003).

[2473] *Société Nationale Industrielle Aerospatiale v. United States District Court for the Southern District of Iowa*, 482 U.S. 522, 544, n. 29 (1987) ("It is well settled that such statutes do not deprive an American court of the power to order a party subject to its jurisdiction to produce evidence even though the act of production may violate that statute [...] The blocking statute [...] is relevant to the court's particularized comity analysis only to the extent that its terms and its enforcement identify the nature of the sovereign interests in nondisclosure of specific kinds of material." …. "It is clear that American courts are not required to adhere blindly to the directives of [a blocking] statute. Indeed, the language of the [French blocking] statute, if taken literally, would appear to represent an extraordinary exercise of legislative jurisdiction by the Republic of France over a United States district judge, forbidding him or her to order any discovery from a party of French nationality, even simple requests for admissions or interrogatories that the party could respond to on the basis of personal knowledge."): *United States v. Chase Manhattan Bank*, 584 F. Supp. 1080, 1086-87 (S.D.N.Y. 1984): "[T]he Court finds that the United States has a greater interest in obtaining the banking records of FDC than does Hong Kong in protecting the secrecy of bank records located there and there would be comparatively little encroachment on Hong Kong's prerogatives by this Court's order to Chase to comply with the summons." *Compagnie Francaise D'Assurance* v. *Phillips Petroleum Co.*, 105 F.R.D. 16, 30 (S.D.N.Y. 1984); *Graco, Inc* v. *Kremlin, Inc.*, 101 F.R.D. 503 (N.D.Ill.1984) *See also* S.K. MEHRA, "Extraterritorial Antitrust Enforcement and the Myth of International Consensus", 10 *Duke J. Comp. & Int'l L.* 191, 202 (1999), with references in n. 61. *See also* Restatement of Foreign Relations Law, § 437, Reporter's Note 5, pp. 41, 42, which differentiates with statutes specifically adopted to impede the application of U.S. statutes and other conflicting statutes. ("[Blocking] statutes […] need not be given the same deference by courts of the United States as substantive rules of law at variance with the law of the United States."). *See* also J.M. FEDDERS, "Policing Internationalized U.S. Capital Markets: Methods to Obtain Evidence Abroad", 18 *Int. Law.* 89, 92 (1984); C.D. WALLACE, "'Extraterritorial' Discovery and U.S. Judicial Assistance: Promoting Reciprocity or Exacerbating Judiciary Overload?", 37 *Int'l Law.* 1055, 1056 (2003). *Contra*: *Reinsurance Company of America, Inc.*, v. *Administratia Asigurarilor de Stat*, 902 F.2d 1278, 1279-80 (7th Cir. 1990); *Cochran Consulting Inc.* v. *Uwatec USA, Inc.*, 102 F.3d 1224, 1226-27 (Fed. Cir. 1996).

[2474] *See* C.D. WALLACE, "'Extraterritorial Discovery: Ongoing Challenges for Antitrust Litigation in an Environment of Global Investment", *J. Int'l Econ. L.* 353, 391 (2003); D. BREWER, "Obtaining Discovery Abroad: the Utility of the Comity Analysis in Determining Whether to Order Production of Documents Protected by Foreign Blocking Statutes", 22 *Houston J. Int'l L.* 525, 538-39 (2000).

[2475] *See e.g.* Brief of the Government of the United Kingdom of Great Britain and Northern Ireland as Amicus Curiae in Support of Petitioners, at 19, *Aérospatiale* (No. 85-1695), *reprinted in* 25 *I.L.M.* 1567 (1986) ("It would be anomalous and unsatisfactory, in any but the most extraordinary situation, for a court, in seeking to do justice, to require the violation of the law of a friendly sovereign state.")

[2476] Case C-153/00, *van der Weduwe* [2002] ECR I-11319.

Van der Weduwe, a Dutch national living in Luxembourg and successively employed by two banks established in Luxembourg, was questioned by a Belgian investigating magistrate in the course of a judicial investigation concerning the offences of forgery, money-laundering and failure to declare tax income. The investigation related to events performed in Belgian territory. Van der Weduwe refused to answer the questions put to him, invoking the obligation of professional secrecy which Luxembourg law imposes on employees in the financial sector.[2477]

The Belgian investigating magistrate, ascribing unwarranted extraterritorial effect to the Luxembourg provisions on banking secrecy, thereupon asked the European Court of Justice for a preliminary ruling on the question of whether Belgian criminal law requiring van der Weduwe to testify as a witness in a Belgian criminal proceeding under threat of criminal sanctions, and Luxembourg law prohibiting van der Weduwe to testify, also under the threat of criminal sanctions, was compatible with Article 49 of the Treaty of the European Community. This article guarantees the freedom of services in the European Community, which includes cross-border banking activities.

In spite of the perceived conflict between Belgian and Luxembourg law, the European Court of Justice refused to rule on the merits, declaring all questions put to it by the Belgian investigating magistrate inadmissible. The Court held that the interpretation chosen by the magistrate – the possible violation of Article 49 ECT by the extraterritorial application of Luxembourg bank secrecy laws – was hypothetical, since the Luxembourg courts had never ruled on the extraterritorial scope of the Luxembourg banking secrecy provisions.[2478] It could therefore well be that the Luxembourg bank secrecy laws have no extraterritorial scope or that, if they have, the exemptions under Luxembourg law could also have extraterritorial application. In this context, the Luxembourg Government itself considered that the banking secrecy prescribed by Luxembourg law cannot be invoked against judicial authorities in other Member States in investigations such as the one being conducted against van der Weduwe.[2479]

768. What could be collected from the *van der Weduwe* decision is that only when there is a direct, and not a hypothetical, conflict between one Member State's professional secrecy laws and another Member State's criminal laws relating to testimonies in the course of criminal proceedings might the European Court of Justice be willing to review these laws in light of Article 49 ECT. A direct conflict will arise when there is no doubt surrounding the compulsory extraterritorial application of the former Member State's secrecy laws to foreign criminal proceedings. For the time being, it remains unclear whether Article 49 ECT precludes such extraterritorial application or the rejection of it by foreign courts. It may be noted that U.S. courts ruling on discovery requests do, even in the context of a direct conflict, not consider themselves to be bound by foreign secrecy laws, although, if the defendant or the

[2477] Article 458 of the Luxembourg Criminal Code *juncto* Article 41 of the Law of 5 April 1993 on the financial sector (Mémorial A, 1993, p. 462).

[2478] Case C-153/00, *van der Weduwe* [2002] ECR I-11319, paragraph 37.
The European Court of Justice can decline to rule on a question submitted by a national court where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a helpful answer to the questions submitted to it. *See* Case C-379/98, *PreussenElektra* [2001] ECR I-2099, paragraph 38, and Case C-390/99, *Canal Satélite Digital* [2002] ECR I-607, paragraph 18.

[2479] Case C-153/00, *van der Weduwe* [2002] ECR I-11319, paragraph 37.

witness has not deliberately courted legal impediments in her home State, the courts may more readily defer to foreign secrecy laws.

9.4. Extraterritorial discovery and the Hague Evidence Convention

769. In 1970, a multilateral convention governing the taking of evidence abroad was signed in The Hague.[2480] The U.S., which took the initiative for the convention, and quite a number of European States are parties to this convention, which sets forth rules of international judicial assistance. In the United States, the question arose whether the Hague Evidence Convention was the exclusive means of obtaining evidence abroad, or whether States could continue to issue evidence-taking (discovery) orders under their own rules of civil procedure. European States invariably took – and still take – the position that the Convention indeed precluded the use of other evidence-taking methods such as discovery.[2481] U.S. courts however were split over the issue. Some took the European stance, while others asserted that the Convention was merely an optional device, that U.S. discovery rules could be applied if evidence-taking could not be secured through the Convention, or that the Convention was merely an avenue of first resort.[2482] Some courts even asserted that the Convention was not intended to protect foreign parties over whom a U.S. court has personal jurisdiction, but only to provide a framework for discovery of foreign non-parties.[2483] The U.S. Supreme Court eventually clarified the issue in *Société Nationale Industrielle Aérospatiale* v. *United States District Court for the Southern District of Iowa* (1987),[2484] ruling that the Convention did *not* confer exclusivity, but was an optional avenue.

9.4.1. The Aérospatiale case

770. *AÉROSPATIALE* MAJORITY – In *Aérospatiale*, a product liability case, U.S. plaintiffs sought discovery of materials from two French state-owned corporations. The French corporations filed a motion for a protective order because in their view, the Hague Convention dictated exclusive procedures, and French penal law precluded them from complying with U.S. discovery. Both the District Court and

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[2480] Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters, March 18, 1970, 847 *U.N.T.S.* 231.

[2481] *See* Brief for Republic of France as *Amicus Curiae* 4, *Société Nationale Industrielle Aerospatiale* v. *United States District Court for the Southern District of Iowa*, 482 U.S. 522 (1986) ("The Hague Convention is the exclusive means of discovery in transnational litigation among the Convention's signatories unless the sovereign on whose territory discovery is to occur chooses otherwise."); R.A. TRITTMANN, "Extraterritoriale Beweisaufnahmen und Souveränitätsverletzungen im deutsch-amerikanischen Rechtsverkehr", 27 *Archiv des Völkerrechts* 195, 214-15 (1989).

[2482] *See* D.J. GERBER, "Extraterritorial Discovery and the Conflict of Procedural Systems: Germany and the United States", 34 *Am. J. Comp. L.* 745, 780 (1986).

[2483] *Graco* v. *Kremlin, Inc.*, 101 F.R.D. 503, 519 (1984); *In re Anschuetz*, 754 F.2d 602, 611 (5th Cir. 1985).

[2484] 482 U.S. 522, 107 S.Ct. 2542 (1987). *See* on this case, *e.g.*, G.A. BERMANN, "The Hague Evidence Convention in the Supreme Court: a Critique of the *Aérospatiale* Decision", 63 *Tul. L. Rev.* 525 (1989); D.J. GERBER, "International Discovery After *Aérospatiale*: The Quest for an Analytical Framework", 82 *A.J.I.L.* 521 (1988); G.B. BORN & S. HOING, "Comity and the Lower Courts: Post-*Aérospatiale* Applications of the Hague Evidence Convention", 24 *Int'l Law.* 393 (1990); H.L. BUXBAUM, "Assessing Sovereign Interests in Cross-Border Discovery Disputes: Lessons From *Aérospatiale*", 38 *Texas Int. L. J.* 87, 90 (2003).

the Circuit Court[2485] dismissed the motion. The Supreme Court granted certiorari.[2486] A number of European Governments thereupon filed *amicus curiae* briefs with the Supreme Court. In 9.2.3, these briefs have been discussed in the context of judicial sovereignty.

In view of the language and negotiating history of the Hague Evidence Convention, the U.S. Supreme Court rejected the view that the Convention required its use to the exclusion of any other discovery procedures, and the view that the Convention required first, although not exclusive, use of its procedures.[2487] Instead, because the Convention did not feature "any command that a contracting state must use Convention procedures when they are not needed,"[2488] use of the Convention was only optional for U.S. courts. Of course, Article 23 of the Convention which expressly authorizes "a contracting state to declare that it will not execute any letter of request in aid of pretrial discovery of documents in a common-law country", an authorization which civil law countries have not failed to act upon, played an important role in reaching this decision. Because declarations under Article 23 might possibly render recourse to the Convention futile, the Court held that the parties to the Convention could not have had the intention to entirely replace U.S. pre-trial discovery by Convention procedures.[2489] Citing *In re Anschuetz & Co.*,[2490] a case decided by the Fifth Circuit in 1985, the Court held that the United States, when adopting the Convention, would have plainly stated that it intended the Convention to pre-empt U.S. discovery methods, *quod non*.[2491]

771. The importance of pre-trial discovery in U.S. litigation was clearly decisive for the Court in ruling against an interpretation of the Hague Convention as the exclusive means for obtaining evidence abroad. Given the frequent use of discovery, the Court feared that a rule of exclusivity would subordinate U.S. courts to foreign authorities for "even the most routine of […] pretrial proceedings", and that, accordingly, international commercial litigation would be unduly delayed.[2492] The Court in *In re Anschuetz* even called the subordination of U.S. courts to foreign authorities "a significant possibility of very serious interference with the jurisdiction of the U.S. courts"[2493], and thus with U.S. judicial sovereignty.

While considerations of U.S. judicial sovereignty may oppose an interpretation under which the Hague Evidence Convention procedures are the exclusive means of obtaining evidence abroad, it could be argued that an interpretation requiring first resort to Convention procedures would not violate U.S. judicial sovereignty. The

[2485] 782 F.2d 120 (8th Cir. 1986).
[2486] 476 U.S. 1168, 106 S.Ct. 2888 (1986).
[2487] 482 U.S. at 534.
[2488] *Id.*, at 535.
[2489] *Id.*, at 536.
[2490] 754 F.2d 602, 612 (5th Cir. 1985).
[2491] 482 U.S. at 539.
[2492] *Id.*, at 539. In product liability cases, U.S. courts typically take the position that manufacturers producing products abroad for use in the United States are subject to the (discovery) laws of the United States. *See e.g. In re Aircrash Disaster Near Roselawn, Indiana*, 172 F.R.D. 295, 309-10 (N.D. Ill. 1997), citing *Aérospatiale* ("We find concern for the sovereignty rights of the United States if discovery for accidents occurring in the United States is limited by the internal law of another country" and "We find the concerns of the United States in protecting its citizens from unsafe products outweighs any of the aircraft defendants' "sovereignty" concerns, if any really exist in the first place.").
[2493] 754 F.2d 602, 612 (5th Cir. 1985).

Supreme Court held however that announcing such a rule would "be unduly time consuming and expensive, as well as less certain to produce needed evidence than direct use of the Federal Rules".[2494] The Court thus ruled that U.S. domestic law ought to prevail over multilaterally agreed cooperative arrangements because applying domestic law may be more expeditious than applying international law. Yet while the Supreme Court rejected a rule that would require *first* resort to the Convention, it did not reject use of the Convention altogether. The Court indeed pointed out that, provided that effectiveness is guaranteed, a comity analysis may at times point at first resort to the Hague Convention.[2495] Moreover, it admitted that "objection to "abusive" discovery that foreign litigants advance should [receive] the most careful consideration"[2496] and, citing *Hilton* v. *Guyot* (1895),[2497] that U.S. courts should take care to demonstrate due respect "for any sovereign interest expressed by a foreign state."[2498]

772. *AÉROSPATIALE* MINORITY – In a partly concurring, partly dissenting opinion, four Supreme Court Justices led by Justice BLACKMUN approved of the Court's position that the Convention does not provide the exclusive means for discovery abroad, but took issue with the Court's determination that the Hague Evidence Convention only constitutes an optional device.[2499] Suggesting the application of a general assumption that U.S. courts should resort first to Convention procedures lest U.S. national and international interests be undermined,[2500] the minority opinion oozes strong support for a more multilateral analysis and for more sensitivity to foreign nations' concerns over extraterritorial discovery. Their position closely resembles the position taken by European States in their *amicus curiae* briefs, although they do not go as far as asserting the exclusivity of the Hague Convention's procedures.

The minority Justices persuasively pointed out that the civil law nations would never have agreed to the Hague Evidence Convention would that Convention not normally channel discovery requests and thus protect their territorial sovereignty.[2501] The Justices advocated first resort to the Convention, pointing out that the methods featuring in the Convention already largely eliminate conflicts between U.S. discovery and foreign laws,[2502] that the supposed lack of effectiveness of its procedures was not proven,[2503] and that failing to heed the Convention's procedures

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[2494] 482 U.S. at 542-43. *Compare Murphy* v. *Reifenhause, KG Maschinenfabrik*, 101 F.R.D. 360, 361 (D. Vt. 1984).
[2495] 482 U.S. at 544. *Compare In re Aircrash Disaster Near Roselawn, Indiana*, 172 F.R.D. 295, 310 (N.D. Ill. 1997) ("We find no useful purpose would be served to substitute effective and efficient discovery under the Federal Rules with the less than certain and burdensome Convention procedure.").
[2496] 482 U.S. at 546.
[2497] *Hilton* v. *Guyot*, 159 U.S. 113 (1895).
[2498] 482 U.S. at 546. The Supreme Court did not distinguish between obtaining evidence from litigants or non-parties: the comity test applies to both situations, although obtaining evidence from non-parties is more likely to offend other nations. *See* H.L. BUXBAUM, "Assessing Sovereign Interests in Cross-Border Discovery Disputes: Lessons From *Aérospatiale*", 38 *Texas Int. L. J.* 87, 99 (2003).
[2499] Justice BLACKMUN, with whom Justice BRENNAN, Justice MARSHALL and Justice O'CONNOR joined, concurring in part and dissenting part, 482 U.S. 547.
[2500] *Id.*, at 548-49.
[2501] *Id.*, at 550-51.
[2502] *Id.*, at 560-61.
[2503] *Id.*, at 561-67.

might provoke a political fall-out.[2504] Against the comity-based case-by-case determination of whether the Hague Convention would apply, set forth by the majority,[2505] the Justices argued that not the courts, but the Executive is "best equiped to determine how to accommodate foreign interests along with our own,"[2506] and that a "pro-forum bias is likely to creep into the supposedly neutral balancing process."[2507]

9.4.2. Aérospatiale progeny

773. After *Aérospatiale*, in keeping with the *Aérospatiale* opinion, comity continued to play a role in the granting of extraterritorial discovery requests, but courts often only engaged in a comity analysis balancing particular sovereign interests, while casting aside international system needs,[2508] of which the Hague

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[2504] *Id.*, at 567-68.

[2505] In spite of the minority's critique, it is however not unusual for the Supreme Court not to elaborate on the content of the comity principle. Without providing general supervisory rules, it often leaves the lower courts discretion to apply a particularized comity analysis as they see fit. As far as extraterritorial discovery is concerned, it so happened in *Aérospatiale* and in *Intel* v. *AMD* (2004), a decision discussed in section 9.8. In both cases, the minority urged the Court to adopt adequate guidance. In *Intel* v. *AMD*, the Supreme Court majority, without adopting supervisory rules, however set forth a comity and international system-based four-factor test, to be heeded by the lower courts. This apparently sufficed to limit the minority to just one Justice.

[2506] 482 U.S. at 552.

[2507] *Id.*, at 553.

[2508] The lack of reference to international system needs in *Aérospatiale* and its progeny was severely criticized by parts of the doctrine. *See e.g.* H.L. BUXBAUM, "Assessing Sovereign Interests in Cross-Border Discovery Disputes: Lessons From *Aérospatiale*", 38 *Texas Int. L. J.* 87, 92-94 (2003). European nations typically emphasize international system needs. *See e.g.* Brief of the Government of Switzerland as Amicus Curiae in Support of Petitioners, at 14, *Aérospatiale* (No. 85-1695), *reprinted in* 25 *I.L.M.* 1556 (1986) ("A decision to violate the [Hague Evidence] Convention should not be made without full consideration of the long-term effects on the international legal system, whose stability benefits the United States, as well as Switzerland and many other countries"); Brief of the Government of the United Kingdom of Great Britain and Northern Ireland as Amicus Curiae in Support of Petitioners, at 15, *Aérospatiale* (No. 85-1695), *reprinted in* 25 *I.L.M.* 1565 (1986) ("There is the further interest, frequently forgotten, in promoting respect for the sovereign equality of states under international law; American individuals and enterprises benefit when another nation's authorities manifest respect for United States sovereignty. It is in the interest of all concerned parties to foster a relatively stable and predictable international system in which it is possible at the same time to abide by the law of each friendly trading nation where one does business."). *Compare In re Vitamins Antitrust Litigation*, 120 F.Supp. 2d 45, 53-54 (D.D.C. 2000) ("[T]he Court finds that most of the lower courts which have considered the issue of whether to proceed under Hague or the Federal Rules appear to have given considerably less deference to the foreign nations' sovereign interests than this Court believes is warranted", while at the same time advocating a particularized analysis of the respective interests and finding "that the signatory defendants' sovereign interests will not be unduly hampered by proceeding with jurisdictional discovery according to the Federal Rules" in this case). The 1987 Restatement (Third) of U.S. Foreign Relations Law (1987) is not particularly instrumental in adequately considering the interests of sovereign States, let alone in considering international system needs. In its § 437(1)(c), it conspicuously prefers a balancing of individual interests over sovereign interests. Only the fifth factor of factors to be taken into account pursuant to § 437(1)(c) of the Restatement refers to sovereign interests:

(1) the importance to the […] litigation of the documents or other information requested;
(2) the degree of specificity of the request;
(3) whether the information originated in the United States;
(4) the availability of alternative means of securing the information; and
(5) the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located.

Evidence Convention may be supposed to be the transmission belt. Comity was further watered down due to the link that the *Aérospatiale* majority drew between comity and effectiveness. The sacrifice of comity in favor of effectiveness could be gleaned from the three-pronged balancing test that the lower courts have distilled from the *Aérospatiale* decision, a test which weighs (1) the effectiveness of the Federal Rules (absence of abusive or unfair discovery); (2) the sovereign interests involved; and (3) the effectiveness of the Convention.[2509] Not surprisingly, given the emphasis laid on effectiveness, subsequent federal case-law has vindicated the *Aérospatiale* minority's concern of pro-forum bias: the analysis typically yields application of the Federal Rules of Civil Procedure and a granting of the extraterritorial discovery request. Only in the 1987 *Hudson*[2510] and the 1991 *Perrier*[2511] judgment did a federal court seem to take other nations' sovereign interests seriously. State courts may however be more forthcoming.

774. *HUDSON* – In a case immediately following the Supreme Court's *Aérospatiale* opinion, *Hudson* v. *Hermann Pfauter GmbH & Co.* (1987),[2512] a New York District Court took a remarkable multilateral approach, drawing to a large extent on the *Aérospatiale* minority opinion instead of on the majority opinion.[2513] It shunned the Restatement and preferred Justice Blackmun's tripartite analysis in *Aérospatiale*, an "analysis that considers the foreign interests, the interests of the United States, and the mutual interests of all nations in a smoothly functioning international legal regime."[2514]

With regard to the foreign interests involved, in the case the interests of West Germany, the District Court pointed out, in harsh words, that the "use of the discovery provisions of the Federal Rules within the borders of West Germany […] constitute[s] nothing less than a violation of West Germany's internal laws by outsiders with the approval and support of American courts".[2515] Unlike the majority in *Aérospatiale*, the District Court in *Hudson* believed that the Hague Evidence Convention prevailed over U.S. discovery rules, and that the burden of proof should be placed on the party opposing the use of Convention procedures to demonstrate that the Convention would frustrate U.S. interests, in particular effective discovery procedures. The District Court admitted that the use of Convention procedures might, as long as judges and lawyers are not familiar with them, cause some delay, but stated that "these

[2509] *E.g.*, *Rich* v. *KIS California, Inc.*, 121 F.R.D. 254 (M.D.N.C. 1988); *Doster* v. *Schenk*, 141 F.R.D. 50 (M.D.N.C. 1991); *In re Perrier Bottled Water Litigation*, 138 F.R.D. 348, 355 (D. Conn. 1991). *Contra In re Asbestos Litigation*, 623 A.2d 546 (Del. Super. Ct. 1992) ("The factors enunciated by the Supreme Court do not represent minimal requirements for an analysis of whether the parties must proceed under the Hague Convention or under the usual Rules of the Court. Nor do those three factors represent the entire universe of relevant considerations.")

[2510] *Hudson* v. *Hermann Pfauter GmbH & Co.*, 117 F.R.D. 33 (N.D.N.Y. 1987). *Compare Haynes* v. *Kleinwefers et al.*, 119 F.R.D. 335, 338-39 (E.D.N.Y. 1988) (construing *Hudson* as following *Aérospatiale*, ruling that it simply elected "to proceed under the Convention based upon an analysis of the competing interests in that case.")

[2511] *In re Perrier Bottled Water Litigation*, 138 F.R.D. 348, 355 (D. Conn. 1991).

[2512] 117 F.R.D. 33 (N.D.N.Y. 1987).

[2513] It has been argued that *Hudson* actually upholds the *Aérospatiale* majority opinion in that it applies the case-by-case review advocated by the majority. *See* C.D. WALLACE, "'Extraterritorial Discovery: Ongoing Challenges for Antitrust Litigation in an Environment of Global Investment", *J.I.E.L.* 353, 384 (2003).

[2514] 482 U.S. 555.

[2515] 117 F.R.D. 38.

inconveniences alone do not outweigh the important purposes served by the Hague Convention."[2516] The Court therefore ruled that the plaintiffs should serve their interrogatories in Germany in accordance with the terms of the Hague Convention.

775. *PERRIER* – By the same token, the *In re Perrier Bottled Water Litigation* (1991) shows that the *Aérospatiale* three-pronged test need not automatically lead to applicatioun of the Federal Rules of Civil Procedure. In *In re Perrier*, a Connecticut District Court held, citing *Hudson*, that "[t]he simple fact that, in joining the Convention, France has consented to its procedures is an expression of France's sovereign interests and weighs heavily in favor of the use of those procedures."[2517] It may submitted that this logical outcome based on the "simple fact" of being a party to the Convention was not exactly the outcome that the U.S. Supreme Court had in mind when devising the foreign interests test in *Aérospatiale*, because the Connecticut District Court in effect distorted the balancing process by laying heavy emphasis on France's general interests of judicial sovereignty.

776. U.S. STATE COURTS – Unlike federal courts, which are bound by the Supreme Court's *Aérospatiale* opinion, state courts may have more leeway to resort to the Hague Evidence Convention.[2518] The New Jersey Supreme Court for instance followed *Hudson* and not *Aérospatiale* in 1999. It held that the French "'"blocking statute" was a cogent expression of French concerns which should be accommodated when possible" and that, as a result, "[U.S.] courts and litigants may harvest reciprocal benefits when in need of the cooperation of foreign tribunals to gather evidence from persons or entities not subject to the jurisdiction of our courts, or in the enforcement of judgments."[2519] At the federal level, courts have ordinarily preferred the Federal Rules over the Convention.

777. *BENTON GRAPHICS* – In *Benton Graphics* v. *Uddeholm Corp.* (1987),[2520] also one of the first post-*Aérospatiale* cases – the New Jersey District Court hearing this case had stayed its proceedings pending *Aérospatiale* – the District Court minimized the importance of the Hague Evidence Convention along the lines of the Supreme Court majority in *Aérospatiale*, and rejected the view taken by the court in *Hudson*.[2521] It held that the Swedish litigants of whom discovery was sought, had to bear the burden of proof if they sought resort to the Convention: "[F]oreign litigants attempting to supplant the federal rules with Convention procedures must demonstrate why the particular facts and sovereign interests support using the Convention."[2522]

[2516] *Id.*

[2517] *See In re Perrier Bottled Water Litigation*, 138 F.R.D. 348, 355 (D. Conn. 1991).

[2518] *See e.g. Husa* v. *Laboratoires Servier SA*, 740 A.2d 1092 (NJ Supreme Ct App Div 1999).

[2519] *Id.*, at 1096. *See however Moake* v. *Source International Corp.*, 623 A.2d 263, 265-66 (N.J. Super. Ct. App. Div. 1993) (finding no "proof in [the] record that plaintiff's discovery request generally would violate [Germany's] sovereignty", instead finding a "strong [U.S.] interest generally in assuring that product liability actions given full attention to protect American consumers"). *See also In re Asbestos Litigation*, 623 A.2d 546. 550 (Del. Super. Ct. 1992) ("The fact that a foreign government might regard discovery outside the Hague Convention procedures as an affront is not, however, dispositive.")

[2520] 118 F.R.D. 386 (D.N.J. 1987).

[2521] *Id.*, at 389 n. 2.

[2522] *Id.*, at 389. *See also Scarminach* v. *Goldwell GmbH*, 140 Misc.2d 103, 531 N.Y.S.2d 188 [Sup. Ct. Monroe Co.1988] (holding that a party seeking to require use of the Hague Convention for the discovery process bore the burden of demonstrating that it was entitled to a system of discovery different than others who do business in the United States). *Compare In re Vitamins Antitrust Litigation*, 120 F.Supp. 2d 45, 51 (D.D.C. 2000) ("*Aérospatiale* did not specifically rule on the burden

Accordingly, in the view of the District Court, the Convention is the exceptional avenue, in need of adequate justification, while the U.S. discovery rules are considered to be applicable *per se*, without further justification, in extraterritorial discovery cases.

In asserting Swedish sovereign interests, the Swedish defendants in *Benton Graphics* heavily relied on an authenticated declaration of an Assistant Under-Secretary of the Swedish Ministry for Foreign Affairs. For our analysis, it might be useful to reproduce the sovereign interests identified by this Swedish official, interests which boil down to Sweden's interests in safeguarding its judicial system and its evidence-taking methods from extraterritorial encroachment by other nations, because the Swedish official's statement may represent a typical European view on the relationship between discovery and the Hague Evidence Convention. She held that the Hague Evidence Convention should apply, since:

> (a) It serves as an essential link and an effective mechanism for cooperation between different legal systems.
> (b) It minimizes conflicts between the legal requirements of different states.
> (c) It satisfies the urging of the United States for Sweden and other civil law nations to provide a means for complying with requests for pretrial discovery of documentary evidence in a manner which is consistent with the laws of Sweden.
> (d) It discourages "fishing expedition" methods of obtaining unspecified evidence, which are regarded as unacceptable in Sweden and in other civil law nations.
> (e) It effectively balances the divergent interests promoted by the United States' and Sweden's conflicting rules on who bears the costs associated with compliance. The rule in Sweden, as in most civil law countries, is that the losing party reimburses the winner for litigation expenses. Unlike the general rule in the United States, the Swedish rule forces plaintiffs to evaluate carefully the merits of a case before bringing it.
> (f) It enables Swedish courts to limit discovery in sensitive and protected areas under Swedish law such as trade secrets and national security.[2523]

As Sweden's arguments were "merely general reasons why Sweden prefers civil law discovery procedures to the more liberal discovery permitted under the federal rules", the District Court rejected them.[2524] With respect to the sovereign interests of a more particularized nature, such as the protection of trade secrets and national security, and the fear of "fishing expeditions", the Court held that no specific allegations were made.[2525]

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of proof for these factors, but most courts have placed this burden on the party seeking to require first-use of the Convention", while also stating that *Aérospatiale* contains indications "that the Supreme Court was placing the burden on the Hague proponents to show why Convention procedures should be used in a given case."). *See also SEC* v. *Euro Security Fund*, S.D.N.Y. Civil Action 98 Civ. 7347, DLC 18 June 2001 (holding that defendants in an insider trading case had failed to make a showing that the production of evidence would violate Swiss law).

[2523] 118 F.R.D. 389..

[2524] *Id.*

[2525] *Id.*

The District Court in *Benton Graphics* also put a high premium on the effectiveness of the Convention's procedures, as did the Supreme Court in *Aérospatiale*, to the detriment of sovereignty concerns. As the case had already been delayed several times and as it would take two months for the letters of request to be processed in Sweden, the District Court found the Convention to be not effective. Yet, oddly, for the District Court the question was not only whether the *Convention* was effective, but in the first place whether the *Federal Rules* were sufficiently effective to deal with the discovery request. If they were, an analysis of the effectiveness of the Convention would appear redundant: "Since discovery of [all relevant] tests and other relevant information can be accomplished efficiently under the federal rules the "particular facts" of this case do not necessitate resort to the Convention."[2526] Obviously, predicating the use of Convention procedures on the perceived ineffectiveness of domestic procedures hardly serves comity, a principle which precisely implies that short-term case-specific effectiveness is sacrificed for the sake of courtesy towards other nations and the smooth functioning of international relations.[2527]

778. *RICH*: DISCOVERY FOR PURPOSES OF PERSONAL JURISDICTION – The *Hudson* view was not only explicitly rejected by the New Jersey District Court in *Benton Graphics*, but also by a North Carolina District Court in *Rich* v. *KIS California, Inc.* (1988).[2528] In this case, the Court ruled that "the proponent of using the Hague Evidence Convention bears the burden of demonstrating the necessity for using those procedures."[2529] As he failed to show discovery abuse or to identify a foreign sovereign interest, the Convention was deemed not to apply.[2530]

[2526] *Id.*, at 391.

[2527] *See also Doster* v. *Schenk* 141 F.R.D. 50 (M.D.N.C. 1991). In this case, the North Carolina District Court similarly preferred the Federal Rules over the Hague Evidence Convention, implying that the Convention procedures are only meant for discovery requests of a potentially harassing or a sensitive nature. While in *Rich* it stated that discovery aimed at establishing personal jurisdiction did not raise sovereignty concerns, it held in *Doster* that fairly standard discovery requests regarding the merits were not intrusive (*Id.*, at 53). This outcome should not be overstated, as it was influenced by the defendant's refusal to participate in a discovery conference procedure, proposed by the plaintiffs, wherein the discovery request could be trimmed. In spite of its characterization of standard discovery requests as not sensitive in sovereignty terms, the District Court in *Doster* nevertheless conducted the three-pronged interest-balancing test borrowed from *Aérospatiale* (a test of the effectiveness of the Federal Rules, the consideration of foreign interests and the effectiveness of the Convention) so as to determine whether the Convention or the Federal Rules should apply. The District Court concluded that the result of these three prongs clearly weighed in favor of an application of the Federal Rules. As to the first prong, it held that the defendant failed to show that the Federal Rules were ill-suited to protect him against abusive or unfair discovery. As to the second, echoing *Benton Graphics*, it ruled that the defendant failed to show how important German interests would be offended by the use of the Federal Rules. Third, it believed the Convention procedures in Germany to be too time-consuming and hence ineffective, especially in view of Germany's unwillingness to execute letters of request for documents (*Id.*, at 53-54. *Compare* the Court in *Hudson*, 117 F.R.D. 33, 38 (N.D.N.Y. 1987). The *Hudson* Court view that the possible delay involved in Convention procedures is not decisive, related to the nature of the requested discovery. While Germany is generally willing to execute letters of request for interrogatories, it is mostly unwilling to execute such letters for *documents*, on the basis of a declaration pursuant to Article 23 of the Convention). Clearly, the District Court failed to heed general concerns of judicial sovereignty and international system needs, instead focusing on particular German interests and the efficiency of discovery procedures.

[2528] 121 F.R.D. 254 (M.D.N.C. 1988).

[2529] *Id.*, at 257.

[2530] *Id.*, at 258.

Rich was however groundbreaking for dealing with another question: whether the Hague Evidence Convention rather than the Federal Rules must be utilized so as to solve disputes over personal jurisdiction, *i.e.*, to find out whether a person has sufficient minimum contacts with the United States (*e.g.*, whether a U.S. parent corporation exercised a sufficient degree of control over a foreign corporation to require production of foreign-based materials). After *Aérospatiale* it was clear that the Federal Rules applied if personal jurisdiction could be secured. It was also clear that, under U.S. law, the plaintiff need only make a *prima facie* showing of jurisdiction for discovery confined to issues of personal jurisdiction to be permitted.[2531] It was however unclear whether the Federal Rules could apply to the same extent in transnational litigation if personal jurisdiction were not yet established, or whether instead, Convention procedures should primarily be followed.

The *Rich* Court decided that the foreign nationality of the defendant did not preclude the applicability of the Federal Rules, and that the Hague Evidence Convention was not entitled to precedence, and *Aérospatiale* would apply unabated in disputes involving personal jurisdiction.[2532] In the view of the District Court, protective orders pursuant to the Federal Rules could trim or prohibit overbroad discovery requests, without the need arising for recourse to Convention procedures. Moreover, not the preliminary issues of personal jurisdiction, but rather the matters of merit would raise sovereignty sensitivities. It would make sense to speed up a determination of personal jurisdiction through the most effective discovery procedures, *i.e.*, pursuant to the Federal Rules and not to the Convention.[2533] The *Rich* holding was later confirmed by other courts.[2534]

While the *Rich* Court's analysis appears sound from a U.S. perspective, Europeans, unfamiliar with the American concept of personal jurisdiction, may fail to see the distinction between extraterritorial discovery for purposes of preliminary personal jurisdiction and such discovery for purposes of resolving the merits. Both types of discovery may be perceived by European States as unduly intrusive on their judicial sovereignty.

[2531] *Marine Midland Bank, N.A.* v. *Miller*, 664 F.2d 899, 904 (2d Cir. 1981); *Compagnie des Bauxites* v. *L'Union*, 723 F.2d 357 (3d Cir. 1983). *See also* reporters' note 11 to § 442 of the Restatement (Third) of U.S. Foreign Relations Law.

[2532] 121 F.R.D. 259-60 ((("In construing the Hague Evidence Convention as an alternative discovery method, the Supreme Court in *Societe Nationale* did not carve out any exception for disputes involving personal jurisdiction.").

[2533] *Id.*, at 260.

[2534] *In re Bedford Computer Corp.*, 114 B.R. 2, 5-6 (Bankr. D.N.H. 1990) (citing *Rich*); *Fishel* v. *BASF Group*, 175 F.R.D. 525, 529 (S.D. Iowa 1997) ("The Court does not believe plaintiff is limited to the Hague Evidence Convention until the Court rules on the personal jurisdiction issue"; "The Supreme Court held that the Convention procedures are optional and do not divest federal district courts of authority to order discovery under the Federal Rules of Civil Procedure."); *In re Vitamins Antitrust Litigation*, 120 F.Supp. 2d 45, 49 and 54 (D.D.C. 2000) (holding that "since the Court has jurisdiction over these foreign defendants to the extent necessary to determine whether or not they are subject to personal jurisdiction in this forum, the Court sees no legal barrier to exercising the discretion given by the trial courts by *Aérospatiale* in cases of jurisdictional discovery," finding that the sovereign interests of six foreign nations did not outweigh U.S. interests, and "that both parties have a strong interests in an efficient and effective means of obtaining this jurisdictional discovery so that this threshold issue can be resolved.").

779. DISCOVERY AND STATES NON-PARTIES TO THE HAGUE EVIDENCE CONVENTION – As *Aérospatiale* dealt with the relationship between the Hague Evidence Convention and the Federal Rules, courts have ruled that *Aérospatiale* is wholly irrelevant to nations that are not signatories to the Hague Evidence Convention.[2535] This need however not yield a more ready application of the Federal Rules. In *In re Vitamins Antitrust Litigation* for instance, the District Court decided to afford "special attention to the international territorial preference which favors discovery procedures governed by the law of the territory where discovery is sought in the absence of any conflict between the Federal Rules and the laws of that territory."[2536] This leads to the strange situation that nations that are parties to a multilateral convention which is precisely aimed at facilitating foreign evidence-taking may find themselves worse off than nations that are not parties to such a convention. While *Aérospatiale*'s particularized and pro-forum interest-balancing test governs the situation of the former, the latter appear to be entitled to a general sovereign interests balancing test which emphasizes the priority of the territorial State. The District Court in *In re Antitrust Vitamins Litigation* indeed ruled that the general principles of comity apply in the event that there is a conflict between the U.S. and foreign evidence laws.[2537] The outcome of the application of the comity principles in this case led however, not surprisingly, to a finding that U.S. sovereign interests outweighed foreign interests. Accordingly, in practice, the *Aérospatiale* test and the general comity test concerning documents located in a State which is a non-party to the Hague Evidence Convention may yield the same results; both may suffer from a pro-forum bias.

9.5. Blocking statutes

780. Reference has already been made several times to the existence of blocking statutes, *i.e.*, statutes that are aimed at undoing the effects of extraterritorial U.S. discovery orders. Blocking legislation typically prohibits persons whose documents are located in the territory of the blocking State from complying with U.S. discovery orders requiring the production of such documents under the threat of a penal sanction.[2538] In this section, the British Protection of Trading Interests Act (1980), a British blocking statute with general scope, will be examined, after a discussion of the U.S. litigation which contributed most to the enactment of blocking legislation, the 1970s *Uranium* litigation.

9.5.1. The Uranium litigation

781. To favour domestic uranium production, the U.S. Atomic Energy Commission ordered in the late 1960s that all future U.S. uranium purchases be made only from U.S. domestic production. As a result, foreign producers were denied access to the U.S. uranium market, which made up 70 percent of the world market.

[2535] *In re Vitamins Antitrust Litigation*, 120 F.Supp. 2d 45, 55 (D.D.C. 2000); *McKesson Corp.* v. *Islamic Republic of Iran*, 185 F.R.D. 70 (D.D.C. 1999); *Japan Halon Co., Ltd.* v. *Great Lakes Chemical Corp.*, 155 F.R.D. 626, 627 (N.D.Ind. 1993).

[2536] *In re Vitamins Antitrust Litigation*, 120 F.Supp. 2d 45, 55 (D.D.C. 2000).

[2537] *Id.*

[2538] *See, e.g.*, for a definition: reporters' note 4 to § 442 (1) (c) of the Restatement (Third) of U.S. Foreign Relations Law ("Blocking statutes are designed to take advantage of the foreign government compulsion defense … by prohibiting the disclosure, copying, inspection, or removal of documents located in the territory of the enacting state in compliance with orders of foreign authorities.").

Thereupon, in 1972, non-U.S. uranium producers agreed to price and quota arrangements to stabilize world prices. The cartel was not aimed at the U.S., as U.S. purchases were confined to U.S.-produced uranium. Before the formation of this cartel, Westinghouse, an American uranium producer, had entered into contracts to supply uranium for nuclear reactors at fixed prices. After 1972 however, the price of uranium rose sharply, from US$ 4.50 per pound to US$ 42.00 per pound in three years' time, due to the foreclosure of the U.S. market, the subsequent price cartel, and a higher demand for uranium. Westinghouse had not made a provision for this price increase and, invoking commercial impracticability, it refused to supply the uranium at the contractual fixed prices. This entailed breach-of-contract suits claiming US$ 2 billion in damages. As a reaction, Westinghouse filed an antitrust suit against 29 domestic and foreign uranium conspirators, alleging that it was their cartel agreement which caused its losses. The U.S. Court of Appeals for the 7th Circuit found that it had jurisdiction over the agreement and permitted Westinghouse to calculate its financial loss. The dispute was eventually settled.[2539]

782. The *Uranium* litigation led to considerable international tension. For one thing, the home States of the uranium producers that formed the cartel disputed the exercise of antitrust jurisdiction over the uranium conspiracy. These States argued that the conspiracy, which admittedly caused some indirect effects in the United States, was precisely formed because of the foreclosure of the U.S. market by the U.S. Atomic Energy Commission (*nemo auditur* principle).[2540] For another, and not entirely unrelated to the former, the home States fiercely opposed discovery orders issued in the United States for the production of documents located in the home States.[2541]

[2539] *See* for relevant court decisions in the *Westinghouse Uranium Litigation: Westinghouse Elec. Corp. Uranium Contracts litigation*, 405 F. Supp 316 (Jud. Pan. Mult. Lit. 1975); *In re Westinghouse Elec. Corp. Uranium Contracts Litig.*, 563 F.2d 992 (10th Cir. 1977); *In re Uranium Antitrust Litig.*, 617 F.2d 1247 (7th Cir. 1980); *In re Uranium Antitrust Litig.*, 480 F. Supp. 1138 (N.D. Ill. 1979); *Westinghouse Elec. Corp. v. Rio Algom Ltd.*, 1980-81 Trade Cases 63183; 1979-1 Trade Cases 62657. See for a more extensive summary of the Westinghouse litigation: W. PENGILLEY, "The Extraterritorial Impact of U.S. Trade Laws – Is it not Time for "ET" to Go Home?", 20 W. Comp. 17, 25-31 (1997).

[2540] *See* the remarks of the British Secretary of State in the British House of Commons, 973 PARL. DEB., H.C. (5th ser.) 1540, 1541 (1979) ("Why, then, should a United States company be able to drag foreign companies, including one of our leading companies, before a United States court in order to obtain massive damages for activities by non-United States companies outside the United States at a time when they were even denied access to the United States market?").

[2541] Standing out is a decision by the District Court for the Northern District of Illinois in 1979 on discovery of foreign documents held abroad by uranium producers. *In re Uranium Antitrust Litig.*, 480 F. Supp. 1138 (N.D. Ill. 1979). In this case, the Court, drawing on a comity-unfriendly decision of the Tenth Circuit in the 1976 case of *Arthur Andersen & Co.* v. *Finesilver*, 546 F.2d 338, 342 (10th Cir. 1976) ("We are not impressed by Andersen's contention that international comity prevents a domestic court from ordering action which violates foreign law. If the problem involves a breach of friendly relations between two nations, Andersen should call the matter to the attention of those officers and agencies of the United States charged with the conduct of foreign affairs, and they could much such representation to the court as they deemed suitable. Andersen has not taken this action. Instead, it purports to speak for the United States.") (citation omitted), held that an interest-balancing test, that might result in deference toward foreign States, would be "inherently unworkable", because three foreign governments had enacted nondisclosure legislation aimed at nullifying the impact of American antitrust litigation by prohibiting access to documents the discovery of which is compelled by U.S. courts. *Id.*, at 1148-49. The Court refused to take protest communications from foreign governments into account in its decision whether to issue a production order, holding that these communications were only relevant for the sanctions in case of non-production (*Id.*, at 1149). *See also* the *Andersen* decision. 546 F.2d 338, 341 (10th Cir. 1976). The Court thereupon proceeded to weigh three factors it

Notably English courts refused to execute U.S. letters rogatory for the production of documents for use in the U.S. *Uranium* litigation. In 1978, the English High Court for instance did so regarding the production of documents located in England, arguing that the production of English documents might subject British nationals to domestic liabilities and violated the jurisdiction and sovereignty of the United Kingdom: "Her Majesty's Government considers that the wide investigatory procedures under the United States antitrust legislation against persons outside the United States who are not United States citizens constitute an infringement of the proper jurisdiction and sovereignty of the United Kingdom."[2542] The House of Lords added that the U.S. letters rogatory "range exceedingly wide and undoubtedly extend into areas, access to which is forbidden by English law",[2543] and that they constituted an "unacceptable invasion of [the United Kingdom's] sovereignty"[2544]. Moreover, a host of countries adopted legislation blocking extraterritorial discovery,[2545] which was to be far more damaging to the conduct of foreign relations in the long term and the situation of

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drew from *Société Internationale* in order to determine whether it should exercise its discretionary power to issue the orders to produce documents located abroad. As to the strength of the Congressional policies underlying the statute which forms the basis for plaintiffs' action, a first factor, the Court referred to the Second Circuit's qualification of the antitrust laws as cornerstones of U.S. economic policies. It believed that the strength of the antitrust policies was even greater than the strength of the Trading with the Enemy Act at issue in *Société Internationale.* 480 F. Supp. at 1154. As to the consideration whether the requested documents are crucial to the determination of a key issue in the litigation, the second factor, the Court considered the withheld information to be "the heart and soul of plaintiffs' case". *Id.*, at 1156. With respect to the appraisal of the chances for flexibility in a country's application of its nondisclosure laws, the third factor, the Court observed that South Africa and Australia had taken a more flexible position in granting waivers than Canada. *Id.* After weighing these factors, the Court concluded that the issuance of orders compelling discovery was warranted, and granted Westinghouse's motions against the foreign corporations in their entirety. Interestingly, the Court held that it did "not seek to force any defendant to violate foreign law," as "the entry of [the] orders may lead to a further narrowing of the defendants' foreign law objections". *Id.* The apparent idea is that if U.S. discovery powers are fully brought to bear, foreign governments will be more willing to waive nondisclosure laws, so that the defendants whose conduct is governed by these laws will eventually not be compelled to violate them.

[2542] *Rio Tinto Zinc Corporation* v. *Westinghouse Electric Corp.*, [1978] 1 All. E.R. 434, 448.

[2543] *In re Westinghouse Uranium Contract*, [1978] A.C. 547, 610 (Lord Wilberforce).

[2544] *Id.*, at 639 (Lord Diplock).

[2545] *See, e.g.*, the United Kingdom's Protection of Trading Interests Act, 1980, ch. 11 (Eng.), *amended by* Civil Jurisdiction and Judgments Act, 1982, ch. 27, *and* Statute Law (Repeals) Act, 1993, ch. 50, Sch. 1, pt. XIV; Canada's Foreign Extraterritorial Measures Act, R.S.C., ch. F-29, § 3 (1984) (Can.), *as amended by* Department of External Affairs Act, 1995, ch. 5, 1994-1995 S.C.; France's Law concerning the Communication of Economic, Commercial, Industrial, Financial or Technical Documents or Information Law No. 80-538, 1980 J.O. 1799 (July 16, 1980); Australia's Foreign Proceedings (Excess of Jurisdiction) Act, No. 3 (1984) (Austl.), *as amended by* Foreign Judgments Act, No. 112 (1991); and South Africa's Protection of Business Act, No. 99, § 1 (1978) (S. Afr.), *as amended by* Protection of Business Act Amendment, No. 114 (1979), *and* Protection of Business Act Amendment, No. 71 (1984), *and* Protection of Business Act Amendment, No. 87 (1987). Claw back statutes authorize citizens to seek and recover extra-compensatory damages paid to plaintiffs that have prevailed in United States litigation. *See, e.g.*, the United Kingdom's Protection of Trading Interests Act, 1980, ch. 11, §§ 5-6 (Eng.) *as amended*; Canada's Foreign Extraterritorial Measures Act, R.S.C., ch. F-29, §§ 8-9 (1984) (Can.) *as amended*; and Australia's Foreign Proceedings (Excess of Jurisdiction) Act, No. 3, cl. 10 (1984) (Austl.) *as amended*; cited *in:* R. PITOFSKY, Chairman U. S. Federal Trade Commission, "Competition Policy in a Global Economy - Today And Tomorrow", The European Institute's Eighth Annual Transatlantic Seminar on Trade and Investment Washington, D.C., November 4, 1998, at http://www.techlawjournal.com/atr/N_1_

parties at which a discovery order is directed.[2546] As argued *supra*, U.S. courts tend to view foreign blocking statutes as illegitimate efforts to deprive them of jurisdiction, and routinely dismiss defendants' foreign sovereign compulsion defense based on these statutes. This may lead to a situation of open warfare between the United States and the blocking State, a situation of which private parties are the prime victims.

9.5.2. The United Kingdom Shipping Contracts and Commercial Documents Act

783. The most controversial and far-reaching blocking legislation adopted during or in the aftermath of the *Uranium Litigation* is probably the British Protection of Trading Interests Act (BPTIA, 1980). The BPTIA, which will be discussed in a moment, was not the first British blocking statute however. As early as 1964, the United Kingdom enacted the Shipping Contracts and Commercial Documents Act so as to secure "Her Majesty's jurisdiction against encroachment by certain foreign requirements in respect of the carriage of goods or passengers by sea and in respect of the production of documents and furnishing of information." The act condemned U.S. efforts to exercise its jurisdiction relating to the shipping industry abroad (U.S. efforts at clamping down on shipping conferences pursuant to the Sherman Antitrust Act in particular), and prohibited British companies from complying with any extraterritorial U.S. laws. It considered all extraterritorial measures relating to the shipping industry to be contrary to international law:

> "If it appears to the Minister of Transport […]
> (a) that measures have been taken by or under the law of any foreign country for regulating or controlling the terms or conditions upon which goods or passengers may be carried at sea, or the terms or conditions of contracts or arrangements relating to such carriage; and
> *(b)* that those measures, in so far as they apply to things done or to be done outside the territorial jurisdiction of that country by persons carrying on business in the United Kingdom, *constitute an infringement of the jurisdiction which, under international law, belongs to the United Kingdom*,
>
> the Minister […] may give to any person in the United Kingdom who carries on such a [shipping] business such directions for prohibiting compliance with any such [*i.e.* imposed by a foreign country] requirement or prohibition as he considers proper for maintaining the jurisdiction of the United Kingdom."[2547]

[2546] Blocking statutes already existed before the *Uranium* litigation, but it was only as a result of this litigation that so many States adopted them. The first blocking statute was an Ontario statute aimed at prohibiting Canadian subsidiaries of U.S. corporations to comply with a U.S. discovery order. In the 1950s, the Netherlands enacted similar legislation. In the 1960s then, the United Kingdom, Germany, France, Norway, Belgium, and Sweden adopted blocking legislation so as to thwart investigations of the United States Federal Maritime Commission into international shipping conferences. *See* A.F. LOWENFELD, "International Litigation and the Quest for Reasonableness", 245 *Recueil des Cours* 9, 208-209 (1994-I); reporters' note 4 to § 442 (1) (c) of the Restatement (Third) of U.S. Foreign Relations Law.

[2547] Section 1(1) and 2 of the Shipping Contracts and Commercial Documents Act (emphasis added). *See* on this act also A.V. LOWE, "Blocking Extraterritorial Jurisdiction: the British Protection of Trading Interests Act, 1980", 75 *A.J.I.L.* 257, 258-59 (1981).

784. Whilst the Act appeared to apply merely to the shipping industry, a second section of the Act had a general scope and was aimed at blocking U.S. discovery requests. The Act did not go as far as stating that any U.S. discovery request relating to materials located in the United Kingdom violated international law (and thus as prohibiting compliance by British nationals with any such request): it left that decision up to the Minister of the Crown, wherever it appeared to him:

> "(a) that any person in the United Kingdom has been or may be required to produce or furnish to any court, tribunal or authority of a foreign country any commercial document which is not within the territorial jurisdiction of that country, or any commercial information to be complied from documents not within that jurisdiction; and
>
> (b) *that the requirement constitutes or would constitute an infringement of the jurisdiction which, under international law, belongs to the United Kingdom,*
>
> that Minister may give directions to that person prohibiting him from complying with the requirement in question, or from complying with that requirement in question, or from complying with that requirement except to such extent or subject to such conditions as may be specified in the directions."[2548]

785. It was unclear what the Act understood as "an infringement of the jurisdiction which, under international law, belongs to the United Kingdom". It is usually assumed, as pointed out in the general chapters on jurisdiction, that, under international law, jurisdiction is concurrent, and that, accordingly, several States could exercise jurisdiction over one and the same legal situation, at least if they do so reasonably (although the latter qualification may not constitute international law). It has therefore been argued that, most likely, the Act should be construed as giving priority to claims on the basis of territoriality.[2549] Discovery orders requiring the production of documents located abroad would then be seen as assertions of jurisdiction which, under international law, do not belong to the United States. As argued in 9.2.3, however, the United States have also justified their transnational discovery orders in terms of territorial jurisdiction, and it is utterly unclear what the customary international law on transnational discovery is. It is not surprising that there are no known instances of the Minister of the Crown invoking the illegality of U.S. discovery orders under the 1964 Act so as to prohibit UK persons from complying with such orders.

9.5.3. The British Protection of Trading Interests Act

786. The reference to the legality under international law of U.S. transnational discovery orders clearly complicated the application of the 1964 Shipping Contracts and Commercial Documents Act. Therefore, in the wake of the *Uranium* litigation, considerations based on sovereignty and the national interest superseded considerations based on international law as justifications for the adoption

[2548] *Id.*, Section 2(1) (emphasis added).
[2549] A.V. LOWE, "Blocking Extraterritorial Jurisdiction: the British Protection of Trading Interests Act, 1980", 75 *A.J.I.L.* 257, 267 (1981).

of prohibitive measures, when Parliament adopted a new blocking statute, the British Protection of Trading Interests Act (BPTIA), in 1980.

787. In the *Uranium* litigation, a U.S. court had ordered discovery of materials held by a British company for the purpose of a grand jury antitrust investigation in the United States, orders which were undone by English courts.[2550] The British-Attorney General's view on the legality of these assertions before the English House of Lords in 1978 is worth reprinting here, as it actually provides the rationale for the British Protection of Trading Interests Act adopted two years later:

> "(1) The anti-trust laws of the United States of America should not provide jurisdiction for U.S. courts to investigate non-U.S. companies and non-U.S. individuals in respect of their actions outside the U.S. …
>
> (2) For the purposes of United Kingdom sovereignty the U.K. does not recognise any such investigation as having any validity or as being proper.
>
> (3) The matters set out above are rendered a fortiori by virtue of the penal character of the anti-trust laws.
>
> (4) Any use of the U.S. anti-trust laws or procedures for the above purposes, except with the authority of the U.K., is an invasion of and prejudicial to U.K. sovereignty."[2551]

788. After the *Uranium* litigation reached the English courts, Parliament soon stepped in, and adopted the BPTIA in 1980, a legislative move which was obviously not particularly welcomed by the United States.[2552] Although the British Government argued that the British Protection of Trading Interests Act (BPTIA) was not anti-American and only "designed to protect and not to provoke",[2553] it cannot seriously be doubted that it was inspired by assertions of U.S. extraterritorial jurisdiction, especially in the field of antitrust and discovery.

The BPTIA casts a wide net and provides the legal basis for all trade measures. It is, unlike the 1964 Act, no longer limited to shipping.[2554] It is primarily aimed at blocking the production of documents ordered by foreign courts or regulators,[2555] and also at prohibiting the enforcement of foreign judgments awarded for multiple damages or competition judgments,[2556] and at granting British persons the right to

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[2550] *In re Westinghouse Uranium Contract*, [1978] A.C. 547; *Rio Tinto Zinc.* v. *Westinghouse Elec. Corp.*, [1978] 2 W.L.R. 81 ("Lord Wilberforce stating that it "establishes that quite apart from the present case, over a number of years and in a number of cases, the policy of Her Majesty's Government has been against recognition of United States investigatory jurisdiction extraterritorially against United Kingdom companies. The courts should in such matters speak with the same voice as the executive: they have, as I have stated, no difficulty in doing so.").
[2551] *Id.*, at 591-92.
[2552] *See* United States Diplomatic Note concerning the U.K. Protection of Trading Interests Bill, Nov. 9, 1979, 21 I.L.M. 840; United Kingdom Response to U.S. Diplomatic Note concerning the U.K. Protection of Trading Interest Bill, Nov. 27, 1979, 21 I.L.M. 847
[2553] 973 PARL. DEB., H.C. (5th ser.) 1546 (1979).
[2554] Section 1(6) BPTIA ("'[T]rade' includes any activity carried on in the course of a business of any description and 'trading interests' shall be construed accordingly.").
[2555] Sections 1-4 BPTIA.
[2556] Section 5 BPTIA.

recover foreign multiple damage awards (the "clawback" remedy).[2557] The BPTIA is, like the 1964 Act, not self-executing. Any measures are discretionary decisions by the Secretary of State (the BPTIA is, unlike the French blocking law not self-executing), who determines whether vital British interests are at stake.[2558] The measures are described as "self-protective measures designed to assure that [the] sovereign policy of the United Kingdom is respected", which other nations, the U.S. in particular, are not entitled to second-guess.[2559]

789. Interestingly, the prohibitions under the BPTIA are no longer premised on the perceived illegality of the foreign discovery order, as was the case under the 1964 legislation, but on the damage done to the trading interests of the United Kingdom.[2560] The United Kingdom does no longer seem to consider U.S.-ordered discovery of materials located abroad as necessarily in breach of international law. As it held in a response to a U.S. diplomatic note, it only believes that U.S. foreign discovery orders "raise issues for other states which may lead these latter states to take such steps as they consider appropriate, within the limits of their proper jurisdiction, to limit or exclude such compulsory jurisdiction."[2561] Thus, even if a foreign State (the United States) legitimately exercises its (extraterritorial) jurisdiction, the BPTIA could still be invoked. LOWE has described this as "a shift towards the analysis of the problem in terms of competing sovereignties, rather than competing jurisdictions."[2562]

A similar emphasis on the national interest and national sovereignty instead of on international law could be gleaned from the United Kingdom's 1994 comments on the draft *Antitrust Enforcement Guidelines for International Operations* issued by the U.S. Department of Justice and the Federal Trade Commission:

[2557] Section 6 BPTIA. The "clawback" remedy was premised on the conclusion "that a limited countervailing remedy should be provided to persons in the U.K. who have, while engaged in international trade, been penalized under laws of this kind." *See* Diplomatic Note No. 225, at 4 (Nov. 27, 1979).

[2558] *See also* Brief of the Government of the United Kingdom of Great Britain and Northern Ireland as Amicus Curiae in Support of Petitioners, at 13, *Aérospatiale* (No. 85-1695), *reprinted in* 25 *I.L.M.* 1564 (1986).

[2559] *Id.*

[2560] By virtue of Section 1(1) BPTIA, the Secretary of State may take steps "[i]f it appears to the Secretary of State – (a) that measures have been or are proposed to be taken by or under the law of any overseas country for regulating or controlling international trade; and (b) that those measures, in so far as they apply or would apply to things done or to be done outside the territorial jurisdiction of that country by persons carrying on business in the United Kingdom, *are damaging or threaten to damage the trading interests of the United Kingdom*" (emphasis added). Under Section 2(2), the Secretary of State may prohibit persons with the UK from complying with orders for the production of documents where it appears that the order "(a) … infringes the jurisdiction of the United Kingdom or is otherwise *prejudicial to the sovereignty of the United Kingdom*; or (b) if compliance with the requirement would be *prejudicial to the security of the United Kingdom* or to the relations of the government of the United Kingdom with the government of any other country." (emphasis added). The prohibition also applies pursuant to Section 2(3) if the order is "(a) … made otherwise than for the purposes of civil or criminal proceedings which have been instituted in the overseas country; or (b) if it requires a person to state what documents relevant to any such proceedings are or have been in his possession, custody or power or to produce for the purposes of any such proceedings any documents other than particular documents specified in the requirement."

[2561] United Kingdom Response to U.S. Diplomatic Note concerning the U.K. Protection of Trading Interest Bill, Nov. 27, 1979, 21 *I.L.M.* 847, 848.

[2562] *See* A.V. LOWE, "Blocking Extraterritorial Jurisdiction: the British Protection of Trading Interests Act, 1980", 75 *A.J.I.L.* 257, 274 (1981).

> "[T]he UK Government objects to the statement in the Guidelines that particular statutes might 'purport to prevent persons from disclosing documents or information for use in United States proceedings'. It is a legitimate exercise of *national sovereignty* for a state to act to protect its sovereignty and its trading interests. The invocation of such a statute by a foreign government would be an important indication of the degree of governmental concern and should be regarded as decisive in the Agencies' comity analysis."[2563]

790. The BPTAIA de-legalizes and politicizes the law of jurisdiction by swapping hard legal principles conferring a measure of certainty and predictability for fickle political interests. While LOWE has hailed this development "because it might facilitate an accommodation of British and American interests tailored to the trading needs of those countries,"[2564] it may be argued that the international legal order does not benefit from jurisdictional criteria that are just by-words for the exercise of political power. It is regrettable that the BPTIA does not set forth a set of flexible but nonetheless legal principles that could be known to transnational actors *before* they conduct a particular transaction, and could thus enable the latter to identify the regulations to which their transaction will be subject. An explicit interest-balancing analysis informed by a jurisdictional rule of reason, *genre Timberlane*, could have been contemplated. Instead, the British Parliament has opted for a statute which unabashedly pulls for the home crowd and shuns the operation of a principle that may neutrally delimit nations' spheres of jurisdiction.

'The national interest' or 'national sovereignty' is not a well-defined public international law concept available for ready use in the context of jurisdiction, prone as it is to State machinations. There is no method of defining in advance what assertions may be at odds with national sovereignty or the national interest, as national sovereignty is essentially a political category shaped by the powers-that-be at a given moment in time. The United Kingdom may take issue with certain U.S. jurisdictional assertions, not because they run afoul of international law, but rather because the UK simply does not like them. It is not unlikely that the UK refused to put forward a jurisdictional rule with definite content because such a rule could curb its own power to apply its laws extraterritorially, if it ever felt the desire to do so.

Due to its broad and uncertain sweep, and its protectionist vigor, the BPTIA risks itself running afoul of international law. Orders under the BPTIA may well protect British sovereign interests, but violate U.S. sovereignty. As argued in 7.2.3, issuing transnational discovery orders may fall within the territorial judicial sovereignty of the United States. LOWE has however held, with respect to the BPTIA's clawback provisions (which are arguably the most far-reaching provisions of the BPTIA), that "it would require considerable imagination to construct an argument under which these provisions were pronounced unlawful while American claims to extraterritorial jurisdiction were upheld".[2565]

[2563] Reprinted in *B.Y.I.L.* 1995, at 671 (emphasis added).
[2564] *Id.*
[2565] *Id.*, at 267.

1 RECENT GOVERNMENT STATEMENTS RELATING TO U.S. DISCOVERY: RELIANCE ON INTERNATIONAL LAW? – In two governmental statements of 1991-92 concerning U.S. extraterritorial discovery orders relating to information held by banks in Hong Kong (at that time still part of the UK) and the Cayman Islands (a dependent territory of the UK), the UK seemed to believe that such orders might violate international law. In the Hong Kong case, it stated that, as "Hong Kong's laws require the bank to keep its customers' information confidential", a requirement to produce such information "would violate the sovereignty of the United Kingdom and as such would be contrary to international law and comity".[2566] In the Cayman Islands case, Cayman Islands law having a similar confidentiality requirement as Hong Kong law, the UK stated that "[f]orcing the violation of Cayman law and ignoring the legal system and judicial process of the Cayman Islands would violate the most basic principles of international comity."[2567] In the same paragraph, it believed international comity to be part of international law.[2568] And in a later part of the statement relating to the international banking system, the UK unambiguously stated: "The [U.S. discovery] Orders sought to be enforced are not consistent with the general legal principle – based upon the rule of territorial sovereignty existing in public international law – that the law of the situs of a bank account sets the terms of the banking relationship unless the account documents (not inconsistently with local law) provide otherwise."[2569]

These statements could however be squared with the argument that the United Kingdom opposes U.S. discovery requests, and U.S. assertions of antitrust jurisdiction, as a matter of national economic policy rather than of international law, because they are designed to defend long-standing UK secrecy laws from encroachment by mandatory U.S. discovery orders. The statements may stand for a rule under a customary international law pursuant to which the foreign sovereign compulsion defense ought to be accepted if a U.S. discovery order were to require a person to violate another State's secrecy laws.

9.5.4. The Laker Airways litigation

794. Since the passing of the Protection of Trading Interests Act, the UK has made a number of statutory instruments and orders and directions under the BPTIA,[2570] for instance to block the U.S. Soviet Pipeline Regulations (re-export controls) in 1982 (discussed in the previous chapter),[2571] as part of a concerted European action to oppose the Regulations. In the antitrust field, the first major clash between the 1980 British blocking legislation and U.S. law came about in the wake of a 1982 antitrust complaint filed with a U.S. district court by Laker Airways, an airline incorporated in Jersey (a British Channel Island) that chartered operations between the United States

[2566] Reprinted in *B.Y.I.L.* 1992, 727.
[2567] Governments of the UK and the Cayman Islands, *amicus curiae* brief in *The Matter of the Tax Liablities: John Doe, etc., No. C-88-137-MISC-DIJ* in the U.S. District Court for the Northern District of California, 14 April 1992, reprinted in *B.Y.I.L.* 1992, 730, 731.
[2568] *Id.* ("The Governments of the United Kingdom and the Cayman Islands also seek to avert the threat to their interests *under the rule of international law*. The successful coexistence of the United States and the United Kingdom and its dependent territories depends in great part on a mutual respect for each country's legal system and judicial process, which is afforded by *international comity*.") (emphasis added).
[2569] *Id.*, at 732.
[2570] *See* for an overview until 1993: *B.Y.I.L.* 644 (1993); *B.Y.I.L.* 589-90 (1987).
[2571] Section 1(1) Order (S.I 1982 No. 885).

and the United Kingdom, against several U.S. and foreign airlines, charging them with conspiring to drive Laker Airways out of the market through predatory pricing.[2572] Thereupon, two British airlines applied for an injunction that would prevent Laker from taking any further U.S. action. The English High Court of Justice terminated their claims, as the application of American antitrust laws to companies carrying on business in the United States did not threaten British sovereignty.[2573]

Soon after however, the British Government, upon making a determination that U.S. discovery orders relating to the *Laker Airways* litigation "threaten to damage the trading interests of the United Kingdom", invoked the provisions of the British Protection of Trading Act and issued an order prohibiting persons who carry on business in the United Kingdom, with the exception of American air carriers, from complying with United States antitrust measures in the U.S. district court, in particular from furnishing "any commercial documents in the United Kingdom" or "any commercial information [regardless of location] which relates to the […] District Court proceedings."[2574] In issuing this order, the British Government directly intervened in U.S. antitrust proceedings. In the U.S. D.C. Circuit's view, this constituted a more serious encroachment upon U.S. sovereignty than if the British Judiciary had issued similar orders, in that it gave rise to a political conflict.[2575] Upon appeal by Laker, the British Court of Appeal ruled that the Government's directions were valid and that Laker must be enjoined from proceedings with its U.S. antitrust claims against the British airlines.[2576]

Meanwhile, Laker had filed a second antitrust suit with a U.S. district court against two other defendants, foreign airlines KLM and Sabena. Fearing that these airlines might also seek injunctive relief in the United Kingdom, Laker sought a temporary restraining order from the U.S. district court in order to prevent them from taking any action in a foreign (British) court that would impair the district court's jurisdiction. The restraining order was duly entered against the defendants, who challenged the injunction on appeal to the Court of Appeals for the D.C. Circuit. As KLM and Sabena, who also carried on business in the United Kingdom, could possibly benefit from the order pursuant to the BPTIA, the question was put to the Court whether U.S. courts should not defer to this Act and British courts in light of the principle of international comity. The Court was however adamant: as the British Executive order aimed at frustrating a legitimate cause of action in U.S. courts, it was not entitled to comity.[2577] It held that the extraterritoriality of the British orders was even more outrageous than the perceived "arrogant exercise of 'extraterritorial' jurisdiction" of U.S. antitrust laws, since the British orders, unlike U.S. antitrust laws, apply "*before* there is an adjudication by a court on the merits of the dispute".[2578] The Court particularly denounced the broad scope of the British orders, which applied to *any*

[2572] *Laker Airways, Ltd.* v. *Sabena*, 731 F.2d 909 (D.C. Cir. 1984).
[2573] *British Airways Board* v. *Laker Airways Ltd.*, [1983] 3 W.L.R. 545, 549.
[2574] 731 F.2d 920 and 940.
[2575] *Compare id.*, at 947 ("Because the [British] directions reflected the firm conclusion of the British Executive Branch that British trading interests were being threatened by Laker's antitrust claim, they presented an entirely different situation to the Court of Appeal than that which Justice Parker [Justice in the High Court of England] had faced."
[2576] *British Airways Board* v. *Laker Airways Ltd.*, [1983] 3 W.L.R. 545, 573.
[2577] 731 F.2d 940.
[2578] *Id.* (emphasis added)

commercial information, also information located in the U.S.[2579] Under the British orders, no party to the dispute could provide information to U.S. courts, which led the Court to believe that the orders did not only protect British interests, but also undermined legitimate U.S. interests.[2580] As the sole purpose of the English proceeding based on the BPTIA was to terminate the American antitrust action, comity would not be warranted.[2581]

795. From the *Laker Airways* litigation one could easily gather the deadlock in which the application of blocking legislation may result: a situation in which U.S. courts are not willing to give effect to foreign blocking legislation (which, as noted *supra*, they rarely are), in which foreign courts are not willing to cede ground and trim the reach of their blocking orders, and in which all courts enjoin the parties from suing in other jurisdictions. Needless to say, such a situation could only have arisen because emotion and patriotism were allowed to gain the upper hand over reasonableness. After the 1984 *Laker Airways* debacle of jurisdictional reasonableness, lessons had apparently been learned on both sides of the Atlantic. Full-blown procedural warfare has ever since been avoided.

9.5.5. French blocking legislation

796. In 1980, France also adopted a blocking statute that provides for criminal sanctions in case a French party assists in foreign evidence-taking methods:

> "Subject to treaties or international agreements and applicable laws and regulations, it is prohibited for any party to request, seek or disclose, in writing, orally or otherwise, economic, commercial, industrial, financial or technical documents or information leading to the constitution of evidence with a view to foreign judicial or administrative proceedings or in connection therewith."[2582]

> "The parties […] shall forthwith inform the competent minister if they receive any request concerning such disclosures."[2583]

The French act aimed at blocking use of U.S. discovery to have documents produced located in France, and at preserving use of the Hague Evidence Convention for purposes of foreign document production.[2584] U.S. courts have however not been

[2579] *Id.*, 940-41.
[2580] *Id.*, at 941.
[2581] *Id.*, at 930. By contrast, if no injunctive relief were sought under English law, a judgment reached in a parallel lawsuit in an English court *before* a judgment is reached in a U.S. court, would be entitled to comity on the basis of the principle of *res judicata*. *Id.*, at 927.
[2582] Law No. 80-583, *J.O.* July 17 1980, p. 1799, Article 1, English translation available in *Aérospatiale*, 482 U.S. 526, n. 6.
[2583] *Id.*, Article 1*bis*.
[2584] *See* Response of the Minister of Justice to Question on Article 1-*bis* of Law No. 80-538 in the National Assembly, 1981 J.O.-Déb. Ass. Nat. (Questions), January 26, 1981 at p. 373 (no. 35893), *reprinted and translated in* B.C. Toms III, "The French Response to the Extraterritorial Application of United States Antitrust Laws", 15 *Int'l Law.* 585, 611 (1981), and *in* Brief of Amicus Curiae of the Republic of France in Support of Petitioners, at 13-14, *Aérospatiale* (No. 85-1695), *reprinted in* 25 *I.L.M.* 1527 (1986) ("The provisions of Article 1-*bis* have, as their main purpose, to have observed in France the rules which define the procedures for obtaining evidence abroad. These procedures result from … the provisions of the New Code of Civil Procedure … and those of the Hague Convention of

particularly impressed by the criminal sanctions defendants can incur in France. A magistrate, cited approvingly by the Supreme Court in *Aérospatiale*, held that it was not strictly enforced in France.[2585] Yet even if it were, U.S. judicial sovereignty may be considered as outweighing French sovereign interests in seeing its blocking law respected.[2586]

9.6. Extraterritorial discovery in the United Kingdom

797. DISCOVERY IN THE UK – Like the United States, the United Kingdom, a common law country, provides for rather liberal discovery. British courts may order discovery of foreign materials held by parties to English litigation,[2587] but not of foreign materials held by third parties.[2588] British courts apply the foreign sovereign compulsion doctrine, pursuant to which they do not order discovery in case of a true conflict with local laws.[2589] They have also developed a number of considerations to be taken into account that may restrict the discretionary exercise of discovery orders.[2590]

Cases involving extraterritorial discovery have mainly focused on the power of English courts to order discovery of materials held by a foreign parent or subsidiary of an English corporation.[2591] In almost all cases, English courts took a restrictive approach. In *Lonrho* v. *Shell*, the House of Lords held that the courts could not require defendants to make an effort to overcome a prohibition of disclosure under inter-corporate or foreign law. In *MacKinnon* v. *Donaldson, Lufkin and Jenrette Corp.*, the Chancery Division, in an opinion clearly informed by international law, held that third

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March 18, 1970 …, together with the declaration made by the French government at the time of its ratification … The procedures thus defined are aimed at giving full effect to our international relations for judicial cooperation by permitting the carrying out on our territory of letters rogatory (letters of request) … as well as the putting into effect, according to well specified conditions, of the procedure for obtaining evidence by commissioners…").

[2585] 482 U.S. at 527. The French Government stated that "the 1980 Law does not empower the executive branch of the French government to grant waivers from the law's prohibitions against transnational discovery conducted outside the Hague Convention procedures." Brief of Amicus Curiae of the Republic of France in Support of Petitioners, at 17, *Aérospatiale* (No. 85-1695), *reprinted in* 25 *I.L.M.* 1529.

[2586] *See, e.g., In re Aircrash Disaster Near Roselawn, Indiana*, 172 F.R.D. 295, 310 (N.D. Ill. 1997).

[2587] *See* D. MCCLEAN, *International Co-operation in Civil and Criminal Matters*, Oxford, Oxford University Press, 2002, 84 (citing early cases *Freeman* v. *Fairlie* (1812) 3 Mer 29, 44-5 (Lord Eldon, LC), *Farquharson* v. *Balfour* (1823) Turn & R 184, 190-1 (Lord Eldon, LC)); *MacKinnon* v. *Donaldson, Lufkin and Jenrette Corp.* (Ch.D.), [1986] 2 W.L.R. 453 [1986] 1 All E.R. 653 (Ch. D.) ("If you join the game you must play according to the local rules […] [T]here is no reason why [a party] should not have to produce all discoverable documents wherever they are"); *South Carolina Ins. Co. v. Assurantie Maatschappij "De Zeven Provinciën" N.V.*, [1985] 3 W.L.R. 739, [1987] 1 App. Cas. 24, 41 (1986).

[2588] *MacKinnon* v. *Donaldson, Lufkin and Jenrette Corp.* (Ch.D.), [1986] 2 W.L.R. 453.

[2589] *MacKinnon* v. *Donaldson, Lufkin and Jenrette Corp.* (Ch.D.), [1986] 2 W.L.R. 453, 458-59; *Lonrho Ltd.* v. *Shell Petroleum* (C.A.), [1980] 1 W.L.R. 627, 634 ("Needless to say, if the local law of the country in which the company is resident forbids disclosure, the company through its board must comply with that local law").

[2590] *See* D. MCCLEAN, *International Co-operation in Civil and Criminal Matters*, Oxford, Oxford University Press, 2002, 95-100 (*e.g.*, non-availability of the witness at the trial, materiality of the evidence, credibility, issues of identity, likely outcome and adequacy of foreign procedure.)

[2591] *See* generally on extraterritorial discovery in British courts: D. LEVARDA, "A Comparative Study of U.S. and British Approaches to Discovery Conflicts: Achieving a Uniform System of Extraterritorial Discovery", 18 *Fordham Int'l L.J.* 1340, 1375-1388 (1995).

parties could not be required do produce documents located abroad, if even personal jurisdiction could be established over them. There may however be some limited possibilities for English courts to issue orders for the production of documents held by a foreign subsidiary of an English bank. All this is a far cry from U.S. extraterritorial discovery practice though.

798. *LONRHO* V. *SHELL* – In *Lonrho* v. *Shell* (1980), the House of Lords was invited to pronounce itself on the power of British courts to order discovery of documents in the sole possession and custody of the foreign subsidiaries of British oil groups Shell and BP.[2592] The House of Lords ruled that the (majority) shareholders of a subsidiary have no legal right to inspect or to take copies of a company's documents if corporate or foreign regulations did not authorize so.[2593] The plaintiffs thereupon argued that Shell and BP could take steps so as to obtain that right, *e.g.*, by altering the subsidiaries' articles of association or by applying for a ministerial licence permitting disclosure (the local law prohibited disclosure).[2594] The U.S. Supreme Court in *Société Internationale* (1958) had developed a similar argument.[2595] Lord Diplock, writing for the majority, however rejected it. He held that the expression "power" in R.S.C. Order 24 – the order authorizing discovery of documents in the possession, custody or power of a party – meant "a presently enforceable legal right to obtain from whoever actually holds the document inspection of it without the need to obtain the consent of anyone else."[2596] Order 24 would not compel a party to take steps that would enable him to acquire such a right in the future.[2597]

799. *MACKINNON* – *Mackinnon* v. *Donaldson, Lufkin and Jenrette Corp.* (1986) is the leading British case concerning discovery orders directed at third parties.[2598] In this case, the plaintiff had obtained an order under the Bankers' Books Evidence Act 1879 allowing him to inspect and take copies of entries in the books of the New York head office of the American bank Citibank, relating to transactions which took place in the United States. Citibank was not a party to the underlying British fraud proceedings, but had a branch in England upon which the order and a subpoena were served. Citibank appealed and argued that the order exceeded British jurisdiction and infringed U.S. sovereignty.

Relying on F.A. Mann's writings, Justice Hoffmann, delivering the opinion of the Chancery Division, held that "it does not follow from the fact that a person is within the jurisdiction and liable to be served with process that there is no territorial limit to the matters upon which the court may properly apply its own rules to the things which it can order such a person to do."[2599] Put differently, although Citibank was subject to UK personal jurisdiction in view of its carrying on business in the UK, UK courts may lack jurisdiction under public international law. Sticking to a strict territorial

[2592] *Lonrho Ltd.* v. *Shell Petroleum* (C.A.), [1980] 1 W.L.R. 627, 636.
[2593] *Lonrho Ltd.* v. *Shell Petroleum* (C.A.), [1980] 1 W.L.R. 627, 634.
[2594] *Id.*, at 635.
[2595] *Société Internationale* v. *Rogers*, 78 S.Ct. 1087, 1096 (1958) (holding that U.S. discovery rules "should not be construed to authorize dismissal of this complaint because of petitioner's noncompliance with a pretrial production order when it has been established that failure to comply has been due to inability, and not to willfulness, bad faith, or any fault of petitioner.")
[2596] *Lonrho Ltd.* v. *Shell Petroleum* (C.A.), [1980] 1 W.L.R. 627, 635.
[2597] *Id.*, at 636.
[2598] *MacKinnon* v. *Donaldson, Lufkin and Jenrette Corp.* (Ch.D.), [1986] 2 W.L.R. 453.
[2599] *Id.*, at 459.

approach, Justice Hoffmann held in particular "that a state should refrain from demanding obedience to its sovereign authority by foreigners in respect of their conduct outside the jurisdiction."[2600] Heavily influenced by previous UK opposition against similar U.S. discovery orders, in particular by the British Protection of Trading Interests Act 1980,[2601] Justice Hoffmann found the subpoena and the order in the Citibank case to be an infringement of the sovereignty of the United States.[2602] He interestingly refused to conduct an American-style interest balancing test, arguing not only that such a test is "extremely difficult to perform in a way which carries conviction outside the forum", but also it is hard "to put objectively into the scales the interests of a foreign country in the integrity of its sovereignty over persons or transactions within its jurisdiction."[2603]

800. *GROSSMAN* – Before *Mackinnon*, the Court of Appeal had already declined jurisdiction in a similar case, *Reg.* v. *Grossman*, concerning the propriety of an order on the English Barclays Bank at its head office in London requiring the English tax authorities to inspect and take copies of an account, maintained by the defendant in an underlying criminal proceeding in Wales, with Barclays Bank's branch in the Isle of Man (a UK territory over which English courts did not have jurisdiction).[2604] In this case, Lord Denning M.R. held that Barclays Bank's Manx branch was not subject to English jurisdiction, as it should be considered "as a different entity separate from the head office in London" and was (exclusively) subject to the laws and regulations of the Isle of Man.[2605] Therefore, orders in respect of the production of books in the branch in the Isle of Man should be made by Manx courts, lest a conflict of jurisdiction between the English courts and the Manx courts arise.[2606]

Lord Denning however pointed out that English courts had jurisdiction to order the head office to produce the books, but that in their discretion, they should not do so.[2607] Thus, unlike *Mackinnon*, *Grossman* seemed to consider an order for the inspection of foreign documents not to be *per se* in violation of the territorial principle under public international law. The difference may lie in the fact that in *Mackinnon*, the production of documents held by a foreign *head office* was at issue, while in *Grossman*, the production of documents held by a foreign *subsidiary* was at issue. Thus, when a foreign corporation is controlled by an English corporation, English courts may have the discretionary power to order foreign document production and inspection.[2608]

801. In exceptional circumstances, English courts might indeed use their discretion to order the production of documents held by the foreign subsidiaries of an English

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[2600] *Id.*
[2601] *See also X A.G.* v. *A Bank* [1983] 2 All. E.R. 464 (English court prohibiting London branch of U.S. bank from complying with discovery order of U.S. District Court).
[2602] *MacKinnon* v. *Donaldson Lufkin Corp.*, [1986] 2 W.L.R. 460.
[2603] *Id.*, at 464.
[2604] *Reg.* v. *Grossman*, 73 Cr.App.R. 302.
[2605] *Id.*, at 307-308.
[2606] *Id.*
[2607] *Id.*
[2608] *Compare MacKinnon* v. *Donaldson Lufkin Corp.*, [1986] 2 W.L.R. 460, 461 ("International law generally recognizes the right of a state to regulate the conduct of its own nationals even outside its jurisdiction, provided that this does not involve disobedience to the local law.").

corporation.[2609] Exceptional circumstances may be present when the money may be spirited away[2610] or when there is little time before trial[2611]. In *London and County Securities* v. *Caplan*, one of the only cases identifying exceptional circumstances, the court ordered that urgent necessity commanded the production of documents held by the foreign subsidiaries of an English bank, relating to bank accounts of a defendant accused of criminal fraud.[2612] The rarity of English discovery cases in which exceptional circumstances have been found stands at any rate in stark contrast to the extensive U.S. case-law of unilateral U.S. discovery orders directed at foreign subsidiaries and branches of U.S. banks.

9.7. Transnational discovery in EC competition proceedings

802. In proceedings under the EC's competition laws, the European Commission could, in full respect of the territoriality principle, compel foreign undertakings' EC subsidiaries to produce evidence for use in EC proceedings.[2613] The Commission has so far, however, refrained from compelling, under the threat of a penalty, the foreign undertakings themselves to disclose information.[2614] Nonetheless, informal requests for the production of evidence have been sent to foreign undertakings,[2615] although it has been argued in the doctrine that if these undertakings were to voluntarily disclose such information, they would violate the sovereignty of the State where the information is located.[2616] Also, the Commision has compelled the production of information that actually belonged to an undertaking located in the EC, but which transferred that information to a body outside the EC, where it was protected by professional secrecy laws.[2617] In so doing, it seemed to follow U.S. practice, which

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[2609] *See* Oliver L.J. in *Reg.* v. *Grossman*, 73 Cr.App.R. 309 ("I do not say that an order in such unusual circumstances can never be made […]"). If a foreign court issues an order which could not be reconciled with the order of an English court, there will be a strong case for English deference (true conflict doctrine). *Compare Mackinnon, supra*, at 461-62 ("It is […] not surprising that any bank, whether English or foreign, should as a general rule be entitled to the protection of an order of the foreign court, before it is required to disclose documents kept at a branch or head office abroad."; "It seems to me that *Grossman's* case decides that an order in respect of documents held at a bank's foreign branch or head office should not be made save in very exceptional circumstances.").

[2610] *See London and County Securities* v. *Caplan* (setting forth an equivalent of the"hot pursuit" doctrine) n 2612.

[2611] *See MacKinnon* v. *Donaldson Lufkin Corp.*, [1986] 2 W.L.R. 460, 465.

[2612] *London and County Securities* v. *Caplan*, May 26, 1978, unreported, cited in *Mackinnon* v. *Donaldson Lufkin & Jenrette Securities Corp.*, [1986] 2 W.L.R. 465, and in D. MCCLEAN, *International Judicial Assistance*, Oxford, Clarendon Press, 1992, 274 (Templeman J. describing the relief granted as "onerous and […] to be granted only in the most exceptional circumstances", which he deemed present in the case).

[2613] *See* B. GOLDMAN, "Les effects juridiques extra-territoriaux de la politique de la concurrence", *Rev. Marché Commun* 612, 621 (1972).

[2614] *See* I. VAN BAEL & J.-F. BELLIS, *Competition Law of the European Community*, 4th ed., The Hague, Kluwer Law International, 2005, 1055.

[2615] *Zoja/CSC-ICI*, *O.J.* L 299/51 (1972).

[2616] *See* B. GOLDMAN, "Les champs d'application territoriale des lois sur la concurrence", 128 *R.C.A.D.I.* 631, 717 (1969-III).

[2617] *CSV*, *O.J.* L 192/27 (1976) ("The reason given by CSV for refusing to comply with the request is unacceptable. The information requested concerns the business activity of the Dutch firms belonging to CSV and of CSV itself. The information is available within the Community, and the Commission is entitled to call for it. The Commission's staff may not disclose any information acquired if it is covered by the obligation of professional secrecy. Part of the information has also been supplied to an international combine established in Switzerland. However, the fact that information has been supplied to a body governed by Swiss law does not mean that it can no longer be supplied to the Commission.

has at times cast aside the foreign sovereign compulsion defense in relation to foreign secrecy laws when U.S. interests outweighed a foreign State's interests in having its secrecy laws upheld. An important difference with U.S. practice is, however, that the Commission restricts its orders to information that was originally held in the EC, whereas, in U.S. practice, the foreign-based information could also be ordered if it was never before held in the U.S.

803. Older doctrine urged the Commission to exercise restraint in ordering the production of documents held abroad,[2618] yet more recent doctrine has argued that the Commission may order EC subsidiaries or branches of foreign corporations to produce documents actually held abroad by the foreign parents.[2619] As of today, the Commission is possibly willing to direct a request for information held by a foreign parent to its EC subsidiary,[2620] yet, apparently, no penalty has ever been imposed on such a subsidiary for failing to comply with the request. Since the Commission has entered into bilateral cooperation agreements with the United States, Canada, and Japan, concerning the exchange of information,[2621] the problem of unilateral transnational evidence-taking is probably less acute than it used to be. It may be recalled in this context that, in the United States, the production of foreign-based materials has primarily been ordered by U.S. courts in private litigation, and that U.S. antitrust enforcement agencies, in contrast, tend to be more respectful of foreign nations' sensitivities.[2622]

9.8. Sovereignty concerns over the use of U.S. discovery by parties in a foreign litigation: Intel v. AMD

804. While foreign nations' curmudgeonliness has focused almost exclusively on extraterritorial discovery practices relating to underlying U.S. litigation, the use of U.S. discovery by parties in a foreign litigation received considerably less attention. Such discovery is supposedly conducted in a high-minded spirit of judicial assistance and cooperation between the United States and foreign nations. Reality may however belie this appearance.

Nor are the Commission and its staff released from their obligation of professional secrecy simply because the information has been supplied to the combine based in Switzerland. Even if Swiss law could be interpreted to mean that the supply of information to the Commission amounted to unlawful disclosure, this would still not warrant delaying the performance of obligations imposed by the Commission in order to enforce the rules of competition.").

[2618] *See, e.g.*, J. FRISINGER, "Die Anwendung des EWG-Wettbewerbsrechts auf Unternehmen mit Sitz in Drittstaaten", *A.W.D.* 553 (1972); D.M. JACOBS, "Extraterritorial Application of Competition Laws: an English View", 13 *Int. Law.* 645, 660-61 (1979)

[2619] *See* P.J. KUYPER, "European Community Law and Extraterritoriality: Some Trends and New Developments", 33 *I.C.L.Q.* 1013, 1019 (1984) (stating that "if a branch or subsidiary within the territory has been used by the parent to perpetrate objectionable acts, then fines or penalties may be executed against the subsidiary in order to obtain the necessary information from the parent," while noting that "that is only a question of theory"); J.E. FERRY, "Towards Completing the Charm: The Woodpulp Judgment", *E.I.P.L.R.* 19, 23 (1989) (arguing that the Commission may require an EC branch or subsidiary of a non-EC corporation to provide information held by the latter corporation which is actually physically outside the EC).

[2620] European Commission, *Dealing with the Commission*, 1997, at point 22, cited in *See* I. VAN BAEL & J.-F. BELLIS, *Competition Law of the European Community*, 4th ed., The Hague, Kluwer Law International, 2005, 1055, n 136.

[2621] *See* chapter 6.8.

[2622] *See* chapter 6.7.5.

The discussion has revolved around 28 U.S.C. § 1782, the provision governing foreign judicial assistance, which authorizes parties to foreign proceedings to obtain discovery in the U.S. for use in these proceedings. § 1782 exists alongside the Hague Evidence Convention,[2623] but has a much broader reach in that it applies to evidence-taking in all matters and allows foreign parties and tribunals to seize the district court directly instead of through letters rogatory sent to the U.S. Department of Justice.[2624] While § 1782 is indeed aimed at assisting foreign proceedings – the hope being that foreign courts and governments would provide reciprocal assistance to U.S. proceedings – that very provision might prove conflict-prone in terms of foreign relations if parties seek the kind of U.S. discovery (document disclosure, depositions…) which is non-existent in the State where the main proceeding is pending. As U.S. discovery practices are the most liberal in the world, especially (European) civil law countries are likely to take offense at too broad an interpretation of § 1782, because that provision could be used to the detriment of their own restrictive evidence-gathering methods. On June 21, 2004, the U.S. Supreme Court rendered a landmark judgment as to the scope of § 1782 in the case of *Intel* v. *AMD*,[2625] holding that § 1782 did not set forth a foreign discoverability rule. Accordingly, documents sought in the U.S. under § 1782 need not be discoverable in the State where the main proceeding is pending.

805. In this part, an overview will be given of how and why AMD sought discovery of Intel's documents in a U.S. federal court under 28 U.S.C. § 1782, despite the locus of the dispute being in Europe (9.7.1). A discussion of the existing U.S. circuit split – which the Supreme Court would resolve – with respect to the scope of § 1782, the alleged existence of a foreign discoverability requirement in particular (9.7.2), will follow. Turning to the Supreme Court's opinion in *Intel* v. *AMD*, the Court's intricate solution of the foreign discoverability quandary – a solution comprised of a rejection of the requirement that left at the same time ample room for the lower courts to uphold it in a disguised form (9.7.4) – and the Court's dubious qualification of the proceedings before the European Commission as proceedings before a foreign tribunal for purposes of § 1782 (9.7.3) will critically be analyzed. Finally, an attempt will be made at gauging the impact of the Supreme Court's decision in *Intel* v. *AMD* on transnational litigation: does *Intel* v. *AMD* indeed create new discovery possibilities for foreign litigants in U.S. federal courts, as might be apparent from the Supreme Court's rejection of a foreign discoverability rule (9.7.5)?

806. Throughout this part, the Supreme Court's dealing with § 1782 will be assessed through the prism of international comity, both as regards the alleged foreign discoverability requirement and the "nature of the Commission's proceedings" for purposes of § 1782. While the Supreme Court's application of the comity principle in *Intel* v. *AMD* may be subject to criticism, its adoption of a four-factor test as a

[2623] Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, March 18, 1970, 847 U.N.T.S. 231.
[2624] 28 C.F.R. § 0.49 (2001).
[2625] *Intel Corp.* v. *Advanced Micro Devices, Inc.*, --- U.S. ---, 124 S.Ct. 2466, 159 L.Ed.2d 355 (2004). *Intel* v. *AMD* concerned a discovery request by AMD, a complainant in an antitrust investigation by the European Commission against its competitor Intel. As the Commission declined to seek discovery of Intel's documents in the U.S., as requested by AMD, AMD filed its own discovery request for documents that Intel produced in a lawsuit before a court in Alabama, in order to use them in the European Commission's proceedings against Intel.

limitation on transnational discovery under § 1782 is surely laudable. This test grants the lower courts sufficient leeway to conduct a proper comity analysis, in line with notions of comity traditionally invoked by the courts, with due respect for the sensitivities of other nations in the first place. The decision on remand by the district court in October 2004 may serve as a model for such an analysis.

9.8.1. Intel v. AMD: from the European Commission to U.S. federal courts

807. In *Intel* v. *AMD,* AMD had filed an antitrust complaint with the Directorate-General for Competition of the European Commission (DG-Competition), believing that Intel, its competitor in the micro-processing industry, was abusing its dominant position in the European Common Market. It recommended that the DG-Competition seek documents that Intel had produced in a private antitrust suit in a U.S. federal court. In principle, the DG-Competition could do this under 28 U.S.C. § 1782, the U.S. provision authorizing a U.S. court to order a resident company to produce, under U.S. discovery rules, a document for use in a proceeding before a foreign tribunal.[2626] The DG-Competition however declined to seek the documents. Thereupon, AMD, also relying on 28 U.S.C. § 1782, sought discovery against Intel in the United States, as a private party, in order to support its complaint. It specifically sought the production of documents Intel had produced to Intergraph Corporation in an action between the parties in the Northern District of Alabama.[2627] Although the European Commission was free not to heed the discovered documents if submitted to it, it was not particularly amused and filed *amicus curiae* briefs to the effect of a dismissal of Intel's request.[2628]

808. It may be useful at this point to provide the background and rationale of AMD's decision to file a § 1782 request in the U.S. In European competition matters, public enforcement far outweighs private enforcement. In case of public enforcement, the European Commission (DG-Competition) gathers the evidence and could fine uncooperative corporations. Although private parties may file antitrust suits in European civil courts, they are often deterred from doing so due to problems of evidence-gathering (non-discoverability). This is not to say that the complaining parties cannot submit evidence themselves; it only implies that the Commission has broad powers to compel production of documents, which the parties, unlike their

[2626] 28 U.S.C. § 1782 provides in relevant part: "The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation." 28 U.S.C. § 1782 only took its current form in 1964. The history of federal discovery for foreign cases goes back to the American Revolution though. *See* for an overview: W.B. STAHR, "Discovery Under 28 U.S.C. § 1782 for Foreign and International Proceedings", 30 *Va. J. Int'l. L.* 597, 600-605 (1989-1990). A rather broad statute compelling witnesses to testify in response to foreign letter rogatory was later adopted in 1855 (Act of March 2, 1855, ch. 140, § 2, 10 Stat. 130), although curiously, Congress swiftly enacted another and more restrictive statute in 1863 (Act of March 3, 1863, ch. 95, § 1, 12 Stat. 769). Invoking the latter statute, federal courts denied discovery for use abroad (*See* W.B. STAHR, *loc. cit.*, at 602). In 1948-1949, Congress rejected the 1863 limitations and adopted the liberal 28 U.S.C. § 1782 (Act of June 25, 1948, Pub. L. No. 80-773, § 1782, 62 Stat. 869, 949; Act of May 24, 1949, Pub.L. No. 81-72, § 93, 63 Stat. 89, 103), which was revised in 1964 (Act of October 3, 1964, Pub. L. No. 88-619, § 9, 78 Stat. 995).

[2627] CV 97-N-3023-NE. In this case, the Alabama District Court rejected Intergraph's antitrust claims against Intel. *See Intergraph Corp.* v. *Intel Corp.*, 88 F.Supp.2d 1288 (N.D.Ala. 2000), *aff'd* 253 F.3d 695 (Fed. Cir. 2001).

[2628] *See* subsection 9.8.3 for a discussion of the content of these briefs.

American counterparts, do not have. It also implies that the Commission has *discretionary* powers to act on a recommendation by a private party. If the Commission believes that an investigative act is not needed, it may legally refuse to act on the recommendation, without the complaining party being entitled to judicial review. Only if the DG-Competition declines to pursue a complaint (no action or rejection) is its decision subject to judicial review by the European Court of First Instance and, on appeal, the European Court of Justice.[2629] As AMD could not force the DG-Competition to seek U.S. documents, it sought these documents on its own, using § 1782. It remains true that, in case AMD submitted the sought documents to the DG-Competition, the latter would remain free to disregard them – although they could be of use to AMD were it to appeal the decision by the DG-Competition.

9.8.2. Foreign discoverability under 28 U.S.C. § 1782

809. FOREIGN DISCOVERABILITY – 28 U.S.C. § 1782 was undoubtedly designed to facilitate transnational litigation, since evidence gathered on its basis could prove helpful to the foreign judge in reaching an informed judgment. The use that AMD made of § 1782 smacked of abuse though. Intel, having failed to convince the European Commission to seek Intel's documents and lacking private rights under European competition procedures to seek the documents, filed a request with an American court that would not turn a deaf ear to it. As the main locus of the dispute, which was moreover of a public law nature (matters of competition law and policy), was clearly in Europe, would it not be common sense that European rules, or at least any decisions by the European Commission as the regulatory agency in competition matters, would govern evidence-taking in the case?

Put in more general terms, the question arose whether U.S. courts should grant document discovery for use in foreign courts when these very courts could not legally authorize discovery if the documents were located in their own jurisdiction (foreign discoverability rule). Given the extremely liberal character of U.S. discovery rules, the foreign discoverability question was already among the most salient questions surrounding the application of § 1782 before the Supreme Court's decision in *Intel* v. *AMD*. U.S. Circuit courts were split over it, although the majority *did* require foreign discoverability.

Given the peculiarities of the U.S. system of legal precedents and the granting of certiorari by the Supreme Court in order to solve existing circuit splits, the outcome of *Intel* v. *AMD* would inevitably be determined by the 'historical trail' of § 1782 and its prevailing case-law. A proper understanding of the challenges posed by *Intel* v. *AMD* could therefore not to do without an overview of the circuit split over § 1782.[2630]

[2629] *See* T-241/97, *Stork Amsterdam BV v. Commission*, 2000 *E.C.R.* II-309 (Ct. 1st Instance 2000).

[2630] Although in antitrust proceedings, a special foreign assistance procedure exists under U.S. law, it did not come into play in *Intel* v. *AMD*. The U.S. International Antitrust Enforcement Assistance Act ("IAEAA") of 1994 authorizes the District Courts, on the application of the Attorney General, to order discovery in order to assist a foreign antitrust authority (15 U.S.C. § 6203). The IAEAA is rarely used however, as only Australia has entered into a mutual assistance agreement with the United States under the IAEAA (Agreement between the Government of the United States of America and the Government of Australia on Mutual Antitrust Enforcement Assistance, April 27, 1999, available at http://www.apeccp.org.tw/doc/USA/Cooperation/usaus7.htm). The International Working Group of the Antitrust Modernization Commission attributes the lack of success of the agreements to an IAEAA provision that permits the use of information obtained under a mutual assistance agreement for non-

810. RESTRICTIVE COURTS – Circuit opposition against a broad interpretation of § 1782 – *i.e.*, opposition against an interpretation that does not require foreign discoverability – was largely premised on the lack of reciprocity, with foreign litigants benefiting from broad discovery in the U.S. while U.S. litigants were not entitled to discovery in the foreign forum, and on the desire to prevent foreign litigants from circumventing their own laws and, accordingly, to prevent upsetting foreign governments.[2631] Some courts however only required foreign discoverability if the request was filed by a private party, and not if a foreign tribunal requested the order compelling discovery, possibly pursuant to the Hague Evidence Convention.[2632]

811. LIBERAL COURTS – More liberal courts, led by the Second Circuit,[2633] argued that the text nor the legislative history of § 1782 supported a foreign discoverability requirement, that § 1782 was a "one-way street" precisely "prompting foreign courts to act similarly based on [the United States'] own generous example"[2634] and that § 1782 could not be read "to condone speculative forays [to examine foreign discoverability] into legal territories unfamiliar to federal judges."[2635] The latter courts typically referred to a decision by the English House of Lords concerning § 1782. In this decision, the House of Lords found that the availability of U.S. discovery posed no "interference with the [English] court's control of its own process"[2636] and thus did not jeopardize English sovereignty, even though English courts could not compel the

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antitrust criminal enforcement (15 U.S.C. § 6211(2)(E)(ii). *See* International Working Group of the Antitrust Modernization Commission, Memorandum, December 21, 2004., p. 6. It proposes to study elimination of amendment of this provision to ensure that the agreements are more appealing to other States. The memorandum is available at http://www.amc.gov/pdf/meetings/International.pdf.). The requirement of reciprocity, especially with respect to broad discovery powers, may be another explanation. It was hoped at the time, somewhat optimistically, that the IAEAA could provide leverage for the spread of liberal discovery powers to other nations (*Compare* C. DAY WALLACE, "'Extraterritorial' Discovery and U.S. Judicial Assistance: Promoting Reciprocity or Exacerbating Judiciary Overload?", 37 *Int'l L.* 1055, 1065 (2003)).

[2631] *See e.g. In re Application of Asta Medica, S.A.*, 981 F.2d 1, 5-6 (1st Cir. 1997). *See also In re Letter of Request for Assistance from Ministry of Legal Affairs of Trinidad and Tobago*, 848 F.2d 1151 (11th Cir. 1988), *cert. denied*, 488 U.S. 1005 (1989); *In re the Court of the Commissioner of Patents for the Republic of South Africa*, 88 F.R.D. 75 (E.D. Pa. 1980).

[2632] *See e.g. Lo Ka Chun v. Lo To*, 858 F.2d 1564 (11th Cir. 1988); *In re Letter of Request from Amtsbericht Ingolstadt*, 82 F.3d 590 (4th Cir. 1996); *In re Letter Rogatory from the First Court of First Instance in Civil Matters, Caracas, Venezuela, in the Matter of Electronic Data Systems Corporation*, 42 F.3d 308, 310 (5th Cir. 1995). Under Article 12 of the Hague Evidence Convention, the execution of a Letter of Request may be refused only to the extent that a) in the State of execution the execution of the Letter does not fall within the functions of the judiciary; or b) the State addressed considers that its sovereignty or security would be prejudiced thereby.

[2633] *See e.g. John Deere Ltd.* v. *Sperry Corp.*, 754 F.2d 132 (3d Cir. 1985); *Application of Malev Hungarian Airlines*, 964 F.2d 97 (2d Cir. 1992), *cert. denied sub nom. United Technologies Int'l* v. *Malev Hungarian Airlines*, 506 U.S. 861 (1992). *See also In re Application of Aldunate*, 3 F.3d 54 (2d Cir. 1993), *cert. denied sub nom. Foden* v. *Aldunate*, 114 S. Ct. 443 (1993); *In re Application of Euromepa*, S.A., 51 F.3d 1095 (2d Cir. 1995), *rev'g* 155 F.R.D. 80 (S.D.N.Y.); *In re Metallgesellschaft AG*, 121 F.3d 77 (2d Cir. 1997); *In re Bayer AG*, 146 F.3d 188 (3d Cir. 1998).

[2634] *In re Application of Malev Hungarian Airlines*, 964 F.2d at 100. See also S.Rep. No. 88-1580, at 2 (1964), reprinted in 1964 U.S.C.C.A.N. 3783. The Third Circuit pointed out that "there is no reason to assume that because a country has not adopted a particular discovery procedure, it would take offense at its use." *In re Bayer AG*, 146 F.3d at 194.

[2635] *In re Application of Euromepa*, S.A., 51 F.3d at 1099.

[2636] *South Carolina Ins. Co. v. Assurantie Maatschappij "De Zeven Provinciën" N.V.*, [1987] 1 App. Cas. 24, 41 (1986). *See e.g. In re Bayer AG*, 146 F.3d at 194-195.

production of the documents for which discovery was sought in the U.S. (as English law proscribed discovery from non-parties).

9.8.3. The nature of the European Commission's proceedings under 28 U.S.C. § 1782

812. 'FOR USE IN A PROCEEDING IN A FOREIGN OR INTERNATIONAL TRIBUNAL' – At first blush, the question posed to the Supreme Court was clear-cut: should it side with the liberal Second Circuit and reject the foreign discoverability requirement or should it side with the majority of the Circuits and uphold the requirement? The division among the Circuits on the question whether § 1782 contained a foreign discoverability requirement was indeed the reason why the Supreme Court granted certiorari.[2637] However, as it happened, the Court was in a position to circumvent the thorny issue of foreign discoverability if it were to focus on the § 1782 requirement that the requested document be for use in a proceeding in a foreign or international *tribunal*.[2638] Given the peculiar nature of the European Commission, it was not unlikely that it would not qualify as a tribunal under § 1782.

813. COMMISSION – The 'nature of the proceedings' argument was the main argument put forward by the European Commission in its two *amicus curiae* briefs (one on its own behalf and one in support of petitioner for certiorari) urging the Court to reverse the Ninth Circuit's interpretation of § 1782 in the case.[2639] The Commission did not call into question the Ninth Circuit's ruling on the foreign discoverability requirement, but contested the characterization of the Commission's preliminary investigations as "proceedings before a foreign tribunal".

814. U.S. SUPREME COURT – It might have been expected that the European Commission's characterization of its competition proceedings could prove decisive. Indeed, could any other institution than the Commission itself, be it even the venerable U.S. Supreme Court, assess more authoritatively the nature of the Commission's proceedings? Remarkably, the Supreme Court thought it could. As far as the nature of the proceedings before the DG-Competition was concerned, the Supreme Court pointed out that Congress, by amending § 1782 in 1964, intended to "provide the possibility of U.S. judicial assistance in connection with administrative and quasi-judicial proceedings abroad."[2640] Heavily relying on the view held by

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[2637] 540 U.S. 1003 (2003).

[2638] In cases involving the application of U.S. law to transnational legal situations, the Supreme Court at times resorts to a statute's internal limitations and qualifications instead of conducting a complicated conflict-of-laws analysis that takes into account the concerns of foreign sovereign powers and considerations of international comity. *See, e.g.*, *Spector, et al.* v. *Norwegian Cruise Line Ltd*., 125 S.Ct. 2169 (2005) (Supreme Court instructing lower courts to sometimes rely on the internal limitations and qualifications of the Americans with Disabilities Act (104 Stat. 353, 42 U.S.C. § 12181 *et seq.* (1990), which "may make resort to the clear statement rule [a rule requiring a clear statement that Congress intended to apply a statute to foreign-flag vessels] unnecessary" (slip op. at 12-14)).

[2639] These two briefs are on file with the author. The author wishes to thank the European Commission for its cooperation in making the briefs accessible. It should be noted that the European Commission is rather active in filing *amicus curiae* briefs with the U.S. Supreme Court if a case affects its interests. *See e.g.* on its brief in the *Alvarez-Machain* case under the Alien Tort Statute (2004): C. RYNGAERT, "The European Commission's Amicus Curiae Brief in the Alvarez-Machain Case", 6 *International Law Forum* 55-60 (2004).

[2640] 124 S.Ct. at 2479; S. Rep. No. 1580, 88th Cong., 2d Sess., 7-8.

SMIT,[2641] the main drafter of § 1782 in 1964, and (allegedly) on the European Commission's own characterization of the DG-Competition in its *amicus curiae brief*, the Court qualified the Commission as a proof-taking first-instance decision-maker exercising quasi-judicial powers, and thus as an 'international tribunal as set forth by § 1782.[2642] As the Court drew, in its own view at least, upon the European Commission's own characterization of its functions ("the investigative function blur[s] into decision-making")[2643], it could be argued that the Court's decision was in line with traditional notions of international comity. The Supreme Court however conspicuously deemed it irrelevant that the Commission, while indeed characterizing its functions as a combination of investigation and decision-making, reached the opposite outcome, namely that its proceedings could not qualify as proceedings before an international tribunal for purposes of the application of § 1782.

815. CRITICAL APPRAISAL – One cannot but agree with Justice BREYER, one of the most internationalist-minded Supreme Court justices, who asserted in a forceful dissenting opinion that the majority *ignored* the Commission and thus precisely undermined comity, in that it disregarded the Commission's opposition against it being labeled a "tribunal". In its brief as *amicus curiae* the Commission indeed espoused a limited interpretation of the wording "international tribunal" in § 1782 lest the district courts would hamper its "ability to carry out its governmental responsibilities."[2644] It noted that proceedings before the Commission are no adjudicative proceedings: "[the Commission] never performs the functions of a tribunal, because it never decides the merits of any dispute between the complainant and the target."[2645] While the Commission indeed admitted that at the very end of the process, the investigative function blurs into decision-making, it also added "that modest convergence in no way converts the Commission into a "tribunal" of the sort contemplated in Section 1782."[2646]

One could only have bitter feelings about the Supreme Court's missed opportunity to set aside any interpretation that would be incongruous with a foreign agency's *c.q.* tribunal's own characterization of its functions. Bearing in mind that, under the classical *Charming Betsy* doctrine, "[a]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains",[2647] it might be argued that, as a matter of statutory construction, the Supreme Court should have taken into account international comity considerations when construing § 1782, and should, on that basis, have deferred to the European Commission. Admittedly, as principles of international comity do however not necessarily constitute international

[2641] H. SMIT, "International Litigation under the United States Code", 65 *Colum.L.Rev.* 1015 (1965). *See also* H. SMIT, "American Assistance to Foreign and International Tribunals: Section 1782 of Title 28 of the U.S.C. Revisited", 25 *Syracuse J. Int'l L. & Com.* 1 (1998)

[2642] 124 S.Ct. at 2479. With respect to Intel's claim that the DG-Competition was merely investigating the complaint filed by AMD and that, hence, adjudicative proceedings against it were not yet pending or imminent, the Court held that Congress purposefully deleted § 1782's reference to "pending" proceedings in 1964. In so doing, the Court rejected the view taken in *In re Ishihara Chemical Co.*, 251 F.3d, 120, 125 (2d Cir. 2001). In the Court's view, "§ 1782(a) requires only that a dispositive ruling by the Commission, reviewable by the European courts, be within reasonable contemplation." (124 S.Ct. at 2480).

[2643] *Id.*, European Commission *amicus curiae* brief, p. 9.

[2644] *Id.*, at 2.

[2645] *Id.*, at 7.

[2646] *Id.*, at 9.

[2647] *Murray* v. *Schooner Charming Betsy*, 2 Cranch 64, 118, 2 L.Ed. 208 (1804) (Marshall, C.J.).

law,[2648] the *Charming Betsy* canon of statutory construction may not entirely be in place. Nonetheless, another doctrine might be called upon here. Under the act of State doctrine, the courts of one State cannot sit in judgment of the acts or conduct of another State.[2649] While international law does not require the application of the doctrine,[2650] in the United States it certainly serves as an established and potent check on the courts' interference in the conduct of foreign affairs, which is the prerogative of the Executive branch of government. For purposes of the act of State doctrine, the *amicus curiae* brief in which the European Commission characterizes the nature of its own proceedings, could indeed be considered as an 'act of another State'. An *amicus curiae* brief may be termed a 'non-standard act', *i.e.*, an act that is not defined in the European treaties. It is accepted that the European institutions can resort to such legal acts, which are soft law and are not binding as they do not produce legal effects on individuals.[2651] Their non-binding character does however not detract from their nature as legal acts. Accordingly, they ought to be taken into account under the American act of State doctrine, and, in the case at hand, the Supreme Court should not have engaged in second-guessing the European Commission's characterization of its competition proceedings. This argument may be all the more compelling given the U.S. Department of Justice's request to confirm the Ninth Circuit's decision, including its characterization of the Commission's proceedings as proceedings before a foreign tribunal,[2652] bearing in mind that the act of State doctrine is now often seen as a doctrine of deference to the political branches' prerogative on the conduct of foreign relations. A logical outcome would thus be that a § 1782 request of documents for use in European competition proceedings ought to be dismissed by U.S. district courts.

Although the Supreme Court qualified the preliminary proceedings before the Commission against the latter's will as "proceedings before an international tribunal", it may be submitted that the Court construed the scope of § 1782 correctly in light of the Senate Report. Congress indeed also wished to cover administrative and quasi-judicial proceedings, such as proceedings before the European Commission. In its *amicus curiae* brief, the Commission conspicuously failed to refer to the Senate Report, instead relying on a line of Supreme Court opinions that set forth a strong presumption against any interpretation that undermines international comity.[2653] The Supreme Court's broad definition of "proceedings before a foreign tribunal" set forth by the Senate Report, and the Commission's legitimate comity concerns could be reconciled though. As will be discussed, since federal courts are *authorized* but not *obliged* to grant discovery pursuant to § 1782, their decision may be informed by considerations of comity. In this case-by-case approach to comity, federal courts may

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[2648] *See, e.g.*, W. GRAF VITZTHUM (ed.), *Völkerrecht*, 2nd ed., Berlin, New York, Walter de Gruyter, 2001, p. 37.

[2649] *Underhill* v. *Hernandez*, 168 U.S. 250, 252 (1897); *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 423 (1964) (noting that the act of State doctrine has 'constitutional underpinnings').

[2650] *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 422-23.

[2651] *See* on soft law instruments in the European Community: K. WELLENS & G.M. BORCHARDT, "Soft Law in EC Law", *European Law Review* 267-321 (1989). *See* on the legal nature of *amicus curiae* briefs also C. RYNGAERT, "The European Commission's Amicus Curiae Brief in the Alvarez-Machain Case", 6 *International Law Forum* 55-60 (2004).

[2652] Department of Justice, *amicus curiae* brief, available at http://www.usdoj.gov/osg/briefs/2003/2pet/6invit/2002-0572.pet.ami.inv.html).

[2653] *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 19-21 (1963) ; *Raygor* v. *Regents of the Univ. of Minn.*, 534 U.S. 533, 543-44 (2002).

well heed the Commission's characterization of the nature of its own proceedings as a factor in determining the scope of § 1782.

9.8.4. The Supreme Court's rejection of a foreign discoverability requirement

816. RESOLVING THE CIRCUIT SPLIT – Although the detrimental effects on transatlantic relations of the Supreme Court's turning a blind eye to the European Commission's characterization of the nature of its proceedings could not be denied, the effects of an across-the-board rejection of the foreign discoverability requirement would obviously produce even more devastating effects on international judicial cooperation. Hence, less the Court's qualification of the nature of the Commission's competition proceedings, but rather the Court's stance on an alleged foreign discoverability requirement contained in § 1782 was eagerly awaited by the litigation community. As pointed out earlier, by ruling on this requirement, the Court would finally resolve a long-standing circuit split between courts that required foreign discoverability of materials sought, and more liberal courts that did not believe foreign discoverability to be required. Its decision would inevitably echo well beyond the limited domain of antitrust law.

817. NO ROLE FOR COMITY – Conducting analyses of both the plain text of § 1782 and its legislative history,[2654] the Supreme Court, like the Second Circuit, concluded that both interpretive methods led to a rejection of the obligatory use of a general foreign discoverability rule.[2655] While this reading may appear warranted, it may be insensitive to other nations' concerns, an objection which was raised by several lower courts adhering to a foreign discoverability rule. The Court therefore applied the principle of comity, another device of statutory interpretation, and concluded that ordering discovery of materials that are not discoverable in a foreign nation does not necessarily offend that foreign nation.[2656] The Supreme Court conceded that foreign nations limited discovery for "reasons peculiar to [their] own legal practices, culture or traditions", yet argued that such did not necessarily reflect opposition against judicial assistance from U.S. courts under § 1782.[2657] On the contrary, the Court submitted, foreign tribunals may find information obtained under § 1782 useful, "for

[2654] As expected, Justice SCALIA, concurring in judgment, rejected the Court's analysis of the legislative history of § 1782, holding that it is "improper but also quite unnecessary to seek repeated support in the words of a Senate Committee Report – which, as far as we know, not even the full committee, much less the full Senate, much much less the House, and much much much less the President who signed the bill, agreed with" (*sic*) (SCALIA, J., concurring in judgment, at 1). *See* generally for Justice SCALIA's approach to statutory interpretation: A. SCALIA, *A Matter of Interpretation: Federal Courts and the Law*, Princeton University Press, 1997, xiii + 159 p.

[2655] The Court however noted that § 1782(a) expressly shields privileged material. 124 S.Ct. at 2480. Shielding privileged material should not be equated to requiring foreign discoverability of the materials. A civil law nation's decision not to allow discovery is indeed not predicated on the desire to shield privileged material, but rather on a general conception of civil procedure that grants judges, instead of the parties, the authority over evidence-taking. Under the *captatio*, only if ordering the production of documents or the testimony of witnesses would violate foreign legal privileges, such as professional secrecy rules, would the U.S. court be precluded from assisting the foreign tribunal.

[2656] To reinforce its argument, the Court not surprisingly referred to the English House of Lords decision cited above. *See South Carolina Ins. Co. v. Assurantie Maatschappij "De Zeven Provinciën" N.V.*, [1987] 1 App. Cas. 24, 41 (1986).

[2657] 124 S.Ct. at 2481.

reasons having no bearing on international comity",[2658] even though they could not obtain such information under their own laws.

818. COMITY IN THE LOWER COURTS: GUIDING PRINCIPLES OF THE SUPREME COURT – It may be submitted that the Supreme Court's application of comity is not entirely convincing. While foreign tribunals may indeed feel unduly constrained by their law of evidence, this does not justify the U.S. in assisting them to circumvent or undo these constraints. Comity requires in the first place respect for other nations' laws and legal practices and only in the second place respect for other nations' judges. This is not to say that the Supreme Court failed to adequately heed comity. In several respects, it *did* take into account comity concerns.[2659] The Court's most conspicuous support for comity relates to the discretionary powers of the district courts. Since § 1782 unambiguously states that the district courts *may* order discovery, they *may* take comity considerations into account so as not to grant discovery if a discovery order would offend foreign nations. It is in this context that the Supreme Court set forth some guiding principles.

Although the Supreme Court refused to adopt supervisory rules regarding comity-based limitations on the use of § 1782, as demanded *inter alia* by the European Commission[2660] and by dissenting Justice BREYER,[2661] it listed four factors that the district courts could take into consideration when deciding a § 1782 request. Hereinafter, these factors will be discussed in conjunction with their application in the decision on remand by the District Court for the Northern District of California in

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[2658] *Id.*. at 2482.

[2659] For instance, dealing with Intel's domestic discoverability argument – Intel asserted that AMD was precluded from obtaining discovery of Intel's documents in the U.S. for use in a regulatory antitrust case – it held that § 1782 "does not direct United States courts to engage in comparative analysis to determine whether analogous proceedings exist here". *Id.*, at 2482. By not construing foreign proceedings through a domestic lens, but instead by adding great weight to the rationale of a specific foreign regulatory regime, the Court is unmistakably guided by comity. Comity commands it to reject a chauvinistic interpretation of § 1782. Illuminating in this regard is the Court's reference to a complaint with (European) antitrust regulators as "a potentially more certain (and cheaper) alternative to private enforcement through the European Union's member states' courts". *Id.*, quoting L. RITTER, W. BRAUN & F. RAWLINSON, *European Competition Law: a Practitioner's Guide*, 824-826 (2nd ed., 2000).

[2660] European Commission *amicus curiae* brief, p. 16 ("The latter approach [*i.e.* a case-by-case method based on the discretion of the lower courts], however, offends principles of comity by placing heavy and inappropriate burdens on foreign countries and their agencies.")

[2661] 124 S.Ct. at 2486. Justice BREYER suggested two categorical limitations, which are however not aimed at mitigating the impact of the rejection of a foreign discoverability requirement, but at introducing such a requirement and questioning the interpretation of the word "tribunal" in § 1782 ("[W]hen a foreign entity possesses few tribunal-like characteristics, so that the applicability of the statute's word "tribunal" is in serious doubt, then a court should pay close attention to the foreign entity's own view of its "tribunal"-like or non-"tribunal"-like status"; "[A] court should not permit discovery where both of the following are true: (1) A private person seeking discovery would not be entitled to that discovery under foreign law, *and* (2) the discovery would not be available under domestic law in analogous circumstances."). Justice BREYER did not merely premise these limitations on respecting comity, but also, albeit to a lesser extent, on preventing judicial overload for U.S. courts: "[Discovery related proceedings] also use up domestic judicial resources and crowd our dockets." *Id.* Justice BREYER aired the same comity views in his concurring opinion in *Sosa* v. *Alvarez-Machain*, 124 S.Ct. 2739, 2782-2783 (2004) with respect to the scope of the Alien Tort Statute ("ATS", 28 U.S.C. § 1350) ("I would ask whether the exercise of jurisdiction under the ATS is consistent with those notions of comity that lead each nation to respect the sovereign rights of other nations by limiting the reach of its laws and their enforcement." *Id.*, at 2782).

AMD v. *Intel* at the end of 2004.[2662] Exercising its discretion, the California District Court considered the four factors set forth by the Supreme Court and ruled that AMD's application for discovery should be dismissed in full.

819. NON-PARTICIPANTS – The Supreme Court firstly noted that the case of evidence sought from a participant in a foreign proceeding should be distinguished from the case of evidence sought from a non-participant: "A foreign tribunal has jurisdiction over those appearing before it, and can itself order them to produce evidence."[2663] Although the Court did not go as far as tying evidence-taking methods to the foreign locus of the underlying proceeding, it emphasized the strong case for U.S. deference if the parties in the U.S. discovery proceeding are the same parties as in the foreign proceeding. Unlike with respect to non-participants located in the U.S., the party seeking discovery could as well try to obtain documents from the other party subject to foreign jurisdiction pursuant to foreign evidence law. This factor appears to be eminently sensible. Parties to a dispute in a foreign jurisdiction, be they voluntarily party to the dispute or not, should satisfy themselves with the evidence-taking methods available in that jurisdiction. In the proceedings on remand, the District Court duly held, with respect to this first factor, that, since Intel and AMD were participants in the EC proceedings, AMD could not seek the production of Intel's documents under § 1782. Instead, the European Commission should ask Intel to produce these documents.[2664] The Commission, being the regulatory agency in matters of competition law, could possibly resort to § 1782 and file a request with a U.S. District Court, but an interested party such as AMD could not.

820. FOREIGN RECEPTIVITY – The Supreme Court secondly suggested, along the lines of the 1964 Senate report, that "a court presented with a § 1782(a) request may take into account the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad to U.S. federal court judicial assistance".[2665] This factor in particular appears to give effect to the international comity principle in judicial assistance requests. When the foreign government or court opposes, *i.e.*, is not receptive to, U.S. discovery pursuant to § 1782, a court may, or even should, dismiss the discovery request. The U.S. Supreme Court does not seem to require explicit opposition by foreign governments or courts against U.S. discovery.

As far as this second factor is concerned, one can only applaud the weight that the Supreme Court attaches to international comity. By proposing this factor; it mitigates the impact of its prior holding that the competition proceedings before the European Commission qualify as proceedings before a foreign tribunal for purposes of § 1782. Although the Supreme Court did not instruct the lower courts to dismiss requests that

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[2662] *Advanced Micro Devices, Inc. v. Intel Corp.*, No. C01-7033, 2004 WL 2282320 (N.D. Cal. Oct. 4, 2004). Ruling that § 1782 does not contain a foreign discoverability requirement, the Supreme Court affirmed the Ninth Circuit judgment, but found that the case bore "closer scrutiny than it [had] received to date" (124 S.Ct. at 2484.). It thereby hinted at an elaboration of four factors that a federal court could use in assessing a § 1782 request. AMD thereupon initiated an action to obtain discovery from Intel with the District Court for the Northern District of California. This court decided the case on October 4, 2004. The request again concerned the documents Intel had produced in the Intergraph case.

[2663] 124 S.Ct. at 2483.

[2664] *Advanced Micro Devices, Inc. v. Intel Corp.*, No. C01-7033, 2004 WL 2282320 (N.D. Cal. Oct. 4, 2004), at p. 2.

[2665] *Id.*

may vex foreign sovereigns, the fact that it concretized the operation of the principle of international comity in the context of § 1782 testifies to its genuine willingness to uphold comity and to prevent international tensions from arising.[2666]

Applying the second factor, the District Court referred to the Commission's *amicus curiae* briefs in which it stated that "it does not need or want the District Court's assistance".[2667] The Commission even stated that granting the discovery request would jeopardize "vital Commission interests".[2668] It feared in particular that AMD's application would undermine its Leniency Program under which cartelists could confess their business restrictive practices in return for prosecutorial leniency.[2669] If a U.S. court could order cartel members to produce documents after they have confessed their antitrust sins, the incentive to cooperate with the Commission's Leniency Program would be removed, it was argued. In light of these unambiguous objections to document production, the District Court appeared to have no choice but to refuse to grant discovery under § 1782.

821. CIRCUMVENTING FOREIGN LAWS – Thirdly, all § 1782 requests aimed at circumventing "foreign proof-gathering restrictions or other policies of a foreign country or the United States" should be treated with suspicion as honoring them might offend other nations.[2670] This possibility of circumventing foreign laws was particularly highlighted by the U.S. Chamber of Commerce in its brief as *amicus curiae* before the Supreme Court. The Chamber complained that the Ninth Circuit's decision provided a mechanism to circumvent foreign discovery rules and allowed competitors to seek information from a business rival by merely filing a complaint with a U.S. court.[2671] The Supreme Court refused to impose categorical limitations on § 1782's scope in this respect, yet it urged the lower courts to take them into account as a factor to dismiss the discovery request in particular cases.

As to the third factor, the District Court plainly held that AMD's application "appear[ed] to be an attempt at circumventing the EC decision not to pursue such discovery".[2672] At least for purposes of assessing this case, the third factor must probably be read together with both the first and the second factor. On the one hand, it belongs to the Commission whether or not to pursue discovery in a case involving the same parties as in the U.S. procedure. On the other hand, where the Commission stated that it did not want U.S. judicial assistance, granting such assistance nevertheless might be perceived by the Commission as circumvention of its own

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[2666] One may regret the fact that the comity factor only comes second in line. This should however not be taken as proof of the reluctance of the U.S. Supreme Court to fully embrace comity. A comity test involves a complicated balancing act that the courts are often understandably wary to conduct. Setting forth the 'same participant test' as the first factor must be understood against that background: this test is much more straightforward than the comity test and only requires the courts to ascertain whether the parties to the U.S. discovery proceeding are the same as those to the foreign proceeding.

[2667] *Id.* European Commission *Amicus Curiae* 11-16; Brief for European Commission as *Amicus Curiae* in Support of Pet. for Cert. 4-8. 124 S.Ct. at 2484.

[2668] European Commission *Amicus Curiae* 15.

[2669] European Commission *Amicus Curiae* 14-15; Brief for European Commission as *Amicus Curiae* in Support of Pet. for Cert. 6.

[2670] 124 S.Ct. at 2471.

[2671] *See* for the U.S. Chamber of Commerce's *amicus curiae* brief: http://www.uschamber.com/NR/rdonlyres/er2yglemxqoalmkuc4d5lirmnp3yndf6u5mqxags2aklhdrgxczy3jl3obiytc2hst45klxjzy4sxls4ikailqybtvg/intel.v.amd0211.pdf

[2672] 2004 WL 2282320, at 3.

procedures. The Commission's *amicus curiae* brief is telling in that respect. The Commission stated that it "is bound by an obligation of confidentiality, as a result of which there are many elements of the Commission's files (including commercial information and business secrets) to which the complainant is denied access."[2673] It feared that construing § 1782 in a broad manner might provide complainants a "powerful incentive to file pretextual complaints at the Commission"[2674] so as to conduct fishing expeditions in documents of its competitors. This clearly runs counter to some basic tenets of European antitrust enforcement procedures.

822. INTRUSIVE REQUESTS – Fourthly, the Supreme Court invited courts to trim or reject "unduly intrusive or burdensome requests".[2675] Applying the fourth factor, the District Court rebuked AMD for "[having] made no attempt to tailor its application to the subject matter of the EC complaint".[2676] The District Court thereby clearly referred to the risk of a "fishing expedition" conducted by AMD in Intel's U.S. documents if discovery was granted. The Court took especially issue with the absence of any reference to documents relevant for Intel's European activities. It may be submitted, that if, AMD had requested the production of specific documents for use in the European antitrust proceedings, it would have stood a better chance of being granted discovery, although the other factors may have weighed against it.

9.8.5. Renewed U.S. discovery possibilities for foreign litigants after *Intel* v. *AMD*?

823. After *Intel* v. *AMD*, litigants in proceedings the locus of which is in a foreign jurisdiction could continue to turn to U.S. courts to obtain discovery for use in foreign proceedings, at least if personal jurisdiction by U.S. courts can be secured over the defendant. None of the district and circuit courts can any longer brandish a general foreign discoverability requirement supposedly contained in 28 U.S.C. § 1782. Litigants in foreign proceedings could therefore principally even obtain discovery over documents located abroad, including, ironically, in the State of the main action.[2677]

824. The rejection of a general foreign discoverability requirement by the Supreme Court is no reason for concern though, since the Supreme Court recognized the role that comity ought to play in dealing with § 1782 requests (although it disingenuously implied the characterization of the European Commission's competition proceedings as proceedings before a foreign tribunal to be in line with notions of comity). This is

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[2673] European Commission *Amicus Curiae* 13-14. The Commission referred to the European Court of Justice's ruling in case 53/85, *AKZO Chemie BV* v. *Comm'n of the European Communities*, 1986 E.C.R. 1965, § 28 ("a third party who has submitted a complaint may not in any circumstances be given access to documents containing business secrets.").

[2674] European Commission *Amicus Curiae* 14.

[2675] 124 S.Ct. at 2471. One could think of imposing conditions of confidentiality on the produced materials. *See In re Bayer AG*, 146 F.3d 188, 196 (3d Cir. 1998).

[2676] 2004 WL 2282320, at 3.

[2677] *See* however *In re Sarrio S.A.*, NO. M9-372, F.Supp., 1995 WL 598988, 1995 U.S. Dist. LEXIS 14822 (S.D.N.Y. October 11, 1995). In this case, the Spanish corporation Sarrio sought discovery of documents held by a European branch of the Chase Manhattan Bank, not in the U.S. but in Spain, the locus of the main litigation. The District Court was "unwilling to hold that § 1782 require[d] production of evidence located in Spain" and that "Sarrio [was] free to obtain production of documents located in Spain by court procedures in Spain." (*Id.*,at 3).

not necessarily to be construed as a gesture towards the more restrictive courts. Even the notably liberal Second Circuit addressed comity concerns in its *Euromepa* decision, considered by opponents to be one of the discovery "excesses".[2678] In this case, the Second Circuit held that, if "authoritative proof that a foreign tribunal would reject evidence obtained with the aid of § 1782" - which may be "embodied in a forum country's judicial, executive or legislative declarations" - can be presented, there is a strong case against granting discovery.[2679] The *Euromepa* Court implied that, if a foreign government protests against § 1782 U.S. discovery, U.S. courts are invited to heed this protest.

The importance of the Supreme Court therefore lies not in its recognition of comity as such, but in its listing of four comity-based factors to be used by the district courts in assessing a discovery request under § 1782. While the application of comity in cases under § 1782 was patchy and inconsistent up to now, it may now be streamlined. Although the district courts retain their discretion to grant discovery requests as they see fit, they are likely to heed the Supreme Court's comity test lest they be subject to Supreme Court supervisory rules. The Supreme Court did indeed not exclude this, yet "[a]ny such endeavor at least should wait further experience with § 1782 applications in the lower courts".[2680] In order to prevent further meddling by the Supreme Court, the lower courts will be well-advised to take into account the Supreme Court's four-factor test. The District Court in *AMD* v. *Intel*, a case initiated by AMD in the wake of the Supreme Court's decision, at any rate meticulously followed it. Its decision persuaded the International Working Group of the U.S. Antitrust Modernization Commission to oppose an amendment of § 1782. While admitting that several commentators had suggested that the Commission should seek to overrule the Supreme Court, this Commission held that the issue was not appropriate for Commission study as the District Court on remand had denied AMD's discovery request, the implications of § 1782 would reach well beyond the antitrust laws, and § 1782 had previously not been viewed as problematic.[2681]

825. In view of the comity test introduced by the Supreme Court in *Intel* v. *AMD*, federal courts could in future not predicate their granting of a discovery request under § 1782 solely on the broad scope of the provision's wording. In exercising their discretion, they are invited to henceforth apply a rule of reason and weigh the interest of the requesting party in being granted discovery against the interest of the foreign nation in preserving its own legal procedures in proceedings pending before its courts or agencies. Opinions such as the one vented by the Second Circuit in *Euromepa*, namely that comity does not necessitate the dismissal of a discovery request, since foreign courts can "simply refuse to consider any evidence gathered by unacceptable practices"[2682] are probably not warranted any longer. Similarly, a request for discovery of documents located in the State of the proceeding's main locus, while principally possible, is highly unlikely to pass the comity test.

[2678] *See e.g.* M. WARNER LIEN, "The Cooperative and Integrative Models of International Comity: Two Illustrations Using Transnational Discovery and *Breard* Scenarios", 50 *Catholic U. L. Rev.* 591, 618 (2000-2001).
[2679] *In re Application of Euromepa*, S.A., 51 F.3d 1095, 1100 (2nd Cir. 1995).
[2680] 124 S.Ct. at 2483.
[2681] International Working Group of the Antitrust Modernization Commission, Memorandum, *loc. cit.*, pp. 9-10.
[2682] *In re Application of Euromepa*, S.A., 51 F.3d at 1101.

826. Although acceptability might be in the eye of the beholder, the Supreme Court implicitly urged federal courts to engage only in acceptable discovery practices. In this context, exhaustion of domestic remedies in the State having jurisdiction over the subject matter may be a necessary yet insufficient condition. If foreign governments take offence at the extraterritorial effect of U.S. discovery, the exhaustion of domestic remedies may indeed be the end of the affair, unless the party requesting discovery can assert weighty private interests. While it may be argued that in some cases foreign courts could oppose excessive discovery practices by not allowing evidence obtained by them, U.S. courts have a duty to prevent materials unacceptably disclosed under § 1782 from even reaching the courts of foreign nations. If U.S. courts are in doubt whether foreign governments or courts will accept discovery, they should either dismiss or trim the request, *e.g.*, by conditioning relief to the requesting party upon the parties' reciprocal exchange of information.[2683] In so doing, the application of § 1782 will be premised, as the Third Circuit elegantly pointed out in *John Deere* v. *Sperry*, on "those considerations of comity and sovereignty that pervade international law".[2684]

827. Hailing the Supreme Court's opinion in *Intel* v. *AMD* as heavenly manna for litigants in foreign procedures seeking to tap into the discovery resources of the U.S. legal system may be misguided. As far as antitrust proceedings are concerned, it does not suffice to file a complaint against a competitor with the European Commission so as to conduct fishing expeditions in the competitor's documents. A greater administrative burden for the Commission should therefore not be feared.[2685] However, the danger of the Commission's leniency policy being undermined should not be underestimated. Corporations may refrain from submitting a leniency request with the Commission for fear that the information they transmit to the Commission could be subject to a U.S. discovery order, and form the basis for a private antitrust suit in the U.S.[2686]

In spite of the cautious reasonableness analysis proposed by the Supreme Court, U.S. court access for litigants in foreign procedures is surely eased. They are no longer required to file their discovery request with such liberal courts as the Second and Ninth Circuit. As the Supreme Court resolved the circuit split on the scope of § 1782, they can now turn to any district court. It remains however to be seen whether the different circuits will not construe the Supreme Court's four-factor test in such a divergent way so as to maintain the existing circuit split, thereby eventually inviting the Supreme Court to pronounce itself again on the matter.

9.9. Reasonable extraterritorial discovery

828. TYPE OF JURISDICTION – After having discussed the intricacies of extraterritorial U.S. discovery, the reader may be forgiven for wondering what type of jurisdiction – adjudicative, prescriptive, or enforcement jurisdiction – U.S. courts

[2683] *See also* the Court in *Euromepa*, *Id.*, at 1102.
[2684] *See John Deere Ltd.* v. *Sperry Corp.*, 754 F.2d at 135.
[2685] E. DE LA SERRE, "L'assistance judiciaire américaine au soutien d'une plainte en droit communautaire de la concurrence", *RDAI* 35, 47-48 (2005).
[2686] *Id.*, at 50-52 (stating that clarification of the "law enforcement investigatory privilege" is apt, and suggesting that the U.S. and the EC could negotiate a convention to that effect).

actually exercise when they order extraterritorial discovery. LOWENFELD has implied that an exact classification is not that important.[2687] Granted, a practical solution for solving jurisdictional conflicts caused by U.S. discovery orders, informed by the rule of reason, may be more useful. However, it is precisely a proper understanding of whether a transnational discovery order constitutes an exercise of adjudicative, prescriptive, or enforcement jurisdiction under international law that may clarify the authorized reach of the U.S. Federal Rules of Civil Procedure in light of the principle of jurisdictional reasonableness.

Notably WALLACE has endeavored to define extraterritorial discovery orders in light of the categories of jurisdiction under international law. She argued that extraterritorial discovery orders are instances of enforcement jurisdiction exercised by U.S. courts upon a finding of adjudicatory jurisdiction pursuant to rules of personal jurisdiction. She added that the United States may lack prescriptive jurisdiction under public international law, in the sense that it is precluded from prescribing discovery laws for situations abroad, but that its courts are for that reason not precluded from exercising their enforcement jurisdiction by ordering discovery for foreign documents and serving a subpoena to that effect.[2688]

Underlying WALLACE's reasoning is clearly a desire to justify the U.S. view of judicial sovereignty, in terms of *territorial* enforcement jurisdiction. Against this, it may be submitted that characterizing discovery orders as instances of legitimate enforcement jurisdiction is not entirely warranted, and that, in fact, when ordering discovery, U.S. courts exercise prescriptive jurisdiction because they prescribe the production of foreign-based materials like laws prescribe a specific conduct. Admittedly, by issuing a subpoena, courts immediately anticipate the possible exercise of enforcement jurisdiction. Yet only when the subpoena is actually enforced, on a territorial basis, does territorial enforcement jurisdiction obtain.[2689] The legitimacy of such enforcement jurisdiction is dependent on the legitimacy of the prescriptive discovery order the effectiveness of which the subpoena is designed to protect. It may be submitted that the (easily established) adjudicative (personal) jurisdiction of U.S. courts does not and should not, of itself, confer the power to order the production of documents. Nor may a court that has established its prescriptive jurisdiction over the underlying dispute (*e.g.*, on the basis of the effects doctrine) have implied powers to order discovery.[2690] Only a balancing of different governmental and

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[2687] *See* A.F. LOWENFELD, "International Litigation and the Quest for Reasonableness", 245 *R.C.A.D.I.* 9, 248 (1994-I) (stating that "[w]hether judicial discovery is described as an aspect of adjudication, prescription, or enforcement, there can be no doubt that orders for discovery are exercises of jurisdiction").

[2688] *See* C.D. WALLACE, "'Extraterritorial Discovery: Ongoing Challenges for Antitrust Litigation in an Environment of Global Investment", *J. Int'l Econ. L.* 353, 360-61 (2003).

[2689] Apparently *contra:* B. GOLDMAN, "Les champs d'application territoriale des lois sur la concurrence", 128 *R.C.A.D.I.* 631, 714 (1969-III) (stating that « la *subpoena* a précisément pour objet de contraindre l'intéressé à produire des documents se trouvant à l'étranger, c'est-à-dire …, de tourner les règles de la recherche des preuves hors du pays du juge. »). Extraterritorial enforcement of subpoenas is undeniably not allowed. *See INGS* v. *Ferguson,* 282 F.2d 149, 151 (2nd Cir. 1960) ("An elementary principle of jurisdiction is that the processes of the courts of any sovereign state cannot cross international boundary lines and be enforced in a foreign country. Thus service of a United States District Court subpoena by a United States Marshal upon a Montreal branch of a Canadian bank would not be enforceable.")

[2690] *Contra* C.D. WALLACE, "'Extraterritorial Discovery: Ongoing Challenges for Antitrust Litigation in an Environment of Global Investment", *J. Int'l Econ. L.* 353, 362 (2003).

private interests and the needs of the international system may eventually determine the legitimacy of every single discovery order at the moment this order is contemplated. Focusing on the subpoena buttressing the order, which is indeed *territorially* enforced, deflects attention from the undeniable fact that the order itself, requiring the production of documents located abroad, has clear extraterritorial effects and thus raises sovereignty concerns. This need however not imply that the order itself is an (impermissible) extraterritorial *enforcement measure*, as some European authors tend to argue.[2691]

829. INTEREST-BALANCING – Interest-balancing serves as a tool of jurisdictional restraint mediating the different conceptions of judicial sovereignty espoused by the U.S. and the EU, set out *supra.* It does not require automatic deference of U.S. courts to the general sovereign interest of a foreign State in having no discovery orders intruding upon its judicial system nor does it require automatic deference of foreign States to the general sovereign interest of the United States in imposing discovery liabilities on a person subject to U.S. personal jurisdiction. Instead, a particularized analysis of sovereign interests appears warranted.[2692]

Interest-balancing was exactly what the U.S. Supreme Court proposed in *Aérospatiale* (1986), when it held: "[T]he concept of international comity requires in this context a … particularized analysis of the respective interests of the foreign nation and the requesting nation … The exact line between reasonableness and unreasonableness in each case must be drawn by the trial court, based on its knowledge of the case and of the claims and interests of the parties and the governments whose statutes and policies they invoke."[2693] Interest-balancing is also the approach advocated by the Restatement (Third) of U.S. Foreign Relations Law (1987).[2694]

830. The balancing process in the context of extraterritorial discovery may operate differently than in the context of other assertions of extraterritorial jurisdiction. Greater weight than usual may be attached to the forum State's interests, because matters of evidence and judicial procedure are ordinarily governed by the forum law, and are thus aspects of the judicial sovereignty of the forum State, even if discovery orders relate to documents located abroad.[2695] Moreover, a discovery order is only a

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[2691] *See, e.g.*, J.-M. BISCHOFF & R. KOVAR, "L'application du droit communautaire de la concurrence aux entreprises établies à l'extérieur de la Communauté", 102 *J.D.I.* 721 (1975).

[2692] *See* cmt. c to § 442 (1) (c) of the Restatement (Third) of U.S. Foreign Relations Law ("In making the necessary determination of foreign interests under Subsection (1) (c), a court or agency in the United States should take into account not merely a general policy of the foreign state to resist "intrusion upon its sovereign interests", or to prefer its own system of litigation, but whether producing the requested information would affect important substantive policies or interests of the foreign state.").

[2693] 482 U.S. at 543-46 I(footnotes omitted).

[2694] § 442 (1) (c) of the Restatement (Third) of U.S. Foreign Relations Law ("In deciding whether to issue an order directing production of information located abroad, and in framing such an order, a court or agency in the United States should take into account the importance to the investigation or litigation of the documents or other information requested; the degree of specificity of the request; whether the information originated in the United States; the availability of alternative means of securing the information; and the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located.").

[2695] *See* A.F. LOWENFELD, "International Litigation and the Quest for Reasonableness", 245 *Recueil des Cours* 9, 217 (1994-I); cmt. e to § 442 (1) (c) of the Restatement (Third) of U.S. Foreign Relations Law.

pre-trial order and not a decision on the merits (although, obviously, it is usually issued with a view to clarifying and eventually resolving the underlying dispute on the merits). Discovery may at times also be necessary to determine whether a court has prescriptive jurisdiction under international law over the underlying dispute (*e.g.*, to determine whether a foreign-based conspiracy had the intent of producing substantial domestic effects). Because a production order is only the first step in the process of resolving transnational disputes,[2696] it is not unreasonable to require that the threshold for deference to foreign nations be higher than it is in other fields of the law.

831. Nonetheless, given the potential for international conflict, jurisdictional restraint appears apt. For one thing, in order to soothe foreign concerns that discovery orders allow parties to conduct "fishing expeditions", discovery orders could be restricted to relevant and essential documents.[2697] For another, dismissal of discovery requests may be contemplated if foreign nations explicitly assert their interests in a given case, and all the more so if the Department of State expresses its view that the political branches' prerogative on the conduct of foreign relations might be jeopardized if a discovery order were issued.[2698] In theory, U.S. courts should also defer to foreign blocking legislation.[2699] However, they might require that the party at whom the order is directed act in good faith.[2700] A party may not act in good faith if

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[2696] *See In re Uranium Antitrust Litig.*, 480 F. Supp. 1138, 1148 (N.D. Ill. 1979) ("[A] production order is only the first step in the process of resolving discovery disputes, and […] it should not be prematurely burdened by a comprehensive inquiry into all ramifications of the controversy.")

[2697] *See* D. BREWER, "Obtaining Discovery Abroad: the Utility of the Comity Analysis in Determining Whether to Order Production of Documents Protected by Foreign Blocking Statutes", 22 *Houston J. Int'l L.* 525, 551 (2000); cmt. a to § 442 of the Restatement (Third) of U.S. Foreign Relations Law (1987) (stating that a U.S. court "should scrutinize a discovery request more closely than it would scrutinize comparable requests for information located in the United States" and that "it is ordinarily reasonable to limit foreign discovery to information necessary to the action … and directly relevant and material"). It may be noted in this context that the United Kingdom made a declaration under Article 23 of the Hague Convention pursuant to which it was willing to execute Letters of Request issued for the purpose of obtaining pretrial discovery of *particular* documents.

[2698] *Compare U.S.* v. *First National City Bank*, 396 F.2d 897, 904 (1968) (honouring an extraterritorial discovery request *inter alia* because the Department of State nor the German Government had expressed any view that enforcement of the subpoena would violate German public policy or embarrass German-American relations, and thus implying that it would be willing not to enforce the subpoena if a foreign government were to protest its enforcement). *See also Societe Nationale Industrielle Aerospatiale*, 482 U.S. at 555 (Blackmun, J.) ("As in the choice-of-law analysis, which from the very beginning has been linked to international comity, the threshold question in a comity analysis is whether there is in fact a true conflict between domestic and foreign law. When there is a conflict, a court should seek a reasonable accommodation that reconciles the central concerns of both sets of laws. In doing so, it should perform a tripartite analysis that considers the foreign interests, the interests of the United States, and the mutual interests of all nations in a smoothly functioning international legal regime.").

[2699] *Contra* reporters' note 5 to § 442 (1) (c) of the Restatement (Third) of U.S. Foreign Relations Law (stating that "when a state has jurisdiction to prescribe and its courts have jurisdiction to adjudicate, adjudication should take place on the basis of the best information available, and that statutes that frustrate this goal need not be given the same deference by courts of the United States as differences in substantive rules of law").

[2700] Good faith may possibly only be an argument in the sanctions phase, not when the discovery request is filed, since taking into account good faith in the latter phase may encourage States to adopt blocking legislation. Drawing adverse inferences in the sanctions phase even if good faith is established, may however be a bridge too far. *See* however § 442 (2) (c) of the Restatement (Third) of U.S. Foreign Relations Law (1987) (stating that "a court or agency may, in appropriate cases, make findings of fact adverse to a party that has failed to comply with the order for production, *even if that party has made a good faith effort* to secure permission from the foreign authorities to make the

she has courted the enactment of blocking legislation, if she has transferred their documents to 'secrecy havens',[2701] or if she did not apply for waivers under the legislation.[2702] Also, if there is evidence that the criminal sanctions attached to the foreign blocking legislation are not actually enforced, U.S. courts may refuse to take such legislation into account. It is unclear whether customary international law opposes disregarding foreign mandatory legislation in other situations.[2703] Arguably, such legislation – which is often only used to defend national economic interests – might at times encroach upon the judicial sovereignty of the United States, which may thus be entitled to disregard it.[2704] If the U.S. were to effectively disregard foreign laws when ordering discovery from a private party, it may be submitted that the foreign State should refrain from punishing that party if, objectively, the U.S. had a stronger interest in applying its law.[2705]

Blocking legislation does surely not represent a workable solution for transnational dispute resolution.[2706] Private parties, caught between a rock and a hard stone, fall victim to it, and cases become "wholly untriable",[2707] in the words of the English Court of Appeals in *Laker Airways*. The high tide of blocking legislation has however waned. As set out *supra* in the chapter 8, in 1996, while the European Union still adopted a regulation so as to block the effects of the 1996 U.S. Helms-Burton and Iran Libya Sanctions Act, it was never applied after an Understanding was reached with the United States in 1997.

832. INTERNATIONAL COOPERATION – Understandings and bilateral agreements seem the way forward to deal with problems of extraterritorial discovery. One of the

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information available and that effort has been unsuccessful.") (emphasis added); D. BREWER, "Obtaining Discovery Abroad: the Utility of the Comity Analysis in Determining Whether to Order Production of Documents Protected by Foreign Blocking Statutes", 22 *Houston J. Int'l L.* 525, 552 (2000). *Contra* the requirement of good faith: D.M. JACOBS, "Extraterritorial Application of Competition Laws: an English View", 13 *Int. Law.* 645, 664 (1979).

[2701] *See also* reporters' note 8 (*in fine*) to § 442 (1) (c) of the Restatement (Third) of U.S. Foreign Relations Law.

[2702] *See also* A.F. LOWENFELD, "International Litigation and the Quest for Reasonableness", 245 *Recueil des Cours* 9, 251 (1994-I); cmt. h to § 442 (1) (c) of the Restatement (Third) of U.S. Foreign Relations Law.

[2703] *Pro* full respect for foreign mandatory laws: A.V. LOWE, "The Problems of Extraterritorial Jurisdiction: Economic Sovereignty and the Search for a Solution", 34 *I.C.L.Q.* 724, 746 (1985) (stating that "blocking statutes"are "simply formal expressions of a legal truth being lost in the flood of detailed discussions of the extraterritoriality problem: that the world is made up of independent sovereign States with sovereign and inalienable rights to choose their own economic system.").

[2704] It has therefore been argued that "the decisive factor should be whether the mandatory rule expresses values shared in common and which the receiving country is itself is willing to protect". B. GROSSFELD & C.P. ROGERS, "A Shared Values Approach to Jurisdictional Conflicts in International Economic Law", 32 *I.C.L.Q.* 931, 939 (1983). The reasonableness test has been framed as: "if the foreign law were transferred to the American system, would it be thought of as possibly compatible with that system or would it be rejected as inconsistent with basic precepts of the domestic law?". *Id.*, at 942.

[2705] *Id.*, at 946 (arguing that "in appropriate cases … the foreign State should relieve the individual of the burden of the conflict or compensate for damages incurred").

[2706] *Compare Laker Airways*, 731 F.2d 941 ("For, if the United States and a few other countries with major airlines enacted and enforced legislation like the Protection of Trading Interests Act, the result would be unfettered chaos brought about by unresolvable conflicts of jurisdiction the world over."); B. GROSSFELD & C.P. ROGERS, "A Shared Values Approach to Jurisdictional Conflicts in International Economic Law", 32 *I.C.L.Q.* 931, 934 (1983).

[2707] *British Airways Board* v. *Laker Airways Ltd.*, [1983] 3 W.L.R. 591.

first agreements in this respect was the Memorandum of Understanding signed between Switzerland and the United States in 1982. The need was felt for such a memorandum because quite some U.S. discovery orders, often related to insider-trading, had clashed with Swiss bank secrecy laws. The District Court's judgment in *SEC* v. *Banca della Svizzera Italiana* requiring disclosure of an insider's identity from a Swiss bank in 1981 was probably the final turning point.[2708] Under the 1982 Understanding, the United States pledged to forego extraterritorial discovery orders and to request, through the SEC, a Swiss bank commission to disclose documents needed in insider-trading proceedings.[2709] In the field of antitrust law, as has been discussed *supra* in chapter 6, the 1990s saw the adoption of two bilateral agreements between the United States and Europe on the exchange of documents and evidence that could be used in international antitrust proceedings.[2710] The United States even enacted a specific law, pursuant to which, on application of the Attorney General, "the district court for the district in which a person resides, is found, or transacts business may order this person to give testimony or a statement, or to produce a document or other thing, to the Attorney General to assist a foreign antitrust authority [...] (1) in determining whether a person has violated or is about to violate any of the foreign antitrust laws administered or enforced by the foreign antitrust authority, or (2) in enforcing any of such foreign antitrust laws."[2711]

833. The ascendancy of transatlantic evidence-taking cooperation agreements is attributable to the fact that substantive regulatory laws (securities and antitrust laws) are increasingly harmonized.[2712] Much of the European opposition against U.S. discovery indeed reflected opposition against the reach of substantive U.S. antitrust and securities laws.[2713] A refusal to cooperate with the enforcement of regulatory laws at the crucial level of evidence-taking, for instance through the enactment of blocking legislation, was seen as the only method of reining in U.S. jurisdictional assertions. It might be expected that, as the benchmarking effect of U.S. regulatory law goes deeper and spreads wider, conflicts over extraterritorial discovery will further diminish. Nonetheless, as the recent case of *Intel* v. *AMD* has shown, even when substantive antitrust laws are similar on both sides of the Atlantic, conflict may arise and arguments of judicial sovereignty may be invoked so as to fend off unwelcome U.S. discovery orders. The Supreme Court's decision in *Intel* v. *AMD* nonetheless bears

[2708] 92 F.R.D. 111 (S.D.N.Y. 1981).

[2709] Memorandum of Understanding between Switzerland and the United States signed at Washington on August 31, 1982, reprinted in 22 *I.L.M.* 1 (1983). The Memorandum was later replaced by the Treaty for Mutual Assistance in Criminal Matters between the United States and Switzerland (1052 *UNTS* 61, entered into force January 3, 1977), when insider-trading became a crime in Switzerland (Article 161 of the Swiss Penal Code).

[2710] *See* for the bilateral agreements between the U.S. and the EC: Agreement Regarding the Application of Competition between the Government of the United States and the Commission of the European Communities, 4 *C.M.L.R.* 823-831 (1991); 30 *I.L.M.* 1487 (1991), *O.J.* L132 (1995); Agreement Between the European Communities and the Government of the United States of America on the Application of the Positive Comity Principles in the Enforcement of their Competition Laws, *O.J.* L 173/28, 1998; 4 *C.M.L.R.* 502 (1999)..

[2711] 15 U.S.C. § 6203.

[2712] *See, e.g.*, A.F. LOWENFELD, "International Litigation and the Quest for Reasonableness", 245 *R.C.A.D.I.* 9, 230 (1994-I) (asking the "fair question" however of "whether the technique worked ou in connection with criminal or quasi-criminal conduct can be adapted to civil litigation [*e.g.*, product liability cases], where there may well be less consensus on substance than there is with regard to securities fraud or money laundering")

[2713] Reporters' note 1 to § 442 (1) (c) of the Restatement (Third) of U.S. Foreign Relations Law.

testimony to a heightened sensitivity in the United States that U.S. discovery orders might be perceived as encroaching upon foreign judicial sovereignty.[2714]

CHAPTER 10: UNIVERSAL CRIMINAL JURISDICTION

10.1. Introduction to universal jurisdiction

834. The exercise of jurisdiction is ordinarily premised on the presence of a nexus of the matter to be regulated with the regulating State. Not so as far as the exercise of universal jurisdiction is concerned. Universal jurisdiction does not operate on the basis of a connecting factor linking up a situation with a State's interests. Instead, it is based solely on the nature of a crime "without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the State exercising such jurisdiction".[2715] Under the universality principle, the heinous nature of an act may in itself confer jurisdiction on any State.

835. Before the 1990s, universal jurisdiction did not receive much doctrinal attention. Although some conventions, anti-terrorism conventions in particular, provided for universal jurisdiction on the basis of an *aut dedere aut judicare* obligation, universal jurisdiction only gained ascendancy in the 1990s, when States increasingly relied on it so as to prosecute such heinous crimes as war crimes,

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[2714] *Compare id.*, at 194.

[2715] Principle 1 (1) of the Princeton Principles on Universal Jurisdiction (2001), *reprinted in* S. MACEDO (ed.), *Universal Jurisdiction*, Philadelphia, University of Pennsylvania Press, 2004, at 21. The Princeton Principles are, according to the Commentary, a progressive restatement of international law, although they contain elements *de lege ferenda. Id.*, at 26. *See* also Principle 13 of the Brussels Principles Against Immunity and for International Justice, in *Combating Impunity: Proceedings of the Symposium Held in Brussels From 11 to 13 March 2002*, 149, at 157, which defines universal jurisdiction as "the right of a State to institute legal proceedings and to try the presumed author of an offence, irrespective of the place where the said offence has been committed, the nationality or the place of residence of its presumed author or of the victim." *See also* INTERNATIONAL LAW ASSOCIATION, *Final Report on the Exercise of Universal Jurisdiction in Respect of Gross HumanRights Violations*, Committee on International Human Rights Law and Practice, London Conference, 2000, p. 2 ("Under the principle of universal jurisdiction, a state is entitled, or even required to bring proceedings in respect of certain serious crimes, irrespective of the location of the crime, and irrespective of the nationality of the perpetrator or the victim."); INSTITUTE OF INTERNATIONAL LAW, Resolution of the 17th Commission on universal criminal jurisdiction with regard to the crime of genocide, crimes against humanity and war crimes, Krakow Session, 2005, nr. 1 ("Universal jurisdiction in criminal matters, as an additional ground of jurisdiction, means 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.").
Judge ad hoc Van den Wyngaert believed in her dissenting opinion in *Arrest Warrant* that "[t]here is no generally accepted definition of universal jurisdiction in conventional or customary international law, that "[m]any views exist as to its legal meaning" and that "uncertainties [...] may exist concerning [its] definition." *See* diss. op. Van den Wyngaert, *Arrest Warrant*, 14 February 2002, 2002 *I.C.J. Rep.*, §§ 44-46. *See also* H.F.A. DONNEDIEU DE VABRES, *Les principes modernes du droit pénal international*, Paris, Sirey, 1928, at 135 ("Dans sa notion élémentaire, et son expression absolue, le système de la *répression universelle*, ou de l'*universalité du droit de punir* est celui qui attribute vocation aux tribunaux répressifs de tous les Etats pour connaître d'un crime par un individu quelconque, en quelconque pays que ce soit.") (original emphasis).

genocide, crimes against humanity, and torture.[2716] Since the late 1990s, a great number of books and articles on the subject have been published. Yet given the rapid change of legislation and case-law on universal jurisdiction, doctrine including empirical data often became obsolete in no time.[2717] This dissertation will probably not be an exception. An attempt will however be made at charting the landscape of universal jurisdiction as it looks as of 2006, with special emphasis on State practice, in particular from a transatlantic perspective. In this chapter, the exercise of universal *criminal* jurisdiction in a number of European States and the United States will be studied. In the next chapter, an analysis of universal *civil* or *tort* jurisdiction, especially as exercised by U.S. federal courts on the basis of the Alien Tort Statute, will follow. In both chapters, due consideration will be given to the application of a rule of reason restraining the exercise of universal jurisdiction. It will be argued that, unlike what the drafters of Section 404 of the Restatement (Third) of U.S. Foreign Relations Law (1987) seemed to believe, the limited number of offenses which may give rise to universal jurisdiction does not itself ensure reasonableness.[2718] An additional reasonableness analysis, based on the subsidiarity principle and procedural constraints, may be appropriate so as to prevent inter-State conflict from arising.

10.1.1. Legality of universal jurisdiction

836. As for any exercise of jurisdiction, the legitimacy of universal jurisdiction may be traced to the *Lotus* judgment (1927),[2719] in which the Permanent Court of International Justice (P.C.I.J.) ruled in favor of a broad grant of jurisdiction under (customary) international law.[2720] In *Lotus*, the Court emphasized the prevalence of State sovereignty as jurisdictional liberty over international law limits.[2721] Since *Lotus*, as set out in part 2.2, legal doctrine has however approached the law of jurisdiction on the basis of the principle of sovereign equality and the concomitant international rules prohibiting the unfettered exercise of jurisdiction. It identified, drawing on State practice and *opinio juris*, a set of legal principles authorizing jurisdiction in limited circumstances. One of these principles has traditionally been the principle of universal jurisdiction. The contours of this principle are, unlike these

[2716] Although the legality of universal jurisdiction might not have been contested before the 1990s, in practice only Nazi war criminals were prosecuted under the universality principle (*e.g.*, Eichmann). *See* D. ORENTLICHER, "Whose Justice? Reconciling Universal Jurisdiction with Democratic Principles", 92 *Georgetown L. J.* 1057, 1073 (2004).

[2717] Luc REYDAMS's excellent monograph on universal criminal jurisdiction, for instance, only includes empirical data until July 1, 2002. *See* L. REYDAMS, *Universal Jurisdiction*, Oxford, Oxford University Press, 2003, at 8.

[2718] The rule of reason set forth in § 403, and discussed at length in chapter 5, only applies to the exercise of prescriptive jurisdiction based on the territorial, nationality and protective principles, but not to the exercise of universal jurisdiction (which is subject to § 404).

[2719] P.C.I.J., *Lotus*, *P.C.I.J. Rep.*, Series A, nr. 10 (1927).

[2720] *Contra* C. KRESS, "Universal Jurisdiction over International Crimes and the *Institut de Droit international*", *4 J.I.C.J.* 561, 572 (2006). KRESS argues that "the *raison d'être* of true universal jurisdiction renders [the *Lotus*] principle inapplicable", implying that *Lotus* concerned State interests, and universal jurisdiction concerns the interests of the international community. Arguably, however, the *Lotus* principle concerns *any* unilateral exercise of jurisdiction by States, irrespective of whether these States act in their self-interest, or whether they act as agents of the international community when asserting jurisdiction.

[2721] P.C.I.J., *Lotus*, *P.C.I.J. Rep.*, Series A, nr. 10 (1927) ("It does not, however, 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.").

of the other principles, not clearly drawn however, and subject to rapid modification. An analysis of State practice and *opinio juris* of the nations exercising this kind of jurisdiction so as to assess its status under customary international law is therefore of utmost importance. It will be argued, after a detailed survey of European and U.S. State practice, that universal jurisdiction over core crimes against international law (genocide, war crimes, crimes against humanity, torture) is authorized, but that the conditions surrounding its actual exercise are still the subject of debate.

837. So far, the International Court of Justice has not addressed the legality of universal jurisdiction, or its modalities of exercise, head-on. It may be hoped that it will eventually, possibly in 2008, clarify the *Lotus* doctrine with respect to universal jurisdiction in a case initiated by the Republic of Congo against France, which had asserted universal jurisdiction over torture offenses allegedly committed by a number of Congolese officials, although the Republic of Congo was not a State Party to the UN Torture Convention. While the International Court of Justice has not yet directly addressed the legality of universal jurisdiction, it could nonetheless have done so in the 2002 *Arrest Warrant* judgment. In that momentous judgment, the Court conspicuously circumvented the question of the legality of universal jurisdiction, and limited itself to ruling on the issue of immunity *ratione personae* of Ministers of Foreign Affairs.[2722]

[2722] Although the Democratic Republic of Congo (DRC) initially challenged the legality of a Belgian arrest warrant against the DRC Minister of Foreign Affairs issued on the basis of the universality principle, arguing that Belgium's claim to exercise universal jurisdiction violated the international law of jurisdiction, it eventually limited the legal grounds which it invoked before the ICJ to the question of immunity. The ICJ admitted that, as a matter of logic, it should first address the legality of universal jurisdiction before addressing jurisdictional immunity, "since it is only where a state has jurisdiction under international law in relation to a particular matter that there can be any question of immunities in regard to the exercise of that jurisdiction." ICJ, *Arrest Warrant*, 14 February 2002, § 46. It however refused to address the question of jurisdiction in view of the DRC's final submissions and assumed that Belgium indeed *ad* universal jurisdiction. It has therefore been submitted that *Arrest Warrant* may be construed as upholding the general presumption of the legality of non-territorial jurisdiction, in line with the *Lotus* judgment. See M. INAZUMI, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law*, Antwerp-Oxford, Intersentia, 2005, 202. While the majority opinion did not deal with the legality of universal jurisdiction over core international crimes, several separate and dissenting opinions did. Judge Guillaume for instance argued that "there can only be immunity from jurisdiction where there is jurisdiction". ICJ, A*rrest Warrant*, Judge Guillaume, separate opinion, § 1. He found the question of universal jurisdiction of such importance and controversy, that clarification of it was in the interest of all States (Id.). Similarly, Judges Higgins, Kooijmans and Buergenthal held that "[i]mmunity depends on pre-existing jurisdiction" (ICJ, *Arrest Warrant*, Judges Higgins, Kooijmans and Buergenthal, joint separate opinion, §§ 3-4 (also holding that "[w]hether the Court should accommodate this consensus [i.e. between Belgium and the DRC] is another matter.")), while Judge Ranjeva pointed out that « [l]es considérations de logique auraient dû amener la Cour à aborder la question de la compétence universelle, une question d'actualité et sur laquelle une décision en la présente affaire aurait nécessairement fait jurisprudence. » (ICJ, *Arrest Warrant*, Judge Ranjeva, separate opinion, § 2). Ad hoc Judge van den Wyngaert, dissenting, held the same, and was the only judge to vigorously defend the legality of universal jurisdiction as epitomized by the issuance of the Belgian arrest warrant against the DRC Minister of Foreign Affairs. ICJ, *Arrest Warrant*, Judge ad hoc Van den Wyngaert, diss. op., §§ 50-51 ("I believe that Belgium, by issuing and circulating the warrant, violated neither the rules on prescriptive jurisdiction nor the rules on enforcement jurisdiction"; "I believe that there is no prohibition under international law to enact legislation allowing it to investigate and prosecute war crimes and crimes against humanity committed abroad."). In what follows, reference will at several occasions be made at these opinions.

10.1.2. Justifying universal jurisdiction

838. The fact that, under the universality principle, a State may exercise jurisdiction over a crime without regard to any connection to that State sits uneasy with the classical State-centered view of public international law. Some doctrine has therefore attempted to link up universal jurisdiction with the interests and goals of the State and the concept of statehood. MARKS, for instance, has predicated the exercise of universal jurisdiction on a 'common interest rationale',[2723] emphasizing the shared interests which States have in exercising universal jurisdiction.[2724] The 'common interest rationale' "acknowledges that the conduct of those who perpetrate serious international crimes in one state has an impact on other states: such conduct poses a potential threat to all States and thus all States have an interest in prosecuting the wrongdoer."[2725] Especially universal jurisdiction over crimes such as piracy, drug offences, hijacking, hostage-taking, and other terrorist acts, lend itself to justification under the common interest rationale. In contrast, perpetrators of core crimes against international law (*e.g.*, genocide, torture …) are not very likely to repeat their crimes, the commission of which finds its origins in the political, historical and social environment of a particular territory. This also explains why another pragmatic State-centered justification of universal jurisdiction – that offenders of extraterritorial crimes present in their territory might cause trouble, given their propensity for criminal behavior –[2726] does not carry much suasion for these crimes.

839. For crimes against international law, another State-centered rationale could be apt, namely that a State embarks on a mission to realize the ideals of justice, and not only to protect narrowly-defined state interests. In idealist Kantian thought, criminal

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[2723] *See* J.H. MARKS, "Mending the Web: Universal Jurisdiction, Humanitarian Intervention and the Abrogation of Immunity by the Security Council", 42 *Col. J. Transnat'l L.* 445, 465-67 (2004). *See also* the type of universal jurisdiction identified by STERN as *"somme d'intérêts propres identiques des Etats"*, as opposed to *"l'intérêt unique partagé par tous"*. *See* B. STERN, "La compétence universelle en France: le cas des crimes commis en ex-Yougoslavie et au Rwanda", 40 *G.Y.I.L.* 280, 281 (1997).

[2724] Compare I. Kant, "Perpetual Peace: A Philosophical Sketch", in H. REISS (ed.), *Kant's Political Writings*, Cambridge, Cambridge University Press, 1970, at 107-108: "The peoples of the earth have [...] entered in varying degrees into a universal community, and it has developed to the point where a violation of rights in one part of the world is felt everywhere." Quoted in: J.H. MARKS, "Mending the Web: Universal Jurisdiction, Humanitarian Intervention and the Abrogation of Immunity by the Security Council", 42 *Colum. J. Transnat'l L.* 445, 465 (2004).

[2725] *Id.*, at 465. MARKS draws an interesting comparison with the Security Council, whose powers extend to serious international crimes committed within the borders of one state since these might be of interest to the international community as a whole. Acting under Chapter VII, the Security Council established, for instance, the ICTR to adjudge crimes of genocide. *Id.*, at 466. *Compare Flores* v. *S. Peru Copper Corp.*, 343 F.3d 140, 156 (2d Cir.), a case arising under the U.S. Alien Tort Statute (holding that "official torture, extrajudicial killings, and genocide, do violate customary international law because the 'nations of the world' have demonstrated that such wrongs are of 'mutual … concern,' and capable of impairing international peace and security")

[2726] Medieval Italian city-states for instance grounded their right to exercise jurisdiction over the offenders of extraterritorial crimes present in their territory on this possibility. *See* H.F.A. DONNEDIEU DE VABRES, *Les principes modernes du droit pénal international*, Paris, Sirey, 1928, 135-36 (1928) (« Néanmoins, il fut admis pendant tout le moyen âge, dans la doctrine italienne, et dans le droit qui gouvernait les rapports des villes lombardes, qu'à l'égard de certaines catégories de malfaiteurs dangereux [...] la simple présence, sur le territoire, du criminel impuni, étant une cause de trouble, donnait vocation à la cité pour connaître de son crime. »). This justification has been criticized for arbitrarily and egoistically downplaying the *universality* of prosecution, by premising the jurisdictional intervention of the custodial State on it being harmed by the later presence of the offender instead of on the nature of the crime. *Id.*, at 142-43.

law is a categorical imperative informed by practical reason. Criminals ought to be punished, not because, from a utilitarian perspective, they breach the King's peace, but because they harm humanity as a whole.[2727] From this viewpoint, some crimes are considered to be breaches of obligations *erga omnes*, owed to every State and which, thus, every State has an interest in adjudicating, even without a concrete link with the State. This has become the dominant rationale of universal jurisdiction (although moral considerations have been emphasized over idealized State interests): some acts are considered as so morally reprehensible that any State should be authorized or even be required to prosecute them.

The practical rationale of the exercise of universal jurisdiction appears however often not to relate to moral considerations, but rather to the public outrage presented by the very presence in the forum State of a perpetrator of an international crime.[2728] It is politically not expedient to condone the territorial presence of international criminals, even if these persons do not pose a public danger. In recent times, media pressure has considerably fed this indignation, with journalists, notably in the United Kingdom, sometimes tracking down presumed perpetrators living quietly in the territory of a bystander State.

10.1.3. The historical trail of universal jurisdiction

840. Universal jurisdiction is not a new phenomenon. It already featured in an embryonic form in the 6th century *Codex Justiniani*, which, regulating the competence of the different governors of the Empire, granted jurisdiction to both the tribunal of the place where the crime was committed (*judex loci delicti commissi*, territorial jurisdiction), and the place where the perpetrator was arrested (*judex deprehensionis*, universal jurisdiction subject to the presence requirement).[2729] Similarly, in the mediaeval city-states of northern Italy, certain dangerous offenders could be prosecuted by any state where they could be found.[2730] In the 17th century, ironically at the time when the territorial principle gained ascendancy, a number of Dutch scholars, such as VOET, COCCEJI and, most importantly, GROTIUS, advocated universal jurisdiction over crimes that violated the law of nature and shocked the *societas generis humani*.[2731] By 1928, DONNEDIEU DE VABRES noted that the system of

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[2727] *Id*., 151.

[2728] *See* R. RABINOVITCH, "Universal Jurisdiction *In Absentia*" 28 *Fordham Int'l L. J.* 500, 518 (2005); ICJ, *Arrest Warrant*, sep. op. President Guillaume, *ICJ Rep.* at 36 (2002) (citing classical writers such as Covarruvias and Grotius).

[2729] *Codex Justiniani*, C. III, 15, *Ubi de criminibus agi oportet*. In civil law matters, embryonic universal jurisdiction could be gleaned from the Roman law practice of allowing the plaintiff to sue a vagrant defendant, *i.e.*, a defendant without domicile, anywhere the plaintiff could find him (*ubi ti invenero ibi te judicabo*). *See* on this practice J. PLESCIA, "Conflict of Laws in the Roman Empire", 38 *Labeo* 30, 47 (1992).

[2730] H.F.A. DONNEDIEU DE VABRES, *Les principes modernes du droit pénal international*, Paris, Sirey, 1928, at 136.

[2731] *Id.* H. GROTIUS, 3 *De Jure Belli Ac Pacis* 504 (1925) (arguing that States have a right "to exact Punishments, not only for Injuries committed against themselves or their Subjects, but likewise, for those which do not peculiarly concern them, but which are, in any Persons whatsoever, grievous Violations of the Law of Nature or Nations" and that "any State would have the moral imperative to punish the perpetrators of *delicta juris gentium*, "[f]or […] it is so much more honorable, to revenge other Peoples Injuries rather than their own […] Kings, beside the Charge of their particular Dominions, have upon them the care of human Society in general".)

universal jurisdiction was recognized as a principle by the international community, but that it remained to be organized in practice.[2732]

841. One crime over which universal jurisdiction was not merely a doctrinal construct, but was historically organized, is piracy, the classical crime giving rise to universal jurisdiction under customary international law. Universal jurisdiction over piracy is generally premised on either the legal fiction that pirates, as enemies of all mankind, are citizens of no country,[2733] on the *res communis* nature of the high seas, and on enforcement difficulties.[2734] Especially the latter justifications make sense from a practical point of view, since, as the high seas do not belong to any State and pirates could easily leave the crime scene, the possibility of a jurisdictional vacuum looms large. Therefore, giving all States jurisdiction to punish piracy offenders would prevent impunity from arising.[2735] In practice however, piracy prosecutions based on the universality principle were extremely rare, as States were reluctant to "[confer] a benefit on many states while single-handedly shouldering all the costs."[2736] Universal jurisdiction over piracy was later codified in Article 19 of the Geneva Convention of 29 April 1958 and Article 105 of the Convention of Montego Bay of 10 December 1982 (UNCLOS).[2737]

842. Universal jurisdiction adapted to the criminal-political agenda of the day. While in the 17th century, piracy was the scourge of sea-faring nations, the 19th century saw the emergence of such State-threatening offences as anarchist offences, counterfeiting and the destruction of cables. These offences – the commission of which modern technology contributed to in no small measure – were considered as *delicta juris gentium*, and on that basis as eligible for universal jurisdiction.[2738] Like piracy, they had a transnational element, were committed by non-State actors against State interests, and were not necessarily particularly heinous. As 'universal' jurisdiction over these offences did not protect *universal* interests ("*répression*

[2732] *See* H.F.A. DONNEDIEU DE VABRES, *Les principes modernes du droit pénal international*, Paris, Sirey, 1928, at 137.

[2733] *See* A. LEVITT, "Jurisdiction over Crimes", 16 *J. Crim. L. & Criminology* 316, 323-24 (1925).

[2734] KONTOROVICH has argued that the *res nullius* argument makes no sense, because, while the high seas may be beyond the jurisdiction of a State, flag States could exercise territorial jurisdiction over their vessels, and States could exercise active or passive personality jurisdiction. Universal jurisdiction over crimes of piracy would thus not be premised on there being a jurisdictional lacuna, but its rationale would rather lie in problems of enforcement, as States had difficulties in policing the activities on the high seas. E. KONTOROVICH, "The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation", 45 *Harv. Int'l L.J.* 183 (2004)

[2735] It has been argued that one should not consider this to be universal jurisdiction in its fullest sense, "since it does not extend [a State's] regulatory authority to conduct in the physical territory of *another nation*."). *See* C.A. BRADLEY, "Universal Jurisdiction and U.S. Law", *U. Chi. Legal. F.* 323, 327 (2001).

[2736] *See* E. KONTOROVICH, "Implementing *Sosa* v. *Alvarez-Machain*: What Piracy Reveals About the Limits of the Alien Tort Statute", 80 *Notre Dame L. Rev.* 111, 154 (2004).

[2737] *See for* a recent prosecution of piracy under the universality principle, the prosecution of ten Somali pirates by a court in Mombasa, Kenya. *See The Nation* (Kenya), "10 Somalis to Stand Trial in Piracy Case", August 4, 2006, available at http://allafrica.com/stories/200608040092.html

[2738] The HARVARD RESEARCH ON INTERNATIONAL LAW, "Draft Convention on Jurisdiction with Respect to Crime", 29 *A.J.I.L.* 439, 478-79 (1935) listed the following offences as *delicta juris gentium*: (1) slavery and the slave trade; (2) traffic in women and children for immoral purposes; (3) counterfeiting; (4) traffic in narcotics; (5) injury to submarine cables; (6) traffic in obscene publications; (7) liquor traffic; (8) illegal trade in arms. Harvard Research did not consider anarchistic crimes of violence to be *delicta juris gentium*.

universelle") but interests that States have in common with *each other* (*"répression internationale"*), DONNEDIEU DE VABRES preferred the term *"compétence réelle"* over *"compétence universelle"*.[2739] By exercising such jurisdiction, States would not act as representatives of the international community but rather as representatives of a foreign State. It may even be submitted that States exercised their jurisdiction for fear of being retaliated upon by foreign States,[2740] which is a far cry from the sort of universal jurisdiction over crimes against international humanitarian law that States are precisely *reluctant* to exercise for fear of being retaliated upon by foreign States.

10.1.4. Aut dedere aut judicare

843. In the 20th century, some of the offences threatening State interests became the object of international conventions.[2741] These conventions typically featured a jurisdictional clause that required a State Party to exercise its jurisdiction over any perpetrator of the offense present in its territory, if it did not extradite him or her (*aut dedere aut judicare/punire*). Such a clause initially conditioned jurisdiction on the law of the forum State *authorizing* the exercise of extraterritorial jurisdiction, a requirement which was however abandoned in postwar conventions containing such provisions, such as the Convention for the Suppression of Unlawful Seizure of Aircraft (1970).[2742] These conventions are often vague on whether the State Party is required to exercise its jurisdiction after an extradition request has been filed, or also if such a request has not been filed.[2743]

844. An *aut dedere aut judicare* provision is a specific conventional clause. It is not part of customary international law.[2744] States that are not parties to the convention providing for an *aut dedere aut judicare* requirement are not bound by it. This implies that, if their nationals are prosecuted by a State Party to the convention on the basis of the universality principle, they have a legitimate right of protest against this jurisdictional assertion. In this sense, *aut dedere aut judicare*-based conventions do not actually provide for *universal* jurisdiction,[2745] as the operation of the *aut dedere*

[2739] H.F.A. DONNEDIEU DE VABRES, *Les principes modernes du droit pénal international*, Paris, Sirey, 1928, at 110 *et seq.*

[2740] *Id.*, at 111.

[2741] *See* for a doctrinal and historical analysis of the principle of *aut dedere aut judicare* C. MAIERHOFER, *Aut dedere aut judicare. Herkunft, Rechtsgrundlagen und Inhalt des völkerrechtlichen Gebotes zur Strafverfolgung oder Auslieferung*, Berlin, Duncker & Humblot, 2006, 453 p. (tracing the doctrinal origins of the principle to the 14th century Italian jurist Baldus de Ubaldis, a student of Bartolus's. *Id.*, at 62).

[2742] Article 7 Hague Hijacking Convention (1970). *See also* Article 5 (2) Montreal Hijacking Convention (1971), Article 6 (2) Convention against the Taking of Hostages (1979), Article 6 (4) Terrorist Bombings Convention (1997), Article 7 (4) Convention on Financing of Terrorism (1999). *See also* ICJ, *Arrest Warrant*, 14 February 2002, Judge Guillaume, separate opinion, § 7 ("the obligation to prosecute was no longer conditional on the existence of jurisdiction, but rather jurisdiction itself had to be established in order to make prosecution possible."). Some of these conventions may have attained the status of customary international law. *See* G. BOTTINI, "Universal Jurisdiction after the Creation of the International Criminal Court", 36 *N.Y.U. J. Int'l L. & Pol.* 503, 543 (2004)

[2743] *See* L. REYDAMS, *Universal Jurisdiction*, Oxford, Oxford University Press, 2003, 63.

[2744] *Id.*, p. 61, n 102.

[2745] *See, e.g.*, R. HIGGINS, *Problems and Process: International Law and How We Use It*, Oxford, Clarendon, 1994, at 64 ("Universal jurisdiction, properly called, allows *any* state to assert jurisdiction over an offence"). These conventional provisions may also not be considered as setting forth universal jurisdiction, given the territorial link they require. *See* ICJ, *Arrest Warrant*, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, § 22. *See also id.*, § 39 (noting that the jurisdictional

requirement is limited to State Parties, which pool their sovereignty and explicitly authorize each other to exercise jurisdiction over crimes committed by their nationals and on their territory. *Aut dedere aut judicare*-based jurisdiction is thus a sort of representational or delegated jurisdiction[2746] which is, from a legal point of view, not informed by the heinous or State-threatening nature of the underlying offense.

845. Conventional *aut dedere aut judicare* clauses may only become mandatory upon any State if they crystallize as norms of customary international law.[2747] This may occur through the absence of protest against the assertions of (universal) jurisdiction by States Parties to the convention over nationals of non-States Parties. In the United States for instance, federal courts have exercised universal jurisdiction over terrorists who were nationals of non-States Parties to relevant anti-terrorism conventions such as the Hostage-Taking Convention and the Hijacking Convention, without these States lodging formal complaints.[2748] MORRIS has argued that "with sufficient time and state practice, [*aut dedere aut judicare* based] universal jurisdiction over [hostage-taking and hijacking] will pass into customary law", given the absence of international protest against the exercise of such jurisdiction over nationals of non-States Parties to the conventions criminalizing these offences.[2749] The exercise of universal jurisdiction over nationals of States that were not parties to the UN Torture Convention, which features an *aut dedere aut judicare* clause in its Article 5 (2), by contrast, has met with criticism. A case on the issue is now pending with the International Court of Justice (*Certain Criminal Proceedings in France, Republic of Congo v. France*, 2003-).[2750]

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ground that in the 1961 Single Convention on Narcotics and Drugs had been referred to as the principle of "primary universal repression" came during the preparatory proceedings of the 1984 UN Torture Convention to be widely referred to by delegates as "universal jurisdiction").

[2746] *See, e.g.*, A. POELS, "Universal Jurisdiction *In Absentia*", 23 *Neth. Q. Hum. Rts.* 65, 68 (2005).

[2747] *See also* M. COSNARD, "La compétence universelle en matière pénale", in C. TOMUSCHAT & J.-M. THOUVENIN (eds.), *The Fundamental Rules of the International Legal Order. Jus Cogens and Obligations Erga Omnes*, Leiden, Boston, Martinus Nijhoff, 2006, 355, 367; K.C. RANDALL, "Universal Jurisdiction under International Law", 66 *Texas L. Rev.* 821 (1998) (arguing that *aut dedere aut judicare*-based jurisdiction may become genuine universal jurisdiction if the underlying crime is a violation of *jus cogens*). *Contra* M. HALBERSTAM, "Terrorism on the High Seas: the Achille Lauro, Piracy and the IMO Convention on Maritime Safety", 82 *A.J.I.L.* 269, 272 (1988) (stating that "limiting the application of anti-terrorist treaties to nationals of state parties would significantly undermine their effectiveness", and that "[i]t would mean that the community of states is essentially helpless to take legal measures against terrorist who are nationals of states that do not ratify the conventions."); M. SCHARF, "The ICC's Jurisdiction over the Nationals of non-Party States: a Critique of the U.S. Position", 64 *Law & Contemp. Probs.* 67, 99-101 (2001).

[2748] *United States* v. *Yunis*, 681 F. Supp. 896 (D.D.C. 1988); *United States* v. *Yunis*, 924 F.2d 1086 (D.C. Cir. 1991) (Lebanon not a party to the Hostage-Taking Convention). *United States* v. *Rezaq*, 899 F. Supp. 697 (D.D.C. 1995); *United States* v. *Rezaq*, 134 F.3d 1121 (D.C. Cir. 1998) (the Palestine Territories not a party to the Hijacking Convention); *United States* v. *Wang Kun Lue*, 134 F.3d 79 (2nd Cir. 1997); *United States* v. *Lin*, 101 F.3d 760 (D.C. Cir. 1996); *United States* v. *Ni Fa Yi*, 951 F. Supp. 42 (S.D.N.Y. 1997); *United States* v. *Chen De Yian*, 905 F. Supp. 160 (S.D.N.Y. 1995) (China not a party to the Hostage-Taking Convention). *See also United States* v. *Marino-Garcia*, 679 F.2d 1373, 1386-87 (11th Cir. 1982) (Honduran and Columbian crew members of stateless vessels prosecuted for trafficking in marijuana under the Law of the Sea Convention, although Honduras and Columbia were not parties to this Convention).

[2749] M. MORRIS, "High Crimes and Misconceptions: the ICC and non-Party States", 64 *Law & Contemp. Probs.* 13, 64 (2001).

[2750] http://www.icj-cij.org

It should not be overlooked, even if one is loath to make a semantic fuss, and believes that conventional *aut dedere aut judicare* clauses confer limited universal jurisdiction on custodial States Parties,[2751] that assertions of jurisdiction on the basis of such clauses are not necessarily assertions of universal jurisdiction. *Aut dedere aut judicare* clauses typically oblige States to either extradite or prosecute *any* person within their power accused of committing the conventional crime, irrespective of whether or not that person has a national or territorial link with the custodial State. In other words, the *aut dedere aut judicare* obligation also relates to traditional grounds of jurisdiction such as the nationality or territoriality principle: the obligation applies as soon as the presumed offender can be found on the territory.[2752]

10.1.5. Universal jurisdiction over core crimes against international law

846. Offences that are nowadays often denoted as core crimes against international law (crimes against international humanitarian law, and crimes of torture), and which are now the main crimes subject to universal jurisdiction,[2753] were historically not subject to universal jurisdiction,[2754] and were often not even subject to international criminalization. Genocide eventually became the object of an international convention in 1948 (Genocide Convention), war crimes were internationally criminalized in 1949 and 1977 (the Four Geneva Conventions), and torture was prohibited as a matter of

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[2751] *See, e.g.*, G. BOTTINI, "Universal Jurisdiction after the Creation of the International Criminal Court", 36 *N.Y.U. J. Int'l L. & Pol.* 503, 516-17 (2004)

[2752] *See also* M. INAZUMI, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law*, Antwerp-Oxford, Intersentia, 2005, 122.

[2753] M. COSNARD, "La compétence universelle en matière pénale", in C. TOMUSCHAT & J.-M. THOUVENIN (eds.), *The Fundamental Rules of the International Legal Order. Jus Cogens and Obligations Erga Omnes*, Leiden, Boston, Martinus Nijhoff, 2006, 355, 358 (noting that the field of core crimes is "à l'heure actuelle son champ d'application de prédilection, quoique non exclusif"). It is notable that proceedings involving crimes against international humanitarian law, mostly war crimes, largely outweigh proceedings involving crimes of torture, although only the UN Torture Convention unambiguously provides for universal jurisdiction. KAMMINGA has attributed this paradox to the fact that instruments addressing crimes against international humanitarian law, the Geneva Conventions in particular, were adopted earlier and have been more widely ratified than the UN Torture Convention. See M.T. KAMMINGA, "First Conviction under the Universal Jurisdiction Provisions of the UN Convention Against Torture", *N.I.L.R.* 439, 442 (2004), who admits that is gratifying that the first torture conviction took only 20 years (Sebastien N., the Netherlands, 2004), whereas the first war crimes conviction took 45 years (Saric, Denmark, 1994). See on the prosecution of torture under the universality principle: C. RYNGAERT, "Universal Criminal Jurisdiction over Torture: A State of Affairs After 20 Years UN Torture Convention", *Neth. Q. Hum. Rts.* 571 (2005).

[2754] *See, e.g.*, H.F.A. DONNEDIEU DE VABRES, *Les principes modernes du droit pénal international*, Paris, Sirey, 1928, at 143 (identifying as crimes giving rise to universal jurisdiction: crimes against telegraph and telephone cables, counterfeiting, trafficking in Negroes, piracy, trafficking in women and children, and trafficking in obscene publications and toxic drinks). Although pre-war doctrine seemed to support universal jurisdiction over egregious human rights violations such as genocide and war crimes (*Id.*, at 47), before 1945 it was only established law that war crimes offenders could be tried by the belligerent party in whose hands they were (*See* J.W. GARNER, "Punishment of Offenders Against the Laws and Customs of War", 14 *A.J.I.L.* 70, 71 (1920)). The Versailles Treaty epitomized this restrictive view, which falls far short of universal jurisdiction as properly understood. Article 228 of the Treaty of Versailles, June 28, 1919, in CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE (ed.), 1 *The Treaties of the* Peace, 1919-23, 1921, at 3 (1924) ("The German Government recognizes the right of the Allied and Associated Powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war. Such persons shall, if found guilty, be sentenced to punishments laid down by law. This provision will apply notwithstanding any proceedings or prosecution before a tribunal in Germany or in the territory of her allies").

treaty law in 1984 (UN Torture Convention). Crimes against humanity never become the object of a convention. Only the Geneva Conventions,[2755] the 1973 Apartheid Convention,[2756] and the UN Torture Convention,[2757] provide for (obligatory) universal

[2755] As far as grave breaches of the laws of war committed in international armed conflicts are concerned, Articles 49, 50, 129 and 146 of Geneva Conventions I, II, III and IV, and Article 85 (1) of Additional Protocol I to the Geneva Conventions stipulate that States should bring war criminals before their own courts. These provisions do not explicitly provide that war criminals should be tried extraterritorially. The *travaux préparatoires* and subsequent State practice contain, however, sufficient indications that the Conventions allow for universal jurisdiction. *See* L. REYDAMS, *Universal Jurisdiction*, Oxford, Oxford University Press, 2003, at 54-55. KAMMINGA, for his part, is convinced that the exercise of universal jurisdiction in the said articles of the Geneva Conventions is clearly mandatory. *See* M. KAMMINGA, "Lessons Learned from the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offenses", 23 *Hum. Rts. Q.* 940, 946 (2001). Mandatory universal jurisdiction over grave breaches may also have a customary character, so that States non-Parties to the Geneva Conventions may equally be bound by the said jurisdictional provisions. *See* G. BOTTINI, "Universal Jurisdiction after the Creation of the International Criminal Court", 36 *N.Y.U. J. Int'l L. & Pol.* 533 (2004); UN Commission on Human Rights, Resolution 1999/1, 16th meeting, 6 April 1999: The Commission "[r]eminds all factions and forces in Sierra Leone that in any armed conflict, including an armed conflict not of an international character, the taking of hostages, wilful killing and torture or inhuman treatment of persons taking no active part in the hostilities constitute grave breaches of international humanitarian law, and that all countries are under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches and to bring such persons, regardless of their nationality, before their own courts.").
As far as non-grave breaches of the laws of war are concerned, the Geneva Conventions may not provide for obligatory universal jurisdiction. It has however been argued that States have a right, although not a duty, under customary international law to exercise universal jurisdiction over these breaches. *See* G. BOTTINI, "Universal Jurisdiction after the Creation of the International Criminal Court", 36 *N.Y.U. J. Int'l L. & Pol.* 503, 534 (2004); M. SCHARF, "The ICC's Jurisdiction over the Nationals of non-Party States: a Critique of the U.S. Position", 64 *Law & Contemp. Probs.* 67, 92 (2001).
As far as war crimes committed in internal armed conflicts – that are not violations of common Article 3 of the Geneva Conventions – are concerned, the situation is similarly unclear. Article 6 of Additional Protocol II 1977, dealing with war crimes committed in internal armed conflicts, provides for penal prosecutions, but does not delineate its geographical scope of application, possibly because of the weight attached to the principle of non-intervention in these matters. In *Tadic* however, the ICTY Appeals Chamber held that "the logical and systematic interpretation of Article 3 [of the Geneva Conventions 1949] as well as customary international law" impelled it to exercise "jurisdiction over the [war crimes] alleged in the indictment, regardless of whether they occurred within an internal or international armed conflict. Thus, to the extent that Appellant's challenge to jurisdiction under Article 3 is based on the nature of the underlying conflict, the motion must be denied." Case No. IT-94-1, *Tadic*, Appeals Chamber, Decision on the Defense Motion for Interlocutory Appeal of the Jurisdiction, 2 October 1995, para. 137. Although *Tadic* only dealt with the jurisdiction of the ICTY, its findings could be extrapolated to universal jurisdiction, as it generally referred to individual criminal responsibility for violations of Article 3 of the Geneva Conventions and national legislation designed to implement the Geneva Conventions (paras. 128-136).

[2756] *See* Article V of Convention on the Suppression and Punishment of the Crime of Apartheid, November 30, 1973, 13 *I.L.M.* 50 (1974). The insertion of an unambiguous universal jurisdiction clause in the Apartheid Convention has been attributed to the specific circumstances under which the convention came into being. REYDAMS has pointed to the absence of a prospect for an international tribunal to try apartheid crimes, the fact that the targeted countries (Rhodesia, Namibia and South Africa) would never adhere to the Convention and the absence of reciprocity. *See* L. REYDAMS, *Universal Jurisdiction*, Oxford, Oxford University Press, 2003, at 59-60. In view of the widespread condemnation of apartheid by the international community and the perceived improbability of other States (re-)introducing apartheid, the U.S. and European nations did not hesitate to sign the convention, assuming that their State organs could never be tried on the basis of universal jurisdiction. No case is reported under implementing legislation of the Apartheid Convention.

[2757] Article 5 (2) of the UN Torture Convention. This provision sets forth an *aut dedere aut judicare* obligation, pursuant to which States, even in the absence of an extradition request, are obliged to

jurisdiction. It has however been argued that customary international law authorizes universal jurisdiction over genocide, crimes against humanity, and war crimes which do not qualify as grave breaches of the Geneva Conventions. This argument has been premised on the wide discretion left to States by the P.C.I.J. in *Lotus*, on the fact that such crimes are analogous to piracy (over which universal jurisdiction historically obtained), and on a permissive rule of customary international law authorizing universal jurisdiction over violations of *jus cogens*. The two latter justifications in particular deserve further scrutiny.

847. PIRACY ANALOGY – Universal jurisdiction over piracy is tied to its being committed on the high seas, *i.e.*, in *terra nullius*, in a territory over which no State has jurisdiction.[2758] It is submitted that core crimes against international law are similarly committed in *terra nullius* in case criminal justice systems with a stronger nexus to the case are unwilling or unable to dispense justice.[2759] If the territorial State does not genuinely investigate or prosecute these crimes, it loses its sovereignty and becomes *terra nullius*.[2760] In this scheme, universal jurisdiction over core crimes is not predicated on their heinous nature but on the fact that they are beyond a State's capacity to punish.[2761] The great international crimes – genocide, war crimes, crimes against humanity, torture – are indeed often committed by officials whom a State may be reluctant to punish. Other crimes, such as non-official killing and torture, which are often as heinous as core crimes, are mostly *not* beyond a State's capacity to punish, for the State has no interest in letting the perpetrators off the hook. These crimes are therefore not subject to universal jurisdiction.

The piracy analogy has been criticized vociferously by KONTOROVICH, who asserted that no single feature of piracy resembles the modern human rights offenses, and that, accordingly, universal jurisdiction over the latter offenses would rest on hollow foundations.[2762] KONTOROVICH argued, *inter alia*, that piracy was committed by

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prosecute anyone suspected of torture if they do not extradite him. *See* J.H. BURGERS & H. DANELIUS, *The United Nations Convention Against Torture*, Dordrecht/Boston/Londen, Martinus Nijhoff, 1988, at 133; A. CASSESE, *International Criminal Law*, Oxford, Oxford University Press, 2003, at 286.

[2758] Another, somewhat related argument has it that pirates are stateless people because they "throw off their national character by cruising piratically" on the high seas (*U.S.* v. *Klintock*, 18 U.S. (5 Wheat.) 144, 152 (1820)).

[2759] *See* A. SAMMONS, "The Under-Theorization" of Universal Jurisdiction: Implications for Legitimacy on Trials of War Criminals by National Courts", 21 *Berkeley J. Int'l L.* 111, 126 (2003); W.B. COWLES, "Universality of Jurisdiction over War Crimes", 33 *Cal. L. Rev.* 177, 194 (1945) (Basically, war crimes are very similar to piratical acts, except that they take place usually on land rather than at sea. In both situations there is, broadly speaking, a lack of any adequate system operating on the spot where the crimes takes place – in the case of piracy it is because the acts are on the high seas and in the case of war crimes because of a chaotic condition or irresponsible leadership in time of war. As regards both piratical acts and war crimes there is often no well-organized police or judicial system at the place where the acts are committed, and both the pirate and the war criminal take advantage of this fact, hoping thereby to commit their crimes with impunity.").

[2760] If one rationalizes universal jurisdiction in this manner, bystander States are obliged to respect the subsidiarity principle and defer to the States with a nexus to the situation that are willing or able to investigate and prosecute. *See also* subsection 10.11.3.

[2761] *See* A. SAMMONS, "The Under-Theorization" of Universal Jurisdiction: Implications for Legitimacy on Trials of War Criminals by National Courts", 21 *Berkeley J. Int'l L.* 111, 128-30 (2003).

[2762] E. KONTOROVICH, "The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation", 45 *Harv. Int'l L.J.* 183 (2004); and in the context of ATS suits: E. KONTOROVICH, "Implementing *Sosa* v. *Alvarez-Machain*: What Piracy Reveals About the Limits of the Alien Tort Statute", 80 *Notre Dame L. Rev.* 111 (2004). KONTOROVICH identified six characteristics of piracy "that made it the sole

private actors, and core crimes against international law ordinarily by official actors. Under 18th century international law, piracy was subject to universal jurisdiction, whereas privateering was not, because, while both pirates and privateers attacked and seized merchant ships, the latter acted with sovereign authorization, and did therefore not commit a crime, let alone were subject to universal jurisdiction. The perpetrators of core crimes may act more like privateers than pirates, as core crimes usually involve State action. Because they might cause friction between States, they ought not to be subject to universal jurisdiction.[2763] This argument carries quite some weight, as gross human rights violations are indeed difficult to commit without some help of State resources. However, while 18th century international law may indeed not have recognized universal jurisdiction over offenses against the law of nations committed by State actors, such as core crimes, the 20th century development of international criminal responsibility teaches us that State and individual criminal responsibility can be combined, and that State officials may no longer mount the defence that their crimes were committed as part of a State policy.

848. KONTOVORICH's main argument boils down to the idea that universal jurisdiction over human rights offences, unlike universal jurisdiction over piracy, jeopardizes the smooth conduct of foreign relations because their commission involves State action. It should therefore be severely curbed, if not outright prohibited. However, universal jurisdiction need not always strain foreign relations, for instance, if the accused belonged to a regime that has been overthrown, or more generally, if he has fallen from grace in the foreign State or if he was a low-level perpetrator whom a foreign State has no interest in protecting. It seems that a number of prudential doctrines could prevent universal jurisdiction from running amok, and could accordingly limit damage to international relations. There is no need to abandon the exercise of universal jurisdiction altogether because *some* assertions of universal jurisdiction *might* cause diplomatic tension. The fight against impunity demands that all States assume their responsibility in investigating and prosecuting core crimes against international law. These crimes, as will be set out in the next paragraph, are so shocking that they threaten the foundational values of humanity and the international community. Their prosecution requires supplanting a State-centered jurisdictional discourse with a humanity-centered one.[2764]

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universally cognizable offense" (*Id.*, at 138): (1) its uniform condemnation (*Id.*, at 139, arguing that, unlike modern day human rights offences, "[t]he universal condemnation of piracy was not just embodied in the law of nations norm against it – piracy was also a serious crime under the municipal laws of every nation"); (2) its being a narrowly-defined offence (*Id.*, at 139-40, and 156, arguing that "[a]ll nations concurred as to [its] definition" and that "its content did not vary in the least for hundreds of years", while "definitions of the human rights offenses nominated for universal jurisdiction are broad and indeterminate"); (3) its uniform punishment and double jeopardy (*Id.*, at 142-45, stating that "[a]ll nations provided for the same punishment for piracy – death", and arguing that "subsequent prosecutions by other nations or tribunals for a given universal offence" are precluded); (4) private actors who reject sovereign protection, (5) *locus delicti* makes enforcement difficult, and (6) directly threatens or harms nations.

[2763] *Id.*, at 145-151 (adding that pirates, unlike perpetrators of human rights violations, had even intentionally waived their home State's protection by not acting under a State license, quoting *U.S.* v. *Smith*, 18 U.S. (5 Wheat.) 153, 162 (1820) (pirates were "not under the acknowledged authority, or deriving protection from the flag or commission of any government.", and that they sometimes acted *against* the interests of their home State by reducing potential revenues for privateers licensed by that State (*Id.*, at 149).

[2764] *Compare* B. STERN, "Le genocide rwandais face aux autorités françaises", in L. BURGORGUE-LARSEN (ed.), *La répression internationale du génocide rwandais*, Brussels, Bruylant, 2003, 140-41.

849. THE *JUS COGENS* RATIONALE – It is submitted that the *jus cogens* nature of an offence reflects upon the authority of a State to prosecute such an offence, and even that the prosecution of violations of *jus cogens* is itself endowed with the status of *jus cogens*.[2765] A related argument has it that sovereignty entails responsibility, and that States are under an obligation not to become a safe haven for perpetrators of human rights violations, because in becoming so, they would actually acquiesce in these very violations.[2766]

Against the *jus cogens* justification, it could be argued that violations of *jus cogens* or *erga omnes* obligations are not *per se* amenable to universal jurisdiction.[2767] On the one hand, Article 53 of the Vienna Convention on the Law of Treaties, in which the concept of *jus cogens* is enshrined, only sets forth that treaties could not derogate from the *jus cogens* obligations incurred by a State, and does not provide that States have the duty or authority to prosecute violations of *jus cogens*.[2768] On the other hand, the international community could decide to have, for instance, international tribunals, instead of national courts, investigate and prosecute such violations,[2769] or even opt for non-criminal law mechanisms to deal with them (countermeasures, international

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[2765] *See* J.J. PAUST, *International Law as Law of the United States*, Durham, NC, Carolina Academic Press, 1996, at 300; M.C. BASSIOUNI, "Universal jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice", 42 *Va. J. Int'l L.* 81, 148-49 (2001); M.C. BASSIOUNI & E.M. WISE, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law*, The Hague, Martinus Nijhoff, 1995, 20-25. *See also Prosecutor* v. *Furundzija*, ICTY Case No. IT-95-17/1-T, Judgment para. 155-56 (Dec. 10, 1998) ("[I]t would seem that one of the consequences of the jus cogens character bestowed by the international community upon the prohibition of torture is that every State is entitled to investigate, prosecute and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction."); M.S. MYERS, "Prosecuting Human Rights Violations in Europe and America: How Legal System Structure Affects Compliance with International Obligations", 25 *Mich. J. Int'l L.* 211, 222 (2003) (arguing that "all nations are now considered bound by customary international law to prosecute crimes that have achieved *jus cogens* status"; drawing the customary international law duty to prosecute all *jus cogens* offences from the conventional law duty to prosecute particular *jus cogens* offences); G. BOTTINI, "Universal Jurisdiction after the Creation of the International Criminal Court", 36 *N.Y.U. J. Int'l L. & Pol.* 503, 517 (2004) ("Customary international law recognizes universal jurisdiction for offenses involving *jus cogens* violations."); investigating judge Brussels, ordonnance of November 6, 1998, *Pinochet*, *Journal des Tribunaux* 308-11 (1999) (stating that *jus cogens* authorizes "les autorités étatiques nationales à poursuivre et à traduire en justice, en toutes circonstances, les personnes soupçonnées de crimes contre l'humanité")

[2766] *See* M. INAZUMI, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law*, Antwerp-Oxford, Intersentia, 2005, 144.

[2767] *See, e.g.*, M. COSNARD, "La compétence universelle en matière pénale", in C. TOMUSCHAT & J.-M. THOUVENIN (eds.), *The Fundamental Rules of the International Legal Order. Jus Cogens and Obligations Erga Omnes*, Leiden, Boston, Martinus Nijhoff, 2006, 355, 358-59 (stating that "la qualification d'une règle "fondamentale de l'ordre juridique international" n'exerce aucune influence juridique directe sur l'établissement d'une competence universelle en matière pénale").

[2768] *See* A. ZIMMERMANN, "Violations of Fundamental Norms of International Law and the Exercise of Universal Jurisdiction in Criminal Matters", in C. TOMUSCHAT & J.-M. THOUVENIN (eds.), *The Fundamental Rules of the International Legal Order. Jus Cogens and Obligations Erga Omnes*, Leiden, Boston, Martinus Nijhoff, 2006, 335, 337.

[2769] *See* G. BOTTINI, "Universal Jurisdiction after the Creation of the International Criminal Court", 36 *N.Y.U. J. Int'l L. & Pol.* 503, 517-19 (2004). *See also* R. HIGGINS, *Problems and Process*, at 62 (stating that "the fact that an act is a violation of international law does not of itself give rise to universal jurisdiction", thereby taking issue with a comment to § 404 of the Restatement (Third) of Foreign Relations Law which states that "[a]n international crime presumably subject to universal jurisdiction."); A. CASSESE, *International Law*, Oxford, Oxford University Press, 2001, at 264.

sanctions, …).[2770] The fact that not many States have acted upon the purported obligation to exercise universal jurisdiction over violations of *jus cogens*, nor actually acted upon conventional obligations to exercise universal jurisdiction over such violations, clearly illustrates that States have not considered themselves to be under an obligation to exercise universal jurisdiction over violations of *jus cogens*.[2771] Even if they have exercised universal jurisdiction, they have, as could be collected from the country study conducted in this chapter, ordinarily done so by attaching a string of restraining conditions (most notably the presence requirement), and by excluding the principle of mandatory prosecution. This is a *modus operandi* which appears at loggerheads with the obligation to prosecute any violation of *jus cogens* on the basis of the universality principle.[2772]

Inferring from the *jus cogens* prohibition of international crimes that States could or even should prosecute these crimes under the universality principle clearly requires a moral leap.[2773] The moral justification, boosted by the *jus cogens* character of the norms over which jurisdiction is exercised,[2774] has become the dominant legitimizing discourse of universal jurisdiction over core crimes against international law. Underlying this discourse is the idea that States may, if not be *obliged*, at least be *authorized*, to exercise universal jurisdiction over violations which are so reprehensible as to shock the conscience of mankind.[2775] These moral underpinnings

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[2770] *See* M. COSNARD, "La compétence universelle en matière pénale", in C. TOMUSCHAT & J.-M. THOUVENIN (eds.), *The Fundamental Rules of the International Legal Order. Jus Cogens and Obligations Erga Omnes*, Leiden, Boston, Martinus Nijhoff, 2006, 355-56.

[2771] *See also id.*, at 363.

[2772] *Id.*, at 367-71.

[2773] *Compare id.*, at 355 ("Règles substantielles d'une part, règles procedurales d'autre part, le rapprochement des deux notions n'est guidé par aucune nécessité intrinsèque, et ne peut s'imposer que par une operation intellectuell extérieure").

[2774] *Id.*, at 361 ("Le caractère fundamental d'une norme, dont le *jus cogens* est le degré ultime, n'aurait donc d'autre function que d'en quelque sorte "doper" la justification de l'établissement d'une competence universelle."), and 364 ("La contrariété des actes incriminés avec les intérêts fondamentaux de la communauté internationale intervient vraisemblablement comme motif (motivation?) de l'Etat posant une règle relative à la compétence universelle, mais il n'y a pas de raison logique d'y voir un lien d'exclusivité.").

[2775] *See, e.g.* ICTY, *Tadic*, Case No. IT-94-T (Trial Chamber August 10, 1995), para. 28 (holding that the crimes listed in the ICTY Statute "are considered so horrific as to warrant universal jurisdiction"); M. INAZUMI, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law*, Antwerp-Oxford, Intersentia, 2005, 142. *Compare* the generals terms of the preamble of the ICC Statute: "The most serious crimes of concern to the international community as a whole must not go unpunished and [...] their effective prosecution must be ensured at the national level." *See also* Principle 14 (1) of the Brussels Principles Against Impunity and for International Justice ("By virtue of international law, any state has the obligation to exercise universal jurisdiction in relation to the presumed author of a serious crime from the moment the said presumed author is present on the territory of that state."); Articles 8, 9, 17, 18, and 20 of the Draft Code of Crimes Against the Peace and Security of Mankind Report of the International Law Commission on the Work of its 48th Session, UN Doc. A/51/10; ICTY, 29 October 1997, Case IT-95-14-AR, *Blaskic*, § 29; Report on the Work of the 43rd Session of the International Law Commission, UN Doc. A/51/10, *ILC Yearbook* 1996, vol. II(2), 29 (ILC proposing to give the ICC inherent jurisdiction over the crime of genocide because of "the character of the crime of genocide as a crime under international law for which universal jurisdiction existed as a matter of customary law for those States that were not parties to the Convention"). *See* specifically with respect to genocide: ICTR, *Ntuyahaga*, Case No. ICTR-90-40-T (March 18, 1999); ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Bosnia and Herzegovina v. Serbia and Montenegro, *I.C.J. Rep.* 1993, 235, 443, Judge *ad hoc* Lauterpacht (grounding permissive universal jurisdiction on Article I of the Genocide Convention, pursuant to which "[t]he Contracting Parties

of universal jurisdiction are emphasized by what is termed the 'normative universalist position' by BASSIOUNI[2776], the 'standard account' by SLAUGHTER,[2777] or the 'Manichean rationale' by MARKS.[2778] According to this position, core moral values of the international community, derived from religion or natural law, prevail over territorial limits on the exercise of jurisdiction.[2779] Any State would have the right, or even obligation, to prosecute core international crimes without the consent of the territorial or national State. In so doing, it would not exercise its own sovereignty, but act as an agent of the international community enforcing international law in the absence of a centralized enforcer of the core values of that community.[2780] The 'unilateral limited universality principle', as defined by REYDAMS, may also fit in this

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confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish"); ICJ, Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Bosnia and Herzegovina v. Yugoslavia, July 11, 1996, *ICJ Rep.* 1996, 594, para. 31 (stating that Article VI of the Genocide Convention does not entail any territorial limitation of the obligation under international law to punish the crime of genocide); R. HIGGINS, *Problems and Process: International Law and How We Use It*, Oxford, Clarendon Press, 1994, at 59 (invoking the trial of *Eichmann* by Israel as a justification for universal jurisdiction over genocide, yet adding that the special circumstances of this trial may diminish the value of it as a precedent); M. SCHARF, "The ICC's Jurisdiction over the Nationals of non-Party States: a Critique of the U.S. position", 64 *Law & Contemp. Probs.* 67, 86 (2001) (stating that "Article VI [of the Genocide Convention] … has been interpreted as merely establishing the minimum jurisdictional obligation for states in which genocide occurs [*i.e.*, the obligation to exercise territorial jurisdiction].").

[2776] *See* M.C. BASSIOUNI, "The History of Universal Jurisdiction and Its Place in International Law", in S. MACEDO (ed.), *Universal Jurisdiction. National Courts and the Prosecution of Serious Crimes under International Law*, Philadelphia, University of Pennsylvania Press, 2004, at 42.

[2777] *See* A.M. SLAUGHTER, "Defining the Limits: Universal Jurisdiction and National Courts", in S. MACEDO (ed.), *Universal Jurisdiction*, Philadelphia, University of Pennsylvania Press, 2004, 184-87. *See also* D. ORENTLICHER, "The Future of Universal Jurisdiction in the New Architecture of Transnational Justice", in S. MACEDO (ed.), *Universal Jurisdiction*, Philadelphia, University of Pennsylvania Press, 2004, 232, who finds the core justification for universal jurisdiction over inhumane crimes a moral claim. As a practical matter, universal jurisdiction steps in in case of lack of punishment in the territorial State.

[2778] *See* J.H. MARKS, "Mending the Web: Universal Jurisdiction, Humanitarian Intervention and the Abrogation of Immunity by the Security Council", 42 *Col. J. Transnat. L.* 445, 463-64 (2004). MARKS criticizes this position as "it must doubted whether there is any role for the concept of "evil" in any modern legal system." *Id.*, at 464. He proposes to recast it as the 'harm rationale', "a rationale based upon the enormity of the harm caused by the perpetrators of serious international crimes, rather than on concepts of good and evil." *Id.*, at 469.

[2779] *Compare* ICJ, *Arrest Warrant*, Judge VAN DEN WYNGAERT, dissenting opinion, § 46 ("Despite uncertainties that may exist concerning the definition of universal jurisdiction, one thing is very clear: the *ratio legis* of universal jurisdiction is based on the international reprobation for certain very serious crimes such as war crimes and crimes against humanity. Its *raison d'être* is to avoid impunity, to prevent suspects of such crimes finding a safe haven in third countries."). *See also* K.L. BOYD, "Universal Jurisdiction and Structural Reasonableness", 40 *Tex. Int'l L.J.* 1, 38 (2004) (stating that "any defense of universal jurisdiction must admit to the existence of a priori principles to which positive law is held accountable").

[2780] *See* E. KONTOROVICH, "Implementing Sosa v. Alvarez-Machain: What Piracy Reveals About the Limits of the Alien Tort Statute", 80 *Notre Dame L. Rev.* 111, 144 (2004) (adding that, as a nation is not exercising its own sovereignty, it could not prosecute a crime that is already adjudicated under "the multiple sovereignties principle"); B. STEPHENS, "Translating Filartiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations", 27 *Yale J. Int'l L.* 1, 37 (2002) (pointing out that "[c]ommentators have long stressed the role of national courts in enforcing international law: in the absence of an international judiciary, most such enforcement necessarily comes through domestic judicial systems fulfilling a dual role as both national and international agents").

category. Under this principle, *any* State may unilaterally exercise its jurisdiction over certain offences *with an international character*, even *in absentia*.[2781] This international character is not explicable in legal terms, but derives directly from a moral source: the international community considers certain offences of such an abhorrent nature that any State may prosecute them. If territorial or national States let these offences go unpunished, they lose a portion of their 'total sovereign bundle' to the international community as a whole,[2782] and forfeit their right of protest against the exercise of universal jurisdiction by bystander States. Driven to its extreme, this position implies that the courts of bystander States could exercise universal jurisdiction even in the absence of domestic enabling legislation.

850. UNIVERSAL JURISDICTION AND POLITICAL CRIMES – Crimes such as genocide, war crimes, crimes against humanity, and torture, are, given their heinousness, generally considered to be the gravest offences imaginable, and as such subject to international criminalization, often by means of an international convention. The exercise of universal jurisdiction over these crimes, which any State has vowed to prevent and punish, may thus seem to be not particularly prone to international conflict.[2783] However, although theoretically perpetrators of international crimes are *hostes humani generis*, if these perpetrators are State officials, assertions of universal jurisdiction may cause an international stir, as was already hinted at *supra* in the context of the piracy analogy. Since international crimes are often political crimes, the mass-scale execution of which requires the collaboration, support or collusion of State authorities, adjudication of these crimes by other State authorities carries the suspicion of politicized prosecution.[2784] It is submitted that, by exercising jurisdiction over the actions of State officials, States pass judgment on the acts of other sovereign

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[2781] *See* L. REYDAMS, *Universal Jurisdiction*, Oxford, Oxford University Press, 2003, at 38-42.

[2782] *See* A. SAMMONS, "The Under-Theorization" of Universal Jurisdiction: Implications for Legitimacy on Trials of War Criminals by National Courts", 21 *Berkeley J. Int'l L.* 111, 127-31 (2003).

[2783] It is against his background that one has to understand REYDAMS's justification of universal jurisdiction on the basis of the co-operative (limited) universality principle (L. REYDAMS, *Universal Jurisdiction*, Oxford, Oxford University Press, 2003, at 28-38). Under this co-operative principle, the custodial State (*i.e.*, the State where the foreign offender is present) acts on behalf of the territorial State in punishing an offender who seeks refuge in the former State, and who is not extradited to the territorial State for whatever reason. Initially, as REYDAMS pointed out, co-operation was strictly applied in that offenders were only prosecuted by a custodial State if they had turned down an extradition request (which conveys the willingness of the requesting State to have the offender prosecuted). Later, this negative *aut dedere aut judicare* approach gradually gave way to an independent positive right of the custodial State to prosecute absent an extradition request, an evolution which hollowed out the co-operative foundation of the universality principle. Under the co-operative principle, the legitimate expectations of the offender who left the territorial State are not frustrated provided that the principles of double criminality, *ne bis in idem* and the application of the *lex mitior* are respected. Moreover, as the territorial State arguably wanted to have the offender prosecuted anyway (in the early form of the co-operative principle given its extradition request, and in its later form given the heinous nature of the offence), a prosecution by the custodial State should not constitute an unwarranted interference in the domestic affairs of the territorial State.

[2784] Also as far as the rights of the defendant are concerned does the co-operative universality principle, set out in the previous footnote, probably represent too rosy a picture, and not only for political crimes. While the offense may indeed *in abstracto* be punished with a milder sentence, the actual sentence in the forum State may prove harsher than the sentence the offender might have incurred in the territorial or national State. The rights of the offender and the discretionary sentencing power of the territorial State may then be encroached upon. Furthermore, although it is submitted that for international crimes the requirement of double criminality may be met by the mere fact of international incrimination, international law does not provide for sentences for international crimes, which can considerably differ from State to State.

States, thereby violating the principles of sovereign equality and non-interference, and creating a serious risk of disrupting world order.[2785] As will be demonstrated in the country study, diplomatic concerns have informed jurisdictional circumspection on the part of bystander States. In the conclusion of this chapter, it will be attempted to draw the contours of a jurisdictional principle of reasonableness which impels States to restrain the exercise of universal jurisdiction on a principled basis.

10.1.6. Universal jurisdiction in absentia

851. Under the classical understanding of universal jurisdiction, informed by the concept of *aut dedere aut judicare*, States only exercise universal jurisdiction over offenders present in their territory.[2786] Universal jurisdiction is then the negation of the right of States to grant asylum to offenders.[2787] The question arises whether States could also exercise universal jurisdiction over offenders who are not (yet) present in their territory. International treaty law does not feature an explicit legal basis for universal jurisdiction *in absentia*,[2788] although at the same time it does not exclude the exercise of such jurisdiction.[2789] Similarly, while most States providing for universal

[2785] *See* M.C. BASSIOUNI, "The History of Universal Jurisdiction and Its Place in International Law", in S. MACEDO (ed.), *Universal Jurisdiction. National Courts and the Prosecution of Serious Crimes under International Law*, Philadelphia, University of Pennsylvania Press, 2004, at 39.

[2786] *See* M. INAZUMI, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law*, Antwerp-Oxford, Intersentia, 2005, at 103; B. VAN SCHAACK, "Justice Without Borders: Universal Civil Jurisdiction", *ASIL Proc.* 120, 121 (2005).

[2787] *See* H.F.A. DONNEDIEU DE VABRES, *Les principes modernes du droit pénal international*, Paris, Sirey, 1928, at 138.

[2788] ICJ, *Arrest Warrant*, Judge Guillaume, sep. op., § 9 and § 12 (stating that none of the conventions "has contemplated establishing jurisdiction over offences committed abroad by foreigners against foreigners when the perpetrator is not present in the territory of the State in question" and that only the "very special case" of Israel appeared to exercise universal jurisdiction *in absentia*). *See also* ICJ, *Arrest Warrant*, individual opinion Judge Rezek, § 6 (« L'activisme qui pourrait mener un Etat à rechercher hors de son territoire, par la voie d'une demande d'extradition ou d'un mandat d'arrêt international, une personne qui aurait été accusée de crimes définis en termes de droit des gens, mais *sans aucune circonstance de rattachement au for*, n'est aucunement autorisé par le droit international en son état actuel. ») (original emphasis).

[2789] ICJ, *Arrest Warrant*, Judges Higgins, Kooijmans and Buergenthal, sep. op., § 57 (asserting that the apparent restriction to the custodial State "cannot be interpreted *a contrario so as to exclude* a voluntary exercise of a universal jurisdiction.") (original emphasis); ICJ, *Arrest Warrant*, Judge Van den Wyngaert, diss. op., § 61 (holding that the conventions do "not exclude any criminal jurisdiction exercised in accordance with national law").
See however with respect to the Geneva Conventions: *Id.*, § 32 ("As no case has touched upon this point, the jurisdictional matter remains to be judicially tested. In fact, there has been a remarkably modest corpus of national case law emanating from the jurisdictional possibilities provided in the Geneva Conventions or in Additional Protocol I."). *See also* A. POELS, "Universal Jurisdiction *in Absentia*", 23 *Neth. Q. Hum. Rts.* 65, 76 (2005); M. INAZUMI, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law*, Antwerp-Oxford, Intersentia, 2005, at 104. Treaties such as the Geneva Conventions 1949 (Articles 49, 50, 129 and 146 respectively of GC I, II, III and IV) and the Torture Convention (Article 5 (3)) do not explicitly prohibit the exercise of universal jurisdiction *in absentia*. O'KEEFE has pointed out that inferring from the restriction of mandatory jurisdiction in the said treaties to instances of the offender being present in the territory, that universal jurisdiction *in absentia* is impermissible is, not warranted, because the pertinent provisions containing this reference to the custodial State are tailored to the criminal procedure systems of common law States for whom trials *in absentia* are, unlike for civil law States, unknown. If the restriction to 'the custodial State' had not been inserted, the legal tradition of common law States would have precluded them for ratifying the treaties. O'KEEFE's therefore concluded that "the territorial precondition serves as a universally acceptable

jurisdiction require the presence of the presumed offender,[2790] this need not imply that a norm of customary international law has emerged that *prohibits* the exercise of universal jurisdiction *in absentia*.[2791] State practice on the subject is just too scarce and inconsistent to reach a conclusive answer.[2792]

852. Universal jurisdiction *in absentia* is controversial, and the doctrine is often reluctant to endorse it.[2793] Whereas traditional universal jurisdiction requiring the presence of the offender in the forum State is still somehow based on classical notions of territorial sovereignty – a State's territorial jurisdiction extending to all individuals within their territory, even with respect to acts done outside the territory before entering it –[2794] universal jurisdiction *in absentia* can no longer be justified on grounds of such (broadly construed) notions. Instead, being "pure" universal jurisdiction, it derives its entire legitimacy from the interest of the international community in punishing perpetrators of crimes against international law.[2795]

853. It is argued that authorizing universal jurisdiction *in absentia* strains foreign relations more than 'territorial' universal jurisdiction does. 'Territorial' universal jurisdiction does indeed not become operative as long as the perpetrator does not travel to States willing to bring their universal jurisdiction laws to bear.[2796] By

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lowest common denominator." R. O'KEEFE, "Universal Jurisdiction: Clarifying the Basic Concept", 2 *J.I.C.J.* 735, 751 (2004).

[2790] In practice, while most States that explicitly provide for universal jurisdiction set forth the presence of the offender before jurisdiction could obtain, it is unclear whether this restriction applies only to the trial stage or also to the pre-trial stage. There may thus be quite some domestic leeway for prosecutors and investigators to conduct investigatory acts *in absentia*.

[2791] *See* ICJ, *Arrest Warrant*, Judge ad hoc Van den Wyngaert, diss. op., §§ 54-55 (arguing that there is no rule of conventional nor customary international law to the effect that universal jurisdiction *in absentia* is prohibited, espousing a teleological interpretation of the 1949 Geneva Conventions, and citing States that do not require the presence of the offender). It is indeed debatable whether concerns over the exercise of universal jurisdiction *in absentia* rise to the level of an *opinio juris* against the exercise of such jurisdiction, since States may sometimes reject universal jurisdiction on practical rather than legal grounds. *See* ICJ, *Arrest Warrant*, Judge ad hoc Van den Wyngaert, diss. op., § 56. From the *travaux préparatoires* of the Scottish International Criminal Court Act 2001, for instance, concerns of overburdening the courts, the desire not to become a global prosecutor, reservations as to the practicability of evidence-gathering and the fear of political repercussions are apparent. Scottish Parliament Official Report, cited in R. O'KEEFE, "Universal Jurisdiction: Clarifying the Basic Concept", 2 *J.I.C.J.* 735, 758 (2004).

[2792] *See* R. RABINOVITCH, "Universal Jurisdiction *In Absentia*" 28 *Fordham Int'l L. J.* 500, 508, 511 (2005).

[2793] *See, e.g.*, INTERNATIONAL LAW ASSOCIATION, *Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Violations*, Committee on International Human Rights Law and Practice, London Conference, 2000, p. 2 ("The only connection between the crime and the prosecuting state that may be required is the physical presence of the alleged offender within the jurisdiction of that state.").

[2794] *See* ICJ, *Arrest Warrant*, sep. op. Judges Higgins, Kooijmans and Buergenthal, § 41 (discussing the *aut dedere aut judicare* provisions contained in some international treaties, and holding that, in view of the fact that these provisions set forth the presence of the offender in the territory of the prosecuting State, "[b]y the loose use of language [this] has come to be referred to as 'universal jurisdiction', though [it] is really an obligatory territorial jurisdiction over persons, albeit in relation to acts committed elsewhere.").

[2795] *Compare* M. INAZUMI, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law*, Antwerp-Oxford, Intersentia, 2005, at 104.

[2796] This has also been used as an argument *against* the exercise of universal jurisdiction. *See* G. BYKHOVSKY, "An Argument against Assertion of Universal Jurisdiction by Individual States", 21

contrast, if universal jurisdiction *in absentia* were exercised, the conduct of any perpetrator of an international crime, wherever he resides, in a safe haven or not, may be amenable to investigation (although, admittedly, the perpetrator may prevent extradition or territorial enforcement acts from taking place as long as he remains in a safe haven). Because universal jurisdiction *in absentia* may reach anyone anywhere, it has been argued that it creates "judicial chaos",[2797] and violates the classical principle of non-intervention in the internal affairs of another State.[2798]

854. Universal jurisdiction *in absentia* may also be at odds with due process, a human right which *inter alia* requires a suspect to know what laws he or she is subject to. Pursuant to the classical concept of universal jurisdiction, jurisdiction is only exercised over a suspect who voluntarily enters the territory of the custodial State, and thus, who knows what laws he or she is subject to. Under universal jurisdiction *in absentia*, in contrast, the forum is arbitrarily determined, which may makes it difficult if not impossible for a suspect to foresee what laws will govern his conduct.[2799] This objection should not be overstated, as, while it is true that in a system of universal jurisdiction *in absentia* suspects could not know beforehand to what legal system and unfamiliar legal procedure they will be subjected, they know beforehand that their heinous conduct is criminal and that they could be hauled before any court.

855. Proponents of universal jurisdiction *in absentia* emphasize the important role it could play in the fight against international impunity. If the presence of the presumed offender is required, he will go unpunished as long as he does not enter the territory of a State which is willing to either prosecute or extradite him to another State willing to prosecute. ROHT-ARRIAZA has argued in this context that "[t]o require that the defendant be present … changes the nature of universal jurisdiction from a doctrine providing for prosecution and punishment, to a doctrine that does little more than eliminate safe havens."[2800] Under the system of universal jurisdiction *in absentia*, victims are more likely to have their day in court given the wide range of possible

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Wisconsin J. Int'l L. 161, 182 (2003) (pointing at "a serious risk of undermining traditional means of diplomacy and freedoms of international travel").

[2797] ICJ, *Arrest Warrant*, sep. op. Judge Guillaume, § 15 ("But at no time has it been envisaged that jurisdiction should be conferred upon the courts of every State in the world to prosecute such crimes, whoever their authors and victims and irrespective of the place where the offender is to be found. To do this would, moreover, risk creating total judicial chaos. It would also be to encourage the arbitrary for the benefit of the powerful, purportedly acting as agent for an ill-defined "international community". Contrary to what is advocated by certain publicists, such a development would represent not an advance in the law but a step backward.").

[2798] *See, e.g.*, R. RABINOVITCH, "Universal Jurisdiction *In Absentia*", 28 *Fordham Int'l L. J.* 500, 521 (2005); *Regina* v. *Bartle and the Commissioner of Police for the Metropolis & Others Ex Parte Pinochet*, 2 All E.R. 97 (H.L. 1999) (Lord MILLETT) ("[T]he limiting factor that prevents the exercise of extra-territorial criminal jurisdiction from amounting to an unwarranted interference with the internal affairs of another State I that, for the trial to be fully effective, the accused must be present in the forum State."). *Compare* H.F.A. DONNEDIEU DE VABRES, *Les principes modernes du droit pénal international*, Paris, Sirey, 1928, at 160 (rejecting universal jurisdiction *in absentia* "puisque l'Etat entre les mains duquel il se trouve actuellement est, de ce chef, mieux qualifié pour connaitre de son affaire.").

[2799] *See* M. INAZUMI, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law*, Antwerp-Oxford, Intersentia, 2005, at 147.

[2800] N. ROHT-ARRIAZA, comment Spanish Constitutional Court, Guatemala Genocide case, 100 *A.J.I.L.* 207, 212 (2006).

fora.[2801] Moreover, universal jurisdiction *in absentia* could help prevent the axe of statutes of limitation from falling.[2802] Bystander States could prosecute the perpetrator directly after he committed his heinous acts, and would not have to wait for the perpetrator to be (voluntary) present in their territory.

856. This study supports the reasonable exercise of universal jurisdiction *in absentia*, since the fight against impunity demands that as wide a prosecutorial net as possible be cast. Unlike what its critics believe, the sweep of universal jurisdiction *in absentia* is not overbroad. While on the basis of an authorization to exercise universal jurisdiction *in absentia*, any State may in theory initiate proceedings against perpetrators of international crimes, wherever committed, any forcible measures against these perpetrators are necessarily tied to their presence in the territory of the forum State. Alleged offenders cannot be deposed, interrogated, let alone arrested or imprisoned in their absence, unless consent of the territorial State could be obtained. No forcible measure can be taken without the alleged offender being voluntarily present in the territory or being extradited by the requested State where he could be found. States can only take non-forcible, pre-trial measures *in absentia* such as compiling information, hearing witnesses, pre-trial seizure of assets, issuing an arrest warrant with a view to securing the territorial presence of the offender (without any certainty that the alleged offender will effectively be arrested),[2803] and, exceptionally (if domestic law allows for it) conduct a trial *in absentia*.[2804] The alleged offender

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[2801] *See* A. POELS, "Universal Jurisdiction *In Absentia*", 23 *Neth. Q. Hum. Rts.* 65, 78 (2005) ("Universal jurisdiction *in absentia* is without doubt the most effective instrument against criminal impunity […] the ultimate translation of [the international community's] reprobation of the most serious crimes.").

[2802] *Id.*, at 79.

[2803] It may be submitted that an international arrest warrant is a purely domestic act with no actual extraterritorial effect, if the warrant could not be and is not executed in the country where it is issued or in the countries to which it is circulated. *See* ICJ, *Arrest Warrant*, Judge ad hoc Van den Wyngaert, diss. op., § 80. An international arrest warrant will however *have* an extraterritorial effect when it is intended to be immediately executed, *quod plerumque fit.* In practice, only international immunities will remove the actual extraterritorial effect. It nevertheless remains true that an arrest warrant ordinarily only envisages the arrest of the alleged perpetrator in the territory of the issuing State or the arrest in a third State at the discretion of the State concerned. While an international arrest warrant may have an extraterritorial effect, it constitutes a territorial measure. In their joint separate opinion, three ICJ judges held that the aim of the arrest warrant "would in principle seem to violate no existing prohibiting rule of international law." ICJ, *Arrest Warrant*, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, § 54. Third States can assist the exercise of universal jurisdiction *in absentia* by the forum State by extraditing the alleged perpetrator to the latter State. This does not seem to violate international law either. *Id.*, § 58.

[2804] In common law countries, trials *in absentia* are normally not authorized. Also in Belgium, trials *in absentia* (before the Cours d'Assises, competent to adjudicate international crimes) are impossible, although the accused could be represented by his lawyer. In France by contrast, such trials are possible. In 2005, a French court convicted Ely Ould Dah, a Mauritanian torturer, in his absence. The rejection of a trial *in absentia* does not reflect a desire to comply with the international law of jurisdiction, but the desire to guarantee the right of a fair trial, enshrined *inter alia* in Article 6 ECHR and Article 14.3 ICCPR, the latter provision giving every person the rights to be tried in his presence. *See* also ICJ, *Arrest Warrant*, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, para. 56. RABINOVITCH for his part, while admitting that trials *in absentia* may be in compliance with human rights, has forcefully argued against them, pointing out that juries may "draw the inappropriate inference that because the accused may be absent he or she is a fugitive and therefore probably guilty", that the presence of the accused is an essential aspect of the adversarial criminal justice system, that his presence of the accused is an essential part of the punishment that he ought to suffer, and that trials *in absentia* may bring the judicial system of the forum State in disrepute. *See* R. RABINOVITCH, "Universal Jurisdiction *In Absentia*" 28 *Fordham Int'l L. J.* 500, 528-29 (2005). *Compare* C. KRESS,

need not be physically too embarrassed by such measures, as long as he stays in or travels to a State which will not extradite him. An exercise of universal jurisdiction *in absentia*, if limited to investigative acts, need therefore not interfere in the domestic affairs of a foreign State any more than the exercise of universal jurisdiction does.[2805]

857. The encroachment of universal jurisdiction *in absentia* upon the principle of non-intervention appears, certainly in light of the grave character of the offences amenable to universal jurisdiction, negligible. Yet the stigmatic and deterrent effect of the initiation of investigations, in combination with the possibility of freezing assets, may provide considerable relief to the victims of core crimes.[2806] Although the chances of a trial and the eventual imprisonment of the perpetrator may be slight because of his absence in the territory (extradition often being impossible), the exercise of universal jurisdiction *in absentia* may thus serve an important redemptive goal.[2807] Furthermore, States that have or obtain custody of the perpetrator may benefit from the preparatory work done by a bystander State investigating the case *in absentia*. A bystander State's amassing of evidence ineluctably pointing to guilt of the offender may even serve as a wake-up call for the State having custody of the offender (usually the territorial or national State), and even trigger a duty to prosecute.[2808] Especially if a transnational network of information-sharing is put into place, as happened in the European Union,[2809] far from wreaking havoc to the international legal system, limited possibilities for an exercise of universal jurisdiction *in absentia* actually further international cooperation in criminal matters. If the prosecution of the presumed offender in any other State – with which the investigating State has judicial cooperation agreements – could be anticipated, gathering evidence in the territory or accepting evidence submitted by civil parties, and hearing witnesses present in the territory should be deemed admissible.[2810] Yet

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"Universal Jurisdiction over International Crimes and the *Institut de Droit international*", 4 *J.I.C.J.* 561, 583 (2006) (arguing that "if trials *in absentia* are considered as inappropriate in *international* criminal proceedings, the same should apply to those national proceddings that are based solely on the exercise of true universal jurisdiction"). *See also* A. POELS, "Universal Jurisdiction *In Absentia*", 23 *Neth. Q. Hum. Rts.* 65, 73 (2005) (not condemning trials *in absentia*, but arguing that "an at least formal notification of the initiation of criminal proceedings should be given to all concerned individuals", such as by the filing of an extradition request).

[2805] *See* in this sense also: C. KRESS, "Universal Jurisdiction over International Crimes and the *Institut de Droit international*", *4 J.I.C.J.* 561, 576-79 (2006).

[2806] *See also* A. SANCHEZ LEGIDO, "Spanish Practice in the Area of Universal Jurisdiction", 8 *Spanish Yb. Int'l L.* 17, 36 (2001-02) ("[E]ven if merely a warning, allowing a pre-trial investigation and the activating of the mechanisms of international criminal cooperation can serve not only as a reminder to the suspect of the consequences that the international legal system attaches to crimes allegedly committed, but also a relief, a relative one of course, as regards the rights that his same legal system affords to the victims.").

[2807] *See also* R. RABINOVITCH, "Universal Jurisdiction *In Absentia*" 28 *Fordham Int'l L. J.* 500, 520 (2005) (drawing a parallel with the ICTY's Rule 61 proceedings).

[2808] *See* N. ROHT-ARRIAZA, *comment Spanish Constitutional Court, Guatemala Genocide case*, 100 *A.J.I.L.* 207, 212 (2006).

[2809] On June 13, 2002, the Council of Ministers of the European Union decided to set up a European network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes. *See* Council, *O.J.* L 167/1-2 (2002). The 2002 Decision was complemented by a 2003 Decision pursuant to which Member States should assist one another in investigating and prosecuting these crimes, in particular through the exchange of information between immigration authorities. *See* Council, *O.J.* L 118/12-14 (2003). The Member States should have taken the necessary measures by May 8, 2005 (Article 7 of the 2003 Decision). See for a more detailed discussion section 10.9.

[2810] *See* in this sense also INSTITUTE OF INTERNATIONAL LAW, Resolution of the 17th Commission on universal criminal jurisdiction with regard to the crime of genocide, crimes against humanity and war

even if the prospect of international cooperation seems to be distant, investigatory acts *in absentia* should still be performed if the (voluntary) presence of the presumed offender in the territory of the forum State itself could be anticipated. Even if performed in absentia, they derive their anticipatory legality from the anticipated territoriality of a later full-fledged prosecution and possible trial. Investigations in absentia may even be necessary if a prosecution on the basis of the universality principle is to be successful: a person entering the territory only becomes a "presumed offender", and could only be arrested, on the basis of a pre-existing dossier listing heinous acts allegedly perpetrated by him.[2811] This appears to be the message underlying the jurisdictional provisions of the Geneva Conventions, which require any State to "search for" persons, whatever their nationality, suspected of committing grave breaches of the laws of war.[2812]

858. While the argument in favour of universal jurisdiction *in absentia* is cogent, reasonableness requires that due consideration is given to the legitimate concerns of foreign States and their agents. It is often argued that the mere initiation of prosecutions *in absentia* may blemish the reputation of persons named in the complaint or act sparking the prosecution. This was actually the main grief of the United States against the Belgian 'Genocide Act', which, because it authorized the exercise of universal jurisdiction *in absentia* (as endorsed by the Court of Cassation on 12 February 2003 in the Sharon case) upon civil party petitions by victims (groups), was repealed on August 5, 2003 after intense U.S. pressure.

859. It could be argued that any initiation of criminal proceedings, be it in a domestic or international setting, could blemish the reputation of persons. It is precisely the task of prosecutors and investigating magistrates to unveil the truth, and by so doing possibly restore the name and integrity of the investigated person. Admittedly, complaints alleging core crimes against international law tend to be mediatized, which might result in condemnation by public opinion and thus jeopardize the impartiality of the investigation and the eventual trial. This need however not undercut the case for universal jurisdiction *in absentia*. If a prosecutor or investigating magistrate could speedily dispose of a case, citing admissibility grounds, the damage to the persons named and the concomitant political fall-out may be limited. This may be illustrated by the complaint against a number of American high-ranking officials and service-members filed by the American Center for Constitutional Rights with the German Federal Prosecutor, a complaint that the prosecutor handily disposed of by invoking the subsidiarity principle, days before a visit of the American Defence Secretary, to U.S. satisfaction.[2813] A speedy disposal of a complaint is not always possible or justified though. States may therefore possibly want to provide that complaints (alleging international crimes) are inadmissible if they are released to the

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crimes, Krakow Session, 2005, nr. 3 (b) ("*Apart from acts of investigation and requests for extradition*, the exercise of universal jurisdiction requires the presence of the alleged offender in the territory of the prosecuting State … or other lawful forms of control over the alleged offender.") (emphasis added).

[2811] *See* M. COSNARD, "La compétence universelle en matière pénale", in C. TOMUSCHAT & J.-M. THOUVENIN (eds.), *The Fundamental Rules of the International Legal Order. Jus Cogens and Obligations Erga Omnes*, Leiden, Boston, Martinus Nijhoff, 2006, 355, 369.

[2812] *See* M. KAMMINGA, "Lessons Learned From the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences", 23 *Hum. Rts. Q.* 940, 954 (2001) (implying that States Parties to the Geneva Conventions are not only authorized, but even *obliged* to exercise universal jurisdiction *in absentia* over grave breaches).

[2813] *See* chapter 10.2 (universal jurisdiction over core crimes in Germany).

public prior to or at the moment of their filing. They could even provide for fines for the complainants if the complaint is released subsequent to the filing. This might discourage complainants from filing complaints to merely capture media attention instead of genuinely seeking legal accountability for the alleged perpetrators. No State appears to have contemplated such drastic measures, which may possibly run counter to freedom of information legislation.[2814] Alternatively, one may, as CASSESE has proposed, limit the exercise of universal jurisdiction *in absentia* to low-key perpetrators, and abolish it for high-ranking officials,[2815] since the former class of offenders may presumably have less legitimate international reputational concerns.

860. COUNTRY STUDY – Having sketched the nature and modalities of universal criminal jurisdiction, the time has now come to analyze in detail how different States have applied the universality principle in practice. Only an analysis of State practice and *opinio juris* may indeed allow us to draw conclusions as to the customary international law nature of universal jurisdiction and as to what tendencies there are in *reasonably* giving shape to the exercise of universal jurisdiction. In this extensive chapter, State practice in Germany, Spain, France, Belgium, the Netherlands, the United Kingdom, Denmark, Switzerland, Austria, Canada, the European Union, and the United States will be discussed. It will become clear from the country study that universal criminal jurisdiction over core crimes against international law is a distinctly European phenomenon. In the final conclusion of this chapter, it will be attempted to explain where this transatlantic divide stems from.

10.2. Universal jurisdiction over core crimes against international law in Germany

861. Germany has been among the States most active in investigating and prosecuting core crimes against international law under the universality principle. On the basis of provisions in the German Criminal Code, more than 100 cases were opened against Balkan war criminals, resulting in half a dozen of trials. In 2002, the German legislature enacted a progressive Code of Crimes against International Law, which even provides for universal jurisdiction *in absentia*. There have so far been no prosecutions under this Code however.

10.2.1. Code of Crimes against International Law

862. The German Code of Crimes against International Law (CCAIL) of 26 June 2002,[2816] which defines as crimes against international law genocide,[2817] crimes

[2814] Curbing the right to civil party petition, *i.e.*, the right of victims to seize an investigating magistrate who is obliged to act upon their petition, as happened in Belgium, may not be very useful if the stated aim is to limit media exposure of the person(s) named in the petition. Indeed, victims could always file complaints with a prosecutor. While the prosecutor may not be obliged to act upon the compliant, the damage may be done if the victims manage to capture media attention – which is often even their main objective.

[2815] A. CASSESE, "The Twists and Turns of Universal Jurisdiction: Foreword", 4 *J.C.I.J.* 559 (2006).

[2816] *Völkerstrafgesetzbuch*, 2002 *Bundesgesetzblatt* (BGBl.) Teil 1, at 2254; English translation available at http://www.iuscrim.mpg.de/forsch/legaltext/vstgbleng.pdf. For the violation of the duty of supervision (Section 13 CCAIL) and the omission to report a crime (Section 14 CCAIL), universal jurisdiction is not possible.

[2817] Section 6 CCAIL.

against humanity,[2818] and war crimes committed in both international and non-international armed conflicts,[2819] stipulates in its Section 1 that it "shall apply to all criminal offences against international law designated under the Act, to serious criminal offences designated therein *even when the offence was committed abroad and bears no relation to Germany.*"[2820] Section 1 of the CCAIL clearly provides for universal jurisdiction.[2821]

863. Exceptionally, prosecution is pursuant to § 153 (f) of the German Code of Criminal Procedure (StPO) not mandatory for crimes against international law.[2822] Prosecution is however mandatory if the accused is present in Germany or his presence can be anticipated.[2823] If the accused is a German, prosecution is also mandatory if he is not present in Germany or if his presence cannot be anticipated, unless where the offence is being prosecuted before an international court or by a State on whose territory the offence is committed or whose national was harmed by the offence.[2824] Accordingly, under German law, the prosecutor *must* prosecute if the perpetrator can be found in Germany or if it can be anticipated that the perpetrator will arrive in future, for instance, if extradition of the suspect is likely.[2825] If these conditions are not met, the prosecutor *could* prosecute, although § 153 (f) StPO counsels against prosecution, particularly if there is no suspicion of a German having committed such offence, if such offence was not committed against a German, if no suspect in respect to such offence is present in Germany and such presence is not be anticipated, and if the offence is being prosecuted before an international court or by a State on whose territory the offence was committed or whose national was harmed by the offence.[2826] § 172 (2) stop excludes review by a court if the prosecutor dismisses the complaint filed by the victim of a violation of international humanitarian law.

[2818] Section 7 CCAIL.

[2819] Sections 8-12 CCAIL. Not all provisions apply to non-international armed conflicts: *see* Section 8 (3) CCAIL. Before the enactment of the CCAIL, it was unclear whether universal jurisdiction could be extended to war crimes committed in non-international armed conflicts. These conflicts are governed by Additional Protocol nr. II to the Geneva Conventions, which does not contain a jurisdictional clause. Ambos argued that German criminal law would be applicable in case of a violation of the "humanitarian minimum standard" during a non-international armed conflict (§ 6.9 StGb *jo.* Common Article 3 of the Geneva Conventions and Article 4 of Additional Protocol nr. II). *See* K. AMBOS, "Aktuelle Probleme der deutschen Verfolgung von "Kriegsverbrechen" in Bosnien-Herzegowina", *Neue Zeitschrift für Strafrecht* 226, 228-30 (1999). The legislature apparently followed this line of reasoning.

[2820] Emphasis added.

[2821] *See also* S. WIRTH, "Germany's New International Crimes Code: Bringing a Case to Court", 1 *J.I.C.J.* 157-58 (2003).

[2822] For other crimes under German law, the principle of mandatory prosecution applies (Section 152 (2) of the German Code of Criminal Procedure).

[2823] Section 153 (f) (1) of the German Code of Criminal Procedure, as amended by Article 3 of the Act to Introduce the Code of Crimes against International Law, 26 June 2002. Before the enactment of the latter act, prosecution of a crime committed abroad was *never* mandatory (Section 153 (c) (1) of the German Code of Criminal Procedure).

[2824] *Id.*

[2825] WIRTH has warned that judging the likeliness of an extradition might prove problematic, as the extradition request is a political decision which is not issued by the prosecutor but by the executive branch. *See* S. WIRTH, "Germany's New International Crimes Code: Bringing a Case to Court", 1 *J.I.C.J.* 160 (2003).

[2826] Section 153 (f) (2) German Code of Civil Procedure.

864. The Explanations of the new law base the exception to the principle of mandatory prosecution upon the observation that "German investigative resources should not be overburdened with cases which have no connection to Germany and for which no notable clarification success is to be anticipated."[2827] Also, the Explanations refer to the principle of complementarity of Article 17 of the ICC Statute, holding that "the jurisdiction of third-party states (which exists under international law) must be understood as a subsidiary jurisdiction which should prevent non-punishment, but not otherwise inappropriately interfere with the primarily responsible jurisdiction."[2828] It is, however, important to note that the law does not *prevent* the prosecutor from initiating proceedings on the basis of the principle of universal jurisdiction in any circumstance.[2829]

The referral to the ICC Statute in the context of universal jurisdiction is not accidental, as Germany proposed to introduce the universality principle as a jurisdictional basis for the ICC, aside from the territoriality and the active personality principle. In a discussion paper presented at the Preparatory Committee in 1998, Germany argued that, as States have universal jurisdiction over crimes against international humanitarian law, the ICC should be able to exercise its jurisdiction over any alleged offender of these crimes, wherever he may be found.[2830]

10.2.2. Case-law under the CCAIL

865. Case-law under the CCAIL is scarce. No cases have reached the trial phase, and complaints that were filed by victim groups were quickly disposed of by the federal prosecutor under the subsidiarity principle. Among these complaints were a complaint filed on November 30, 2004 by the American Center for Constitutional Rights against U.S. Minister of Defence Rumsfeld, former CIA-Director Tenet and U.S. military personnel concerning abuse at the Abu Ghraib prison in Iraq,[2831] a

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[2827] Explanations on the *Draft of an Act to Introduce the Code of Crimes against International Law*, http://www.iuscrim.mpg.de/forsch/legaltext/VStGBengl.pdf, p. 82.

[2828] *Id.*

[2829] For the second case, the original draft of the Act to Introduce the Code of Crimes against International Law, provided that the prosecutor *should* ("soll") dispense with prosecuting if the conditions set forth were met. The final text now reads that the prosecutor *can, in particular* ("kann insbesondere"), dispense with prosecuting. As far as the first case is concerned, the law uses the less compelling verb *may* ("kann").

[2830] Informal Discussion Paper presented by Germany, 'The Jurisdiction of the International Criminal Court', UN Doc A/AC249/1998/DP2.

[2831] An English version of the complaint, which counts 181 pages, is available at http://www.ccr-ny.org/v2/legal/september_11th/docs/German_COMPLAINT_English_Version.pdf. The complaint alleged that the said persons were responsible for acts of torture by U.S. military personnel in the Abu Ghraib prison in Iraq. The acts were identified as torture and as crimes against humanity. Under the CCAIL, as noted, German courts may exercise universal jurisdiction over crimes against humanity not only if the suspect is present in Germany, but also if his presence can be anticipated. The U.S. nationals that were not present in the U.S. could thus in principle be prosecuted in Germany. If the acts were qualified as torture, German courts would lack jurisdiction over these persons because the prosecution of torture in Germany on the basis of the universality principle requires the voluntary presence of the offender in Germany (§ 6.9 StGB and § 7.2 StGB). The presence requirement would however be met with respect to U.S. service-members present in Germany. On February 10, 2005, the federal prosecutor dismissed the Abu Ghraib complaint days before a visit by U.S. Minister of Defence Rumsfeld to a security conference in Munich. He held that there was no room for a jurisdictional intervention by a German prosecutor in view of the subsidiarity principle set forth in § 153 (f) of the

complaint filed on December 12, 2005 against Uzbek Minister of the Interior Almatov, and a complaint filed by Falun Gong on November 21, 2003 against the former Chinese president Jiang Zemin. Upon dismissal of the *Abu Ghraib* complaint by the federal prosecutor, the complainants appealed to the *Oberlandesgerichte* of Karlsruhe (which declared the complaint inadmissible on the ground that it was territorially not competent) and Stuttgart. The Stuttgart court dismissed the appeal on September 13, 2005, ruling that, as a general matter, complainants alleging international crimes do not have recourse against a decision made by the federal prosecutor under § 153(f) of the StPO,[2832] and thus, that the courts do not have the power to review the prosecutor's decision to give prevalence to the jurisdiction of the defendants' State of nationality over the subsidiary jurisdiction of Germany (as happened in the *Abu Ghraib* case).[2833] Aware of the uselessness of appealing the

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German Code of Criminal Procedure (a copy of the decision is available at http://www.ccr-ny.org/v2/legal/september_11th/docs/German_Prosecutors_Decision2_10_05.pdf).

In the prosecutor's opinion, the exercise of universal jurisdiction as provided for in the CCAIL is only warranted if such does not interfere with the domestic affairs of foreign States. Drawing on the complementarity principle enshrined in Article 17 of the ICC Statute, he ruled: *"Aus denselben Gründen darf ein Drittstaat die Rechtspraxis fremder Staaten nicht nach eigenen Massstäben überprüfen, im Einzelfall korrigieren oder gar ersetzen."* (*Id.*, at p. 3). The prosecutor thus construed Article 17 of the ICC Statute as the guideline for assessing the legality of exercising universal jurisdiction: bystander States are only allowed to step in when the territorial State or the national State of the perpetrator or victim fail to dispense justice. The prosecutor thus construed Article 17 of the ICC Statute as the guideline for assessing the legality of exercising universal jurisdiction: bystander States are only allowed to step in when the territorial State or the national State of the perpetrator or victim fail to dispense justice.

The federal prosecutor found that there was no indication that the United States, the national State of the alleged perpetrators, had refrained or would refrain from criminal investigations. He held in this respect that the concept of prosecution should be construed not in light of the alleged individual perpetrators or their alleged offences, but in light of the entire 'situation' (*Gesamtcomplex*) as contemplated by Article 14, § 1 of the ICC Statute. The subsidiarity principle would command that how (means and timeframe) the State having jurisdictional priority investigates or prosecutes a situation, should be left to that State and not to another State, unless a genuine willingness to prosecute appears to be lacking. As the U.S. had already launched investigations against servicemembers, Germany should defer.

The Abu Ghraib case was complicated by the presence of a number of alleged offenders in U.S. military bases in Germany. Under the CCAIL, the prosecutor *must* prosecute if the alleged offender is present in Germany. The federal prosecutor held however that these U.S. servicemembers have, in relation to their presence in Germany, a special duty of compliance (*Gehorsamspflicht*) *vis-à-vis* their U.S. superiors. The U.S. would therefore have unlimited jurisdiction (*Zugriff*) over these persons. Whether they were present in Germany or in the U.S. would make no difference. As they were also liable for criminal prosecution in the U.S., there would be no need for the exercise of subsidiary jurisdiction over the alleged offenders by Germany.

[2832] OLG Stuttgart, Beschl. 13 September 2005, 5 Ws 109/05, NStZ 2006, 117, 119, § 25 ("Die eigentliche Ermessensentscheidung , d.h. das Ermessen im engeren Sinne, ist im Rahmen des § 153 f StPO nicht justiziabel.")

[2833] *Id.* ("Insbesondere die Bejahung des Erfordernisses einer anderweitigen Verfolgung in § 153 f II 1 Nr. 4 StPO und die damit einhergehende Entscheidung des [Generalbundesanwalts] für einen Vorrang des Heimatstaates der angezeigten Personen (hier: der Vereinigten Staaten von Amerika) gegenüber der subsidiären Drittstaaten-Gerichtsbarkeit der BR Deutschland ist gerichtlich nicht überprüfbar."). The court ruled that it could marginally appreciate the prosecutor's discretionary decision, and ascertain whether the federal prosecutor has actually exercised his discretion and whether he has not exceeded the limits of arbitrariness (*Id.*, at 118, § 19 ("Die angefochtene Ermessensentscheidung is im Rahmen der gerichtlichen Prüfungs- und Beurteilungskompetenz nur dahingehend kontrollierbar, ob überhaupt Ermessen ausgeübt und ob die Grenze zur Willkür überschritten wurde.")). Nevertheless, as § 153(f) of the StPO grants the prosecutor wide latitude in exercising his discretion and judgment, especially if a nexus of the case with Germany is lacking (*Id.*, at 119, § 23 (adding that a complaint under § 153(f) can, unlike other complaints, even be withdrawn at any stage of the proceedings)), abuse

federal prosecutor's decision not to investigate the *Almatov* case,[2834] the plaintiffs called in June 2006 on the *new* federal prosecutor to open an investigation.[2835] The *Falung Gong* decision, which resulted in dismissal on grounds of foreign sovereign immunity and lack of nexus with Germany,[2836] was not appealed.

10.2.3. Universal jurisdiction before the enactment of the CCAIL

866. PRE-CCAIL REGULATORY FRAMEWORK – Before the enactment of the CCAIL in 2002, the German Criminal Code (*Strafgesetzbuch* or *StGB*) applied to the prosecution of crimes against international humanitarian law. In practice, German prosecutors almost exclusively claimed jurisdiction over presumed perpetrators of crimes against international humanitarian law committed in the territory of the former Yugoslavia, who were living or residing in Germany. The StGB provided at the time that it applied to crimes of genocide committed outside Germany[2837] and still provides that it applies to crimes, committed outside Germany, that Germany is required to prosecute pursuant to a binding international treaty.[2838] According to the Bavarian High Court in *Djajic*, the latter category includes the four Geneva Conventions.[2839] As the Geneva Conventions do not set forth the elements of the grave breaches, these breaches were prosecuted under general German criminal law, with the attendant disadvantages.[2840]

867. VICARIOUS JURISDICTION – Even if a crime does not qualify as genocide, or is not the subject of a binding international treaty, jurisdiction could still be grounded upon the typical Germanic principle of vicarious and representation jurisdiction (*stellvertretende Rechtsprinzip)*. By virtue of this principle, German courts can prosecute the presumed offender of an extraterritorial crime in case of double

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of discretion will usually not be found. The decision of the federal prosecutor not to prosecute the *Abu Ghraib* case was accordingly upheld.

[2834] *See* on this decision not to prosecute: S. ZAPPALÀ, "The German Federal Prosecutor's Decision not to Prosecute a Former Uzbek Minister", 4 *J.I.C.J.* 602 (2006).

[2835] *See* press release Human Rights Watch, June 22, 2006, available at http://hrw.org/english/docs/2006/06/20/german13552.htm. In addtion, both Theo van Boven, former UN Special Rapporteur on Torture and Manfred Nowak, current UN Special Rapporteur on Torture, called on Germany to initiate a criminal investigation and prosecute Almatov. *See* http://hrw.org/english/docs/2006/06/13/german13551.htm; http://www.unhchr.ch/huricane/huricane.nsf/424e6fc8b8e55fa6802566b0004083d9/010f8506deae951ec12570dc002bfd07?OpenDocument

[2836] Decision of the federal prosecutor of June 24, 2005, available at http://www.diefirma.net/download.php?8651010ea2af5be8f76722e7f35c79de&hashID=44b8c6eba6a3530e554210fa10d99b3a

[2837] § 6.1 StGB *iuncto* § 220a StGB (the latter provision was inserted into the StGB on 9 August 1954, *BGBl* 1954, II, 729.

[2838] § 6.9 StGB.

[2839] Bayerisches Oberstes Landesgericht (BayObLG), Judgment, 23 May 1997, 3 St 20/06 (*'Djajic'*), reprinted in: 51 *Neue Juristische Wochenschrift* 392, 394 (1998). *See also* R. RISSING-VAN SAAN, "The German Federal Supreme Court and the Prosecution of International Crimes Committed in the Former Yugoslavia", 3 *J.I.C.J.* 381, 383 and 385 (2005). In the *Djajic case*, the Court held there to be an international armed conflict in the territory of the former Yugoslavia.

[2840] Unlike individual domestic crimes such as murder, war crimes require a widespread and systematic attack under international law. *See* R. RISSING-VAN SAAN, "The German Federal Supreme Court and the Prosecution of International Crimes Committed in the Former Yugoslavia", 3 *J.I.C.J.* 381, 383 (2005).

criminality and if extradition to the territorial State proves impossible.[2841] The historical existence of vicarious jurisdiction in Germany has probably spurred the adoption of universal jurisdiction in Germany, without the conditions traditionally attached to the exercise of vicarious jurisdiction, such as double criminality and the filing of a prior extradition request.[2842]

868. LEGALITY OF UNIVERSAL JURISDICTION OVER GENOCIDE – In *Jorgic*, the Constitutional Court held that § 6.1 StGB, the article providing for universal jurisdiction over genocide, did not violate the German Constitution or international law.[2843] It construed the Genocide Convention in a 'systematic-teleological' manner, ruling that, while Article VI of this Convention may not contain a *duty* to prosecute, it did not, in view of Article I of the Convention (which obliges States Parties to prevent and punish genocide) rule out the *competence* of States to prosecute.[2844] The Court pointed out that genocide, being the most heinous human rights violation, is the classic case for application of the principle of universality[2845]. The *Bundesgerichtshof* in *Jorgic* had previously pointed out that universal jurisdiction over crimes committed on the territory of the former Yugoslavia was necessary since the ICTY could only

[2841] § 7 (2) StGB. *See Djajic*, 51 *Neue Juristische Wochenschrift* 392, 395 (1998), in which the Bavarian Supreme Court grounded jurisdiction alternatively in the declaration of Bosnia-Herzegovina that it was not interested in the extradition of Djajic and in the refusal of the ICTY to take over the prosecution.

[2842] *See* I. CAMERON, "Jurisdiction and Admissibility Issues under the ICC Statute", in D. MCGOLDRICK, P. ROWE & E. DONNELLY (eds.), *The Permanent International Criminal Court. Legal and Policy Issues*, Hart, Oxford, Portland, Oregon, 2004, at 80-81.

[2843] Pursuant to Article 25 of the German Constitution (*Grundgesetz*), rules of international law prevail over statutory law.

[2844] BverfG, 2 BvR 1290/99, 12 December 2000, EuGRZ 76, 81; BGH, Judgment, 30 April 1999, 3 StR 215/98 (OLG Düsseldorf), *Neue Zeitschrift für Strafrecht* 1999, 396, 397. *See also* C. HOSS & R.A. MILLER, "German Federal Constitutional Court and Bosnian War Crimes: Liberalizing Germany's Genocide Jurisprudence", 44 *German Yearbook of International Law* 576, 585-596 (2001). *Compare* International Court of Justice, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina* v. *Yugoslavia* (Serbia and Montenegro), *I.C.J. Rep.* 1996, 595, 616, para. 31: "It follows that the rights and obligations enshrined by the Convention are rights and obligations *erga omnes*. The Court notes that the obligation each State thus has to prevent and to punish the crime of genocide is not territorially limited by the Convention." *See also* International Court of Justice, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina* v. *Yugoslavia* (Serbia and Montenegro), Provisional Measures, separate opinion Judge LAUTERPACHT, *I.C.J. Rep.* 1993, 325, 443. LAUTERPACHT held that the definition of genocide in Article I of the Genocide Convention was intended "to permit parties, within the domestic legislation that they adopt, to assume universal jurisdiction over the crime of genocide – that is to say, even when the acts have been committed outside their respective territories by persons who are not their nationals."

[2845] *Id.*

deal with ten cases a year.[2846] Against this background, the German Federal Attorney-General allegedly investigated a sheer 131 cases of suspected genocide.[2847]

869. DOUBLE CRIMINALITY – In the pre-CCAIL period some German courts required double criminality for *international* crimes. Double criminality is actually only required for vicarious jurisdiction (Article 7.2 StGB), not for universal jurisdiction (Article 6 StGB). A number of cases predicated jurisdiction of German courts on both vicarious and universal jurisdiction, which often led to elaborate comparative and international law analyses. The court in *Djajic*, for instance, developed an entire argument based on the law of State succession to establish the applicability of the Geneva Conventions in the former Yugoslavia.[2848] The investigative judge (*Ermittlungsrichter*) in *Tadic*, by contrast, ruled that Article 6.1 StGB, a provision which provides for universal jurisdiction over genocide, applies irrespective of the law of the place where the genocide is committed.[2849] The CCAIL now implicitly emphasizes the *international* character of core crimes. The defense of domestic non-criminalization and the concomitant defense of legal uncertainty are no longer valid, since the requirement of double criminality is supposedly met by the criminalization of the conduct under both German and *international* law.

870. SIGNIFICANT NEXUS – Classical German law on extraterritorial jurisdiction requires there to be a significant nexus (*sinnvoller Anknüpfungspunkt* or *Inlandsbezug*) between the foreign state of affairs (*Sachverhalten*) and Germany before Germany could exercise its jurisdiction over the foreign state of affairs. The *Bundesgerichtshof* introduced this requirement in a 1977 case involving a Dutch narcotics dealer, who sold marijuana to Germans in the Netherlands for resale in Germany.[2850] While Section 6 (5) of the Criminal Code provides for universal jurisdiction over narcotics offences without restriction, the *Bundesgerichtshof* required a legitimizing nexus between the offence and Germany, although it admitted that international law did not outline the weight and extent of the required national nexus.[2851] In a 1987 narcotics case, the *Bundesgerichtshof* appeared to ground

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[2846] BGH, *Jorgic*, 30 April 1999, 3 StR 215/98, at 397. The *Bundesgerichtshof* also referred to Article 9, I of the Statute of the ICTY, which provides, independent of Article VI of the Genocide Convention, for a concurring competence for *any* national courts, as to the prosecution of genocide. Furthermore, the ICTY's Office of the Prosecutor would have welcomed the jurisdictional claims of Germany over crimes committed in the former Yugoslavia. *Id.* The *Bundesgerichtshof* interestingly considers the international community responsible for drafting the Genocide Convention (1948) to be identical to the international community responsible for drafting the ICTY Statute (1993). In the ICTY Statute, this community would have clarified the jurisdictional competence of States under Article VI of the Genocide Convention.

[2847] *See* R. RISSING-VAN SAAN, "The German Federal Supreme Court and the Prosecution of International Crimes Committed in the Former Yugoslavia", 3 *J.I.C.J.* 381, 382 (2005). 4, 500 witnesses have been heard. *See* HUMAN RIGHTS WATCH, *Universal Jurisdiction in Europe: The State of the Art*, Vol. 18, No. 5(D), June 2006, p. 68.

[2848] *Djajic*, 51 *Neue Juristische Wochenschrift* 392, 393 (1998). *See also* BGH, *Jorgic*, 3 StR 215/98, at 398-399. The Court must not only ensure that the crime is punishable in the territorial and the custodial State, but also that extradition to the territorial State proved impossible for reasons not related to the act (this implies, *e.g.*, that vicarious jurisdiction over political crimes is not warranted). In *Jorgic*, the BGH thus asked the Ministry of Justice whether the federal government would grant extradition to the authorities of Yugoslavia. *Id.*, at 399.

[2849] BGH-Ermittlungsrichter, Beschl. 13.2.1994 – 1 BGs 100/94, *Neue Zeitschrift für Strafrecht* 1994, 232, 233. Tadic was later transferred to the ICTY.

[2850] BGH, 32 *JZ* 1977, 66-68.

[2851] *Id.*, 68.

jurisdiction over a Dutch narcotics dealer upon the protective principle.[2852] The violation of German interests might then in itself constitute the necessary legitimizing nexus.

871. The German Constitutional Court has grounded the legitimating nexus upon the principle of non-intervention, anchored in Article 2 (1) of the UN Charter.[2853] This was affirmed in the context of crimes against international humanitarian law by the investigating magistrate in the *Tadic* case, the first case involving universal jurisdiction over such crimes.[2854] In *Jorgic* however, the Constitutional Court considered the principle of universality in itself to constitute a significant nexus.[2855] Nonetheless, in most cases concerning atrocities committed in the territory of the former Yugoslavia however, German courts required "a legitimizing point of contact *(Anknüpfungspunt) in the individual case* [emphasis added], which creates a direct connection of the criminal prosecution to the home state; only then is the application of domestic (German) penal authority over the foreign state of a foreigner justified".[2856] This implied that, even if the universal jurisdiction requirements of the Criminal Code were met, an additional nexus with Germany should be found before German courts could actually assert jurisdiction, most likely because German courts wanted to avoid becoming the world's courts.[2857] The requirement of an additional nexus was criticized by the doctrine, as international law would not require a national

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[2852] BGH, 40 *NJW* 1987, 2170 (*"Die dargelegte Verletzung schutzwürdiger deutscher Interessen durch die Auslandstat des Angeklagten reicht zur Anknüpfung bei der Anwendung des § 6 Nr. 5 StGB jedenfalls insoweit aus, als er zie nach den Umständen erkannt had oder zumindest unschwer hätte erkennen können."*).

[2853] BVerfGE 63, 343 [369] = EuGRZ 1983, 649 [Rsprber.Nr. 31]; 77, 137 [153] EuGRZ 1987, 483 [487 f.] [In this jugdment, which concerned the question of whether the Federal Republic of Germany (Western Germany) could grant German nationality to a national of the German Democratic Republic (Eastern Germany), the Constitutional Court ruled: *"Der Staat darf die Staatsangehörigkeit inbesondere nicht an sachfremde, mit ihm nicht in hinreichender Weise verbundene Sachverhalte anknüpfen." (Id.*, at 488) The Court found in the case a sufficient nexus between the said state of affairs and the legal situation of Germany: *"Sie findet ihren sachlichen Anknüpfungspunkt an der bestehenden Rechtslage Deutschlands, insbesondere daran, dass dem deutschen Volk seit der Niederlage der deutschen Staates im Zweiten Weltkrieg versagt geblieben ist, in freier selbtbestimmung über seine politische Form zu entscheiden."* (*Id.*) Granting German nationality to a national of the German Democratic Republic would not imply the exercise of jurisdiction by the Federal Republic of Germany on the territory of the German Democratic Republic or non-respect of the latter's independence and autonomy (*Id.*, at 491); 92, 277 [320 f.] = EuGRZ 1995, 203 [214]; BverfG, 2 BvR 1290/99, 12 December 2000, EuGRZ 76, 81.

[2854] BGH-Ermittlungsrichter, *Tadic*, 13 February 1994, 1 BGs 100/94, *reprinted in* 5 *NStZ* 1994, 232,233.

[2855] BVerfGE 92, 277 [320 f.] = EuGRZ 1995, 203 [214]; BverfG, 2 BvR 1290/99, 12 December 2000, EuGRZ 76, 81. *See also* C. HOSS & R.A. MILLER, "German Federal Constitutional Court and Bosnian War Crimes: Liberalizing Germany's Genocide Jurisprudence", 44 *G.Y.I.L.* 576, 599-600 (2001). *See* for criticism: R. RISSING-VAN SAAN, "The German Federal Supreme Court and the Prosecution of International Crimes Committed in the Former Yugoslavia", 3 *J.I.C.J.* 381, 399 (2005).

[2856] Bundesgerichtshof (BGH), Judgment, 30 April 1999 - 3 StR 215/98 (*'Jorgic'*), reprinted in: 45 *Entscheidungen des Bundesgerichtshofes in Strafsachen* 65; English translation available at http://www.universaljurisdiction.info/index/72648,0. The requirement of domestic legitimizing points of contact was severely criticized by S.R. LÜDER, "Eröffnung der deutschen Gerichtsbarkeit für den Völkermord in Kosovo", *NJW* 2000, 269-270.

[2857] *See* R. RISSING-VAN SAAN, "The German Federal Supreme Court and the Prosecution of International Crimes Committed in the Former Yugoslavia", 3 *J.I.C.J.* 381, 386 (2005).

nexus for the exercise of universal jurisdiction.[2858] Presiding Federal Supreme Court Judge RISSING-VAN SAAN has however pointed out that this requirement was warranted, since the German courts were at the time "tied up in a fast-moving jurisprudence, prepared but not yet ready to develop an internationally respected system of international criminal norms."[2859] By equating (anticipated) presence with the legitimizing point of contact, the CCAIL may have taken into account the doctrine's criticism. As the CCAIL requires no other point of contact with Germany than the mere presence of the offender in Germany, Germany should now in principle more readily establish its jurisdiction over crimes against international humanitarian law. The CCAIL nevertheless counsels against prosecution in the absence of sufficient domestic links, which is a remnant of the previous requirement of legitimizing points of contact.[2860]

872. In the *Tadic* case, the investigative judge identified as legitimizing points of contact the fact that the accused voluntarily resided in Germany for a number of months, had his *Lebensmittelpunkt* in Germany and was arrested in Germany. Although these points of contact may, even taken together, not suffice to establish jurisdiction, there were, in the judge's view, further legal and political considerations, such as the manifold political, military and humanitarian measures taken by the international community in the former Yugoslavia, which not only authorized Germany to establish its jurisdiction over the acts of genocide committed by *Tadic*, but even *obliged* it to do so.[2861] Hence, the "legitimizing point of contact" doctrine not only served to establish permissive universal jurisdiction but also to establish obligatory universal jurisdiction. This is surely a very progressive reading of Article VI of the Genocide Convention, which only provides for territorial and international jurisdiction. Tadic was subsequently indicted by and transferred to the ICTY, where he was convicted for crimes against humanity and war crimes.[2862]

873. In the *Djajic* case, the court found a number of legitimizing points of contact which precluded Germany, in the court's view, from infringing upon the international law principle of non-interference.[2863] In the first place, the prosecution of war criminals would be related with a variety of political, military and humanitarian measures used by the international community, including Germany, to deal with the situation in the former Yugoslavia. Tolerating a war criminal having his permanent residence in Germany to go unpunished would frustrate these international efforts.

[2858] *See, e.g.*, C. HOSS & R.A. MILLER, "German Federal Constitutional Court and Bosnian War Crimes: Liberalizing Germany's Genocide Jurisprudence", 44 *German Yearbook of International Law* 576, 599 (2001).

[2859] *See* R. RISSING-VAN SAAN, "The German Federal Supreme Court and the Prosecution of International Crimes Committed in the Former Yugoslavia", 3 *J.I.C.J.* 381, 387 (2005).

[2860] *Id.*, at 388.

[2861] BGH-Ermittlungsrichter, *Tadic*, 13 February 1994, 1 BGs 100/94, *reprinted in* 5 *NStZ* 1994, at 233.

[2862] Tadic was arrested in Germany following an order of the Federal Supreme Court's investigating judge before the establishment of the ICTY. After Germany acceded to the ICTY Statute in 1995 (BGBl, 1995, I, 485ff), he was transferred to the ICTY. The ICTY indicted Tadic because, in the words of Depute Prosecutor Graham Blewitt, it was "amazed that Germany had no specific evidence on that charge [of genocide]. They were going to attempt to prove it solely on the basis of the testimony of an expert witness. But we thought it would be difficult to establish genocide with respect to Tadic." M. SCHARF, *Balkan Justice*, Durham, NC, Carolina Academia Press, 1997, at 101, quoted in W.A. SCHABAS, "National Courts Finally Begin to Prosecute Genocide, the 'Crime of Crimes'", 1 *J.C.I.J.* 39, 53 (2004).

[2863] *Djajic*, 51 *Neue Juristische Wochenschrift* 392, 395 (1998).

The mere accidental presence of a foreigner in German territory might on the other hand not of itself constitute a legitimizing point of contact. The court also referred to Germany's legitimate interest not to become a safe haven for war criminals. The drafters of the CCAIL took the latter consideration into account in determining that the (anticipated) presence of the presumed offender in Germany would constitute a sufficient nexus. The former consideration, *i.e.* the involvement of Germany in the peace-making or –building process in the territorial State, is no longer relevant for purposes of jurisdiction.

874. Post-*Djajic* cases grounded jurisdiction of German courts on the permanent residence of the presumed offender. In the *Jorgic* case, this legitimizing point of contact was the defendant's permanent residence in Germany from 1969 until 1992, his official registration thereafter in Germany, his German wife and his daughter living in Germany and his arrest within the country after voluntarily stepping onto German territory. Also, the involvement of Germany in the reconstruction of the former Yugoslavia would provide an additional nexus.[2864] In the *Sokolovic* case, the point of contact was the defendant's permanent residence and work in Germany from 1969 until 1989, his house and his several visits to Germany for purposes of pension and labour registration.[2865] In this case, unlike the *Djajic* case, the court held, possibly influenced by the Constitutional Court's judgment in *Jorgic*,[2866] that additional legitimizing points of contact were not required if an international treaty imposed a duty to prosecute on Oermany (the Geneva Conventions for instance), as this precluded the violation of the principle of non-intervention.[2867]

875. While the presence of the offender in Germany might constitute a sufficient nexus with Germany, the presence of the victim in Germany is, according to the *Bundesgerichtshof*, not a legitimizing point of contact.[2868] The latter situation would only be dependent upon accidental circumstances which are not related to the offender or the act. It is, accordingly, no pertinent criterion. Deciding otherwise would, in the Court's view, lead to an unacceptable extension of domestic prosecution, even in cases where the possibility that the crime will be elucidated and adjudged in domestic proceedings is minimal.[2869] The *Bundesgerichtshof* thus dismissed the possibility of jurisdiction based on the sole presence of the victim, *i.e.*, universal jurisdiction *in absentia*. The CCAIL, however, provides now that jurisdiction is possible in case the offender is not present in Germany, as far as his presence may be anticipated. This implies that the prosecutor and the investigative judge can initiate proceedings in the *temporary* absence of the offender.

[2864] BGH, *Jorgic*, 3 StR 215/98, at 397-98.
[2865] BGH, Judgment, 21 February 2001 - 3 StR 372/00 (*'Sokolovic'*), reprinted in: 46 *Entscheidungen des Bundesgerichtshofes in Strafsachen* 65, also available at http://www.universaljurisdiction.info/index/114400. In the *Sokolovic* case, jurisdiction was grounded upon § 6.1 StGB (genocide) and § 6.9 StGB (war crimes punishable under the Fourth Geneva Convention). *See also* the *Kuslic* judgment: BGH, Judgment, 21 February 2001 - 3 StR 244/00 (*'Kuslic'*), reprinted in: 54 *Neue Juristische Wochenzeitschrift* 2732, available at http://www.universaljurisdiction.info/index/114524.
[2866] *See* C. HOSS & R.A. MILLER, "German Federal Constitutional Court and Bosnian War Crimes: Liberalizing Germany's Genocide Jurisprudence", 44 *G.Y.I.L.* 576, 600-601 (2005).
[2867] BGH, 3 StR 372/00, 19.
[2868] BGH, *Beschl. v.* 11.12.1998 – 2 ARs 499/98, *Neue Zeitschrift für Strafrecht* 1999, 236.
[2869] *Id.*

10.2.4. Concluding remarks

876. Whereas in Belgium and Spain, courts and the legislature have restricted the scope of universal jurisdiction, the pendulum has swung the other way in Germany. While German courts traditionally required a significant nexus with Germany, often residence of the presumed offender, before jurisdiction could be established, the recently enacted Code of Crimes against International Law does no longer require the presence of the offender – although prosecutors may be hard-pressed to actually exercise their jurisdictional discretion in such a situation.[2870]

Germany boasts one of the world's most solid records of prosecuting and trying perpetrators of crimes against international humanitarian law under the universality principle. Below the statistical surface however lurks a reality which is not that bright. So far, only Balkan war criminals have been prosecuted, which is probably attributable to the fact that Germany allowed a great number of Balkan refugees to enter its territory, and therefore wished "to counter any perception that German territory is a safe haven for criminals."[2871] As is apparent from the *Djajic* case, the involvement of Germany in the reconstruction of the former Yugoslavia gave additional credence to the assertion of jurisdiction over Balkan war criminals residing in Germany.

In light of the features facilitating the prosecution of Balkan war criminals in Germany, it comes as no surprise that there have been no serious investigations or prosecutions, let alone trials, under the CCAIL, although its jurisdictional provisions are supposedly more liberal than the provisions of the German Criminal Code. As of June 2006, the unit within the Federal Criminal Police Office (*BundesKriminalamt*) which specializes in the investigation and prosecution of international crimes, consisted of exactly one investigator, a sharp reduction compared with the heyday of the specialized unit's activities in the late 1990s.[2872]

10.3. Universal jurisdiction over core crimes against international law in Spain

877. Spain has been among the States most active in exercising universal criminal jurisdiction over core crimes against international law. Where German prosecutorial efforts focused almost exclusively on Balkan war criminals, Spain has committed its prosecutorial resources almost exclusively to the investigation and prosecution of Latin America human rights violators who committed their heinous acts during the

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[2870] HUMAN RIGHTS WATCH, *Universal Jurisdiction in Europe: The State of the Art*, Vol. 18, No. 5(D), June 2006, p. 64, available at http://hrw.org/reports/2006/ij0606/ (pointing out that German officials, interviewed on December 12, 2005, indicated to it "that an investigation is far more likely to start in cases where the suspect is present in Germany, since this would increase the likelihood of a successful investigation").

[2871] *See* C.J.M. SAFFERLING, "Public Prosecutor v. Djajic", 92 *A.J.I.L.* 528, 532 (1998).

[2872] HUMAN RIGHTS WATCH, *Universal Jurisdiction in Europe: The State of the Art*, Vol. 18, No. 5(D), June 2006, pp. 66-67 (noting however that the fact that only a small number of complaints concerning international crimes have been received so far, "is invoked [by German officials] to justify the low number of people working exclusively on international crimes"). *Id.*, at 68 ("In light of the considerable experience German practitioners obtained in the investigation of international crimes, and the fact that a specialized unit has existed in this capacity, the current commitment does not seem to correspond to that once shown on a practical level by German authorities.").

dictatorships of the 1970s and 1980s.[2873] While in Germany, the presence of the perpetrators of the violations on German territory caused the authorities to initiate proceedings, in Spain it was the presence of the victims – who had fled persecution in their home country – that served as the main catalyst for the exercise of universal jurisdiction by Spanish authorities.[2874]

10.3.1. Article 23.4 of the Spanish Organic Law of the Judicial Power

878. Universal criminal jurisdiction is provided for in Article 23.4 of the Spanish Organic Law of the Judicial Power. Pursuant to this article, introduced in 1985, Spanish courts may exercise universal jurisdiction over crimes of genocide[2875] and over any other offence which Spain is obliged to prosecute under an international treaty or convention.[2876] This grant of jurisdiction reflects (the former version of) Article 6 (6.1 and 6.9) of the German *Strafgesetzbuch.* A major procedural difference between Germany and Spain however, is the role of the victim in the criminal procedure. Whereas in Germany the prosecutor has the monopoly of the prosecution, in Spain victims can file a complaint directly with an investigating magistrate, request investigation and become party to the case, even against the will of the prosecutor. Spanish law even provides for a popular action (*acción popular)*, which implies that persons or groups concerned with the public interest have the same procedural rights as direct victims and can, accordingly, also bring a case ('popular accusers').[2877] In

[2873] It may be noted that, since the 1980s, Spanish courts asserted universal jurisdiction over drug traffickers. *See* N. ROHT-ARRIAZA, "Universal Jurisdiction: Steps Forward, Step Back", 17 *L.J.I.L.* 375, 376 (2004). It has also been argued that jurisdictional assertions over ETA members hiding in France in the 1970s foreshadowed the later exercise of universal jurisdiction over core crimes committed in Latin America. *See* M.C. Bassiouni, in G. Pingree & L. Abend, "Spanish Justice", *The Nation*, October 9, 2006.
As Spain was the former colonial power in much of Latin America, where Spanish is also the *lingua franca*, Latin America and Spain may form a cultural community – which may have encouraged prosecutors to investigate gross human rights violations in Latin American States. The Supreme Court minority judges in the Guatemala Genocide case for instance considered the adjudication of gross human rights violations committed in Guatemala by Spanish courts to be based on the "criterion of cultural community" between Spain and Guatemala (42 ILM 711), apparently fearing that exercise of universal jurisdiction without any factor connecting the crimes with Spain would run afoul of international law. Introducing the notion of cultural and historic ties is a noteworthy attempt to limit the scope of universal jurisdiction. Yet it is probably politically too charged and lacks the necessary clarity to employ in a legal context. It would imply that courts of former European colonial powers would be competent to try crimes committed in their former overseas colonies. Such a neo-colonialist approach is hardly in keeping with the established principles of self-determination and sovereign equality of States. *See also* S. RATNER, "Belgium's War Crimes Statute: A Postmortem", 97 *A.J.I.L.* 894-95 (2003).
[2874] Some Latin American cases, notably the Argentine and Chilean cases, moved forward more smoothly in Spanish courts than others such as the Guatemalan and the Peruvian case. ROHT-ARRIAZA has attributed this to a number of political factors. Unlike Chilean General Pinochet, Guatemalan General Rios Montt never became the person the impunity movement loved to hate. The persecution of the Mayan Indians in Guatemala was also less known than the persecution of Argentine and Chilean opposition figures, many of whom were of European descent and shared European left-wing ideology. Guatemalans were less integrated into Spanish society and had less access to the powers that be in Spain than their counterparts from Argentina and Chile. *See* N. ROHT-ARRIAZA, *The Pinochet Effect*, Philadelphia, PA, University of Pennsylvania Press, 2004, at 173.
[2875] Article 23.4 (a) of the Organic Law of the Judicial Power.
[2876] *Id.*, Article 23.4 (g).
[2877] *See* on the popular action Article 125 of the Spanish Constitution: "Citizens may engage in popular action and participate in the administration of justice through the institution of the jury, in the manner

practice, investigations under the universality principle are almost invariably ignited by a popular action and not by a prosecutor acting *proprio motu*.[2878] The non-governmental organizations which ordinarily filed the complaint have also provided most of the evidence, thus greatly reducing the workload of the police.[2879]

Article 23.4 of the Organic Law does not require the presence of the offender, as was also pointed out by the Constitutional Court in the Guatemala Genocide case, discussed later in this section. *Trials in absentia* are however not allowed in Spain,[2880] so that only when the accused voluntarily enters Spanish territory (which was the case in the *Scilingo* case) or is extradited to Spain (which was the case in the *Cavallo* case) a trial might go forward.

10.3.2. Case-law

879. Quite a number of complaints alleging core crimes have been filed under Article 23.4 of the Spanish Organic Law. Complaints filed against sitting Head of State and Government were swiftly dismissed on grounds of international immunity *ratione personae*.[2881] Most complaints were however filed against officials who did not enjoy functional immunity. The seminal case against General Pinochet has received most attention, and his even given rise to what has been dubbed "the Pinochet effect",[2882] the expansion of national prosecutions of human rights violations committed abroad. Yet from a conceptual perspective, the Guatemala Genocide case, heard by the Spanish Supreme Court (2003) and the Constitutional Court (2005), is undoubtedly the more interesting one. The better part of this section will therefore be devoted to an analysis of this case. In spite of the flurry of prosecutorial and judicial activity relating to the application of Article 23.4, almost no cases have reached the trial phase. Only in 2005 was a first accused, Adolfo Scilingo, an Argentine naval officer, sentenced (to 640 years of imprisonment).

10.3.2.a. Pinochet

880. The most famous Spanish accusation under the universality principle is the accusation filed against General Augusto Pinochet, former president of Chile, on July 1, 1996.[2883] After investigation, the Spanish investigation judge Garzon issued an

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and with respect to those criminal trials as may be determined by law, as well as in customary and traditional courts".

[2878] *See* HUMAN RIGHTS WATCH, *Universal Jurisdiction in Europe: The State of the Art*, Vol. 18, No. 5(D), June 2006, p. 88, available at http://hrw.org/reports/2006/ij0606/. Initially, prosecutors often even opposed investigations initiated on the basis of a popular action. *Id.*, at 89.

[2879] *Id.*, at 88 (drawing on an interview with a Spanish official).

[2880] Article 834 *et seq.* Spanish Code of Criminal Procedure.

[2881] Complaints were filed amongst others against Cuban President Fidel Castro, Moroccan King Hassan II and President Theodoro Nguema of Equatorial Guinea and President Hugo Chavez of Venezuela. *See* N. ROHT-ARRIAZA, *The Pinochet Effect*, Philadelphia, PA, University of Pennsylvania Press, 2004, 170; A. SANCHEZ LEGIDO, "Spanish Practice in the Area of Universal Jurisdiction", 8 *Spanish Yb. Int'l L.* 17, 42-46 (2001-02).

[2882] *See* N. ROHT-ARRIAZA, The *Pinochet Effect*, Philadelphia, PA, University of Pennsylvania Press, 2005, xiii + 256 p.

[2883] Accusation filed in Spain against General Pinochet and others for genocide and other crimes, 1 July 1996 (www.derechos.org/nizkor/chile/juicio). The original complaints were filed by seven individuals possessing dual Spanish-Chilean citizenship. Later, the investigation was broadened to include non-Spanish victims as well. Another early accusation concerned human rights violations committed by

arrest warrant against Pinochet, charging him with crimes of genocide, terrorism and torture. On November 5, 1998, the National Court Criminal Division upheld the exercise of universal jurisdiction in the case.[2884] The Spanish court refuted the objection relating to the retroactive application of the Organic Law – which became effective only in 1985, whereas the charges dated back to 1973 – on the ground that the law "is not a substantive provision of criminal law" as it "does not define or criminalize any act or omission." The court went on to state that the law's effect "is limited to proclaiming Spain's jurisdiction for trying offenses defined and punished in other laws," and that the "procedural rule in question applies no unfavorable sanction, nor does it restrict individual rights."[2885] In later cases, Spanish courts have not cast doubt on the legality of exercising universal jurisdiction over acts that were not yet subject to universal jurisdiction in Spain at the time when they were committed. A request for the extradition of Pinochet was filed with the British government in late 1998, when Pinochet was receiving medical treatment in the United Kingdom. The case came before the UK House of Lords, which held in a much-debated opinion that Pinochet could be extradited for acts of torture committed after 1988, rejecting a defence of immunity *ratione materiae*.[2886] Pinochet was eventually not extradited on medical grounds, and returned safely to Chile, where he became mired in domestic legal proceedings.

10.3.2.b. Guatemala Genocide

881. An analysis of universal jurisdiction in Spain could not do without the Guatemala Genocide case, initiated in 1999. In this case, conceptual questions as to the legality and reach of universal jurisdiction were clarified by the Spanish Supreme Court in 2003 and the Constitutional Court – which overruled the Supreme Court – in 2005. The upshot of the Guatemala Genocide case is that, while the Supreme Court appeared to have relegated universal jurisdiction to obscurity,[2887] there are now almost no limits on the exercise of universal jurisdiction, even *in absentia*, over core crimes against international humanitarian law.

The Guatemala genocide proceedings were instituted in 1999, after 19 complainants, including Guatemalan 1992 Nobel Prize Laureate Rigoberta Menchù Tum, family members of people killed in Guatemala, Spanish labor unions and solidarity groups,

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members of the Argentine junta (1976-1983). *See* Accusation filed by the Spanish Union of Progressive Public Prosecutors giving rise to hearings commencing on 28 March 1996 (www.derechos.org/nizkor/arg/espana).

[2884] Order of the Criminal Chamber of the Spanish Audencia Nacional affirming Spain's Jurisdiction to Try Crimes of Genocide and Terrorism Committed During the Chilean Dictatorship, November 5, 1998 (Appeal No. 173/98, Criminal Investigation No. 1/98), available at http://www.derechos.org/nizkor/chile/juicio/audi.html, translated in R. BRODY & M. RATNER, *The Pinochet Papers: the Case of Augusto Pinochet in Spain and Britain*, The Hague, Kluwer Law International, 2000, pp. 95 *et seq.*

[2885] *Id.*, at 99.

[2886] U.K. House of Lords, *Regina v. Bartle and the Commissioner of Police for the Metropolis*, Ex parte *Pinochet*, 37 *I.L.M.* 1302 (1998); U.K. High Court of Justice, Queen's Bench Division: *In Re Augusto Pinochet Ugarte*, 38 ILM 70 (1999); United Kingdom House of Lords: *In re Pinochet*, 38 *I.L.M.* 432 (1999); U.K. Bow Street Magistrates' Court: *The Kingdom of Spain v. Augusto Pinochet Ugarte*, 39 *I.L.M.* 135 (2000).

[2887] *See, e.g.*, A. SANCHEZ LEGIDO, "Spanish Practice in the Area of Universal Jurisdiction", 8 *Spanish Yb. Int'l L.* 17, 31 (2001-02) (stating that "the new Supreme Court doctrine implies an extraordinary restriction on the universal jurisdiction of Spanish courts").

filed a complaint against several high-ranking Guatemalan officials, including former President General Efrain Rios Montt, for crimes against international law committed against the Guatemalan population and against Spanish and other foreign nationals during the Guatemalan civil war in the 1980s. The complaint charged the Guatemalan officials with genocide, terrorism and torture.[2888]

882. GUATEMALA GENOCIDE: INVESTIGATING COURT – On 27 March 2000, the Spanish Investigating Court decided to hear the case since the Guatemalan courts had failed to do so: "In the absence of the honourable and effective exercise jurisdiction, it must be replaced by [territorial] courts – such as Spain's – that uphold the universal prosecution of crimes against human rights [...] There is no reason to presume that the petition for justice before the Spanish courts was made with caprice or frivolity... Despite the big words, the reticence of states in the issues under consideration forces the victims of crimes against humanity, their heirs, their families and their legal representatives to bear a costly international legal pilgrimage due to the passivity - if not the complicity - of the territorial judges who should assume these cases in the first place."[2889]

883. GUATEMALA GENOCIDE: NATIONAL COURT – On appeal of the public prosecutor however,[2890] on 14 December 2000, the Spanish National Court, while recognizing that Article VI of the Genocide Convention did not prevent States from exercising universal jurisdiction over genocide, dismissed the case on the basis of the theory of subsidiarity, pursuant to which bystander States only exercise universal jurisdiction in the event that courts with a stronger nexus to the case are unwilling or unable to hear the case.[2891] The Court stated that the principle of subsidiarity is part of *jus cogens*, is crystallized in Article VI of the Genocide Convention, and more recently in Article 17 of the Rome Statute of the ICC.[2892] Applying it to the case, and apparently believing that the Investigating Court had not conducted a proper analysis, it held that the plaintiffs did not demonstrate Guatemalan authorities' present unwillingness to prosecute, "pressure from official or de facto powers that create a climate of intimidation or fear making it impossible to carry out the judicial function with the serenity and impartiality required",[2893] nor the existence of a legal

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[2888] Presentation of complaint, No. 331/99, before Juzgado Central de Instruccion no. 1 de la Audiencia Nacional, December 2, 1999.

[2889] Central Trial Court 1, ruling of 27 March 2000, available at www.derechos.org/nizkor/guatemala/doc/autojuz.html). As translated by N. ROHT-ARRIAZA, "Universal Jurisdiction: Steps Forward, Step Back", 17 *L.J.I.L.*, 375, 379 (2004); N. ROHT-ARRIAZA, *The Pinochet Effect*, Philadelphia, PA, University of Pennsylvania Press, 2004, at 172.

[2890] Diligencias Previas No. 331/99, May 4, 2000.

[2891] Ruling delivered by the Spanish National Criminal Court calling for a stay of proceedings with regard to the Guatemalan case for genocide of 14 December 2000, available at www.derechos.org/nizkor/guatemala/doc/autoan.html

[2892] *Id* .(« que nos impone el art. 23.4 a) de la LOPJ, con los criterior de atribución jurisdiccional del art. 6 del Convenio, que también es un mandato que tenemos por cuanto forma parte de nuestra legislación interna (art. 96 de la Constitución Española y art. 1.5 del C. Civil), y así mismo, el principio general de subsidiaridad, que entendemos forma parte del "ius cogens" internacional y que ha cristalizado en el propio art. 6 del mentado Convenio, y más recientemente en el art. 17 y ss. Del Estatuto del Tribunal Penal Internacional adoptado el 17.07.1998 y firmado por España el 18.07.1998 y firmado por España el 18.07.1998, y con respecto al que se ha autorizado su ratificación por las Cortes Generales por Ley Orgánica 6/2000 (B.O.E. 05.12.2000) »).

[2893] As translated by N. ROHT-ARRIAZA, *The Pinochet Effect*, Philadelphia, PA, University of Pennsylvania Press, 2004, at 175.

impediment to the prosecution (the Guatemalan National Reconciliation Law excluded gross human rights violations[2894]).[2895]

884. GUATEMALA GENOCIDE: SUPREME COURT – As the National Court dismissed the case under the subsidiarity principle, Menchù Tum and other human rights organizations appealed.[2896] On 25 February 2003, the Spanish Supreme Court decided the appeal.[2897] Its judgment is remarkable in that it applied the law more restrictively than even the National Court had done, on appeal of human rights groups precisely favouring a more liberal interpretation:[2898] it quashed the National Court's theory of subsidiarity (which could yield the assumption of universal jurisdiction in case the State with the stronger nexus is unable or unwilling to genuinely prosecute and investigate) and, instead of allowing unfettered universal jurisdiction (only subject to the requirement that the defendant not be acquitted, pardoned or convicted abroad) – which would be a logical outcome after the Court had disposed of the subsidiarity principle – it seemed to reject the possibility of universal jurisdiction, at least universal jurisdiction deriving from customary international law. Only when a link between the crime and the national interest, such as the Spanish nationality of the victims could be found, would the exercise of jurisdiction be authorized.

885. It is interesting to reconstruct the reasoning of the Supreme Court, because it is almost entirely based on international law, or at least the Court's understanding of international law – which we do not share. In section 4.6, it has been argued that international law does not prioritize the grounds of jurisdiction. The Supreme Court however held that, as the Genocide Convention recognized the possibility that more than one national jurisdiction may intervene, given the various criteria of jurisdiction (including universal jurisdiction), priority should be given to the courts of one State, if normative competency conflicts were not to arise: logically, this would be the State of the *locus delicti*. This priority also underpins the theory of subsidiarity, pursuant to which only when a legislative impediment or obstacle prevented the prosecution of

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[2894] Ley de Reconciliacion Nacional, Decree 145-96, December 18, 1996. The report of the Historical Clarification Commission was issued in 1999. It has been pointed out that, if the Audiencia had opted for 1986 (the end of military rule in Guatemala) or 1996 (the beginning of the peace process) as starting date by which to measure Guatemala's inactivity, it could have reached the opposite conclusion. *See* N. ROHT-ARRIAZA, *The Pinochet Effect*, Philadelphia, PA, University of Pennsylvania Press, 2004, at 175.

[2895] *Guatemala Genocide Case*, Audiencia Nacional Decision of 13 December 2000, available at http://www.icrc.org/ihl-nat.nsf/46707c419d6bdfa24125673e00508145/e020bc9287127e7fc1256bc00033280e?OpenDocument

[2896] This was a risky option in that the Supreme Court was generally considered to be even more conservative than the *Audiencia Nacional*. Some complainants wanted to document the inactivity of the Guatemalan courts better in order to present a stronger case to the investigating magistrate. The others, favoring an appeal, eventually got the upper hand though. *See* N. ROHT-ARRIAZA, *The Pinochet Effect*, Philadelphia, PA, University of Pennsylvania Press, 2004, at 175.

[2897] Spanish Supreme Court, *Menchù Tum and others*, 25 February 2003, 42 ILM 686 (2003). *See for* an overview of the Guatemalan Genocide proceedings: L. BENAVIDES, "Introductory Note to the Supreme Court of Spain: Judgment on the Guatemalan Genocide Case", 42 ILM 683 (2003).

[2898] The Supreme Court held that "the decision of the Court is non conditioned by the submissions of the appealing parties [...] The extension of jurisdiction depends only on the law, and once the issue is presented, the Court must apply its provisions, without conceding jurisdiction to the parties which it is lacking and without denying jurisdiction when the law provides for it." (42 ILM 683, 695) ROHT-ARRIAZA points out that the complainants were aware of the possibly more conservative stance of the Supreme Court, but that, nonetheless, they were anxious to put the law forward. *See* N. ROHT-ARRIAZA, "Universal Jurisdiction: Steps Forward, Step Back", 17 *Leiden J.I.L.*, 375, at 380 (2004).

the acts alleged in the territorial State are courts of other States authorized to prosecute. Like the National Court, the Supreme Court did not find any such impediment or obstacle. Surprisingly however, after first applying the theory of subsidiarity to the case, it subsequently stated that the Genocide Convention did not recognize it, because Article VIII of the Genocide Convention determines a UN procedure to be followed by the Contracting Parties in case of genocide.[2899] Apparently, under the rule of *expressio unus est exclusio alterius*, if recourse for the competent organs for the UN, aside from recourse for the courts of the territorial State or an international criminal tribunal,[2900] is provided for by the Genocide Convention, bystander States would not be competent to initiate proceedings on a subsidiary basis. Moreover, "to determine when to intervene subsidiarily for the prosecution of certain acts, basing such decision on either real or apparent inactivity on the part of the courts of another sovereign State implies judgment by one sovereign State on the judicial capacity of similar judicial bodies in another sovereign State."[2901] The Supreme Court pointed in particular to Article 97 of the Spanish Constitution, by virtue of which the Government, and not the judiciary, directs foreign affairs (*i.e.*, in U.S. terms, the political question argument). Clearly, a rejection of the principle of subsidiarity on the ground that the Genocide Convention nor the Spanish Constitution allow the courts of bystander States to exercise jurisdiction by default, more or less amounts to a rejection of the principle of universality, at least as far as genocide is concerned.

Nonetheless, the Court admitted that, while the Genocide Convention may not establish universal jurisdiction, it did not exclude it either.[2902] Ordinarily, a jurisdictional assertion – when it is not explicitly conventionally provided for – derives its legality from customary international law. Specifically, a widespread State practice of active assertions or acquiescence in another State's assertions may bear testimony that to fact that such assertions do not infringe upon such international law principles as the principle of non-intervention and sovereign equality of States. It is in this vein that the Supreme Court's holding should be understood that "one should analyse, in particular, whether the principle of universal jurisdiction can be applied without taking into consideration other principles of public international law."[2903]

The Court however failed to adequately trace indications of State practice pointing to international law authorization of universal jurisdiction. It purportedly found evidence in the traditional principles of extraterritorial criminal jurisdiction – the protective principle, and the active and passive personality principle – of an international law rule pursuant to which the exercise of jurisdiction is only justified if it is necessary to provide protection to national interests.[2904] Admittedly, this seems to comport with the postulate that a State may not exercise jurisdiction when it has no interest in doing so, a postulate which was defended in part 2.2. It is however to neglect the fact that all States may have an interest in the repression of heinous crimes, wherever they are committed, as such crimes are violations of *erga omnes* obligations and of norms of

[2899] Article VIII of the Genocide Convention provides: "Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the acts enumerated in Article III."
[2900] Article VI of the Genocide Convention.
[2901] 42 ILM 696.
[2902] *Id.*, at 695 and 697.
[2903] *Id.*, at 697.
[2904] *Id.*

jus cogens, i.e., the very rationale of universal jurisdiction, which is solely based on the heinous nature of the crime over which jurisdiction obtains, and not on a narrowly defined national interest.

The Court conceded that the exercise of universal jurisdiction may be justified "when such jurisdiction derives from a source recognised by international law, especially when such source has been agreed upon by State Parties to a treaty,"[2905] but it seemed to believe that there was no permissive rule on the matter deriving from customary international law, which it confusingly termed "universal jurisdiction derived from internal criminal law". If customary international law is taken seriously, the purported rule that "it has been understood that the exercise of jurisdiction cannot, as has already been said, contravene other principles of public international law nor operate when no point of connection exists between national interests,"[2906] should be borne out in State practice and *opinio juris*. The Supreme Court conspicuously failed to identify relevant State practice which opposed the assumption of permissive universal jurisdiction over core crimes. It cited older German practice in the field (*Tadic*),[2907] but forgot to state that Germany, after the enactment of the Code of Crimes against International Law (2002), boasts probably the world's most progressive universal jurisdiction legislation, pursuant to which a point of connection between the crime and the national interest is not required, and universal jurisdiction in absentia is allowed. More unforgivingly, it cited the *Sharon* judgment (2003) by the Belgian Court of Cassation as evidence of State practice against a norm that would authorize States to exercise jurisdiction absent a connection with the national interest. In Sharon, the Belgian Court of Cassation precisely upheld universal jurisdiction *in absentia*, while at the same time holding that a sitting head of government is entitled to functional immunity (an issue that did not arise in the Guatemala Genocide litigation). Far from supporting the Spanish Supreme Court's argument, the cases the Court cited actually undermined it.

886. As it happened, four Spanish priests either were killed or disappeared in Guatemala, and a number of Spanish citizens were allegedly tortured in a massacre at the Spanish embassy in Guatemala in 1980. Since the Supreme Court had approved of the exercise of passive personality jurisdiction on the ground that it defends the national interest, and since the UN Torture Convention explicitly authorized (but did not oblige) States to exercise passive personality jurisdiction over torture offences, the Court ruled that the torture claims filed by the relatives of these Spanish nationals could go forward, even if the presumed offenders could not be found in Spain, stating that "[i]n addition to the obligation to prosecute the presumed offender once found in the State and when the State does not surrender him according to an extradition request, other criteria of jurisdiction, among them, that of passive personality, may be found [...]."[2908] The apparent reference to Article 5(2) of the UN Torture Convention

[2905] *Id.*, at 697-98.
[2906] *Id.*, at 698.
[2907] German Supreme Court, *Tadic*, BGHST 27, 30;34, 340; ruling of February 2, 1994 [1 Bgs 100/93].
[2908] 42 ILM 699. The Supreme Court restated this position in the judgment in the case of Chilean General Hernán Julio Brady Roche, when it upheld jurisdiction over claims for torture of a Spanish national committed in Chile. *See* Supreme Court of Spain, Judgment No. 319/2004 (March 8, 2004), Spanish text available at http://www.derechos.org/nizkor/chile/juicio/brady.html. *See also* N. ROHT-ARRIAZA, *The Pinochet Effect*, Philadelphia, PA, University of Pennsylvania Press, 2004, at 178, n 9 (stating that under Article 1 (6) of the Spanish Civil Code, court decisions complement doctrine when the Supreme Court has established them "repeatedly").

may soothe concerns that the Court may not even have supported the exercise of universal jurisdiction over torturers who could be found in Spanish territory.[2909] Alarmingly however, the Court's list of international treaties relating to the prosecution of crimes subject to the protection of the international community does not feature the Geneva Conventions.

887. Under the Supreme Court's interpretation of universal jurisdiction, only one core crime against international law may possibly be subject to universal jurisdiction: torture. This far-reaching restriction of universal jurisdiction was actually decided by the narrowest majority (8-7), with the minority judges issuing a compelling joint dissenting opinion disagreeing with the majority decision on the ground that its application of the principle of universal jurisdiction was overly restrictive.[2910]

[2909] Because the Supreme Court only referring to the UN Torture Convention's universal jurisdiction in passing, doubts may linger as to its support for universal jurisdiction over torture. *See, e.g.*, N. ROHT-ARRIAZA, *The Pinochet Effect*, Philadelphia, PA, University of Pennsylvania Press, 2004, 176 (pointing out that the Spanish courts remain open for cases involving victims of Spanish ancestry *and perhaps for refugees residing in Spain*).

[2910] - The minority ruled that the Genocide Convention does not establish a rule of priority for the locus delicti (42 ILM 683, 704), yet at the same time it believed that there is a rule of priority for the territorial State which could only be cast aside by application of the "principle of necessity of jurisdictional intervention" (by the extraterritorial State) (*Id.*, at 705). The minority opined that in the case, jurisdictional intervention by the Spanish courts was necessary since "the courts in Guatemala have not been able to effectively exercise jurisdiction with regard to genocide of the Mayan population" (*Id.*, at 705).

- According to the minority, Article I of the Genocide Convention ("The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.") authorizes States to provide for universal jurisdiction. The general wording of Article I may however not suffice in itself to establish universal jurisdiction, as it would make the ensuing jurisdictional provisions superfluous. The minority therefore interpreted Article I of the Genocide Convention in light of later customary international law. The minority found both the necessary *opinio juris* and the State practice so as to establish a norm of regional customary international law, in this case "a principle of concurrent jurisdiction over crimes of international law". *Id.*, at 704 ("Assuming that acts of genocide have occurred under the protection of the power of a State in which they have been committed, and in which territorial jurisdiction finds itself incapable of functioning, extraterritorial jurisdiction constitutes the only means of preventing impunity."). The minority judges referred in particular to practice in Spain, Germany, Belgium, Italy, Portugal and France (*Id.*, at 704), concluding that "[i]t is clear that those surrounding us in the European legal community recognise the notion of universal jurisdiction as it is incorporated in Article 23.4 of the Judicial Power Organisation Act as an established norm of customary international law for crimes of genocide and other crimes against humanity." (*Id.*, at 710).

- The minority rejected the majority's *reformatio in peius* construction as this prejudices the position of the complainants prior to the appeal. *Id.*, at 706.

- The minority took the view that the majority interpreted Article 23.4 of the Judicial Power Organization Act *contra legem*, as "[t]he only limitation that the law establishes for the exercise of said extraterritorial jurisdiction is that the offender must not have been acquitted, pardoned or convicted in a foreign territory." *Id.*, at 707. The minority referred to a doctrinal consensus that Article 23.4 included the principle of universal jurisdiction. Under this principle, jurisdiction is attributed exclusively in consideration of the nature of the crime, "without taking into account either the place where the crime was committed, nor the nationality of the victim or the offender." *Id.* With respect to genocide, the passive personality principle would make extraterritorial prosecution of the crime practically meaningless, as genocide is a crime under Spanish law only when certain conduct has occurred in respect of an ethnic group with the intent to destroy. *Id.* As the genocide was directed at the ethnic Mayan population, Spanish nationals do not correspond to that group. Also, according to the minority, the majority applied a principle of national interest that has nothing to do with the consideration of the crime as a crime against the international community. *Id.*, at 708.

Fortunately for the victims, a special remedy existed under Spanish law which allowed an appeal of a Supreme Court's judgment to the Spanish Constitutional Court in the interest of the law if constitutional rights were infringed (the *amparo* procedure). It was in this case alleged that Article 24 of the Spanish Constitution, which mirrors Article 6 of the European Convention of Human Rights, and guarantees the right to an effective legal remedy, was violated. The Constitutional Court accepted the case and handed down its judgment on September 26, 2005.[2911] Drawing on the arguments provided by the Supreme Court's minority judges, it vacated the Supreme Court's decision in its entirety, and, dismissing the principle of subsidiarity in favour of wholesale assumption of universal jurisdiction, it showed itself even more 'progressive' than the National Court. Yet before discussing the Constitutional Court's judgment in the Guatemala Genocide case, it is useful to analyze the judgment rendered by the Supreme Court in the Peruvian Genocide case, a judgment handed down by the Court shortly after its judgment in Guatemala Genocide.

888. PERUVIAN GENOCIDE CASE – In the Peruvian Genocide judgment of May 20, 2003, a less hard-boiled Supreme Court seemed to retreat somewhat from its position in the Guatemala Genocide judgment.[2912] It took a more nuanced approach toward universal jurisdiction, which was more in line with the National Court's position. As noted *supra*, the National Court supported the exercise of universal jurisdiction on a subsidiary basis, namely if the territorial or national State was unable or unwilling to investigate the case. In Peruvian Genocide, the Supreme Court recognized the legality of exercising universal jurisdiction over genocide without elaborating on required points of contact or national interests. Yet, coining a "principle of necessity of jurisdictional intervention", it believed that universal jurisdiction should only be exercised in case of jurisdictional necessity in view of "the nature and the finality of universal jurisdiction." The principle of necessity of jurisdictional intervention was actually already advanced by the minority judges in Guatemala Genocide, which appeared to believe that only jurisdictional necessity, and not subsidiarity, could guarantee the reasonableness of assertions of universal jurisdiction. In 2004, it was espoused by the American Bar Association in its report on universal jurisdiction, discussed in part 10.3.3 ("principle of necessity"), although it is unclear whether the ABA consciously drew on Spanish case-law or whether it advocated this principle as a matter of common sense.

889. To what extent the principle of necessity of jurisdictional intervention differs from the principle of subsidiarity is not wholly clear. The term itself seems to imply

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- The minority also took issue within the requirement set forth by the majority that the offender be located in Spanish territory, arguing that jurisdiction *in absentia* is also authorized under Spanish and international law. *Id.*, at 708.
- As a subsidiary argument, the minority judges put forward that, if one requires a nexus with Spain so as to exercise jurisdiction, there would precisely be such a nexus in the Guatemalan genocide case. They identified a "criterion of cultural community" between Spain and Guatemala, and referred to the defense of the Mayan population by Spanish nationals and to an attack on the Spanish Embassy in Guatemala, so as to find this nexus. *Id.*, at 711.

[2911] Constitutional Court Spain (Second Chamber), Guatemala Genocide case, judgment No. STC 237/2005, available at http://www.tribunalconstitucional.es/stc2005/stc2005-237.htm. Unfortunately, no English translation of this judgment appears to be available. A brief English summary of, and comment on the judgment may be found in N. ROHT-ARRIAZA, comment, Spanish Constitutional Court, Guatemala Genocide case, 100 *A.J.I.L.* 207 (2006).

[2912] 42 ILM 1200 (2003).

that the threshold for assumption of jurisdiction is higher than under the subsidiarity principle. The Supreme Court clarified the principle somewhat by stating that the criterion for the application of the principle of necessity of jurisdictional intervention was the absence of an effective prosecution by the territorial State, and that applying it would not imply a judgment as to the reasons or the political, social or material conditions of impunity. *In casu*, since the Peruvian authorities had initiated investigations against several defendants, some of whom were already in jail, while others had fled the country, it was held that Peru was effectively prosecuting the case, thereby precluding Spain from exercising universal jurisdiction, on the basis of the principle of necessity of jurisdictional intervention. It appears that, unlike under the principle of subsidiarity, or the Rome Statute's principle of complementarity, the principle of necessity of jurisdictional intervention principle may not require a genuine quality judgment on the foreign State's effective prosecution. As long as the foreign State is somehow dealing with the case, albeit inefficiently, bystander States should defer to it and refrain from exercising universal jurisdiction. ROHT-ARRIAZA, who considered the principle of necessity of jurisdictional intervention a more workable bright-line rule in that only factual non-prosecution should be assessed,[2913] wondered in this context "at what point the passage of time will lead to a finding that no effective jurisdiction exists."[2914] Regrettably, the criterion of 'effective jurisdiction' may serve to decline jurisdiction even if the territorial or national State stages a show trial and is unwilling to genuinely investigate and prosecute the case.

890. Taking Guatemala Genocide and Peruvian Genocide together, Spanish courts could thus use two alternative arguments to decline jurisdiction over core crimes against international law: they could rule either that a point of contact with Spain is lacking (the Guatemala Genocide argument), or that the territorial State is 'effectively' prosecuting the case (the Peruvian Genocide argument). Whether Spanish courts should cumulatively apply both analyses (ascertaining the effective prosecution by the territorial or national State after finding that the case had a nexus with Spain, such as the Spanish nationality of the victim or the presence of the foreign offender on Spanish territory) was unclear. The least one could say, thus, is that uncertainty abounded after Guatemala and Peruvian Genocide.[2915] It was hoped that the Constitutional Court hearing the Guatemala Genocide case could eventually clarify the whole issue of universal jurisdiction under Spanish law.

891. GUATEMALA GENOCIDE CASE: CONSTITUTIONAL COURT – While in Peruvian Genocide, the Supreme Court embraced the Guatemala Genocide Supreme Court minority's interpretation of subsidiarity ("jurisdictional necessity"), the Constitutional Court embraced the remainder of the minority's arguments in the Guatemala Genocide appeal from the Supreme Court, ruling that the Supreme Court majority in Guatemala Genocide took an unwarranted narrow and even *contra legem* approach to

[2913] *See* N. ROHT-ARRIAZA, *The Pinochet Effect*, Philadelphia, PA, University of Pennsylvania Press, 2004, 194.
[2914] *See* N. ROHT-ARRIAZA, "Universal Jurisdiction: Steps Forward, Step Back", 17 *Leiden J.I.L.*, 375, 383 (2004).
[2915] In light of the prevailing uncertainty as to universal jurisdiction in Spain, Judge Garzón was careful to base his indictment of Osama bin Laden and 34 others on charges of terrorist activities not on the universality principle but on the territorial principle, asserting that some preparatory acts of the September 11, 2001 attacks took place in Spain. See N. ROHT-ARRIAZA, "Universal Jurisdiction: Steps Forward, Step Back", 17 *Leiden J.I.L.* 375, 381 (2004).

universal jurisdiction.[2916] It held that Article VI of the Convention, which provides for obligatory jurisdiction over crimes of genocide for the territorial State (aside from jurisdiction for an international criminal tribunal), would only set forth a minimum requirement for States.[2917] Drawing on Article I of the Genocide Convention, it believed the principle of universal prosecution and avoidance of impunity for crimes against international law to form part of customary international law,[2918] law which would not require States to identify points of contact ("*vinculos de connexion*") like the presence of the presumed offender in Spanish territory, the Spanish nationality of the victims, or any other point of contact with national interests, so as to justify their jurisdictional assertions over core crimes.[2919] Deciding otherwise would in the Court's view amount to negating the very nature of core crimes and their universal prosecution by the international community.[2920] Accordingly, Spanish courts, in accordance with the plain text of Article 23.4 of the Spanish Organic Law, would be entitled to exercise universal jurisdiction over such crimes. The Constitutional Court even held such exercise to be warranted *in absentia*. It conceded that in the trial phase, the presence of the presumed offender in Spain was required, but that the law did not prohibit the initiation of investigations in his or her absence.[2921]

892. The reach of Spanish universal jurisdiction legislation was further broadened when the Constitutional Court rejected the principle of subsidiarity as espoused by the National Court since the *Pinochet* litigation,[2922] a principle which was later advocated and upheld in an even stricter form as the principle of necessity of jurisdictional intervention by the Supreme Court minority in Guatemala Genocide and the Supreme Court majority in Peruvian Genocide. The Constitutional Court, in line with what this study held in section 4.6, did not believe that international law prioritized the grounds

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[2916] Constitutional Court Spain (Second Chamber), Guatemala Genocide case, judgment No. STC 237/2005, available at http://www.tribunalconstitucional.es/stc2005/stc2005-237.htm, legal consideration II.9, *in fine* (holding that the Supreme Court's conception of universal jurisdiction leads to "*una practica abrogacion* de facto *del art. 23.4 LOPJ*").

[2917] *Id.*, at II.5.

[2918] *Id.*

[2919] *Id.*, at II.6. The Constitutional Court pointed out, as we did, that the Supreme Court's citations of foreign State practice, which would purportedly strengthen its argument that a legitimating nexus of the case with Spain was necessary, actually proved the contrary. It noted that States such as Belgium, Denmark, Sweden, Italy, and Germany, all provided, more or less, for universal criminal jurisdiction over core crimes against international law.

[2920] *Id.*, at II.9 ("*La persecucion internacional y transfronteriza que pretende imponer el principio de justicia universal se basa exclusivamente en las particular caracteristicas de los delitos sometidos a ella, cuya lesividad (paradigmaticamente en el case del genocidio) transcienda la de las concretas victims y alcanza a la Comunidad Internacional en su conjunto. Consecuentemente su persecucion y sancion constituyen, no solo un compromiso, sino tambien un interes compartido de todos les Estados, cuya legitimidad, en consecuencia, no depende de ulteriores intereses particulares de cada uno de ellos. »*).

[2921] *Id.*, at II.7, *in fine*.

[2922] Order of the Criminal Chamber of the Spanish Audencia Nacional affirming Spain's Jurisdiction to Try Crimes of Genocide and Terrorism Committed During the Chilean Dictatorship, November 5, 1998 (Appeal No. 173/98, Criminal Investigation No. 1/98), available at http://www.derechos.org/nizkor/chile/juicio/audi.html, translated in R. BRODY & M. RATNER, *The Pinochet Papers: the Case of Augusto Pinochet in Spain and Britain*, The Hague, Kluwer Law International, 2000, pp. 95 *et seq*. *See also* Constitutional Court, *Guatemala Genocide*, at II.4 (*Pinochet* National Court holding that "*la jurisdiccion de un Estado deberia abstenerse de ejercer jurisdiccion sobre hechos, constitutivos de genocide, que estuviesen siendo enjuiciados por los tribunals del pais en que ocurrieron o por un tribunal internacional*").

of jurisdiction, and that there would thus be a rule that would give jurisdictional priority to the territorial State under some sort of subsidiary principle. It admitted that procedural and political-criminal reasonableness might point to a priority of the *locus delicti*, yet it did not consider that priority to be a rule of international law.[2923] This is not to say that the Constitutional Court advocated the assumption of universal jurisdiction, regardless of whether the territorial or national State initiated investigations and prosecutions. It probably only intended to eviscerate the narrow interpretation given over the years to the principle of subsidiarity by Spanish courts, an interpretation pursuant to which Spanish courts would only hear a case in the event of legal impediments or prolonged judicial inactivity in the territorial or national State.[2924] The Constitutional Court opined that requiring proof of this impossibility and inactivity amounted to a *probatio diabolica* which would jeopardize the right to an effective remedy guaranteed by Article 24.1 of the Spanish Constitution, and frustrate the very finality of universal jurisdiction sanctioned by Article 23.4 of the Spanish Organic Law and by the Genocide Convention.[2925]

893. The high threshold required under the principle of jurisdictional necessity as put forward by the Supreme Court in the Peruvian Genocide in particular could indeed be very difficult to take for plaintiffs in Spanish proceedings. If impunity is not to arise, the courts of bystander States should be entitled to pass judgment on the quality of investigations and prosecutions in the territorial or national State, and should not wait until that State takes action. The Constitutional Court did not clarify what standard should govern this analysis. Probably, common sense should inform the analysis, and practical considerations should be taken into account. If an investigation is underway in the territorial or national State and if there are reasonable grounds to believe that this investigation is undertaken in good faith, Spain should defer. It should not defer if there is a *prima facie* finding of inactivity abroad,[2926] for instance if there is only a possibility that foreign proceedings could be initiated in the future.[2927] Moreover, as ROHT-ARRIAZA has pointed out, if a proper territorial or national forum becomes available later, after Spain, or any bystander State for that matter, has begun its investigations and prosecution under the universality principle, the latter State should not automatically defer, since "considerations of judicial

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[2923] *Id.*, at II.4. *See also* N. ROHT-ARRIAZA, comment Spanish Constitutional Court, Guatemala Genocide case, 100 *A.J.I.L.* 207, 213 (2006) ("Spain's Constitutional Tribunal helped to clarify that such accommodations [deference to the home State] are neither jurisdictional nor required – the International Criminal Court's "unable or unwilling" requirement does not apply to national courts."); H. ASCENSIO, « The Spanish Constitutional Tribunal's Decision in *Guatemalan Generals*", 4 *J.I.C.J.* 584, 590-91 (2006) ("Priority is probably a principle much more than a rule … It is reasonable on grounds of procedural practicability and criminal policy, both reasons being more sociological than legal.").

[2924] *Id.*, at II.4.

[2925] Id. (… "por cuanto seria precisamente la inactividad judicial del Estado donde tuvieron lugar los hechos, no dando respuesta a la interposicion de una denuncia e impidiendo con ello la prueba exigida por la Audiencia Nacional, la que bloquearia la jurisdiccion internacional de un tercer Estado y abocaria a la impunidad del genocidio"). It has, quite convincingly, been argued that other high courts could draw inspiration, in the context of adjudication of gross human rights violations, from the Constitutional Court's reliance on procedural rights, such as access to justice. H. ASCENSIO, « The Spanish Constitutional Tribunal's Decision in *Guatemalan Generals*", 4 *J.I.C.J.* 584, 594 (2006).

[2926] *See* email conversation with Professor RODRIGUEZ-PINZON, visiting professor, American University, Washington College of Law, April 10, 2006.

[2927] *See* email conversation with Professor ROHT-ARRIAZA, University of California, Hastings College of the Law, April 19, 2006.

economy and "sunk costs" counsel continuing a prosecution where it has begun".[2928] Doubtless, the Constitutional Court has made the burden of proof for plaintiffs much lighter, arguably even shifting it to the defendants. The exercise of universal jurisdiction by Spanish courts is accordingly more likely now than ever before, all the more so since Spanish voters voted the conservative government out of office in 2004, replacing it with a progressive one that does no longer oppose, for foreign policy reasons, the prosecution of core crimes committed abroad.[2929]

10.3.2.c. Tibetan genocide

894. The effects of the Constitutional Court's judgment in Guatemala Genocide were soon felt. On January 10, 2006, the National Court ordered the investigative judge to open an investigation into an alleged genocide in Tibet, subject of a complaint filed as a 'popular action' on June 28, 2005 against Jiang Zemin, former president of China, and five other high-ranking Chinese officials.[2930] The National Court pointed out in a somewhat strange instance of adverse complementarity, that, since the International Criminal Court did not have jurisdiction over core crimes allegedly committed in China, because the violations were committed before the entry into force of the Rome State, and because China is not a party to the Rome Statute, the unavailability of an international tribunal might justify the exercise of universal jurisdiction by Spanish courts.[2931] More convincingly, from a theoretical perspective at least, the National Court submitted that the circumstances of the case and the lapse of time since the moment the alleged violations took place (1998) testified to the unwillingness of China to seriously investigate the violations, and to the uselessness of filing suit territorially.[2932] The Court thereupon ruled that, in light of the acts listed

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[2928] N. ROHT-ARRIAZA, comment Spanish Constitutional Court, Guatemala Genocide case, 100 *A.J.I.L.* 207, 212-13 (2006). *Compare* A. POELS, "Universal Jurisdiction *In Absentia*", 23 *Neth. Q. Hum. Rts.* 65, 83 (2005) (arguing that "the subsequent commencement of investigations and prosecutions by the other State on the basis of the territoriality or personality principle will probably be concurrent with political pressure and judicial bias").

[2929] HUMAN RIGHTS WATCH, *Universal Jurisdiction in Europe: The State of the Art*, Vol. 18, No. 5(D), June 2006, p. 89, available at http://hrw.org/reports/2006/ij0606/ (noting, on the basis of an interview with a Spanish official that "[t]he position of the national prosecution office concerning universal jurisdiction cases generally reflects the position of the national government").

[2930] National Court, Criminal Chamber, January 10, 2006, Roll of Appeal No 196/05 (Spanish text on file with the author).

[2931] *Id.*, legal consideration nr. 9 (c). Under Article 17 of the Rome Statute, the International Criminal Court may only exercise its jurisdiction if other States, including bystander States, are unable and unwilling to genuinely investigate and prosecute. Under the Rome Statute, States have primary jurisdiction and the International Criminal Court has complementary jurisdiction. The National Court however seems to believe that the jurisdiction of the International Criminal Court prevails over the jurisdiction of bystander States, such as Spain in the Guatemala Genocide case. The Court in effect opines that only when the ICC is unavailable may Spain bring its universal jurisdiction legislation to bear. It may be submitted that this is an incorrect understanding of the role of the ICC's complementarity principle, which, informed as it is by considerations of State sovereignty, requires deference to *any State*'s investigations and prosecutions. *Contra* C. KRESS, "Universal Jurisdiction over International Crimes and the *Institut de Droit international*", 4 *J.I.C.J.* 561, 581 (2006) (stating that "the decision taken by … Spain in favour of *double* subsidiarity, i.e. the acceptance of a priority right to prosecute not only by a directly connected state but also by the ICC, can be seen as … a (wise) policy choice")..

[2932] *Id.*, legal consideration nr. 9 (d) ("*Por ultimo, en relacion a las posibilidades de que el pueblo tibetano pueda hacer valer la pretension de justicia que aqui ejercita frente a los tribunals chinos, dadas las circunstancias del caso, el lapso de tiempo desde que los hechos tuvieron lugar y las*

in detail in the complaint, and the important accompanying documents, it would be reasonable, and not amount to abuse of right, to open an investigation.[2933] As the investigation was opened on the basis of a *prima facie* finding of judicial inactivity on the part of China, the principle underlying the National Court's decision was clearly a far cry from the principle of necessity of jurisdictional intervention set forth in the Peruvian Genocide case. It appears that the Court premised the reasonableness of its exercise of universal jurisdiction solely on the heinous nature of the acts alleged by the complainants. This dovetails with the position taken by the Restatement (Third) of U.S. Foreign Relations Law (1987), which did not subject assertions of universal jurisdiction to the rule of reason enshrined in Section 403 – a rule which applied to any other jurisdictional assertion – arguably because reasonableness was guaranteed by the fact that only specific crimes (violations of *jus cogens* and/or *erga omnes* obligations) are subject to universal jurisdiction.[2934]

10.3.2.d. Scilingo: the first trial

895. Only one perpetrator has so far been tried under Article 23.4 of Spain's Organic Law. On April 19, 2005, the Argentine naval officer Adolfo Scilingo who worked in the Argentina Naval Mechanics School (ESMA) during the Argentine junta, was convicted by the Spanish National Court to 640 years of imprisonment.[2935] Scilingo was charged with and convicted for crimes against humanity, committed inter alia against Spanish nationals.[2936] It was arguably only the second trial for crimes against humanity on the basis of extraterritorial jurisdiction in history,[2937] the first trial for such crimes being the trial in Israel of Adolf Eichmann, a Nazi criminal.[2938] The charge of crimes against humanity proved problematic however because a substantive provision criminalizing crimes against humanity under Spanish law was only inserted as Article 607*bis* into the Spanish Penal Code by law of November 25, 2003, and moreover, Article 23.4 of the Organic Law does not provide for universal jurisdiction over crimes against humanity. Sidestepping the problem, the National Court argued

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innumerables gestiones realizadas por parte de las autoridades del Tibet segun se acredita en la aportacion documental unida a la querella, hacen innecesario cualquier otra peticion en defense de sus derechos en el territorio en el que los hechos denunciados ocurrieron").

[2933] *Id.*, legal consideration nr. 10 *juncto* nr. 7 *in fine* (arguing that "*debera examinerse … si se aprecia en el case un ejercicio racional del derecho al presenter en Espana la querellq origen de estas actuaciones"*).

[2934] Prospects for a trial of the high-ranking Chinese officials are obviously almost non-existent. Nonetheless, as BAKKER has pointed out, the *Tibetan Genocide* case might "usefully contribute to the state practice supporting or confirming the customary rule of international law that allows statest o exercise universal jurisdiction over the most heinous international crimes." C.A.E. BAKKER, "Universal Jurisdiction of Spanish Courts over Genocide in Tibet: Can it Work?", 4 *J.I.C.J.* 595 (2006).

[2935] National Court, Criminal Chamber, April 19, 2005, Spanish text available at www.derechos.org/nizkor/espana/juicioral/doc/sentencia.html. During the trial, live video-links with witnesses located in Argentina were used.

[2936] It has been submitted that the National Court nonetheless failed no specifically establish that Spanish nationals numbered among the victims. *See* C. TOMUSCHAT, "Issues of Universal Jurisdiction in the *Scilingo* Case", 3 *J.I.C.J.* 1074, 1076 (2005). Against this, it has been argued that "the fact that Spanish nationals were among the victims of the *general repressive system* carried out by the Argentinean military dictatorship was a sufficient link between Spain and the extraterritorial crime". *See* G. PINZAUTI, "An Instance of Reasonable Universality", 3 *J.C.I.J.* 1092, 1095 (2005). The Spanish nationality of the victims may have been relevant at the time when Scilingo was tried in light of the Supreme Court's judgment in Guatemala Genocide (*see supra*).

[2937] *See* G. PINZAUTI, "An Instance of Reasonable Universality", 3 *J.C.I.J.* 1092 (2005).

[2938] Supreme Court of Israel, Judgment of May 29, 1962, 36 *I.L.R.* 277 *et seq.*

that the definition of genocide included the crimes against humanity committed by Scilingo (the so-called 'social notion' of genocide, *i.e.*, genocide directed at political opponents, a notion which is not recognized under international law). This argument has rightly been deemed not very persuasive,[2939] yet it is understandable in light of the limitations posed by the Organic Law which, as far as core crimes are concerned, only provides for universal jurisdiction over genocide and crimes over which Spain is obliged to establish its jurisdiction under international law. Crimes against humanity do not fall under the latter category, yet some of them are arguably subject to permissive universal jurisdiction under customary international law. It may however not suffice to merely imply, as the Court did, that the jus cogens nature of the prohibition of crimes against humanity in itself conferred universal jurisdiction.[2940] An analysis of State practice and opinio juris underpinning the claim that universal jurisdiction obtained over the crimes against humanity with which Scilingo was charged would have been more convincing.[2941]

It has been argued, in addition, that the National Court should also have addressed concerns of retroactivity of Article 607*bis* of the Spanish Penal Code, which was only adopted long after Scilingo committed his acts in Argentina.[2942] The Court believed that the principle of legality was respected because crimes against humanity were criminalized under international law at the time Scilingo committed his acts, and that, hence, he knew that his acts were criminal.[2943] It is not easy to prove that customary international law criminalized the crimes committed by Scilingo in the late 1970s and early 1980s. This explains why the Dutch Supreme Court circumvented the issue in the *Bouterse* case (2001) by holding that customary international law could not trump Dutch law in force in 1982, when Bouterse committed his crimes of torture in Suriname. Given the shocking character of the charges, it appears reasonable to require the defendant to disprove that his acts violated customary international law.[2944] An additional problem is that, if Scilingo's acts indeed violated customary international law, the international law prohibition may not have set forth a specific *punishment* for transgressions. Punishing someone if he is unaware of the existence or level of possible penalties may run counter to the principle of nulla poena sine lege.[2945] Quite possibly, a prison sentence of 640 years far outweighs what Scilingo may have had in mind when he threw the regime's political opponents alive into the Pacific during two 'death flights'.

[2939] *See* C. TOMUSCHAT, "Issues of Universal Jurisdiction in the *Scilingo* Case", 3 *J.I.C.J.* 1074 (2005).

[2940] *See* G. PINZAUTI, "An Instance of Reasonable Universality", 3 *J.C.I.J.* 1092, 1096 (2005); *See also*, generally, A. ZIMMERMANN, "Violations of Fundamental Norms of International Law and the Exercise of Universal Jurisdiction in Criminal Matters", in C. TOMUSCHAT & J.-M. THOUVENIN (eds.), *The Fundamental Rules of the International Legal Order. Jus Cogens and Obligations Erga Omnes*, Leiden, Boston, Martinus Nijhoff, 335, 337-39 (2006)

[2941] *Id.*, at 1080 (stating that "[i]f one takes the requirements of international customary law seriously, each of the of the [core crimes against international law] needs to be carefully examined as to the relevant practice and the *opinio juris* that may accompany this practice.").

[2942] *See* A. GIL GIL, "The Flaws of the *Scilingo* Judgment", 3 *J.C.I.J.* 1082, 1084-88 (2005).

[2943] *Scilingo* judgment, para. 74.

[2944] *Compare* G. PINZAUTI, "An Instance of Reasonable Universality", 3 *J.C.I.J.* 1092, 1096 (2005) ("In the case at issue, the crimes ascribed to Scilingo are unquestionably banned by customary international law.").

[2945] The National Court recognized this problem, but believed that it is overcome as soon as a State, such as Spain, provides for penalties. *See Scilingo*, judgment, para. 69-70. Before 2003, a crime against humanity could thus not be prosecuted in Spain, not even if qualified as another crime such as murder or rape for which specific penalties existed.

10.3.2.e. Cavallo

896. The next trial under Article 23.4 of the Organic Law will probably be the trial of Ricardo Miguel Cavallo, like Scilingo an Argentine military officer. Cavallo, who worked, also like Scilingo, at the ESMA, was accused of torturing political dissidents, including a number of Spanish citizens. Cavallo was arrested in Mexico on August 25, 2000[2946]after a Spanish judge had requested his extradition[2947]. His extradition to Spain was approved by the Mexican Foreign Office on February 2, 2001 and by the Mexican Supreme Court on June 10, 2003.[2948] Cavallo was only extradited to Spain for crimes against humanity and genocide, not for torture because the torture charges were time-barred under Mexican law: torture was subject to a statute of limitations of 20 years, and genocide and crimes against humanity to a statute of limitations of 30 years.[2949] The scope of Spanish investigations into the Argentine dirty war has in the meantime been further broadened. In May 2005, Ricardo Oliveros, a former Argentine military intelligence officer, admitted before a Spanish court to involvement in the death of three people.[2950]

10.3.3. Concluding remarks

897. Since the Constitutional Court's judgment in Guatemala Genocide, Spanish courts may assume universal jurisdiction in an unprecedented way. No connection with Spain whatsoever, not even the presence of the presumed offender in Spanish territory, is required, and jurisdiction may be exercised on a *prima facie* evidence of judicial inactivity in the offender's home State. Undoubtedly, no State exercises universal jurisdiction in as broad a manner as Spain does. In light of Belgium's experience with its universal jurisdiction law, it might be expected that the almost unfettered possibilities of exercising universal jurisdiction by Spanish courts will meet with foreign opposition, which might in turn cause the courts and the legislature to insert restrictions. Possibly however, guidelines on the practical and reasonable exercise of universal jurisdiction to be drawn up by the Spanish Attorney-General might succeed in fending off a political backlash.[2951] Also, States might acquiesce in Spain's broad assertions of universal jurisdiction *in absentia*, believing that they are not harmful as long as they do not cooperate with requests for interrogations. In June 2006 for instance, the Guatemalan Tribunal for Conflicts of Jurisdiction suspended indefinitely the request for interrogation of, *inter alia*, General Rios Montt, filed by a judge of Spain's National Court.[2952] The Spanish judge reacted by issuing a warrant

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[2946] Oficio PGR/0583/2000, August 25, 2000, Procuraduria General de la Repùblica.
[2947] Investigating Judge, Extradition No. 5, 2000, Decision of January 11, 2001, Judge Jesus Guadalupe Luna Altamirano, Juez Sexto de Distrito en Procesos Penales Federales en el Distrito Federal, available at www.derechos.org/nizkor/arg/cavallo.
[2948] Supreme Court of Mexico, Decision on the Extradition of Ricardo Miguel Cavallo, 42 *ILM* 884 (2003).
[2949] *See* on the *Cavallo* case: N. ROHT-ARRIAZA, *The Pinochet Effect*, Philadelphia, PA, University of Pennsylvania Press, 2004, 140-49.
[2950] *Reuters*, May 10, 2005.
[2951] Such guidelines are forthcoming. *See* HUMAN RIGHTS WATCH, *Universal Jurisdiction in Europe: The State of the Art*, Vol. 18, No. 5(D), June 2006, pp. 89-90, available at http://hrw.org/reports/2006/ij0606/
[2952] *See* http://www.elmundo.es/elmundo/2006/06/24/espana/1151109358.html

for the arrest of several former high-ranking Guatemalan officials in early July 2006.[2953] As long as these officials do not leave their country, they will probably enjoy impunity though.

10.4. Universal jurisdiction over core crimes against international law in Belgium

898. The words "Belgium" and "universal jurisdiction" appear to be inextricably linked. This is because, until 2003, Belgium boasted possibly the most progressive universal jurisdiction law in the world as far as the prosecution of crimes against international humanitarian law was concerned. The law provided for universal jurisdiction *in absentia* and for the possibility of unlimited civil party petition, and excluded defendants' recourse to foreign sovereign immunities. Belgium became not surprisingly victims' most favorite forum, which overloaded the prosecutorial resources of as tiny a country as Belgium. The law was eventually repealed in 2003. Universal jurisdiction now only obtains on the basis of a general enabling clause in the Preliminary Title of the Code of Criminal Procedure (PT CCP), which confers universal jurisdiction on Belgian courts when international law obliges Belgium to exercise universal jurisdiction over an offence.

10.4.1. The former regime

899. On June 16, 1993, the Belgian Parliament adopted an act on the punishment of grave breaches of international humanitarian law,[2954] which was amended on February 10, 1999,[2955] after which it was commonly referred to as the 'Genocide Act' (*Genocidewet*) in the Dutch-speaking north of the country, and as 'loi de compétence universelle" in the French-speaking south of the country. The act provided for universal jurisdiction over genocide, war crimes, and crimes against international humanitarian law. It did not set forth a presence requirement[2956] nor did it take into account immunities under international law.[2957]

900. PROSECUTIONS UNDER THE FORMER REGIME – While Spain became the beloved forum for complaints against Latin-American perpetrators of international crimes in view of the cultural and historic ties between Spain and the States of Latin America, Belgium (and also France) became a beacon of hope for the victims of the Rwandan genocide in 1994.[2958] Initially, Belgian prosecutors were reluctant to use the 1993 act to prosecute Rwandan suspects of crimes committed in Rwanda in 1994. In February 1995 however, the Belgian Minister of Justice issued an exceptional affirmative

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[2953] *See* http://www.elmundo.es/elmundo/2006/07/07/espana/1152285483.html

[2954] *Moniteur belge*, August 5, 2003.

[2955] *Moniteur belge*, March 23, 2003.

[2956] In the *Sharon* case, the Court of Cassation confirmed that the presence of the presumed offender was not required for jurisdiction to obtain. *See* Cass., February 12, 2003, *J.L.M.B.*, 2003, 364, *J.T.*, 2003, 243, comment P. D'ARGENT, "Monsieur Sharon et ses juges belges"; J. KIRKPATRICK, "A propos de l'arrêt de la Cour de cassation du 12 février 2003 relatif à la compétence universelle de la justice pénale belge en matière de violations graves du droit international humanitaire et à l'immunité de juridiction des chefs d'Etat et de gouvernement étranger", *Journ. Proc.*, 2003, nr. 455, 16-23.

[2957] *See* for a wide-ranging discussion of the 1993/1999 act: J. WOUTERS & H. PANKEN (eds.), *De Genocidewet in internationaal perspectief* [The [Belgian] Act Concerning Crimes against International Humanitarian Law in International Law Perspective], Ghent, Larcier, 2002, xi + 377 p.

[2958] In 1923, the League of Nations gave a mandate to Belgium to administer both Rwanda and Burundi under the name of Rwanda-Urundi. In 1946, Rwanda became a United Nations trustee territory. It was granted independence by Belgium in 1962.

injunction under Article 151 of the Belgian Constitution. In this injunction, he required the Prosecutor-General of Brussels to initiate proceedings against Rwandan criminals who had sought refuge in Belgium following the genocide.[2959] On June 8, 2001, a jury of the Court of Assizes of Brussels convicted four Rwandans (the 'Butare Four') for war crimes committed in the course of an internal armed conflict on the territory of Rwanda. The Butare Four case was the first and only trial in Belgium on the basis of the 1993/1999 act.[2960]

The prosecution of Rwandan criminals in Belgium was facilitated by the presence of Belgian military personnel in Rwanda at the time of the genocide,[2961] and in particular by the cooperation of the Rwandan government, which had overthrown the extremist Hutu regime held responsible for the 1994 atrocities.[2962] Rwandan cooperation was crucial for the prosecution of Rwandan criminals in Belgium in terms of field and cultural knowledge and the possibility of taking testimony in the witnesses' language.[2963]

Belgian legal authorities and the International Criminal Tribunal for Rwanda (ICTR) developed a fruitful relationship over the years. Belgian prosecutors had six Rwandan accused present in Belgium arrested on behalf of the ICTR,[2964] and the Court of Cassation ordered Belgian investigating judges to withdraw in favor of the ICTR in four cases.[2965] Conversely, the ICTR Office of the Prosecutor communicated documents and evidence to Belgian prosecutors, and took testimony from persons detained by the ICTR for use in Belgian proceedings.[2966] Under the 2004 ICTR completion strategy,[2967] some Rwandan accused are to be prosecuted in Belgium and not before the ICTR.

Belgian judicial authorities did not only receive complaints from Rwandan victims under the 1993 legislation however. Complaints were also filed by Cambodian

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[2959] *See* D. VANDERMEERSCH, "Prosecuting International Crimes in Belgium", 3 *J.I.C.J.* 400, 403 (2005).

[2960] *See* L. REYDAMS, "Belgium's First Application of Universal Jurisdiction in the "Butare Four" Case", 1 *J.I.C.J.* 428 (2003). It has been submitted that the case take eight years to reach the trial phase because of "inertia or even outright opposition of the Brussels general prosecution." *See* D. VANDERMEERSCH, "Prosecuting International Crimes in Belgium", 3 *J.I.C.J.* 400, 409 (2005).

[2961] Upon their return, all Belgian servicemembers testified before Belgian judicial authorities. *Id.*, at 412.

[2962] In most cases of international crimes prosecution by contrast, the government of the territorial State will be hostile to prosecution by the forum State, which seriously hampers the efficiency of this prosecution.

[2963] Rwanda police offers assisted Belgian judges and investigators, under Rwandan procedure. Taking testimony in the original language limits subsequent challenges to the translation. *Id.*, at 413. Belgian investigators also benefited from extensive cooperation from the government of Chad in the case against Hissène Habré, their former head of State. The investigators, including investigating judge Daniel Fransen, paid an on-site visit to Chad, where they took testimony from local witnesses.

[2964] *See, inter alia*, Ghent (indictment) , January 22, 2000, in the case of N.; Cass., August 7, 2001, 82 *Revue de droit pénal et de criminologie* (2002) at 681; Brussels (indictment), August 8, 2001, 82 *Revue de droit pénal et de criminologie* (2002) at 277; Cass., January 22, 2002, 82 *Revue de droit pénal et de criminologie* (2002) at 706. *See also* D. VANDERMEERSCH, "Prosecuting International Crimes in Belgium", 3 *J.I.C.J.* 400, 403 (2005).

[2965] *Id.*, at 415.

[2966] *Id.*, at 414.

[2967] Security Council Resolution 1534 (2004) called on the ICTR to terminate all investigatory acts by the end of 2004, and to inquire what cases could be transferred to national authorities.

refugees against former Khmer Rouge leaders, against a former Moroccan Minister, and against former Iranian President Rafsanjani. After the 1999 amendments to the 1993 act, which granted Belgian courts jurisdiction over all crimes against international humanitarian law, the tide could no longer be stemmed. Complaints against such high-ranking foreign political leaders as Saddam Hussein, Fidel Castro, Paul Kagame, Yasser Arafat, Ariel Sharon and George Bush *sr*, followed.[2968] No prosecutions were initiated by the public prosecutors themselves, although prosecutors joined the civil petitioners in several cases.[2969]

901. DRAWING AUTHORIZATION TO EXERCISE UNIVERSAL JURISDICTION DIRECTLY FROM CUSTOMARY INTERNATIONAL LAW – The exercise of universal jurisdiction is ordinarily premised on a domestic legal basis.[2970] Rarely do national courts directly invoke the international law of jurisdiction so as to exercise jurisdiction in the absence of statutory authorization. A Belgian investigating magistrate, Judge Vandermeersch, however established universal jurisdiction over crimes against humanity in 1998,[2971] where the Belgian Penal Code did not criminalize crimes against humanity and did not provide for universal jurisdiction over them. Judge Vandermeersch's decision was sparked by a request by the civil parties in an investigation initiated against General Pinochet on November 1, 1998, when Pinochet was provisionally detained in the United Kingdom.[2972]

As the English House of Lords did in *Pinochet*, Judge Vandermeersch held that Pinochet as a former Head of State of Chile was not entitled to immunity *ratione materiae* for the international crimes allegedly committed by him, as committing heinous crimes could not be considered as a normal exercise of the functions of a Head of State.[2973] The justification of the judge's jurisdictional claim over Pinochet's acts proved however far more difficult. The civil parties had qualified these acts as war crimes, so as to activate the 1993 act, which as of 1998 only provided for universal jurisdiction over war crimes, either committed in an international or internal armed conflict. Judge Vandermeersch held, correctly, that the condition of the existence of an armed conflict, either international or internal, was not met in the case.[2974] Instead, he qualified, arguably correctly as well, the alleged acts as crimes

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[2968] *See* D. VANDERMEERSCH, "Prosecuting International Crimes in Belgium", 3 *J.I.C.J.* 400, 408 (2005).
[2969] *Id.*, at 409.
[2970] M.C. BASSIOUNI, "The History of Universal Jurisdiction and Its Place in International Law", in S. MACEDO (ed.), *op. cit.*, at 46.
[2971] Investigating Magistrate Brussels, *Pinochet,* November 6, 1998, *Rev. dr. pén.* 1999, 278; reprinted in J. WOUTERS, *Bronnenboek Internationaal Recht*, Antwerpen, Intersentia, 2000, 131.
[2972] Under Belgian procedural law, the victims of a crime have, as civil parties, the right to demand additional investigative acts (Article 61*quinquies* of the Code of Criminal Procedure). The civil parties had requested the judge to issue an arrest warrant against Pinochet within 48 hours with a view to obtaining his extradition to Belgium. On November 6, 1998, Judge Vandermeersch established his jurisdiction over the offences allegedly committed by Pinochet. He ultimately refused to issue an arrest warrant because such would be premature and would harm the investigation at that very moment in time. He later issued a default warrant for Pinochet's arrest, submitted an extradition request to the United Kingdom, and sent two international letters rogatory to the United Kingdom. An international letter rogatory was also sent to Chile upon Pinochet's return. *See* D. VANDERMEERSCH, "Prosecuting International Crimes in Belgium", 3 *J.I.C.J.* 400, 404 (2005).
[2973] Investigating Magistrate Brussels, *Pinochet*, in J. WOUTERS, *op. cit.*, at 131-132.
[2974] *Id.*, at 133.

against humanity.[2975] Admitting that these crimes are as such not defined by Belgian criminal law, he pointed out that the alleged acts could in his view nevertheless be qualified as assassination, murder, assault and battery, sequestration with torture and hostage-taking, existing crimes under Belgian law.[2976]

There was, however, no domestic law which could justify Vandermeersch's claim of universal jurisdiction over crimes against humanity. Therefore, he resorted directly to international law, and pointed out that customary international law authorized States to exercise universal jurisdiction over crimes against humanity, even *in absentia*, stating « qu'il existe une règle coutumière du droit des gens, voire de jus cogens, reconnaissant la competence universelle et autorisant les autorités étatiques nationals à poursuivre et à traduire en justice, en toutes circonstances, les personnes soupçonnées de crimes contre l'humanité. »[2977] Vandermeersch did however not cite any relevant State practice which would testify to the crystallization of a norm of customary international law that authorizes a State to initiate criminal proceedings on the basis of the universality principle.[2978] His judicial activism is particularly striking

[2975] An investigating magistrate is not bound by the qualification of the acts given by the prosecutor or the civil parties ("saisi du fait (*in rem*)"). *See* Court of Cassation, December 11, 1990, *Pas.* 1991, I, 355. One could wonder why Judge Vandermeersch qualified the acts allegedly committed by Pinochet as crimes against humanity, whereas the English House of Lords qualified similar acts allegedly committed by Pinochet as torture. One explanation could be the lack of ratification of the UN Torture Convention by Belgium at the moment of the *Pinochet* proceedings (Belgium signed the UN Torture Convention on February 4, 1985, but only ratified it on June 9, 1999, *Moniteur belge*, October 28, 1999). The English legislature had already implemented the Torture Convention in 1988 (Section 134 of the Criminal Justice Act 1988). Under English law, there was thus a clear legal basis for universal jurisdiction over torture in the *Pinochet* case. The lack of ratification of the UN Torture Convention by Belgium may have caused Judge Vandermeersch to conclude that universal jurisdiction over torture offences, as provided for by Article 5, § 2 of the Convention, was not warranted under Belgian law. He might also have considered the conspicuous lack of ratification of the Convention as an implicit rejection of a parallel norm of customary international law with the same content as Article 5, § 2 of the Convention. Finally, even if he could have considered torture offences to be subject to universal jurisdiction, he might have chosen the qualification of the acts as crimes against humanity, as these crimes are generally deemed more heinous, as is apparent from the jurisdiction of the ICC over them, and are thus logically more susceptible for universal jurisdiction under customary international law than crimes of torture are.

[2976] The legality principle would accordingly be respected if Pinochet were to be prosecuted in Belgium. Investigating Magistrate Brussels, *Pinochet*, in J. WOUTERS, *op. cit.*, at 134. Judge Vandermeersch was reluctant to ground the legality of prosecutions on the basis of crimes against humanity exclusively in international law, although he indeed held that these crimes are part of customary international law and even *jus cogens*. *Id.*, at 135. The partial recourse to domestic law incriminations in order to domestically justify universal jurisdiction over crimes against humanity seems somewhat artificial and may preclude the use of an autonomous international interpretation of the concept of crimes against humanity in domestic proceedings. At any rate, whereas the requirement of legality of the criminalization might be met in light of the *international* criminalization of crimes against humanity, it appears that the requirement of legality of the penalties should be met in *domestic* criminal law, as *international* law does not provide for specific penalties for crimes against humanity. In the Spanish *Scilingo* case (2005), the trial court held that a perpetrator of crimes against humanity could be prosecuted on the basis of the international criminalization of such crimes, but that penalties could only be imposed from the moment Spanish law provided for precise penalties for crimes against humanity.

[2977] Investigating Magistrate Brussels, *Pinochet*, in J. WOUTERS, *op. cit.*, at 135.

[2978] Judge Vandermeersch refers to Resolution 3074 (XXVIII) of the United Nations General Assembly of December 3, 1973, on the principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity, and qualifies this resolution without further evidence as the expression of a norm of customary international law. The

in the following consideration : "[E]n droit humanitaire, le risque ne semble pas tellement résider dans le fait que les autorités nationales outrepassent leur compétence mais bien plutôt dans le réflexe qu'elles auraient de rechercher des prétextes pour justifier leur incompétence, laissant ainsi la porte ouverte à l'impunité des crimes les plus graves (ce qui est assurément contraire à la raison d'être des règles de droit international)".[2979] And where he held that "la première mission de la justice est de rendre justice et que cela vaut *a fortiori* pour les crimes les plus graves, à savoir ceux de droit international"[2980] his opinion appears to be situated in the realm of morality rather than in the legal realm, especially as he fails to identify States which indeed brought perpetrators of crimes against humanity to justice on the basis of universal jurisdiction.[2981] While Vandermeersch's argument dovetails well with the main rationale of universal jurisdiction (the heinous nature of an offense which in itself authorizes any State to exercise universal jurisdiction), it would have been more convincing if Vandermeersch had indeed linked up with State practice in the field. Without State practice, it is hard to sustain that customary international law authorizes the exercise of universal jurisdiction over crimes against humanity.

10.4.2. The new regime

902. After far-reaching, but ill-conceived procedural modifications to the 1993/1999 act were rushed through Parliament, resulting in an amended act on April 23, 2003,[2982] the act was eventually repealed by the act of August 5, 2003 concerning serious violations of international humanitarian law.[2983] This act inserted the incriminations of the former legislation into the Penal Code,[2984] and provided that some watered-down jurisdictional provisions of the PT CCP would henceforth govern the jurisdiction of the Belgian courts over such violations. Political abuse of the universality principle by pressure groups and subsequent diplomatic tension with States such as the United States and Israel because of complaints and procedures

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resolutions calls on all States to prosecute crimes against humanity wherever or whenever they are committed.

[2979] *Id.*

[2980] *Id.*

[2981] Judge Vandermeersch's progressive decision in *Pinochet* paved the way for a swift amendment to the 1993 War Crimes Act, which from 1999 on also provided for universal jurisdiction over crimes against humanity and genocide.

[2982] *Moniteur belge*, May 7, 2003. *See* for a commentary of this amendment: S. SMITS & K. VAN DER BORGHT, *I.L.M.* 740 (2003). This amendment did not abandon the universality principle, but limited the mechanism of civil party petition to offences that had a nexus with Belgium (Article 7, para. 1 of the revised act). The Court of Cassation could also remove a case from a Belgian federal prosecutor at the initiative of the Minister of Justice, if another forum was more convenient (as far as it was independent, impartial and fair) (Article 7, paras. 2-4 of the revised act).

[2983] *Moniteur belge*, August 7, 2003. *See for* a first commentary: L. REYDAMS, "Belgium Reneges on Universality: The 5 August 2003 Act on Grave Breaches of International Humanitarian Law", 1 *J.I.C.J.* 679 (2003). The April 2003 amendment could not sufficiently accommodate foreign concerns. For one thing, civil party petition remained possible if the victim was able to prove at least three years of residence in Belgium (Article 7, para 1 (2) 4° of the revised act), which could encourage jurisdictional forum shopping. For another, the decision to initiate proceedings under the universality principle remained a discretionary decision by the federal prosecutor without any political supervision. In addition, the *Conseil d'Etat*, a legal body advising the legislature, criticized the amendment on the grounds that it violated the separation of powers and the constitutional principle of non-discrimination. *Conseil d'Etat*, Advisory opinion 35.252/2, April 4,2003, *Parl. Doc.*, Senate, 2002-2003, nr. 2-1256/13, II.1 and II.2.

[2984] Articles 136*bis*-136*octies* Penal Code.

against their current and former political and military leaders, had discredited the act, and made it untenable to defend for the Belgian government.[2985] When U.S. Defense Secretary Donald Rumsfeld threatened to block the expansion of the NATO headquarters, located in Belgium, on June 12, 2003, [2986] the withdrawal of the act had become all but inevitable.[2987] On July 22, 2003, the Belgian Government introduced a new bill in Parliament, which was approved on August 5, 2003.[2988] The bill was purportedly "based on a comparative study of the legislation of a number of Western countries", from which could be gleaned "that most countries had introduced a restricted form of universal jurisdiction, respectful of immunities under international law, and with a clear personal (perpetrator and/or victim) or territorial nexus with the forum State,"[2989] an assessment which is surely open to criticism.

Under the new regime, jurisdiction over crimes against international humanitarian law only obtains on the basis of the active and personality principles. There are no restrictions on prosecution on the basis of the active personality principle. Civil party petition remains possible, and Belgian residents are equated with Belgian nationals.[2990] Procedural restrictions apply however to complaints by Belgian victims (or victims residing in Belgium) against foreigners concerning acts committed abroad (passive personality jurisdiction). Civil party petition is no longer possible.[2991] In addition, the federal prosecutor may dispose of a case if the complaint is clearly without merit, if the facts listed in the complaint do not correspond to a definition of the international offenses, if the complaint cannot give rise to an admissible criminal prosecution, or if there is a more appropriate adjudicative forum (*forum non conveniens*).[2992] The federal prosecutor's decision not to prosecute is not amenable to appeal,[2993] and the prosecutor may defer to a foreign State even if that State does not effectively prosecute a case. Foreign sovereign immunities, which the Court of

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[2985] After the April 2003 amendments, new complaints were filed against U.S. General Tommy Franks and U.S. President George W. Bush. Although the new mechanisms put in place by the amendments could filter the complaints, the lack of confidentiality of the procedure exposed these U.S. officials to public suspicion and contempt. The U.S. reacted furiously. On May 9, 2003, a U.S. Congressman, Ackermann, even introduced a bill in the U.S. Congress with a view to counter the undesired effects of such acts as the Belgian universal jurisdiction act (H.R. 2050 IH, 108th Congress, 1st Session).

[2986] "U.S. Threatens NATO Boycott over Belgium War Crimes Law", *The Guardian*, June 13, 2003, available at http://www.guardian.co.uk/nato/story/0,12667,976499,00.html

[2987] *See* for the withdrawal provision Article 27 of the Act of August 5, 2003.

[2988] *Moniteur belge*, August 7, 2003.

[2989] *Parl. St.* Kamer, B.Z. 2003, nr. 0103/001, p. 3.

[2990] Article 6 PT CCP. It suffices that Belgian residence or nationality could be established at the moment of prosecution. *See Parl. St.*, Kamer, B.Z. 2003, nr. 0103/003, pp. 25 and 36-37 (Minister of Justice); *Gedr. St.*, Senaat, B.Z. 2003, nr. 3-136/3, p. 26 (Minister of Foreign Affairs). This new regimes also applies to the other offences over which active personality jurisdiction is possible, such as offences against the security of the State.

[2991] Henceforth, the federal prosecutor could thus develop his own prosecutorial policy, without interference of civil petitioners, under auspices of the Minister of Justice. The impossibility of developing such a policy, due to the interference of civil petitioners, was one of the reasons of the demise of the Genocide Act. *See* D. VANDERMEERSCH, "Prosecuting International Crimes in Belgium", 3 *J.I.C.J.* 400, 410 (2005).

[2992] Article 10, 1°*bis*, 4° PT CCP. The Minister of Justice stated that the list of countries with which Belgium has concluded a treaty on judicial cooperation, or a human rights treaty (such as the ICCPR), is not decisive. *Parl. St.* Kamer, B.Z. 2003, nr. 0103/003, p. 45 (stating that "the federal prosecutor cannot refuse to investigate the way justice is dispensed in a particular country on the sole ground that Belgium has enter into a treaty with that country"). It may be noted that the victim ought to be a Belgian national or resident at the time of the facts.

[2993] Article 10, 1°*bis*, 2° PT CCP; Article 12*bis*, 2° PT CCP.

Cassation applied to the *Sharon* case in spite of a contrary provision in the 1993/1999 act, [2994] are henceforth enshrined in Article 1*bis* PT CCP. According to the Belgian Government, the modifications "enable it to develop an active and dynamic foreign policy,"[2995] which had arguably suffered from the broad sweep of the 1993/1999 act.

The new regime does however not scrap universal jurisdiction altogether. Pursuant to Article 12*bis* PT CCP, around the interpretation of which the *Sharon* case (the case approving of universal jurisdiction *in absentia* under the former legislation) had revolved, confers jurisdiction on Belgian courts in case international law (treaty law or customary law) obliges Belgium to prosecute an offence. Article 12*bis* PT CCP may thus authorize the exercise of universal jurisdiction over grave breaches of the Geneva Conventions and torture,[2996] although this remains to be tested in Belgian courts. The actual exercise of jurisdiction on the basis of Article 12*bis* PT CCP is subject to the same restrictive conditions as the exercise of passive personality jurisdiction.

903. LEGAL CHALLENGES TO THE NEW REGIME – Several legal challenges were brought against the jurisdictional regime introduced by act of 5 August 2003. Quite some succeeded. In one case, claimants argued that the Court of Appeals of Brussels, in rejecting a complaint filed after the new act was adopted, violated the international principle of standstill, which would purportedly also apply to the prosecution of crimes against international humanitarian law. Claimants argued that the jurisdictional provisions of the Geneva Conventions precluded a State from adopting legislation which would lower the existing level of protection (*in casu* by conferring a prosecutorial monopoly on the federal prosecutor without the possibility of appeal, and by restricting the exercise of universal jurisdiction *in absentia*). The Court of Cassation not surprisingly rejected the claimants' argumentation, noting that the standstill obligation is not a general principle of law. It went on to state that the jurisdictional provisions from the Geneva Conventions did not create such an obligation, and that, accordingly, States who provided for instance for universal

[2994] Article 5 (3) of the 1993/1999 act. *See* Cass., *Sharon*, February 12, 2003, *J.L.M.B.*, 2003, 364, *J.T.*, 2003, 243.
[2995] *Parl. St.* Kamer, B.Z. 2003, nr. 0103/001, p. 3.
[2996] Article 12*bis* PT CCP does not require the presence of the presumed offender. Belgian courts may possibly however not exercise universal jurisdiction *in absentia* over offences that Belgium is required to prosecute, as no rule of international law obliges Belgium to exercise universal jurisdiction *in absentia*. *See Parl. St.* Kamer, B.Z. 2003, nr. 0103/001, p. 3. *Compare* Conclusions of the Advocate-General of the Court of Cassation J. SPREUTELS, *Bush*, September 10, 2003 ("[I]l ne fait aucun doute que l'article 12bis du titre préliminaire du Code de procédure pénale s'applique aux violations graves du droit international humanitaire, puisqu'il se réfère lui-même à ces infractions et qu'il est visé par l'article 29 de la loi du 5 août 2003, qui concerne les affaires pendantes à l'information ou à l'instruction portant sur de telles infractions. Ensuite, de la combinaison des articles 12 et 12*bis* du titre préliminaire, tels que modifiés par la loi du 5 août 2003, il résulte, à mon avis sans ambiguïté, que l'exigence, pour intenter des poursuites, que l'inculpé soit trouvé en Belgique ne s'applique pas au cas de compétence extraterritoriale visé par l'article 12*bis*, c'est-à-dire lorsque une règle de droit international conventionnelle ou coutumière impose à la Belgique, de quelque manière que ce soit, de soumettre l'affaire à ses autorités compétentes pour l'exercice des poursuites. Il faut alors, dans chaque cas, vérifier le contenu de cette règle de droit international et déterminer si elle impose ou non à la Belgique d'établir, pour les infractions qu'elle concerne, une compétence universelle " par défaut " ou " in abstentia." [sic]) ; Cass., *Bush*, September 24, 2003; Conclusions Advocate-General of the Court of Cassation R. LOOP, *Sharon*, Augustus 29, 2003; Cass., *Sharon*, September 24, 2003.

jurisdiction *in absentia* over war crimes, could later introduce restrictive conditions.[2997]

904. In another case, two human rights NGO's filed a request with the Constitutional Court (*Cour d'Arbitrage*) for the annulment of the provisions of PT CCP which provided for passive personality jurisdiction over crimes against international humanitarian law, and for universal jurisdiction on the basis of an international law obligation, as amended by the 2003 act.[2998] Where the complainants in the case discussed in the previous paragraph had argued that the impossibility of civil party petition, combined with the impossibility of judicial recourse against a decision of the federal prosecutor not to prosecute, set forth by the contentious provisions, violated the international standstill obligation, the complainants in this case argued that the modifications violated the constitutional principle of equality before the law, because victims of common crimes, unlike victims of international crimes, enjoyed civil party petition.[2999]

The Constitutional Court retorted that the decision of the legislature to confer the prosecutorial monopoly on the federal prosecutor for the prosecution of the said crimes was not disproportionate,[3000] as his monopoly corresponded to "the desire to establish an organ for the centralization and co-ordination of the exercise of the criminal action with respect to these crimes".[3001] The Court was however well aware that granting the federal prosecutor exclusive powers to dismiss rash complaints, without the brouhaha of a judge pronouncing himself on the legality of a dismissal, may have benefits in terms of international relations (avoidance of negative publicity for the alleged offenders), but may at the same time abrogate the legitimate rights of victims.[3002] The Court therefore decided that a *judge*, instead of the federal

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[2997] Court of Cassation, January 14, 2004, P031310F, www.cass.be

[2998] Article 10, 1°*bis* of the PT CCP, as introduced by Article 16, 2° of the 2003 act, and Article 12*bis* of the PT CCP, as amended by Article 18, 4° of the 2003 act.

[2999] The possibility of civil party petition is one of the basic tenets of Belgian criminal procedure. Victims (*parties civiles*) have the right to seize an investigating judge in case a prosecutor decides not to prosecute or fails to take a timely decision to prosecute. *See* Article 63 of the CCP. The 2003 act conferred the monopoly of prosecution of international crimes on the federal prosecutor. Victims could lodge complaints with him, but he would be under no obligation to act on them, nor would the victims be entitled to judicial review of his decision not to prosecute

[3000] Judgment nr. 62, March 23, 2005, Dutch and French text available at www.arbitrage.be, § B.7.4.

[3001] *Id.* This argument is not convincing though. Centralization of the exercise of the criminal action in case of crimes against international law need not imply the monopoly of the federal prosecutor. In order to safeguard the rights of the victims, the legislature could have provided for the possibility of civil party petition with a single *federal* investigating magistrate, who specializes in the investigation and prosecution of international crimes. When the Belgian legislature created the federal prosecutor for a number of crimes – including international crimes – in 2001 (Act of June 21, 2001, *Moniteur belge*, July 20, 2001), it did nonetheless not opt for the creation of a federal investigating magistrate. (*See* for two rejected amendments in the other sense: *Parl. St.*, Kamer, 2000-2001, nr. 897/8, p.5 and nr. 897/12, p. 91; *Gedr. St.*, Senaat, 2000-2001, nr. 2-691/2, pp. 8-9, and nr. 2-691/4, p. 64. In March 2005, the Council of Minister of the federal Government of Belgium however announced the creation of a federal investigating magistrate who would co-ordinate all terrorism investigations. *See* http://www.belgium.be/eportal/application?languageParameter=nl&pageid=comnewslist&navId=5907) . The Constitutional Court probably wanted to avoid second-guessing the legislature regarding another act which was not put before it for judicial review.

[3002] The Belgian Government had admitted that the impossibility of judicial review was "not ideal", but it asked the complainants to "trust the federal prosecutor". *See* Constitutional Court, judgment nr. 62, March 23, 2005, § A.6.4. In a State governed by the rule of law, Belgium in particular, the prosecutor is usually *mis*trusted however. In order to safeguard the rights of the victims, the Code of Criminal

prosecutor, should take the decision whether or not to prosecute, although it added that it was not disproportionate "to determine that the federal prosecutor had the sole responsibility to decide that the case should not be brought before the Belgian courts, because it could be brought either before an international tribunal or before an independent and impartial national judge [...]." (*i.e.*, one of the four grounds of dismissal).[3003] The Court thereupon annulled the 2003 act, insofar as it provided that there was no recourse against certain decisions of the federal prosecutor.[3004] Accommodating the concerns of the legislature, the Court stated however that it need not provide for a remedy against the decision of the judge, nor for a public procedure or the hearing of the parties involved.[3005]

905. On May 22, 2006, the Belgian legislature brought the 2003 act in line with the Constitutional Court's judgment.[3006] Henceforth, if the complaint is clearly without merit, if the facts listed in the complaint do not correspond to a definition of the international offenses, or if the complaint cannot give rise to an admissible criminal prosecution, the federal prosecutor should seize the Court of Appeals of Brussels. If the Court deems the complaint admissible, it refers it to an investigating magistrate. The federal prosecutor may appeal to the Court of Cassation.[3007] While this mechanism appears to respect victims' rights, it may be feared that the federal prosecutor will tend to dispose of a case under the only ground of dismissal which is not subject to judicial review, the ground on the basis of which the federal prosecutor may decide that the case should not be brought before the Belgian courts because it could be brought either before an international tribunal or before an independent and impartial national judge.[3008]

906. Another legal challenge, which eventually culminated in an open war between the Constitutional Court and the Court of Cassation, Belgium's two highest courts, related to the transitory regime of the act of 5 August 2003. Under Article 29 § 3 of this act, pending cases which are investigated by the prosecutor at the time of entry into force of the act are to be discontinued by the federal prosecutor if jurisdiction

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Procedure therefore generally provides for civil party petition when the acts of the prosecutor do no correspond to the wishes of the victims. In case the legislature legitimately excludes civil party petition for certain crimes, such as international crimes, it should grant the victims a remedy or at least guarantee that the decision not to prosecute is taken in an independent and impartial manner. Judicial review of this decision is one avenue. Another avenue is conferring the decision not to prosecute on a judge instead of on a prosecutor. In the act of April 23, 2003, which amended the 1993/1999 act, the legislature chose the first avenue. Without being entitled to civil party petition, the complaining party could appeal the federal prosecutor's decision not to prosecute within fifteen days. A special chamber of the court of appeals (*Chambre des Mises en Accusation*) would pronounce itself on the legality of that decision (Article 5 of the Act of April 23, 2003 amending the Act of June 16, 1993 concerning the punishment of grave breaches of international humanitarian law, *Moniteur belge*, May 7, 2003; 38 *I.L.M.* 749 (2003). Article 5 modified Article 7, § 1 of the 1993 act). The act of August 5, 2003, does not provide such a remedy.

[3003] Constitutional Court, judgment nr. 62, March 23, 2005, § B.7.7. The prosecutor, and not the court, thus applies the principle of subsidiarity, probably because the application of this principle inevitably implies a political balancing act, which takes into account the consequences of a decision to prosecute for the forum State's foreign affairs, and for which a judge may not be the appropriate actor.

[3004] *Id.*, § B.9.

[3005] *Id. Compare* Article 5 of the act of April 23, 2003.

[3006] *Moniteur belge*, July 7, 2006.

[3007] New Articles 10, 1°*bis* and 12*bis*, 6th al. of the PT CCP.

[3008] The act of May 22, 2006, explicitly provides that there is no judicial review of this decision available. New Articles 10, 1°*bis* and 12*bis*, 7th and 8th al. of the PT CCP.

could not be established under the new jurisdictional provisions of the PT CCP. Pending cases which are investigated by an investigating magistrate are similarly discontinued, by the Court of Cassation, unless an investigatory act has been performed before the entry into force of the act, provided that at least one of the complainants had Belgian nationality at the time of initiation of the prosecution, or at least one of the presumed offenders had his principal place of residence in Belgium at the time of entry into force of the act. Five cases pending with a prosecutor and nine cases pending with an investigating magistrate were discontinued.[3009] On the basis of the transitory regime, the case against the former President of Chad, Hissène Habré, could be continued.[3010]

When the Court of Cassation was invited to discontinue the proceedings against the Rwandese President Kagame and others, and against the French-Belgian oil giant TotalFinaElf, under the transitory provision, the victims, who were refugees in Belgium, argued that they should be treated on the same footing as Belgian nationals for purposes of the application of Article 29, § 3 of the 2003 act, and that, as they enjoyed refugee status at the time of initiation of the prosecution, the proceedings against Kagame and Total ought not to be discontinued. Faced with this argument, the Court of Cassation decided to put a preliminary question to the Constitutional Court regarding the constitutionality of the said Article 29, § 3.[3011]

On April 13, 2005, drawing on Article 16.2 of the 1951 Refugee Convention, the Constitutional Court opined that the *Kagame* case could be *discontinued*, because the complainants had only *applied* for refugee status, whereas the *Total* case should be

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[3009] *See* Ph. MEIRE, "Certains aspects politiques et techniques", in *Compétence universelle, Annales de droit de Louvain*, 2004, nrs. 1-2, *Rev. Dr. ULB*, 2004, 334. Cass., *Bush e.a.*, 24 september 2003, N° P.03.1216.F; Cass., *Sharon e.a.*, 24 september 2003, N° P.03.1217.F; Cass., *Yaron e.a.*, 24 september 2003, N° P.03.1218.F; Cass., *Al Marrakchi*, 10 december 2003, N° P.03.1469.F; Cass., *Castro e.a.*, 10 december 2003, N° P.03.1506.F; Cass., *Service A. e.a.*, 17 december 2003, N° 03.1476.F; Cass., *Nezzar e.a.*, 17 december 2003, N° P.03.1475 F; Cass., *Biya e.a.*, 17 december 2003, N° P.03.1517.F; Cass., *Hoessein*, 10 maart 2004, N° P.04.0231.F.

[3010] On November 30, 2000, civil parties, among them persons with Belgian nationality, petitioned the Belgian investigating magistrate Daniel Fransen with a view to opening an investigation into the crimes allegedly committed by Habré. The procedure against Habré was suspended after the Court of Appeals of Brussels decided on June 26, 2002, in the *Sharon* case, that universal jurisdiction *in absentia* was not allowed under Belgian law. Upon cassation in *Sharon* (February 12, 2003), the procedure against Habré was continued. *See* on the *Habré* case *inter alia* S.P. MARKS, "The Hissène Habré Case: the Law and Politics of Universal Jurisdiction", in S. MACEDO (ed.), *Universal Jurisdiction*, Philadelphia PA, University of Pennsylvania Press, 2004, 131-167. It is unclear whether Habré, who resides in Senegal – which held that it did not have jurisdiction to try him (*Chambre d'Accusation*, 4 July 2000; *Cour de Cassation*, 20 March 2001) – will ever be extradited to Belgium so as to stand trial there. In some recent evolutions, in January 2006, the African Union created a Committee of Eminent Jurists so as to examine the available options with a view to judging Habré. On 16 March 2006, the European Parliament adopted a resolution calling on Senegal to either prosecute Habré or extradite him to Belgium or an African country. On 19 May 2006, the Committee against Torture, upon complaint of one Habré's victims, ruled that Senegal had violated Articles 5, § 2 and 7 of the UN Torture Convention by not prosecuting nor extraditing Habré (CAT, Communication No. 181/2006, CAT/C/36/D/181/2001, in particular considerations 9.9, 9.11, 9.12). On 15 June 2006 then, the Belgian Senate adopted a resolution in which it called on Senegal to prosecute or extradite Habré, and even threatened to file a complaint with the International Court of Justice if Senegal refused to comply with the *aut dedere aut judicare* obligations under the UN Torture Convention.

[3011] Cass., 5 mei 2004, *TotalFinaElf*, nr. P040482F; Cass., *K.P. e.a.*, 19 mei 2004, nr. P.04.0352.F, available at www.cass.be.

continued, because the complainants had already *acquired* refugee status.[3012] The Court of Cassation however refused to follow the Constitutional Court's opinion, and discontinued the *Total* case as well.[3013] Fortunately for the victims, a procedural nicety allowed the complainants to apply for annulment of Article 29, § 3 with the Constitutional Court.[3014] On June 21, 2006, the Constitutional Court annulled the article for the same reasons as it had declared it unconstitutional in its 2005 judgment.[3015] The *Total* case may now go forward, and possibly lead to a first finding ever of criminal liability for international crimes committed by a multinational corporation. Nonetheless, under Belgian procedural law, the decision of the Court of Cassation needs first to be undone in case a legal provision on which that decision is based has been annulled by the Constitutional Court. As not the complainants, but only the office of the prosecutor of the Court of Cassation may take the initiative to undo that decision,[3016] there is not much cause for optimism, especially in light of the criticism explicitly leveled by the Constitutional Court at the Court of Cassation's 2005 judgment.[3017]

907. CASES UNDER THE NEW REGIME – As of 2006, one trial had been conducted under the new regime governing the prosecution of crimes against international humanitarian law. On June 29, 2005, the *Cour d'Assises* sentenced the two Rwandese half-brothers Etienne Nzabonimana and Samuel Ndashikirwa to respectively ten and twelve years of imprisonment for their role in the 1994 Rwandese genocide.[3018] They had their principal place of residence in Belgium and were arrested in respectively Antwerp and Brussels in 2002. Jurisdiction was not premised on the universality principle, but on the active personality principle enshrined in Article 6, 1°*bis* PT CCP. According to this provision, not only Belgian nationals but also any persons having their principal place of residence in Belgium may be prosecuted in Belgium.

Another trial, of the Rwandese former major Bernard Ntuyahaga will soon follow. Ntuyahaga is accused of committing crimes against international humanitarian law, and in particular of ordering the murder of ten Belgian blue helmets in Kigali in

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[3012] Constitutional Court, judgment nr. 68, April 13, 2005, available at www.arbitrage.be.

[3013] Cass., *TotalFinaElf*, June 29, 2005, nr. P.04.0482.F, available at www.cass.be (arguing that the principle of interpretation *per analogiam* is prohibited in the field of criminal law, and that, thus, the scope of Article 29, § 3 of the 2003 act could not be extended so as to cover refugees as well). *See* for a critical comment: C. RYNGAERT, *Tijdschrift voor Vreemdelingenrecht* [Journal for Foreigners' Law] 2005, 229-233.

[3014] Article 4, 2nd para. of the 1989 Special Law concerning the Constitutional Court allows complainants to apply for annulment of a legal provision which the Constitutional Court had already considered as in violation of the Constitution in a judgment rendered upon a preliminary question put to the Court.

[3015] Constitutional Court, judgment nr. 104, June 21, 2006 available at www.arbitrage.be. The Court maintained the consequences of the cases which were already discontinued, *i.e.*, the cases in which there was no recognized asylum-seeker among the plaintiffs. Meanwhile, the Belgian Parliament had already brought Article 29, § 3 of the 2003 act into line with the Constitutional Court's 2005 judgment. *See* Article 4 of the act of May 22, 2006, *Moniteur belge*, July 7, 2006.

[3016] Article 11 of the 1989 Special Law concerning the Constitutional Court.

[3017] The office of the prosecutor is *required* to take the initiative (*Parl. St.* Kamer, 1988-89, 633/4, 27), but there is no legal remedy against non-action. It may be expected that the office of the prosecutor will protect the court. *See also* C. RYNGAERT & W. VERRIJDT, "Arbitragehof vernietigt overgangsbepaling Genocidewet", *De Juristenkrant*, 13 September 2006, p. 6.

[3018] *De Standaard*, June 30, 2005. Like in the "Butare Four" trial, dozens of witnesses were flown to Rwanda. Video-conference was used to hear witnesses who were imprisoned in Rwanda. *De Standaard*, May 9, 2005; May 26, 2005.

1994.[3019] The prosecution of Ntuyahaga is not based on the universality principle, but on the passive personality principle enshrined in Art. 10, 1°*bis* PT CCP. Although Rwanda was itself interested in the prosecution of Ntuyahaga for his role in the murder of Agathe Uwilingiyimana, the prime minister of Rwanda, it may recognize Belgium's overriding prosecutorial interest, so that a diplomatic fall-out may be prevented.

10.4.3. Concluding remarks

908. Foreign protest impelled the Belgian Parliament to seriously scale down the reach of its international crimes legislation in 2003. It could have introduced procedural modifications, by limiting the availability of civil party petition, scrapping the possibility of exercising universal jurisdiction *in absentia*, or espousing a strict subsidiarity principle. Regrettably, it opted to abolish universal jurisdiction over crimes against international humanitarian law altogether. Such crimes are nominally no longer subject to universal jurisdiction, although under the enabling clause of the PT CCP, crimes of torture and war crimes committed in international armed conflicts, which Belgium is required to prosecute under international treaty law, may be amenable to universal jurisdiction. While since 2003 no cases have been prosecuted under the new regime's universality principle,[3020] Belgium remains quite active in prosecuting international crimes. For one, some cases that were initiated under the old regime's universality principle are continued (*Habré, Total*). For another, prosecutors have established jurisdiction under an expansive concept of the active personality principle, and under the passive personality principle. It may be hoped that the successful prosecution of these cases could convince the Belgian legislature of reconsidering universal jurisdiction over core crimes against international law.

10.5. Universal jurisdiction over core crimes against international law in France

909. UNIVERSAL JURISDICTION IN FRANCE – Unlike Germany and the Netherlands, the French legislator has not enacted a special statute dealing with crimes against international humanitarian law. These crimes remain governed by the general provisions of the Penal Code and the Code of Criminal Procedure. The French Code of Criminal Procedure (CCP) provides for extraterritorial jurisdiction in its Article 689, stating that "[p]erpetrators of or accomplices to offences committed outside the territory of the Republic may be prosecuted and tried by French courts either when French law is applicable under the provisions of Book I of the Penal Code[3021] or any other statute, or when an international Convention gives jurisdiction to French courts

[3019] Ntuyahaga surrendered voluntarily to the ICTR on June 24, 1998. The ICTR released him in 1999 after the prosecutor had withdrawn her accusations against him: Soon after, Ntuyahaga was arrested in Tanzania for an immigration offence, whereupon both Belgium and Rwanda requested his extradition. On March 26, 2004, a court in Tanzania rejected the Rwandese request for surrender: The next day, Ntuyahaga took, voluntarily, the plane to Belgium, where he surrendered to the Belgian authorities. Oddly, Ntuyahaga was also a civil party in a case against Paul Kagame and others: He asked the Court of Cassation to join the case against him and the case in which he was a civil party. The Court refused to do so and discontinued, on the basis of transitory regime of the 2003 act, the Kagame case on May 19, 2004. Cass., *K.P. e.a.*, May 19, 2004, N° P.04.0352.F, available at http://www.cass.be.
[3020] Article 12*bis* PT CCP.
[3021] That is, on the basis of the active and passive nationality principle.

to deal with the offence."[3022] Articles 689-1 *et seq.* CCP go on to specify over what offences French courts may exercise universal jurisdiction in accordance with international conventions, provided that the author happens to be in France.[3023] This list does however not feature any conventions relating to violations of international humanitarian law.[3024] Pursuant to Articles 689-2 to 689-10 CPP, French courts may only exercise jurisdiction over any person who happens to be in France and who has committed an offence punishable under any of the listed conventions relating to torture, terrorism, nuclear protection, maritime navigation, civil aviation and corruption.[3025]

[3022] Article 692 of the Code of Criminal Procedure clarifies that "no prosecution may be initiated against a person who proves that he has been finally tried abroad for the same matters and, in the case of conviction, that the sentence has been served or extinguished by limitation." (*i.e.* the principle of *non bis in idem*)

[3023] Article 689-1 of the Code of Criminal Procedure states that [i]n accordance with the international Conventions quoted in the following articles, a person guilty of committing any of the offences listed by these provisions outside the territory of the Republic and who happens to be in France may be prosecuted and tried by French courts. The provisions of the present article apply to attempts to commit these offences, in every case where attempt is punishable."

[3024] French reluctance to adopt the universality principle for crimes against international humanitarian law can be traced to France's post-World War II negotiating positions, notably in the run-up to the adoption of the Genocide Convention (1948). In the Sixth Committee of the UN General Assembly, France, like the other permanent members of the UN Security Council, opposed universal jurisdiction for the crime of genocide. (See L. REYDAMS, *Universal Jurisdiction*, Oxford, Oxford University Press, 2003, 51). At the same time however, France did not trust the willingness of the territorial State to investigate and prosecute possible crimes of genocide, pointing out that "[n]o State would commit its governing authorities to its own courts" (UN Doc. E/AC.25/SR.9), apparently believing that an international tribunal (which eventually was only established at the end of the 20th century) could provide solace. In the Barbie case, the Court of Cassation seemed however to support the exercise of universal jurisdiction over crimes against international humanitarian law, where it held that "by reason of their nature, the crimes against humanity with which Klaus Barbie, who claims German nationality, is charged in France where those crimes were committed, do not simply fall within the scope of French municipal law but are subject to an international criminal order to which the notions of frontiers and extradition rules arising therefrom are completely foreign." (*Fédération Nationale des Déportés et Internés Résistants et Patriotes and Others v. Barbie*, Court of Cassation (Criminal Chamber), 6 October 1983, 78 I.L.R. 125, 130). The Barbie case was however not concerned with universal jurisdiction, as Barbie, a German Gestapo commander, had committed crimes against humanity on French territory during the Second World War. The proceedings against Barbie were therefore firmly anchored in the territorial principle. While the holding that "an international criminal order to which notions of frontiers are completely foreign" could be construed as a modest endorsement of universal jurisdiction, its purpose was only to validate the institution of a criminal prosecution in France against Barbie in spite of the absence of extradition proceedings between Bolivia, where Barbie had taken refuge, and France. As there was no extradition treaty between Bolivia and France, Bolivia first refused to extradite Barbie and thereafter expelled him to French Guyana where he was arrested by French agents.

[3025] The UN Torture Convention (Article 689-2), the European Convention on the Suppression of Terrorism (Article 689-3), the Convention on the Physical Protection of Nuclear Material (Article 689-4), the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (Article 689-5), the Convention for the Suppression of Unlawful Seizure of Aircraft, the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Article 689-6), the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation (Article 689-7), the Protocol to the Convention on the Protection of the Communities' Financial Interests, the Convention on the Fight against Corruption involving Officials of the European Communities or Officials of Member States of the European Union (Article 689-8), the International Convention for the Suppression of Terrorist Bombings (Article 689-9), and the International Convention for the Suppression of the Financing of Terrorism (Article 689-10).

10.5.1. War crimes

910. Although the Geneva Conventions, to which France is a party, arguably require France to bring persons, regardless of their nationality, before its own courts for war crimes if it does not extradite them,[3026] French domestic criminal law does not bestow universal jurisdiction over war crimes upon French courts.[3027] Possibly, France puts a higher premium on the *raison d'Etat* and the desire not to upset foreign relations than on the need to prosecute war crimes. French reluctance to embrace universal jurisdiction over war crimes may surely also be explained by the fact that claiming universal jurisdiction over war crimes could serve as an incentive for other States to claim universal jurisdiction over war crimes involving French service-members, who are, like U.S. forces, deployed worldwide.[3028] The absence of universal jurisdiction over war crimes under French law is also reflected by France's towards ICC jurisdiction over war crimes: upon ratification, France filed a declaration under Article 124 of the ICC Statute pursuant to which for a period of seven years after the entry into force of the Statute for France, it does not accept the jurisdiction of the Court with respect to a war crime when that crime is alleged to have been committed by its nationals or on its territory.[3029] Only one other State, Colombia, has made such a declaration.

911. Although the Geneva Conventions do not feature among the Conventions listed in Articles 689-2 – 689-10 which, in the French legislator's view, provide for

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[3026] Articles 49, 50, 129 and 146 of respectively Geneva Conventions I, II, III and IV.

[3027] Article 70 of the French Code of Military Justice however empowers French military courts to exercise some sort of universal jurisdiction over crimes committed during an armed conflict to which France is a party ("Sont de la compétence des juridictions des forces armées les crimes et délits commis depuis l'ouverture des hostilités par les nationaux ennemis ou par tous agents au service de l'administration ou des intérêts ennemis, sur le territoire de la République ou sur un territoire soumis à l'autorité de la France ou dans toute zone d'opérations de guerre, soit à l'encontre d'un national ou d'un protégé français, d'un militaire servant ou ayant servi sous le drapeau français, d'un apatride ou réfugié résidant sur un des territoires visés ci-dessus, soit au préjudice des biens de toutes les personnes physiques visées ci-dessus et de toutes les personnes morales françaises, lorsque ces infractions, même accomplies à l'occasion ou sous le prétexte du temps de guerre, ne sont pas justifiées par les lois et coutumes de la guerre. Est réputée commise sur le territoire de la République toute infraction dont un acte caractérisant un de ses éléments constitutifs a été accompli en France.").

[3028] Fear and uncertainty surround particularly the assessment by foreign or international prosecutors of military necessity pursuant to Article 51 of Additional Protocol I to the Geneva Conventions. *See* W. BOURDON, "Prosecuting the Perpetrators of International Crimes: What Role May Defence Counsel Play?", 3 *J.I.C.J.* 434, 442 (2005). This is one of the main reasons why the United States opposes the ICC. *See* I. CAMERON, "Jurisdiction and Admissibility Issues under the ICC Statute", in D. MCGOLDRICK, P. ROWE & E. DONNELLY (eds.), *The Permanent International Criminal Court. Legal and Policy Issues*, Hart, Oxford, Portland, Oregon, 2004, 87.

[3029] *See also* J. Chirac, President of the Republic of France, Letter to the French Coalition for the International Criminal Court, February 15, 1999, reprinted in Ligue française des droits de l'homme et du citoyen, Groupe d'action judiciaire, "France, compétence universelle. Etat des lieux de la mise en oeuvre du principe de compétence universelle", June 2005, available at http://www.fidh.org/IMG/pdf/cufrance29juin.pdf ("En réponse à votre interrogation relative à l'article 124, je vous confirme que la France déclinera pour une période transitoire la compétence de la Cour pour les crimes de guerre. En effet, la définition des crimes de guerre au sens du Statut est distincte de celle des crimes contre l'humanité ou du génocide en ce sens qu'elle peut recouvrir des actes isolés. Des plaintes sans fondement et teintées d'arrière-pensées politiques pourraient donc plus aisément être dirigées contre les personnels du pays qui, comme le nôtre, sont engagées sur des théâtres extérieurs, notamment dans le cadre d'opérations de maintien de la paix. L'expérience permettra de vérifier l'efficacité des garanties intégrés au Statut afin d'éviter de tels dysfonctionnements.").

obligatory universal jurisdiction, it might be argued that the list of conventions providing for jurisdiction for French courts over non-territorial crimes is not exhaustive, in light of the duty to construe domestic law in accordance with international law in case of doubt. In other words, Article 689 of the Code of Criminal Procedure, channeling *any* convention giving French courts obligatory universal jurisdiction under international law, may also constitute the legal basis for universal jurisdiction over war crimes under French domestic law.[3030] In the *Javor* case, a case concerning the prosecution of a Bosnian Serb initiated by a number of victims on July 20, 1993, the examining magistrate grounded his jurisdiction indeed directly on the Geneva Conventions, and even held that investigations *in absentia* were allowed under the Conventions.[3031] The Paris Court of Appeals however rejected the analysis of the examining magistrate, ruling that the relevant provisions of the Geneva Conventions were too general to directly create rules of extraterritorial criminal jurisdiction, rules which ought to be detailed and precise to cause effects within the French legal order.[3032] Absent direct effect of these provisions with respect to investigation and prosecution, Article 689 of the Code of Criminal Procedure could thus not be applicable to grave breaches of the Geneva Conventions. The French Court of Cassation did not contest the Court of Appeals' reasoning.[3033] The doctrine has criticized this approach, holding that, while perhaps some provisions of the Geneva Conventions cannot be considered to have direct effect, this cannot be said of the articles on universal jurisdiction.[3034] The opinion of the courts is nonetheless that that the list of conventions enumerated in the Articles 689-1 and the following of the CCP is exhaustive.[3035] The examining magistrate in *Javor* had besides already held that the strict reference to treaty law in Article 689 CPP does not allow for universal jurisdiction over international crimes derived from customary international law, such as over genocide and crimes against humanity.[3036]

[3030] *Compare* B. STERN, "Le genocide rwandais face aux autorités françaises", in L. BURGORGUE-LARSEN (ed.), *La répression internationale du génocide rwandais*, Brussels, Bruylant, 2003, 140-43 (« [S]i les Conventions de Genève ne sont pas incorporées dans l'ordre juridique français en application de l'article 689-1, c'est qu'elles n'avaient pas à l'être, puisqu'elles relevaient de l'article 689, applicable aux conventions créant directement une compétence universelle. »).

[3031] *See* Tribunal de Grande Instance de Paris (examining magistrate), 6 May 1994, available at http://www.u-j.info/xp_resources/material/Cases/France/Javor/Ordonnance.pdf.

[3032] *See* Cour d'Appel de Paris, 24 October 1994, available at http://www.u-j.info/xp_resources/material/Cases/France/Javor/Appeal%20Decision.doc (« Ces dispositions revêtent un caractère trop général pour créer directement des règles de compétence extraterritoriale en matière pénale, lesquelles doivent nécessairement être rédigées de manière détaillée et précise. »).

[3033] Cass. fr. (crim.), 26 March 1996, *Bulletin criminel* 1996 N° 132 p. 379, *R.G.D.I.P.* 1996, 1083. With respect to the allegations of torture, also contained in the complaint, the Court of Cassation ruled that Article 689-2 CPP did not apply as there was no indication that the perpetrators were present in France. It made the same reasoning with respect to the Law No. 95-1 of 2 January 1995, which provides for universal jurisdiction over crimes against international humanitarian law committed in the territory of the former Yugoslavia.

[3034] *See* M. SASTRE, *R.G.D.I.P.* 1996, 1090-1091; C. LOMBOIS, "De la compassion territoriale", *Rev. sc. Crim.* 1995/2, 399; comment to the *Munyeshyaka* judgment, *R.G.D.I.P.* 1998, 830.

[3035] *See also* M. SASTRE, comment to *Javor*, *R.G.D.I.P.* 1996, 1090.

[3036] The examining magistrate found, on the one hand, that Article 6 of the Genocide Convention only provides for territorial an international jurisdiction, and, on the other hand, that universal jurisdiction over crimes against humanity, being a domestic law qualification, should abide by Articles 689 and 689-1 of the Code of Criminal Procedure, which do not allow for jurisdiction over acts committed abroad by foreign nationals against foreign nationals. *See* Tribunal de Grande Instance de Paris (examining magistrate), 6 May 1994, available at http://www.u-j.info/xp_resources/material/Cases/France/Javor/Ordonnance.pdf.

10.5.2. Rwanda and the former Yugoslavia

912. Whilst general French criminal law does not provide for universal jurisdiction over crimes against international humanitarian law, two *ad hoc* laws explicitly confer universal jurisdiction upon French courts for war crimes, genocide, and crimes against humanity committed in the territory of Rwanda[3037] and the former Yugoslavia[3038], in the framework of French cooperation with the ICTR and the ICTY.[3039] The exercise of universal jurisdiction on the basis of these laws is dependent upon the presence of the presumed offender in France.[3040] If the presumed offender were not present in France, testimony from victims who had sought refuge in France, could nevertheless still be taken.[3041] By adopting the law on Rwanda, the French Parliament implemented

[3037] Law No. 96-432 of 22 May 1996 adapting French legislation to the provisions of United Nations Security Council Resolution 955 establishing the International Criminal Tribunal to prosecute persons responsible for acts of genocide or other serious violations of international law committed in 1994 in Rwanda and, for Rwandan citizens, in neighbouring states, *Journal Officiel*, 23 May 1996, English translation available at http://www.u-j.info/index/99335,79779;.

[3038] Law No. 95-1 of 2 January 1995 adapting French legislation to the provisions of United Nations Security Council Resolution 827 establishing an international criminal tribunal to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the Former Yugoslavia since 1991 (amended by Law No. 96-432 of 22 May 1996 and by Law no. 2002-268 of 26 February 2002 on cooperation with the International Criminal Court), *Journal Officiel*, 3 January 1995, English translation available at http://www.u-j.info/index/99260,79779.

[3039] *Id.*, common Article 1 and 2.

[3040] *Id.*, common Article 2 (« The authors or accomplices of crimes prohibited in Article 1 may be prosecuted and tried before French courts 'under French law' if they are apprehended in France. These provisions also apply to the attempt of crimes, where prohibited as such. Any person who is affected by one of these crimes may file a complaint and become a civil petitioner in the case under the provisions of Article 85 of the Code of Criminal Procedure, where French courts may exercise jurisdiction under the aforementioned paragraph. The International Tribunal shall be informed of any ongoing procedure concerning acts which may fall within its jurisdiction.)" (translated by W. BOURDON, "Prosecuting the Perpetrators of International Crimes: What Role May Defence Counsel Play?", 3 *J.I.C.J.* 434, 439 (2005)). *See also Circulaire* of February 10, 1995, *Direction des affaires criminelles et des graces, Service des affaires européennes et internationales*, reprinted in *Journal Officiel*, February 21, 1995, 2757 ; Cass. fr. (crim.), *Javor*, 26 March 1996, *Bulletin criminel* 1996 N° 132 p. 379, *R.G.D.I.P.* 1996, 1083 (holding that the *ad hoc* laws only establish investigative, prosecutorial and adjudicative jurisdiction over crimes against international humanitarian law provided that the authors of these crimes can be found in France, and that the presence of the victims in France would not constitute a sufficient basis). The strict presence requirement was denounced by STERN, who considered it not the best way of cooperation with the ICTR and the ICTY. *See* B. STERN, "La compétence universelle en France: le cas des crimes commis en ex-Yougoslavie et au Rwanda", 40 *G.Y.I.L.* 280, 298 (1997).

[3041] *See Circulaire*, February 10, 1995, *J.O.* nr. 44, February 21, 1995, p. 2757 ("comme cela a été indiqué au cours des debats devant l'Assemblée nationale (*J.O.* AN CR, December 20, 1994, p. 9446), l'impossibilité de mettre en mouvement l'action publique contre des personnes ne se trouvant pas sur le territoire empêche nullement les parquets de faire procéder, à titre conservatoire et au cours d'une enquête préliminaire, a l'audition des personnes victimes de ces crimes et qui se seraient réfugiés en France"); *Circulaire*, July 22, 1996, quoted in Ligue française des droits de l'homme et du citoyen, Groupe d'action judiciaire, "France, compétence universelle. Etat des lieux de la mise en oeuvre du principe de compétence universelle", June 2005, available at http://www.fidh.org/IMG/pdf/cufrance29juin.pdf (pointing out that "le caractère limitatif de cette compétence [*i.e.*, the presence requirement] n'empêche pas les parquets de faire procéder, au cours d'un concours préliminaire, à l'audition des personnes victimes de ces crimes qui se sont refugiés en France"); W. BOURDON, "Prosecuting the Perpetrators of International Crimes: What Role May Defence Counsel Play?", 3 *J.I.C.J.* 434, 440 (2005). It is unclear whether the loosening of the presence requirement for purposes of the operation of the two *ad hoc* laws may be extrapolated to the operation of Article 689-2 CPP.

Security Council Resolution 978 (1995).[3042] For the crimes committed in ex-Yugoslavia there was no Security Council Resolution urging States to exercise universal jurisdiction.[3043] The two *ad hoc* laws may probably be construed as instruments dealing with very specific circumstances.[3044]

French law enforcement authorities hardly acted upon the grant of universal jurisdiction contained in the *ad hoc* laws,[3045] until the United Nations called upon France to prosecute Callixte Mbarushimana, accused of genocide committed in Rwanda and present in French territory on July 27, 2005. The French Minister of Justice responded that France would consider prosecution on the basis of the *ad hoc* laws in the framework of the completion strategy of the ICTR, the tribunal having requested France to assist it in the prosecution of *génocidaires*.[3046]

10.5.3. Nationality-based jurisdiction over crimes against international humanitarian law

913. The possibilities for the exercise of universal jurisdiction over crimes against international humanitarian law might be limited under French law. Jurisdiction under French law may however be established over such crimes on the basis of the active and passive personality principles. The aforementioned Article 689 CCP indeed not only sets forth that (universal) jurisdiction may be exercised over crimes that French is obliged to prosecute under international conventions, but also that jurisdiction could be established under Book I of the French Penal Code, which provides for active and passive personality jurisdiction, subject to the principle of *non bis in idem*.[3047]

[3042] Resolution 978 (1995) urged States "[t]o arrest and detain, in accordance with their national law and relevant standards of international law, pending prosecution by the International Tribunal for Rwanda or by the appropriate national authorities, persons found within their territory against whom there is sufficient evidence that they were responsible for acts within the jurisdiction of the International Tribunal for Rwanda." The Resolution was not taken under Chapter VII of the UN Charter and was, accordingly, not binding upon the UN Member States.

[3043] In this context, the Minister of Justice pointed out: "Article 2 of the first Chapter in Title I of the law grants the exercise of universal jurisdiction to French courts over the crimes prohibited by Article 1, where the author or accomplice of such crimes is apprehended on French territory. The establishment of such universal jurisdiction is not required by the Security Council's Resolution and heralds an important development: it underscores France's will to ensure utmost efficiency when collaborating in the punishment of such crimes. It extends the application of French law to any war criminal seeking refuge on our territory, even if such person is not yet sought by the International Tribunal". Minister of Justice, memorandum of interpretation of the law implementing the Statute of the ICTY, at 3, translated in *See* W. BOURDON, "Prosecuting the Perpetrators of International Crimes: What Role May Defence Counsel Play?", 3 *J.I.C.J.* 434, 440 (2005).

[3044] These circumstances include the great number of perpetrators, their presence abroad and the collapse of the Rwandan judicial system. *See* L. REYDAMS, *Universal Jurisdiction*, Oxford, Oxford University Press, 2003, 71.

[3045] *See however, e.g.*, the torture complaint against Dr Sosthene Munyemana with the Prosecutor of the Republic in Bordeaux, and the genocide complaint against Laurent Bucyibaruta, both of them relating to the Rwandan genocide. The latter was indicted on 31 May 2000 by an investigating judge in Troyes. On 26 September 2001, the Criminal Chamber of the Court of Cassation transferred these cases to Paris with a view to a good administration of justice under Article 622 of the Code of Criminal Procedure.

[3046] *Le Monde*, 29 June 2005.

[3047] Article 113-9 CP.

914. Under Article 113-6 of the Penal Code,[3048] crimes against international humanitarian law are, if committed by a French national abroad, always punishable in France, even in case the territorial State does not punish the conduct.[3049] If the offender is no French national at the time of the commission of the offence, he might still be prosecuted if he acquires the French nationality afterwards. This extended active nationality principle may amount to an application of the universality principle, although a clear *a posteriori* link to the forum is still present. Jurisdiction *in absentia* is not excluded under Article 113-6 CP.

915. Under Article 113-7 CP, crimes against international humanitarian law are also punishable in France if the victim is a French national.[3050] Unlike under Article 113-6 CP, if the *victim* acquires the French nationality after the commission of the offence, the author of the crime is not punishable in France. Jurisdiction *in absentia* is also not excluded.[3051] On the basis of Article 113-7 CP, Alfredo Astiz, the 'Blond Angel' of the ESMA detention camp in Buenos Aires during the Argentine junta (1976-83) was tried in 1990 *in absentia* by the Paris *Cour d'Assises* for his role in the disappearance of two French nuns in 1977, and convicted to life imprisonment.[3052] In October 2001, a French examining magistrate, supported by the French government, issued an arrest warrant against former Chilean General Pinochet and 16 others for the crime of disappearance of a number of French citizens under the military regime of Pinochet.[3053]

[3048] Article 113-6 CP states that "French criminal law is applicable to any felony committed by a French national outside the territory of the French Republic. It is applicable to misdemeanours committed by French nationals outside the territory of the French Republic if the conduct is punishable under the legislation of the country in which it was committed. The present article applies although the offender has acquired the French nationality after the commission of the offence of which he is accused." Article 111-1 of the Penal Code classifies criminal offences according to their seriousness as felonies, misdemeanours or petty offences, felonies being the most serious offences. For the commission of felonies, natural persons incur a minimum term of criminal imprisonment or criminal detention of 10 years (Article 131-1 of the Penal Code). For the commission of misdemeanours, they could incur a variety of sanctions, the most serious thereof being imprisonment of 10 years (Articles 131-3 and 131-4 of the Penal Code). For the commission of petty offences, they incur a fine, a forfeiture or restriction of rights (Article 131-12 of the Penal Code).

[3049] Crimes against international humanitarian law qualify, almost by definition, as felonies for purposes of Article 113-6 CP. This has also consequences at the level of civil party petition. The French Penal Code adds an additional filter for the prosecution of misdemeanours in its Article 113-8, which requires action of the public prosecutor and thus excluding *'constitution de partie civile'* or civil party petition for the prosecution of such offences. As crimes against international humanitarian law almost invariably qualify as felonies, their prosecution can also be instigated at the behest of the victims.

[3050] Article 113-7 CP states that "French Criminal law is applicable to any felony, as well as to any misdemeanour punished by imprisonment, committed by a French or foreign national outside the territory of the French Republic, where the victim is a French national at the time the offence took place."

[3051] *See Public Prosecutor v Astiz*, Cour d'assises of Paris, 16 March 1990; *Pinochet*, Cour d'appel de Paris. Tribunal de Grande Instance de Paris (examining magistrate), orders of 2 and 12 November 1998 (B. STERN, 93 *A.J.I.L.* 696 (1999)).

[3052] Cour d'Assises de Paris, March 16, 1990, *Alfredo Astiz*. *See also* N. ROHT-ARRIAZA, *The Pinochet effect: Transnational Justice in the Age of Human Rights*, Philadelphia, PA, University of Pennsylvania Press, 2005, at 124.

[3053] *See also* relating to Pinochet: *Pinochet*, Cour d'appel de Paris. Tribunal de Grande Instance de Paris (examining magistrate), orders of 2 and 12 November 1998 (B. STERN, 93 *A.J.I.L.* 696 (1999); R.A. FALK, "Assessing the Pinochet Litigation: Whither Universal Jurisdiction?", in S. MACEDO (ed.), *Universal Jurisdiction*, Philadelphia, PA, University of Pennsylvania Press, 2004, at 108. It has been noted that this willingness to prosecute Pinochet is rooted in French domestic politics. French

10.5.4. Presence requirement

916. Under Articles 689-1 *et seq.* CCP and the two ad hoc laws, universal jurisdiction only obtains when the perpetrator happens to be in France. The examining magistrate in the *Javor* case, a case under Article 689-2 CCP, which implements Article 5 (2) of the UN Torture Convention, held that, in order to start an investigation, it was not necessary for the author to be apprehended in France.[3054] The Paris Court of Appeals and the Court of Cassation for their part however pointed out in the same case that the jurisdiction of France, as set forth in Article 689-2 CCP, could only result from "un element objectif et matériel de rattachement consistant en la présence des auteurs présumés sur le territoire français [« an objective and material connecting element consisting of the presence of the presumed perpetrators on French territory »]."[3055] As there was no indication of Javor's presence in France, the Court ruled that France had no investigative universal jurisdiction over the alleged torture offences.

It may be noted that in France, unlike in countries such as Denmark and the Netherlands, prosecutors and courts do not discontinue criminal proceedings after the suspect against whom proceedings were initiated when he was present in France, as happened *inter alia* in the *Ely Ould Dah* case, discussed in subsection 10.5.7. There is thus some leeway for the exercise of universal jurisdiction *in absentia* in France.

917. Although the suspect's presence is required for jurisdiction to obtain, the burden of proof of a suspect's presence gradually shifted from the victims to the French State, which made a finding of jurisdiction more likely. The victims were only required to show evidence of the probable transit or presence of the suspect in French territory, and prosecutors could only refuse to investigate the crimes if they could conclusively establish that the suspect was not present in France.[3056] This

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authorities may have pandered to public opinion and the large Chilean exile community in France. Their efforts could also be perceived as making amends for their own human rights violations, notably in Algeria. When the United Kingdom eventually decided not to extradite Pinochet to Spain on medical grounds, the French government expressed "regret". *See* N. ROHT-ARRIAZA, *The Pinochet Effect*, Philadelphia, PA, University of Pennsylvania Press, 2005, 125.

[3054] *See* Tribunal de Grande Instance de Paris (examining magistrate), 6 May 1994, available at http://www.u-j.info/xp_resources/material/Cases/France/Javor/Ordonnance.pdf. (« Attendu qu'une telle analyse autorise la mise en place d'un dispositif judiciaire appropriée et efficace permettant l'arrestation et la traduction des présumés auteurs des faits dénoncés devant les Juridiction Françaises; qu'en conséquence, et pour ces motifs, il y a lieu de se déclarer compétent pour instruire en vertu de la présente Convention de New York [i.e. the UN Torture Convention]. »).

[3055] *See* Cour d'Appel de Paris, 24 October 1994, available at http://www.u-j.info/xp_resources/material/Cases/France/Javor/Appeal%20Decision.doc; Cass. fr. (crim.), *Javor*, *R.G.D.I.P.* 1996, 1083.

[3056] *See* W. BOURDON, "Prosecuting the Perpetrators of International Crimes: What Role May Defence Counsel Play?", 3 *J.I.C.J.* 434, 441 (2005). On January 25, 2000, the prosecutor of Paris, acting upon a complaint of FIDH and LDH, two French human rights organizations, ordered the national anti-terrorist division to investigate whether Rwandan nationals designated as perpetrators or accomplices of the Rwandan genocide could be located on French territory. A few months later, Laurent Bucybaruta was indicted and arrested by the investigating magistrate of Troyes. Also, on November 7, 2001, a complaint against Tunisian torturers was considered to be admissible on the ground that the victims should not prove the presence on French territory of the presumed torturers. *See* FIDH, Groupe d'action judiciaire, "France. Compétence universelle", June 2005, p. 21, available at http://www.fidh.org/IMG/pdf/cufrance29juin.pdf.

accommodation of the victims' concerns was however undone in the *Congo Beach* judgment of the Chambre d'Instruction of the Paris Court of Appeals. In *Congo Beach*, the Court held that it is not up to the investigating judge to establish the presence of the suspect. Instead, it ruled that the presence requirement ought to be assessed at the time when proceedings are initiated by the "réquisitoire introductif", i.e., the legal act by which the investigating judge is seized of the case by the prosecutor. This would imply that the réquisitoire is null and void if the presence of the presumed offender could only later be conclusively established on the basis of an investigation. Before discussing the argument, the facts and procedural history of the *Congo Beach* case will be set out, as the case has also given rise to proceedings before the International Court of Justice.

918. On December 5, 2001, a number of human rights associations filed a complaint with the prosecutor of Paris for crimes against humanity and torture allegedly committed against 350 Congolese nationals. They had disappeared in Brazzaville, in the Republic of Congo, in 1999 upon their return from the Democratic Republic of Congo (Kinshasa), where they had sought refuge during the civil war in the Republic of Congo. The complaint named Denis Sassou Nguessou, the President of the Republic of Congo, general Pierre Oba, the Minister of the Interior, Norbert Dabira, the Inspector-General of the Army (who was residing in France at the moment the complaint was filed) and Blaise Adoua, the commander of the Republican Guard. The complaint alleged torture, forced disappearances and crimes against humanity – torture being the only crime for which French law explicitly provided for universal jurisdiction. The case became popularly known as the 'Congo Beach' case. [3057]

919. The Congo Beach case was transferred to the prosecutor of Meaux (where Norbert Dabira resided), who ordered a preliminary investigation to be conducted by an investigating judge, by means of a "réquisitoire introductif" of January 23, 2002. The investigating judge gathered information and heard Dabira as a witness ("témoin assisté", i.e., a witness who may also be a suspect) in the course of 2002. On September 11, 2002, Dabira was indicted ("mis en examen") in his absence, as he had already returned to Congo. On September 16, 2002, a warrant for immediate appearance ("mandat d'amener") was issued against him, followed by an international arrest warrant on January 15, 2004. Furthermore, when Congolese President Sassou Nguesso paid a visit to France, the investigating judge ordered police officers to hear him as a witness – although he was never indicted nor effectively heard as a witness.[3058] Finally, when Jean-François Ndengue, the Congolese police chief who was in charge of security at Congo Beach in 1999, arrived in Paris, he was arrested by French police on April 1, 2004 at the request of the investigating magistrate. Judicial proceedings in the wake of Ndengue's arrest were to culminate in an across-the-board cancellation of the Congo Beach proceedings by the Chambre d'Instruction of the Paris Court of Appeals.

[3057] The history of the proceedings could be partly gleaned from the ICJ Order of June 17, 2003 – request for the indication of a provisional measure, available at http://www.icj-cij.org/icjwww/idocket/icof/icoforder/icof_iorder_20030617.pdf. An extensive dossier has been compiled by the FIDH, a French human rights NGO and a civil party to the case; dossier available at www.fidh.org.

[3058] *R.G.D.I.P.* 2002, 930.

The investigating magistrate indicted Ndengue upon his arrival and after calling upon the *juge des libertés et de la détention* (JLD), had him, imprisoned on April 2, 2004. Upon appeal of the prosecutor and Ndengue's lawyer, the Chambre d'Instruction of the Paris Court of Appeals quashed the decision by the JLD on April 3, 2004, arguing that Ndengue's lawyer "was not asked to present oral observations", a technicality prescribed by law. Ndengue was immediately set free and the prosecutor of Meaux filed a request to annul the investigatory acts against Ndengue, arguing that he was entitled to immunity.[3059]

920. After the President of the Chambre d'Instruction had stayed the investigation on April 8, 2004, the Chambre cancelled the entire proceedings on November 22, 2004.[3060] It was a remarkable *coup de théâtre*, since the Chambre was merely called upon to rule on the legality of the detention of Ndengue. As expected, the court decided that Ndengue was entitled to immunity – as the Government had argued.[3061] Yet it also quashed the "réquisitoire introductif", *i.e.*, the initial prosecutorial act, in effect ending the Congo Beach proceedings before French courts, on the ground that universal jurisdiction in absentia was not allowed under French law. In spite of French political pressure allegedly being brought to bear on the victims to drop the proceedings in France,[3062] the civil parties immediately appealed to the Court of Cassation. Hereinafter, light will be shed on the main thrust of the Court of Appeal's argument – the presence requirement as set forth by Article 689-1 CCP.

Article 689-1 CCP provides that "[i]n accordance with the international Conventions [including the UN Torture Convention – Article 689-2 CCP] a person guilty of committing any of the offences listed by these provisions outside the territory of the Republic and who happens to be in France may be prosecuted and tried by French courts." Under a strict textual reading of Article 689-1 CCP, a person may only be prosecuted if he could be found in France, or conversely, he cannot be prosecuted in France if he is found abroad. Although logical, this reading may be at loggerheads with another provision of the CCP, which contains one of the basic tenets of French criminal procedure. Pursuant to Article 80-1 CCP "[o]n pain of nullity, the

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[3059] Applications for annulment are based on Article 173 CCP.

[3060] The judgment is not published. An inquiry with the editor of the *Revue Générale de Droit International Public* revealed that neither did he have access to the judgment (email conversation with Patrice Despretz, Director of Publications, *Actualité et Droit International*, August 18, 2005, on file with the author). In France, decisions by the *Chambre d'Instruction* of the Court of Appeals are usually not published. The main arguments of the Court's reasoning can however be retrieved from the website of the *Fédération Internationale des Droits de l'Homme* (FIDH), one of the civil parties in the case. *See* FIDH, Groupe d'action judiciaire, "France. Compétence universelle", June 2005, pp. 18-24, available at http://www.fidh.org/IMG/pdf/cufrance29juin.pdf. *See also* Jeune Afrique L'Intelligent / AFP, November 22, 2004.

[3061] According to the Court, Ndengue was on an official mission in Paris, and, accordingly, would be entitled to diplomatic immunity under Article 21, para. 2 of the Convention of New York of December 8, 1969 on special missions, in its customary international law version (France nor Congo being party to that convention). The civil parties for their part asserted that Ndengue was only on a private visit as there was no prior consultation between France and Congo on his visit to France, and that Ndengue did not figure on the diplomatic list of the Ministry of Foreign Affairs. Drawing on a 1990 decision of the Court of Cassation (Cass., 1e civ., 4 janv. 1990 : Bull. civ. I, nr. 5), they argued that Ndengue could under these circumstances impossibly be entitled to diplomatic immunity. *See* FIDH, Groupe d'action judiciaire, "France. Competence universelle", June 2005, p. 19, available at http://www.fidh.org/IMG/pdf/cufrance29juin.pdf.

[3062] *See* http://www.fidh.org/article.php3?id_article=2271.

investigating judge may place under judicial examination only those persons against whom there is strong and concordant evidence making it probable that they may have participated, as perpetrator or accomplice, in the commission of the offences he is investigating." This provision presupposes that the investigating judge is investigating a case *before* he places certain persons under judicial examination. He is seized of a case *in rem*, or put differently, he investigates *offences*. He is not seized of a case *in personam*, as identifying the perpetrators is precisely one of the aims of his investigation. Similarly, the investigating judge may not know the whereabouts of the perpetrator before he initiates his investigation. The exact whereabouts of the perpetrator, including his presence in France, may possibly only be established in the course of the investigation and not at the moment of the initiation of the proceedings, as indeed, locating the perpetrator is precisely one of the aims of the investigation. The tension between Article 80-1 CCP and Article 689-1 CCP is palpable: the latter seems to require that the perpetrator be present at the moment of the *initiation* of the proceedings, whereas the former implies that the presence of the perpetrator could only be established in the *course* of the proceedings.

The Chambre d'Instruction held that Article 689-1 CCP, the jurisdictional provision, takes precedence over Article 80-1 CCP, the general procedural law provision. Accordingly, before any investigation could be initiated, the presumed offender should be named in the *réquisitoire introductif* so as to ascertain his presence in France. A *réquisitoire* "against X" – which is not uncommon for common crimes – is henceforth inadmissible in the context of international crimes listed in Article 689-1 CCP et seq. The Court of Appeals seemed not to unduly restrict the scope of Article 689-1 CCP, which indeed requires that the alleged perpetrator be present in France. If the Court had upheld the in rem character of investigations into extraterritorial offences, it may have circumvented the presence requirement set forth by Article 689-1 CCP, thereby possibly acting contra legem. Article 689-1 CCP may be construed as a lex specialis vis-à-vis the lex generalis of Article 80-1 CCP, which provides for the in rem character of the investigation. Under this rule of statutory construction, any perceived conflict between the said provisions is undone and the specific provisions of Article 689-1 CPP relating to extraterritorial offences prevail over the general provisions of Article 80-1 CPP relating to common offences.

921. This may appear eminently sensible. However, the nullified investigatory acts were largely aimed at localizing the presumed offenders in France. One may wonder how the presence of the presumed offender can ever be conclusively established without any investigatory acts. The Court of Appeals seemed to assume that the perpetrators of extraterritorial offences are highly unlikely to be present in France, so that any investigation set in motion by a "réquisitoire introductif" to ascertain their pre{ence is likely to yield no results. While this assumption is undoubtedly true, it confuses the efficiency and the legality of judicial investigations. The fact that an investigation is unlikely to bear any fruit may cost dearly to society and may unduly embarrass foreign States, but it does not detract from its legality. And it is legality, not expediency, that courts are expected and required to uphold.

The perverse effect of a strict application of the presence requirement may thus be that cases which an investigating judge is seized of will hardly be prosecuted, unless the presence of the presumed offender is from the outset all too clear. Civil party petition of victims with the investigating judge will then in effect no longer be a

potent tool in the fight against international impunity. The only remaining possibility for victims is their filing a complaint with the prosecutor in the hope that that magistrate is willing to pursue the case. If he is unwilling, he might perhaps be willing to locate the presumed offender. Cognizant of his whereabouts, the victims could then successfully file a civil party petition with the investigating magistrate.

It remains however to be seen whether the court's decision has no implications for investigations by prosecutors. It is true that the court only pronounced on the legality of the investigations by the investigating magistrates, and not on the legality of preliminary investigations by prosecutors short of a full-fledged investigation. Nevertheless, the court's central argument revolved around the presence requirement of Article 689-1 CPP, a jurisdictional provision which both investigating magistrates and prosecutors obviously have to comply with. Only if the presumed offender could be found in France may French law enforcement authorities legally bring a case. This would imply that investigating magistrates and prosecutors are barred from initiating any proceedings against persons who are not present in France, including preparatory proceedings aimed at gathering evidence and hearing witnesses in the absence of the presumed offender, and even investigations precisely aimed at establishing their presence. Unfortunately, the court's decision in Congo Beach may herald a return to a time when French prosecutors demanded that the complainants, and not the authorities after an investigation, prove the presence of the presumed offender, a time of which the 1996 *Javor* judgment by the Court of Cassation was emblematic, but which prosecutors recently appeared to have left behind.

922. Concluding, it appears an aberration that law enforcement authorities should not have the powers to locate in their territory a criminal who could legally be prosecuted under domestic law. Even if that criminal committed his crime(s) outside the forum State, it remains one of the basic tasks of law enforcement authorities to see to it that no person who committed a crime under domestic law can walk freely in the State's territory.[3063] This is also what the jurisdictional provisions of the Geneva Conventions require from a State Party: it is expected "*to search for*" and "bring … regardless of their nationality [perpetrators of grave breaches of Conventions] before its own courts."[3064]

10.5.5. Torture as genocide

923. French law makes the prosecution of crimes against international humanitarian law in France nearly impossible. It may however happen that during a war or genocide, acts of torture have been committed. Such acts could in principle be prosecuted in France under Article 689-2 CCP, which provides for universal jurisdiction over torture. In the French *Munyeshyaka* case, which was brought in 1995 by victims of the Rwandan genocide, the chambre d'accusation of the court of appeals

[3063] One of the rationales of universal jurisdiction is precisely preventing foreign criminals from causing trouble in the territory in which they seek refuge, a rationale which harks back to the times of the medieval Italian city-states. *See* H. DONNEDIEU DE VABRES, *Les Principes Modernes de Droit Pénal International*, Paris, Recueil Sirey, 1928, at 135-36; R. RABINOVITCH, "Universal Jurisdiction *In Absentia*", 28 *Fordham Int'l L. J.* 500, 517 (2005).

[3064] *See also* A. ZIMMERMANN, "Violations of Fundamental Norms of International Law and the Exercise of Universal Jurisdiction in Criminal Matters", in C. TOMUSCHAT & J.-M. THOUVENIN (eds.), *The Fundamental Rules of the International Legal Order*. *Jus Cogens and Obligations Erga Omnes*, Leiden, Boston, Martinus Nijhoff, 2006, 335, 352 (emphasis added).

however ruled in 1996 that, if criminal charges include both genocide and torture, "la compétence du juge d'instruction doit s'apprécier uniquement au regard de la plus haute acceptation pénale, la plus spécifique, celle de génocide, infraction distincte des tortures et actes de barbarie [...]." ["the jurisdiction of the investigating judge should be exclusively assessed in view of the highest and most specific incrimination, i.e., the crime of genocide, an offence that differs form torture and barbaric acts"].[3065] Since the French CCP, while providing for universal jurisdiction over torture offences in Article 689-2 CCP, did not specifically provide for universal jurisdiction over genocide, French courts would, in the Court's view, lack jurisdiction to entertain the torture case.

The judgment of the court of appeals in *Munyeshyaka* was duly quashed by the Court of Cassation, which ruled « qu'en affirmant que seule la qualification de génocide était applicable en l'espèce, la chambre d'accusation a méconnu l'article 689-2 » [by affirming that only the qualification of genocide applied in the case, the chambre d'accusation has violated Article 689-2 CPP].[3066] The Court of Cassation held that French courts have jurisdiction as soon as "les faits délictueux sont susceptibles de revêtir, selon la loi française, une qualification entrant dans les prévisions de l'article 689-2 du code de procédure pénale" [the criminal acts may qualify, under French law, as acts provided for in Article 689-2 CPP, i.e., acts of torture][3067].

924. The *Munyeshyaka* case highlights a long-standing inconsistency in international treaty law : genocide, the crime of crimes, is, pursuant to the 1948 Genocide Convention, subject to a less vigorous jurisdictional regime than the crime of torture is, which, heinous as it is though, does not rise to the level of heinousness generally ascribed to genocide. The French Court of Cassation has wisely held that courts should not be allowed to compound this aberration by qualifying acts that indeed constitute torture as crimes of genocide in order to circumvent their authority or duty to exercise universal jurisdiction. [3068]

10.5.6. Subsidiarity

925. The subsidiarity principle is not enshrined in French law. In practice, French prosecutors and investigating judges only defer to the territorial State or the offender's home State if that State succeeds with a prosecution, not when it merely initiates a prosecution.[3069] Accordingly, a genuine willingness to prosecute by that State does not make the case for deference. France's lack of consideration for subsidiarity in the Congo Beach case caused the Republic of the Congo to file a complaint with the International Court of Justice on November 25, 2002 (i.e., before the judgment of the

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[3065] *R.G.D.I.P.* 1996, 1084 (comment M. SASTRE) (own translation).
[3066] Cass. fr. (crim.), *R.G.D.I.P.* 1998, at 828.
[3067] *Id.*, at 827.
[3068] In spite of the Court of Cassation's judgment, the *Munyeshyaka* proceedings are still underway. Because of the delay, the victims brought a case before the European Court of Human Rights. On June 8, 2004, the Court ruled that France was in breach of Articles 6, § 1 and 13 of the European Convention for Human Rights as it had violated the right to a hearing in a reasonable time. European Court of Human Rights, *Mutimura* v. *France*, Nr. 44621/99, June 8, 2004, available at http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=mutimura&sessionid=986790&skin=hudoc-fr
[3069] HUMAN RIGHTS WATCH, *Universal Jurisdiction in Europe: The State of the Art*, Vol. 18, No. 5(D), June 2006, pp. 58-59.

French Court of Appeals). Aside from arguing that exercising universal jurisdiction over nationals of States non-Parties to the UN Torture Convention violated the principle of sovereign equality of States, Congo submitted that the principle of subsidiarity is a principle of international law. It stated in particular that Article 5, § 2 of the UN Torture Convention contains a prioritization of fora, the first and foremost adjudicative forum being the territorial State, as could purportedly be gleaned from the reference that Article 5, § 2 makes to Article 5, § 1 of the Convention (which features the other jurisdictional grounds than the universality principle).[3070] Another State, such as France, would only have subsidiary (universal) jurisdiction, even if the suspect were present on its territory and even if an extradition request were not filed. Congo pointed out that it had started a procedure on the basis of the same facts, about which it informed France on September 9, 2002. As it was investigating the case, France would lack jurisdiction.[3071] The *Congo Beach* case is still pending before the ICJ. It is hard to predict how the ICJ will decide the case. Drawing from the reference to Article 5, § 1 by Article 5, § 2 that the territorial forum prevails over other fora may appear unwarranted. Article 5, § 2, a classical *aut dedere aut judicare* provision, only requires that the custodial State either prosecute or extradite the alleged perpetrator of torture offences to a State with a stronger nexus to the case (the States mentioned in Article 5, § 1), without anyhow precluding a prosecution by the custodial State in case the territorial State is prosecuting the case.

10.5.7. The first trial under the universality principle: Ely Ould Dah

926. After quite some procedural vicissitudes, a first trial on the basis of the universality principle, that of the Mauritanian commander Ely Ould Dah, who was charged with torture of Black Africans committed in Mauritania, was finally scheduled for June 2005, after repeated promises by the Prosecutor-General.[3072] On July 1st, 2005, the Cour d'Assises of Nîmes sentenced Ely Ould Dah, in his absence but in the presence of his lawyers and five civil parties, to the maximum sentence of 10 years imprisonment for having directly committed, ordered and organized acts of torture in Mauritania.[3073]

[3070] "Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 *to any of the States mentioned in paragraph I of this article*." (emphasis added). Congo's request is available at http://www.icj-cij.org/icjwww/idocket/icof/icoforder/icof_iapplication_20020209.pdf

[3071] Since 2000, Congolese prosecutors were indeed investigating the Congo Beach case (*see* on the course of the investigations: http://www.fidh.org/IMG/pdf/Affbeach400.pdf). The trial of 15 accused, including Dabira and Ndengue, on charges of genocide, war crimes and crimes against humanity, opened on July 18, 2005 at the Criminal Court of Brazzaville. On August 17, 2005, the court acquitted all of them, while condemning the Congolese State to indemnify 86 relatives of the disappeared. The victims intended to appeal to the Congolese Supreme Court (AFP, August 17, 2005; *Le Monde*, August 18, 2005). Not surprisingly, concern has been voiced over the quality and impartiality of the Congolese trial (*see*, *e.g.*, the view of the *Fédération Internationale des Droits de l'Homme*: http://www.fidh.org/article.php3?id_article=2630).

[3072] Ely Ould Dah, a Mauritanean commander, was arrested in France after a complaint by two human rights organizations at the behest of Mauritanean refugees in France, on July 1, 1999, when he was receiving training in a French army school in Montpellier. He was charged with torture committed in Mauritania in 1990-1991 against alleged black African coup conspirators in the camp of Jreïda. On July, 8, 2002, the Nîmes Court of Appeals (*chambre d'instruction*) referred the case to the Gard *Cour d'Assises*. *See* on the *Ely Ould Dah* case: http://www.fidh.org/IMG/pdf/ely2005f.pdf.

[3073] *See* www.fidh.org. Judgment not published.

927. The *Ely Ould Dah* case nearly ran aground due to the fact that France inserted Article 689-2, the article providing for universal jurisdiction over torture, into the CCP (1987) before it inserted a substantive torture provision into the Penal Code (Article 222-1 CCP, 1994). Ould Dah asserted that the autonomous substantive criminalization of torture in Article 222-1 of the Penal Code was retroactively applied to his case, and that, accordingly, he could not be prosecuted in France. Article 222-1 of the Criminal Code was indeed only introduced on March 1, 1994, whilst Ould Dah allegedly committed his offences in 1990-91. The court of appeals and the Court of Cassation did not follow Ould Dah's argument, and ruled that the requirement of legality could be met by the definition of an offence in a treaty, *in casu* the UN Torture Convention – which was ratified by France on November 12, 1985 and entered into force on June 26, 1987 – as a treaty prevails over a statute.[3074] They added that torture was already an aggravating circumstance before 1994 for offences pursuant to then Articles 309 and 303 (2) of the Criminal Code.[3075] For these reasons, universal jurisdiction over the torture offences allegedly committed by Ely Ould Dah in 1990-1991 would not be retroactively applied.[3076]

928. The legal problem highlighted in *Ely Ould Dah* may be arcane. Usually, when implementing a convention into their domestic laws, States will implement both the substantive and jurisdictional provisions of that convention. States may nonetheless believe that existing domestic substantive law provisions relating to offences against the physical integrity of the person suffice to comply with the international criminalization, e.g., the criminalization of torture laid down in Article 1 of the Torture Convention.[3077] These States, such as France before 1994, then only implement the jurisdictional provisions of the Convention. If an existing substantive provision specifically criminalizes – possibly as an aggravating circumstance of offences against the physical integrity of the person – the sort of conduct that Article 1 of the Torture Convention criminalizes, without naming it torture, it appears that the jurisdictional provision can legitimately be linked to the substantive provision.[3078]

[3074] Cass. fr. (crim.), *Ely Ould Dah*, 23 October 2002, Nr. 02-85379, available at http://www.legifrance.gouv.fr/WAspad/UnDocument?base=CASS&nod=CXRXAX2002X10X06X00195X000 (« que le principe de légalité ne s'oppose nullement à ce qu'une infraction soit définie dans un traité ou un accord international, celui-ci ayant une force supérieure à la loi ») This holding may have served the purpose of strengthening the case for non-retroactivity of the criminalization of torture, which hinged on the domestic qualification of torture as an aggravating circumstance of violent crimes

[3075] This Court's holding that the crime of torture was already defined in the UN Torture Convention may have served the purpose of strengthening the case for non-retroactivity of the criminalization of torture, which hinged on the domestic qualification of torture as an aggravating circumstance of violent crimes.

[3076] The court of appeals nor the Court of Cassation pronounced in the *Ely Ould Dah* case on the possible punishment of crimes of torture committed before the enactment of Article 222-1 of the Criminal Code, which makes torture punishable with up to 15 years imprisonment. In view of the non-retroactivity of the (stricter) law, one should assume that the punishment of 5-10 years imprisonment set forth by then Articles 309 and 303 (2) of the Criminal Code applies.

[3077] This is however to deny the exceptional seriousness of torture offences. *See, e.g.,* Proposal of an act to bring Belgian law into line with the UN Torture Convention, *Chambre des Représentants* [Belgian House of Representatives], DOC 50 1387/001, 2000-2001, p. 6 (this act was a belated implementation of the UN Torture Convention by Belgian Parliament, which did not touch upon the issue of jurisdiction).

[3078] At first sight, *Ely Ould Dah*, *Pinochet* (United Kingdom) and *Bouterse* (Netherlands) appear related, in that in these three cases retroactivity concerns were raised. Yet the respective outcomes were different because the date of commission of the alleged torture crimes was different. In *Pinochet III*,

10.5.8. Draft ICC law

929. French dealing with crimes against international humanitarian law, which was patchy up to now and lagging behind in comparison with France's neighboring countries, may be strengthened in the near future. A draft law adapting French legislation to the ICC Statute, which is still pending in Parliament, favors a modification of Article 689 of the Code of Criminal Procedure, the universal jurisdiction provision, to include all crimes over which the ICC has jurisdiction.[3079] The draft law sets forth that anyone found in France, who is a national of a State which is not a party to the ICC Statute and has committed a war crime, genocide or a crime against humanity may be prosecuted and judged by French courts.[3080] Although

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the UK House of Lords held that Pinochet could only be prosecuted for acts of torture committed after September 29, 1988, *i.e.*, the date of enactment of Section 134 of the Criminal Justice Act, which at the same time introduced the substantive crime of torture and created universal jurisdiction for English courts over it. Given the prohibition of retroactivity, the bulk of the alleged torture crimes committed by Pinochet (who was Chile's head of State from 1973 until 1990) could not be prosecuted in England, as English law did not criminalize torture nor did it provide for universal jurisdiction before 1988. Similarly, acts of torture committed in 1982 by Bouterse could not be prosecuted in the Netherlands because they were committed before the entry into force of the Dutch Torture Convention Implementation Act. In contrast, in *Ely Ould Dah*, the French Court of Cassation ruled, correctly, that retroactivity concerns were not warranted since French law already criminalized torture, if not as an autonomous offense, at least as an aggravating circumstance of other crimes, *and*, most importantly, since French law already provided for universal jurisdiction over torture when Ely Ould Dah allegedly committed his torture crimes.

[3079] Draft Law Adapting French Legislation to the International Criminal Court Statute and Amending Provisions of the Criminal Code, Military Justice Code, the Press Freedom Law of 29 July 1881 and the Criminal Procedure Code, available at http://www.u-j.info/xp_resources/material/law_documents/France/Draft%20ICC%20Law.doc. *See also* Law No. 2002-268 of 26 February 2002 on the cooperation with the ICC, *Journal Officiel*, 27 February 2002. The law, aside from adapting the incriminations of the French Penal Code to the ICC Statute, puts forward an overhaul of the jurisdictional Article 689 of the Code of Criminal Procedure in its Article 10.

[3080] New Article 689 of the Code of Criminal Procedure would read (Article 10 of the draft law):

"Les auteurs ou complices d'infractions commises hors du territoire de la République peuvent être poursuivis et jugés par les juridictions françaises soit lorsque, conformément aux dispositions du deuxième alinéa ci-dessous, du livre Ier du Code pénal ou d'un autre texte législatif, la loi française est applicable, soit lorsqu'une convention internationale donne compétence aux juridictions françaises pour connaître de l'infraction.

Peut être poursuivie et jugée par les juridictions françaises toute personne, si elle se trouve en France et est ressortissante d'un Etat non partie au traité portant statut de la Cour pénale internationale signé à Rome le 18 juillet 1998, qui s'est rendue coupable hors du territoire de la République de l'une des infractions suivantes :

1° Crimes contre l'humanité définis aux articles 211-1, 212-1 à 212-3 du Code pénal ;

2° Crimes de guerre définis aux articles 400-1 à 400-4 du même Code ;

3° Crime ou délit défini par les articles 23 et 25 de la loi du 29 juillet 1881 relative à la liberté de la presse lorsque cette infraction constitue une incitation à la commission d'un génocide au sens l'article 25, paragraphe 3 e) dudit traité.

Les dispositions du deuxième alinéa sont applicables à la tentative de ces infractions, chaque fois que celle-ci est punissable.

La poursuite des crimes et délits visés au deuxième alinéa ne peut être exercée qu'à la requête du ministère public.

Pour la poursuite, l'instruction et le jugement des crimes et délits mentionnés au deuxième alinéa, le procureur de la République, le juge d'instruction, le tribunal correctionnel et la cour d'assises de Paris exercent une compétence exclusive. Lorsqu'ils sont compétents pour la poursuite et l'instruction desdites infractions, le procureur de la République et le juge d'instruction de Paris exercent leurs attributions sur toute l'étendue du territoire national."

the draft law authorizes the exercise of universal jurisdiction over all crimes against international humanitarian law, it excludes civil party petition. This has provoked fierce criticism from non-governmental organizations.[3081]

930. When the French Minister of Justice presented a new version of the draft law to the Council of Ministers on July 26, 2006, the availability of universal jurisdiction had entirely disappeared, an apparent result of conflicting views held by the Ministries of Foreign Affairs, Defence and Justice on the possible diplomatic fall-out of the exercise of universal jurisdiction.[3082] Unlike in other States, and unlike Article 29 of the ICC Statute, war crimes would be subject to a statute of limitations of thirty (grave breaches) and twenty (lesser offences) years. According to the Government, the new version was justified because "la France ne veut pas faire de concurrence à la [Cour Pénale Internationale],"[3083] yet it was severely critized by civil society.[3084] French Parliament will probably vote on the final text by late November 2006.

10.5.9. Concluding remarks

931. French law and practice present a confusing picture of the prosecution of core crimes against international law. On the downside, only torture and crimes against international humanitarian law committed during the conflicts in the former Yugoslavia and Rwanda are subject to universal jurisdiction under French law. In the aftermath of the *Congo Beach* case, prosecutors and investigating magistrates may be unwilling to seek for a suspect on French territory, and instead require the victims to present proof of the suspect's presence in France – presence being statutorily required for jurisdiction to obtain. Furthermore, there are no police units, prosecutors, investigating magistrates, or courts, specifically designated to deal with the investigation and prosecution of core crimes,[3085] although on 26 September 2001, the Criminal Chamber of the Court of Cassation transferred a number of Rwandan cases to Paris with a view to a good administration of justice.[3086] The immigration authorities do not consistently refer cases relating to core crimes possibly committed by asylum-seekers to the prosecution.[3087]

[3081] Commission Nationale Consultative des Droits de l'Homme (CNCDH), Avis sur l'avant-projet de loi portant adaptation de la législation française au Statut de la Cour pénal internationale, 15 May 2003, available at http://www.fidh.org/communiq/2003/ij1605f.pdf. The CNCDH also criticizes the limitation of universal jurisdiction of nationals of States which are not parties to the ICC Statute. It construes the complementarity principle progressively to require a non-territorial State to prosecute as well. *See also* Ligue française des droits de l'homme et du citoyen, Groupe d'action judiciaire, "France, compétence universelle. Etat des lieux de la mise en oeuvre du principe de compétence universelle", June 2005, pp. 29-30, available at http://www.fidh.org/IMG/pdf/cufrance29juin.pdf (considering civil party petition necessary in light of the lack of prosecutorial zeal to prosecute violations of international humanitarian law).

[3082] N. GUIBERT & S. MAUPAS, « Les crimes de guerre pourraient figurer dans le code pénal », *Le Monde*, July 27, 2006.

[3083] *Id.*

[3084] *See, e.g.*, Editorial "Guerre et droit", *Le Monde*, July 27, 2006.

[3085] HUMAN RIGHTS WATCH, *Universal Jurisdiction in Europe: The State of the Art*, Vol. 18, No. 5(D), June 2006, p. 59. *See also* W. BOURDON, "Prosecuting the Perpetrators of International Crimes: What Role May Defence Counsel Play?", 3 *J.I.C.J.* 434, 438 (2005) (propounding the establishment by the Ministry of Justice of a task force of judges specialized in prosecuting international criminals).

[3086] Article 622 of the Code of Criminal Procedure.

[3087] HUMAN RIGHTS WATCH, *Universal Jurisdiction in Europe: The State of the Art*, Vol. 18, No. 5(D), June 2006, p. 59 (basing itself on an interview with French officials).

932. On the upside, victims may initiate criminal proceedings on the basis of a civil party petition with an investigating magistrate,[3088] although a new law contemplates curbing this right. Torture complaints were filed against, *inter alia*, the Algerian general Nezzar,[3089] against a number of Tunesian officials.[3090] and against Cuban President Fidel Castro.[3091] Also, in spite of the presence requirement, French authorities may continue investigations and prosecutions if the suspect leaves the territory. This has even resulted in a conviction *in absentia* of the Mauritanian torturer Ely Ould Dah. Furthermore, France espouses a very liberal subsidiarity principle, by virtue of which it only defers to a State with a greater nexus to the case if that State has completed the prosecution of the suspect. Finally, courts seem to be willing not to take amnesties into account in French proceedings. In the *Ely Ould Dah* case, a Mauritanian amnesty law was set aside by the court,[3092] and the accused was convicted.

933. It may be hoped that France soon adopts the law implementing the ICC Statute, which provides for universal jurisdiction over all crimes against international humanitarian law. On the continent, France is surely the odd man out as far as the authorization to exercise universal jurisdiction over such crimes is concerned. France has nevertheless been quite active in the prosecution of torture offences under the universality principle. An ICJ judgment concerning the exercise of universal jurisdiction over torture by France (the *Congo Beach* case) is eagerly awaited. This judgment may be the first ever by the ICJ on the legality of universal jurisdiction.

[3088] By virtue of Article 85 of the French Code of Criminal Procedure, "[a]ny person claiming to have suffered harm from a felony or misdemeanour may petition to become a civil party by filing a complaint with the competent investigating judge." Civil party petition allows victims to bypass the public prosecutor if he decides not to prosecute. There is no principle of mandatory prosecution in France. Pursuant to Article 40 of the French Code of Criminal Procedure, "[t]he district prosecutor receives complaints and denunciations and decides how to deal with them. He informs the complainant of the discontinuance of the case, as well as the victim where the latter has been identified." The French Code of Criminal Procedure carefully sets out the consequences of civil party petition and its ensuing rights for the victims (Articles 86 to 91 of the French Code of Criminal Procedure). Interestingly, Article 2-4 of the Code of Criminal Procedure explicitly refers to the role of the civil party in war crimes and crimes against humanity cases: "Any association lawfully registered for at least five years proposing in its constitution to combat crimes against humanity or war crimes, or to defend the moral interests and the honour of the Resistance or of those of deported persons, may exercise the rights granted to the civil party in respect of war crimes and crimes against humanity."

[3089] *R.G.D.I.P.* 2001, 730-31. After the *Parquet* of Paris opened an investigation against Nezzar in April 2001, he fled. A new complaint was filed in June 2002, but Paris prosecutors decided not to prosecute, as the acts of torture would not have committed under his alleged command responsibility. *See* W. BOURDON, "Prosecuting the Perpetrators of International Crimes: What Role May Defence Counsel Play?", 3 *J.I.C.J.* 434, 442 (2005).

[3090] *R.G.D.I.P.* 2002, 154. When the accused, the Tunisian vice-consul Khaled Ben Said, fled France, an international warrant for his arrest was issued on February 15, 2002.

[3091] *R.G.D.I.P.* 2002, 473. Castro was also accused of other crimes, including crimes against humanity and trafficking of narcotics, partly on the basis of the passive personality principle. The complaint was rejected.

[3092] Ordonnance of the Juge d'instruction de Montpellier, May 25, 2001 (ruling that "quelle que soit la légitimité d'une telle amnistie [granted by the Mauritanian authorities on June 14, 1993] , dans le cadre d'une politique locale de réconciliation, cette loi n'a d'effet que sur le territoire de l'Etat concerné et n'est pas opposable aux pays tiers, dans le cadre de l'application du droit international. Elle n'a par conséquent aucune incidence sur l'action publique pour l'application de la loi en France" ; stating that "[il] appartient donc à la France, comme Etat signataire de la Convention de New York [*i .e.*, the UN Torture Convention], de se saisir des faits non prescrits ni amnistiés en France susceptibles d'entrer dans le champ d'application de cette convention, quels que puissent être, en Mauritanie, les incriminations existantes en matière de torture, leur délai de prescription ou leur amnistie".).

10.6. Universal jurisdiction over core crimes against international law in the Netherlands

10.6.1. International Crimes Act

934. On 19 June 2003, the Netherlands adopted the International Crimes Act (ICA),[3093] which entered into force on 1 October 2003. The ICA addresses crimes of genocide,[3094] crimes against humanity,[3095] war crimes[3096] and torture[3097]. It provides for universal jurisdiction in that it applies to anyone who commits any of the crimes defined in the ICA outside the Netherlands, if the suspect is present in the Netherlands.[3098] The investigation of core crimes could only be initiated by the prosecutor, although the victims may appeal a decision not to investigate.[3099] Pursuant to Article 4 of the Penal Code, which deals with the extraterritorial application of Dutch criminal law, Dutch courts also have universal jurisdiction over air piracy,[3100] sea piracy[3101] and certain terrorist offences[3102], if the suspect is present in the Netherlands. The Penal Code does not contain a *Blankettnorm* which automatically extends Dutch jurisdiction if international law obliges the Netherlands to establish universal jurisdiction.[3103]

10.6.2. Knezevic

935. Before the enactment of the ICA, Dutch courts had universal jurisdiction over war crimes[3104] and torture[3105], but not over crimes against humanity or genocide.[3106]

[3093] Act of 19 June 2003 containing rules concerning serious violations of international humanitarian law. The integral English text of this act is available at http://www.minbuza.nl/default.asp?CMS_ITEM=48969E53AB41497BB614E6E9EAABF9E0X3X35905X73. *See also* Section 23 of the ICA.

[3094] ICA, Section 3. Section 19 repeals the Genocide Convention Implementation Act.

[3095] ICA, Section 4.

[3096] ICA, Sections 5-7.

[3097] ICA, Section 8. Section 20 repeals the Torture Convention Implementation Act. This may have put an end to the awkward legal situation created by the latter act, which as a *lex specialis* excluded the applicability of the Geneva Conventions, according to the Dutch Minister of Justice at least. This implied that the Geneva Conventions only governed torture committed by non-official actors and not torture committed by official actors. *See* Kamerstukken II (Parliamentary Papers) 1986-1987, 20 042, No. 3, at 3, cited in R. VAN ELST, "Implementing Universal Jurisdiction over Grave Breaches of the Geneva Conventions", 13 *L.J.I.L.* 815, 847 (2000).

[3098] ICA, Section 2, 1 (a). The Explanatory Memorandum of the ICA believed the assumption of universal jurisdiction with respect to international crimes to be in line with international law. Explanatory Memorandum on the approval of the International Crimes Act, *reprinted in* 34 *N.Y.I.L.* 232, 244 (2003) (stating that "[i]t is generally accepted that States can maintain universal jurisdiction for their criminal courts with respect to the international crimes defined in the [ICA].").

[3099] Articles 12-13 of the Code of Criminal Procedure.

[3100] Article 4 (7) Penal Code.

[3101] Article 4 (8) Penal Code.

[3102] Article 4 (13) and (14) Penal Code provide for universal jurisdiction over terrorist bombings and the financing of terrorism. *See* Implementation Acts of December 20, 2001, *Stb.*, 673 and 675.

[3103] *Compare* R. VAN ELST, "Universele rechtsmacht over foltering: Bouterse en de Decembermoorden", 27 *NJCM-Bulletin* 208, 221 (2002), who asserted that a legislative intervention is required before the UN Torture Convention could confer universal jurisdiction on Dutch courts.

[3104] Section 3 (1) of the Wartime Offences Act, confirmed by the Supreme Court in the *Knesevic* judgment of November 11, 1997, *Nederlandse Jurisprudentie* 1998, 463, 30 *N.Y.I.L.* 315 (1999).

[3105] Section 5 of the Torture Convention Implementation Act.

Yet it took the courts also quite some time before they recognized the existence of universal jurisdiction over war crimes in the *Knezevic* case (1995-98), which was eventually decided by the Supreme Court.[3107]

In *Knezevic*, the examining magistrate at Arnhem District Court concluded on December 1, 1995 that the Netherlands lacked jurisdiction over the alleged war crimes committed by Knezevic, a soldier in the Bosnian-Serbian forces. The District Court quashed that decision on February 21, 1996, and held that the Netherlands *had* jurisdiction over the alleged war crimes The Court premised its jurisdiction on Article 9, § 1 of the ICTY Statute, which provides that the ICTY and national courts have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991. It also pointed out that "[…] the history of the introduction of the Wartime Criminal Law Act provide[s] [no] support for the view that the legislator intended […] merely to deal with cases of war in which the Netherlands is directly involved."[3108] On the contrary, that history would reveal that universal jurisdiction over war crimes was indeed contemplated, even for war crimes committed in a civil war (non-international armed conflict).[3109] In the District Court's view, deciding otherwise would result in an incomplete fulfilment of the Geneva Conventions.[3110] The Court added that military courts were competent to take cognizance of Knezevic's crimes, and not the civilian courts. On March 19, 1997, the Court of Appeals confirmed the District Court's holding on the issue of universal jurisdiction, but ruled that the ordinary criminal courts, and not the military courts, were competent to take cognizance of the alleged offences.[3111] On November 11, 1997, the Supreme Court held, like the District Court and the Court of Appeals, that "[t]he intention of the government to comply in full in the Wartime Criminal Law with [the jurisdictional provisions of the Geneva Conventions] is evident, *inter alia*, from the parliamentary history of the Act […],"[3112] but that the military courts, and not the ordinary courts, were competent to take cognizance of the offences.[3113] The lack of clarity of the Wartime Offences Act concerning the venue (civilian or military tribunals) may have sped up the adoption of the International Crimes Act in 2003.[3114]

10.6.3. Bouterse

936. Before the entry into force of the ICA, Dutch courts had universal jurisdiction over torture offences on the basis of the Dutch Torture Convention Implementation Act. In the *Bouterse* case (2000-2001), the question arose however whether that Act

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[3106] The Genocide Convention Implementation Act only recognized jurisdiction on the basis of the active personality, passive personality and protective principles. *See* Section 3 (2) and (4) and Section 5 of the Genocide Convention Implementation Act.
[3107] Supreme Court, *Public Prosecutor* v. *Knezevic*, November 11, 1997, *MRT* 198-221 (1998), *Y.I.H.L.* 600-607 (1998), *N.Y.I.L.* 316-328 (1999).
[3108] *N.Y.I.L.*, at 321 (1999).
[3109] *Id.*, at 322.
[3110] *Id.*
[3111] *Id.*, at 324-325.
[3112] *Id.*, at 325.
[3113] *Id.*, at 326-327.
[3114] *Compare* G.L. COOLEN, "Nogmaals: oorlogsmisdrijven, gepleegd in voormalig Joegoslavië", *MRT* 104-106 (1995); G.L. COOLEN, "De Wet Oorlogsstrafrecht: een wet met gebreken", *DD* (1996) 43-53; R. VAN ELST, "De zaak Knezevic: rechtsmacht over Joegoslavische en andere buitenlandse oorlogsmisdadigers", *Nederlands Juristenblad* 1587-93 (1998).

could also apply to acts of torture committed before its entry into force. The Amsterdam Court of Appeals held, in keeping with the opinion of legal expert John Dugard, a South African law professor appointed by the Court, that the Torture Convention was merely of a declaratory nature and that as of 1982, when the acts of torture were allegedly committed by Surinam commander Desi Bouterse, torture was a crime under customary international law, and customary international law authorized universal jurisdiction over torture.[3115] On 18 September 2001, the Dutch Supreme Court (*Hoge Raad*) quashed the judgment of the Amsterdam Court of Appeals, on a petition by the Supreme Court's Prosecutor-General in the interest of the law, ruling that Bouterse could not be tried in the Netherlands for acts of torture committed before the entry into force of the Torture Convention Implementation Act.[3116]

As Dutch criminal law did not criminalize torture in 1982, the prosecution of Bouterse could only be based on a customary international law criminalization of torture at the time. The Supreme Court however circumvented the answer to the nettlesome question of whether or not, in 1982, torture was a crime under customary international law. Pointing out that, while binding treaties could prevail over domestic law pursuant to Article 94 of the Dutch Constitution, unwritten international law, such as customary international law, could not aspire to the same status,[3117] it confined itself to ruling that, as a general matter, customary international law could not prevail over contrary domestic law. It therefore held with respect to the alleged torture offences that "in so far as the obligation to declare such offences as punishable with retroactive

[3115] Amsterdam Court of Appeals, November 20, 2000, *NJ* 2001, 51; *reprinted* in 32 *N.Y.I.L.* 276, 278-279 (2001). It should be pointed out here that in 1995, the same Court of Appeals still rejected a complaint against the former Chilean president Pinochet for torture charges "on grounds deriving from the (Dutch) public interest." Merely pointing at the many legal and factual problems that the Dutch Public Prosecutor would encounter, the latter decision conspicuously lacked any reference to universal jurisdiction. *See* Amsterdam Court of Appeals. 4 January 1995, available at http://www.u-j.info/xp_resources/material/Cases/Netherlands/Pinochet%20case/Pinochet-%20Court%20of%20Appeal%20Decision%20(English).doc. In *Bouterse*, the Court of Appeals based the prosecution exclusively on the Dutch Torture Convention Implementation Act. It dropped the charge of crimes against humanity. *Id.*, at 281. As to crimes against humanity, the expert had pointed out that, although Bouterse could in principle be prosecuted for these crimes under customary international law, there was no Dutch law criminalizing crimes against humanity. As a result, Bouterse could not be punished under Dutch law for crimes against humanity. This reasoning might surprise, as the relevant point in time to assess the authority to exercise universal jurisdiction is the moment when Bouterse's acts were committed. At that moment in 1982, these acts were, at least in the view of the expert and the Court, acts of torture and crimes against humanity, and subject to universal jurisdiction under customary international law. The expert and the Court thus directly premised universal jurisdiction on international law. However, they subsequently distinguished between the crimes under international law that were later codified in domestic law, such as torture, and those that were never codified in domestic law, such as crimes against humanity. Dutch courts would arguably only have universal jurisdiction over the former category. The expert and the Court do not further justify their reluctance to apply customary international law short of any reference in the domestic legal system to the relevant subject matter governed by that law. Especially where they point out "that Dutch law requires a national statute in order to incorporate obligations under international law into its own system as regards the punishability of human behavior" (*Id.*), they seriously undermine the role they had given to customary international law in the Dutch legal order. Although they do not state so, the dichotomy they introduce might be attributable to the problem of what punishment to mete out for crimes against humanity, since customary international law on crimes against humanity does not provide for any punishment (*nulla poena sine lege*).

[3116] 32 *N.Y.I.L.* at 287 (2001).

[3117] *Id.*, at 287-92 (2001).

effect results from unwritten international law, the courts are not free to decide not to apply the Torture Convention Implementation Act on account of the fact that it is contrary to unwritten international law."[3118]

As the Supreme Court had decided that the crime of torture could not be considered to be part of Dutch criminal law in 1982 and was thus not punishable in the Netherlands – which is a matter of *substantive* criminal law – it did in principle not have to assess the jurisdictional argument: if there is no crime, there is no need to exercise jurisdiction. Yet as the appeal was filed in the interest of the law, the Court also pronounced itself on the issue of jurisdiction, arguably hypothesizing the punishability of torture in the Dutch legal order as early as 1982. The Court pointed out that the jurisdictional provisions of the Criminal Code did not provide for universal jurisdiction in 1982 and that the Torture Convention Implementation Act did nowhere give retroactive effect to its jurisdictional provisions. At the same time, for the same reasons that it had used so as to reject the punishability of torture under Dutch law in 1982, it ruled out that a rule of customary international law could grant Dutch courts universal jurisdiction over torture committed in 1982 – thereby however not pronouncing on the existence or content of any such rule.

937. In spite of the Supreme Court's conservative approach to customary international law, the Court should be credited with not turning a blind eye to the role that customary international law might play in the criminalization of heinous conduct. In the Court's view, such an international criminalization could not produce effects in the Dutch legal order. This is not too surprising: almost no courts have premised criminalization of, or jurisdiction over, an international crime directly on customary international law. Only in Spain, which faces a barrage of complaints relating to core crimes committed in Latin American in the 1970s and 1980s, before the adoption of Article 23.4 of the Organic Law – the article providing for universal jurisdiction – has so far a person – Adolfo Scilingo (*see* subsection 10.3.2.d) – been sentenced on the basis that his heinous conduct was criminal under international law and subject to universal jurisdiction at the time he performed the conduct. The Spanish court however also ruled that punishment would not have been possible had there not been later domestic law providing for the exact punishment of the conduct.

10.6.4. Universal jurisdiction in absentia

938. The ICA does not provide for universal jurisdiction *in absentia*. Jurisdiction will obtain provided that the suspect of an international crime is present in the Netherlands. Before the entry into force of the ICA, Dutch law did not set forth the presence requirement. The question arose notably whether Article 5 of the Dutch Torture Convention Implementation Act authorized the exercise of universal jurisdiction *in absentia* over torture offences. In *Bouterse*, the Dutch Supreme Court assumed "that the legislator, when introducing the jurisdiction rule of Article 5 of the Torture Convention Implementation Act did not wish to go further than the obligation to which the Netherlands is subject under Article 5, §§ 1 and 2 of the [UN Torture Convention]," [3119] and thus did not intend to provide for universal jurisdiction *in*

[3118] *Id.*, at 291.

[3119] 32 *N.Y.I.L.* at 296 (2001). The Court premised its rejection of universal jurisdiction *in absentia* primarily on an analogous interpretation of the Torture Convention Implementation Act in light of the Act implementing the Hague and Montreal Hijacking Conventions (Act of May 10, 1973, *Stb.* 228).

absentia. In a confusing paragraph, the Court thereupon concluded: "It follows that the prosecution and trial in the Netherlands of the suspected perpetrator of an offence within the meaning of Articles 1 and 2 of the Torture Convention Implementation Act, which was committed abroad, is possible only if a connection mentioned in that Convention for the establishment of jurisdiction is present, for example because […] the suspected perpetrator is in the Netherlands at the time of his arrest."[3120] The message that the Court actually intended to convey was probably that the suspect should be found in the Netherlands at the moment of his arrest, and not that he can only be prosecuted if he is arrested while being in the Netherlands, as if he could also be arrested by the Dutch authorities while being abroad.[3121] Such a reading would imply that some preparatory prosecutorial acts such as gathering evidence and hearing witnesses could be conducted *in absentia*. Accordingly, under Dutch law, if one construes the Supreme Court's judgment in *Bouterse* liberally, there appeared however to be no prohibition of investigating crimes if the presence of the suspect is not yet secured but can be anticipated.[3122] This holding may be supported by the *travux préparatoires* of the provision on universal jurisdiction over air piracy, in which the Dutch legislator deemed the time of prosecution to be relevant, and may thus arguably have approved of *in absentia* investigations short of prosecutorial acts.[3123]

939. In practice, police and prosecution only start investigations into international crimes as soon as the suspect can be found in the Netherlands.[3124] This is in line with the *travaux préparatoires* of the ICA, which state that investigations can only be

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The latter act inserted Article 4, § 7 into the Criminal Code, an article which provides that Dutch courts have universal jurisdiction over hijacking offences "where the suspect is in the Netherlands". The Court also pointed out that it would be absurd to provide for universal jurisdiction *in absentia* over torture offences, whereas the Genocide Convention Implementation Act, which provides for harsher sentences than the Torture Convention Implementation Act, did not even provide for universal jurisdiction with a presence requirement. 32 *N.Y.I.L.* at 297-98 (2001). Since the 2003 International Crimes Act, crimes of genocide are also subject to universal jurisdiction.

[3120] *Id.*, at 298.

[3121] *See* L. ZEGVELD, "The Bouterse Case", 32 *N.Y.I.L.* 97, 112 (2001). This interpretation is reinforced by Article 6 of the UN Torture Convention, which obliges a State on whose territory the suspected perpetrator is present to arrest and detain him.

[3122] *See* generally on the presence requirement: R. VAN ELST, "Universele rechtsmacht over foltering: Bouterse en de Decembermoorden", 27 *NJCM-Bulletin* 208, 216-22, in particular 221 (2002). In order to arrest or to try the suspect, his voluntary presence should be secured. Voluntary presence implies that extradition is excluded. However, extradition is possible in case the prosecution is partly based on other principles of jurisdiction than the universality principle. *Id.*, at 221-222.

[3123] *Kamerstukken II* 1971-1972, 11 866, nr. 3 (MvT) p. 5, quoted in R. VAN ELST, "Universele rechtsmacht over foltering: Bouterse en de Decembermoorden", 27 *NJCM-Bulletin* 208, 222 (2002).

[3124] *See* HUMAN RIGHTS WATCH, *Universal Jurisdiction in Europe: The State of the Art*, Vol. 18, No. 5(D), June 2006, p. 72 n 325 (interview with Dutch officials). In the wake of the complaint against Bouterse, on January 12, 2001, a number of Argentinean complainants filed a complaint with the Dutch Board of Prosecutors-General against former Argentinean Minister of Agriculture Jorge Zorreguieta, the father of the Dutch Crown Prince's girlfriend and later wife Màxima, for his role in crimes of torture and crimes against humanity allegedly committed by the Argentinean dictatorship between 1976 and 1983. *See* for the text of the complaint: http://www.noticias.nl/zr_anklacht1_jan01.html. On March 21, 2001, the chief prosecutor refused to initiate criminal proceedings against Zorreguieta for lack of jurisdiction. The complainants appealed, but the prosecutor's decision was later upheld by the Amsterdam Court on the basis of the Supreme Court's judgment in *Bouterse*, in particular as the alleged offender was not present in the Netherlands. *See* for the text of the motion for appeal: http://www.noticias.nl/zr_anklacht2_maart01.html.

conducted when the suspect is presumably present on Dutch territory,[3125] thereby attaching investigative powers to jurisdictional powers.[3126] Apparently, investigations are not warranted if the presence of the suspect can be anticipated but not established.[3127] This is regrettable.[3128] It is desirable that some investigative acts, that are not overly intrusive, could be performed in the absence if the suspect. Information could then be used when the suspect enters the territory, or it could be exchanged with the State eventually exercising its jurisdiction, in keeping with the Council of the EU's Decisions on the investigation and prosecution of international crimes.

10.6.5. Subsidiarity

940. Where Spain and Germany both apply some version of the principle of subsidiarity, the ICA does not set forth one, nor have the courts developed one.[3129] This may be explained by the fact that the Netherlands, unlike Spain and Germany do not exercise universal jurisdiction *in absentia*. The presence requirement may serve as a sufficient tool of jurisdictional restraint. It is however not unlikely that the home State of a suspect who is only temporarily present in the Netherlands might be able and willing to investigate and prosecute the offences which he allegedly committed. In exercising their discretion, Dutch prosecutors and courts might prove willing to defer to the suspect's home State in this situation. It is nevertheless regrettable that the Dutch Parliament has not explicitly mandated them to apply a subsidiarity analysis.[3130]

941. A related question is whether universal jurisdiction as exercised by Dutch courts under the ICA is subsidiary, or more accurately, complementary to the jurisdiction of the International Criminal Court under Article 17 of the Rome Statute. It could be argued that, in light of the plain text of Article 17 of the Statute, the ICC ought to defer to *any* State, including a mere bystander State, that is genuinely able to investigate and prosecute. According to the Dutch government however, the ICC should only defer to States with a direct link to the case, such as the State where the crime occurred or the State of which the suspect is a national.[3131] Without approving of it, DUYKX has attributed the restrictive view of the Dutch government to the wish of the Netherlands not to be seen as biased as a host country of the ICC itself, and to

[3125] *Kamerstukken II* 2001/02, 28 337, nr. 3, p. 38.
[3126] An amendment to uncouple these powers was rejected. *See Kamerstukken II* 2001/02, nr. 11, p. 1-2.
[3127] *Compare* Section 153 (f) (1) of the German Code of Criminal Procedure, which provides for jurisdiction in that case.
[3128] *See also* P. DUYKX, "De beperkte rechtsmacht van de Wet Internationale Misdrijven" [The limited jurisdiction of the International Crimes Act], *NJCM-Bulletin*, 23-24 (2004).
[3129] *Contra* HUMAN RIGHTS WATCH, *Universal Jurisdiction in Europe: The State of the Art*, Vol. 18, No. 5(D), June 2006, p. 72 (stating that "Dutch courts will only exercise universal jurisdiction of neither the territorial courts nor the ICC is exercising jurisdiction", without however substantiating this claim).
[3130] *See also* P. DUYKX, "De beperkte rechtsmacht van de Wet Internationale Misdrijven" [The limited jurisdiction of the International Crimes Act], *NJCM-Bulletin*, 19-20 (2004) (referring to the Spanish National Court's decision in *Guatemala Genocide* (2000) and to the separate opinion of judges Higgins, Kooijmans and Buergenthal in the ICJ's *Arrest Warrant* judgment, who held that a State prosecuting on the basis of universal jurisdiction "must first offer to the national State of the prospective accused person the opportunity itself to act upon the charges concerned" (International Court of Justice, *Democratic Republic of the Congo v. Belgium*, 14 February 2002, separate opinion of Higgins, Kooijmans, Buergenthal, para 59).
[3131] *See travaux préparatoires*, *Kamerstukken II* 2001/02, nr. 3, p. 18.

the perceived authoritative and investigative surplus of the ICC.[3132] The Dutch government's stance is somewhat surprising, as it was precisely the Dutch government that took the initiative for the Council of the EU's Decisions on the investigation and prosecution of international crimes (2002/2003),[3133] the preamble of which recalls on the one hand, that Member States are being confronted with persons who were involved in international crimes and are seeking refuge within the European Union's frontiers, and on the other hand, that the investigation and prosecution of such crimes is to remain the responsibility of national authorities in line with the complementarity principle of the Rome Statute.

10.6.6. Cases under the International Crimes Act

942. Facilitated by liberal rules of evidence, which allow witness testimonies to be read out during trial,[3134] two ICA trials on the basis of universal jurisdiction have so far been conducted.[3135] The first trial on the basis of the ICA was held in 2004. On April 7, 2004, the Rotterdam District Court convicted against the Congolese commander Sébastien N., who had filed an asylum request with the Dutch authorities and could, hence, be found on Dutch territory,[3136] to two years and six months of imprisonment for complicity in acts of torture committed in the Congo (then Zaire) by his subordinates against Congolese nationals in 1996. He could also have been convicted on the basis of the Torture Convention Implementation Act, which was repealed by the ICA. In light of the established legal basis for universal jurisdiction, it comes as no surprise that the presumed author did not object to the court's jurisdiction over the case. It has been submitted that this conviction was the first anywhere under the universal jurisdiction provisions of the UN Convention against Torture.[3137] The successful outcome of the case may be attributable to the co-operative stance of the Congolese authorities, for whom the trial was not problematic since the accused was commander of the *Garde Civile* under the *deposed* President Mobutu.[3138]

[3132] *See* P. DUYKX, "De beperkte rechtsmacht van de Wet Internationale Misdrijven" [The limited jurisdiction of the International Crimes Act], *NJCM-Bulletin*, 28 (2004).

[3133] Council, 2002/494/JHA, *O.J.* L 167/1-2 (26/6/2002); Council, 2003/335/JHA, *O.J.* L 118/12-14 (14/5/2003).

[3134] *See* HUMAN RIGHTS WATCH, *Universal Jurisdiction in Europe: The State of the Art*, Vol. 18, No. 5(D), June 2006, p. 78. Unlike in Belgium, foreign witnesses are ordinarily not flown to the Netherlands due to budgetary constraints. Unlike English courts, Dutch courts have not relied upon live video links so as to hear testimony given in the witnesses' home State.

[3135] The Dutch case against Guus Kouwenhoven, a Dutch national accused of supplying weapons to Charles Taylor and his armed forces, was not a universal jurisdiction case nor was it based on the ICA. Kouwenhoven was sentenced to eight years of imprisonment on June 7, 2006 by the district court of The Hague. His conviction was based on Articles 47 and 57 of the Penal Code, Articles 1, opening lines and 2° (old), 1, opening lines and 1°, 2 and 6 of the Economic Offenses Act, Articles 2 (old), 2, 3 (old), 3 and 13 of the Sanctions Act 1977, Article 2 of the Liberian Sanctions Regulations 2001, and Article 2 of the Liberian Sanctions Regulations 2002. *See* LJN: AY5160, Rechtbank 's-Gravenhage, 09/750001-05. English text of judgment available at http://zoeken.rechtspraak.nl/zoeken/dtluitspraak.asp?searchtype=ljn&ljn=AY5160&u_ljn=AY5160

[3136] Rotterdam District Court, *Sebastien N.*, 7 April 2004, *N.I.L.R.* 444-449 (2004).

[3137] *See* M.T. KAMMINGA, "First Conviction under the Universal Jurisdiction Provisions of the UN Convention Against Torture", *N.I.L.R.* 439 (2004). KAMMINGA terms this "a remarkable twist of history" in view of the original opposition of the Netherlands against the inclusion of a universal jurisdiction provision in the UN Torture Convention. *Id.*, at 441.

[3138] *Id.*, at 440.

943. A year later, on October 14, 2005, The Hague District Court sentenced Hesamuddin Hesam, a former Afghan intelligence chief, to 12 years in prison and Habibullah Jalalzoy, his former deputy, to 9 years of imprisonment for torturing detainees held by Afghanistan's communist regime in the 1980s. Both men had filed an asylum application when they came to the Netherlands in the 1990s, and stayed in the country after their application was rejected. The Court rejected the challenge by the defendants that it had no jurisdiction to hear the case on the grounds that the alleged crimes were committed during an internal armed conflict and did not fall under the 1949 Geneva Conventions.[3139] It pointed out that the alleged acts of torture qualified as violations of Common Article 3 of these Conventions, and could thus be prosecuted under the universality principle.[3140]

10.6.7. Concluding remarks

944. Dutch courts may exercise universal jurisdiction over core crimes against international law such as genocide, war crimes, crimes against humanity, and torture. Although the strict presence requirement set forth by the International Crimes Act only guarantees that the Netherlands does not become a safe haven for perpetrators of core crimes, and may thus contribute only marginally to the global fight against impunity, Dutch police, prosecutors, and immigration authorities have taken the prosecution of such perpetrators present in the Netherlands seriously. As of June 2006, 32 people were employed by the multidisciplinary war crimes unit of the national police (*Nationale Recherche bij Korps Landelijke Politie Diensten*, KLPD), which replaced the NOVO team (*Nationaal Opsporingsteam voor Oorlogsmisdrijven*) after 2002. Six people, two of them prosecutors, were employed by a department of the national office of the prosecution (*Landelijk Parket*).[3141] One court, The Hague District Court of The Hague, is exclusively responsible for trials of core crimes under

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[3139] Hague District Court (Rechtbank 's-Gravenhage), October 14, 2005, LJN: AU4373,, 09/751005-04, and LJN: AU4347.
See http://zoeken.rechtspraak.nl/zoeken/dtluitspraak.asp?searchtype=ljn&ljn=AV1489&u_ljn=AV1489

[3140] The Court has been faulted for deriving universal jurisdiction from the Geneva Conventions, which only provide for universal jurisdiction over grave breaches of the laws of war, and not over violations of Common Article 3. Universal jurisdiction over such violations arguably needs to be premised on customary international law. *See* G. METTRAUX, "Dutch Courts' Universal Jurisdiction over Violations of Common Article 3 *qua* War Crimes", 4 *J.C.I.J.* 362, 366-69 (2006).

[3141] A special unit was established on September 1, 1994 to prosecute war criminals from the former Yugoslavia (NOJO, *Nationaal Opsporingsteam Joegoslavische Oorlogsmisdadigers*), an establishment which may be linked to the establishment of the ICTY in The Hague. In January 1998, its purview was extended to cover all war crimes (NOVO, *Nationaal Opsporingsteam voor Oorlogsmisdrijven*). After an assessment in 2002, the multidisciplinary NOVO-team was integrated into the *Landelijk Parket*, a sort of nation-wide office of the prosecutor, and into the national police (*Nationale Recherche bij Korps Landelijke Politie Diensten*, KLPD). The assessment of the work of NOVO was made, at the request of the Minister of Justice, by A. BEIJER, A.H. KLIP, M.A. OOMEN, A.M.J. VAN DER SPEK, *Evaluatie van het Nationaal Opsporingsteam voor Oorlogsmisdrijven*, Utrecht, Willem Pompe Instituut, 69 p., 2002, available at http://www.wodc.nl/images/ewb02nat_Volledige%20tekst_tcm11-7283.pdf. The Dutch Lawyers' Committee for Human Rights also made an assessment of NOVO, in the context of refugee protection and the fight against terrorism: NEDERLANDSE JURISTEN COMITE VOOR DE MENSENRECHTEN (NJCM), "NJCM commentaar betreffende de toepassing van artikel 1F Vluchtelingenverdrag en de bestrijding van terrorisme", 2002, available at http://www.njcm.nl/upload/comm-artikel-1F-Vluchtelingenverdrag-def110602.PDF. *See* for more practical information about the special departments of police and prosecution: HUMAN RIGHTS WATCH, *Universal Jurisdiction in Europe: The State of the Art*, Vol. 18, No. 5(D), June 2006, p. 73.

the ICA,[3142] which allows specialization in the adjudication of core crimes. Furthermore, the Dutch Immigration and Naturalization Service (IND) screens the applications of asylum-seekers on core crimes. The IND may send the files of suspected persons to the office of the prosecution.[3143] The prosecution of the two Afghans, resulting in a conviction in 2005, was for instance based on a dossier by the immigration authorities. It comes as no surprise that other States have drawn inspiration from the Dutch model.[3144]

10.7. Universal jurisdiction over core crimes against international law in the United Kingdom

945. Quite a number of English statutes deal with international crimes: the Geneva Conventions Act 1957, the Genocide Act 1969, the Criminal Justice Act 1988, the War Crimes Act 1991, and the International Criminal Court Act 2001. These statutes are however largely symbolic, as almost no prosecutions have been reported under them,[3145] which is partly attributable to the fact that only torture and grave breaches of the laws of war are subject to universal jurisdiction. Universal jurisdiction may however be exercised under English law over crimes which jeopardize State interests, such as the crime of piracy, and a number of terrorist offences. Prospects may appear bleak for the successful prosecution of core crimes in a common law country such as the United Kingdom, given the evidentiary hurdles, the prominent role of the territoriality principle, and the influence which the executive branch wields over the prosecution. In 2005, a first trial for torture, one of the core crimes, was however successfully completed in a London courtroom. This trial may portend an increase in the number of investigations into international crimes.

10.7.1. Piracy

946. Universal jurisdiction over piracy is traditionally recognized by English courts. As early as 1696, the courts of the Admiral held that "[t]he King of England, hath … an undoubted jurisdiction and power in concurrency with other princes and states for the punishment of all piracies and robberies at sea … so that if any person whatsoever, native or foreigner … shall be robbed or spoiled in … any seas, it is piracy within … the cognisance of this court."[3146] Permissive universal jurisdiction over piracy was later explicitly predicated on international law, as is aptly illustrated by a 1934 case before the Privy Council. In this case, the Council held that "according to international law the criminal jurisdiction of municipal law [...] is also recognized as extending to piracy committed on the high seas by any national of any State. He is no longer a national, but 'hostis humani generis' and as such he is justiciable by any

[3142] Article 15 of the Dutch International Crimes Act of 19 June 2003 (*Wet Internationale Misdrijven*).
[3143] A special IND unit deals exclusively with suspected "1F cases". Under Article 1F of the Convention relating to the Status of Refugees (1951), a refugee is ineligible for refugee status if he or she has committed a "crime against peace, a war crime, or a crime against humanity" or a "serious non-political crime"). *See also* HUMAN RIGHTS WATCH, *Universal Jurisdiction in Europe: The State of the Art*, Vol. 18, No. 5(D), June 2006, p. 74.
[3144] *Opportuun*, May 2002, available at www.om.nl.
[3145] M. HIRST, *Jurisdiction and the Ambit of the Criminal Law*, Oxford, Oxford University Press, 2003, at 237.
[3146] *R* v. *Dawson* (1696) 13 St Tr 451.

State anywhere."[3147] Piracy is now made punishable by § 26 of the Merchant Shipping and Maritime Security Act 1997.

10.7.2. Torture

947. Universal jurisdiction over crimes of torture is codified in Section 134 of the 1988 Criminal Justice Act, which implements the UN Torture Convention. Although the United Kingdom initially opposed the insertion of universal jurisdiction into the Torture Convention, arguing that such jurisdiction should be reserved for "offences of a more obviously international character,"[3148] Section 134 now provides that "[a] public official or person acting in an official capacity, *whatever his nationality*, commits the offence of torture if in the United Kingdom *or elsewhere* he intentionally inflicts severe pain or suffering on another in the performance or purported performance of his official duties" (emphasis added). Inchoate offences relating to torture, such as conspiracies, are also subject to universal jurisdiction.[3149]

In *Pinochet III*, the majority opinion, written by Lord BROWNE-WILKINSON, recognized universal jurisdiction over torture and premised it on its *jus cogens* prohibition: "The jus cogens nature of the international crime of torture justifies states in taking universal jurisdiction over torture wherever committed. International law provides that offences jus cogens may be punished. International law provides that offences jus cogens may be punished by any state because the offenders are 'common enemies of all mankind and all nations have an equal interest in their apprehension and prosecution'."[3150] The majority held, however, that the former Chilean President Pinochet was only extraditable to Spain for crimes of torture committed after September 29, 1988, *i.e.*, the date of entry into force of Section 134 of the Criminal Justice Act, by which the UK implemented Article 5 of the UN Torture Convention. Pinochet could not be extradited for acts of torture committed before that date, as torture committed abroad was not punishable in the UK (double criminality rule). Unlike what Lord MILLETT held in his progressive opinion,[3151] the majority thus

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[3147] *In re Piracy Jure Gentium*, [1934] A.C. 586, 589.

[3148] Commission on Human Rights, E/CN.4/1367, E/CN.4/1408 (1980), quoted in J.H. BURGERS & H. DANELIUS, *The United Nations Convention against Torture*, Dordrecht/Boston/London, Martinus Nijhoff, 1988, at 58.

[3149] *R* v. *Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No. 3)* [2000] 1 AC 147, 237-38 (Lord HOPE) ("I consider that the common law of England would, applying the rule laid down in *Liangsiriprasert* v. *US Government*, also regard as justiciable in England a conspiracy to commit an offence anywhere which was triable here as an extra-territorial offence in pursuance of an international Convention, even although no act was done here in furtherance of the conspiracy. I do not think that this would be an unreasonable extension of the rule. It seems to me that on grounds of comity it would make good sense for the rule to be extended in this way in order to promote the aims of the Convention.").

[3150] *Pinochet III*, para. 12, quoting *Demjanjuk v. Petrovsky* (1985) 603 F. Supp. 1468; 776 F. 2d. 571.

[3151] In the words of Lord MILLETT: "Every State has jurisdiction under customary international law to exercise extraterritorial jurisdiction in respect of international crimes which satisfy the relevant criteria". "In my opinion, crimes prohibited by international law attract universal jurisdiction under customary international law if two criteria are satisfied. First, they must be contrary to a peremptory norm of international law so as to infringe a jus cogens. Secondly, they must be so serious and on such a scale that they can justly be regarded as an attack on the international legal order." English courts would have jurisdiction over all crimes committed by Pinochet well before 1988 (entry into force of the Section 134 of the Criminal Justice Act) or even 1984 (signature of the UN Torture Convention): "Customary international law is part of the common law, and accordingly I consider that the English courts have and always have had extraterritorial criminal jurisdiction in respect of crimes of universal

discarded the possibility of universal jurisdiction for torture under customary international law, requiring statutory authority under the non-retrospective Section 134 of the Criminal Justice Act.[3152]

10.7.3. Crimes against international humanitarian law

948. The United Kingdom's position on the assumption of universal criminal jurisdiction over crimes against international humanitarian law is ambiguous and confusing.. During the drafting process of the Genocide Convention 1948, a British delegate rejected in the Sixth Committee of the UN General Assembly an Iranian amendment to the Draft Genocide Convention providing for (subsidiary) universal jurisdiction, considering it to be "incompatible with the principle of territoriality on which the jurisdiction of penal courts in the United Kingdom is based", going to state that "criminal courts in the United Kingdom did not punish British citizens for crimes committed abroad and, except in time of war, those courts could not punish aliens for war crimes which they had committed outside the territory of the United Kingdom."[3153] The United Kingdom's opposition against universal criminal jurisdiction over genocide, echoed in the Genocide Act 1969, dovetails with the UK's historically strict adherence to the territoriality principle. It nonetheless sits somewhat uneasy with a decision by the British Military Court for the Trial of War Criminals in 1945, which stated "[t]hat under the general doctrine called Universality of Jurisdiction over war crimes, every independent state has in International Law jurisdiction to punish pirates and war criminals in its custody regardless of the nationality of the victim or the place where the offence was committed."[3154] In the aftermath of the Second World War, the United Kingdom seemed to be equivocal about the legality and opportunity of the exercise of universal jurisdiction for international crimes. Nonetheless, there need not be incongruity between rejection of universal jurisdiction over genocide (admittedly the international crime *par excellence*) and support for universal jurisdiction over war crimes. At the level of

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jurisdiction under customary international law." Reprinted in D. WOODHOUSE (ed.), *Pinochet: A Legal and Constitutional Analysis*, Oxford, Hart, 2000, at 276-77.

[3152] On the other hand, the majority construed Article 5 (2) of the Torture Convention in a very liberal manner. This provision obliges each State Party to take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction if it is does not extradite him to any of the States mentioned in Article 5 (1) of the Torture Convention. The States mentioned in the latter provision are the State where the offences are committed, and the State of which the alleged offender or the victim is a national. Pinochet being in UK territory, the UK would thus have two possibilities: either it brings Pinochet to justice, or it extradites him to the territorial or the national State. Article 5 of the Torture Convention does not oblige the UK to extradite him to another State, such as the State claiming universal jurisdiction. Accordingly, to the extent that the Spanish extradition request was not based on the passive personality principle (which it partly was), Spain could not have expected it to be honored by the UK. Article 5 of the Torture Convention does however not oppose extradition to a third State such as Spain: every State has the right to extradite a person to any other State as it deems fit, provided that, in so doing, it does not infringe the human rights of the extraditable person. *See* L. REYDAMS, *Universal Jurisdiction*, Oxford, Oxford University Press, 2003, 67 and 209.

[3153] Official Records of the General Assembly, Third Session, Sixth Committee, Part I, 97th, 98th, and 100th Meetings, at 360-407, quoted in L. REYDAMS, *Universal Jurisdiction*, Oxford, Oxford University Press, 2003, 51.

[3154] The Almelo Trial (Otto Sandrock and others), 1 *L. Rep. Trials War Crimes* 35, 42 (Almelo, Netherlands 1945), quoted in J.D. VAN DER VYVER, "National Experiences with International Criminal Justice", *offprint*, at 16.

international law, the Genocide Convention does not feature a provision on universal jurisdiction, while the Geneva Conventions on the laws of war do.

949. Not surprisingly, Section 1(1) of the UK Geneva Conventions Act 1957 (amended in 1995), which implements the 1949 Geneva Conventions, provides for universal jurisdiction:[3155] "[a]ny person, whatever his nationality, who, whether in or outside the United Kingdom, commits, or aids, abets or procures the commission of any other person of, a grave breach of any of the scheduled Conventions or the first Protocol shall be guilty of an offence." At the time, universal jurisdiction was considered by Members of Parliament as "an unusual extension of our jurisdiction" but also as being "necessary by the special circumstances against which we are providing."[3156] In the *Manuel of Military Law*, published a year before the enactment of the Geneva Conventions Act, the same idea could be found: "War crimes are crimes *ex jure gentium* and are thus triable by all States …British military courts have jurisdiction outside the United Kingdom over war crimes committed … by … persons of any nationality … It is not necessary that the victim of the war crime should be a British subject."[3157]

British courts proved however unwilling to act upon the grant of jurisdiction contained in the Geneva Conventions Act 1957. In 1988, the Home Secretary seemed to justify their reluctance, stating that "[t]he British courts have jurisdiction over British citizens who have committed manslaughter or murder abroad, but do not have jurisdiction over people who may now be British citizens, or who many now live here and have done so for some time, if the allegations relate to events before they became British citizens or before they came to live here."[3158] A year later, however, in 1989, the British *Report of the War Crimes Inquiry* reminded the political and legal world of the possibility of universal jurisdiction in the UK: "War crimes, or grave breaches of the 1949 Geneva Conventions, wherever in the world they are committed, are already triable in the United Kingdom under the Geneva Conventions Act 1957 [...]. Parliament did not demur from the proposition that war crimes are offences sufficiently serious for the British courts to be given jurisdiction over them, whatsoever the nationality of the person committing them and wheresoever they were committed."[3159] In a preliminary court ruling in the *Zardad* case (2004), a universal jurisdiction case involving, amongst others, charges of hostage-taking, but not of crimes against international humanitarian law, the Central Criminal Court held that the Geneva Conventions Act 1957 authorized British courts to exercise universal

[3155] Hirst, at 238-40.
[3156] 204 HL Hansard columns 350-351 (The Lord Chancellor Viscount Kilmuir, 25 June 1957); 573 HC Hansard columns 716-717 (Frank Soskice, 12 July 1957), cited in R. VAN ELST, "Implementing Universal Jurisdiction over Grave Breaches of the Geneva Conventions", 13 *Leiden J. Int. L.* 815, 829 (2000).
[3157] *Manual of Military Law*, III (1956), para. 637, quoted in R. HIGGINS, *Problems and Process: International Law and How We Use It*, Oxford, Clarendon Press, 1994, at 59-60.
[3158] Hansard, Official Report, 8 February 1988, col. 32, quoted in R. HIGGINS, *Problems and Process: International Law and How We Use It*, Oxford, Clarendon Press, 1994, at 60.
[3159] *See* T. HETHERINGTON & W. CHALMERS, *War Crimes: Report of the War Crimes Inquiry*, 1989, Cmnd 744, at 45, quoted in T. MERON, "International Criminalization of Internal Atrocities", 89 *A.J.I.L.* 554, 573 (1995).

jurisdiction over war crimes committed in international armed conflicts, but not over war crimes committed in non-international armed conflicts.[3160]

950. Because the Geneva Conventions Act 1957 was non-retrospective, Nazi criminals residing in the United Kingdom could not be prosecuted. In 1991, the United Kingdom therefore adopted a War Crimes Act which provides that "proceedings for murder, manslaughter or culpable homicide may be brought against a person in the United Kingdom irrespective of his nationality at the time of the alleged offence if that offence (a) was committed during the period beginning with 1st September 1939 and ending with 5th June 1945 in a place which at the time was part of Germany or under German occupation; and (b) constituted a violation of the laws and customs of war."[3161] The Act also provides that "[n]o proceedings shall by virtue of this section be brought against any person unless he was on 8th March 1990, or has subsequently become, a British citizen or resident in the United Kingdom, the Isle of Man or any of the Channel Islands."[3162] Although theoretically premised on the universality principle (as at the time of committing the crimes, the perpetrator nor the victim may have had British nationality or residence), even with retrospective effect, the Act sets forth a strong nexus with Britain through the requirement of British nationality or residence after 1990. Two cases have been brought under the War Crimes Act 1991, one resulting in a conviction.[3163]

951. The legal regime for the prosecution of crimes against international humanitarian law was overhauled by the International Criminal Court Act 2001.[3164] At a jurisdictional level, this Act is not a step forward, quite on the contrary: it excludes the assumption of universal or passive personality jurisdiction over genocide, crimes against humanity, and war crimes by the courts of England and

[3160] Central Criminal Court London, *R* v *Zardad*, 5 October 2004, decision on file with the author. The ruling was not *obiter dictum*. Indeed, the court was precluded from establishing its jurisdiction if the alleged acts of hostage-taking were committed in the course of an armed conflict as defined in the Geneva Conventions 1949 and its Additional Protocols, in keeping with Article 12 of the UN Convention on the Taking of Hostages 1979, *and* if the United Kingdom was bound under the Geneva Conventions to prosecute or handover the hostage-taker. Accordingly, the court needed to ascertain whether the United Kingdom incurred an *aut dedere aut judicare* obligation under the Geneva Conventions for the crimes committed by Zardad. If not, it could proceed with the charges of hostage-taking (There is thus no lacuna in the jurisdictional regime for acts of hostage-taking. If these acts are committed in the course of an armed conflict *and* if they qualify as grave breaches for purposes of the *aut dedere aut judicare* obligation of the Geneva Conventions, they may be prosecuted under the Geneva Convention Implementation Act. If these two conditions are not satisfied, the acts are subject to the *aut dedere aut judicare* obligation enshrined in the Hostage-Taking Convention, and they could be prosecuted under the Taking of Hostages Act). The *Zardad* court held that, while Zardad committed his acts of hostage-taking in the course of an armed conflict and the first requirement for Article 12 of the Hostage-Taking Convention working in his favour was thus satisfied, the second requirement was not, since jurisdiction to prosecute war crimes under the Geneva Conventions Act, in keeping with the Geneva Conventions, is restricted to grave breaches of the laws of war. Hostage-taking committed in the course of an internal armed conflict was arguably not included in the grave breaches. The Court therefore held that Zardad could only be prosecuted under the universal jurisdiction provisions of the English Taking of Hostages Act 1982.

[3161] Article 1 (1) War Crimes Act 1991, c. 13.

[3162] Article 1 (2) War Crimes Act 1991, c. 13.

[3163] *R* v. *Sawoniuk* [2000] All ER (D) 154 (conviction); *R* v. *Serafinowicz*, unreported, 18 January 1997 (defendant found unfit to stand trial). *See also* M. HIRST, *Jurisdiction and the Ambit of the Criminal Law*, Oxford, Oxford University Press, 2003, at 240-41.

[3164] Full text available at http://www.hmso.gov.uk/acts/acts2001/20010017.htm.

Wales. Section 51 of the 2001 Act indeed provides that crimes against international humanitarian law are offences against the law of England and Wales only if committed in England or Wales, or outside the United Kingdom, by a United Kingdom national, a United Kingdom resident or a person subject to UK service jurisdiction.[3165] The restrictive jurisdictional regime of the Act was justified by reference to the ICC Statute, which does, indeed, not require the United Kingdom to extend its jurisdiction over crimes against international humanitarian law beyond the territoriality and active personality principle.[3166] The 2001 Act repeals the Genocide Act 1969,[3167] which, from a jurisdictional point of view, makes no difference. The Geneva Conventions Act 1957 remains in force however, as the Solicitor-General did not fail to point out during the Parliamentary debate on the International Criminal Court Bill.[3168] Grave breaches of the Geneva Conventions thus remain subject to universal jurisdiction in the United Kingdom. Other breaches of the Geneva Conventions are only subject to territorial and active personality jurisdiction in accordance with the 2001 Act.

10.7.4. Terrorism

952. While the possibilities for universal jurisdiction over crimes against international humanitarian law are limited in the United Kingdom, terrorist offences are subject to wide-ranging universal jurisdiction under English law, like they are under U.S. law as well. Statutes providing for universal jurisdiction over terrorist offences ordinarily implement international conventions.

Under § 3 of the Explosive Substances Act 1883, as amended in 1975, English courts had limited 'universal jurisdiction' over acts and conspiracies by any person with intent to cause an explosion within the United Kingdom or the Republic of Ireland. This modest extension of the ambit of the criminal law was basically aimed at clamping down on terrorist activity relating to the conflict in Northern Ireland,[3169] and was not based on an international convention. Since the Terrorism Act 2000, implementing the 1998 UN Convention on Terrorist Bombings, English courts have

[3165] Section 67(3) clarifies what should be understood by a "person subject to UK service jurisdiction". Persons subject to UK service jurisdiction are persons subject to military law, air force law or the Naval Discipline Act 1957 (c. 53), and passengers in HM ships and aircraft, and certain civilians. While these persons need not be UK nationals, they are civilian and military personnel of the British Army or Navy. Section 68 clarifies that proceedings could also be brought against foreigners who become resident in the United Kingdom subsequent to the crime.

[3166] *See* I. CAMERON, "Jurisdiction and Admissibility Issues under the ICC Statute", in D. MCGOLDRICK, P. ROWE & E. DONNELLY (eds.), *The Permanent International Criminal Court. Legal and Policy Issues*, Hart, Oxford, Portland, Oregon, 2004, 76.

[3167] Sch. 10 to the 2001 Act.

[3168] "Historically, our practice has been to take universal jurisdiction only when it is obligatory as a result of an international agreement. The Torture Convention …, the Hostage-taking Convention and the grave breaches of the Geneva Protocols [*sic*] are cases that involved obligations on our part to take universal jurisdiction, and we did so. … The Bill does not affect the universal jurisdiction that operates over grave braches of the Geneva Protocols. That universal jurisdiction will remain … The Bill mirrors the provisions of the Geneva Protocols to a large extent." Quoted in M. HIRST, *Jurisdiction and the Ambit of the Criminal Law*, Oxford, Oxford University Press, 2003, 243.

[3169] *See* M. HIRST, *Jurisdiction and the Ambit of the Criminal Law*, Oxford, Oxford University Press, 2003, 249.

truly universal jurisdiction over terrorist offences involving explosions.[3170] Other terrorist offences over which English courts have universal jurisdiction by virtue of statutes giving effect to obligations under international conventions adopted over the last decades, include offences involving the use of biological and chemical weapons,[3171] nuclear material offences,[3172] 'European' terrorism,[3173] offences against internationally protected persons,[3174] hostage-taking,[3175] attacks against United Nations personnel,[3176] terrorist fundraising and finance,[3177] hijacking of ships,[3178] seizing fixed platforms,[3179] and a number of offences against aviation security.[3180] English courts may also entertain limited universal jurisdiction over maritime drug trafficking,[3181]

[3170] § 62(2)(a) of the Terrorism Act 2000 (c.11), implementing the 1998 UN Convention for the Suppression of Terrorist Bombings.

[3171] § 1 of the Biological Weapons Act 1974 and § 3(2) of the Chemical Weapons Act (in case the offence is a terrorist offence under § 62 of the Terrorism Act 2000).

[3172] §§ 1-2 of the Nuclear Material (Offences) Act 1983, implementing the 1980 UN Convention on the Physical Protection of Nuclear Material.

[3173] § 4 (1) and (3) of the Suppression of Terrorism Act 1978 (providing for universal jurisdiction over terrorist offences committed in countries that have ratified the 1977 European Convention on the Suppression of Terrorism).

[3174] §§ 1 and 2 of the Internationally Protected Persons Act 1978, giving effect to the 1973 UN Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons. No prosecution has been reported under these provisions. An American request for the extradition of an Al-Qaeda terrorist on charges of conspiracy to murder internationally protected persons outside the United States has however been honored by the House of Lords in 2002 because the dual criminality requirement was met, the said UK Act indeed providing for universal jurisdiction over such a conspiracy. *See Re Al-Fawwaz and others* [2002] 1 All ER 545, 577 (Lord MILLETT) ("In political terms, what is alleged is a conspiracy entered into abroad to wage war on the United States by killing its citizens, including its diplomats and other internationally protected persons, at home and abroad. Translating this into legal terms and transposing it for the purpose of seeing whether such conduct would constitute a crime 'in England or within English jurisdiction', the charges must be considered as if they alleged a conspiracy entered into abroad to kill British subjects, including internationally protected persons, at home or abroad. Such a conspiracy would constitute a criminal offence within the extra-territorial jurisdiction of our courts.").

[3175] § 1 of the Taking of Hostages Act 1982, giving effect to the 1979 International Convention against the Taking of Hostages. No prosecution has been reported under this provision. A German request for the extradition of a person who took a German citizen hostage in Bolivia was however honored because the dual criminality requirement was met, the UK Taking of Hostage Act indeed providing for universal jurisdiction over such a crime. *Rees* v. *Secretary of State for the Home Department* [1986] AC 937 (no extradition granted however for the offense of *kidnapping* a German citizen in Bolivia, because the United Kingdom does not recognize passive personality jurisdiction – *see supra*).

[3176] § 1 of the United Nations Personnel Act 1997, giving effect to the 1994 UN Convention on the Safety of United Nations and Associated Personnel,

[3177] § 63 of the Terrorism Act 2000, giving effect to the 1999 UN Convention for the Suppression of the Financing of Terrorism.

[3178] § 9 of the Aviation and Maritime Security Act 1990, giving effect to the 1988 Convention on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation.

[3179] § 10 of the Aviation and Maritime Security Act 1990, giving effect to the 1988 Convention on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation.

[3180] Sections 1-4 of the Aviation Security Act 1982, giving effect to the 1970 Hague Convention for the Suppression of the Unlawful Seizure of Aircraft and the 1971 Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation. Three cases have been brought under this Act: *R* v. *Moussa Membar and others* [1983] Crim LR 618; *R* v. *Abdul-Hussain and others* [1999] Crim LR 570; *R* v. *Hindawi* (1988) 10 Cr App R (S) 104.

[3181] Section 19 of the Criminal Justice (International Cooperation) Act 1990, giving effect to the 1988 Vienna Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (universal jurisdiction however limited to "Convention countries").

953. Oddly, English courts may have universal jurisdiction under § 4 of the Suppression of Terrorism Act 1978 over acts which are, in spite of the title of the statute, not terrorism at all, such as common murder, manslaughter and kidnapping, offences over which States ordinarily do not exercise universal jurisdiction. English courts have jurisdiction over any such offences, if they are committed in one of 39 countries,[3182] irrespective of the nationality of the offender or the victim. Nonetheless, as consent of the Attorney General for England and Wales is required for prosecutions to take place, instances of English courts actually exercising such universal jurisdiction have not been reported.[3183]

10.7.5. Explaining UK opposition against the assumption of universal jurisdiction

954. The reluctance of the United Kingdom to exercise broad universal jurisdiction is closely linked with the strict evidentiary rules guaranteeing the adversarial debate in criminal proceedings. Under English law of criminal procedure, unlike under continental civil law, evidence should be presented orally, which implies that the witness has to appear in person, and all witnesses should be liable for cross-examination.[3184] Statements of witnesses included in a pre-trial written dossier are considered as hearsay evidence which is generally not admissible.[3185] In cases with an extraterritorial element, particularly in cases involving international crimes, the strict evidentiary requirements are often hard to satisfy.[3186] A report by the Steering Committee of the British Home Office, produced in 1996, therefore submitted that the exercise of universal jurisdiction in Britain could only be expected to function effectively if reforms of the rules governing the admissibility of evidence are adopted.[3187] Reforms should include more flexibility in terms of acceptability of evidence and less reliance on oral testimony (*e.g.*, by relying on *procès-verbal* as in France or Belgium instead) and cross-examination, without reneging on the British common law evidentiary tradition.[3188] The Steering Committee did however not support assuming universal jurisdiction. It suggested the exercise of extraterritorial jurisdiction only in respect of British nationals and on the basis of dual criminality.[3189]

[3182] *I.e.*, the 37 other parties to the 1977 European Convention on the Suppression of Terrorism designated under § 8(1) of the Act, and India and the U.S.A. designated under § 5(1) of the Act.

[3183] M. HIRST, *Jurisdiction and the Ambit of the Criminal Law*, Oxford, Oxford University Press, 2003, 260.

[3184] *See* J. SMITH, "Evidence in Criminal Cases", in M. MCCONVILLE & G. WILSON, *The Handbook of the Criminal Justice Process*, Oxford, Oxford University Press, 2002, at 200.

[3185] *See* HOME OFFICE, "Review of Extra-Territorial Jurisdiction", Steering Committee Report, July 1996, p. 9, § 2.10.

[3186] *Id.*, at p. 20, § 3.5. Civil law countries, which have a system of free evaluation of evidence, then appear to be more amenable to international crimes trials. *Compare* I. CAMERON, "Jurisdiction and Admissibility Issues under the ICC Statute", in D. MCGOLDRICK, P. ROWE & E. DONNELLY (eds.), *The Permanent International Criminal Court. Legal and Policy Issues*, Hart, Oxford, Portland, Oregon, 2004, 81.

[3187] HOME OFFICE, "Review of Extra-Territorial Jurisdiction", Steering Committee Report, July 1996,, at pp. 22-23, §§ 3.12-3.13.

[3188] *Id.*, at pp. 9-10, § 2.11; pp. 21-23, §§ 3.8-3.13.

[3189] The Committee proposed a set of guidelines against which the exercise of extraterritorial jurisdiction by the UK should be measured: (1) the serious character of the offence; (2) the availability of the witnesses and evidence necessary for the prosecution in the UK; (3) the international consensus on the reprehensible character of the conduct; (4) the vulnerability of the victim; (5) the interests of the standing and reputation of the UK in the international community; (5) the danger that offences would otherwise not be justiciable (preventing impunity). *Id.*, p. 12, § 2.21.

Wider assumptions of jurisdiction would, in the view of the Committee "set a bad example and weaken [British] protests against the wide exercise of jurisdiction on the part of other States", notably by the United States in commercial matters.[3190]

955. The lack of success of universal jurisdiction in the United Kingdom may also be explained by the role of the 17th century rule of lenity, which requires courts to rule in favor of criminal defendants in case of statutory and regulatory ambiguities, and may counsel against a direct application of universal jurisdiction without the intervention of the legislature, especially if the jurisdictional basis can be found in customary international law.[3191] If the legislature has not incorporated into domestic law international criminal law permitting or obliging the United Kingdom to exercise universal jurisdiction over certain crimes, the English judge will refuse to hear the case or try to dispose of the case on other grounds. For an English judge to decide otherwise may amount to usurping the lawmaking function.[3192] It does not surprise then that, unlike in continental European countries, there is no legislative "enabling clause", which would enable English courts to exercise obligatory universal jurisdiction without legislative intervention. It is against the background of a hostility towards giving direct effect to international authorization or obligation to exercise jurisdiction that one should probably interpret a letter written by Lord BROWNE-WILKINSON, the senior law lord in the *Pinochet* case, who declared himself strongly in favour of universal jurisdiction over serious international crimes but only "if, by those words, one means the exercise by an international court or by the courts of one state of jurisdiction over the nationals of another state with the prior consent of that latter state, i.e. in cases such as the ICC and Torture Convention."[3193]

956. Obviously, the tradition of strict adherence to territoriality in England also raises its head in the context of universal jurisdiction over international crimes. KIRBY has noted that where civil law countries tend to ask what right they have *not* to adjudge an international crime committed abroad, common law countries such as the United Kingdom rather ask what right they *do* have to dispense justice.[3194] He believed this view to be informed by the principle of comity, or the "respect for the legitimate primacy of other legal systems operating within their own territory".[3195]

957. Even if the assumption of universal jurisdiction by English courts is technically possible, the prosecutorial monopoly of the Crown Prosecution Service

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[3190] *Id.*, at p. 10, § 2.12; p. 19, § 3.4.

[3191] *See* H.M. OSOFSKY, "Domesticating International Criminal Law: Bringing Human Rights Violators to Justice", 107 *Yale L. J.* 191, 202. The rule of lenity originally related to the arbitrary imposition of capital punishment in England. *See* L.K. SACHS, "Strict Construction of the Rule of Lenity in the Interpretation of Environmental Crimes", 5 *N.Y.U. Environmental Law Journal* 600, 603 (1996).

[3192] *See* M. KIRBY, "Universal Jurisdiction and Judicial Reluctance: a New "Fourteen Points"", in S. MACEDO (ed.), *Universal Jurisdiction*, Philadelphia, University of Pennsylvania Press, 2004, 241, 244-46. This may appear strange as the common law is itself judge-made law. Recently, an emphasis on due process and non-retroactivity has led the judiciary to defer to the legislature in the creation of new crimes. *See Reg* v. *Knuller Ltd* [1973] AC 435 (HL).

[3193] Letter from N. Browne-Wilkinson to William J. Butler, Commentary to the Princeton Principles, note 20, quoted in S. MACEDO, "Introduction", in S. MACEDO (ed.), *Universal Jurisdiction*, Philadelphia, University of Pennsylvania Press, 2004, at 6.

[3194] *See* M. KIRBY, "Universal Jurisdiction and Judicial Reluctance: a New "Fourteen Points"", in S. MACEDO (ed.), *Universal Jurisdiction*, Philadelphia, University of Pennsylvania Press, 2004, at 245.

[3195] *Id.*, at 244.

(CPS),[3196] which takes into account the public interest and the likelihood of success of a prosecution,[3197] and the necessary consent of the Attorney General (in England and Wales) or the Attorney General for Northern Ireland (in Northern Ireland) before proceedings shall be begun,[3198] may render the practical exercise of jurisdiction unlikely.

958. All this may explain why the United Kingdom has tended to extradite perpetrators of international crimes, even to States that had initiated proceedings against them on the basis of universal jurisdiction, instead of prosecuting them where it had jurisdiction to do so. In *Rees v. Secretary of State for the Home Department* (1986), the House of Lords granted extradition of a British national to Germany, which prosecuted him under the universality principle for kidnapping a German national in Bolivia.[3199] In the famous *Pinochet* case (1999), the House of Lords granted extradition of the former Chilean President Pinochet to Spain, which accused him, *inter alia*, of torture committed in Chile against Chilean nationals.[3200]

10.7.6. Procedural features contributing to the assumption of universal jurisdiction

959. In spite of some inherent disadvantages, the English legal system may however prove sufficiently flexible to allow universal jurisdiction cases to move forward. For one thing, limited procedural rights are however granted to victims. Under English law they could file a complaint where the police refuse to investigate,[3201] and even apply for an arrest warrant against a perpetrator present in England,[3202] thus bypassing the CPS and the Attorney General, although the actual prosecution could only be continued by the CPS and the Attorney General. On September 10, 2005, for instance, a Senior District Judge issued, at the request of a number of Palestinian victims, a warrant for the arrest of Israeli Major General (retired) Doron Almog on suspicion of committing a grave breach of the Fourth Geneva Convention 1949 in the occupied Palestinian Territory.[3203] Victims may also appeal to the High Court a decision not to investigate or prosecute.[3204] Israeli pressure

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[3196] The CPS designated two prosecutors of its Counter-Terrorism Department to work on international crimes. *See* HUMAN RIGHTS WATCH, *Universal Jurisdiction in Europe: The State of the Art*, Vol. 18, No. 5(D), June 2006, p. 95.

[3197] *See* A.-M. SLAUGHTER, "Defining the Limits: Universal Jurisdiction and National Courts", in S. MACEDO (ed.), *Universal Jurisdiction*, Philadelphia, University of Pennsylvania Press, 2004, at 188.

[3198] Section 135 of the Criminal Justice Act 1988 (This procedural hurdle allowed General Pinochet to leave the UK in 1994 before the Attorney General could actually initiate a prosecution against him at the request of human rights groups); Section 1A(3)(a) of the Geneva Conventions Act 1957; Section 53(3) of the International Criminal Court Act 2001.

[3199] *Rees* v. *Secretary of State for the Home Department*, [1986] 2 All ER 321.

[3200] House of Lords, *Regina* v. *Bartle and the Commissioner of Police for the Metropolis and Others* ex parte *Pinochet*, 24 March 1999, reprinted in 38 *ILM* 581 (1999).

[3201] Section 6(1) of the Prosecution of Offences Act 1985.

[3202] *Id.*, Section 25(2).

[3203] *See* http://www.hickmanandrose.co.uk/news05.html. The victims had requested the issuance of an arrest warrant by the Magistrate because the War Crimes Unit of the Metropolitan Police was unable to take a decision on the arrest or prosecution of Almog. Almog managed to take his flight back from Heathrow airport to Israel before the arrest warrant could be executed. The UK Foreign Secretary thereupon apologized for the incident. The matter was also discussed by the Israeli and British prime ministers at a meeting of the UN in New York.

[3204] *R* v. *Director of Public Prosecutions, ex parte C* (1995), 1 Cr. App. R 136.

in the wake of the *Almog* case may however result in a restriction of victims' rights in the near future, the right to seek an arrest warrant in particular.[3205]

960. For another, the Home Office's Immigration and Nationalization Department (IND) screens asylum and immigration applications of international crimes, and refers allegations of such crimes committed to the police which may further investigate them.[3206] Moreover, modern technology and the allocation of financial resources have allowed courts to overcome the difficulties posed by the geographical distance of the crime scene and the victims. In the momentous *Zardad* case (2004-2005), witnesses testified via live video-link from Afghanistan, a procedure which guaranteed the defendant's right to cross-examination. Zardad was also entitled to legal aid, which enabled his lawyer to supervise the prosecution's investigative work in Afghanistan.[3207]

10.7.7. Zardad: the first trial

961. It may be useful to conclude with a more extensive discussion of the *Zardad* case, because it is the first ever trial of an international crime in the United Kingdom on the basis of the universality principle, and because it may serve as a harbinger of more successful trials on charges of international crimes to come in the United Kingdom. In the *Zardad* case, the Attorney General, Lord Goldsmith, had brought torture charges against Faryadi Sarwar Zardad for acts relating to a period from 1991 until 1996, *i.e.*, after the entry into force of the Criminal Justice Act 1988, when Zardad commanded a group of militia fighters in Afghanistan.[3208] After holding sway in Afghanistan in the 1990s, Zardad moved to Britain in 1998, where he filed an asylum request. He was arrested in south London, where he was running a pizza restaurant, in July 2003,[3209] and charged with nine counts under Section 134 of the Criminal Justice Act and five counts under Section 1(1) of the 1982 Taking of Hostages Act.[3210] As Afghanistan did not request his extradition, the United Kingdom

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[3205] *See* V. DODD, "UK Considers Curbing Citizens' Right to Arrest Alleged War Criminals", *The Guardian*, February 3, 2006. The UK Foreign Secretary apologized for the incident. Israeli officials thereupon met with their British counterparts, and the matter was also discussed by the Israeli and British prime ministers at a meeting of the UN in New York. In June 2006, the UK Attorney-General paid a visit to Israel so as to resolve the issue of Israeli generals visiting the United Kingdom risking to be arrested. *See New Statesman*, June 26, 2006.

[3206] *See* HUMAN RIGHTS WATCH, *Universal Jurisdiction in Europe: The State of the Art*, Vol. 18, No. 5(D), June 2006, p. 96 (noting that 12 cases had been referred to the police as of June 2006, that the IND is also reviewing past cases, and screening guidelines and criteria are forthcoming).

[3207] *Id.*, at 100.

[3208] Torture charges had previously been brought against Sudanese doctor Mohamed Mahgoub in 1997. The charges were dropped by the Crown Office on May 19, 1999 (Cited in R. VAN ELST, "Implementing Universal Jurisdiction over Grave Breaches of the Geneva Conventions", 13 *Leiden J. Int. L.* 815, 852 (2000)).

[3209] Zardad was tracked down by BBC journalist John Simpson in 2000 with the help of the Afghan exile community. In 1999, Simpson had interviewed the Taleban Foreign Minister who accused the UK of sheltering Zardad - an enemy of the Taleban. His film for Newsnight on his confrontation with Zardad was originally broadcast on 26 July 2000. BBCNews, July 18, 2005, available at http://news.bbc.co.uk/1/hi/programmes/newsnight/4693783.stm.

[3210] For purposes of Section 134 of the Criminal Justice Act, Zardad could be considered as a person acting *de facto* in an official capacity, in that, as a military commander in Afghanistan, he tortured or gave orders for torture to be carried out as part of his official duties. *See* Central Criminal Court London, *Zardad*, 7 April 2004, paras. 3-39, on file with the author. Zardad was also charged under

decided to prosecute him, giving effect to the Torture Convention's *aut dedere aut judicare* requirement. Zardad's trial began on October 8, 2004. The Attorney General asserted that it was the first time ever that a foreign national would be tried on torture charges relating to foreign victims in a foreign State.[3211]

962. As happened in other universal jurisdiction cases in Europe, implicitly or explicitly, the UK Attorney General in *Zardad* emphasized the links of the crime with the forum State beyond the mere presence of the alleged perpetrator. He explained that Sarobi, the town where the torture was alleged to have taken place, was at a strategic point on the Kabul-Khyber Pass road. Referring to the spot where the British Army lost 15,000 men on the retreat from Kabul in 1842, the Attorney General told the jurors ominously: "Some history then and perhaps some history today."[3212]

The jury in the 2004 *Zardad* trial was discharged after it failed to reach a verdict on November 18, 2004 (after 25 hours of deliberations). Thereupon, on November 25, 2004, the Crown Prosecution Service decided to seek a retrial in 2005.[3213] Weather conditions in Afghanistan proved decisive in scheduling the retrial, given the importance of local Afghan witnesses. The case was eventually retried in July 2005. On July 18, 2005, the jury convicted Zardad to 20 years of imprisonment and deportation from the United Kingdom after serving his sentence.[3214]

963. The *Zardad* case highlighted the practical problems encountered in trials on the basis of universal jurisdiction, where much of the evidence and many witnesses are located abroad, in the State where the crimes occurred.[3215] Scotland Yard detectives visited Afghanistan several times, and witnesses gave evidence to the Central Criminal Court in London via a live video link with the British Embassy in Kabul, Afghanistan.[3216] A reliable connection could however not always be

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section 1(1) of the 1977 Criminal Law Act that he plotted with others to carry out or order torture, and under section 1(1) of the 1977 Criminal Law Act that he plotted with others to take a hostage.

[3211] Quoted by BBCNews, October 8, 2004, available at http://news.bbc.co.uk/2/hi/uk_news/politics/3727894.stm. This is not correct: the Netherlands was the first State to exercise universal jurisdiction over torture offences by trying a Congolese commander in April 2004 (*see* subsection 10.6.6).

[3212] Quoted by BBCNews, October 8, 2004, available at http://news.bbc.co.uk/2/hi/uk_news/politics/3727894.stm. 'Neocolonialist' remarks are frequent in universal jurisdiction cases, and are obviously *gefundenes Fressen* for critics of universal jurisdiction. In the *Bouterse* case for instance, the Amsterdam Court of Appeals pointed out that the Netherlands would be the most appropriate forum to try Bouterse, a Surinam commander who allegedly committed torture in Surinam, a former Dutch colony, in light of the close historic ties of the Netherlands with Surinam and the residence of the complainants in the Netherlands (Amsterdam Court of Appeals, November 3, 2000, *reprinted* in 32 *N.Y.I.L.* 269, 272 (2001)). *See also* the "criterion of cultural community" propounded by the minority judges in the *Guatemala Genocide Case* before the Spanish *Supreme Court* (42 *I.L.M.* 711 (2003)).

[3213] AFP, November 26, 2004.

[3214] Given the level of the court, no written judgment is available. *See* email conversation with Carla Ferstman, Director of Redress, August 25, 2005 (on file with the author). The success of the second trial may be attributed to the testimony of three eyewitnesses in person. *See* HUMAN RIGHTS WATCH, *Universal Jurisdiction in Europe: The State of the Art*, Vol. 18, No. 5(D), June 2006, p. 100.

[3215] Another evidentiary problem was solved by the Court in a preliminary ruling, in which it held that the evidence of video-identification based on images of Zardad taken in 1996 and 2003 was admissible. *See* Central Criminal Court London, *Zardad*, 7 April 2004, paras. 40-55, on file with the author.

[3216] Taking evidence in a British Embassy or Consulate in the presence of diplomatic staff and legal representatives in extraterritorial cases had already been proposed in a report by the Home Office in 1996. *See* HOME OFFICE, "Review of Extra-Territorial Jurisdiction", Steering Committee Report, July

maintained. Time was lost due to a power cut in Kabul, and witnesses could not always attend court on time, given the 3½ hour time difference between London and Kabul.[3217] Rapid technical progress in the field of live video links may nevertheless prove an incentive for national prosecutors to increasingly go ahead with cases involving extraterritorial torture charges.[3218] In order to give further impetus to the prosecution of international crimes, the possibility of giving evidence via telephone link may be contemplated.[3219]

964. In spite of the practical difficulties and the high standard of evidence required under British law, police and prosecutors did not give up. Possibly, they were galvanized by the 1998-99 *Pinochet* proceedings and by Redress, a British non-governmental organization seeking redress for torture victims. The *Zardad* case eventually cost more than £3m,[3220] but the authorities considered this astronomical

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1996, at 27, § 3.30 (on file with the author). Under § 32(1) of the Criminal Justice Act 1988 (c. 33), "a person other than the accused may give evidence through a live television link […] if (a) the witness is outside the United Kingdom; or (b) the witness is under the age of 14 […]." Giving evidence through a live television link is not always authorized. § 32(2) lists the offences to which § 32 applies: (a) to an offence which involves an assault on, or injury or a threat of injury to, a person; (b) to an offence under section 1 of the [1933 c. 12.] Children and Young Persons Act 1933 (cruelty to persons under 16); (c) to an offence under the [1956 c. 69.] Sexual Offences Act 1956, the [1960 c. 33.] Indecency with Children Act 1960, the [1967 c. 60.] Sexual Offences Act 1967, section 54 of the [1977 c. 45.] Criminal Law Act 1977 or the [1978 c. 37.] Protection of Children Act 1978; and (d) to an offence which consists of attempting or conspiring to commit, or of aiding, abetting, counselling, procuring or inciting the commission of, an offence falling within paragraph (a), (b) or (c) above." Importantly, perjury committed by a witness outside the UK through a live video link is punishable in the UK under § 1 of the [1911 c.6] Perjury Act 1911 (§ 32(3) of the Criminal Justice Act). The Home Office has however noted that practical difficulties still abound, such as the difficulty to compel a witness abroad to give evidence via satellite link, and the difficulty in bringing an action for perjury. *See* HOME OFFICE, "Review of Extra-Territorial Jurisdiction", Steering Committee Report, July 1996, at 26, § 3.25.

[3217] In this context, the Home Office pointed out: "Trials, particularly if they are long or complex, do not always run on schedule and, if the satellite slot is missed, it must be re-booked and paid for again. This has implications for courts' administration and adjournments may incur additional costs, particularly if the court has to sit outside usual hours." *See* HOME OFFICE, "Review of Extra-Territorial Jurisdiction", Steering Committee Report, July 1996, at p. 26, § 3.26.

[3218] *Compare* BBCNews, October 12, 2004, available at http://news.bbc.co.uk/2/hi/uk_news/3737914.stm, noting that "[a] few years ago [such a trial] might not have been technically feasible." International criminal tribunals have pioneered the use of live video links to local witnesses. Rule 71*bis* of the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY), adopted on November 17, 1999, now provides that, "[a]t the request of either party, a Trial Chamber may, in the interests of justice, order that testimony be received via video-conference link." Building on previous practice by the ICTY and safeguarding the rights of the defense, Rule 67.1 of the Rules of Evidence of the International Criminal Court, adopted on September 9, 2002 (ICC-ASP/1/3, Part II-A), provides that "a Chamber may allow a witness to give viva voce (oral) testimony before the Chamber by means of audio or video technology, provided that such technology permits the witness to be examined by the Prosecutor, the defense and the Chamber itself, at the time the witness so testifies". Rule 67.2 of these rules require the Chamber to "ensure that the venue chosen for the conduct of the audio or video-link testimony is conducive to the giving of truthful and open testimony and to the safety, to the physical and psychological well-being, dignity and privacy of the witness."

[3219] *See* M. HIRST, *Jurisdiction and the Ambit of the Criminal Law*, Oxford, Oxford University Press, 2003, 340. Under § 31 of the Crime (International Co-operation) Act 2003, *a person in the United Kingdom* may give evidence by telephone in criminal proceedings before a court in another country.

[3220] http://news.bbc.co.uk/go/pr/fr/-/1/hi/uk/4693787.stm. It was not the first time that English prosecutors staged a costly prosecution based on extraterritorial jurisdiction. *See, e.g.*, the *Kular* case,

expenditure worthwhile. *Zardad* may hold high hopes for the future of universal jurisdiction, but it remains to be seen whether British judicial authorities will be prepared to foot the bill every time an alleged torturer could be found in the United Kingdom.

10.7.8. Concluding remarks

965. Although the United Kingdom lagged behind continental Europe as far as the prosecution of international crimes was concerned, it was nonetheless among the first States to stage a successful trial for crimes of torture committed abroad (*Zardad* case, 2004-2005). Victims seem, moreover, recently to have discovered the ill-known possibility under English law of initiating criminal proceedings for international crimes, even if police and prosecution are opposed (*Almog* case, 2005). This is reason for cautious optimism. Obstacles remain high however. The availability of private complaints may be scrapped by the legislature, evidentiary requirements may render trials prohibitively expensive, and international crimes such as genocide and crimes against humanity are not even subject to universal jurisdiction under English statutory law. Only if the media[3221] and non-governmental organizations[3222] continue to bring relentless pressure to bear on police and prosecution will a practice of prosecuting international crimes in the United Kingdom under the universality principle gradually become established.

10.8. Universal jurisdiction over core crimes against international law in some other States

10.8.1. Denmark

966. Under Section 8 (5) of the Danish Criminal Code, Danish courts may establish universal jurisdiction over any crime that Denmark is obliged to prosecute under international law. Like the German Criminal Code, the Danish Criminal Code also provides for representational jurisdiction. Under Section 8 (6) of the Danish Criminal Code, Danish courts may establish universal jurisdiction over offenses that are punishable in Denmark with imprisonment of more than year, in case these offenses are also punishable in the territorial State and extradition has been rejected. Pursuant to Section 7 of the Danish Criminal Code, in a measure of the far-reaching legal integration of the Nordic countries, Danish courts also have universal jurisdiction over crimes committed by nationals or residents of these countries who are present in Denmark.

967. The practical modalities of the exercise of universal jurisdiction in Denmark resemble these in the Netherlands. Presence of the suspect is required before universal jurisdiction could be exercised, although an arrest warrant could be issued against a

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cited in M. HIRST, *Jurisdiction and the Ambit of the Criminal Law*, Oxford, Oxford University Press, 2003, at 338.

[3221] *See, e.g.*, S. LAVILLE, "Wanted for Genocide in Kigali. Living Comfortably in Bedford", *The Guardian*, May 13, 2006; *Id.*, "Stop Giving Haven to Genocide Suspects, Attorney General is Told", *The Guardian*, August 8, 2006; J. SWAIN, "Britain Gives Genocide Suspect Asylum", August 13, 2006, available at http://www.timesonline.co.uk/article/0,,2087-2310650,00.html.

[3222] *See, e.g.*, www.redress.org; Letter from Irene Khan, Secretary General of Amnesty International to the Attorney General, warning that the UK may become a safe haven to people who have committed genocide, August 4, 2006, available at http://web.amnesty.org/library/Index/ENGEUR450132006.

person who had already been charged while being present in Denmark.[3223] A special unit deals with the investigation and prosecution of international crimes, the Special International Crimes Office (SICO), which was established in 2002, and had a staff of six prosecutors and nine investigators as of June 2006.[3224] Also, the immigration authorities cooperate well with SICO, which receives most of its caseload from them.[3225] The prosecutor enjoys a monopoly on the prosecution of international crimes, but victims can file an administrative appeal with the director of public prosecution.[3226]

968. Denmark was the first European country to convict a Balkan war criminal on the basis of the universality principle. The Danish Supreme Court ruled on August 15, 1995 in a case against the Bosnian Muslim Refik Saric, who was involved in atrocities committed as a guard in a concentration camp, that "the requirements set out in the [Geneva] Conventions as to 'grave breaches' have been met in the case of all counts of the indictment."[3227] As the charges against Saric involved grave breaches, universal jurisdiction would be warranted over Saric, who had taken refuge in Denmark in 1994. The Supreme Court upheld the decision of the Eastern Division of the High Court, which had sentenced *Saric* to eight years in prison on November 25, 1994.[3228] Both courts did not question the grant of jurisdiction laid down in the Geneva Conventions and its direct effects in the Danish legal order. Under Danish law, the exercise of universal jurisdiction over grave breaches of the laws of war was premised on the *Blankettnorm* of Section 8 (5) of the Criminal Code.[3229]

[3223] In November 2002, the former Iraqi general Nizar Al-Khazradji, who allegedly took part in the gassing of the Kurds in Halabja in March 1988, was put under house arrest in Denmark on suspicion of war crimes. Al-Khazradji, a defector of the Iraqi regime, was living there as a refugee since 1999. On March 15, 2003, days before the American invasion of Iraq, however, he vanished. There have been rumours that he was helped by the CIA, because the U.S. preferred him as a successor to Saddam Hussein. *See* http://www.casi.org.uk/analysis/2004/msg00151.html. The Danish authorities issued a national and international arrest warrant against Al-Khazradji, which may be indicative of Danish willingness to exercise universal jurisdiction *in absentia* if the presumed perpetrator flees Denmark after being indicted during his presence in Denmark, and certainly after being detained or put under house arrest in Denmark. In the trial phase the accused must be present though (Section 847 Administration of Justice Act).

[3224] www.sico.ankl.dk. The Office agreed on February 28, 2006 to prosecute the 15 suspects of the 1994 Rwandan genocide allegedly residing in Denmark. These persons could not be extradited to Rwanda in the absence of an extradition agreement between Denmark and Rwanda. Denmark and Rwanda are working closely together on the issue. *See* http://www.trial-ch.org/en/trial-watch/profile/db/legal-procedures/sylvere_ahorugeze_476.html.

[3225] HUMAN RIGHTS WATCH, *Universal Jurisdiction in Europe: The State of the Art*, Vol. 18, No. 5(D), June 2006, p. 49.

[3226] Section 724 (1) of the Administration of Justice Act. Two appeals have been filed so far. *See* HUMAN RIGHTS WATCH, *Universal Jurisdiction in Europe: The State of the Art*, Vol. 18, No. 5(D), June 2006, p. 51 n 217 (basing itself on an interview with Danish officials).

[3227] *See Public Prosecutor v. T.*, Supreme Court (Hojesteret), Judgment, 15 August 1995, *Ugeskrift for Retsvaesen*, 1995, p. 838, reported in *Yb. Int'l Hum. L.* 43 (1998). *See also* R. MAISON, "Les premiers cas d'application des dispositions pénales des Conventions de Genève: commentaire des affaires danoise et française", *E.J.I.L.* 260 (1995).

[3228] Available at http://www.icrc.org/ihl-nat.nsf/46707c419d6bdfa24125673e00508145/9d9d5f3c500edb73c1256b51003bbf44?OpenDocument

[3229] In March 2005, the Danish Attorney General refused to detain the visiting former Russian Interior Minister Anatoly Kulikov, after pro-Chechen groups demanded that he face trial for war crimes that he allegedly committed in Chechnya. Danish authorities found that they had no jurisdiction over the matter, as the war in Chechnya was an internal armed conflict.[3229] Crimes committed during non-international armed conflicts may indeed not be subject to obligatory universal jurisdiction under

10.8.2. Austria

969. Under Section 64 of the Austrian Criminal Code, Austrian courts can exercise universal jurisdiction in respect of kidnapping, slave trade, trade in human persons[3230] and serious sexual offences involving minors.[3231] Section 64 (6) of the code contains a Blankettnorm, pursuant to which Austrian courts may establish jurisdiction if Austria is internationally obliged to prosecute a crime. The prosecution of persons accused of crimes covered by Section 64 is not dependent on double criminality or the impossibility of extradition. Austrian representational jurisdiction is codified in Section 65 (1) (2) of the Austrian Penal Code, which sets forth that Austria may establish jurisdiction over crimes committed abroad by foreigners who can be found in Austria, if the crime was punishable in the State where the crime was committed and extradition is impossible for reasons not related to the crime.

970. In 1994, the *Oberlandesgericht* of Linz premised jurisdiction over Dusko Cvjetkovic, a Bosnian Serb accused of genocide, on Section 65 (1) (2) of the Austrian Penal Code, the provision providing for representational jurisdiction.[3232] The Supreme Court upheld this judgment.[3233] It ruled that extradition to Bosnia-Herzegovina was impossible for reasons unrelated to the nature and characteristics of Cvjetkovic's offence: extradition could not be proposed to Bosnia-Herzegovina, as all communication with that State was interrupted since the outburst of the Balkan war. Interestingly, the Supreme Court also reviewed the legality of exercising universal representational jurisdiction over Cvjetkovic in light of international law. It held that the Genocide Convention does not oppose universal jurisdiction, but that universal jurisdiction over genocide was, pursuant to the convention, self-evident.[3234] In the Court's view, it could not be inferred from the Genocide Convention drafters' silence on the issue of universal jurisdiction that they would have rejected universal jurisdiction. On the contrary, they would arguably have approved of the exercise of universal jurisdiction if the territorial forum was unable or unwilling to prosecute the perpetrator. The Supreme Court's decision seems to be based on the subsidiarity principle: only if the territorial forum is unable or unwilling to genuinely prosecute the perpetrator of genocide, Austrian courts will defer. Cvjetkovic was later acquitted, because none of the witnesses *à charge* could identify him as the perpetrator.[3235]

Section 8 (5) of the Danish Criminal Code. The authorities did not invoke representational jurisdiction, which may imply that they will only exercise such jurisdiction if an extradition request is rejected.

[3230] StGB Section 64 (1) (4).

[3231] StGB § 64 (1) (4a).

[3232] Oberlandesgericht Linz, 1 June 1994, AZ 9 Bs 195/94 (GZ 26 Vr 1335/94-30).

[3233] Oberste Gerichtshof Wien, 13 July 1994, 15 Os 99/94-6 at 5 and 6.

[3234] *Id.* ("Art VI der Genozid-Konvention [...] setzt den ihm immanenten Grundgedanken nach voraus, daß im Tatortstaat eine funktionierende Strafgerichtsbarkeit (und darauf basierend die Möglichkeit einer justizförmigen Auslieferung des Verdächtigen dorthin) gegeben ist, zumal andernfalls - zum Zeitpunkt des Abschlusses der Genozid-Konvention bestand kein internationales Strafgericht - sich die den Intentionen der Konvention geradezu diamentral zuwiderlaufende Folgerung ergabe, daß ein des Völkermordes oder sonstiger im Art III der Konvention aufgezählter Handlungen Verdächtiger bei nicht funktionierender Strafgerichtsbarkeit im Tatortstaat und Nichtbestehen eines internationalen Strafgerichtes (oder Nichtanerkennung dieser Gerichtsbarkeit durch einen Vertragsstaat) überhaupt nicht verfolgt würde.").

[3235] Landesgericht Salzburg, 31 May 1995, 38 Vr 1335/94, 38 Hv 42/94.

971. On August 13, 1999, a complaint was filed with an Austrian prosecutor, possibly at the behest of the United States, requesting him to take action against Issat Ibrahim Khalil Al Doori, an Iraqi commander who allegedly took part in the 1988 gas attack against the Kurds in Halabja and the crushing of a Kurdish revolution against the Iraqi government in 1991.[3236] Al Doori, who was at the time of the complaint the deputy president of the Iraqi Revolutionary Council, was in Austria for medical treatment, but he left the country before legal action could actually be taken. The complaint submitted that Al Doori could be prosecuted for certain acts of torture on the basis of the *Blankettnorm* contained in Section 64 (1) (6) of the Austrian Criminal Code, as Article 5 (2) of the UN Torture Convention obliges States to establish their jurisdiction over the perpetrators of torture present on their territory.[3237] As Al Doori's presence in Austria could eventually not be secured, the investigations were suspended.

10.8.3. Switzerland

972. Swiss law contains a general enabling clause for the exercise of obligatory universal jurisdiction by Swiss courts. Article 6*bis* of the Criminal Code provides that the Criminal Code applies to anyone who committed a crime that Switzerland is obliged to prosecute pursuant to a binding international treaty, if the act is also punishable in the territorial State and if the alleged perpetrator can be found in Switzerland and is not extradited. Since 2000, Article 264 of the Swiss Criminal Code provides that Swiss courts have jurisdiction over crimes of genocide if the alleged perpetrator could be found in Switzerland and could not be extradited. Under civilian criminal law, universal jurisdiction is thus possible over grave breaches of the laws of war, torture, and genocide in Switzerland, subject to a presence requirement. The prosecution of international crimes, war crimes in particular, has in practice nonetheless not been grounded upon civilian law, but on military law.[3238]

973. In 1997, a Swiss court established jurisdiction over a Bosnian Serb, named Goran Grabez, accused of war crimes committed in the Omarska concentration camp. He was however acquitted by the Military Tribunal of Lausanne, because of lack of sufficient evidence.[3239] In 1994, the military prosecutor had already refused to pursue a case against F.K., a Rwandan, in spite of his obligation to prosecute under the 1949 Geneva Conventions, because he feared an acquittal for lack of sufficient evidence.[3240]

[3236] The complaint is available at http://www.u-j.info/xp_resources/material/Cases/Austria/Al%20Doori%20case/Al%20Doori%20Complaint-German%20.doc

[3237] The complaint may not have been based on Section 65 (1) (2) in view of the unclear criminality under Iraqi law of the acts allegedly committed by Al Doori.

[3238] *See also* M. SASSOLI, "Le genocide rwandais, la justice militaire Suisse et le droit international", 12 *R.S.D.I.E.* 151 (2002) ; R. ROTH & Y. JEANNERET, « Droit suisse », in A. CASSESE & M. DELMAS-MARTY (eds.), *Juridictions nationales et crimes internationaux*, Paris, PUF, 2002, 275-297 ; A. ZIEGLER, « Domestic Prosecution and International Cooperation With Regard to Violations of International Humanitarian Law : the Case of Switzerland », 5 *R.S.D.I.E.* 561 (1997); A. ZIEGLER, "Note", *Pratique Juridique Actuelle* 1304 (1997).

[3239] *In Re* G., Military Tribunal, Division 1, Lausanne, Switzerland, April 18, 1997. *See* A.R. ZIEGLER, "*In Re* G.", 92 *A.J.I.L.* 78-82 (1998).

[3240] *See* M. HENZELIN, "La compétence universelle et l'application du droit international pénal en matière de conflits armés. La situation en Suisse », in L. BURGORGUE-LARSEN (ed.), *La répression internationale du génocide rwandais*, Brussels, Bruylant, 2003, 155, 156.

Jurisdiction over Grabez was grounded upon Article 109 of the Swiss Military Penal Code (CPM), which penalizes all acts contrary to the provisions of any international agreement governing the laws of war, without specifying its scope of application *ratione loci*.[3241] Agreements on both international and non-international armed conflicts qualify as relevant international agreements.[3242] The military judge qualified the conflict in Yugoslavia as an international armed conflict. The exercise of universal jurisdiction by military courts was arguably permitted under Article 2, Section 9 CPM, which provides that the CPM not only applies to crimes committed abroad by Swiss servicemembers but also to crimes committed by civilians and members of foreign armed forces, without a nexus with Switzerland.[3243]

974. Switzerland's most momentous universal jurisdiction case is the *Niyonteze* case, a case which resulted in the first conviction ever for war crimes committed in an internal armed conflict by a court on the basis of universal jurisdiction. Niyonteze, a former Rwandan mayor, was arrested on 28 August 1996 in Switzerland. It is unclear whether Rwanda requested his extradition,[3244] yet it authorized the Swiss investigating judge and the tribunal to hear witnesses in Rwanda. Niyonteze was sent to the *Tribunal de division 2* in March 1999. Although evidentiary problems were rife - 23 Rwandan witnesses were heard by the tribunal as no written proof was available, memories may have faded and fear of reprisals loomed large – the tribunal was able to conduct the process in an equitable manner.[3245] On 30 April 1999, it found that it had jurisdiction pursuant to Article 109 CPM, and sentenced Niyonteze to life imprisonment.[3246] On 26 May 2000, the court of appeals partially overturned the decision by the lower court. It reversed the convictions for common crimes under the CPM (Niyonteze was prosecuted for murder and incitement to murder, *i.e.*, common crimes, as well as for violations of the laws and customs of war, *i.e.*, international crimes), but upheld the convictions for war crimes.[3247] It sentenced him to fourteen years of imprisonment. On appeal, the *Tribunal militaire de cassation* held that Swiss courts had jurisdiction over Niyonteze's acts, as these were closely linked to an armed conflict, and were thus war crimes.[3248]

[3241] Article 108 CPM provides that the CPM applies in case of war or other armed confict between two or more States.

[3242] *See* Article 108, Sections 1 and 2.

[3243] A trial *in absentia* is possible. *See* Article 133 *Procédure Pénale Militaire*.

[3244] *Pro* L. REYDAMS, International Decisions, *Niyoneze* v. *Public Prosecutor*, 96 *A.J.I.L.* 231 (2002). *Contra* M. HENZELIN, "La compétence universelle et l'application du droit international pénal en matière de conflits armés. La situation en Suisse », in L. BURGORGUE-LARSEN (ed.), *La répression internationale du génocide rwandais*, Brussels, Bruylant, 2003, 155, 161.

[3245] *See* M. HENZELIN, "La compétence universelle et l'application du droit international pénal en matière de conflits armés. La situation en Suisse », in L. BURGORGUE-LARSEN (ed.), *La répression internationale du génocide rwandais*, Brussels, Bruylant, 2003, 155, 162.

[3246] Judgment of the *Tribunal de division 2*, 30 April 1999. The tribunal quashed an amendment to the indictment by the prosecutor pursuant to which Niyonteze would also be indicted for genocide and crimes against humanity. The tribunal held that it had no universal jurisdiction over these crimes under customary international law.

[3247] Judgment of the *Tribunal militaire d'appel 1A*, 26 May 2000.

[3248] This conclusion appears to run counter to the one reached by the ICTR Trial Chamber in *Akayesu*, a case involving similar factual allegations. In 1998, the ICTR had found that the genocidal conduct of Akayesu was *not* connected to the armed conflict taking place in Rwanda. *Prosecutor* v. *Akayesu*, No. ICTR-96-4-T, Judgment, 2 September 1998. REYDAMS has attributed the Swiss courts' conclusion to the fact that the war crimes counts constituted their only jurisdictional basis to justify their conviction,

10.8.4. Canada

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975. Under Section 6 (1) of the Canadian Crimes Against Humanity and War Crimes Act (2000),[3249] "[e]very person who, either before or after the coming into force of this section, commits outside Canada (*a*) genocide, (*b*) a crime against humanity, or (*c*) a war crime, is guilty of an indictable offence and may be prosecuted for that offence". This section thus confers universal jurisdiction on Canadian courts for core crimes against international humanitarian law. A section of the Criminal Code confers universal jurisdiction over torture offences.[3250] As a general matter, the exercise of universal jurisdiction is subjected to a presence requirement.[3251] However, in specific situations, Canadian courts may also exercise universal jurisdiction *in absentia*, when the perpetrator is employed by Canada in a civilian or military capacity, when he or she was a citizen of a state that was engaged in an armed conflict against Canada, or was employed in a civilian or military capacity by a State that was engaged in an armed conflict against Canada, or when the victim of the alleged offence was a citizen of a State that was allied with Canada in an armed conflict.[3252] Jurisdiction *in absentia* is also possible when either the perpetrator or the victim is a Canadian citizen.[3253]

976. Canada being a common law country, evidentiary constraints may complicate the trial of a perpetrator of a core crime against international law. This is evidenced by the case of *Regina* v. *Finta*. Finta was acquitted by the Court of Appeal for lack of proof, a decision which was upheld by the Supreme Court of Canada in 1994.[3254] Under the new Canadian legislation, only one person, Désiré Munyaneza, a Canadian permanent resident of Rwandan origin, has been charged (with participation in the Rwandan genocide of 1994). Thanks to the cooperation and support of the ICTR and the Rwandan government, the evidence may now possibly suffice to justify a conviction. The trial of Munyaneza will begin in March 2007 in Montreal.

10.9. Universal criminal jurisdiction: the role of the European Union

977. TERRORISM – At the European level, only a number of legal instruments dealing with terrorism explicitly endorsed the universality principle. In 1977, a European anti-terrorism convention was adopted in the framework of the Council of Europe,[3255] which featured a typical *aut dedere aut judicare* provision on the basis of which "[a] Contracting State in whose territory a person suspected to have committed [a terrorist] offence is found and which has received a request for extradition [from a

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since universal jurisdiction over genocide was only introduced in 2000 in the Criminal Code. *See* L. REYDAMS, International Decisions, *Niyoneze* v. *Public Prosecutor*, 96 *A.J.I.L.* 231, 235 (2002).

[3249] 2000, c. 24.

[3250] Section 7(3.7) of the Criminal Code *juncto* Section 269.1 (Torture) of that Code.

[3251] *Id.*, Section 8 (b) ("A person who is alleged to have committed an offence under section 6 or 7 may be prosecuted for that offence if … after the time the offence is alleged to have been committed, the person is present in Canada.").

[3252] *Id.*, Section 8 (a) (i), (ii) and (iv).

[3253] *Id.*, Section 8 (a) (i) and (iii).

[3254] *Regina* v. *Finta*, Supreme Court of Canada, 24 March 1994; I. COTLER, Casenote *In re* Finta, 90 *A.J.I.L.* 460 (1996).

[3255] European Convention on the Suppression of Terrorism, January 26, 1977, 1137 *UNTS* 93.

Contracting State whose jurisdiction is based on a rule of jurisdiction existing equally in the law of the requested State], shall, if it does not extradite that person, submit the case, without exception whatsoever and without undue delay, to its competent authorities for the purpose of prosecution."[3256] The 2002 Framework Decision of the Council of the European Union on Combating Terrorism[3257] provides likewise, stating that "[e]ach Member State shall take the necessary measures … to establish its jurisdiction over [terrorist] offences … in cases where it refuses to hand over or extradite a person suspected or convicted of such an offence to another Member State or to a third country".[3258] EU Member States are thus required to exercise (universal) jurisdiction over the perpetrator of a terrorist offence listed in the Framework Decision if they do not extradite him.

978. EUROPEAN ARREST WARRANT – The 2002 Framework Decision of the Council of the European Union on the European Arrest Warrant[3259] does not require Member States to adopt rules governing the exercise of extraterritorial jurisdiction. It only facilitates surrender procedures between Member States and respects the jurisdictional choices that its Member States have made, where it authorizes Member States to refuse a European arrest warrant if the offence has been committed outside the territory of the issuing Member State and the law of the executing Member State does not allow prosecution for the same offences when committed outside its territory.[3260] Refusal is not unlikely to arise in universal jurisdiction prosecutions, since on the one hand, universal jurisdiction precisely implies that the offence has been committed outside the territory of the forum State, and on the other hand, Member States may well not provide for universal jurisdiction.

979. CORE CRIMES AGAINST INTERNATIONAL LAW – Although the EU has not explicitly endorsed the exercise of universal jurisdiction over core crimes against international law, it has adopted two decisions on the prosecution of crimes against international humanitarian law which implicitly support universal jurisdiction (10.9.1). In future, the EU may want to upgrade the role Eurojust and Europol could play in assisting Member States to prosecute core crimes (10.9.2). It could also consider the adoption of a Framework Decision on the prosecution of core crimes that features progressive jurisdictional options (10.9.3).

The reader may have the impression that the exercise of universal jurisdiction over core crimes will be looked upon with an extremely favorable eye in this chapter. It will indeed be argued that the EU should spare no effort to ensure the effectiveness of European prosecutions of core crimes. While this study indeed supports universal jurisdiction, it nevertheless also advocates reasonableness in its exercise. What constitutes 'reasonableness' has already been touched upon in the country studies, yet an overall assessment will follow in 10.11.

[3256] *Id.*, Articles 6-7.
[3257] *O.J.* L 164/3 (2002).
[3258] *Id.*, Article 9.
[3259] *O.J.* L 190/1 (2002).
[3260] *Id.*, Article 4(7)(b).

10.9.1. The 2002 and 2003 Decisions by the EU Council of Ministers: the establishment of a European network of contact points

980. 2002 DECISION – On June 13, 2002, the Council of Ministers of the European Union decided to set up a European network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes.[3261] Such a network should enable specialized legal teams to benefit from the information held by other teams. As argued in 10.1, information gathered *in absentia* by one State might be particularly helpful for other States wishing to initiate proceedings.

The 2002 Council decision, which should have been implemented by 13 June 2003,[3262] recalls in particular that the ICC Statute affirms "that the most serious crimes of concern to the international community as a whole [...] must not go unpunished and that their effective prosecution must be ensured by taking measures at national level and by enhancing international cooperation."[3263] It emphasizes the complementary character of the ICC, which implies that "[t]he investigation and prosecution of [...] crimes against humanity and war crimes is to remain the responsibility of national authorities."[3264] The Council seems to construe the complementarity principle in such a way that *all* national courts have the primary responsibility to investigate and prosecute international crimes, including the courts of European bystander States exercising universal jurisdiction. In the preamble of the Decision, it is indeed stated that the EU Member States should have jurisdiction over persons who are involved in such crimes and are seeking refuge within the European Union's frontiers.[3265] In order to successfully investigate and prosecute, the Member States should, in the view of the EU, cooperate closely, in particular through the designation and notification of contact points for the exchange of information.[3266] These contact points shall provide on request any available information that may be relevant in the context of investigations into genocide, crimes against humanity and war crimes, or to facilitate cooperation with the competent national authorities.[3267] It appears obvious that any information-sharing could draw upon the resources of the

[3261] Council Decision of 13 June 2002 setting up a European network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes, *O.J.* L 167/1 (2002). The legal basis of the Council's decision was Title VI of the EU Treaty, and in particular Articles 30 and 34(2)(c) thereof. Article 30 provides for Council action in the field of police and Europol investigation, whereas Article 34(2)(c) sets out that the Council, acting unanimously on the initiative of any Member State or of the Commission, may adopt decisions for any purpose consistent with the objectives of police and judicial cooperation in criminal matters. Pursuant to Article 34(2)(c) EU Treaty, these decisions are binding, but shall not entail direct effect. The Council, acting by a qualified majority shall adopt measures necessary to implement these decisions at the level of the Union. The 2002 decision was, not surprisingly, taken on the initiative of the Netherlands. *See* Initiative of the Kingdom of the Netherlands with a view to the adoption of a Council Decision setting up a European network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes, *O.J.* C 295/7-8 (2001). The Dutch initiative mentions Articles 31 and 34(2)(c) EU Treaty as legal bases instead. Article 31 refers to common action on judicial cooperation in criminal matters.
[3262] *Id.*, Article 4 *jo.* 5.
[3263] Council Decision, Preamble, (2).
[3264] *Id.*, Preamble, (4)
[3265] *Id.*, Preamble, (7).
[3266] *Id.*, Article 1.
[3267] *Id.*, Article 2.

European Judicial Network,[3268] an existing pan-European network that ensures the proper execution of mutual legal assistance requests.[3269]

981. 2003 DECISION – On May 8, 2003, the Council adopted another decision on the investigation and prosecution of genocide, crimes against humanity and war crimes,[3270] this time on the initiative of Denmark.[3271] In its preamble, the Council restated the considerations of its previous decision and called on the EU Member States to ensure that full use is made of the contact points to facilitate cooperation between the competent national authorities.[3272]

The innovative feature of the 2003 Decision, which should have been implemented by May 8, 2005,[3273] concerns its specific immigration aspects. The Council summons the national law enforcement and immigration authorities to cooperate very closely in order to enable effective investigation and prosecution of crimes committed by persons who have applied for a residence permit.[3274] The Council increases the cooperation between law enforcement authorities of Member States in that it calls upon the Member States to take the necessary measures in order for the law enforcement authorities to be informed when facts are established which give rise to a suspicion that an applicant for a residence permit has committed international crimes which may lead to prosecution in a Member State or in international criminal courts.[3275] Under the decision, Member States should also assist one another in investigating and prosecuting these crimes, in particular through the exchange of information between immigration authorities.[3276]

The importance of the 2003 Decision should not be underestimated, since quite some prosecutions on the basis of the universality principle were initiated against refugees found in the territory of the bystander State. In addition, the link between the prosecution of core crimes and immigration has the advantage of tapping into an established field of EU competence and thus setting in motion Europol and Eurojust assistance. There are however no data available on the extent to which Member States effectively cooperate, through Eurojust, Europol or otherwise, in the prosecution of core crimes.

10.9.2. A role for Europol and Eurojust

[3268] *See* http://www.ejn-crimjust.eu.int/

[3269] Council Joint Action of 29 June 1998 on the creation of a European Judicial Network, *O.J.* L 191/4 (1998).

[3270] Council Decision of 8 May 2003 on the investigation and prosecution of genocide, crimes against humanity and war crimes, *O.J.* L 118/12 (2003). This decision was based on Articles 30, 31 and 34(2)(c) of the EU Treaty.

[3271] Initiative of the Kingdom of Denmark with a view to adopting a Council Decision on the investigation and prosecution of *inter alia* war crimes and crimes against humanity, *O.J.* C 223/19 (2002). Denmark was the first country to initiate criminal proceedings against Balkan war criminals on the basis of universal jurisdiction (Supreme Court (Hojesteret), *Saric*, Judgment, 15 August 1995, *Ugeskrift for Retsvaesen*, 1995, p. 838, reported in *Yb. Int'l. Human. L.* 43 (1998).

[3272] 2003 Council Decision, Preamble, (11). To that end, the contact points shall meet at regular intervals. *Id.*, Article 5.

[3273] *Id.*, Article 7.

[3274] *Id.*, Preamble, (7)-(8).

[3275] *Id.*, Article 2.

[3276] *Id.*, Article 3.

982. A glance at the 2004 annual reports of Eurojust and Europol reveals that cooperation in the investigation and prosecution of core crimes is not a priority in Europe.[3277] The reports do not even contain a passing reference to core crimes, nor do core crimes feature among Eurojust's objectives for 2005.[3278] Redress and FIDH, two human rights NGOs, attribute this to "[t]he perception that "international crimes" fall only in the domain of foreign policy, and not also within the sphere of judicial cooperation matters (third pillar)," and to the fact that "[t]he competence of certain cooperation mechanisms, such as Europol, has to date been narrowly construed."[3279] If one examines the founding instruments of Eurojust and Europol, it is clear that the prosecution of IHL crimes is not their core mandate, if it is, legally speaking, their mandate at all.

983. EUROPOL – Under Article 2(1) of the 1995 Europol Convention, the objective of Europol is "to improve, by means of the measures referred to in this Convention, the effectiveness and cooperation of the competent authorities in the Member States in preventing and combating terrorism, unlawful drug trafficking and other serious forms of international crime where there are factual indications that an organized criminal structure is involved and two or more Member States are affected by the forms of crime in question in such a way as to require a common approach by the Member States owing to the scale, significance and consequences of the offences concerned."[3280] Although core crimes could fall under the heading of serious crimes, they are unlikely to affect two or more Member States, thus complicating Europol's intervention in this field. Importantly, Europol is seriously hamstrung by the Convention's requirement that the EU Council instruct Europol to deal with specific forms of crime.[3281] The Council has so far not instructed Europol to deal with core crimes.

Europol's lame duck status stands in stark contrast to the expansive role that Interpol, Europol's international counterpart, assumes in the field of the investigation and prosecution of core crimes. Interpol has been supporting Member States and international criminal tribunals in the location and apprehension of perpetrators of core crimes since 1994, and has recently stepped up its efforts in view of the expansion of its Member States' investigations and prosecutions.[3282]

984. EUROJUST – European criminal law cooperation not only takes place through Europol, but also through Eurojust. Eurojust's mandate is somewhat broader than

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[3277] *See* http://www.eurojust.eu.int/pdfannual/ar2004/Annual_Report_2004_EN.pdf. http://www.europol.eu.int/index.asp?page=publar2004

[3278] The crimes for which Eurojust is instrumental in providing assistance are mainly, in this order, drug-trafficking, fraud, money-laundering, homicide, terrorism and armed robbery. *Report*, figure 6, p. 44. Europol mainly focuses on counter-terrorism, drug-trafficking, illegal immigration and trafficking in human beings, forgery of money, and financial and property crime,

[3279] http://www.redress.org/conferences/Backgroundpaper%20C2.pdf

[3280] Convention on the establishment of a European Police Office, July 26, 1995, *O.J.* C 316/2 (1995), adopted by Council Act of 26 July 1995 drawing up the Convention based on Article K.3 of the Treaty on European Union, on the establishment of a European Police Office (Europol Convention), O.J. C 316/1 (1995).

[3281] Article 2(2) of the Europol Convention.

[3282] *See* http://www.interpol.int/Public/CrimesAgainstHumanity/default.asp (listing relevant expert meetings, recommendations and resolutions since 2004).

Europol's.[3283] Not only does it cover the types of crime and the offences in respect of which Europol is at all times competent, as well as a number of specific types of crime, it also covers other offences committed together with the said types of crime of offences.[3284] In addition and most relevant for our purposes, Eurojust may "in accordance with its objectives, assist in investigations and prosecutions at the request of a competent authority of a Member State."[3285] Such assistance may cover core crimes, as the objectives of Eurojust are very broad and may cover almost all types of crimes.[3286] The fact that assistance in the field of core crimes is not explicitly conferred upon Eurojust may however serve as a disincentive for any Eurojust action.

985. ROLE OF THE EU INSTITUTIONS – As core crimes are currently not explicitly within the purview of Europol and Eurojust, the EU's main agencies in the field of criminal law cooperation, the EU institutions should take a more leading role in ensuring that core crimes are effectively prosecuted by the Member States with the assistance of Europol and Eurojust. The EU Treaty provides a legal basis for doing so.

At present, the objective of police and judicial cooperation in criminal matters shall, pursuant to Article 29 of the EU Treaty, be achieved by preventing and combating crime, organized or otherwise, in particular terrorism, trafficking in persons and offences against children, illicit drug trafficking and illicit arms trafficking, corruption and fraud. Similarly, Article III-271 of the Constitutional Treaty provides that the Union may define criminal offences and sanctions in ten areas of particularly serious crime with cross-border dimensions: terrorism, illicit drug trafficking, organized crime, trafficking in human beings and sexual exploitation of women and children, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment and computer crime.

Genocide, crimes against humanity and war crimes are not included in the Treaties. However, they are not excluded either: any crime might fall within the purview of Article 29 of the EU Treaty. The Council could thus legally promote cooperation with respect to the investigation and prosecution of core crimes through Europol[3287] and Eurojust[3288], as it has already done when requiring the Member States to set up a network of contact points. Yet it should not stop there. If an explicit inclusion of core crimes in the EU Treaty may prove elusive, the Council should at least specifically endorse Europol's and Eurojust's active responsibility in the field of core crimes cooperation.

986. JURISDICTIONAL GUIDELINES – Although Eurojust may not have specifically addressed core crimes, some of its more general guidelines may prove useful for prosecutions of core crimes. Notably its 2005 *Guidelines for Deciding Which Jurisdiction Should Prosecute* should be cited in this context.[3289] As more than one State usually has a stake or interest in the prosecution of core crimes, guidelines that

[3283] Council Decision of 28 February 2002, setting up Eurojust with a view to reinforcing the fight against serious crime, *O.J.* L 63/1 (2003).
[3284] *Id.*, Article 4(1).
[3285] *Id.*, Article 4(2).
[3286] *Id.*, Article 3(1).
[3287] Article 30 of the EU Treaty.
[3288] Article 31 of the EU Treaty.
[3289] *See* Eurojust College, *Guidelines for Deciding Which Jurisdiction Should Prosecute*, 23 March 2005, available at http://www.atlas.mj.pt/news-detail.aspx?anunID=65.

designate the better-placed jurisdiction could avoid normative competency conflicts. The Guidelines may be particularly instructive for States that are willing to exercise universal jurisdiction *in absentia, i.e.*, jurisdiction without any nexus to the crime.

The 2005 Guidelines "assist Eurojust when exercising its powers to ask one state to forgo prosecution in favor of another state which is better place to do so."[3290] Although the Guidelines are mainly concerned with crimes that occurred in or affected the territory of the Member States,[3291] and are thus firmly anchored in the territorial principle, their application to crimes committed outside the EU's territory subject to universal jurisdiction in an EU Member State, is not excluded. Factors to be considered when deciding in which Member State to bring a case include, *inter alia*, the location of the accused.[3292] This implies that the State on which territory the presumed offender of a core crime can be found is primarily entitled to exercise its jurisdiction. Also, if the competent authorities of one Member State are better capable of obtaining the extradition or surrender of the defendant than other Member States, they should enjoy primacy.[3293] Another factor is the willingness of witnesses to give evidence: if a key witness is only willing to travel to one Member State, that State should prevail, especially if it could adequately protect the witness.[3294]

The Guidelines counsel against choosing a jurisdiction where proceedings might be delayed.[3295] They support jurisdictions that take into account the interests of victims, including their possibility of claiming compensation, and that do not encounter substantial evidentiary problems. By contrast, Eurojust does not prefer the jurisdictions where the penalties are highest or where a more effective recovery of the proceeds of the crime may be expected.[3296] Importantly, Eurojust points out that "[c]ompetent authorities should not refuse to accept a case for prosecution in their jurisdiction because the case does not interest them or is not a priority for the senior prosecutors or the Ministries of Justice".[3297] In case of reluctance, Eurojust will exercise its powers to persuade the authority to act.[3298] It might be hoped that Eurojust will in future take a leading role in persuading Member States to take up core crimes that they are capable of prosecuting, taking into account the factors listed in the Guidelines.

987. The Guidelines are very helpful in assigning jurisdictional priority to Member States. However, in the very specific context of the prosecution of core crimes, an approximation of jurisdictional rules could be a more appropriate tool to ensure that these crimes do indeed not go unpunished because of lack of State interest in their prosecution.

10.9.3. An approximation of jurisdictional rules in the European Union

[3290] *Id.*, at p. 1.
[3291] *Id.*, at p. 3 ("[I]f possible, a prosecution should take place in the jurisdiction where the majority of the criminality occurred or where the majority of the loss was sustained.").
[3292] *Id.*
[3293] *Compare id.*
[3294] *Compare id.*, p. 4.
[3295] *Id.*
[3296] *Id.*
[3297] *Id.*, at 5.
[3298] *Id.*

988. The EU has taken cautious steps to better coordinate the prosecution of core crimes by its Member States. Another matter is whether the EU should assume a leading role, not only in the field of judicial and police cooperation, but also in the harmonization of the currently divergent jurisdictional regimes in the Member States.[3299] Although national legislation implementing the ICC Statute has approximated substantive core crimes law, procedural aspects of core crimes enforcement still widely differ among EU Member States. At present, only a handful of Member States seem to be genuinely willing to exercise universal jurisdiction over core crimes. In order to bring a halt to forum-shopping by victims of core crimes within the EU, a limited harmonization of the jurisdictional core crimes regime may be useful, if not necessary.[3300]

989. Critics may retort that core crimes do not have the typical aspects of cross-border crimes warranting EU harmonization in that their constitutive elements are mostly committed in only one State, which is usually not even an EU Member State. Framework Decisions that have approximated the laws of the Member States,[3301] such as the Framework Decision on combating terrorism[3302] and the Council Framework Decision on combating trafficking in human beings[3303], indeed dealt with crimes that are usually committed, at least partly, in the territory of the Member States. The Framework Decision on Combating Decision reflects this intra-EU approach. It provides for universal jurisdiction over terrorist offences, but only if the offences are committed in the territory of a Member State.[3304] The Framework Decision on combating trafficking in human beings does not even go that far: it only requires Member States to take the necessary measures to establish their jurisdiction over crimes committed, in whole or in part, *within their own territory*.[3305]

990. Both Framework Decisions however also provide for obligatory jurisdiction for a Member State if the offender is one of its nationals or residents.[3306] This implies that Member States may incur jurisdictional duties even if the offense is committed

[3299] On a meeting in July 2003, organized by Redress, an organization seeking reparation for torture survivors, and the International Federation of Human Rights (FIDH), experts advanced this idea. They proposed to draft a Framework Decision on international crimes, along the lines of the Council Framework Decision on combating terrorism and the Council Framework Decision on combating trafficking in human beings (http://www.redress.org/conferences/Backgroundpaper%20C2.pdf). It will be pointed out in the next paragraph that these framework decisions provide for no or very limited universal jurisdiction. They can however be inspirational in that they provide for some form of extraterritorial jurisdiction.

[3300] A look at history does not bode well for the international consolidation of national implementing legislation with respect to universal jurisdiction. States indeed never acted upon the model implementing legislation drafted by the International Congress of Penal Law and the International Committee of the Red Cross so far. *See* J. PICTET (ed.), *The Geneva Conventions of 12 August 1949, Commentary II*, at 264, n. 2.

[3301] The use of Framework Decision to approximate laws is authorized by Article 34 (2) (b) of the EU Treaty.

[3302] Council Framework Decision of 13 June 2002 on combating terrorism, *O.J.* L 164/3 (2002).

[3303] Council Framework Decision of 19 July 2002 on combating trafficking in human beings, *O.J.* L 203/1 (2002).

[3304] *See* Article 9(1)(a) of the Framework Decision on combating terrorism.

[3305] *See* Article 6(1)(a) of the Framework Decision on combating trafficking in human beings.

[3306] *See* Article 9(1)(c) of the Framework Decision on combating terrorism; Article 6(1)(b) of the Framework Decision on combating trafficking in human beings.

outside the EU.[3307] Along these lines, the Council may decide to approximate the jurisdictional regime governing core crimes. It may provide for obligatory jurisdiction on the basis of the active personality principle and for obligatory universal jurisdiction if the core crime is partly committed in EU territory.[3308] At the same time, a Framework Decision on core crimes could approximate some substantive law rules that are not yet harmonized by the implementation of the Rome Statute, such as the rules on penalties[3309].

991. Admittedly, the adoption of a framework decision on core crimes that goes beyond the jurisdictional boundaries of the previous framework decisions, decisions that moreover addressed crimes that were explicitly listed in the EU Treaty, and implicate narrowly defined State interests, seems a distant prospect. Nonetheless, it could be argued that core crimes are to be distinguished from terrorism and trafficking in human beings for jurisdictional purposes. Indeed, under international law, the latter crimes are not subject to universal jurisdiction,[3310] whereas genocide, crimes against humanity and war crimes presumably are. Without any doubt, it will require substantial courage of EU leaders to adopt a framework decision featuring a provision requiring States to exercise universal jurisdiction over core crimes (possibly on the basis of a classical *aut dedere aut judicare* provision). If they could muster that courage and match their support for the ICC with stringent rules on universal jurisdiction, they will send a powerful signal to the international community that impunity is not an option for the perpetrators of core crimes.

10.10. The United States and universal criminal jurisdiction

992. In the United States, universal criminal jurisdiction is a rare species. Only piracy, terrorist offences, torture are subject to universal jurisdiction. While there are U.S. statutes addressing war crimes and genocide, they do not feature a universal jurisdiction provision. So far, cases have only arisen under the antiterrorism statutes (subsection 10.10.1). U.S. reluctance to embrace universal jurisdiction is not necessarily or solely a product of lack of political will or indifference to human suffering abroad.[3311] Indeed, a number of structural features of the U.S. legal system greatly complicate the assumption of universal criminal jurisdiction by the U.S.

[3307] Terrorist offences committed outside the EU should also be prosecuted if the offence is committed on board a vessel flying its flag or an aircraft registered there (Article 9(1)(b) of the Framework Decision on combating terrorism) or if the offence is committed for the benefit of a legal person established in its territory (*Id.*, Article 9(1)(d)). Trafficking in human beings may also be prosecuted in the latter situation (Article 6(1)(c) of the Framework Decision on combating trafficking in human beings).

[3308] Hopefully, the possibility of such universal jurisdiction will remain largely hypothetical.

[3309] *See also* E. KONTOROVICH, "Implementing Sosa v. Alvarez-Machain: What Piracy Reveals About the Limits of the Alien Tort Statute", 80 *Notre Dame L. Rev.* 111, 142 (2004) ("Differences in punishment across nations result in forum shopping, weakened deterrence, and conflict between states that prescribe different penalties.").

[3310] Some forms of terrorism are subject to universal jurisdiction under a treaty-based *aut dedere aut judicare* provision. *See* subsection 10.1.4.

[3311] *See* however M.T. KAMMINGA, "Universal Civil Jurisdiction: Is It Legal? Is It Desirable?", *ASIL Proc.* 123 (2005) ("[M]ostly the United States openly and proudly deports perpetrators of human rights abuses committed abroad found on its territory without any attempt to obtain prior assurances that they will be prosecuted in those foreign states. Through this policy of exporting criminals rather than bringing them to justice on the basis of universal jurisdiction, the United States is in fact sponsoring their continued impunity.").

(subsection 10.10.2). If U.S. unwillingness to exercise universal jurisdiction may be explained by the inherent characteristics of its legal system rather than by active political opposition, the United States might possibly not take issue with the jurisdictional assertions by States with a legal tradition conducive to universal criminal jurisdiction. It could for instance be gleaned from a 2004 report by the American Bar Association that the United States may tolerate such assertions, as far as they remain within reasonable boundaries (in particular: as far as they do not harm U.S. interests) (subsection 10.10.3). Recently, under the Bush Administration, the U.S. political discourse has turned increasingly anti-universal jurisdiction, however, in spite of the prevalence of universal tort jurisdiction cases under the U.S. Alien Tort Statute. Arguments against universal jurisdiction have mingled with arguments against the International Criminal Court, which the United States is not a party to and has vowed to actively oppose (subsection 10.10.4). Independent prosecutors, sacrifice of political solutions and alternative justice systems contributing to long-term post-conflict peace on the altar of retributive justice, ostracism of local justice, and, most importantly, the risk of U.S. service-members and officials being indicted by foreign or international tribunals, have been among the chief U.S. concerns over the high tide of international criminal justice (section 10.11).

10.10.1. U.S. State practice

10.10.1.a. Piracy

993. Piracy, the oldest of international crimes, has been subject to U.S. universal jurisdiction since the very inception of the United States.[3312] Pursuant to Article 1, Section 8, Clause 10 of the U.S Constitution, Congress has the power "[t]o define and punish piracies and felonies committed on the high seas". Congress acted upon this grant of jurisdiction in 1819.[3313] In *U.S.* v. *Klintock* (1820), Chief Justice Marshall described pirates as "proper objects for the penal code of all nations". He added that "we think [the general words of the Act of Congress] ought to be applied to offences committed against all nations, including the United States, by persons who by common consent are equally amenable to the law of all nations."[3314]

[3312] Piracy should not be confused with privateering. Universal jurisdiction only obtains over the former. *See* M. MORRIS, summary of her contribution to an AEI panel, *Internationalizing Justice: The Rise of the International Criminal Court*, November 2003, available at http://www.aei.org/events/filter.foreign,eventID.661/summary.asp ("When piracy was conducted on a state-authorized basis, it was called privateering, and it was specifically excluded from criminalization and the realm of universal jurisdiction for the purpose of separating universal jurisdiction from state action.").

[3313] Act of Mar. 3, 1819, ch. 76, § 5 ("That if any person or persons whatsoever, shall, on the high seas, commit the crime of piracy, as defined by the law nations , and such offender or offenders shall afterwards be brought into, or found in, the United States, every such offender or offenders shall, upon conviction thereof, before the Circuit Court of the United States, for the District into which he or they may be brought, or in which he or they shall be found, be punished with death.").

[3314] *U.S.* v. *Klintock*, 18 U.S. (5 Wheat.) 144 (1820). *Compare U.S.* v. *Palmer*, 16 U.S. (3 Wheat.) 610, 632-33 (1818) ("[N]o general words of a statute ought to be construed to embrace them when committed by foreigners against a foreign government.") with *id.*, at 630 ("[T]here can be no doubt of the right of the legislature to enact laws punishing pirates, although they may be foreigners, and may have committed no paritcular offence against the United States."). *See also U.S.* v. *Brig Malek Adhel*, 43 *U.S.* 210, 232 (1844) ("A pirate is deemed, and properly deemed, hostis humani generis […] [b]ecause he commits hostilities upon the subjects and property of any or all nations without any regard to right or duty, or any pretence of public authority."). *Compare U.S.* v. *Furlong*, 18 U.S. (5 Wheat.) 184 (1820) ("If by calling murder piracy, [Congress] might assert a jurisdiction over that offence

994. Jurisdiction over piracy is now codified in 18 U.S.C. Sections 1651 and 1653:

> "Whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life." (Section 1651)

> "Whoever, being a citizen or subject of any foreign state, is found and taken on the sea making war upon the United States, or cruising against the vessels and property thereof, or of the citizens of the same, contrary to the provisions of any treaty existing between the United States and the state of which the offender is a citizen or subject, when by such treaty such acts are declared to be piracy, is a pirate, and shall be imprisoned for life." (Section 1653)

10.10.1.b. Core crimes against international law

995. It has been asserted that the United States endorsed universal jurisdiction over crimes against international humanitarian law as early as 1945, because at Nuremberg, the International Military Tribunal held that the Signatory Powers who created the Tribunal "have done together what any of them might have done singly."[3315] The International Military Tribunal of Tokyo however, referred to the Signatory Powers as "the members of the Tribunal, being otherwise wholly without power in respect to the trial of the Accused".[3316] The contradictory nature of these two

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committed by a foreigner in a foreign vessel, what offence might not be brought within their power by the same device? The most offensive interference with the governments of other nations might be defended on the precedent."). *See* generally G.E. WHITE, "The Marshall Court and International Law: The Piracy Cases", 83 *A.J.I.L.* 727 (1989).

[3315] Trial of the Major War Criminals before the International Military Tribunal sitting at Nuremberg (Germany), judgment of 1 October 1946, section 'The Law of the Charter'. *See* for supportive voices *e.g.* the Court of Appeals for the Sixth Circuit: *Demjanjuk* v. *Petrovksy*, 776 F.2d 571, 583 (6th Cir. 1985), J. VAN DER VYVER, "Prosecution and Punishment of the Crime of Genocide", 23 *Fordham Int. L. J.* 286, 323 (1999); J. VAN DER VYVER, "National Experiences with International Criminal Justice", offprint, at 5. *See also United States* v. *Wilhelm List and others*, 11 *Trials of the War Crimes Before the Nuremburg Military Tribunals*, October 1946 - April 1949, 757, 1241, Washington D.C.: Gov. Printing Office (1950) (*'Hostage case'*), quoted in J.D. VAN DER VYVER, "National Experiences with International Criminal Justice", offprint, at 15: "An international crimes is […] an act universally recognized as criminal, which is considered a grave matter of international concern and for some valid reason cannot be left within the exclusive jurisdiction of the State that would have control over it under ordinary circumstances."; The Hadamar Trial (Alfons Klein and others), 1 *L. Rep. Trials War Crimes* 46, 53 (U.S. Mil. Comm., Wiesbaden 1945), quoted in J.D. VAN DER VYVER, "National Experiences with International Criminal Justice", offprint, at 16: "[…] "universality of jurisdiction over war crimes", [...] according to which every independent State has, under International Law, jurisdiction to punish not only pirates but also war criminals in its custody, regardless of the nationality of victim or of the place where the offence was committed, particularly where, for some reason, the criminal would otherwise go unpunished."; Trial of Lothar Eisenträger and others, 14 *L. Rep. Trials War Crimes* 8, 15 (U.S. Mil. Comm., Shanghai 1947), quoted in J.D. VAN DER VYVER, "National Experiences with International Criminal Justice", *offprint,* at 16: "A war crime […] is not a crime against the law or criminal code of any nation, but a crime against the *jus gentium*. The laws and usages of war are of universal application, and do not depend for their existence upon national laws and frontiers. Arguments to the effect that only a sovereign of the *locus criminis* has jurisdiction and that only the *lex loci* can be applied, are therefore without foundation."

[3316] International Military Tribunal for the Far East, Tokyo (Japan), judgment of 12 November 1948, section 'Jurisdiction of the Tribunal'. *See* L. REYDAMS, *Universal Jurisdiction*, Oxford, Oxford University Press, 2003, 69. It may be said that this dictum truly reflects the position of the United

statements, in combination with the absence of an express U.S. position on the issue, clearly weakens the case for a historical reconstruction of U.S. support for universal jurisdiction.[3317] It will be demonstrated in this subsection that, currently, there is no statutory authorization for U.S. courts to exercise universal jurisdiction over crimes against international humanitarian law such as genocide, war crimes and crimes against humanity.

996. GENOCIDE – The drafting history of the Genocide Convention, signed in 1948, only shortly after the Nuremberg Trials took place, is a clear illustration of U.S. opposition against universal jurisdiction over crimes against humanitarian law. The original draft of the Genocide Convention contained a clause on universal jurisdiction in its Article VII, which authorized the exercise of universal jurisdiction absent the consent of the territorial State. That this clause ultimately came to nothing is largely due to the opposition of the United States throughout the drafting process in the Ad Hoc Committee preparing the Genocide Convention. The U.S. feared that, as crimes of genocide are mostly committed by, or at least with the involvement of, State actors, universal jurisdiction could make the State, through its actors, accountable for political crimes in foreign courts. Foreign governments would then be authorized to pass judgment on the sovereign acts of a State, which arguably runs counter to the principle of State sovereignty.[3318] The U.S. feared in particular that its practices of racial segregation and the persecution of political opponents could be qualified as genocide in foreign courts.[3319] Given the active U.S. opposition against universal jurisdiction during the drafting process, it came not as a surprise that, at the Genocide Convention conference, the U.S. delegate eviscerated the principle of universal jurisdiction, calling it "one of the most dangerous and unacceptable of principles", which the U.S. would "vigorously oppose".[3320] After the U.S. was joined in its opposition by France and the United Kingdom, the other Western representatives in the Security Council, the delegates eventually rejected the universal jurisdiction clause. REYDAMS has pointed out that excluding State immunity for crimes of

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States, since Japan, unlike Germany, was under exclusive U.S. control. The establishment of the Tokyo Tribunal was premised on belligerent jurisdiction or the consent of Japan. *See* D. MCGOLDRICK, "Criminal Trials Before International Tribunals: Legality and Legitimacy", in D. MCGOLDRICK, P. ROWE & E. DONNELLY (eds.), *The Permanent International Criminal Court. Legal and Policy Issues*, Oxford/Portland, Oregon, Hart, 2004, 21.

[3317] Authors rejecting the post-Second World War trials as instances of universal jurisdiction include BASSIOUNI, MORRIS and KAMMINGA. BASSIOUNI justifies the jurisdiction of the post-World War II tribunals on the basis of territoriality and passive personality. *See* M.C. BASSIOUNI, "The History of Universal Jurisdiction and Its Place in International Law", in S. MACEDO (ed.), *Universal Jurisdiction. National Courts and the Prosecution of Serious Crimes under International Law*, Philadelphia, University of Pennsylvania Press, 2004, at 52. *See also* M. MORRIS, "High Crimes and Misconceptions: the ICC and Non-Party States", in 64 *L. & Contemp. Probs.* 13, 37-42 (2001); M. KAMMINGA, "Lessons Learned from the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offenses", 23 *Human Rights Quarterly* 940, 942 (2001); D. MCGOLDRICK, "Criminal Trials Before International Tribunals: Legality and Legitimacy", in D. MCGOLDRICK, P. ROWE & E. DONNELLY (eds.), *The Permanent International Criminal Court. Legal and Policy Issues*, Oxford/Portland, Oregon, Hart, 2004, 15 (arguing that the international legal authority of the Allies to set up the Tribunal could be derived from both the territorial and universality principle).

[3318] *See* L. REYDAMS, *Universal Jurisdiction*, Oxford, Oxford University Press, 2003, at 48-49.

[3319] *See* R. VAN ELST, "Universele rechtsmacht over foltering: Bouterse en de Decembermoorden", 27 *NJCM-Bulletin* 208, 218 (2002).

[3320] Official Records of the General Assembly, Third Session, Sixth Committee, Part I, 97th, 98th, and 100th Meetings, at 399, quoted in L. REYDAMS, *Universal Jurisdiction*, Oxford, Oxford University Press, 2003, at 51, footnote 37.

genocide *and* providing for universal jurisdiction in one and the same instrument probably went too far for the Great Powers.[3321]

Even though the Genocide Convention did, at the behest of the United States, not require, let alone authorize, States to exercise universal jurisdiction, the United States only ratified the Genocide Convention in 1986.[3322] It adopted a Genocide Convention Implementation Act (the Proxmire Act) in 1988.[3323] Like the Genocide Convention itself, the Proxmire Act does not provide for universal jurisdiction: it only applies when the offense is committed within the United States (territoriality principle) or if the alleged offender is a national of the United States (active personality principle).[3324] The U.S. State Department justified the absence of a provision on universal jurisdiction in the Proxmire Act during the hearings on the War Crimes Act in 1996 on the ground that "United States law [the Proxmire Act] currently provides authority even beyond that required by the U.N. Convention on the Prevention and Punishment of the Crime of Genocide"[3325], and that "[a]lthough expansion of jurisdiction over genocide committed outside the United States by non-U.S. nationals warrants further serious consideration, in view of the short legislative calendar remaining in this Congress, the Department of State would not propose such expansion at this time."[3326] While Congress's legislative calendar remains as short as it was in 1996, the State Department's statement may hold same hopes for the future, because it seemed to concede that the Genocide Convention does not prohibit the exercise of universal jurisdiction, and that, by implication, universal jurisdiction over genocide is allowed under customary international law. In 1996, its introduction into U.S. law was just not a priority.

997. Further tacit U.S. support for the exercise of universal jurisdiction over genocide may be found in UN Security Council Resolution 978 (1995). In Resolution 978, the Security Council urged States "to arrest and detain, in accordance with their

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[3321] *See* L. REYDAMS, *Universal Jurisdiction*, Oxford, Oxford University Press, 2003, at 53.
[3322] 132/15 *Cong. Rec.* S1377-78 (daily ed. Feb. 19, 1986).
[3323] Genocide Convention Implementation Act, 102 Stat. 3045 (1988), 18 U.S.C. Sections 1091-1093.
[3324] 18 U.S.C.A. Section 1091 (d). *See* on the restrictive jurisdictional view of the Genocide Convention Implementation Act: M. LIPPMAN, "The Convention on the Prevention and Punishment of the Crime of Genocide: Fifty Years Later", 15 *Ariz. J. Int. & Comp. L.* 415 (1998); J.J. PAUST, "Congress and Genocide: They're Not Going to Get Away with It", 11 *Mich. J. Int. L.* 90 (1989-1990); L.A. STEVEN, "Genocide and the Duty to Extradite or Prosecute: Why the United States is in Breach of Its International Obligations", 39 *Va. J. Int. L.* 425 (1999).
[3325] War Crimes Act of 1995; Hearings on H.R. 2587 Before the Subcomm. On Immigration and Claims of the Comm. On the Judiciary, 154th Cong., 2d Sess., at 46 (letter dated July 15, 1996 from Barbara Larkin, Acting Assistant Secretary of State, Legislative Affairs). The State Department is certainly correct in its assessment that the Genocide Convention does not require the U.S. to provide for universal jurisdiction over genocide. The Genocide Convention does moreover not require the exercise of passive personality jurisdiction either, nor does the U.S. Genocide Convention Implementation Act. This implies that crimes of genocide committed by foreigners against U.S. nationals cannot be tried in the United States. To be true, such cases may be rare. CASSEL referred to the case of two U.S. citizens who where killed in a nature reserve in Uganda. Under U.S. law, even if the perpetrators were caught in New York, U.S. courts would have no jurisdiction to prosecute them for crimes of genocide, unless their acts qualify as torture. These perpetrators could possibly be tried under the protective principle. *See* D. CASSEL, "Empowering U.S. Courts to Hear Crimes Within the Jurisdiction of the International Criminal Court", 35 *New Eng. L. Rev.*, 421, 435 (2001).
[3326] War Crimes Act of 1995; Hearings on H.R. 2587 Before the Subcomm. On Immigration and Claims of the Comm. On the Judiciary, 154th Cong., 2d Sess., at 47 (letter dated July 15, 1996 from Barbara Larkin, Acting Assistant Secretary of State, Legislative Affairs).

national law and relevant standards of international law, pending prosecution by the International Tribunal for Rwanda *or by the appropriate national authorities*, persons found within their territory against whom there is sufficient evidence that they were responsible for acts within the jurisdiction of the International Tribunal for Rwanda".[3327] Resolution 978 drew on a report of the UN Special Rapporteur for Rwanda, which emphasized prosecution of *génocidaires* by the appropriate national authorities of *third States*.[3328]

Support for universal jurisdiction over the 1994 Rwandan genocide by the Security Council may probably be explained by the special circumstances of the case: rampant genocidal violence that left in no time 800.000 people dead, with the Western world inexplicably looking the other way.[3329] It would surely be too hasty a conclusion that the U.S. would under all circumstances support universal jurisdiction over genocide. On the contrary, it may be submitted that the U.S. may support the exercise of universal jurisdiction only if the Security Council gives authorization to UN Member States.

998. WAR CRIMES – The drafting history of the Geneva Conventions (signed in 1948), which address breaches of the laws of war, does, unlike the history of the Genocide Convention, not present a vivid account of U.S. opposition against universal jurisdiction. The U.S. signed the Geneva Conventions and became party on February 2, 1956. An explanation for the lack of opposition could be that the Geneva Conventions do simply not provide for universal jurisdiction, so that there was nothing to oppose. Although the jurisdictional provisions of the Conventions[3330] leave indeed much to be desired in terms of explicit support for universal jurisdiction, the drafting history and subsequent State practice nevertheless reveal that the States Parties intended to vest national courts with the authority to judge war crimes committed abroad.[3331] The better explanation is that the Conventions authorize and

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[3327] Security Council Resolution 978 (1995), para. 1 (emphasis added).

[3328] Report on the situation of human rights in Rwanda submitted by Mr. R. Degni-Ségui, Special Rapporteur of the Commission on Human Rights, under paragraph 20 of Commission Resolution E/CN.4/S-3/1 of 25 May 1994; UN Doc. E/CN.4/1995/7, 28 June 1995, para. 70.

[3329] Even the often conservative (at least in international law matters) American newspaper *The Wall Street Journal* supported the Butare Four judgment of a Belgian Cour d'Assises (2001). Cited in S. MACEDO, "Introduction", in S. MACEDO (ed.), *Universal Jurisdiction*, Philadelphia, University of Pennsylvania Press, 2004, at 2. In Resolution 1264 (1999) concerning the situation in East Timor, by contrast, the Security Council demanded "that those responsible for [acts of violence in East Timor] be brought to justice", without specifying which courts were supposed to dispense justice. The scale of violence in East Timor compared to that in Rwanda did apparently not warrant an explicit authorization for national courts to exercise universal jurisdiction. This double standard was implicitly denounced by a Report to the Security Council by the UN Secretary-General, submitted in 1999, in which he recommended that the Security Council "[u]rge Member States to adopt national legislation for the prosecution of individuals responsible for genocide, crimes against humanity and war crimes. Member States should initiate prosecution of persons under their authority or on their territory for grave breaches of international humanitarian law on the basis of the principle of universal jurisdiction and report thereon to the Security Council." Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflicts, U.N. Doc. S/1999/957, 8 September 1999.

[3330] Article 49 GC I, Article 50 GC II, Article 129 GC III and Article 146 GC IV.

[3331] *See* L. REYDAMS, *Universal Jurisdiction*, Oxford, Oxford University Press, 2003, at 54-55. *See also* R. WEDGWOOD, summary of her contribution to an AEI panel, *Internationalizing Justice: The Rise of the International Criminal Court*, November 2003, available at http://www.aei.org/events/filter.foreign,eventID.661/summary.asp ("The 1949 Geneva Conventions do

even oblige States to exercise universal jurisdiction. The United States may possibly not have opposed the jurisdictional provisions providing for universal jurisdiction, because the great number of substantive provisions diverted the attention from the jurisdictional provisions.[3332] Also, as VAN ELST pointed out, U.S. practices of racial segregation and political persecution at the time, which could – at least in the U.S. view – be qualified as genocide, could never be qualified as war crimes, so that opposition to universal jurisdiction over grave breaches of the Geneva Conventions was not deemed necessary.[3333] Ironically, as of today, it is precisely the possibility of foreign and international courts passing judgment on the military acts of the United States abroad that has informed fierce U.S. opposition against the exercise of universal jurisdiction and against the jurisdiction of the International Criminal Court.

999. It took the United States forty years to implement the Geneva Conventions through the adoption of the War Crimes Act (WCA) in 1996.[3334] The U.S. believed, until 1996, that war crimes could be prosecuted under existing domestic law.[3335] Yet as "over the years, U.S. courts have handed down a series of decisions which cast doubt on the constitutionality of the exercise by military tribunals of criminal jurisdiction over the acts abroad of various categories of persons who are not in active military service,"[3336] the enactment of a specific war crimes statute in 1996 was deemed wise.

The WCA, which was amended in 1997,[3337] fails, however, to provide for universal jurisdiction, and limits itself to territorial and nationality-based jurisdiction.[3338] Most witnesses at the hearings appearing before the House Judiciary's Subcommittee on

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have a provision for consent-based universal jurisdiction. This is unlike the attempts of the Belgian courts to use customary law […].").

[3332] *Id.*, at 56.

[3333] *See* R. VAN ELST, "Universele rechtsmacht over foltering: Bouterse en de Decembermoorden", 27 *NJCM-Bulletin* 2002, 208, 218.

[3334] Pub. L. No. 104-192 (codified at 18 U.S.C. §§ 2401, 2441 (1996)). The WCA legislative process was initiated by a proposal from an American prisoner of war during the Vietnam conflict. *See* War Crimes Act of 1995; Hearings on H.R. 2587 Before the Subcomm. On Immigration and Claims of the Comm. On the Judiciary, 154th Cong., 2d Sess. 7-8 (1996) (Statement of Captain Michael P. Cronin).

[3335] *See* War Crimes Act of 1995; Hearings on H.R. 2587 Before the Subcomm. On Immigration and Claims of the Comm. On the Judiciary, 154th Cong., 2d Sess., at 11-12 ("[T]he Executive Branch advised that implementing legislation was not required, since offenders could be prosecuted under federal and state penal statutes (in the case of crimes within United States jurisdiction) or the Uniform Code of Military Justice (with respect to crimes committed abroad).)"

[3336] *Id.*

[3337] Its jurisdictional scope remained unmodified. *See* H.R. 1348, 105th Cong. (1997) ("Expanded War Crimes Act of 1997"). Whilst original 18 U.S.C. Section 2441 limited war crimes to grave breaches of the Geneva Conventions, the amended Section 2441 also considers as war crimes the violation of some provisions of Hague Convention IV, crimes committed in non-international armed conflicts, and violations of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices. *See* new Section 2441 (c) (2)-(4).

[3338] Not all war crimes are listed in the WCA, because the United States has not yet ratified Additional Protocols I and II to the Geneva Conventions (although the WCA anticipates their ratification). This has jurisdictional consequences. If U.S. citizens commit war crimes that are not listed in the WCA on the territory of a State party to the ICC Statute, U.S. courts may not have the authority to establish jurisdiction over such crimes. They may not have domestic authority to pre-empt ICC jurisdiction. CASSEL has pointed out however that Under the Uniform Code of Military Justice, however, military jurisdiction possibly extends to all war crimes ("the laws of war"). *See* D. CASSEL, "Empowering U.S. Courts to Hear Crimes Within the Jurisdiction of the International Criminal Court", 35 *New England L. Rev.*, 421, 437 (2001).

Immigration and Claims had nonetheless favored the kind of universal jurisdiction originally contemplated by the Geneva Conventions.[3339] The final conclusions of the Subcommittee explain why, eventually, universal jurisdiction was not chosen:

> "The Committee decided that the expansion of H.R. 3680 to include universal jurisdiction would be unwise at present. Domestic prosecution based on universal jurisdiction could draw the United States into conflicts in which this country has no place and where our national interests are slight. In addition, problems involving witnesses and evidence would likely be daunting. This does not mean that war criminals should go unpunished. There are ample alternative venues available which are more appropriate. Prosecutions can be handled by the nations involved or by international tribunal. If a war criminal is discovered in the United States, the federal government can extradite the individual upon request in order to facilitate prosecution overseas. The Committee is not presently aware that these alternative venues are inadequate to meet the task."[3340]

The WCA has been termed a "feel good" law by its detractors, as it would be unlikely that war crimes will ever occur in the U.S. (which is true) or that many Americans will commit war crimes (which is more doubtful).[3341] The WCA would enable war criminals to live free in the U.S., unless the U.S. decides to seek extradition or deportation.[3342]

1000. There may, however, be some leeway for limited universal jurisdiction over war crimes in the United States, although case-law is still lacking. Under the WCA, U.S. civil courts have jurisdiction over war crimes committed abroad if the person committing a war crime or the victim of such war crime is a member of the Armed Forces of the United States, even if it is not a national of the United States.[3343] U.S. civil courts also have jurisdiction over whomever engages in conduct outside the United States that would constitute an offence punishable by imprisonment for more than 1 year if the conduct had been engaged in within the special maritime and territorial jurisdiction of the United States, while being employed by[3344] or

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[3339] *See* Hearings, n 3334, at 7-8. Professor RUBIN, however, opposed universal jurisdiction and called the relevant provisions in the Geneva Conventions "notoriously badly drafted." *Id.*, at 56-60.

[3340] Hearings, n 3334, at 8 (footnotes omitted). The cost of prosecution may be added as a reason for not providing for universal jurisdiction; *See* M.S. ZAID, "Should the U.S. Ever Prosecute War Criminals?: a Need for Greater Expansion in the Areas of Both Criminal and Civil Liability", 35 *New Eng. L. Rev.* 447, 453 (2001). Construing the restrictive WCA to clarify the jurisdictional scope of the Geneva Conventions seems however unwarranted. A single State cannot in itself determine the interpretation of a treaty (consent of the States Parties is required under Article 31 (3) (a) and (b) VCLT). Besides, VAN ELST has pointed out that "no country is known to have rejected the obligation to establish universal jurisdiction by arguing that the Conventions do not require it." *See* R. VAN ELST, "Implementing Universal Jurisdiction over Grave Breaches of the Geneva Conventions", 13 *Leiden J. Int. L.* 815, 830 (2000).

[3341] *See* M.S. ZAID, "Should the U.S. Ever Prosecute War Criminals?: a Need for Greater Expansion in the Areas of Both Criminal and Civil Liability", 35 *New Eng. L. Rev.* 447, 453 (2001).

[3342] *Id.*, at 448.

[3343] 18 U.S.C. § 2441(b).

[3344] 'Employed by the Armed Forces' means: (A) employed as a civilian employee of the Department of Defense (including a nonappropriated fund instrumentality of the Department), as a Department of Defense contractor (including a subcontractor at any tier), or as an employee of a Department of Defense contractor (including a subcontractor at any tier); (B) present or residing outside the United

accompanying the Armed Forces[3345] outside the United States or while being a (former) member of the Armed Forces.[3346] These persons are not necessarily U.S. nationals.[3347] U.S. civil courts may thus have some sort of universal jurisdiction over these persons, although a strong nexus with the U.S. is still present.[3348]

1001. Moreover, under the Uniform Code of Military Justice, general courts-martial have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war.[3349] Case-law has elaborated on this grant of jurisdiction so as to subject certain persons who are not members of the Armed Forces (civilians, enemy combatants) to courts-martial.[3350] Jurisdiction over these persons always had a nexus with the U.S., so that none of the cases established pure universal jurisdiction: all cases involved crimes committed by either (U.S.) civilians[3351] or by enemy combatants[3352] against U.S. servicemembers. CASSEL has however submitted that U.S. law may permit military courts to try all war crimes, wherever committed and by whomever, including civilians, to the full extent permitted by international law, on the basis of the general wording of the Uniform Code of Military Justice.[3353]

States in connection with such employment; and (C) not a national of or ordinarily resident in the host nation. 18 U.S.C. § 3267 (1).

[3345] 'Accompanying the Armed Forces' means: (A) a dependent of (i) a member of the Armed Forces; (ii) a civilian employee of the Department of Defense, or; (iii) a Department of Defense Contractor (including a subcontractor at any tier), or as an employee of a Department of Defense contractor (including a subcontractor at any tier); (B) residing with such member, civilian employee, contractor, or contractor employee outside the United States; (C) not a national of or ordinarily resident in the host nation. 18 U.S.C. § 3267 (2).

[3346] 18 U.S.C. § 3261(a) and (d).

[3347] As O'KEEFE notes, such an assertion of extraterritorial jurisdiction has not produced foreign reactions. *See* R. O'KEEFE, "Universal Jurisdiction: Clarifying the Basic Concept", 2 *J.I.C.J.* 735, 739 (2004).

[3348] It may be noted that military courts may have concurrent jurisdiction over the matter. 18 U.S.C. § 3261(c).

[3349] 10 U.S.C. § 818.

[3350] *See* D. CASSEL, "Empowering U.S. Courts to Hear Crimes Within the Jurisdiction of the International Criminal Court", 35 *New Eng. L. Rev.*, 421, 430-31 (2001). In *Yamashita* v. *Styer*, the Supreme Court held that a former Japanese commander in the Philippines during the Second World War could be tried by a U.S. military commission. *Yamashita* v. *Styer*, 327 U.S. 1 (1946).

[3351] In *Reid* v. *Covert*, the Supreme Court ruled that "[f]rom a time prior to the adoption of the Constitution the extraordinary circumstances present in an area of actual fighting have been considered sufficient to permit punishment of some civilians in that area by military courts under military rules." *Reid* v. *Covert*, 354 U.S. 1, 33 (1957). The case involved Mrs. Covert who killed her husband, a sergeant in the United States Air Force, at an airbase in England. Mrs. Covert, who was not a member of the armed services, was residing on the base with her husband at the time. She was tried by a court-martial for murder under Article 118 of the Uniform Code of Military Justice (UCMJ). In *Madsen* v. *Kinsella*, the Supreme Court held that Ms. Madsen, the wife of a member of the U.S. armed forces who murdered her husband, could be tried by a military occupation court in Germany. *Madsen* v. *Kinsella*, 343 U.S. 341 (1952).

[3352] In *Ex parte Quirin*, the Supreme Court decided that a U.S. military commission could try civilian German military spies in wartime. *See Ex parte Quirin*, 317 U.S. 1 (1942). In *Yamashita* v. *Styer*, the Supreme Court held that a former Japanese commander in the Philippines during the Second World War could be tried by a U.S. military commission. *Yamashita* v. *Styer*, 327 U.S. 1 (1946).

[3353] *See* D. CASSEL, "Empowering U.S. Courts to Hear Crimes Within the Jurisdiction of the International Criminal Court", 35 *New England L. Rev.*, 421, 431 n 49 (2001). In order to close the gap of U.S. war crimes enforcement, CASSEL also proposed to grant civilian federal courts universal jurisdiction over war crimes, because of their stronger assurances of independence and impartiality. *Id.*, at 442. *Compare* M. KAMMINGA, "Lessons Learned From the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences", 23 *Hum. Rts. Q.* 940, 966 (2000). The American

1002. CRIMES AGAINST HUMANITY – There is no legal basis in U.S. law to establish universal jurisdiction over crimes against humanity.[3354] As will be shown in 10.3.2, a direct appeal to international law (mediated by the U.S. Constitution) authorizing such jurisdiction fails to receive majority support. The specific nature of customary international law, which as an unwritten source of international law may lack the clarity and legal certainty of treaty law, might *a fortiori* counsel against too ready an exercise of universal jurisdiction over crimes against humanity under U.S. law.[3355] Also outside the United States, courts and prosecutors have not relied upon customary international law to justify universal jurisdiction over crimes against humanity. The only exception is Belgian investigating judge Vandermeersch's preliminary decision in the *Pinochet* case (1998).[3356]

1003. In a remarkable case, a U.S. court granted extradition of a person accused of crimes against humanity to a State intending to exercise universal jurisdiction over him, at the same time pointing out that it could as well have exercised its own jurisdiction to try the perpetrator. This may add to the recognition that the United States bestows on the universality principle in the context of the prosecution of crimes against international humanitarian law. In *Demjanjuk* v. *Petrovsky* (1985),[3357] the Sixth Circuit decided in favor of the extradition to Israel of John Demjanjuk, a former Nazi official accused of war crimes and crimes against humanity committed in the Treblinka concentration camp in Poland during the Second World War. Israel had requested his extradition, basing its jurisdictional claim on similar grounds as in its case against Adolf Eichmann.[3358] The Sixth Circuit rejected Demjanjuk's defense that he was not a citizen or resident of Israel, that he did not commit crimes in Israel, and that the State of Israel did not exist at the time of his offenses, pointing out that the crimes alleged were offenses against the law of nations over which all nations had jurisdiction: "The 'universality principle' is based on the assumption that some crimes are so universally condemned that the perpetrators are the enemies of all people.

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perpetrators of the ignominious crimes in the Iraqi Abu Ghraib prison (2003-2004) were however severely punished by a military court in Texas on January 15, 2004. The main accused, U.S. reservist Charles Graner, received a prison sentence of 10 years.

[3354] The incrimination of crimes against humanity does not even feature in the U.S. criminal code. U.S. perpetrators of crimes against humanity could thus in principle not be prosecuted in the United States. The general criminal law (murder, aggravated assault) or other international criminal law (torture, terrorism) may nonetheless apply here – although the elements of common or other international crimes may obviously differ. *See* D. CASSEL, "Empowering U.S. Courts to Hear Crimes Within the Jurisdiction of the International Criminal Court", 35 *New Eng. L. Rev.*, 421, 437 (2001). As the elements of the crime might differ, a U.S. case for mass murder differs from an ICC case for crimes against humanity. It is not impossible that the ICC decides, on that basis, that the U.S. is not adequately prosecuting the case, and establishes its complementary jurisdiction under Article 17 of the ICC Statute.

[3355] *See e.g.* H.M. OSOFSKY, "Domesticating International Criminal Law: Bringing Human Rights Violators to Justice", 107 *Yale Law Journal* 191, 214-15 (1997).

[3356] Investigating Magistrate Brussels, *Pinochet*, November 6, 1998, *Rev. Dr. Pén.* 1999, 278; reprinted in J. WOUTERS, *Bronnenboek Internationaal Recht*, Antwerp, Intersentia, 2000, 131.

[3357] *Demjanjuk* v. *Petrovksy*, 776 F.2d 571 (6th Cir. 1985), cert. denied, 475 U.S. 1016, 89 L. Ed. 2d 312, 106 S. Ct. 1198 (1986), reprinted in 79 *ILR* 538.

[3358] *The Attorney General of the Government of Israel* v. *Adolf Eichmann*, District Court of Jerusalem (1961), *reprinted in* 36 *ILR* 18. *See* on the *Eichmann* case: G.J. BASS, "The Adolf Eichmann Case: Universal and National Jurisdiction", in S. MACEDO (ed.), *Universal Jurisdiction. National Courts and the Prosecution of Serious Crimes under International Law*, Philadelphia, University of Pennsylvania Press, 2004, 77-90.

Therefore, any nation which has custody of the perpetrators may punish them according to its law applicable to such offenses."[3359] The United States did *in casu* not punish Demjanjuk, but left this to another State, Israel, under the principle of *aut dedere aut judicare*. Demjanjuk was eventually acquitted by the Supreme Court of Israel on July 29, 1993.[3360] In granting extradition of Demjanjuk to Israel, the U.S. Court of Appeals recognized universal jurisdiction, even *in absentia*,[3361] but it did not exercise it because it believed that Israel had a stronger nexus with the claim, and arguably also because it lacked domestic authorization to do so.[3362] It may as well be assumed that *Demjanjuk* constituted an exceptional case which echoed the Allied Powers' victors' justice meted out at the Nuremberg trials.

1004. INTERNATIONAL CRIMINAL COURT – One of the most recent U.S. indictments of universal jurisdiction took place druing the drafting process of the Statute of the International Criminal Court (ICC). Faithful to its stance during the drafting process of the Genocide Convention, the U.S. unambiguously rejected an ICC functioning on the basis of the principle of universal jurisdiction,: "We must object very strongly and in principle to this option, because the language effectively incorporates universal jurisdiction for the crime of genocide […] We are sympathetic to the goal of ensuring prosecution for genocide, but we cannot support this way of achieving it. This option reaches beyond the treaty parties to subject non-parties to the Court's jurisdiction."[3363] The U.S. delegation also undertook to "actively oppose [the ICC] if the principle of universal jurisdiction or some variant of it were embodied in the jurisdiction of the court. As theoretically attractive as the principle of universal jurisdiction may be for the cause of international justice, it is not a principle accepted in the practice of most governments of the world […]".[3364] The principle of universal jurisdiction was ultimately not inserted in the ICC Statute – which however failed to prevent the United States from actively opposing the Court.

1005. TORTURE – Somewhat surprisingly, the U.S. did not oppose universal jurisdiction during the drafting process of the UN Torture Convention (signed in 1984), although this convention deals with crimes committed by State actors, often in a purely domestic context.[3365] During the drafting process of the Genocide Convention, the U.S. had still rejected the exercise of universal jurisdiction of this kind of crimes. U.S. support for the *aut dedere aut judicare* provision in the Convention constitutes a major change of heart. It is the first unambiguous

[3359] *Demjanjuk* v. *Petrovksy*, 776 F.2d 571, 583 (6th Cir. 1985), 79 *I.L.R.* 535.
[3360] *See* on the extradition of Demjanjuk: R.H. REISS, "The Extradition of John Demjanjuk: War Crimes, Universality Jurisdiction, and the Political Offense Doctrine", 20 *Cornell Int. L.J.* 281 (1987).
[3361] *See also* M. INAZUMI, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law*, Antwerp-Oxford, Intersentia, 2005, at 104.
[3362] The endorsement of universal jurisdiction over the crimes committed by Demjanjuk may therefore be considered as *obiter dictum*. *See* A. ZIMMERMANN, "Violations of Fundamental Norms of International Law and the Exercise of Universal Jurisdiction in Criminal Matters", in C. TOMUSCHAT & J.-M. THOUVENIN (eds.), *The Fundamental Rules of the International Legal Order. Jus Cogens and Obligations Erga Omnes*, Leiden, Boston, Martinus Nijhoff, 2006, 335, 350.
[3363] United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Bureau Proposal, U.N. Doc. A/CONF.186/C.1/L.59 (1998).
[3364] Intervention on the Bureau's Discussion Paper, U.N. Doc A/CONF.183/C.1/L.53 (1998).
[3365] Article 1 of the UN Torture Convention.

manifestation of U.S. *opinio juris* to subject a core crime against international law to universal jurisdiction.[3366]

Article 5 of the Torture Convention contains an *aut dedere aut judicare* provision modeled on previous antiterrorism conventions, on the basis of which States could try persons suspected of torture even in the absence of an extradition request. Unlike the United Kingdom, which repeated its opposition against universal jurisdiction during the drafting process of the convention, the United States supported the inclusion of Article 5, holding, in the clearest possible terms:

> "For the international community to leave enforcement of the convention to [the territorial] State would be essentially a formula for doing nothing. Therefore in such cases universal jurisdiction would be the most effective weapon against torture which could be brought to bear. It could be utilized against official torturers who travel to other States, a situation which was not at all hypothetical. It could also be used against torturers fleeing from a change of government in their States if, for legal or other reasons, extradition was not possible."[3367]

The universal jurisdiction clause of the Torture Convention is codified in 18 U.S.C. §2340A(b)(2), adopted in 1994.[3368] No cases are reported under this provision, although other nations' assertions of universal jurisdiction over torture offences, such as the 1998-99 proceedings against General Pinochet, who was indicted by a Spanish investigating judge on torture charges, and whose extradition to Spain was upheld by the English House of Lords, have not met with U.S. opposition.

10.10.1.c. Terrorism

1006. Although the United States hardly provides for universal jurisdiction over core crimes against international law, universal jurisdiction over certain terrorist offences is widely codified in U.S. law. U.S. courts have universal jurisdiction over such terrorist acts as air hijacking and destruction of aircraft and violence at international airports,[3369] violence against foreign officials, official guests and internationally

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[3366] *See* L. REYDAMS, *Universal Jurisdiction*, Oxford, Oxford University Press, 2003, at 68-70.

[3367] Quoted in J.H. BURGERS & H. DANELIUS, *The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment*, Dordrecht, Nijhoff, 1988, at 78-79, who term the United States "a highly articulate advocate of universal jurisdiction".

[3368] 18 U.S.C. §2340(A)(b): "There is jurisdiction over [torture] if (1) the alleged offender is a national of the United States; or (2) *the alleged offender is present in the United States, irrespective of the nationality of the victim or alleged offender*." (emphasis added) ORENTLICHER considers this statutory provision to be the only one in U.S. law to provide for universal jurisdiction. *See* D. ORENTLICHER, "The Future of Universal Jurisdiction in the New Architecture of Transnational Justice", in S. MACEDO (ed.), *Universal Jurisdiction*, Philadelphia, PA, University of Pennsylvania Press, 2004, at 214, n 2.

[3369] 18 U.S.C. Section 32(b)(4) (destruction of aircraft and aircraft facilities): "There is jurisdiction over an offense under this subsection if a national of the United States was on board, or would have been on board, the aircraft; an offender is a national of the United States; *or an offender is afterwards found in the United States.*" (emphasis added); Section 37(b) (violence at international airports): "There is jurisdiction over the prohibited activity […] if (1) the prohibited activity takes place in the United States; or (2) the prohibited activity takes place outside the United States and (A) *the offender is later found in the United States*; or (B) an offender or a victim is a national of the United States" (emphasis added); 49 U.S.C. Section 46502(b)(2) (aircraft piracy): "There is jurisdiction over the offense […] if

protected persons,[3370] hostage taking,[3371] violence against ships or against fixed maritime platforms,[3372] financing of terrorism,[3373] and terrorist bombings[3374].[3375]

(A) a national of the United States was aboard the aircraft; (B) an offender is a national of the United States; or (C) *an offender is afterwards found in the United States.*" (emphasis added)

[3370] 18 U.S.C. Section 112(e) (protection of foreign officials, official guests and internationally protected persons): "If the victim of an offense under subsection (a) is an internationally protected person outside the United States, the United States may exercise jurisdiction over the offense if (1) the victim is a representative, officer, employee, or agent of the United States, (2) an offender is a national of the United States, or (3) *an offender is afterwards found in the United States*." (emphasis added); Section 878(d) (threats and extortion against foreign officials, official guests, or internationally protected persons): *Id.*; Section 1116(c) (murder or manslaughter of foreign officials, official guests, or internationally protected persons): *Id.*

[3371] 18 U.S.C. Section 1203(b)(1): "It is not an offense under this section if the conduct required for the offense occurred outside the United States unless (A) the offender or the person seized or detained is a national of the United States; (B) *the offender is found in the United States*; or (C) the governmental organization sought to be compelled is the Government of the United States." (emphasis added)

[3372] 18 U.S.C. Sections 2280(b) (violence against maritime navigation): "There is jurisdiction […] (1) in the case of a covered ship, if (A) such activity is committed (i) against or on board a ship flying the flag of the United States at the time the prohibited activity is committed; (ii) in the United States; or (iii) by a national of the United States or by a stateless person whose habitual residence is in the United States; (B) during the commission of such activity, a national of the United States is seized, threatened, injured or killed; or (C) *the offender is later found in the United States after such activity is committed*; (2) in the case of a ship navigating or scheduled to navigate solely within the territorial sea or internal waters of a country other than the United States, *if the offender is later found in the United States after such activity is committed*; and (3) in the case of any vessel, if such activity is committed in an attempt to compel the United States to do or abstain from doing any act." (emphasis added); Section 2281(b) (violence against maritime fixed platforms): "There is jurisdiction […] if (1) such activity is committed against or on board a fixed platform (A) that is located on the continental shelf of the United States; (B) that is located on the continental shelf of another country by a national of the United States or by a stateless person whose habitual residence is in the United States; (C) in an attempt to compel the United States to do or abstain from doing any act; (2) during the commission of such activity against or on board a fixed platform located on a continental shelf, a national of the United States is seized, threatened, injured or killed; or (3) such activity is committed against or on board a fixed platform located outside the United States and beyond the continental shelf of the United States *and the offender is found in the United States.*" (emphasis added)

[3373] 18 U.S.C. Section 2339C(b)(2): "[There is jurisdiction if] the offense takes place outside the United States and (A) a perpetrator is a national of the United States or is a stateless person whose habitual residence in the United States; (B) *a perpetrator is found in the United States*; or (C) was directed toward or resulted in the carrying out of a predicate act against (i) any property that is owned, leased, or used by the United States or by any department or agency of the United States, including an embassy or other diplomatic or consular premises of the United States; (ii) any person or property within the United States; (iii) any national of the United States or the property of such national; (iv) any property of any legal entity organized under the laws of the United States, including any of its States, districts, commonwealths, territories, or possessions." (emphasis added)

[3374] 18 U.S.C. 2332f(b)(2)(C) (Bombings of places of public use, government facilities, public transportation systems and infrastructure facilities): "[There is jurisdiction if] the offense takes place outside the United States and (A) a perpetrator is a national of the United States or is a stateless person whose habitual residence is in the United States; (B) a victim is a national of the United States; (C) *a perpetrator is found in the United States*; (D) the offense is committed in an attempt to compel the United States to do or abstain from doing any act; (E) the offense is committed against a state or government facility of the United States, including an embassy or other diplomatic or consular premises of the United States; (F) the offense is committed on board a vessel flying the flag of the United States or an aircraft which is registered under the laws of the United States at the time the offense is committed; (G) the offense is committed on board an aircraft which is operated by the United States.

[3375] *See also* American Bar Association, Section of Individual Rights and Responsibilities, Report on universal criminal jurisdiction, adopted by the House of Delegates, February 9, 2004, available at http://www.abanet.org/leadership/2004/dj/103a.pdf.

Terrorist acts are violations of *erga omnes* obligations and not of *jus cogens.*[3376] Universal jurisdiction over them does not derive from the heinous nature of the acts, but from international conventions ratified by the U.S. which oblige States Parties to establish universal jurisdiction if they do not extradite the perpetrator of the crime (*aut dedere aut judicare*).[3377] Like piracy on the high seas, the adjudication of terrorist offences is predicated on practical rather than moral concerns: these crimes cannot be simply tied to a territory for purposes of jurisdiction. The absence of a clearly identifiable territorial forum necessitates universal jurisdiction if impunity is not to arise.[3378] Also like piracy, terrorist offences are typically committed by non-State actors without State support. Unlike such crimes as war crimes, genocide, crimes against humanity, and torture, they are unlikely to be committed by U.S. officials or servicemembers. As a result, the United States does not have a 'national interest' in opposing universal jurisdiction over terrorist offences. Quite to the contrary: such offences are often directed against U.S. persons and interests.

It may be noted that there is no wholesale assumption of universal jurisdiction over terrorist offences: U.S. courts will only exercise universal jurisdiction over terrorism when the perpetrator is present in the United States. It has been deemed immaterial whether the perpetrator voluntarily entered U.S. territory or whether his presence was forcibly brought about by means of extradition.[3379]

1007. A number of terrorism cases invoking the universality principle cases are reported. In *U.S.* v. *Yunis*, a case of aircraft hijacking, the D.C. Circuit ruled that "[a]ircraft hijacking may well be one of the few crimes so clearly condemned under the law of nations that states may assert universal jurisdiction to bring offenders to justice, even when the state has no territorial connection to the hijacking and its

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[3376] *See* L. FISLER DAMROSCH, "Comment: Connecting the Threads in the Fabric of International Law", in S. MACEDO (ed.), *Universal Jurisdiction*, Philadelphia, PA, University of Pennsylvania Press, 2004, at 94.

[3377] The Antihijacking Act of 1974 was the first act of these acts (universal jurisdiction over air piracy is codified in 49 U.S.C. Section 46502(b)(2)). The act was based on the Convention for the Suppression of Unlawful Seizure of Aircraft, 16 December 1970, 10 *I.L.M.* 133, 134, and was the first act since 1819 (piracy) that provided for universal jurisdiction. *See for* one of the most recent antiterrorism conventions the International Convention for the Suppression of Terrorist Bombings, signed in New York on 12 January 1998, provides in Article 7, § 2: "Upon being satisfied that the circumstances so warrant, the State Party in whose territory the offender or alleged offender is present shall take the appropriate measures under its domestic law so as to ensure that person's presence for the purpose of prosecution or extradition." This convention does not require the offender or alleged offender to be a national of a State party. This implies that all terrorists, wherever they committed their acts or whatever their nationality, can be prosecuted by States Parties to this convention, unless they are extradited to another State claiming jurisdiction.
Non-treaty based terrorist acts may be subject to passive personality jurisdiction in the United States. *See, e.g.*, 18 U.S.C. § 2332, which criminalizes U.S. homicide, attempt or conspiracy with respect to homicide and physical violence causing serious bodily injury to a U.S. national abroad (introduced by the Omnibus Diplomatic Security and Anti-Terrorism Act 1986, Pub. L. No. 99-399, § 1202(a), 100 Stat. 896, 896-97 (1986) after the murder of a U.S. Congressman in Guyana). *See also* 18 U.S.C. § 2332b which criminalizes conduct abroad that causes serious bodily injury or creates a risk of serious bodily injury to persons within the United States (introduced by the Antiterrorism and Effective Death Penalty Act 1996, Pub. L. No. 104-132, § 702(a), 110 Stat. 1214, 1291 (1996)). *See also supra* (passive personality principle).

[3378] *See, e.g.*, H.J. STEINER, "Three Cheers for Universal Jurisdiction", in 5 *Theoretical Inquiries in Law* 199, 201 (2004).

[3379] *See United States* v. *Rezaq*, 134 F.3d 1121, 1130-32 (D.C.C. 1998); *United States* v. *Yunis*, 924 F.2d 1086, 1090-92 (D.C. Cir. 1991).

citizens are not involved."[3380] In another terrorist case, *U.S.* v. *Rezaq*, a District Court, establishing jurisdiction over a hijacker of an Airegypt flight from Athens (Greece) to Cairo (Egypt), similarly held that "[t]he justification for universal jurisdiction over hijackers is clear,"[3381] although in that case, an American citizen actually numbered among the victims. In a non-hijacking case, *U.S.* v. *Layton*, concerning the terrorist shooting of a U.S. Congressman in Guyana, the court also referred to universal jurisdiction, holding that "nations have begun to extend [universal] jurisdiction to […] crimes considered in the modern era to be as great a threat to the well-being of the international community as piracy […]".[3382] Yet also in *Layton* was a U.S. citizen the victim of the attack.

1008. If universal jurisdiction is not provided for in an antiterrorism treaty ratified by the United States, U.S. courts will not exercise universal jurisdiction. In *United States v. Yousef and others* (2003), the Second Circuit held that there is no universal jurisdiction over terrorism based on customary international law.[3383] Citing *Tel-Oren v. Libyan Arab Republic* (1984),[3384] a tort case under the ATS, the court held:

> "We regrettably are no closer now than eighteen years ago to an international consensus on the definition of terrorism or even its proscription; the mere existence of the phrase "state-sponsored terrorism" proves the absence of agreement on basic terms among a large number of States that terrorism violates public international law. Moreover, there continues to be strenuous disagreement among States about what actions do or do not constitute terrorism, nor have we shaken yourselves free of the cliché that "one man's terrorist is another man's freedom fighter." We thus conclude that the statements of Judges Edwards, Bork, and Robb [in *Tel-Oren* v. *Libyan Arab Republic*] remain true today, and that terrorism – unlike piracy, war crimes, and crimes against humanity – does not provide a basis for universal jurisdiction."[3385]

10.10.2. Structural impediments to the assumption of universal criminal jurisdiction by U.S. courts

1009. U.S. reluctance to embrace universal criminal jurisdiction over gross violations of human rights and international humanitarian law is not only a product of a lack of political or judicial will. It dovetails with a number of built-in features of the U.S. legal system. For one thing, under the presumption against extraterritoriality, statutes that do not explicitly provide for extraterritorial application will not be applied extraterritorially. Deriving criminal liability from international law is generally not allowed in the United States. For another, in the federal criminal justice system, the Executive Branch enjoys sweeping powers. Politically embarrassing cases may readily be disposed of by the U.S. Attorneys, who are directly accountable to the

[3380] *United States* v. *Yunis*, 681 F.Supp. 896 (D.D.C. 1988), 924 F.2d 1086 (D.C. Cir. 1991).
[3381] *United States* v. *Rezaq*, 899 Fed. Supp. 697 (D.D.C. 1995), confirmed in *United States v. Rezaq*, 134 F.3d 1121 (D.C.C. 1998).
[3382] *United States* v. *Layton* 509 F.Supp. 212, at 223 (N.D. Cal. 1981), *appeal dismissed*, 645 F.2d 681 (9th Cir. 1981), *cert. denied*, 452 U.S. 972 (1981).
[3383] *United States* v. *Ramzi Ahmed Yousef and others*, 327 F.3d 56, 78-88 (2nd Cir. 2003).
[3384] *Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984).
[3385] 327 F.3d at 106-107.

Attorney-General, who is a member of the Presidential Administration. Strict common law rules of evidence and the emphasis laid on due process in the United States may serve as other impediments to the liberal exercise of universal jurisdiction by U.S. courts and prosecutors. Finally, U.S. criminal proceedings under the universality principle may go the detriment of the existing and well-functioning practice of universal civil litigation under the U.S. Alien Tort Statute.

10.10.2.a. Presumption against extraterritoriality

1010. The presumption against extraterritoriality, discussed at length in subsection 3.3.2, serves as a powerful disincentive for courts willing to exercise universal jurisdiction. In the field of jurisdiction, U.S. courts may be precluded from being judicial activists, since, where legislative authorization is lacking, they may not be authorized to establish universal jurisdiction.[3386] OSOFSKY has pointed out that if U.S. courts were to exercise universal jurisdiction over crimes against international humanitarian law (the universal prosecution of which there is no statutory basis for), they may violate the separation of powers, the principle of legality and the rule of lenity.[3387]

1011. Some doctrine has attempted to bypass the constraint represented by the presumption against extraterritoriality by arguing that the competence of U.S. federal courts to exercise universal jurisdiction stems directly from the American Constitution, which in its Article 1, Section 8, Clause 10 not only gives Congress the power to define and punish "piracies and felonies committed on the high seas" but also to define and punish "offences against the law of nations".[3388] The majority opinion, however, seems to be that the United States cannot exercise universal jurisdiction, absent a clear congressional authorization.[3389]

10.10.2.b. Role of international law in U.S. courts

1012. Sometimes, U.S. courts seemed to cast aside the presumption against extraterritoriality, and applied U.S. law to the extent permitted by international law

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[3386] *See, e.g., United States* v. *Bowman*, 260 U.S. 94, 98 (1922) ("If punishment of [crimes] is to be extended to include those committed out side of the strict territorial jurisdiction, it is natural for Congress to say so in the statute, and failure to do so will negative the purpose of Congress in this regard.").

[3387] *See* H.M. OSOFSKY, "Domesticating International Criminal Law: Bringing Human Rights Violators to Justice", 107 *Yale L.J.* 191, 202 (1997).

[3388] *See e.g.* J. VAN DER VYVER, "National Experiences with International Criminal Justice", *offprint*, at 4, citing *U.S.* v. *Smith*, 18 U.S. (5 Wheat.) 153, 160-61 (1820), VAN DER VYVER asserts that the offences against the law of nations should not necessarily be incorporated into domestic law by Congress, provided that the crime to be punished is "defined in international law with reasonable certainty", a certainty which can be established "by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law". It should be noted that the *Smith* case dealt with the crime of piracy. It is against this background that VAN DER VYVER submitted that Congress, when adopting the Proxmire Act in 1988 violated the Article 1, Section 8, Clause 10 of the U.S. Constitution by not providing for universal jurisdiction over genocide ("It is not within the powers of the legislature to detract from the competencies vested in law enforcement agencies in virtue of the constitutional powers of Congress without a formal constitutional amendment.").

[3389] *See, e.g.*, D. CASSEL, "Empowering U.S. Courts to Hear Crimes Within the Jurisdiction of the International Criminal Court", 35 *New Eng. L. Rev.*, 421, 444 (2001).

(*see* subsection 3.3.2 *in fine*). In the field of universal criminal jurisdiction, U.S. courts will normally be precluded from doing so. For one thing, treaties cannot create domestic criminal liability in the United States, or put differently, they are "non-self-executing". This implies that Congress ought to implement treaties containing universal jurisdiction provisions (e.g., the Geneva Conventions, the UN Torture Convention) before U.S. courts could actually assert universal jurisdiction.[3390] For another, as there is no federal common law of crimes, and customary international law is generally considered to be part of federal common law, courts cannot assert universal jurisdiction based on customary international law (e.g., over genocide or crimes against humanity).[3391]

10.10.2.c. Prosecutorial discretion

1013. If U.S. law were exceptionally to permit U.S. courts to establish universal jurisdiction, efforts at actually exercising jurisdiction might come to nothing, given the role of the "political question" doctrine in the U.S. litigation. The influence of this doctrine as a doctrine of jurisdictional restraint will be discussed in subsection 11.2.3.a in the context of litigation under the Alien Tort Statute (ATS), but it may be pointed out here already that it requires the judiciary to defer to the executive branch when legal proceedings involve important political questions, because it is the executive branch which is constitutionally empowered to conduct foreign relations.[3392] As core crimes cases typically involve State actors, it is not fanciful to state that the smooth conduct of foreign relations could be jeopardized, and that deference should be warranted under the doctrine. Defenses premised on foreign sovereign immunities, which will also be discussed in an ATS context and may also be informed by deference to the executive branch's opinion, may similarly serve as a potent check on the exercise of universal jurisdiction.

1014. Ordinarily, however, the political question doctrine will not come into play in universal criminal jurisdiction proceedings, because of the specificity of U.S. federal criminal law proceedings.[3393] Prosecutorial discretion, the government's exclusive power to prosecute, and the powers of the executive branch will prevent politically embarrassing cases from actually reaching the courts. It has been observed in this context that the U.S. criminal justice system "is designed in such a way that the government's political opposition to prosecution can make it impossible to punish violations of international human rights law."[3394]

The Criminal Division of the Department of Justice and the U.S. Attorneys, over which the Criminal Division exercises supervisory authority, normally determine

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[3390] C.A. BRADLEY, "Universal Jurisdiction and U.S. Law", *U. Chi. Legal. F.* 323, 330 (2001).
[3391] *Id.*, at 329-30.
[3392] *See also* R.A. FALK, "Assessing the Pinochet Litigation: Whither Universal Jurisdiction?", in S. MACEDO (ed.), *Universal Jurisdiction*, Philadelphia, PA, University of Pennsylvania Press, 2004, at 105.
[3393] Violations of international humanitarian law committed outside the United States are federal offenses. 18 U.S.C. Section 109(a) (2002) (genocide); 18 U.S.C. Section 2340A(a) (2002) (torture); 18 U.S.C. Section 2441 (2002) (war crimes).
[3394] *See* M.S. MYERS, "Prosecuting Human Rights Violations in Europe and America: How Legal System Structure Affects Compliance with International Obligations", 25 *Mich. J. Int'l L.* 211, 228 (2003).

whether prosecutorial action is warranted.[3395] The U.S. Attorneys and a great number of Department officials, most notably the Attorney-General who leads the Department and is part of the Presidential Administration, are appointed and removed by the President.[3396] Accordingly, they are likely to heed the *Realpolitik*-oriented concerns of the executive branch in exercising their almost absolute discretionary powers.[3397] U.S. Attorneys who show too much zeal in prosecuting human rights violations committed abroad, on the basis of universal jurisdiction will be duly held to account by the executive branch, which may be wary of embarrassing foreign allies. If the Attorneys refuse to pursue a case, victims have no right to appeal[3398], or to file a civil party petition,[3399] a right which they have in some European States.

1015. Given the tight grip of the executive branch on the prosecution of human rights violations in the United States, the appointment of an independent counsel style prosecutor for human rights violations has been proposed.[3400] Congress created the office of independent counsel in 1978 in the aftermath of the Watergate scandal, because of Executive Branch meddling in the investigations by the Department of Justice.[3401] The independent counsel, a special prosecutor not subject to the Attorney General, could be appointed by the U.S. Court of Appeals in order to investigate criminal conduct allegedly committed by top executive branch officials. After the independent counsel grew unpopular due to Kenneth Starr's investigation of the Lewinsky affair, implicating President Clinton, Congress failed to renew the Act that created the office in 1999. MYERS has asserted however that, while the sort of criticism leveled at the 1978-style independent counsel may have been warranted, it need not necessarily apply to an independent counsel for human rights violations.[3402]

[3395] *See* N. ABRAMS, *Federal Criminal Law and Its Enforcement*, St. Paul, Minn., West Publishing, 1986, at 7, 9.

[3396] *See* M.S. MYERS, "Prosecuting Human Rights Violations in Europe and America: How Legal System Structure Affects Compliance with International Obligations", 25 *Mich. J. Int'l L.* 211, at 229-30 (2003).

[3397] The Supreme Court has held that the discretion of the U.S. Attorneys is a "special province of the executive". *United States* v. *Armstrong*, 517 U.S. 456, 464 (1996). *See also Heckler* v. *Chaney*, 470 U.S. 821, 832 (1985); *Newman* v. *United States*, 382 F.2d 479 (D.C. Cir. 1967); *Smith* v. *United States*, 375 F.2d 243 (5th Cir. 1967). For the prosecution of certain conduct that occurs outside the United States, such as corrupt practices, the U.S. attorneys even need authorization. *See* U.S. Department of Justice, the United States Attorney Manual § 9-47.00 (1997) ("No investigation or prosecution of cases involving alleged violations of Section 103 and 104, and related violations of Section 102, of the Foreign Corrupt Practices Act (FCPA) of 1977 … shall be instituted without the express authorization of the Criminal Division"). This guideline is however not legally enforceable. *Id.*, at § 1.1-100.

[3398] *Newman*, 382 F.2d at 480 ("Few subjects are less adapted to judicial review than the exercise by the Executive of his discretion in deciding when and whether to institute criminal proceedings"); *Inmates of Attica Correctional Facility* v. *Rockefeller*, 477 F.2d 375, 380 (2nd Cir. 1973) ("[T]he manifold imponderables which enter into the prosecutor's decision to prosecute or not to prosecute make the choice not readily amenable to judicial supervision.")

[3399] *New York* v. *Muka*, 440 F.Supp. 33, 36 (N.D.N.Y. 1977) ("It is well settled that a private citizen has no right to prosecute a federal crime").

[3400] *See* M.S. MYERS, "Prosecuting Human Rights Violations in Europe and America: How Legal System Structure Affects Compliance with International Obligations", 25 *Mich. J. Int'l L.* 211, 254-61 (2003).

[3401] The Ethics in Government Act, Pub. L. No. 95-521, 29 Stat 1824 (1978).

[3402] The independent counsel was denounced, *inter alia*, for prosecuting trivial criminal acts and for expanding his investigation at will to cover other crimes. Gross human rights violations obviously are no trivial acts, and the jurisdiction of the independent counsel could be restricted. *See* M.S. MYERS, "Prosecuting Human Rights Violations in Europe and America: How Legal System Structure Affects Compliance with International Obligations", 25 *Mich. J. Int'l L.* 211, 260 (2003).

Needless to say, the creation of an independent prosecutor is in the current climate of political opposition against universal jurisdiction, both criminal and tort jurisdiction, not very likely.

1016. U.S. federal prosecutors' lack of independence from the executive branch may explain U.S. typecasting of European prosecutors as 'overzealous'.[3403] In Europe, prosecutors are often magistrates who operate at arm's length of the executive branch. Aside from having the right to oblige a prosecutor to initiate prosecutions, the executive branch may ordinarily not interfere in criminal investigations and prosecutions. To Americans, European prosecutors' right to initiate proceedings, unchecked by the democratically accountable political branches, may appear as infringing upon the sacrosanct principle of liberty. Even if prosecutions come to nothing, Americans may believe that irrevocable harm has been done. It is in this context that one has to understand the warning of John BOLTON, U.S. Assistant Secretary of State for International Organization Affairs (Bush Administration) and a later U.S. ambassador at the United Nations: "[A] zealous independent prosecutor can make dramatic news simply by calling witnesses and gathering documents, without ever bringing formal charges."[3404] U.S. pressure on Belgium to withdraw its universal jurisdiction legislation (2003) was in large measure based on the perception that the mere filing of a complaint with a Belgian prosecutor or investigating magistrate against high-ranking U.S. officials, irrespective of whether this complaint was acted on or not, damaged U.S. interests to an extent that could not be tolerated by the United States.

10.10.2.d. Rules of evidence

1017. Strict common law rules concerning the admissibility of evidence and the adversarial debate may further impede the application of universal jurisdiction in the United States. In proceedings on the basis of universal jurisdiction, witnesses could sometimes not be subject to cross-examination for practical reasons (geographical distance). Such proceedings may run counter to some basis tenets of U.S. criminal procedure, in particular the right to confrontation, which is constitutionally protected by the Sixth Amendment's confrontation clause. The confrontation clause guarantees the right to cross-examination,[3405] and even the right to a face-to-face meeting with the witnesses.[3406] Out-of-court statements are not allowed under federal criminal law,[3407] and the relevant cross-examination can only be restricted by a showing of some compelling state need.[3408] The application of universal criminal jurisdiction in

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[3403] *See, e.g.*, R.K. GOLDMAN, Washington College of Law, American University, summary of his contribution to an AEL panel, *Internationalizing Justice: The Rise of the International Criminal Court*, November 2003, available at http://www.aei.org/events/filter.foreign,eventID.661/summary.asp ("On the domestic level, there is nothing incompatible with the exercise of universal jurisdiction by states with the concept of sovereignty. I think that where the confusion enters is when certain overzealous magistrates or prosecutors have cast too wide a net.").

[3404] J.R. BOLTON, "The Risks and Weaknesses of the International Criminal Court from America's Perspective", 64 *Law & Contemp. Probs.* 167, 173 (2001) (actually criticizing the ICC prosecutor, whose functions are, according to Bolton, based on European prosecutorial ideas).

[3405] The right to cross-examine prosecution witnesses is the "primary interest" secured by the confrontation clause. *See Douglas* v. *Alabama*, 380 U.S. 415 (1965).

[3406] *See Coy* v. *Iowa*, 487 U.S. 1012 (1988).

[3407] *See* however *Lilly* v. *Virginia*, 527 U.S. 116 (1999).

[3408] *See Davis* v. *Alaska*, 415 U.S. 308 (1974).

the United States may thus require a softening of strict procedural rules. Nonetheless, as recent English practice in the field of the prosecution of torture offences under the universality principle has shown, strict common law rules of evidence need not necessarily render the exercise of universal jurisdiction practically impossible. Live video-conferences may go some way in accommodating the defence's concerns, although obviously, putting them in place on a structural basis requires considerable commitment of judicial resources.

10.10.2.e. Due process

1018. The United States may more generally take issue with universal jurisdiction on due process grounds. The due process argument against universal jurisdiction is also used as an argument against the jurisdiction of the International Criminal Court, and, hence, as an argument against the global fight against impunity for core crimes.[3409] It is submitted, notably by FLETCHER, that traditionally, U.S. criminal procedure first and foremost protects the interest of the accused, rather than the interest of the victims or the State. In international criminal law, this presumptive order is arguably reversed, with the most important interest being that of the victims, then the State, and lastly the accused. FLETCHER has argued that the imperfect justice scheme of traditional criminal procedure, which is informed by due process guarantees for the accused, is in the theory and practice of universal jurisdiction be replaced by the desire to prevent impunity at all costs, to the detriment of due process.[3410]

1019. The principle of double jeopardy or *ne bis in idem* would arguably be among the due process guarantees which may be endangered.[3411] While most States exercising universal jurisdiction tend to take into account the principle of *ne bis in idem*, which is nonetheless as yet not a principle of international law, they might indeed reject prosecutions by the territorial or national State that are deemed ineffective or testifying to the unwillingness of this State to genuinely prosecute. Under the cloak of the principle of complementarity, subsidiarity or jurisdictional necessity, a State may decide not to respect the acquittal of a person by the territorial or national State and bring him to justice before its own courts on the basis of the universality principle. The principle of *ne bis in idem* is thus indeed not unconditionally respected: it is only operationalized once the proceedings in the territorial or national State are of a certain quality.[3412]

[3409] U.S. opposition against the ICC will be discussed in subsection 10.10.4.

[3410] *See* G.P. FLETCHER, "Against Universal Jurisdiction", 1 *J.I.C.J.* 580, 581-82 (2003).

[3411] *See for instance* the Fifth Amendment to the U.S. Constitution: "[…] nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb."

[3412] *See e.g.* Article 20 (3) of the ICC Statute ('ne bis in idem'): "No person who has been tried by another court for conduct also proscribed under article 6, 7 or 8 shall be tried by the Court with respect to the same conduct unless the proceedings in the other court (a) were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or (b) otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice." It should be noted that FLETCHER considered the application of *ne bis in idem* to universal jurisdiction cases to be even worse than the disease: "It would give the first court to hear the case the power to decide the fate of the accused and the whole world would have to defer to their possibly idiosyncratic judgment". Hence his outright rejection of universal jurisdiction. *See* G.P. FLETCHER, "Against Universal Jurisdiction", 1 *J.I.C.J.* 580, 584 (2003).

10.10.2.f. Relationship with universal tort jurisdiction

1020. As will be set out in section 11.2, U.S. civil courts are willing to exercise universal tort jurisdiction. Intuitively, one might suppose that universal tort jurisdiction is the flipside of universal criminal jurisdiction. With the former guaranteeing compensation, and the latter retribution, justice across-the-board for core crimes may be meted out. It has however been argued, notably by OSOFSKY, that, because civil and criminal law remedies for core crimes serve different purposes, the existence of both remedies for the same violations may at times cause adverse effects for redress sought by victims. The possibility of delays in civil suits provoked by criminal suits is cited in particular As a general principle of U.S. law, the civil suit is stayed pending the resolution of the criminal trial.[3413] As criminal trials involving gross human rights violations are often highly complicated and slow, given the international nature and the scale of the violations, the civil proceedings could be stayed for several years, thus hampering efforts by victims to gain quick redress.[3414] OSOFSKY therefore warned: "While international law and the need for completeness suggest the value of an expanded criminal regime, it will increase justice only if it does not reduce opportunities for redress."[3415]

1021. A solution could be that prosecutors defer to the civil action, if such were to serve the needs of international justice. However, as such is *prima facie* at odds with the principle that the criminal action prevails over the civil action, a system of civil party petition, as used in some civil law countries in Europe, may be the most attractive alternative. Under this system, victims might tie their claim for damages to the criminal action. The criminal judge may eventually, aside from convicting the perpetrator, also grant compensation to the victims. During the investigatory stage, victims may also be entitled to rights of information and initiation.

1022. In chapter 11 (in particular in section 11.4.1), it will be argued that universal criminal and universal tort jurisdiction are two equally valid methods of fighting impunity and granting relief to victims of core crimes against international law. It will be submitted that it is not surprising that universal criminal jurisdiction gained ascendancy in continental-Europe, and universal tort jurisdiction in the United States. The features of the European criminal justice system make European prosecutors and courts better placed to exercise universal jurisdiction, while the features of the U.S. tort system render U.S. courts more appropriate fora to grant compensation to victims of core crimes committed abroad. Without a transposition of the systemic features which made the European exercise of universal criminal jurisdiction successful, mere U.S. statutory authorization to exercise criminal jurisdiction will in itself not greatly contribute to the fight against impunity. The sheer lack of cases under the universality provisions of the UN Torture Convention Implementation Act bears testimony to this.

[3413] *United States* v. *Kordel*, 397 U.S. 1 (1969) ("Federal courts have deferred civil proceedings pending the completion of parallel criminal prosecutions when the interests of justice seemed to require such an action, sometimes at the request of the prosecution [...] sometimes at the request of the defense."). The principle of staying civil proceedings is known in continental Europe as "le criminel tient le civil en état".

[3414] *See See* H.M. OSOFSKY, "Domesticating International Criminal Law: Bringing Human Rights Violators to Justice", 107 *Yale L.J.* 191, 214 (1997), who can even imagine a situation in which the U.S. civil suit is stayed by a U.S. criminal prosecution, which in turn is stayed pending the outcome of an international criminal prosecution.

[3415] *Id.*

10.10.3. The 2004 report on universal criminal jurisdiction by the American Bar Association

1023. In 2004, the American Bar Association (ABA) issued a report on universal criminal jurisdiction. The American Bar Association is an important legal player in the United States, and is often consulted by lawmakers. Although the report does in itself not constitute direct State practice for purposes of customary international law, a discussion of it is certainly warranted, because it conveys the opinion of an important part of the legal profession in the United States.[3416]

In this section 10.10, it has been demonstrated that U.S. law hardly provides for universal jurisdiction. In its report, the ABA conspicuously fails to call on the United States to expand legal opportunities to exercise universal jurisdiction, thus implying that the law as it stands is adequate. Nonetheless, it does not recommend other States to follow the narrow U.S. approach: it recognizes and supports the principle of universal jurisdiction "as an important tool in the worldwide effort to strengthen the rule of law by providing the means for the prosecution of persons who have committed serious international crimes, regardless of where they are committed or by whom or against whom." Yet at the same time it urges the United States Government "to work with governments of other nations to take all reasonable steps to ensure that the application of universal criminal jurisdiction by all nations is uniform and consistent with the [complementarity principle]."[3417] The emphasis of the ABA's report is on the need for other States to exercise universal jurisdiction in a reasonable manner (so that U.S. interests are not harmed). The ABA implicitly takes issue with Section 404 of the American Law Institute's Restatement (Third) of U.S. Foreign Relations Law, which does not subject assertions of universal jurisdiction, unlike other jurisdictional assertions, to a rule of reason. In order to prevent jurisdictional abuse of the universality principle, the ABA proposes three guiding principles: the principles of legality, necessity, and due process. These principles as understood by the ABA, the principles of legality and necessity in particular, will be fiercely criticized on the ground that they are informed by an unduly narrow understanding of universal jurisdiction which takes the interests of the United States as too controlling. They do certainly not constitute international law.

1024. LEGALITY – The ABA posits that under the principle of legality, universal jurisdiction may be exercised only with respect to serious international crimes that are clearly recognized by treaty or by customary international law authorizing such jurisdiction.[3418] It appears straightforward that only the most heinous crimes may be subject to universal jurisdiction. Where a treaty, such as the UN Torture Convention, explicitly provides for universal jurisdiction over a particular crime, States exercising universal jurisdiction will easily comply with the principle of legality. The problem

[3416] The Mission of the American Bar Association is to be the national representative of the legal profession. It is the largest voluntary professional association in the world. With more than 400,000 members, the ABA provides law school accreditation, continuing legal education, information about the law, programs to assist lawyers and judges in their work, and initiatives to improve the legal system for the public. *See* www.abanet.org/about.

[3417] American Bar Association, Section of Individual Rights and Responsibilities, Report on universal criminal jurisdiction, adopted by the House of Delegates, February 9, 2004, available at http://www.abanet.org/leadership/2004/dj/103a.pdf.

[3418] *Id.*, at 6.

lies in determining whether a particular crime is subject to universal jurisdiction under customary international law. The ABA report does not elaborate on what crimes are recognized by customary international law, probably because of the prevailing uncertainty.

1025. Disturbingly however, it points out that "[j]ust as coastal states are the primary relevant states for purposes of customary law on maritime territorial boundaries, states with forces experienced in armed conflict are the primary relevant states for purposes of the customary international law of war." In so stating, the ABA implicitly considers the practice and *opinio juris* of the United States in the field of universal jurisdiction to be more decisive for purposes of customary international law than the practice and *opinio juris* of other States, including European States, who do not deploy forces in armed conflicts to the same extent as the United States do. Such a view, which emphasizes the primary role of specially affected States, is debatable, to say the least. Admittedly, in the *North Sea Continental Shelf Cases*, the International Court of Justice indeed held: "With respect to the other elements usually regarded as necessary before a conventional rule can be considered to have become a general rule of international law, it might be that, even without the passage of any considerable period of time, a very widespread and representative participation in the convention might suffice of itself, provided it included that of States whose interests were specially affected."[3419] This holding may however not apply to the laws of war. War is a scourge that may affect *all* States – there are almost no States that have not known war – whereas States with minimal maritime boundaries, or even entirely land-locked States, are by nature less interested in and affected by the laws on maritime delimitation, be it in the past, the present or the future. The laws of war are, furthermore, not only concerned with the military, but also with non-combatants such as the sick and wounded, prisoners of war and civilians. And, last but not least, violations of the laws of war are often considered to be violations of *erga omnes* obligations, the punishment of which every State may have an interest in.[3420] Therefore, for purposes of customary international law, it appears irrelevant that the U.S., unlike other States, has a global military presence and hence, would be more affected by the laws of war. In matters of war, the principle of sovereign equality requires respect for every nation's opinion on the legality of acts of war and on the necessity of certain mechanisms to repress breaches of the laws of war, such as universal jurisdiction.

If indeed the U.S. view is entitled to more weight than other nations' views, it is at any rate unclear what U.S. practice and *opinio juris* with respect to universal jurisdiction over war crimes actually is. The fact that U.S. courts do not entertain universal jurisdiction over war crimes should certainly not be taken as evidence of U.S. opposition against such jurisdiction, since U.S. acquiescence in other States' universal jurisdiction practice may also constitute relevant State practice and *opinio juris.* There are few indications of what war crimes, under what circumstances, the

[3419] ICJ, *Germany/Denmark, Germany Netherlands*, 20 February 1969, *I.C.J. Rep.* 1969, 4, para. 73.

[3420] *See* International Criminal Tribunal for the Former Yugoslavia, *Prosecutor* v. *Furundzija*, 38 *I.L.M.* 317, 348-49 (1998) (stating the prohibition of torture imposes obligations *erga omnes*, *i.e.*, obligations "owed toward all the other members of the international community, each of which then has a correlative right [which] gives rise to a claim for compliance accruing to each and every member, which then has the right to insist on fulfillment of the obligation or in any case to call for the breach to be discontinued.").

United States would desire not to see adjudicated on the basis of the universality principle. The only certainty is that the U.S. does not like other nations' courts to sit in judgment of acts of the U.S. military, as the demise of the Belgian Act concerning Crimes against International Humanitarian Law, after intense U.S. pressure, testifies to. Quite often, the specter of foreign and international courts posing as Monday morning quarterbacks second-guessing the military necessity of U.S. operations abroad is cited in this context.

1026. NECESSITY – Under the ABA's proposed principle of necessity, complementarity serves as a principle that ensures that the State that has nationality-based jurisdiction may pre-empt exercise of universal jurisdiction by another nation.[3421] This principle is reminiscent of the principle of complementarity enshrined in Article 17 of the Rome Statute of the ICC. The ABA report employs the principle of necessity, *inter alia,* to prevent potential misuse of universal jurisdiction to bring unwarranted criminal prosecutions against American military personnel.[3422] It "specifically recognizes that the United States has in place adequate procedures by which the United States could pre-empt any other nation from exercising universal criminal jurisdiction over its military personnel (or any other citizen or lawful permanent resident of the United States), should it choose to do so."[3423] This is no doubt true. Elsewhere in this chapter (section 10.11.3)., the complementarity principle has been advocated with great force as a means of ensuring that the rule of law becomes entrenched in the States with the strongest nexus to the violation. The ABA may however go a bridge too far where it, admittedly without questioning the legality of universal jurisdiction under international law, implies that other States could never establish universal jurisdiction over U.S. nationals or residents under the principle of necessity, "because American courts meet international norms for fair trials and due process of law", which are arguably among the strictest in the world.[3424] The ABA points out that the United States successfully prosecuted more than twenty cases involving war crimes during the Vietnam conflict.[3425] As a general matter, the U.S. prosecution record is, compared to other nations' record, indeed rather solid. However, it is *a priori* not a given that U.S. perpetrators of core crimes will always be adequately prosecuted by U.S. prosecutors and courts. In times of war, patriotism may cause the courts of the perpetrator's home State to punish the perpetrator more lightly than is warranted.[3426] Against this, it could be argued that reputational concerns, which traditionally underpin the active personality principle, may cause these courts to actually punish the perpetrator more harshly than is warranted. Whatever the merits of both arguments, it appears that a case-by-case approach should be taken. U.S. investigations and prosecutions of core crimes should not be exempted beforehand from an objective analysis under the complementarity principle.

1027. DUE PROCESS – In subsection 10.10.2.e, it has been observed that due process concerns may explain the U.S. opposition against international criminal justice,

[3421] ABA Report, at 6-7.
[3422] *Id.*, at 7-8.
[3423] *Id.*, at 7.
[3424] *Id.*, at 7-8.
[3425] *Id.*, at 8.
[3426] According to CASSEL in his comment on the ABA report, which he co-authored, the U.S. record has indeed been far from perfect. *See* D. CASSEL, "Universal Criminal Responsibility", *Human Rights* 2004, ABA, 22, at 24.

including universal jurisdiction. Similarly, the ABA points out in its report that foreign nations should respect the principle of due process of law (which it nevertheless believes not to be specifically recognized in customary international law). For the ABA, this principle requires that a nation refrain from exercise universal criminal jurisdiction if its courts fail to comply with international norms on the protection of human rights in the context of criminal proceedings.[3427] The ABA may not have meant to criticize European universal jurisdiction practice, as European human rights protection in the context of criminal proceedings is adequately supervised by the European Court of Human Rights. Nor may the ABA have meant to criticize, like FLETCHER, the complementarity principle as a violation of the *ne bis in idem* rule, as it precisely supported the complementarity principle under the name 'principle of necessity'. Quite possibly, it may have wanted to discourage developing countries with weaker legal systems from exercising universal jurisdiction (over U.S. nationals).

10.10.4. U.S. opposition against the International Criminal Court

1028. UNIVERSAL JURISDICTION V. INTERNATIONAL JURISDICTION – Universal jurisdiction over core crimes has not been unequivocally condemned by the United States, and the exercise of universal jurisdiction has sometimes even been supported by the United States, *e.g.*, over torture offences, or when such was politically expedient.[3428] Espousing a pick-and-choose approach to universal jurisdiction, epitomized by its opposition against the Belgian universal jurisdiction act, the U.S. may believe that its bilateral political bargaining power may suffice to discipline foreign States that exercise universal jurisdiction in ways that jeopardize U.S. interests.[3429] Because bilateral bargaining power evaporates once an international institution with broad participation is established, and all the more so once the U.S. has joined that institution, it is important for the U.S. to restrict the jurisdiction of that institution in the preparatory stages and to cajole States Parties to the statute of that institution into signing agreements with the U.S. protecting U.S. citizens from the undesired reach of the institution. This is exactly the approach taken by the U.S. towards the International Criminal Court.

1029. LESSONS FROM U.S. OPPOSITION AGAINST THE ICC – Because of the different *modus operandi* of universal jurisdiction (national jurisdiction, easy to influence) and the ICC (international jurisdiction, difficult to influence), it may not be warranted to extrapolate U.S. criticism of the ICC to universal jurisdiction. However, because the ICC is based on the same logic as the universality principle, the logic that individuals should not enjoy impunity for violations of core crimes against international law, but may be held accountable by a tribunal which has no connection of nationality or

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[3427] *Id.*, at 7.

[3428] *See* A. ZIMMERMANN, "Violations of Fundamental Norms of International Law and the Exercise of Universal Jurisdiction in Criminal Matters", in C. TOMUSCHAT & J.-M. THOUVENIN (eds.), *The Fundamental Rules of the International Legal Order. Jus Cogens and Obligations Erga Omnes*, Leiden, Boston, Martinus Nijhoff, 2006, 335, 348 (stating that, while the U.S. opposed the exercise of universal jurisdiction by the ICC, it "contemplated the idea that United States military forces would seize *Pol Pot* and other leading former members of the *Khmer Rouge* in Cambodia in order to then surrender them to other States, such as the Federal Republic of Germany, which should then punish those offenders for acts of genocide on the basis of the principle of universal jurisdiction").

[3429] Foreign States' assertions of universal jurisdiction that do not implicate U.S. interests have so far not met with meaningful U.S. criticism.

territoriality with the offence, quite some objections against the ICC may apply *mutatis mutandis* to universal jurisdiction. Objections against the ICC and objections against universal jurisdiction indeed overlap to a great extent. They are based on the same legal-political philosophy pitting world public order and accountability against national sovereignty. Criticism of the ICC has only been harsher because the ICC is more difficult to influence than individual (and preferably small) States. In view of the similarity of criticism, it is most useful to analyze how and why the United States has demonized and attempted to undermine the ICC.

10.10.4.a. U.S. practice vis-à-vis the ICC

1030. THE U.S. AT THE NEGOTIATING TABLE – Since 1995, U.S. negotiators attended the sessions of the Ad hoc and Preparatory Committee on the establishment of the ICC. From the very beginning, in the light of its experience with the ICTY and the ICTR, the U.S. supported the establishment of a permanent criminal court "that could be more quickly available for investigations and prosecutions and more cost-efficient in its operation".[3430] It identified as the main challenges "the task of fusing the diverse criminal law systems of nations and the laws of war into one functioning courtroom", and the ICC's jurisdiction, which would be binding upon sovereign governments.[3431] The U.S. delegation took actively part in the negotiations and achieved quite some of its objectives, such as an improved regime of complementarity (Article 17 of the ICC Statute) and the affirmation of the Security Council's power to bring a halt to the Court's investigations.

Eventually however, the U.S. voted against the final text adopted in Rome on July 17, 1998, in WEDGWOOD's view because it did not have real negotiating points "until it was too late to get what we thought we might want."[3432] It was indeed only late in the negotiating phase that the U.S. raised red flags, primarily concerning the jurisdiction of the ICC over nationals of non-Party States and over the role of the Security Council. The U.S. opposed the delegation of territorial jurisdiction over nationals of non-Party States from States Parties to the ICC,[3433] and wanted to subordinate ICC

[3430] Statement of D.J. SCHEFFER, Ambassador-at-Large for War Crimes Issues and Head of the U.S. Delegation to the UN Diplomatic Conference on the Establishment of a Permanent International Criminal Court, before the Committee on Foreign Relations, 23 July 1998, p. 1. This statement is available at the website of the Coalition for the International Criminal Court (CICC): http://www.iccnow.org/documents/statements/governments/USScheffer_Senate23July98.pdf.

[3431] *Ibid.*, p. 2. *See also* the references to a number of statements by President Clinton and former Secretary of State Albright: D. CASSEL, "Empowering United States Courts to Hear Crimes Within the Jurisdiction of the International Criminal Court", 26 *New England L. Rev.* 421, 423, n. 9.

[3432] R. WEDGWOOD, summary of her contribution to an AEL panel, *Internationalizing Justice: The Rise of the International Criminal Court*, November 2003, available at http://www.aei.org/events/filter.foreign,eventID.661/summary.asp

[3433] *See, e.g.*, G. HAFNER, "An Attempt to Explain the Position of the USA towards the ICC", 3 *J.I.C.J.* 323, 325 (2005) (stating that "the main reason for the U.S. rejection of the ICC is undoubtedly connected with the question of *third-party rule*"). *See* for the conceptual underpinnings of U.S. opposition against the third-party rule; M. MORRIS, "High Crimes and Misconceptions: the ICC and non-Party States", 64 *Law & Contemp. Probs.* 13 (2001) (stating, *inter alia*, that ICC jurisdiction over nationals of States-non Parties could not be justified under theories of delegated (universal or territorial) jurisdiction, because there is no previous instance of delegation of territorial or universal jurisdiction to an international court, and because "the delegation of a state's jurisdiction to an international court may raise concerns for states regarding the diminished availability of compromise outcomes in interstate disputes, the heightened political impact of verdicts, the role of an international court in shaping the law, and the possible impediments to diplomatic protection of nationals." *Id.*, at

action to Security Council authorization. The U.S. proposals were soundly defeated. In its final version, the ICC Statute does not exempt nationals of non-Party States from ICC jurisdiction if they committed their acts in the territory of a State Party.[3434] Although the Statute allows for Security Council intervention, a Security Council resolution could only *discontinue* ICC proceedings, and is not required for the initiation of ICC proceedings.[3435]

1031. PRESIDENT CLINTON SIGNING THE ROME STATUTE – Although the U.S. had voted against the Rome Statute in 1998, and it continued to denounce the ICC's significant flaws, President Clinton announced on December 31, 2000 that, as one of his last official acts, he had signed the Rome Statute. The President justified his decision as follows: "With signature [...] we will be in a position to influence the evolution of the Court. Without signature, we will not." He held in particular that the U.S. "should have the chance to observe and assess the functioning of the Court, over time, before choosing to become subject to its jurisdiction." Through signature, the U.S. would send a powerful signal that crimes against international humanitarian law would not go unpunished. In spite of non-ratification, signature would nevertheless enable the U.S. to remain involved in the multilateral system.[3436] At the same time, however, voicing concerns about the jurisdiction of the ICC as it will not only exercise authority over personnel of States that have ratified the Treaty, but also claim jurisdiction over personnel of States that have not, President Clinton did not recommend that his successor, President Bush, submit the Rome Statute to the Senate for advice and consent until fundamental U.S. concerns would be satisfied.[3437] Contrary to popular belief, U.S. opposition against the ICC is thus not initiated by the Bush Administration, but is widely shared across party lines.[3438]

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45). *See* for a U.S. voice supporting ICC jurisdiction over nationals of States non-Parties: M. SCHARF, "The ICC's Jurisdiction over the Nationals of non-Party States: a Critique of the U.S. position", 64 *Law & Contemp. Probs.* 67 (2001) (stating that "Professor Morris's argument blurs the important distinction between the state and its nationals", that "the state of nationality has no right to exercise exclusive jurisdiction over acts committed by its nationals abroad, whether or not they constitute official acts", and that "no *right* of the state of nationality of the accused is prejudiced by assignment of the case to an international criminal court"). SCHEFFER has argued that the U.S. always viewed the Rome Statute as a treaty that would exclude nationals of non-Party States from the jurisdiction of the ICC, except when the Security Council referred a situation to the Court or in case of consent of the non-Party State (*see* D.J. SCHEFFER, "How to Turn the Tide Using the Rome Statute's Temporal Jurisdiction", 2 *J.I.C.J.* 27-28 (2004)). When it became clear that Article 12, § 2 (a) of the ICC Statute would allow the ICC to exercise jurisdiction over nationals of non-Party States who committed a crime in the territory of a State Party, SCHEFFER unsuccessfully attempted to delay the Conference so as to consult with U.S. policy makers in Washington on the issue of extension of jurisdiction. *Id.*, at 28.

[3434] Article 12, § 2 (a) of the ICC Statute.

[3435] Article 16 of the ICC Statute. By severely limiting the role of the Security Council, the drafters de-politicized the ICC. As HAFNER stated, the drafters, the European States in particular, opted for "a system of justice which is said to represent mankind, which is not necessarily understood to be the community of states," whereas the the United States "emphasizes the role of the state as the basic and unique actor in international law." *See* G. HAFNER, "An Attempt to Explain the Position of the USA towards the ICC", 3 *J.I.C.J.* 323, 326 (2005).

[3436] *See also* J.S. NYE *jr.*, *The Paradox of American Power*, Oxford University Press, 2002, at 160.

[3437] President CLINTON's statement is available at http://www.iccnow.org/documents/statements/governments/USClintonSigning31Dec00.pdf

[3438] *See also* P. STEPHAN, "U.S. Constitutionalism and International Law: What the Multilateralist Move Leaves Out", 2 *J.I.C.J.* 12 (2004).

1032. PRESIDENT BUSH 'UNSIGNING' THE ROME STATUTE – Unlike the Clinton Administration, the Bush Administration took a much more intransigent stance on the ICC.[3439] It is however unclear whether a Democratic administration would have continued its support for President Clinton's 'wait-and-see' approach in light of the entry into force of the Rome Statute on July 1, 2002, and thus the possibility of an international court exercising jurisdiction over U.S. nationals. Only as the prospect of an ICC coming into being drew closer, the Bush administration indeed publicly toughened its tone *vis-à-vis* the ICC. Nonetheless, the Head of the U.S. Delegation to the Rome Diplomatic Conference, David SCHEFFER, who was appointed by President Clinton, termed the Bush Administration's stance "a policy of destructive disengagement,"[3440] suggesting that a Democratic Administration would have acted differently.

One of the earliest and most symbolic acts of opposition against the ICC performed by the Bush Administration was its unsigning the Rome Statute on May 6, 2002. A letter signed by Under Secretary of State for Arms Control and International Security John Bolton, on behalf of the U.S., informed the UN Secretary-General that the U.S. did not intend to become a party to the Rome Statute.[3441] Not only did the U.S. exclude any future ratification of the Statute, it also stated that, accordingly, the U.S. would have no legal obligations from its signature on December 31, 2000.

1033. Terming this U.S. action 'unsigning' is legally speaking incorrect though. The Vienna Convention on the Law of Treaties (VCLT, 1969) only provides for the withdrawal of a party to a treaty, *i.e.*, a State that had ratified the treaty.[3442] A State that has merely signed the treaty cannot withdraw or unsign. Nonetheless, under Article 18 VCLT it is possible for a State to renounce the obligation not to defeat the object and purpose of a treaty, the ICC Statute *in casu*, prior to ratification (an obligation conferred by the same provision), if it makes its intention clear not to become a party to the treaty. This is precisely what the U.S. did in its letter from May 6, 2002.

1034. PURSUING 'BILATERAL IMMUNITY AGREEMENTS' – After 'unsigning' the Rome Statute, the U.S. concluded and signed a number of bilateral immunity agreements purportedly based on Article 98 (2) of the ICC Statute.[3443] Under these reciprocal or

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[3439] Some critics contend that President Clinton acted in a dishonest way. Knowing that the U.S. could never accept the Statute, he would have passed on the poisoned chalice of an ICC signature to his successor, President Bush. *Id.*

[3440] *See* D.J. SCHEFFER, "How to Turn the Tide Using the Rome Statute's Temporal Jurisdiction", 2 *J.I.C.J.* 26 (2004).

[3441] Letter by J.R. BOLTON to the Secretary-General of the UN, 6 May 2002, available at http://www.usembassy.org.uk/forpo496.html. This action was pondered in conservative circles since the signature of the Rome Statute by President Clinton. *See e.g.* B.D. SCHAEFER, "Overturning Clinton's Midnight Action on the International Criminal Court", Executive Memorandum, *The Heritage Foundation*, 9 January 2001, available at http://www.heritage.org/Research/InternationalOrganizations/loader.cfm?url=/commonspot/security/getfile.cfm&PageID=3411

[3442] Article 54 VCLT.

[3443] Pursuant to Article 98 (2) of the ICC Statute, "[t]he Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender."

non-reciprocal agreements, the other party commits not to surrender U.S. persons to the ICC, not to retransfer persons extradited to a country for prosecution, and not to assist other parties in their efforts to send U.S. persons to the ICC. They were typically the result of economic pressure brought to bear on the other party by the U.S.[3444]

Having conceded defeat in the Rome Conference on the subject, through signing bilateral immunity agreements, the U.S. intended to make sure that is nationals (the nationals of a non-State Party) would not be surrendered to the ICC.[3445] The agreements cover *all* U.S. nationals, including private citizens.[3446] The Article 98 Agreements have been widely criticised by governments, NGO's and legal doctrine, since the shape that these agreements take would not have been contemplated by Article 98 (2) and would violate the letter and spirit of the ICC Statute. David SCHEFFER for instance, the head of the U.S. delegation to the negotiations on the ICC, argued that the original understanding of Article 98 (2) of the ICC Statute by the Clinton Administration was that it only covered U.S. military personnel and their dependents, and not private citizens.[3447] The Clinton Administration arguably espoused the natural reading of Article 98 (2), which refers to the 'sending State', a term typically featuring in Status of Forces Agreements. Others, particularly the EU and the NGO community, have argued that even the Clinton Administration took too

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[3444] REISMAN describes these agreements as measures of diplomacy or retorsion and does not consider them to be unlawful. *See* M. REISMAN, "Learning to Deal With Rejection: The International Criminal Court and the United States", 2 *J.I.C.J.* 17 (2004).

[3445] In pursuing such agreements, the U.S. may be said to have accepted the *reality* of the ICC. *See* L. P. BLOOMFIELD *Jr.*, U.S. Assistant Secretary for Political-Military Affairs, "The U.S. Government and the International Criminal Court", Remarks to the Parliamentarians for Global Action, Consultative Assembly of Parliamentarians for the International Criminal Court and the Rule of Law, United Nations, New York, 12 September 2003, available at http://www.iccnow.org/documents/statements/governments/USBloomfieldPGA12Sept03.pdf. Reportedly, European States quietly advised the U.S. to pursue bilateral immunity agreements instead of virulently denouncing the ICC. *Id.* It is however difficult to square such purported European insistence well with the later objections of the EU, from September 2002 onwards, to these agreements.

[3446] It has been argued that agreements that cover all U.S. nationals was needed, because in 2003, 400,000 U.S. military personnel were serving in over 100 countries, in 2004, the U.S. would have over 50 treaty alliance commitments to defend the security of other States (L. P. BLOOMFIELD *Jr.*, U.S. Assistant Secretary for Political-Military Affairs, "The U.S. Government and the International Criminal Court", Remarks to the Parliamentarians for Global Action, Consultative Assembly of Parliamentarians for the International Criminal Court and the Rule of Law, United Nations, New York, 12 September 2003, available at http://www.iccnow.org/documents/statements/governments/USBloomfieldPGA12Sept03.pdf), and a considerable number of civilians are present in conflict societies, including journalists, humanitarian workers and corporate executives. In the American view, U.S. nationals could be subject to politically motivated prosecutions at the behest of certain parties to the conflict. Similar concerns are raised by Defense Secretary Donald RUMSFELD and professor WEDGWOOD. RUMSFELD referred to the troubling effect that ICC jurisdiction over U.S. citizens could have in the midst of a difficult, dangerous war on terrorism, a war which is in the interest of the entire world (D. RUMSFELD, Statement on the ICC Treaty after the President's decision to formally notify the UN that the U.S. will not become a party to the ICC Treaty, 6 May 2002, available at http://www.globalsolutions.org/programs/law_justice/icc/resources/rumsfeld_unsigning.html). WEDGWOOD, herself a law professor, for her part denounced ICC supporters for "putting the conduct of future armed conflict wholly in the hand of law professors." (*See* R. WEDGWOOD, summary of her contribution to an AEL panel, *Internationalizing Justice: The Rise of the International Criminal Court*, November 2003, available at http://www.aei.org/events/filter.foreign,eventID.661/summary.asp).

[3447] *See* D. SCHEFFER, "Article 98(2) of the Rome Statute: America's Original Intent", 3 *J.I.C.J.* 333 (2005).

broad a view of Article 98 (2), which would only cover existing agreements.[3448] John BOLTON, the Bush Administration's Under Secretary for Arms Control and National Security, has however retorted that that "our current tally attests to the growing consensus worldwide that Article 98 agreements with coverage of all U.S. persons are legitimate mechanisms as provided in the Rome Statute itself."[3449]

1035. AMERICAN SERVICE-MEMBERS PROTECTION ACT – The U.S. policy of pursuing bilateral immunity agreements ensuring that no U.S. national would be surrendered to

[3448] *See* EU Council Conclusions on the ICC, in response to proposal by the U.S. for bilateral non-surrender agreements with EU Member States, Guiding Principle 1, September 30, 2002 , available at http://www.iccnow.org/documents/EUConclusions30Sept02.pdf. *See also id.*, Guiding Principle 2 ("Entering into US agreements – as presently drafted – would be inconsistent with ICC States Parties' obligations with regard to the ICC Statute and may be inconsistent with other international agreements to which ICC States Parties are Parties."); Council of Europe Parliamentary Assembly Resolution 1300 (2002) of September 25, 2002, and Resolution 1336 (2003), June 25, 2003. *See* for NGO voices: http://www.iccnow.org/documents/FS-BIAsAug2005.pdf

[3449] J. BOLTON, Under Secretary for Arms Control and National Security, U.S. Department of State, Address before the Federalist Society 2003 National Lawyers Convention, delivered November 2003, available at http://www.fed-soc.org/IntlLaw&AmericanSov.htm. Recourse to a "growing consensus worldwide" may betray that the language of Article 98 might not that straightforward. BOLTON however also argued that "Article 98 clearly allows non-surrender agreements that cover all persons, and those who insist upon a narrower interpretation must, in effect, read language into Article 98 that is not contained within the text of that provision." *Id.* According to the Office of the Legal Adviser of the State Department, as quoted by BLOOMFIELD (the opinion of the Office of the Legal Adviser of the State Department is confidential), this reasoning finds support in the 1963 Vienna Convention on Consular Relations. In this Convention, the term 'sending State' would refer to all persons who are nationals of the sending State (In reality, the immunity from jurisdiction under this Convention merely applies to consular officers and consular employees. *See* Article 43 of the Vienna Convention on Consular Relations. *See* Article 1 of this Convention for the definition of the protected persons.). Moreover, construing the scope of Article 98 (2) to include all U.S. nationals would not run counter to the *travaux préparatoires* of the Rome Statute, as these preparatory works would neither confirm nor determine the meaning of Article 98 (2) as relates to scope of coverage. *See* L. P. BLOOMFIELD *Jr.*, U.S. Assistant Secretary for Political-Military Affairs, "The U.S. Government and the International Criminal Court", Remarks to the Parliamentarians for Global Action, Consultative Assembly of Parliamentarians for the International Criminal Court and the Rule of Law, United Nations, New York, 12 September 2003, available at http://www.iccnow.org/documents/statements/governments/USBloomfieldPGA12Sept03.pdf. In another argument, BOLTON and BLOOMFIELD also tried to counter EU criticism by accusing EU countries of hypocrisy, pointing out that France had exempted its nationals who committed war crimes for a period of seven years from the jurisdiction of the ICC under Article 124 of the ICC Statute (BOLTON, *loc. cit.*), and that European States have required broad immunity for their peacekeeping troops in Afghanistan (BLOOMFIELD, *loc. cit.*). At bottom, the U.S. may actually believe that a legal justification is not that important. Notably BLOOMFIELD's statement "I wish to report my government's view that the U.S. position is both legally correct and, *as important, politically appropriate in the most formal sense of the term "political""* (*Id.*, emphasis added) is telling in this context. It should be noted that the *Oxford English Dictionary* defines "political" not only as "relating to the public affairs of a country", but also as "done or acting in the interests of status within an organization rather than on principle" (chiefly derogatory). *See* J. PEARSALL, *The Concise Oxford Dictionary*, 10th ed., 2001, at 1107.

See for a supportive academic voice: R. WEDGWOOD, summary of her contribution to an AEL panel, *Internationalizing Justice: The Rise of the International Criminal Court*, November 2003, available at http://www.aei.org/events/filter.foreign,eventID.661/summary.asp.

See for an overview of the bilateral immunity agreements as of July 8, 2006: http://www.iccnow.org/documents/BIAdb_Current.xls. As of October 1, 2005, a total of 54 countries had rejected US efforts to sign bilateral immunity agreements, even if they risked losing military assistance under the American Servicemembers' Protection Act (ASPA). *See* http://www.iccnow.org/documents/CountriesOpposedBIA_AidLoss_16Dec05.pdf.

the ICC was backed by the American Service-members Protection Act (ASPA), signed into law on August 2, 2002 by President Bush.[3450] The ASPA prohibits any U.S. cooperation with the ICC,[3451] and prohibits any U.S. military assistance to States Parties to the Rome Statute, unless that State has entered into a bilateral immunity agreement with the U.S. or unless that State is a NATO member country or a major non-NATO ally.[3452] Under the Nethercutt amendment, signed into law by President Bush on December 7, 2004, countries that refuse to sign bilateral immunity agreements with the U.S. also see U.S. Economic Support Fund aid cut.[3453] The ASPA even provides, quite outrageously, that [t]he President is authorized to use all means necessary and appropriate to bring about the release of [any U.S. national] who is being detained or imprisoned [for official actions] by, on behalf of, or at the request of the International Criminal Court."[3454]

1036. SECURITY COUNCIL IMMUNITY RESOLUTIONS – The ASPA restriced U.S. participation in UN peacekeeping operations if U.S. service-members participating in such operations were not permanently exempted from ICC jurisdiction.[3455] The Bush Administration therefore made an effort with the members of the Security Council at securing such exemptions. In July 2002, the Security Council granted immunity to personnel from States non-Parties to the ICC Statute (such as the United States) that were involved in UN missions, not indefinitely, but for a renewenable period of twelve months.[3456] In June 2003, the exemption was renewed.[3457] In the face of fierce criticism from States Parties to the ICC Statute, NGO's, and academia, the United States failed to garner sufficient votes in 2004. The few U.S. peacekeepers who operate in the territory of a State Party to the ICC Statute may thus be subject to ICC jurisdiction.[3458]

[3450] Public Law 107-206, Title II, S. AMDT. 3597 to Supplemental Appropriations Act of 2002 (H.R. 4775).
[3451] ASPA, Section 2004.
[3452] ASPA, Section 2007.
[3453] H.AMDT.706 (A015) to the Foreign Operations, Export Financing, and Related Programs. Appropriations Act, 2005 (H.R. 4818).
[3454] ASPA, Section 2008. The ASPA has therefore been dubbed the 'Hague Invasion Act'.
[3455] ASPA, Section 2005.
[3456] Security Council Resolution 1422 (2002). After Hans CORELL, the UN Legal Counsel, stepped down from office in 2004 after a ten-year tenure, he provided the Coalition for the International Criminal Court with an intriguing inside view of the informal consultations leading up to the adoption of Resolution 1422. *See* H. CORELL, "A Question of Credibility", May 2004, http://www.iccnow.org. CORELL was invited by the Security Council to give his opinion on the compromise that the Security Council members had reached, a compromise which was to be formalized in Resolution 1422. At the time, CORELL reluctantly endorsed the text, albeit not on principled grounds. He explained that "under the present circumstances" he could live with it, citing the following reasons for his lukewarm support, all of which testify to his reservations as to the legitimacy of Resolution 1422: 1. the situation that the resolution addressed would not occur; 2. the ICC would anyway independently examine the legality of the resolution; 3. the issue had arisen suddenly in the Council and the compromise would leave time for reflection under less stressful circumstances. Importantly, CORELL was satisfied that the Security Council did not install a perpetual regime clearly in contravention of the Rome Statute, and that the UN Mission in Bosnia-Herzegovina could be extended. For CORELL, the *vaudeville* surrounding Resolution 1422 (and subsequent Resolution 1487) was thus a non-issue. He gave clearance to the U.S.-sponsored resolution, but merely because he believed it would not produce any tangible effects on the working of the ICC.
[3457] Security Council Resolution 1487 (2003).
[3458] If the exemption had been renewed, and a U.S. peacekeeper had appeared before the ICC, the Court would probably have reviewed the legality of the Security Council resolutions under Article 16 of the ICC Statute and possibly declare them invalid. The ICC might indeed not be bound by Security

1037. 2005-2006: SOFTENING THE TONE – In 2005-2006, the critical tone of the United States *vis-à-vis* the ICC softened considerably. This is largely attributable to the Darfur crisis, in the resolution of which the Bush Administration, largely due to pressure from evangelical Christians, had taken a special interest.[3459] On March 31, 2005, the Security Council, acting under Chapter VII of the UN Charter, decided to refer the situation in Darfur since July 1, 2002 to the Prosecutor of the International Criminal Court.[3460] Although the United States abstained from voting,[3461] the fact that it did not scuttle the resolution illustrates that it did no longer oppose the ICC under all circumstances. While it actually preferred a hybrid tribunal to deal with the Darfur crimes, the U.S. eventually decided not to oppose the Resolution "because of the need for the international community to work together in order to end the climate of impunity in Sudan,[3462] and because the resolution provides protection from investigation or prosecution for U.S. nationals and members of the armed forces of non-state parties".[3463] On June 1, 2005, the ICC Prosecutor decided to initiate an investigation into the situation in Darfur.[3464] The United States later pledged to

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Council resolutions, even if adopted under Chapter VII of the UN Charter, since Article 103 of the UN Charter, pursuant to which such resolutions prevail over any other international agreements, is only applicable to UN Members and, at least not expressly, to international institutions such as the ICC. *See, e.g.*, D. SCHEFFER, "Article 98(2) of the Rome Statute: America's Original Intent", 3 *J.I.C.J.* 333, 352 (2005) (stating that "the ICC judges will examine [a bilateral immunity agreement] to determine whether it qualifies as an Article 98(2) agreement that can be invoked by the State Party.") A new Security Council resolution dealing with the case before the ICC might then be required so as to secure immunity for U.S. service-members. *See* H. CORELL, "A Question of Credibility", May 2004, http://www.iccnow.org.

[3459] On July 22, 2004, the U.S. Congress unanimously declared the actions of the Sudanese government and their proxy militias in Darfur as a "genocide". *See* House Concurrent Resolution 467 and Senate Concurrent Resolution 133. The U.S. was the only State to officially declare what was going on in Darfur as a genocide.

[3460] Security Council Resolution 1593 (2005).

[3461] The United States abstained because it "continues to fundamentally object to the view that the ICC should be able to exercise jurisdiction over the nationals, including government officials, of states not party to the Rome Statute". *See* Explanation of Vote by Ambassador Anne W. Patterson, Acting U.S. Representative to the United Nations, on the Sudan Accountability Resolution, in the Security Council, March 31, 2005, available at http://www.un.int/usa/05_055.htm.

[3462] *Compare* J. BRAVIN, "U.S. Warms to Hague Tribunal: New Stance Reflects Desire to Use Court to Prosecute Darfur Crimes", *Wall Street Journal*, June 14, 2006 ("With Britain and France refusing to consider alternatives to the ICC, Washington had to choose which it considered worse: lending the ICC the prestige that would come with a Security Council referral, or leaving atrocities in Darfur unpunished.").

[3463] *Id.* In Resolution 1593 (2005), the Security Council indeed decided "that nationals, current or former officials or personnel from a contributing State outside Sudan which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to operations in Sudan established or authorized by the Council or the African Union, unless such exclusive jurisdiction has been expressly waived by that contributing State" (para. 6). Interestingly, this paragraph has been seized upon by the U.S. as supporting the U.S. view that nationals of non-State parties should not be subject to ICC jurisdiction. *See* Explanation Patterson ("The language providing protection for the US and other contributing states is precedent-setting, as it clearly acknowledges the concerns of states not party to the Rome Statute and recognizes that persons from these states should not be vulnerable to investigation or prosecution by the ICC, absent consent by these states or a referral by the Security Council. In the future, we believe that, absent consent of the state involved, any investigations or prosecutions of nationals of non-Party states should come ONLY pursuant to a decision by the Security Council.").

[3464] *See* http://www.icc-cpi.int/library/cases/ICC-02-05-2_English.pdf.

actively cooperate with the ICC investigation.[3465] The Darfur resolution may be a harbinger of more resolutions in which the Security Council, with explicit or tacit approval of the United States, refers a case to the ICC.[3466] The fact that the Security Council may arguably "exercise … oversight as investigations and prosecutions pursuant to the referral proceed"[3467] might suffice to ensure that an independent overzealous ICC prosecutor does not run amok. In an interview with the *Wall Street Journal*, John BELLINGER, the State Department's Legal Adviser stated that now, the U.S. "acknowledge[s] that [the ICC] has a role to play in the overall system of international justice".[3468] This accords with the rather strong support that the ICC enjoys among the American public.[3469]

In 2006 then, the sanctions regime set forth in the American Service-members Protection Act (ASPA, 2002) – which punished countries which refused to enter into a bilateral immunity treaty with the United States – was relaxed at the behest of the U.S. Southern Command, which pointed out that 11 Latin American countries are sanctioned under the ASPA and were barred from receiving U.S. International Military Education and Training (IMET) funds. It was feared in particular that limiting opportunities for foreign military personnel to attend school with U.S. service-members "[would open] the door for competing nations and outside political actors who may not share [U.S.] democratic principles to increase interaction and influence within the region,"[3470] notably China. Under the new regime, the IMET

[3465] *See* Statement of Assistant Secretary of State for African Affairs Jendayi Frazer in the U.S. House of Representatives, Committee on International Relations, Subcommittee on Africa, Global Human Rights and International Operations, transcript of hearing on Sudan, November 1, 2005, available at http://wwwc.house.gov/international_relations/afhear.htm (stating that "Deputy Secretary [of State] Zoellick has made very clear that if we were asked by the ICC for our help we would try to make sure tat this gets pursued fully, to use his words, because we don't want to see impunity for any of these actors, so they haven't asked, but if they did, we stand ready to assist."). *See however* Section 2004 (b) ASPA ("Notwithstanding section 1782 of title 28, United States Code, or any other provision of law, no United States Court, and no agency or entity of any State or local government, including any court, may cooperate with the International Criminal Court in response to a request for cooperation submitted by the International Criminal Court pursuant to the Rome Statute.").

[3466] Such a referral is possible under Article 13 (b) of the ICC Statute.

[3467] *See* Explanation of Vote by Ambassador Anne W. PATTERSON, Acting U.S. Representative to the United Nations, on the Sudan Accountability Resolution, in the Security Council, March 31, 2005, available at http://www.un.int/usa/05_055.htm.

[3468] *See* J. BRAVIN, "U.S. Warms to Hague Tribunal: New Stance Reflects Desire to Use Court to Prosecute Darfur Crimes", *Wall Street Journal*, June 14, 2006.

[3469] In the WorldPublicOpinion.org/Knowledge Networks Poll, sponsored by the Center on International Cooperation, New York University, published May 11, 2006, 74 pct. of the respondents answered that the U.S. "*should* participate in the International Criminal Court that can try individuals for war crimes, genocide, or crimes against humanity if their own country won't try them." 68 pct. continued to support participation after being presented the U.S. government's argument that "trumped-up charges may be brought against Americans, for example, U.S. soldiers who use force in the course of a peacekeeping operation." Among Republicans answering the latter question, 52 pct. *opposed* participation however. *See* Findings of this poll, p. 9.

[3470] General B.J. CRADDOCK, Head of U.S. Southern Command, statement before the House Armed Services Committee, March 16, 2006, http://www.house.gov;/hasc/schedules/3-16-06SOUTHCOMTestimony.pdf.

program is exempted from ASPA's aid ban,[3471] although other sanctions remain in force.[3472] Possibly, these sanctions may soon be relaxed as well.

10.10.4.b. Common rationale of U.S. opposition against the ICC and against universal jurisdiction

1038. The U.S. mainly opposes the ICC because it fears that the ICC's 'independent' prosecutor will bring politically motivated prosecutors for ill-defined war crimes allegedly committed by U.S. nationals, irrespective of whether the U.S. joins the ICC or not.[3473] It has been pointed out in particular that, although the norms of war are at an abstract level clear, there may be no consensus on the operational standards,[3474] and that prosecutors and courts thus enjoy a wide margin of discretion to assess military necessity.[3475] The danger of prosecutors and courts second-guessing military leaders and official State policy then looms large.[3476] This objection is primarily

[3471] *See* http://www.amicc.org. The amendment was part of the 2007 National Defense Authorization Act, and was passed 96-0 by the U.S. Senate.

[3472] *See* P. BACHELET, "Senate agrees to lift aid ban tied to international court", *Miami Herald*, June 24, 2006 (pointing out that Latin American nations "will not receive $ 24 million in aid from the U.S. Agency for International Development because they joined the ICC".

[3473] *See, e.g.*, Pentagon Memorandum on the ICC, 1998, cited in G. CONSO, "The Basic Reasons for U.S. Hostility to the ICC in Light of the Negotiating History of the Rome Statute", 3 *J.I.C.J.* 314, 316 (2005) ("We must preclude the creation of a so-called *proprio motu* (independent) Prosecutor with unbridled discretion to start investigations."). *Id.*, at 321 ("There was … only *one* major cause for serious disagreement on the part of the United States, namely the conferring of powers of initiative *motu proprio* on the Prosecutor."); J.R. BOLTON, "The Risks and Weaknesses of the International Criminal Court from America's Perspective", 64 *Law & Contemp. Probs.* 167, 173 (2001) (warning that "a zealous independent prosecutor can make dramatic news simply by calling witnesses and gathering documents, without ever bringing formal charges").

[3474] R. WEDGWOOD, summary of her contribution to an AEL panel, *Internationalizing Justice: The Rise of the International Criminal Court*, November 2003, available at http://www.aei.org/events/filter.foreign,eventID.661/summary.asp.

[3475] Even such liberal American voices as Judge Patricia WALD recognize the risk of judges second-guessing the military judgments of military and civil leaders. She proposed considering a special process for dealing with charges based on such judgments. She did not support an amendment of the Rome Statute, but called upon the Prosecutor to issue a policy statement, "setting out the circumstances under which this kind of case would be brought" and to consider publicly justifying a decision not to investigate. *See* P. WALD, "Is the United States' Opposition to the ICC Intractable?", 2 *J.I.C.J.* 24 (2004). In so doing, the Prosecutor could defuse accusations of politicized prosecutions.

[3476] *See, e.g.*, A.P. RUBIN, "The International Criminal Court: Possibilities for Prosecutorial Abuse", 64 *Law & Contemp. Probs.* 153 (2001); R. WEDGWOOD, "The Irresolution of Rome", 64 *Law & Contemp. Probs.* 193, 194 (2001) (arguing that "the emphasis on third-party liability is a measure of U.S. anxiety that the court might ultimately choose to criminalize good faith debates in military doctrine"); *Id.*, 199 ("[W]here the charged conduct consists of the faithfulk execution of official policy, the state remains a real party in interest and the matter is closely akin to the jurisdictional prerequisite of an "indispensable party"); J.R. BOLTON, "The Risks and Weaknesses of the International Criminal Court from America's Perspective", 64 *Law & Contemp. Probs.* 167, 170 (2001) (stating that it is "untolerable and inacceptable" "that the United States would have been guilty of a war crime for dropping atomic bombs on Hiroshima and Nagasaki"); Speech given to the College of Law of the American University of Washington by U.S. Ambassador-at-large for war crimes SCHEFFER quoted in G. CONSO, "The Basic Reasons for U.S. Hostility to the ICC in Light of the Negotiating History of the Rome Statute", 3 *J.I.C.J.* 314, 317 (2005) (stating that "the permanent court must not handcuff governments that take risks to promote peace and security and undertake humanitarian missions. It should not be a political forum in which to challenge legitimate actions of responsible governments by targeting their military personnel for criminal investigation and prosecution."). It has been suggested by the Head of the Italian Delegation to the Rome Conference, and the President of the Conference, that "better calibrating the wording of the principle of complementarity" may soothe U.S. criticism. *See id.* at 315 (2005). It

directed at the ICC for the reasons advanced in the introduction to 10.4.4. Yet it applies as well, and even more so, to the exercise of universal jurisdiction. In national criminal codes, war crimes are at times more ill-defined than in the ICC Statute. Moreover, national prosecutors and courts exercising universal jurisdiction over war crimes have less expertise in dealing with war crimes than their international counterparts. They may also apply war crimes provisions less independently than the ICC because States are more prone to use their universality laws as a tool of political vendetta. In fact, a common rationale underlies U.S. opposition against the ICC and against universal jurisdiction. Yet as the U.S. could more easily influence one State's laws and practice than it could influence the ICC, its has reserved most of its criticism for the ICC.[3477]

1039. That the 'unaccountable' prosecutor of the ICC and of bystander States exercising universal jurisdiction is the man the U.S. loves to hate may be explained by the importance of the Lockeian idea of checks and balances for the U.S. governmental system.[3478] Checks and balances imply that the executive, the legislative and the judicial branch should never have unchecked power lest they become all too powerful.[3479] For the U.S., checks and balances are the *nec plus ultra* of legitimate

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remains however to be seen how Article 17 of the ICC Statute could be rephrased without not somehow widening the impunity gap.

[3477] *Compare* L. P. BLOOMFIELD *Jr.*, U.S. Assistant Secretary for Political-Military Affairs, "The U.S. Government and the International Criminal Court", Remarks to the Parliamentarians for Global Action, Consultative Assembly of Parliamentarians for the International Criminal Court and the Rule of Law, United Nations, New York, 12 September 2003, available at http://www.iccnow.org/documents/statements/governments/USBloomfieldPGA12Sept03.pdf. Citing the amendments to and the eventual abolition of the Belgian universal jurisdiction act in 2003, BLOOMFIELD asserted that, whereas national governments could modify their universal jurisdiction laws in case they prove to be prone to political abuse (*see also* M. MORRIS, "High Crimes and Misconceptions: the ICC and non-Party States", 64 *Law & Contemp. Probs.* 13, 33 (2001)), the ICC has no equivalent oversight mechanism. Although it is true that the Belgian act was repealed by the Belgian legislature, *i.e.*, on the basis of a democratic procedure, it is by no means a secret that the pressure brought to bear on it by the U.S. government was the main incentive to repeal the act. In a realist's terms, the abolition of the act was far from a free and sovereign decision by the Belgian legislature.

The cost of influencing the Security Council members to obtain a desired outcome is undoubtedly much higher than coaxing an isolated State to repeal universal jurisdiction legislation that jeopardizes U.S. interests. Influencing the proceedings before the ICC is much more complicated than influencing national State practice, because it requires a positive vote (or abstention) of all permanent members of the Security Council and a 9 out of 15 majority. ICC accountability to the international community united in the Security Council thus depends on the consensus of all permanent members.

[3478] *See, e.g.*, Pentagon Memorandum, April 21, 1998, quoted in G. CONSO, "The Basic Reasons for U.S. Hostility to the ICC in Light of the Negotiating History of the Rome Statute", 3 *J.I.C.J.* 314, 316 (2005) (recalling "the preoccupation that a court without adequate limitations and a proper system of checks and balances be exploited for political and arbitrary ends"); J.R. BOLTON, "The Risks and Weaknesses of the International Criminal Court from America's Perspective", 64 *Law & Contemp. Probs.* 167, at 174 (2003) (pointing at the "excessive accumulation of powers" in the hands of the ICC Prosecutor, seen from a U.S.-style separation of powers perspective).

[3479] The power of the executive is, amongst others, restrained in that Congress could impeach the President (Article II, § 4 of the U.S. Constitution; Article I, § 2 (5); Article I, § 3 (6)), may override Presidential vetoes (Article I, § 7 (2-3) and has the power to declare war (Article I, § 8 (11)). The power of the legislature is, amongst others, restrained in that the President can wield its veto over decisions by Congress (Article I, § 7 (2-3)) and is commander in chief of the military (Article II (2) (1)). The power of the judiciary is, amongst others, checked in that the President has to power to appoint judges (Article II, § 2 (2)) and pardon power (Article II, § 2 (1)). The judiciary may review acts of the legislature and the executive (Article III).

constitutional organization. It is not surprising then that the U.S. brandished John Adams's words that "[p]ower must not be trusted without a check" at the international level as well.[3480] Europeans, by contrast, draw arguably more heavily on the idea that constitutional legitimacy and individual liberty could only be guaranteed by an efficient and legalized organization of political power, an idea that is prevalent in German political thought, particularly in the writings of WEBER[3481] and HABERMAS.[3482] This is not to say that Europeans are not familiar with a system of separation of powers or checks and balances, or, *horresco referens*, have a predisposition for despotic rule. They certainly are familiar with checked power, as the constitutions of all European States illustrate. Yet European sensitivity for elaborate U.S.-style checks and balances may be less outspoken. With regard to the ICC and universal jurisdiction, this implies that Europeans tend to emphasize institutional efficiency, the application of rational law, and the function of holding criminals accountable (output legitimacy), over adequate checks and balances (input legitimacy). Such a view may, in Habermasian terms, not sufficiently account for the function of social integration that the law and its institutional procedures are deemed to perform. Possibly, Europeans are overly optimistic about the chances of success of a permanent ICC, or of bystander States engaging in the exercise of universal jurisdiction.

1040. For Americans, who tend to emphasize checks and balances over prosecutorial and adjudicative efficiency, the ICC, as well as arguably the mechanism of universal jurisdiction, were created without due regard for constraining conferred powers or providing adequate oversight mechanisms.[3483] STEPHAN, a sharp U.S. critic of the

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[3480] *See* P. STEPHAN, "U.S. Constitutionalism and International Law: What the Multilateralist Move Leaves Out", 2 *J.I.C.J.* 13-14 (2004) (arguing that "[w]orking with [its] constitutionally framed perspective, an American will look at any exercises of substantial authority and ask where the institutional checks are," and that, if an American does not find genuine and regularised checks on the exercise of power, he is "constitutionally inclined to suspect that despotism looms.").

[3481] *Id. See on* Max WEBER's social thinking: M. WEBER & J. WINCKELMANN, *Wirtschaft und Gesellschaft*, Tübingen, Mohr Siebeck, 1990, 5th ed., 945 p.

[3482] See J. HABERMAS, *Between Facts and Norms*, Cambridge, Massachusetts, MIT Press, 1999, 73 (stating that the constitutional polity "does not, in the final analysis, draw its legitimation from the democratic form of the political will-formation of citizens," but that instead "legitimation is premised solely on aspect of the legal medium through which political power is exercised, namely, the abstract rule-structure of legal statutes, the autonomy of the judiciary, as well as the fact that administration is bound by law and has a "rational" construction.").

[3483] *See* M. GROSSMAN, Under Secretary for Political Affairs. Remarks to the Center for Strategic and International Studies, Washington, D.C., 6 May 2002, available at www.iccnow.org. The checks and balances argument is a valid argument. Within an international institution, checks and balances need however not imply that single States should have a decisive role to play in reining in the powers of the institution, lest institutional efficiency be hampered. By creating an international institution, States have precisely abandoned a portion of their sovereign rights. The argument, sometimes advanced by Americans, that the ICC is anathema to national or popular sovereignty is therefore not persuasive. *See, e.g.*, J.R. BOLTON, Under Secretary for Arms Control and National Security, U.S. Department of State, Address before the Federalist Society 2003 National Lawyers Convention, delivered November 2003, available at http://www.fed-soc.org/IntlLaw&AmericanSov.htm (arguing that in case U.S. efforts to secure bilateral immunity agreements are not legitimate under the Rome Statute, they at least "reflect the basic right of any representative government to protect its citizens from the exercise of arbitrary power."); J.R. BOLTON, "The Risks and Weaknesses of the International Criminal Court from America's Perspective", 64 *Law & Contemp. Probs.* 167, 172 (2001) (stating that coercive authority ought to be resting on popular sovereignty). In fact, however, the popular sovereignty argument may not primarily be directed at the ICC itself. It is rather based on the observation that the Prosecutor and the judges do not necessarily come from democratic countries. As RICKARD noted however, all but one

ICC, has argued that an unrestrained judiciary might engage in "hubris, self-enlargement of jurisdiction and the substitution of social policymaking for the considered decision of specific cases."[3484] While U.S. political and economic power may admittedly represent an adequate counterweight against national prosecutors and courts running amok, such power may not suffice to influence the workings of the ICC. A counterweight to the ICC and its prosecutor could be the Security Council, a sort of international executive branch, in which the U.S. wields veto power, yet the Security Council was given only limited powers over ICC proceedings. It does not have the monopoly of seizing the Prosecutor, a monopoly that was favored by the U.S. Instead, it can only, through a negative act taken on the basis of Article 16 of the ICC Statute, temporarily suspend an investigation or prosecution. Any such decision may be vetoed by one of its permanent members. In the American view, such political control by the Security Council is insufficient,[3485] and flawed, politicized prosecutions are the inevitable byproduct.[3486] So far, at any rate, U.S. concerns have not been vindicated, with the ICC only opening investigations after a self-referral by a State Party (Uganda, Democratic Republic of Congo) and by a Security Council referral (Darfur).

1041. U.S. opposition against ICC and universal jurisdiction should, however, not only be explained in terms of different conceptions of constitutional design, but also by the exceptional role in world affairs that the United States sees for itself. It is argued that granting the ICC jurisdiction over the operations of the U.S. military overseas "could well create a powerful disincentive for U.S. military engagement in

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of the 18 judges are citizens of "free countries." *See* S. RICKARD, summary of his contribution to an AEL panel, *Internationalizing Justice: The Rise of the International Criminal Court*, November 2003, available at http://www.aei.org/events/filter.foreign,eventID.661/summary.asp

[3484] *See* P. STEPHAN, "U.S. Constitutionalism and International Law: What the Multilateralist Move Leaves Out", 2 *J.I.C.J.* 13 (2004).

[3485] It is submitted that, as the ICC does, unlike the ICTR and the ICTY, not operate under the functional supervision of the Security Council, it would be far removed from the will of sovereign States, to say nothing of democratic voters in sovereign States. L. P. BLOOMFIELD *Jr.*, U.S. Assistant Secretary for Political-Military Affairs, "The U.S. Government and the International Criminal Court", Remarks to the Parliamentarians for Global Action, Consultative Assembly of Parliamentarians for the International Criminal Court and the Rule of Law, United Nations, New York, 12 September 2003, available at http://www.iccnow.org/documents/statements/governments/USBloomfieldPGA12Sept03.pdf.

[3486] There are other mechanisms of political oversight over the ICC, yet they may fall far short of what the U.S. considers as adequate. The Conference of Parties to the Rome Statute has the power to amend the Statute from 2007 on (Article 121 ICC Statute). It does not require much explanation that a treaty amendment procedure is not an appropriate mechanism to hold the Prosecutor or the Court accountable in specific instances. An amendment may however accommodate some concerns of the U.S. Notably an amendment that would confer immunity *ratione personae* – which is now excluded under Article 27 of the ICC Statute – has been mooted. *See* G. CONSO, "The Basic Reasons for U.S. Hostility to the ICC in Light of the Negotiating History of the Rome Statute", 3 *J.I.C.J.* 314, 315 (2005). A more powerful tool of political control is the authority of the ICC Assembly of States Parties to remove, at any time, the Prosecutor from office by a simple majority if he is found to have committed serious misconduct or a serious breach of his duties (Article 46 ICC Statute. *See also* Rules 23-32 of the ICC Rules of Procedure and Evidence. Article 112, § 6 ICC Statute enables the Assembly of States Parties to hold a special session to that effect.), which may surely include rash and politicized investigations into alleged misconduct by the U.S. nationals (Under Rule 24, § 1 (a) (iii) of the ICC Rules of Procedure and Evidence, "serious misconduct" shall be constituted, *inter alia*, by abuse of judicial office in order to obtain unwarranted favourable treatment from any authorities, officials or professionals.). This 'votes-buying' process, which may be required to reach a majority, might be too burdensome for the U.S.

the world".[3487] U.S. isolationism would in turn be detrimental to the interests of the international community, given the level of U.S. engagement in the world and its contribution to a more peaceful and stable world.[3488] ICC and universal jurisdiction over U.S. nationals (service-members) would thus not only affect U.S. security, but also the security of U.S. friends and allies worldwide.[3489] This 'multilateral' argument is weak because it is not multilaterally developed but unilaterally presented by the U.S. The European Union and European States have criticized U.S. efforts to undermine the ICC, thus apparently denying the validity of the U.S. reasoning, and believing that the ICC would not affect world security.[3490] In addition, European States have refused to grant exemptions to U.S. nationals from prosecutions of core crimes violations under the universality principle.[3491]

In the final analysis, the U.S. does not want to have its hands tied by international criminal justice mechanisms because these may endanger the U.S. *own* national interest. In view of its recent military interventions and the attendant high level of U.S. troops deployment overseas, the risk of having its military actions second-guessed by possibly biased international judges is just too high to take.[3492] European States support international criminal justice because it hardly endangers their national interests, given the low level of European troops deployment overseas. For Europeans, international criminal justice may in addition serve as a tool of restraining

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[3487] *See* D. RUMSFELD, Statement on the ICC Treaty after the President's decision to formally notify the UN that the U.S. will not become a party to the ICC Treaty, 6 May 2002, available at http://www.globalsolutions.org/programs/law_justice/icc/resources/rumsfeld_unsigning.html

[3488] *Id.*

[3489] *See* J. BOLTON, Under Secretary for Arms Control and National Security, U.S. Department of State, Address before the Federalist Society 2003 National Lawyers Convention, delivered November 2003, available at http://www.fed-soc.org/IntlLaw&AmericanSov.htm

[3490] *See* Article 1 (1) of EU Council Common Position 2003/444/CFSP on the International Criminal Court of June 13, 2003 ("The International Criminal Court, for the purpose of preventing and curbing the commission of the serious crimes falling within its jurisdiction, is an essential means of promoting respect for international humanitarian law and human rights, thus contributing to freedom, security, justice and the rule of law as well as contributing to the preservation of peace and the strengthening of international security, in accordance with the purposes and principles of the Charter of the United Nations."). *See also* EU Council Conclusions on the ICC, in response to proposal by the U.S. for bilateral non-surrender agreements with EU Member States, September 30, 2002, available at http://www.iccnow.org/documents/EUConclusions30Sept02.pdf.

[3491] At times, they seem to have given in to U.S. pressure (*e.g.*, Belgium, abolition of universal jurisdiction act in 2003; Germany, federal prosecutor disposing of a complaint against Defence Secretary Rumsfeld in 2005), but there is no evidence that they have done so because they considered the U.S. to be an exceptional nation whose nationals are somehow above the law.

[3492] It has been argued that "if the United States seeks a multilateral basis for its military interventions", "it would be hard [for the ICC] to argue that action based on this foundation was illegal". Accordingly, if the U.S. were to decide not to go it alone any longer, prospects for U.S. ICC participation may be brighter. It has also been suggested that, if effective U.S. participation may prove elusive, "some restrictions to the jurisdiction of the ICC concerning military personnel of third States [such as the U.S.]", *e.g.*, an arrangement that official U.S. action in the framework of "activities performed under international authorization" may not be amenable to ICC jurisdiction, may at least bring the United States to a position of neutrality toward the ICC. *See* G. HAFNER, "An Attempt to Explain the Position of the USA towards the ICC", 3 *J.I.C.J.* 323, 328-29 (2005). In Security Council Resolution 1593 (2005), the latter solution was indeed decisive in securing U.S. abstention from voting against a resolution which would refer the situation in Darfur to the ICC (stating that "nationals, current or former officials or personnel from a contributing State outside Sudan which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to operations in Sudan established or authorized by the Council or the African Union").

the international action of powerful and interventionist States such as the United States.[3493] Drawing on Robert KAGAN's ideas, international law and international criminal justice then appear as instruments in the hands of the weak to limit the sphere of action of the strong.[3494]

10.11 Concluding remarks on universal criminal jurisdiction

1042. Universal jurisdiction has been described as 'the linchpin of international law'.[3495] It is assumed to solve negative conflicts of jurisdiction stemming from a situation when States with a nexus to the case prove unwilling or unable to genuinely prosecute the case. Universal jurisdiction corrects the shortcomings of territoriality- and nationality-based jurisdiction, and allows bystander States to exercise their jurisdiction by default, through fiat of the international community.[3496]

Since the 1990s, universal criminal jurisdiction has finally made headway, particularly in Europe. This is largely attributable to the international community's desire to punish the offenders of grave violations of international humanitarian law committed in the territory of Rwanda or the former Yugoslavia.[3497] In order to try these crimes, international tribunals were set up, the success of which may have boosted demands for the assertion of universal jurisdiction by national tribunals, willing to shoulder their burden of global justice responsibility.[3498] In the *Blaskic* case

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[3493] *Compare id.*, 325-26 ("Whereas the Europeans adhere to a Lockean concept of international relations, which views international law as an instrument to steer cooperation, the US position is seen to be governed by a Hobbesian approach, which sees states as being in permanent conflict with each other, and under which international law is seen as a device to protect state interests against assaults by hostile states.").

[3494] R.A. KAGAN, *Of Paradise and Power: America and Europe in the New World Order*, New York, Knopf, 2003, 103 p.; J.R. BOLTON, "The Risks and Weaknesses of the International Criminal Court from America's Perspective", 64 *Law & Contemp. Probs.* 167, 171 (2001) (denouncing an international law "that continues ineluctably and inexorably to reduce the international discretion and flexibility of nation States, and the United States, in particular").

[3495] *See* A. SAMMONS, "The Under-Theorization" of Universal Jurisdiction: Implications for Legitimacy on Trials of War Criminals by National Courts", 21 *Berkeley J. Int'l L.* 111, 113 (2003).

[3496] *See* M. INAZUMI, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law*, Antwerp-Oxford, Intersentia, 2005, at 204-206.

[3497] The conflicts in Rwanda and the former Yugoslavia had a stronger nexus with Europe than with the United States. Until 1960, Rwanda was colonized by European powers, whereas Yugoslavia is an integral part of Europe. This may partly explain European activity and U.S. passivity in the prosecution of core crimes committed in the course of these conflicts. European countries may have felt morally more obligated than the United States to try these crimes that they were not able to prevent. The French *ad hoc* law establishing universal jurisdiction over crimes within the purview of the ICTR and the ICTY may testify to this sensitivity. One could surely doubt whether the desire for *Wiedergutmachung vis-à-vis* the Rwandan and Yugoslav victims through adopting and using general laws providing for universal jurisdiction will deter perpetrators of gross human rights violations. Most likely, the desire for justice prevails over deterrence as the rationale for the exercise of universal jurisdiction. *See* M. KAMMINGA, "Lessons Learned from the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offenses", 23 *Hum. Rts. Q.* 940, 944 (2001).

[3498] *See* R. VAN ELST, "Implementing Universal Jurisdiction over Grave Breaches of the Geneva Conventions", 13 *Leiden J. Int. L.* 815, 841 (2000); M. INAZUMI, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law*, Antwerp-Oxford, Intersentia, 2005, at 43; M. COSNARD, "La compétence universelle en matière pénale", in C. TOMUSCHAT & J.-M. THOUVENIN (eds.), *The Fundamental Rules of the International Legal Order. Jus Cogens and Obligations Erga Omnes*, Leiden, Boston, Martinus Nijhoff, 2006, 355, 356. Doctrinal interest in universal jurisdiction has historically however precisely

(1997), the ICTY Appeals Chamber even encouraged States to exercise universal jurisdiction, holding that the "national jurisdictions of the States of ex-Yugoslavia, as those of all States, were required by customary law to judge or to extradite those persons presumed responsible for grave violations of international humanitarian law."[3499]

1043. In this final section on universal criminal jurisdiction, it will be argued that it could be collected from the country studies that universal jurisdiction is authorized under public international law, although the United States may be fairly critical of the universality principle, and of international criminal justice in general (subsection 10.11.1). Because of the U.S.-EU perspective of this study, in a separate subsection it will be explained why and how the transatlantic international criminal justice gap emerged (subsection 10.11.2).

Although universal jurisdiction may be legal under international law, reasonableness requires that States exercise some restraint when asserting universal jurisdiction, so that foreign nations' sovereignty concerns are accommodated. Gradually, a principle is being formed by virtue of which States only exercise universal jurisdiction on a subsidiary basis, namely when the home State is unable or unwilling to prosecute and investigate a violation (subsection 10.11.3). After discussing the subsidiarity principle, and comparing it to the ICC's complementarity principle, it will finally be pointed out that reasonable adjustments to the exercise of universal jurisdiction may ensure its survival. Jurisdictional reasonableness may explain why, after the tension over the Belgian universal jurisdiction act, assertions based on the universality principle have met with less hostile reactions (subsection 10.11.4).

10.11.1. Legality of universal jurisdiction

1044. In the subsection 10.11.1, the answer to the question whether universal jurisdiction is legal under international law was reserved for a later stadium, because it required a careful analysis of the State practice. Having surveyed the practice of a wide array of States in this chapter 10, could one now assume that customary international law *authorizes* the exercise of universal criminal jurisdiction over core crimes against international law? The doctrine has taken the view that one could, given the widespread State practice in the field.[3500] All States studied in this study

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been linked with the *failure* to establish international criminal tribunals. *See* M. INAZUMI, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law*, Antwerp-Oxford, Intersentia, 2005, at 117.

[3499] ICTY, *Blaskic*, 29 October 1997, case IT-95-14-AR, para. 29.

[3500] *See also* A. ZIMMERMANN, "Violations of Fundamental Norms of International Law and the Exercise of Universal Jurisdiction in Criminal Matters", in C. TOMUSCHAT & J.-M. THOUVENIN (eds.), *The Fundamental Rules of the International Legal Order. Jus Cogens and Obligations Erga Omnes*, Leiden, Boston, Martinus Nijhoff, 2006, 335, 351 ("the exercise of universal jurisdiction regarding the three core crimes – genocide, crimes against humanity and war crimes – is indeed based on broad State practice"). Courts typically exercise universal jurisdiction on the basis of statutory authorization (*see, e.g.*, M. COSNARD, "La compétence universelle en matière pénale", in C. TOMUSCHAT & J.-M. THOUVENIN (eds.), *The Fundamental Rules of the International Legal Order. Jus Cogens and Obligations Erga Omnes*, Leiden, Boston, Martinus Nijhoff, 2006, 355, 371). The legislature rather than the courts have thus considered universal jurisdiction to be authorized by customary international law. Among all decisions by European courts and magistrates involving the exercise of universal jurisdiction, just one was directly based on international law: in 1998, a Belgian investigating magistrate based universal jurisdiction over crimes against humanity on customary international law, in

indeed entertain universal jurisdiction over one or more core crimes against international law. However, only the States that *actually* exercise universal jurisdiction have been examined. Is it intellectually honest to argue, on that basis, that a norm of universal customary international law authorizing universal jurisdiction has crystallized? It arguably is, if one takes a somewhat different view of customary international law formation, a view termed a "modern positivist" understanding of international law making by KRESS,[3501] who draws on SIMMA and PAULUS.[3502] Under this understanding, customary international law may also develop on the basis of general principles and 'verbal' State practice. One may argue that the international community's desire not to let core crimes go unpunished, a desire which has been translated in the international criminalization of heinous acts and in widespread State support for international criminal tribunals, notably the ICC, may, as KRESS submits, "be seen as a strong indication in favour of a customary state competence to exercise universal jurisdiction".[3503] Admittedly, in itself, international criminalization does not necessarily confer universal jurisdiction over international crimes, yet the fact that no State seems to have objected *as a matter of principle* to another State's particular assertion of universal jurisdiction[3504] (although in the ICJ proceedings of *Congo* v. *France*, Congo submitted that France could not exercise universal jurisdiction over torture under the UN Torture Convention over nationals of non-Party States, and thus argued that there was no universal jurisdiction over torture under customary international law) may surely be seen as a boon for an argument in favour of universal jurisdiction. The fact that not all States exercise universal jurisdiction does not seem to betray an *opinio juris* that universal jurisdiction is *illegal* under international law. Rather, their reluctance is informed by a lack of prosecutorial resources, the desire not to upset powerful foreign nations, or evidentiary constraints. This is not to say that the exercise of universal jurisdiction is uncontroversial. As shown, it surely is. However, the controversy focuses rather on the modalities of application of the universality principle. It is, indeed, not yet settled what restraining principles should be applied so as to render actual assertions of universal jurisdiction reasonable (see subsection 10.11.3),[3505] nor is it settled what crimes against international humanitarian law (*e.g.*,

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the absence of a domestic statute authorizing such jurisdiction. *See* Juge d'instruction de Bruxelles, ordonnance, 6 November 1998, *Rev. dr. pén. crim.* 1999, 278, 288. Legislatures have conferred universal jurisdiction on the courts on the basis of detailed legal provisions, while others resorted to general enabling clauses authorizing national courts to exercise universal jurisdiction if the State is under an international obligation to do so. States which expressly provided for universal jurisdiction over specific offences have typically been more active in the prosecution of such offences under the universality principle than States which relied on a general enabling clause.

[3501] C. KRESS, "Universal Jurisdiction over International Crimes and the *Institut de Droit international*", *4 J.I.C.J.* 561, 573 (2006).

[3502] B. SIMMA & A. PAULUS, "The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: a Positivist View", 93 *A.J.I.L.* 302 (1999).

[3503] *See* C. KRESS, "Universal Jurisdiction over International Crimes and the *Institut de Droit international*", *4 J.I.C.J.* 561, 573 (2006).

[3504] *See also* A. ZIMMERMANN, "Violations of Fundamental Norms of International Law and the Exercise of Universal Jurisdiction in Criminal Matters", in C. TOMUSCHAT & J.-M. THOUVENIN (eds.), *The Fundamental Rules of the International Legal Order*. *Jus Cogens and Obligations Erga Omnes*, Leiden, Boston, Martinus Nijhoff, 2006, 335, 353 ("it seems that no State has with regard to the exercise of universal jurisdiction concerning genocide, crimes against humanity or war crimes, so far acted as a persistent objector").

[3505] *See also* M. COSNARD, "La compétence universelle en matière pénale", in C. TOMUSCHAT & J.-M. THOUVENIN (eds.), *The Fundamental Rules of the International Legal Order. Jus Cogens and Obligations Erga Omnes*, Leiden, Boston, Martinus Nijhoff, 2006, 355, 364.

only grave breaches of the laws of war, or also minor breaches) are amenable to universal jurisdiction.[3506]

1045. Admittedly, it has been submitted that U.S. "reluctance … to assert universal jurisdiction underscores the premise that this doctrine is not part of well-established customary international law."[3507] Nonetheless, while the U.S. may be loath to exercise universal criminal jurisdiction, it need therefore not *per se* take issue with other States' assertions of universal jurisdiction. The United States opposed the universality principle during the drafting process of the 1948 Genocide Convention, but there have been no official declarations by the United States rejecting the universality principle as a matter of international law in the context of core crimes ever since.[3508] Domestic concerns may go a long way in explaining the non-application of the universality principle to the prosecution of crimes against international humanitarian law. And when the United States virulently opposed the Belgian 1993/1999 international crimes act, it may have taken issue with the conditions of the exercise of universal jurisdiction (the mechanism of civil party petition in particular) rather than with the principle itself. Similarly, while, as will be elaborated upon in this section, U.S. opinion is critical of the role that universal jurisdiction, and international criminal justice in general, could play in ensuring long-term political stability in the territorial State, this criticism may not call into question the legality of universal jurisdiction itself, but rather urge, not unwarrantedly, that it constitute the exception rather than the rule when 'solving' situations of gross human rights violations. What is more, there are indications of active U.S. support for universal jurisdiction over core crimes. The U.S. occasionally encouraged other States to exercise universal jurisdiction over such crimes where it could not,[3509] and was one of the main promoters of the universal jurisdiction clause in the UN Torture Convention.

10.11.2. The transatlantic divide over international criminal justice

1046. TRANSATLANTIC DIVIDE – In subsection 10.11.1, it has been argued that while the United States does not exercise universal jurisdiction over core crimes

[3506] INSTITUTE OF INTERNATIONAL LAW, Resolution of the 17th Commission on universal criminal jurisdiction with regard to the crime of genocide, crimes against humanity and war crimes, Krakow Session, 2005, nr. 3(a), states that "[u]niversal jurisdiction may be exercised over crimes identified by international law as falling within that jurisdiction *in matters such* as genocide, crimes against humanity, grave breaches …" (emphasis added). The Institute thus seems to imply that *not all* crimes of genocide, crimes against humanity and grave breaches of the law are amenable to universal jurisdiction. *See also* C. KRESS, "Universal Jurisdiction over International Crimes and the *Institut de Droit international*", *4 J.I.C.J.* 561, 571 (2006).

[3507] See G. BYKHOVSKY, "An Argument against Assertion of Universal Jurisdiction by Individual States", 21 *Wisconsin J. Int'l L.* 161, 168 (2003).

[3508] Admittedly, during the drafting process of the ICC Statute, the United States rejected the exercise of universal jurisdiction by the ICC. This need however not imply that it would also take issue with the exercise of universal jurisdiction by bystander States. M. MORRIS, "High Crimes and Misconceptions: the ICC and Non-Party States", 64 *Law & Contemp. Probs.* 13, 30 (2001) (stating that "states would have reason to be more concerned about the political impact of adjudication before an international court than before an individual state's courts").

[3509] *See* A. ZIMMERMANN, "Violations of Fundamental Norms of International Law and the Exercise of Universal Jurisdiction in Criminal Matters", in C. TOMUSCHAT & J.-M. THOUVENIN (eds.), *The Fundamental Rules of the International Legal Order. Jus Cogens and Obligations Erga Omnes*, Leiden, Boston, Martinus Nijhoff, 2006, 335, 348. *See, e.g.*, the prosecution of Al Doori by Austria (chapter 10.8).

against international law, it does therefore not oppose other States' assertions of universal jurisdiction. U.S. reluctance to exercise universal jurisdiction may be explained by the particular features of the U.S. legal system,[3510] and by the fear that exercising universal jurisdiction could invite other States to prosecute U.S. nationals abroad – a fear which is not unfounded given the worldwide deployment of U.S. troops. It could however also be explained by a different philosophy of how to address situations in which international crimes have occurred. Where European States tend to believe that international criminal justice, dispensed by either national courts (e.g., bystander States exercising universal jurisdiction) or international courts (e.g., the ICC), plays an important role in ensuring long-term peace and political reconciliation in post-conflict countries, the United States may believe that political solutions are the prime methods of ensuring peace and reconciliation, even if they confer impunity on particular individual perpetrators. In the U.S. view, local justice should be emphasized and international retributive mechanisms should only exceptionally be resorted to.

1047. EUROPE – By providing for universal jurisdiction over politically charged crimes, European States espouse the rule of law view on dealing with international crimes. They are followers of the idealist or legalist school of international relations which emphasizes that law should prevail over politics.[3511] In their grand design of an international society, they believe that criminal justice is a potent tool to hold perpetrators of gross human rights violations to account and to deter new violations. For Europeans, universal jurisdiction is a step toward a just world order in which the weak are protected from abuse by the powerful. In economic terms, peace and freedom from human rights violations is a global public good that could arguably only be guaranteed by providing for international retributive justice.

This is not to say that European prosecutors are always willing to investigate and prosecute international crimes subject to universal jurisdiction if a suspect can be found in a European State. In practice, they will often refuse to take the case due to

[3510] Much more than in the civil law tradition, evidence presented by the prosecutor is in such common law countries as the United States subject to an adversarial debate. As trials involving overseas gross human rights offences may require written depositions and testimony by means of video- or audio-link instead of direct testimony *in personam*, because of the distance between the territorial State and the forum State and in view of the possible unwillingness of witnesses to testify for fear of reprisals, the adversarial debate between the accused and the prosecutor may be hampered. Also, common law criminal justice system do not have the sort of independent civil law investigating magistrates (*e.g.*, Belgium, France) *required* to initiate investigations into crimes against international humanitarian law upon a *prima facie* valid complaint. The independence of prosecutors – and its concomitant risk of freewheeling unaccountable behavior – is almost non-existent, which obviously serves as an important brake on the exercise of universal jurisdiction.

[3511] *See* H.J. STEINER, "Three Cheers for Universal Jurisdiction", 5 *Theoretical Inquiries in Law* 199, 212 (2004). *See id.*, at 217. STEINER identified four arguments used by the proponents of universal jurisdiction, including European States;

1. prosecutions are a less costly and risky path than strong intervention or other significant political commitments of international organizations and States;
2. they provide a ray of hope given the failures of will to act politically, economically and militarily at an earlier stage with respect to several of the worst ethnic conflicts;
3. they attempt to "depoliticize" and "legalize" and perhaps make manageable the unruly world of human rights by setting legal-institutional precedents that move towards the rule of law;
4. their creation expresses a passionate moral belief that those committing gross abominations should be subjected to legally and fairly imposed punishment."

lack of experience or specialization,[3512] lack of cultural knowledge[3513] and resources[3514], the difficulties of obtaining evidence abroad,[3515] the unwillingness or impossibility to travel of foreign witnesses,[3516] witness protection, the elapse of time, translation costs, and last but not least, political expediency.[3517] Yet at bottom, European States believe that the threat of universal jurisdiction and international criminal justice "widens the political and moral space for accountability in countries where atrocious crimes occurred,"[3518] in the short run, and ensures peace in the long run.

[3512] *See, e.g.*, M. INAZUMI, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law*, Antwerp-Oxford, Intersentia, 2005, at 201.

[3513] Bystander States may in this context be keener to exercise jurisdiction if they have cultural and historical ties with the territorial State. *See, e.g.*, Spain (primarily prosecuting crimes committed in its former colonies in Latin America) and Belgium (primarily prosecuting crimes committed in its former colony Rwanda).

[3514] *Compare* L. REYDAMS, *Niyoneze* v. *Public Prosecutor*, 96 *A.J.I.L.* 231, 236 (2002) (stating that "[t]he [Swiss] *Niyonteze* case demonstrates that once judicial authorities have gained expertise, are willing to devote the necessary resources, and can count on the assistance of the territorial state, perpetrators of crimes under international law can be tried fairly and speedily in a foreign state" [in the *Niyoneze* case in less than a month, while an ICTR trial typically takes 15 months]).

[3515] It is not surprising that in most cases that reached the trial phase, prosecutors could rely upon the co-operation of the territorial State, which often had an interest in the conviction of a perpetrator of human rights violations associated with a former regime – who fled the new regime and requested asylum in the forum State. Yet even when the territorial State cooperates, evidence-gathering may be complicated, although the notoriety of the facts may facilitate it. *See* D. VANDERMEERSCH, "Prosecuting International Crimes in Belgium", 3 *J.I.C.J.* 400, 411 (2005). When prosecutors could obtain evidence, verifying their authenticity or interpreting it properly may also prove an arduous task *See* R. RABINOVITCH, "Universal Jurisdiction *In Absentia*" 28 *Fordham Int'l L. J.* 500, 526 (2005).

[3516] The government sometimes grants financial assistance for the transferral of witnesses from abroad. In France, the investigating judge in the *Pinochet* case obtained the French Treasury's financial assistance in bringing French witnesses from Chile to France. It could however be doubted that financial assistance would be granted if the victims were not French citizens. *See* W. BOURDON, "Prosecuting the Perpetrators of International Crimes: What Role May Defence Counsel Play?", 3 *J.I.C.J.* 434, 442 (2005).

[3517] *See also* HOME OFFICE, "Review of Extra-Territorial Jurisdiction", Steering Committee Report, July 1996, at 20, § 3.6 (on file with the author – see for an illustrative calculation of costs relating to extraterritorial cases: *id.*, at pp. 30-35, Part 4). VAN ELST quotes the Danish Public Prosecutor in the *Saric* case as saying: "Why did this happen to me? Why did he have to come to Denmark? Why did he not go somewhere else to seek asylum?". *See* R. VAN ELST, "Implementing Universal Jurisdiction over Grave Breaches of the Geneva Conventions", 13 *Leiden J. Int. L.* 815, 853 (2000). *See also* M. KAMMINGA, "Lessons Learned From the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences", 23 *Hum. Rts. Q.* 940, 959-60 (2000). What is more, public prosecutors almost never initiate prosecutions for international crimes at their own behest, and the police are not particularly keen on tracking down presumed offenders of IHL crimes on their territory (*see* W. BOURDON, "Prosecuting the Perpetrators of International Crimes: What Role May Defence Counsel Play?", 3 *J.I.C.J.* 434, 440 (2005)), probably because States do not want to offend other States. Instead, the initiative is often left to the victims (or their attorneys) (*Id.*, at 441, asserting that victims have "become the quasi-exclusive architects of the evolution of international law and French jurisprudence."), who could file a civil party petition in the framework of a criminal proceeding (which an investigating magistrate is required to investigate), or who could sue the offenders in civil courts. This illustrates how important individuals are in the enforcement of international law (*see also* M.P. GIBNEY, "On the Need for an International Civil Court", 26-FALL *Fletcher F. World Aff.* 47, 50-51 (2002) ("victims have shown a far greater interest in seeing that justice is served than states have", referring to the U.S. Alien Tort Statute, a *tort* statute, in particular).

[3518] *See* D. ORENTLICHER, "The Future of Universal Jurisdiction in the New Architecture of Transnational Justice", in S. MACEDO (ed.), *Universal Jurisdiction*, Philadelphia, PA, University of Pennsylvania Press, 2004, at 228. The prosecution of General Pinochet by Chilean judicial authorities,

1048. The European position is clearly captured by a recent EU policy document, the "European Union Guidelines on promoting compliance with international humanitarian law."[3519] While the EU admits that "[t]o have a deterrent effect during an armed conflict the prosecution of war crimes must be visible, and should, if possible, take place in the State where the violations have occurred",[3520] it also states that "[w]hile, in post-conflict situations it is sometimes difficult to balance the overall aim of establishing peace and the need to combat impunity, *the European Union should ensure that there is no impunity for war crimes*."[3521] The EU thus implies that criminal liability for gross human rights violations ought not to be bargained away by the parties to the conflict, and that, if local justice cannot be done, international criminal justice should be dispensed.

1049. UNITED STATES – Americans by contrast tend to emphasize the role of political over criminal processes in dealing with gross human rights violations.[3522] Americans typically argue that international criminal justice risks neglecting the wider political context of gross human rights violations, or even worse, thwarting efforts that a fractured society undertakes toward political reconciliation.[3523] STEINER warned in this respect that "[c]ourts do not decree and enforce the fundamental political

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after the proceedings in the UK, is often cited in this context. *See, e.g.*, N. ROHT-ARRIAZA, *The Pinochet Effect*, Philadelphia, PA, University of Pennsylvania Press, 2004.; M. KAMMINGA, "Lessons Learned from the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offenses", 23 *Hum. Rts. Q.* 940, 944 (2001); A. POELS, "Universal Jurisdiction *In Absentia*", 23 *Neth. Q. Hum. Rts.* 65, 79 (2005). The conviction of the Afghan warlord Zardad by a British court in 2005 also raised prospects for prosecution in post-Taleban Afghanistan, where (former) war lords still wield enormous power and are awarded government positions. *See* P. GROSSMAN, "Warlord's conviction brings hope for justice", *International Herald Tribune*, July 22, 2005. There is however no conclusive empirical evidence of an enhanced domestic accountability effort.

[3519] *O.J.*, C 327/4 (2005).

[3520] *Id.*, nr. 16 (g) (adding that "[t]he EU should therefore encourage third States to enact national penal legislation to punish violations of IHL.")

[3521] *Id.*, nr. 16 (g) (emphasis added).

[3522] *See* in particular J.R. BOLTON, "The Risks and Weaknesses of the International Criminal Court from America's Perspective", 64 *Law & Contemp. Probs.* 167, 175 (2001) ("Misunderstanding the appropriate roles of force, diplomacy, and power in the world is not just bad analysis, but bad and potentially dangerous policy."). *Id.*, at 176 (preferring political tradeoffs over justice because "[h]uman conflict teaches that, unfortunately for moralists and legal theorists, mortal policymakers often must make tradeoffs among inconsistent objectives"). *Id.*, at 177-78 ("[A]ccumulated experience strongly favors a case-by-case approach, politically and legally, rather than the inevitable resort to adjudication", citing the South African Truth and Reconciliation Commission).

[3523] *See, e.g.*, J.R. BOLTON, "The Risks and Weaknesses of the International Criminal Court from America's Perspective", 64 *Law & Contemp. Probs.* 167, at 178-80 (2001) (railing against "vindication, punishment and retribution", pointing at the "complexity of the moral and political problems", and stating that "insisting on legal process as a higher priority than a basic political resolution can adversely affect both the legal and political sides of the equation"). How national courts should handle amnesties and the decisions of truth commissions, for instance, is a widely debated issue. *See, e.g.* H.J. STEINER, "Three Cheers for Universal Jurisdiction", 5 *Theoretical Inquiries in Law* 2004, 199, at 220-21. It has interestingly been pointed out that the nature of the amnesty may determine the possibility of complaints filed with foreign prosecutors and courts. Victims will usually not be queuing up to file such complaints in case of conditional amnesties receiving widespread domestic and international legitimacy. Conversely, the odds of complaints alleging human rights violations covered by blanket amnesties and self-amnesties being filed ought to be much greater. *See* N. ROHT-ARRIAZA, *The Pinochet Effect*, Philadelphia, PA, University of Pennsylvania Press, 2004, 196.

transformations that can amount to human rights revolutions."[3524] In the same vein, STEPHAN warned of the risk that the claims of international criminal justice, buttressed by the "gently pressed aspirations" of the Europeans, may fail to be honored: "What the United States is telling the international community, … is that, as the enterprise of international law becomes greater and more meaningful, we need to devote attention to means, not just ends."[3525] It may be submitted that the U.S. support international criminal justice, and international law in general, only if they are convinced that they – and the international community – can live up to it. For Americans, international law is not a playground for experimentation. If the U.S. is in doubt whether a particular regime will prove workable, it will not support it. Europeans, on the other hand, seem more inclined to embark on a trial-and-error process so as to bring international law on a higher plane.[3526] Americans may not believe that international criminal justice will work. Instead, they tend to support local criminal justice, because justice done in a local setting, close to the events, may arguably have more impact on post-conflict societies.[3527] It has been submitted, not

[3524] *See* H.J. STEINER, "Three Cheers for Universal Jurisdiction", 5 *Theoretical Inquiries in Law* 2004, 199, 217.

[3525] P. STEPHAN, "U.S. Constitutionalism and International Law: What the Multilateralist Move Leaves Out", 2 *J.I.C.J.* 12 (2004).

[3526] President CLINTON's signature of the ICC Statute and his accompanying wait-and-see statement are testimony to this. Pushed to its extremes, it implies that the U.S. will only support international law and institutions provided that their claims can be honoured in a domestic context, *i.e.* the most readily available touchstone of practical feasibility. Short of domestic mirroring, the U.S. will attempt to heavily influence a legal regime so as to have its concerns taken into account. The vicissitudes of the UN Convention of the Law of the Sea (UNCLOS) may exemplify this. As the U.S. refused to sign UNCLOS, its contentious Part IX was amended. This might pave the way for the eventual ratification of UNCLOS by the U.S. In the same vein, an amendment to the Rome Statute aimed at assuaging U.S. fears may prompt the U.S. to ratify the Statute, although REISMAN doubts whether any adjustment of the Statute will satisfy its opponents. *See* W.M. REISMAN, "Learning to Deal With Rejection: the International Criminal Court and the United States", 2 *J.I.C.J.* 18 (2004).

[3527] J.R. BOLTON, "The Risks and Weaknesses of the International Criminal Court from America's Perspective", 64 *Law & Contemp. Probs.* 167, 178 (2001) (arguing that "the fullest cathartic impact of the prosecutorial approach to war crimes and similar outrages occurs when the responsible population itself comes to grips with its past and administers appropriate justice"); American Servicemembers' Protection Act: Hearing on H.R. 4654 Before the House Committee on International Relations, 107th Cong. (2000) (testimony of John R. Bolton, Senior Vice President, American Enterprise Institute, later Undersecretary of State for Arms Control and U.S. Ambassador to the United Nations) ("Morally and politically, what Pinochet's regime did or did not do is primarily a question for Chile to resolve."). Local justice surely has obvious advantages in terms of evidence-gathering and victim participation. It enables local communities to seek for an acceptable societal solution that distant and disconnected fora cannot provide. *See, e.g.*, G.P. FLETCHER, "Against Universal Jurisdiction", 1 *J.I.C.J.*, 580, 583 (2003) ("The very idea that a totally disconnected country would bring the case is an offence to the jurisdictions that have the primary responsibility to resolve the conflicts inherent in the trial."). *See also* M. INAZUMI, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law*, Antwerp-Oxford, Intersentia, 2005, at 200 (arguing that "[t]rials abroad force suspects to face an unfamiliar legal system", which may possibly violate their human rights). It may be noted that the United Kingdom traditionally took largely the same view as the United States (*see* HOME OFFICE, "Review of Extra-Territorial Jurisdiction", Steering Committee Report, July 1996, at p. 4, § 1.9), although this may have changed now that a first trial on the basis of the universality principle has been conducted (*Zardad*, torture).

The American preference for the community where the crime has occurred has been premised on the Sixth Amendment to the U.S. Constitution (although this amendment is merely applicable to domestic prosecutions): "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district *wherein the crime shall have been committed.*" (emphasis added). *See* G.P. FLETCHER, "Against Universal Jurisdiction", 1 *J.I.C.J.*, 580, 583 (2003). Such an argument is typical of American exceptionalism and its distinctive rights culture, which is

without reason, that "[t]his view directly challenges a core justification of universal jurisdiction, which emphasizes the universality of interest in and responsibility for repressing atrocious crimes."[3528]

1050. Admittedly, policy calculations have at times caused the United States to support international criminal justice, most often when dispensed by international criminal tribunals, but also when dispensed by national courts, when a territorial forum was outright impossible,[3529] and when doing so served U.S. interests. In general, however, mainstream U.S. opinion remains fairly critical of international criminal justice. Americans might question the consistency of court decisions, because adjudication by different States might imply a different assessment of the facts, a different incorporation of international crimes into domestic law and different features of criminal procedure.[3530] It is moreover submitted that the incriminations of international crimes are inherently vague, which may cause their adjudication to operate in a non-neutral way, with prosecutors and judges using their discretion to dispense justice in accordance with their own political and moral leanings.[3531] Americans fear in particular that States (or international tribunals) will use their courts to settle political accounts with (other) States (such as the United States), and put the foreign State itself on trial.[3532] Accordingly, international criminal justice may, in the

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considered to be superior to and at times incompatible with international rights culture. *See, e.g.*, H. HONGJU KOH, "America's Jekyll-and-Hyde Exceptionalism", in M. IGNATIEFF (ed.), *American Exceptionalism and Human Rights*, Princeton, Princeton University Press, 2005, at 114 (identifying a distinctive rights culture as one of the faces of American exceptionalism). *See also* H. HONGJU KOH, "On American Exceptionalism", 55 *Stan. L. Rev.* 1479 (2003). Using Ignatieff's classification, reliance on the Sixth Amendment to discredit universal jurisdiction may fall under the 'legal isolationism' strand of American exceptionalism (a resistance of U.S. lawyers and courts to be informed in their opinions by foreign and international precedent). *See* M. IGNATIEFF, "Introduction", in M. IGNATIEFF (ed.), *American Exceptionalism and Human Rights*, Princeton, Princeton University Press, 2005, at 8. It may be noted here that the unfairness in conducting territorial trials usually outweighs the unfairness associated with a non-territorial judicial system unknown to the defendant. *See* M. INAZUMI, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law*, Antwerp-Oxford, Intersentia, 2005, at 208 ("Cynically, the closer the nexus of a State to the crime in question, the less likely it is that that State would be viewed by other States involved as being capable of conducting a trial in an impartial manner."). Hence, an appeal to the Sixth Amendment appears largely misguided, in that it, while indeed protective of the rights of the defendants, risks justifying the overall unfairness (involving the rights of the victims and long-term peace prospects of post-conflict societies) of territorial judicial proceedings.

[3528] *See* D.F. ORENTLICHER, "Whose Justice? Reconciling Universal Jurisdiction with Democratic Principles", 92 *Georgetown L. J.* 1057, 1116 (2004) (contrasting this view with a judgment by a *U.S.* military tribunal in Germany after the Second World War, characterizing the Nazi war crimes not as "crimes against any specified country, but against humanity." […] Those who are indicted […] are answering to humanity itself, humanity which has no political boundaries and no geographical limitations." United States v. Otto Ohlendorf, 4 *Trials of war criminals before Nuernberg Military Tribunals under Control Council Law* No. 10, at 411, 497-98 (1950)).

[3529] *Compare* H.J. STEINER, "Three Cheers for Universal Jurisdiction", 5 *Theoretical Inquiries in Law* 199, 223 (2004).

[3530] *See* H.J. STEINER, "Three Cheers for Universal Jurisdiction", 5 *Theoretical Inquiries in Law* 2004, 199, at 220.

[3531] E. KONTOROVICH, "Implementing *Sosa* v. *Alvarez-Machain*: What Piracy Reveals About the Limits of the Alien Tort Statute", 80 *Notre Dame L. Rev.* 111, 156-57 (2004); M. INAZUMI, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law*, Antwerp-Oxford, Intersentia, 2005, at 200 (citing the risk of arbitrary prosecutions).

[3532] *See, e.g.*, R. RABINOVITCH, "Universal Jurisdiction *In Absentia*" 28 *Fordham Int'l L. J.* 500, 522 (2005) (arguing that "States might abuse universal jurisdiction to prosecute the nationals of enemy

U.S. view, not enhance, but rather hollow out the international rule of law, because it might result in *partisan* justice – of which the United States risks to be the prime victim.

1051. Outside the field of core crimes against international law, with respect to terrorist offences in particular (*e.g.*, aircraft hijacking), the United States has, however, been at the forefront of the development of universal criminal jurisdiction. This should not surprise, as the objections against universal jurisdiction and international criminal justice are based on the observation that adjudicating core crimes equates putting the State on trial. As terrorist offences are ordinarily *not* perpetrated by State actors, the objections do not apply to universal jurisdiction over these offences.[3533] Given the non-political nature of terrorist offences, their adjudication will prove less conflict-prone in terms of international relations.

1052. U.S. opposition against universal jurisdiction and international criminal justice may easily be explained in terms of power politics. For one thing, faraway courts may indict U.S. nationals, service-members in particular, and thus directly jeopardize the interest which the U.S. has in protecting its nationals and not having its purportedly legitimate military decisions second-guessed by some legal institution over which it has no direct control. For another, international justice reduces the leverage which the United States could use to reach a desired solution to a conflict. Courts may indict the high-ranking officials and rebel leaders who are precisely needed to sign a peace agreement bringing the sort of national and international stability conducive to U.S. interests.

1053. U.S. opposition against international criminal justice may, however, also be attributable to a different historical experience with colonialism. This argument is often overlooked in the debate. While European States built themselves huge colonial empires since the advent of the modern age, the United States has always prided itself on its stand against colonialism and oppression, having wrought itself from the bonds of British colonialism during the American Revolutionary War.[3534] It may be submitted that the desire of European States to investigate and prosecute core crimes under the principle of universal jurisdiction is not, or at least not exclusively, premised on moral considerations, but (also) on a hidden desire to continue their colonial past (having lost to the United States their leading role in

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States as a means of gaining a political advantage or impugning their reputation in the international community."); M. INAZUMI, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law*, Antwerp-Oxford, Intersentia, 2005, at 34 and 199.

[3533] Universal jurisdiction over terrorist offences is justified by practical rather than moral considerations. As these crimes, unlike core crimes against international law, are mostly not bound to a territory, but require transnational transport or communication links for their success, non-territorial jurisdictional grounds, such as the universality principle are resorted to so as to ensure that the perpetrator does not go unpunished. U.S. support for universal jurisdiction over crimes of hijacking in particular may also be premised on the exposure of U.S. citizens to terrorist offences, unlike to crimes against international humanitarian law, which are chiefly committed in developing countries. In this sense, universal jurisdiction is closely connected to the protection of national interests. At any rate, given the non-political nature of these crimes, their adjudication will prove less conflict-prone in terms of international relations.

[3534] *See for* a formidable account of the crucial year of the Continental Army's efforts to oust the British colonizers: D. MCCULLOUGH, *1776*, New York, Simon & Schuster, 2005, 386 p.

world affairs since the end of the Second World War).[3535] It is by no means a surprise that European States often exercise jurisdiction over nationals of States that previously were part of their colonial empire in Africa, Latin America and Asia.[3536] The European exercise of universal jurisdiction then masquerades as the triumph of law over politics, but is as much an instrument of power politics as U.S. reliance on political rather than legal arrangements for dealing with core crimes.

1054. In view of the foregoing considerations, U.S. opposition against universal jurisdiction and international criminal justice is not necessarily linked to a lack of moral standing, as is sometimes alleged by Europeans. Americans can rightly prefer *political* rather than *judicial* post-conflict justice over universal jurisdiction in moral-efficient terms. U.S. opinions on international criminal justice are nevertheless not only to be described in a detached way. They cannot be separated from world U.S. hegemony and views of American exceptionalism. As the sorry demise of the Belgian Genocide Act and the virulent opposition of the Bush Administration against the International Criminal Court demonstrate, the U.S. will not hesitate to coax States into watering down statutes and treaties that put U.S. interests in harm's way.[3537] The partial success of the at times heavy-handed U.S. efforts to derail mechanisms of international criminal justice illustrate the old insight that international law can only function properly when it takes into account the interests of the powerful.

10.11.3. Reasonableness and subsidiarity

1055. The critical U.S. attitude to universal jurisdiction has undoubtedly informed the rise of reasonableness in the exercise of universal jurisdiction (directly in Belgium, indirectly in other States). A modest reasonableness-based harmonization of universal jurisdiction laws in Europe could indeed be witnessed. Jurisdictional provisions are, along with substantive criminal law provisions, gradually streamlined in the light of the positive and negative experiences of other European States[3538] and the practice of international tribunals.[3539] SLAUGHTER termed this a process of "transjudicial communication and consultation", a "common global search for solutions."[3540]

[3535] *See* for a scathing indictment of universal jurisdiction as an expression of colonial power: J. VERHOEVEN, "Vers un ordre répressif universel?", 45 *AFDI* 55 (1999); *see also* R. RABINOVITCH, "Universal Jurisdiction *In Absentia*" 28 *Fordham Int'l L. J.* 500, 523-24 (2005).

[3536] *See, e.g.*, Belgium (Rwanda), France (Mauritania, Republic of Congo), Spain (Latin America), the Netherlands (Surinam). Needless to say, the latter States are, given their sheer lack of resources and vulnerable position in the international arena, barely able to indict nationals of European States.

[3537] Typically and somewhat disingenuously, the U.S. may equate its own interest with the global interest, on the ground that, as the U.S. shoulders the burden of policing the world it should somehow be exempted from restraining international rules lest the world fall prey to anarchy.

[3538] Looking for guidance in amending its universal jurisdiction statute in 2003, Belgium for instance studied other States' experiences.

[3539] *See* for the influence of the ICTR and the ICTY on national procedures *e.g.* D. ORENTLICHER, "The Future of Universal Jurisdiction in the New Architecture of Transnational Justice", in S. MACEDO (ed.), *Universal Jurisdiction*, Philadelphia, PA, University of Pennsylvania Press, 2004, at 227. Conversely, States' experiences with universal jurisdiction may influence the practice of international tribunals as evidence of a norm of customary international law.

[3540] See A.-M. SLAUGHTER, "Defining the Limits: Universal Jurisdiction and National Courts", in S. MACEDO (ed.), *Universal Jurisdiction*, Philadelphia, University of Pennsylvania Press, 2004, at 187-190. ICC implementing legislation has played an important role in this respect.

State practice shows a diverse picture, but almost no State employs the same procedural principles in the context of prosecution of international crimes as it does in the context of prosecution of common crimes. Concerns over foreign sovereignty have informed a practice of procedural and jurisdictional restraint in the prosecution of core crimes against international law, which includes precluding victims from initiating proceedings (Belgium, France, United Kingdom),[3541] exempting international crimes from mandatory prosecution (Germany), restricting the rights of appeal against a decision not to prosecute (Belgium, Germany, Denmark), and applying a subsidiarity test.[3542] The role of the subsidiarity test in particular deserves

[3541] It was precisely in States which provided for civil party petition that most universal jurisdiction proceedings were initiated (*see, e.g.*, Ligue française des droits de l'homme et du citoyen, Groupe d'action judiciaire, "France, compétence universelle. Etat des lieux de la mise en oeuvre du principe de compétence universelle", June 2005, p. 27, available at http://www.fidh.org/IMG/pdf/cufrance29juin.pdf-). Prosecutors are typically more reluctant to initiate proceedings for international crimes, because doing so may overload the prosecutorial system and cause diplomatic tension with other States. The risk of international tension caused States to scrap or contemplate scrapping victims' rights of initiation. Belgium scrapped the possibility of civil party petition in 2003. France contemplates scrapping it in its pending ICC implementing legislation. The United Kingdom contemplates scrapping the possibility for victims of applying for a warrant for the arrest of a presumed perpetrator of an international crime. Spain's 'popular action' has so far withstood criticism.

[3542] *See* for the application of a rule of reason for the resolution of competing claims of jurisdiction, including universal jurisdiction, *e.g.*, Article 8 of the Princeton Principles on universal jurisdiction on the resolution of competing national jurisdiction (reprinted in S. MACEDO (ed.), *Universal Jurisdiction*, Philadelphia, University of Pennsylvania Press, 2004, p. 23): "Where more than one state has or may assert jurisdiction over a person and where the state that has custody of the person has no basis for jurisdiction other than the principle of universality, that state or its judicial organs shall, in deciding whether to prosecute or extradite, base their decision on an aggregate balance of the following criteria:

(a) multilateral or bilateral treaty obligations;
(b) the place of commission of the crime;
(c) the nationality connection of the alleged perpetrator to the requesting state;
(d) the nationality connection of the victim to the requesting state;
(e) any other connection between the requesting state and the alleged perpetrator, the crime, or the victim;
(f) the likelihood, good faith, and effectiveness of the prosecution in the requesting state;
(g) the fairness and impartiality of the proceedings in the requesting state;
(h) convenience to the parties and witnesses, as well as the availability of evidence in the requesting state;
(i) the interests of justice."

Although the Princeton Principles distinguish between nine different factors, they are actually interlinked. The Principles seem to prioritize the bases of jurisdiction, with the territoriality and the nationality principle prevailing over universal jurisdiction (factors b-d), although not as a matter of course, since the territoriality or nationality connection is but one factor in the interest-balancing analysis. Indeed, if the quality of the prosecution in the requesting State, *i.e.*, the non-bystander State, is insufficient (factors f-g), in particular if that State is unable or unwilling to prosecute, the bystander State may be vindicated in asserting universal jurisdiction. Conversely, if the quality of the prosecution in the bystander State is inadequate (biased or inefficient), it should forego any assertions of universal jurisdiction. *See, e.g.*, Brussels Principles, Principle 15(2) (citing 'the rules governing the right to a fair trial' as a factor in resolving jurisdictional conflicts).

If a State does not bring its prosecutorial resources to bear, this need not imply that it is genuinely unwilling to investigate and prosecute. It may well be that a political solution or a non-criminal law method of dealing with post-conflict situations is at times preferable to serve the purpose of long-term peace. Nonetheless, bystander States, as representatives of the international community, may believe that, in some situations, peace and reconciliation could not be attained without justice being done (i). Yet even if a bystander State has a sufficient nexus with the case to legitimately exercise universal jurisdiction, or when a State with a stronger nexus is unwilling or unable to dispense justice, the assertion of universal jurisdiction may be a dead end if the bystander State encounters serious

closer examination, as it may be on the verge of recognition as a principle of international law.

10.11.3.a. Justification

1056. Under the principle of subsidiarity as understood here, bystander States, when asserting universal jurisdiction, defer to the territorial State or the State of nationality of the presumed offender if the latter is (genuinely) able and willing to prosecute. It has been argued that universal jurisdiction is precisely *based* on the subsidiarity principle, and that it thus only functions as a *last resort* solution so as to prevent impunity from arising.[3543] The principle of subsidiarity features prominently in a 2005 resolution of the Institute of International Law.[3544] As already stated, it resembles the principle of complementarity, set forth in Article 17 of the ICC Statute, pursuant to which the ICC only declares a case admissible in case a State fails to genuinely investigate and prosecute it.

1057. This study is strongly in favor of the application of a subsidiarity test. As far as reasonably possible, bystander State should give priority to States with a

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difficulties in gathering evidence located abroad, or in hearing foreign witnesses (h). Much will obviously depend on the cooperation between the bystander State and the territorial or national State (lack of cooperation may sometimes lead to heavy reliance on eyewitness testimony rather than on material evidence to be found in the territorial or national State; M. INAZUMI, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law*, Antwerp-Oxford, Intersentia, 2005, at 216), which is sometimes required under international law (*see* Article 9 of the UN Torture Convention) and on the willingness of the bystander State to bring resources to bear in order to take evidence (costs of sending rogatory commissions abroad) and to involve witnesses in the trial phase (accommodation and translation costs).

[3543] The principle of subsidiarity dovetails well with the historical rationale of universal jurisdiction – the exceptional exercise of jurisdiction supplementing other national jurisdictions – as well with the undeniable advantages in terms of effectiveness that territorial jurisdiction enjoys. *See* M. INAZUMI, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law*, Antwerp-Oxford, Intersentia, 2005, at 219. *See also* A. SANCHEZ LEGIDO, "Spanish Practice in the Area of Universal Jurisdiction", 8 *Spanish Yb. Int'l L.* 17, 38, 41 (2001-02) ("[The] stance, taken in Spanish practice, based on recognition of the priority of the judge in the place where the crime was committed, is fully coherent with the foundation upon which [...] the universality principle is based."); H.F.A. DONNEDIEU DE VABRES, *Les principes modernes du droit pénal international*, Paris, Sirey, 1928, at 169 (arguing in favor of a rigorous hierarchy of criminal jurisdiction, with the territorial State and the State of the nationality of the perpetrator having priority over the bystander State); N. STRAPATSAS, "Universal Jurisdiction and the International Criminal Court", 29 *Manitoba L. J.* 1, 31 (2002) (arguing that a national court exercising universal jurisdiction should be a venue of last resort "in order to respect the principle of territoriality which is also *jus cogens*.").

[3544] INSTITUTE OF INTERNATIONAL LAW, Resolution of the 17th Commission on universal criminal jurisdiction with regard to the crime of genocide, crimes against humanity and war crimes, Krakow Session, 2005, nr. 3 (c) ("Any State having custody over an alleged offender should, before commencing a trial on the basis of universal jurisdiction, ask the State where the crime was committed or the State of nationality of the person concerned whether it is prepared to prosecute that person, unless these States are manifestly unwilling or unable to do so. It shall also take into account the jurisdiction of international criminal courts."), nr. 3 (d) ("Any State having custody over an alleged offender, to the extent that it relies solely on universal jurisdiction, should carefully consider and, as appropriate, grant any extradition request addressed to it by a State having a significant link, such as primarily territoriality or nationality, with the crime, the offender, or the victim, provided such State is clearly able and willing to prosecute the offender.").

stronger nexus to the situation: the territorial or the national State.[3545] The territorial or national State may indeed be a better forum in light of the proximity of the evidence, the knowledge of the accused and the victims, and the better perspective which it has on all circumstances surrounding the crime.[3546] Moreover, the entrenchment of the rule of law in States with historically weak judicial systems, typically developing countries, requires that bystander States with stronger judicial systems, typically industrialized countries, enable the former States to assume their responsibility in putting an end to a culture of impunity.[3547] Although prosecutions on the basis of the universality principle may have a catalytic effect on home State prosecutions, bystander States should exercise appropriate restraint in case the home State is able and willing to investigate and prosecute a situation in which a core crime has been committed.[3548]

1058. Article 17 of the ICC Statute obliges the ICC to conduct an 'able-and-willing' test. Regrettably, national laws rarely feature a provision with the same compelling force. However, recent developments in national State practice demonstrate that prosecutors and courts tend to apply a principle of subsidiarity in various forms. In this subsection 10.11.3, national practice with the subsidiarity principle in Germany, France, Spain, and Belgium, will be examined, with a view to determining whether the principle is mandated by customary international law (10.11.3.f), and with a view to providing insights for the application of the complementarity principle by the ICC (10.11.3.h).

10.11.3.b. Spain

1059. While the application of the principle of subsidiarity to the prosecution of international crimes is not a statutory requirement in Spain, Spanish courts and

[3545] *See* ICJ, *Arrest Warrant*, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, § 54 ("A State contemplating bringing criminal charges based on universal jurisdiction must first offer to the national State of the prospective accused person the opportunity itself to act upon the charges concerned"). *Contra* A. POELS, "Universal Jurisdiction *In Absentia*", 23 *Neth. Q. Hum. Rts.* 65, 83 (2005) (arguing that priority should be given to the State exercising universal jurisdiction *in absentia*, "as the subsequent commencement of investigations and prosecutions by the other State on the basis of the territoriality or personality principle will probably be concurrent with political pressure and judicial bias").

[3546] *See* D.F. ORENTLICHER, "Whose Justice? Reconciling Universal Jurisdiction with Democratic Principles", 92 *Georgetown L. J.* 1057, 1132 (2004) ("If consent that takes the form of pre-commitment validates the exercise of foreign jurisdiction, courts that can exercise universal jurisdiction should nonetheless respect the right of the "home state" to prosecute offenders if its courts are willing and able to bring them to justice. By averting or dispelling a culture of impunity, in-country justice provides the surest guarantee that human rights will be respected in the future, provided there are sufficient guarantees of fair process. Moreover, justice at home can more surely advance a wounded nation's recovery in the wake of mass atrocity than the remote justice dispensed by foreign courts. Provided that they enjoy legitimacy, trials in the state most affected by human rights abuses are more likely than prosecutions conducted a world away to inspire ownership by societies that have endured mass atrocity. Thus, unless there is reason to doubt the fairness or capacity of their courts, the claims of states that endured such crimes should be honored."). *See also* ICJ, *Arrest Warrant*, individual opinion Judge Rezek, § 4.

[3547] *See* A.K. SHORT, "Is the Alien Tort Statute Sacrosanct? Retaining Forum Non Conveniens in Human Rights Litigation", 33 *N.Y.U. J. Int'l L. & Pol.* 1001, 1072-77 (2001).

[3548] The enhanced domestic accountability effect may ironically reduce the possibility of effective prosecution in the home State, because the home State may tend not to investigate crimes on the ground that a bystander State is investigating them. *See also* N. ROHT-ARRIAZA, *The Pinochet Effect*, Philadelphia, PA, University of Pennsylvania Press, 2004, 195.

prosecutors nonetheless have conducted a subsidiarity analysis at least since 1998.[3549] In the 2003 *Peruvian Genocide* case, the Spanish Supreme Court tightened the subsidiarity principle somewhat, terming it the 'principle of necessity of jurisdictional intervention'.[3550] Under both principles, Spanish authorities were precluded from exercising their jurisdiction if the territorial authorities proved able and willing to prosecute international crimes. In case of competing jurisdictional claims, the territorial or national State was deemed to enjoy jurisdictional priority.[3551] In 2005, however, in the *Guatemala Genocide* case, the Spanish Constitutional Court rejected the subsidiarity test as unduly burdensome for the victims.[3552] Henceforth, from a legal point of view, Spanish prosecutors and courts need not apply a subsidiarity analysis, although from a practical point of view, they will defer to the territorial or national State if the latter conducts investigations in good faith.[3553]

10.11.3.c. France

1060. It may appear that France does not apply a principle of subsidiarity, given the fact that the Republic of Congo predicated its proceedings which it initiated against France in 2002 *inter alia* on France's perceived lack of respect for the subsidiarity nature of the universality principle. France was moreover the first State to cast aside an amnesty for core crimes and thereupon convict the perpetrator.[3554] The subsidiarity principle is indeed not enshrined in French law. Yet in practice, French prosecutors and investigating judges seem to apply some version of it: they defer to the territorial State or the offender's home State if that State succeeds with a

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[3549] *See* National Criminal Court, *Pinochet*, Rulings of 4 and 5 November 1998, available at http://www.derechos.org/nizkor/arg/espana/juri.html ("[Article 6 of the Genocide Convention] imposes subsidiarity status upon actions taken by jurisdictions different from those envisioned in the precept. Thus, the jurisdiction of a State should abstain from exercising jurisdiction regarding acts constituting a crime of genocide that are being tried by the courts of the country in which said acts were perpetrated or by an international court.") (as translated by A. SANCHEZ LEGIDO, "Spanish Practice in the Area of Universal Jurisdiction", 8 *Spanish Yb. Int'l L.* 17, 38, 39 (2001-02).

[3550] Supreme Court of Spain, *Peruvian Genocide*, 42 *I.L.M.* 1200 (2003). *See also* N. ROHT-ARRIAZA, "Universal Jurisdiction: Steps Forward, Step Back", 17 *Leiden J. Int'l .L.* 375 (2004). In the *Peruvian Genocide Case*, the Supreme Court derived the principle of necessity of jurisdictional intervention from the "nature and the finality of universal jurisdiction" (*"la propia naturaleza y finalidad de la jurisdicción universal")*.

[3551] The Spanish principle of necessity of jurisdictional intervention appeared to be stricter than the ICC's complementarity principle, in that it may not require a genuine quality judgment of the foreign State's effective prosecution. *See also* N. ROHT-ARRIAZA, *The Pinochet Effect: Transnational Justice in the Age of Human Rights*, Philadelphia, PA, University of Pennsylvania Press, 2004, at 194; N. ROHT-ARRIAZA, "Universal Jurisdiction: Steps Forward, Step Back", 17 *Leiden J. Int'l .L.* 375, 383 (2004).

[3552] Constitutional Court Spain (Second Chamber), Guatemala Genocide case, judgment No. STC 237/2005, available at http://www.tribunalconstitucional.es/stc2005/stc2005-237.htm.

[3553] *See supra* chapter 10.3.

[3554] Ordonnance of the Juge d'instruction de Montpellier, May 25, 2001 (ruling that "quelle que soit la légitimité d'une telle amnistie [granted by the Mauritanian authorities on June 14, 1993], dans le cadre d'une politique locale de réconciliation, cette loi n'a d'effet que sur le territoire de l'Etat concerné et n'est pas opposable aux pays tiers, dans le cadre de l'application du droit international. Elle n'a par conséquent aucune incidence sur l'action publique pour l'application de la loi en France" ; stating that "[il] appartient donc à la France, comme Etat signataire de la Convention de New York [*i .e.*, the UN Torture Convention], de se saisir des faits non prescrits ni amnistiés en France susceptibles d'entrer dans le champ d'application de cette convention, quels que puissent être, en Mauritanie, les incriminations existantes en matière de torture, leur délai de prescription ou leur amnistie".).

prosecution.[3555] This is however an approach which is even less deferential to the territorial or national State than Spain's approach. French courts may only defer when a foreign prosecution has been finalized, not when it has merely been initiated, even if there are good prospects that the case could properly be finalized. It is at any rate utterly unclear what the elapse of time ought to be before a French prosecutor or judge could start to exercise its jurisdiction. The French approach is unsatisfactory, yet the havoc it may wreak is limited, since, as far as core crimes are concerned, French prosecutors and judges only have universal jurisdiction over crimes of torture,[3556] and not over crimes against international humanitarian law.[3557]

10.11.3.d. Belgium

1061. In Belgium, the principle of subsidiarity is statutorily provided for since the modification of the legislation concerning grave crimes against international humanitarian law in 2003.[3558] It is included in the restrictive conditions surrounding prosecutions of international crimes, inserted into the Preliminary Title of the Code of Criminal Procedure.[3559] The federal prosecutor may refuse to initiate proceedings if « the specific circumstances of the case show that, in the interest of the proper administration of justice and in order to honor Belgium's international obligations,

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[3555] HUMAN RIGHTS WATCH, *Universal Jurisdiction in Europe: The State of the Art*, Vol. 18, No. 5(D), June 2006, pp. 58-59.

[3556] Although French courts and prosecutors have universal jurisdiction over torture, such jurisdiction may, in accordance with Article 689-2 of the Code of Criminal Procedure, only be exercised if the suspect is present in France. The Court of Appeals of Paris construed the presence requirement extremely strictly in the *Congo Beach* case, precisely the case which sparked the ICJ proceedings initiated by the Republic of Congo, by holding that before any investigation could be initiated, the presumed offender should be named in the *réquisitoire introductif*, *i.e.*, the act initiating the investigation, so as to ascertain his presence in France. The presence requirement should thus be met *before* the investigation starts, although often only an investigation could conclusively establish that the presumed offender is present in France. The judgment of the Court of Appeals is not published. The main arguments of the Court's reasoning can however be retrieved from the website of the *Fédération Internationale des Droits de l'Homme* (FIDH), one of the civil parties in the case. *See* FIDH, Groupe d'action judiciaire, "France. Compétence universelle", June 2005, pp. 18-24, available at http://www.fidh.org/IMG/pdf/cufrance29juin.pdf. *See also* Jeune Afrique L'Intelligent / AFP, November 22, 2004. *See* on this case at length: C. RYNGAERT, "Universal Criminal Jurisdiction over Torture: A State of Affairs After 20 Years UN Torture Convention", *Neth. Q. Hum. Rts.* 571, 594-600 (2005).

[3557] Whilst general French criminal law does not provide for universal jurisdiction over crimes against international humanitarian law, two *ad hoc* laws explicitly confer universal jurisdiction upon French courts for war crimes, genocide, and crimes against humanity committed in the territory of Rwanda and the former Yugoslavia. Law No. 96-432 of 22 May 1996 adapting French legislation to the provisions of United Nations Security Council Resolution 955 establishing the International Criminal Tribunal to prosecute persons responsible for acts of genocide or other serious violations of international law committed in 1994 in Rwanda and, for Rwandan citizens, in neighbouring states, *Journal Officiel*, 23 May 1996, English translation available at http://www.u-j.info/index/99335,79779; Law No. 95-1 of 2 January 1995 adapting French legislation to the provisions of United Nations Security Council Resolution 827 establishing an international criminal tribunal to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the Former Yugoslavia since 1991 (amended by Law No. 96-432 of 22 May 1996 and by Law no. 2002-268 of 26 February 2002 on cooperation with the International Criminal Court), *Journal Officiel*, 3 January 1995, English translation available at http://www.u-j.info/index/99260,79779.

[3558] Act of 5 August 2003, *Moniteur belge* 7 August 2003.

[3559] *See* Article 10, 1°*bis* PT CCP (prosecution of crimes against international humanitarian law on the basis of the passive personality principle) and Article 12*bis* PT CCP (prosecution of international crimes under the universality principle).

said case should be brought either before the international courts, or before the court of the place in which the acts were committed, or before the court of the State of which the perpetrator is a national, or the court of the place in which he can be found, and to the extent that said court is independent, impartial, and fair, as may be determined from the international commitments binding on Belgium and that State ».[3560]

Pursuant to this '*forum non conveniens*' provision,[3561] Belgium will defer to a State with a narrower nexus to the case. There is, however, no hard and fast rule under Belgian law which requires that the State with a narrower nexus be genuinely able and willing to investigate and prosecute. The only requirement is that its courts are "independent, impartial, and fair". One could wonder whether the provision also requires that, *in a given case*, they are also able and willing to dispense justice in an equitable manner. Moreover, the assessment of the ability of a foreign State to conduct an investigation into and prosecution of international crimes is, as the Belgian text has it, informed by "international commitments binding on Belgium and that State". Although the government assured that this was only one factor in a more encompassing subsidiarity analysis,[3562] it is not fanciful idea that the federal prosecutor will shun a tricky analysis of the investigatory ability and willingness of a foreign State, and instead prefer black-letter 'assurances' stemming from the ratification of an international treaty. There is not much cause for optimism, if one recalls the atmosphere laden with pressure from the U.S. (which threatened to have NATO headquarters removed from Brussels if Belgium failed to scale down its assertions of universal jurisdiction) in which the provision was adopted at the time.[3563] The fact that a refusal to initiate proceedings on subsidiarity grounds is a discretionary decision by the federal prosecutor which is not subject to judicial review, unlike a refusal to initiate proceedings on other grounds, is reason for additional concern.[3564] No application of the subsidiarity principle by the Belgian federal prosecutor has so far been reported.

10.11.3.e. Germany

1062. In Germany, like in Belgium, application of the subsidiarity principle is statutorily provided for, although, also like in Belgium, the federal prosecutor is not under an obligation to apply it.[3565] In the Explanations to the relevant provision, which was modelled on the ICC Statute's principle of complementarity, it was stated that "the jurisdiction of third-party states (which exists under international law) must

[3560] English translation available in 42 *I.L.M.* 1258, 1267 (2003).
[3561] Terms used *inter alia* by E. DAVID, « La compétence universelle en droit belge », *Ann. Dr. Louvain* 2004, 125.
[3562] *Parl. St.* Kamer, B.Z. 2003, nr. 0103/003, p. 45.
[3563] "U.S. Threatens NATO Boycott over Belgium War Crimes Law", *The Guardian*, June 13, 2003, available at http://www.guardian.co.uk/nato/story/0,12667,976499,00.html
[3564] A refusal to initiate proceedings on this ground is not taken by a judge, unlike a refusal to initiate proceedings on other grounds. *See* Belgian Constitutional Court, Judgment nr. 62/2005, March 23, 2005, available at www.arbitrage.be. New Articles 10, 1°*bis* and 12*bis*, 7th and 8th al. of the PT CCP, inserted by the act of May 22, 2006, *Moniteur belge*, July 7, 2006.
[3565] § 153 (f) of the Code of Criminal Procedure *counsels against* prosecution of a crime against international humanitarian law if the offence is being prosecuted before an international court or by a State on whose territory the offence is committed or whose national was harmed by it.

be understood as a subsidiary jurisdiction which should prevent non-punishment, but not otherwise inappropriately interfere with the primarily responsible jurisdiction."[3566]

In the *Abu Ghraib* case (2005), the subsidiarity principle was applied for the first time by the federal prosecutor, who drew on both the German provision and Article 17 of the ICC Statute.[3567] The prosecutor found in particular that there was no indication that the United States, the national State of the alleged perpetrators, had refrained or would refrain from criminal investigations. He held in this respect that the concept of prosecution should be construed not in light of the alleged individual perpetrators or their alleged offences, but in light of the entire 'situation' (*Gesamtcomplex*) as contemplated by Article 14, § 1 of the ICC Statute. In a previous note, I have criticized this determination, primarily on the ground that drawing a link between Article 17 and Article 14 of the ICC, as the federal prosecutor did, is not only unwarranted because the Rome Statute, and certainly its admissibility provisions, do as such not apply in the German legal order, but also because Article 14, § 1 of the ICC Statute only provides that "[a] State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed…", without linking this legal basis for States Parties to seize the Court with the complementarity principle.[3568] I do not retract my criticism here; I still believe that, if a situation is only *generally* being dealt with by the home State, and some individual offenders are not punished for their transgressions, deference to the home State under the subsidiarity principle may not be warranted, unless the home State could advance very good reasons for granting impunity. If anything, the prosecutor's *Abu Ghraib* opinion could hardly be cited as authoritative as far as the *law of the ICC* is concerned: only the Court itself has authority to interpret the provisions of the Statute.

10.11.3.f. International law character of the principle of subsidiarity

1063. The four States discussed here all apply a subsidiarity principle. Inferring from this practice that the subsidiarity principle is an emerging principle of international law may however not be warranted, because these States could hardly be deemed representative for the international community. Nonetheless, the four States studied here have been amongst the most active States in exercising universal jurisdiction. Surely, States that do not assert universal jurisdiction, ordinarily for lack of prosecutorial resources, for fear of upsetting foreign nations, of for fear of encouraging other States to exercise universal jurisdiction over their the former States' nationals, might welcome an international rule that *limits* the reach of a State's universality laws. The question then remains what position States that *have* exercised universal jurisdiction take towards the subsidiarity principle (United Kingdom, Canada, Netherlands, Denmark, Switzerland, Austria). These States have not been studied in this note because they do not apply a subsidiarity principle in the first place. Yet this is not to say that they oppose such a principle. They do not apply it because

[3566] Explanations on the *Draft of an Act to Introduce the Code of Crimes against International Law*, http://www.iuscrim.mpg.de/forsch/legaltext/VStGBengl.pdf, p. 82.
[3567] A copy of the decision is available at http://www.ccr-ny.org/v2/legal/september_11th/docs/German_Prosecutors_Decision2_10_05.pdf .
[3568] C. RYNGAERT, "Universal Jurisdiction in an ICC Era: A Role to Play for EU Member States with the Support of the European Union", *Eur. J. Crime, Crim. L. & Crim. Justice* 46, 63 (2006).

they have less experience with it than the States studied. They have precisely less experience with it because they are afraid of jurisdictional overreaching. In practice, these States will apply the principle, yet not as a matter of law, but as a matter of prosecutorial discretion.

1064. The fact that the principle of subsidiarity is not seen as a legal matter undercuts its customary international law character, for the *opinio juris*, a constitutive element of every customary norm, may be lacking. This could also be gathered from the country studies in this subsection 10.11.3. Only in Germany and Belgium do prosecutors and courts apply the subsidiarity principle as a matter of law, yet even in these States, they are, strictly speaking, not *obliged* to. In Spain and France, the subsidiarity principle is applied only as a prudential principle of reasonableness, which is not mandated by law. In the 2005 *Guatemala Genocide* case, the Spanish Constitutional Court stated clearly that international law provides for concurring competencies for States, and that international law does not oblige States to apply a principle of subsidiarity that grants priority to the forum with the strongest nexus to the case. Accordingly, while there may be some, and possibly even sufficient, State practice in support of the subsidiarity principle, the absence of a conviction on the part of States that subsidiarity has the compelling force of law probably leads to the inevitable conclusion that the subsidiarity principle is not a norm of customary international law.[3569] Hopefully, the International Court of Justice will provide more clarification in the context of the prosecution of core crimes in *Certain proceedings against France*, brought by the Republic of Congo in 2002. A judgment in this case will probably not be rendered before 2009.[3570]

[3569] CASSESE, however, seems to believe that the principle of subsidiarity *does* represent customary international law. *See* A. CASSESE, "Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction?", 1 *J.I.C.J.* 589, 593 (2003) (submitting that "it would seem that, *at least at the level of customary international law*, universal jurisdiction may only be exercised to substitute for other countries that would be in a better position to prosecute the offencer, but from some reason do not…"). *See also* C. KRESS, "Universal Jurisdiction over International Crimes and the *Institut de Droit international*", *4 J.I.C.J.* 561, 580 (2006) (submitting that "the *opinio juris* is based not only on considerations of procedural economy but also on the recognition of a legitimate primary interest of those states that are directly connected with the crime", and that, thus, "it would now seem to be possible, despite the relative scarcity of practice to argue, that the subsidiarity principle has grown into a principle of customary international law supplementing the principle of universal jurisdiction over crimes under international law.").
Scepticism as to the customary international law character of the principle of subsidiarity could also be gleaned from the European Commission's *amicus curiae* brief in the *Sosa* case before the U.S. Supreme Court (2004). In its brief, the Commission stated that "[t]here is *some support* for the proposition that the same approach [as the approach taken by the Article 17 of the ICC Statute, which sets forth the complementarity principle] should be taken to the exercise of universal criminal jurisdiction", thus implying that the subsidiarity principle is not settled international law. *See* European Commission, *amicus curiae* brief, *Sosa v. Alvarez-Machain*, 23 January 2004, p. 25. The Commission's *amicus curiae* brief is available at http://www.nosafehaven.org/_legal/atca_oth_EurComSupportingSosa.pdf. *See however* M. COSNARD, "La compétence universelle en matière pénale", in C. TOMUSCHAT & J.-M. THOUVENIN (eds.), *The Fundamental Rules of the International Legal Order. Jus Cogens and Obligations Erga Omnes*, Leiden, Boston, Martinus Nijhoff, 2006, 355, 359 ("un accord semble se dégager pour que, à tout le moins la compétence universelle soit considerée comme seconde par rapport aux trois autres [compétences]").

[3570] By an Order of 11 January 2006, the Court fixed 11 July 2006 and 11 August 2008 as the respective time-limits for the filing of these pleadings. *See* http://www.icj-cij.org/icjwww/idocket/icof/icofframe.htm.

1065. While, in the context of the prosecution of core crimes against international law, the principle of subsidiarity may, under current international law, not be a customary norm, reasonableness nonetheless demands that States do not exercise universal jurisdiction if States with a stronger nexus to the case are able and willing to investigate and prosecute. Stating that an adequate local forum is the best place to conduct a trial is indeed stating the obvious. It may be submitted that in the criminal cases arising under the universality principle that are the subject of this note, States ought to apply a subsidiarity principle for criminal-political rather than for legal reasons – but for legitimate reasons nevertheless. Subsidiarity actually underlies the entire system of human rights and international humanitarian law litigation. It may be recalled in this context that the U.S. federal courts, when exercising universal tort jurisdiction under the Alien Tort Statute[3571] over violations of the law of nations, typically gross human rights violations, also apply some sort of subsidiarity principle, as they defer to the local forum, under a forum non conveniens analysis, when that forum is adequate, and when an analysis of relevant private and public interests points to it.[3572] It may also be recalled that international courts and commissions hearing human rights complaints typically set forth the exhaustion of local remedies as an admissibility requirement.[3573]

10.11.3.g. Level of deference

1066. Having surveyed the practice relating to the application of the subsidiarity principle in selected European States, and having reached the conclusion that it is not required by international law although desirable nevertheless, the question arises now what level of deference to the home State under the subsidiarity principle is appropriate. On the one hand, it may be argued that a high level of deference is warranted, because national prosecutors and courts do not have the level of expertise to properly conduct an able-and-willing test that the ICC has. In addition, the smooth conduct of international relations may understandably impel States not to pass judgment on the acts perpetrated by officials of other States. States Parties to the ICC Statute by contrast may more readily accept the ICC's lower level of deference in application of the complementarity principle, because they have ratified the ICC Statute and have thus explicitly supported the complementarity principle. For these reasons, a high level of deference to other States' interests by States asserting universal jurisdiction appears reasonable,[3574] and Belgian, German, and previous Spanish practice in the field may be considered as justified.

[3571] 28 U.S.C. § 1350 (1988).

[3572] *See* chapter 11.2.3.c.

[3573] The local remedies rule in international law has its origins in the law of diplomatic protection. It may be assumed to be a general principle of international law. *See* C.F. AMERASINGHE, *Local Remedies in International Law*, Cambridge, Cambridge University Press, 2004, 2nd ed. (electronic reproduction).

[3574] This study does not support the argument that, for these reasons, State courts are *inappropriate* fora for conducting a subsidiarity test, as argued by *inter alia* C. KRESS, "Universal Jurisdiction over International Crimes and the *Institut de Droit international*", 4 *J.I.C.J.* 561, 584-85 (2006) (submitting that an international judicial organ should be entrusted with the power to conduct such a test). As things stand now, it is in the interest of the fight of impunity to have States exercise universal jurisdiction, even if the quality of the subsidiarity test which they conduct does not rise to the level of the ICC's complementarity test. Not having States exercise universal jurisdiction at all on the ground that their subsidiarity analysis is flawed, is surely a worse option.

1067. On the other hand, the fight against impunity requires a joint effort by States and the ICC, as is clear from the preamble[3575] and Article 17 of the ICC Statute. The ICC will never be able to prosecute all international crimes which are not adequately prosecuted by the home State, so that bystander States will continue to have their role to play, in particular as far as the prosecution of lower-level perpetrators is concerned. The consistency of international criminal law requires that substantive and procedural aspects of the prosecution of international crimes do not diverge too much. Similar admissibility standards should govern international and national procedures, unless there is a compelling reason for different standards.

1068. There is no compelling reason for international and national courts to use a different standard of subsidiarity/complementarity. From the perspective of the victims, it is important that the impunity door is not left ajar. Especially if the ICC has no jurisdiction over a case, bystander States should apply the subsidiarity principle as strictly as the ICC would have applied the complementarity principle. Deciding otherwise would leave the victims in the cold, without assurances that justice will be done by the home State. If the ICC has jurisdiction over a case, the case for deference appears stronger, as, with the entry into force of the ICC Statute, bystander States' courts are no longer courts of last resort. Because the ICC has an advantage in terms of expertise and legitimacy, bystander States may believe that they should not bear the burden of prosecution, and that they might readily defer to the territorial or national State. They are however mistaken, because the fight against impunity is a joint enterprise of States, whatever their bond with the perpetrator, and the ICC alike. Bystander States Parties to the ICC Statute stand actually to lose their credibility if the ICC opines that they were unwilling to genuinely prosecute a case over which they had jurisdiction under international law, *e.g.*, in case the perpetrator was present on their territory and they refused to initiate proceedings against him, assuming that doing so was not their responsibility. Only if bystander States could invoke the able-and-willing test as applied by the ICC and argue that the ICC would also have deferred to the territorial or national State under Article 17 of the ICC Statute, would they be able to justify their decision not to prosecute. Accordingly, it is also in the interests of bystander States that the complementarity principle and the subsidiarity principle mirror each other in 'ability-and-willingness' content. Bystander States should then not defer more readily to the territorial or national State than the ICC would.

10.11.3.h. Lessons to learn for the ICC from bystander States' practice so far

1069. In the previous subsection, a harmonization of the modalities of application of the complementarity and subsidiarity principles has been advocated. The question then ineluctably arises how a common principle should be given shape in practice. An encompassing discussion of the desired application of the complementarity principle obviously falls outside the scope of this study. It will only be examined here whether the ICC could draw some insights from bystander States' experiences with the principle of subsidiarity so far, in light of the competing interests – sovereignty and justice – underlying the principles of complementarity and subsidiarity. States Parties to the Rome Statute – which all surveyed States are – are

[3575] "Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes …"

likely to favour pretty much the same approach to subsidiarity/complementarity as they take at their national level. Because European States have been the driving forces behind the ICC, it is not unreasonable for the ICC to take their views on complementarity into account. After all, the ICC could only function properly if it has the backing of the Parties to the Rome Statute. If the ICC strays from the line drawn by States Parties, it stands to lose both its credibility and legitimacy. In this final part, it will be examined whether the ICC could draw some lessons from on the one hand the Spanish-French subsidiarity approach, and on the other hand the German-Belgian approach.

1070. As set out, Spain and France are willing to exercise jurisdiction after a *prima facie* finding of inactivity by the home State of the offender. Article 17 of the ICC Statute, by contrast, probably requires a higher threshold than mere unwillingness or inability, since it reflects a compromise between the need to fight impunity and the *need to protect legitimate sovereign interests*. Arguably, States would not have agreed upon Article 17 if *prima facie* inactivity or unwillingness would suffice for a case to be admissible before the ICC. Under Article 17 of the ICC Statute, a more in-depth analysis of the home State's willingness and ability to prosecute is therefore required. Conducting this analysis, the ICC may for instance be unlikely to reject the opposability of an amnesty out of hand, as a French investigating judge did in the *Ely Ould Dah* case.[3576] It may instead be expected that the ICC will accept certain amnesties if they further the objective of long-term peace.[3577] Thus, the Spanish-French approach to subsidiarity appears to be anathema to the philosophy underlying Article 17 of the ICC Statute. This may preclude the ICC from drawing much inspiration from Spanish and French practice.

1071. While Spanish and French experiences with the subsidiarity principle may not be relevant for the ICC, German and Belgian practices may not be relevant either: where the Spanish-French approach emphasizes the need to fight impunity over respect for sovereign interests, the German-Belgian approach emphasizes sovereign interests over the need to fight impunity. Both approaches fail to strike the balance that the drafters of the Rome Statute had in mind. If the ICC were to adopt the German-Belgian view, it could distort the compromise of Article 17 of the ICC Statute by deferring to States when such is not warranted from a justice perspective: Article 17 requires a *genuine* ability or willingness to investigate and prosecute on behalf of the State. It is not in the interests of justice to require that States only *generally* prosecute a 'situation' rather than that they see to it that every individual offender is adequately dealt with (Germany). Nor is it in the interests of justice to have a subsidiarity analysis informed by the fact that the courts of a State are considered to be impartial, independent, and fair, or by the fact that a State is a party to a relevant human rights treaty, irrespective of how it deals with the concrete case at issue (Belgium).

1072. The answer to the question whether the ICC might draw lessons from bystander States' experience with the subsidiarity principle may be short and

[3576] Ordonnance of the Juge d'instruction de Montpellier, May 25, 2001.

[3577] The possible peace agreement between Uganda and the indicted leaders of Uganda's Lord Resistance Army (LRA), an agreement which may grant amnesty to LRA members, will probably present the first opportunity for the ICC prosecutor to clarify his prosecutorial policy on the subject of amnesties.

disappointing: not really. Yet the exercise has certainly not been in vain. It helps us to get the picture of the sovereignty-justice balancing act clear. It shows starkly how some States Parties to the Rome Statute emphasize one side of the equation, and other States the other side. It teaches us that "the truth", the ideal degree of tension between sovereignty and justice, as collected from a comparison of State practice, informed and compounded by scientific insights, will probably lie somewhere in the middle. The ICC may now better know which pitfalls it ought to avoid, and that – it is a *cliché*, to be fair – it has to render a Solomon's judgment that accommodates both the advocates of State sovereignty and the crusaders against impunity. When the Court soon pronounces itself on one of the situations of which it is seized, its decision could provide the authority for bystander States to set their record straight.[3578]

10.11.4. A future for universal jurisdiction

1073. Contemplating European States' scaling back of assertions of universal jurisdiction in the early 2000s, Belgian investigating judge Vandermeersch, pointed out that this reveals "a tide of scepticism and the resurgence of the principle of non-interference concerning crimes against international humanitarian law".[3579] This tide of scepticism may be largely due to unwise decisions of victims' groups targeting high-profile defendants for political rather than accountability reasons, thereby causing diplomatic tensions.[3580] While non-governmental actors may at times contribute to the progressive development of international law (*e.g.*, their role in the drawing up of the Rome Statute of the ICC), their bungled efforts to explore the limits of the law, without due regard for foreign policy concerns, may cause a backlash and leave the state of international law (implementation) temporarily worse off than had they not intervened. Against that backdrop, it would make sense if a loosely integrated transnational network of civil society groups would retain some measure of oversight over victims' and victims' groups' efforts to tap universal jurisdiction laws.

1074. Without necessarily forgoing the principle of universal jurisdiction, European States made an attempt at dovetailing idealistic ambitions and realistic constraints. This has led one commentator to term the watering down of universal jurisdiction through the (re-)introduction of points of contact with the forum as a negation of universal jurisdiction, and its reduction of the entire concept to "a simple variant on [...] personality jurisdiction".[3581] All States providing for universal jurisdiction indeed introduced a number of constraints on the actual exercise of universal jurisdiction, mostly in the form of nationality, residence or presence requirements. Exercising restraint as far as the prosecution of core crimes is concerned is however not necessarily unreasonable, as long as the universality principle itself is not encroached upon. It may even be argued that only if restraint is exercised will the universality principle survive in a hostile world still largely based on notions of State sovereignty.

[3578] *Compare* C. KRESS, "Universal Jurisdiction over International Crimes and the *Institut de Droit international*", *4 J.I.C.J.* 561, 580 (2006).
[3579] *See* D. VANDERMEERSCH, "Prosecuting International Crimes in Belgium", 3 *J.I.C.J.* 400, 420 (2005).
[3580] *See* N. ROHT-ARRIAZA, *The Pinochet Effect*, Philadelphia, PA, University of Pennsylvania Press, 2004, 196-98 (noting that "the danger is not that politically motivated courts will run amok, but that complainants will overreach.").
[3581] *Id.*, at 191.

1075. Cutting off the prosecutorial avenue for victims in their capacity as civil parties may for instance serve the legitimate purpose of ensuring that the national prosecutorial system is not overloaded and that the reputation of foreign officials is not besmirched by frivolous complaints.[3582] Especially the subsidiarity principle deserves credit as a restraining principle that only authorizes the exercise of universal jurisdiction as a last resort. Far from hollowing out the universality principle, it is not predicated on a desire to tie foreign cases to aspects of the forum's national sovereignty, such as territory or nationality, but on a genuine willingness to take responsibility for the prosecution of international crimes, wherever and by whomever they are committed, subject to the requirement that another State is not able or willing to investigate or prosecute. Applying the subsidiarity principle, bystander States at the same time pay respect to the jurisdictional priority of the home State (the State with the stronger nexus to the crime), and allow the development of the rule of law in that State. So far, as KRESS has rightly noted, it is however, "impossible to identify – as a matter of customary international law – a certain standard of proof required in determining whether or not the holder of the primary right to adjudication is unwilling or unable to prosecute the case."[3583]

1076. By applying principles of restraint, States seem to have subjected their jurisdictional assertions to the requirement of reasonableness, set forth by Section 403 of the Restatement (Third) of U.S. Foreign Relations Law. A reasonable exercise of jurisdiction accommodates foreign nations' concerns. After the tensions arising over the application of the Belgian universal jurisdiction act, international jurisdictional conflict has indeed remained rather low-key. Looming conflicts were defused and are being defused by bystander States catering to the demands of foreign States.[3584] States exercising universal jurisdiction, with the possible exception of Spain after the Constitutional Court's judgment of September 2005, could therefore more and more be considered to "*appropriately* represent the international community".[3585]

[3582] In 1997 a UN Special Rapporteur on impunity however still urged States to grant victims and victims' groups wide-ranging possibilities to institute proceedings along the lines of the Belgian-French system of civil party petition. *See* Final Report on the Question of Impunity for Violations of Human Rights (Civil and Political Rights), prepared by Louis Joinet in accordance with resolution 1996/119 of the Subcommission for the Prevention of Discrimination and Protection of Minorities, 49th Sess., Agenda Item 9, UN Doc. E/CN.4/Sub.2/1997/20/Rev. 1 (2 Oct. 1997), principle 18 ("Although the decision to prosecute lies primarily within the competence of the State, supplementary procedural rules should be introduced to enable victims to institute proceedings, on either an individual or a collective basis, where the authorities fail to do so, particularly as civil plaintiffs. This option should be extended to nongovernmental organizations with recognized long-standing activities on behalf of the victims concerned.").

[3583] *See also* C. KRESS, "Universal Jurisdiction over International Crimes and the *Institut de Droit international*", 4 *J.I.C.J.* 561, 580 (2006).

[3584] After a complaint was filed by the Republic of Congo against France with the International Court of Justice (*Congo Beach* case), a French court of appeals discontinued, arguably on questionable grounds, the French proceedings initiated against a number of Congolese officials under the universality principle (chapter 10.5). English officials met several times with their Israeli counterparts so as to limit the political damage caused by the issuance of a warrant for the arrest of Israeli retired Major General Almog (chapter 10.7).

[3585] *See* A. SAMMONS, "The Under-Theorization" of Universal Jurisdiction: Implications for Legitimacy on Trials of War Criminals by National Courts", 21 *Berkeley J. Int'l L.* 111, 141 (2003) (noting that Belgium overstepped the limits of reasonableness).

CHAPTER 11: UNIVERSAL TORT JURISDICTION

11.1 The international law framework

1077. UNIVERSAL CRIMINAL VERSUS UNIVERSAL TORT JURISDICTION – Universal jurisdiction is often equated with universal *criminal* jurisdiction.[3586] This obscures the reality that States might also be willing to exercise universal *tort* jurisdiction by allowing a civil court to hear complaints for damages suffered abroad from victims of foreign human rights violations. Universal tort jurisdiction may be defined as the exercise of jurisdiction by a State which cannot point to a territorial or personal nexus with the violation, and which premises the inapplicability of the traditional *locus delicti* rule in tort law on the heinous nature of the violation. The essence of the universality principle, in criminal as well as civil matters, is indeed that it is a jurisdictional ground that operates solely on the basis of the nature of the offence, without further legitimizing links with the forum State being required.

Universal tort jurisdiction may be conceived of as a logical complement of universal criminal jurisdiction pursuant to the maxim 'the greater includes the lesser' (the greater being jurisdiction in criminal matters, the lesser being jurisdiction in civil matters). The seemingly paradoxical observation that European States self-consciously assert universal *criminal* jurisdiction, but, as will be demonstrated in chapter 11.3, hardly exercise universal *tort* jurisdiction independent of a criminal investigation in the manner contemplated by the U.S. Alien Tort Statute (ATS) and Torture Victim Protection Act (TVPA),[3587] shows that both are nonetheless not necessarily linked. In chapter 11.2, it will be argued that universal *tort* jurisdiction, is, thanks to the peculiar features of the U.S. procedural system, a distinctly U.S. phenomenon.[3588] Firstly, however, the status of universal tort jurisdiction in public international law will be examined.

1078. NO TREATIES – A substantial number of treaties authorize or require the exercise of universal *criminal* jurisdiction, often on the basis of an *aut dedere aut judicare* provision. No single treaty however explicitly authorizes, let alone obliges, States to exercise universal *tort* jurisdiction. The UN Torture Convention for instance, while providing for universal criminal jurisdiction over torture, remains silent on the scope of the article that provides for reparation. The case for universal tort jurisdiction under public international law will thus have to be made under customary international law, unless the international community returns to the negotiating table

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[3586] *See, e.g.*, J. TERRY, "Taking *Filàrtiga* on the Road: Why Courts Outside the United States Should Accept Jurisdiction Over Actions Involving Torture Committed Abroad", in C. SCOTT (ed.), *Torture as Tort*, Oxford, Portland, Oregon, Hart, 2001, at 109.

[3587] *See* B. STEPHENS, "Translating *Filàrtiga*: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations", 27 *Yale J. Int'l L.* 1, 17 (2002) (noting that no *Filàrtiga*-style lawsuits were filed outside the United States - *Filàrtiga* being the seminal ATS case). In 1997, STEPHENS still identified European opposition against extraterritorial subject-matter jurisdiction as a reason for Europeans not embracing universal tort jurisdiction (B. STEPHENS, "Expanding Remedies for Human Rights Abuses: Civil Litigation in Domestic Courts", 40 *German Yearbook of International Law* 134 (1997)). In view of European assertions of universal jurisdiction in criminal matters since 1997, that argument should now be rejected.

[3588] *See* J. TERRY, "Taking *Filàrtiga* on the Road: Why Courts Outside the United States Should Accept Jurisdiction Over Actions Involving Torture Committed Abroad", in C. SCOTT (ed.), *Torture as Tort*, Oxford, Portland, Oregon, Hart, 2001, 110.

of the Hague Conference on Private International Law, which it had left in 2001, *inter alia* over disagreements about the possible scope of a provision of a draft convention authorizing universal civil jurisdiction over gross human rights violations.

1079. UN TORTURE CONVENTION – The most important convention that explicitly provides for universal criminal jurisdiction is the UN Convention against Torture and Other Cruel, Human and Degrading Treatment or Punishment (1984).[3589] The UN Torture Convention does not only provide for penal repression of torture, it also features a provision on reparation. Filing a tort suit is a method of obtaining reparation. In Article 14 of the Convention, it is stated:

> 1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.
>
> 2. Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law.

Unlike Article 5 of the UN Torture Convention, which deals with criminal jurisdiction, Article 14 of the Convention, the right-to-a-remedy provision, remains silent on its jurisdictional scope.[3590] This has led Lord Bingham of Cornhill and Lord Hoffmann, of the United Kingdom House of Lords, to state in *Jones* v. *Saudi Arabia* (2006) that the article does not provide for universal civil jurisdiction.[3591] Textual silence need however not imply that the Torture Convention prohibits the exercise of universal tort jurisdiction. Indeed, States may premise the exercise of universal tort jurisdiction on Article 14 (2) of the Convention, the provision that does not "affect any rights of the victim or other persons to compensation which may exist under national law". It has been argued that, most likely, in view of Article 14 (2), the Convention *permits* universal tort jurisdiction,[3592] but does not require it[3593]. The

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[3589] Article 5.2 of the UN Torture Convention.

[3590] So do the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005, available at http://www.ohchr.org/english/law/remedy.htm

[3591] *Jones* v. *Saudi Arabia* [2006] UKHL 26, § 20 (Lord Bingham of Cornhill) ("[A]rticle 14 of the Torture Convention does not provide for universal civil jurisdiction. It appears at one stage of the negotiating process the draft contained words, which mysteriously disappeared from the text, making this clear. But the natural reading of the article as it stands in my view conforms with the U.S. understanding …, that it requires a private right of action for damages only for acts of torture committed in territory under the jurisdiction of the forum state … The correctness of this reading is confirmed when comparison is made between the spare terms of article 14 and the much more detailed provisions governing the assumption and exercise of criminal jurisdiction."); *Id*,, § 46 (Lord Hoffmann) (stating that Article 14 is "plainly concerned with acts of torture within the jurisdiction of the state concerned").

[3592] *See* B. STEPHENS, "Translating *Filartiga*: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations", 27 *Yale J. Int'l L.* 1, 49 (2002).

[3593] *See* A. BYRNES, "Civil Remedies for Torture Committed Abroad: An Obligation under the Convention against Torture?", in C. SCOTT (ed.), *Torture as Tort*, Oxford, Portland, Oregon, Hart,

United States could thus arguably legitimately confer universal tort jurisdiction on its federal courts under the Torture Victim Protection Act (1991).[3594]

1080. HAGUE CONVENTION – Until 2001, work was undertaken in the framework of the Hague Conference on Private International Law to draft a Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters. The draft convention was the first of its kind to authorize universal tort jurisdiction. Indeed, although it required that States refrain from exercising jurisdiction in the absence of a substantial connection between the case and the State exercising jurisdiction, its Article 18(3) stated:

> "Nothing in this Article shall prevent a court in a Contracting State from exercising jurisdiction under national law in an action [seeking relief] [claiming damages] in respect of conduct which constitutes –
>
> Variant One:
> a) genocide, a crime against humanity or a war crime, as defined in the Statute of the International Criminal Court;
> b) a serious crime against a natural person under international law; or
> c) a grave violation against a natural person of non-derogable fundamental rights established under international law, such as torture, slavery, forced labour and disappeared persons.
>
> Sub-paragraphs b) and c) above apply only if the party seeking relief is exposed to a risk of a denial of justice because proceedings in another State are not possible or cannot reasonably be required.
>
> Variant Two:
> a serious crime under international law, provided that this State has established its criminal jurisdiction over that crime in accordance with an international treaty to which it is a party and that the claim is for

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2001, 537 *et seq.*, 549 in particular (arguing that if Article 14 of the UN Torture Convention were to require States to provide civil remedies for torture committed abroad, immunity claims should be addressed). *Contra* Conclusions and recommendations of the Committee against Torture (CAT): Canada 7 July 2005 (CAT/C/CR/34/CAN) (expressing concern at "the absence of effective measures to provide civil compensation to victims of torture in all cases", and recommending that Canada should "review its position under article 14 of the Convention to ensure the provision of compensation through its civil jurisdiction to all victims of torture"). *Contra* CAT recommendation: *Jones* v. *Saudi Arabia* [2006] UKHL 26, § 57 (Lord Hoffmann) ("Quite why Canada was singled out for this treatment is unclear, but as an interpretation of article 14 or a statement of international law, I regard it as having no value … The committee has no legislative powers.").

[3594] S.Rep. No. 249, 102d Cong., 1st Sess., at 2-5 (1991). *Contra Jones* v. *Saudi Arabia* [2006] UKHL 26, § 58 (Lord Hoffmann) ("[The TVPA] represents a unilateral extension of jurisdiction by the United States which is not required and perhaps not permitted by customary international law. It is not part of the law of … any … state."). When notifying its ratification of the Torture Convention in December 1984, the United States had however expressed its understanding "that article 14 requires a State Party to provide a private right of action for damages only for acts of torture committed in territory under the jurisdiction of that State Party." (quoted in *Jones* v. *Saudi Arabia* [2006] UKHL 26, § 20 (Lord Bingham of Cornhill), holding that "there is no reason to think that the United States would now subscribe to a rule of international law conferring a universal tort jurisdiction which would entitle foreign states to entertain claims against US officials based on torture allegedly inflicted by the officials outside the state of the forum").

> civil compensatory damages for death or serious bodily injury arising from that crime."[3595]

Progress on the draft convention stalled, however, and States postponed negotiations. Nevertheless, that some States managed to insert a human rights exception to the classical rules of judicial jurisdiction in civil matters into the draft convention, bears testimony to a growing trend within the international community of authorizing that, in the field of human rights, the classical rules of tort jurisdiction are superseded by special jurisdictional rules that allow victims of gross human rights violations to obtain relief in *any* court.[3596]

1081. LEGALITY OF UNIVERSAL TORT JURISDICTION DERIVING FROM UNIVERSAL CRIMINAL JURISDICTION – Although there are no international instruments explicitly providing for universal tort jurisdiction, such need not undercut its legality. Universal tort jurisdiction may indeed be authorized under customary international law. Older doctrine has argued that customary international law does not limit a State's assertion of jurisdiction over civil claims,[3597] although this view is by now possibly obsolete.[3598] Newer doctrine has, given the dearth of specific State practice in the field of tort law, attempted to derive the legality of universal tort jurisdiction from the accepted legality of universal criminal jurisdiction under customary international law.

Notably the Restatement (Third) of Foreign Relations Law of the United States, which purportedly restates international law, sets forth that a State has universal jurisdiction "to define and prescribe *punishment* for certain offences recognized by the community of nations as of universal concern."[3599] In a comment it adds that "[i]n general, jurisdiction on the basis of universal interests has been exercised in the form of criminal law, but international law *does not preclude the application of non-criminal law* on this basis, for example, by *providing a remedy in tort or restitution for victims* of piracy."[3600] The drafters of the Restatement arguably considered both universal criminal and universal tort jurisdiction (the latter as enshrined in the ATS)[3601], to be acceptable under international law, because "the greater includes the

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[3595] HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, October 30, 1999, Preliminary Document No. 11 (August 2000), available at www.hcch.net/upload/wop/jdgmpd11.pdf.

[3596] *See* D.F. DONOVAN & A. ROBERTS, "The Emerging Recognition of Universal Civil Jurisdiction", 100 *A.J.I.L.* 142, 152 (2006).

[3597] *See* G. FITZMAURICE, "The General Principles of International Law", 92 *R.C.A.D.I.* 1, 218 (1957-II) (arguing that "public international law does not effect any delimitation of spheres of competence in the civil sphere, and seems to leave the matter entirely to private international law – that is to say in effect to the States themselves for determination, each in accordance with its own internal law"); M. AKEHURST, "Jurisdiction in International Law", 46 *B.Y.I.L.* 145, 172 (1972-73) ("It is hard to resist the conclusions that … customary international law imposes no limits on the jurisdiction of municipal courts in civil trials.").

[3598] *See* B. STEPHENS, "Translating Filartiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations", 27 *Yale J. Int'l L.* 1, 50-51 (2002) (inferring from this historical view however that "assertions of civil jurisdiction, at the least, should be less controversial than assertions of criminal jurisdiction").

[3599] § 404 Restatement (Third) (emphasis added). *See also* R. HIGGINS, *Problems and Process. International Law and How We Use It*, Oxford, Clarendon Press, 1994, at 57.

[3600] § 404 Restatement (Third), cmt. b (emphasis added).

[3601] U.S. courts do generally not analyze the ATS as a statute conferring universal jurisdiction, although, from an international law perspective, the statute may indeed do just that, as it does not

lesser" (*qui peut le plus, peut le moins*), criminal jurisdiction being generally more intrusive than tort jurisdiction.[3602] In this 'permissive' scheme, it would be irrelevant that other States do generally not exercise universal tort jurisdiction.[3603] It would suffice that the concept of universal jurisdiction in general is recognized under customary international law.

This view seems recently to have been espoused by the United Kingdom Court of Appeals and the Italian Court of Cassation. In *Jones* v. *Saudi Arabia* (2004), the United Kingdom Court of Appeals stated that "there is the obvious potential for anomalies, if the international criminal jurisdiction which exists under the Torture Convention is not matched by some wider parallel power to adjudicate over civil claims."[3604] In *Ferrini* v. *Federal Republic of Germany* (2004), the Italian Court of Cassation stated that it had "no doubt that the principle of universal jurisdiction *also* applies to civil actions which trace their origins to such crimes [war crimes in the case]".[3605] The *Ferrini* view was criticized by the Lord Bingham of Cornhill of the United Kingdom House of Lords in *Jones* v. *Saudi Arabia* (2006), who suspected that "despite the court's closing statement to the contrary, … the decision was influenced by the occurrence of some of the unlawful conduct within the forum State."[3606] Lord Bingham went on the state that, even if no unlawful conduct had occurred territorially, the *Ferrini* statement could not be treated "as an accurate statement of international law as generally understood; one swallow does not make a rule of international law."[3607] He eventually vacated the Court of Appeal's decision in *Jones*

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exclude suits by aliens against aliens for acts committed abroad. *See* however *Xuncax* v. *Gramajo*, 886 F. Supp. 162, 183 n. 25 (D. Mass. 1995) (quoting Restatement (Third) of Foreign Relations Law, § 404) (upholding "the legitimacy of United States jurisdiction over [human rights] violations from the perspective of international law" in light of "the doctrine of universal jurisdiction", which "provides that a 'state may exercise jurisdiction to define and punish certain offenses recognized by the community of nations as of universal concern."); *Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d 774, 781 (D.C. Cir. 1984) (Edwards, J., concurring) (stating that "persons may be susceptible to civil liability if they commit either a crime traditionally warranting universal jurisdiction or an offense that comparably violates current norms of international law"). *See also* R.H. BORK, "Judicial Imperialism", *Wall Street Journal*, July 12, 2004, at A16 ("The expansion of ATS so that our courts can judge the actions of foreigners in their own countries is a version of the embryonic concept of universal jurisdiction."); B. STEPHENS, "Translating Filartiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations", 27 *Yale J. Int'l L.* 1, 40 (2002) (arguing that "civil and criminal responses to international human rights violations … all fall within the broad authorization of universal jurisdiction").

[3602] *See* B. STEPHENS, "Translating Filartiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations", 27 *Yale J. Int'l L.* 1, 50 (2002); D.F DONOVAN, "Universal Civil Jurisdiction – the Next Frontier; Introductory Remarks", *ASIL Proc.* 117 (2005); B. VAN SCHAACK, "Justice Without Borders: Universal Civil Jurisdiction", *ASIL Proc.* 120 (2005). *See also* J.F. MURPHY, "Civil Liability for the Commission of International Crimes as an Alternative to Criminal Prosecution", 12 *Harvard Hum. Rts. J.* 1. 53 (1999) ("Since [a number of international crimes] are clearly subject to the universality principle of jurisdiction, as well as to the more controversial passive personality principle, there would be no valid objections based on the extraterritorial application of [tort] law.") (footnote omitted). *Compare* § 403 of the Restatement, reporters' note 8 ("It is generally accepted by enforcement agencies of the United States government that criminal jurisdiction over activity with substantial foreign elements should be exercised more sparingly than civil jurisdiction over the same activity, and only upon strong justification.").

[3603] *Contra* C.A. BRADLEY, "Universal Jurisdiction and U.S. Law", *U. Chi. Legal. F.* 323, 348 (2001).

[3604] *Jones* v. *Saudi Arabia*, [2004] EWCA Civ 1394, § 79.

[3605] Italian Court of Cassation, Decision No 5044/2004, reproduced in the original Italian text in 87 *Rivista di diritto internazionale* 539 (2004) (emphasis added).

[3606] *Jones* v. *Saudi Arabia* [2006] UKHL 26, § 22 (Lord Bingham of Cornhill).

[3607] *Id.*

v. *Saudi Arabia*, which had approved of the exercise of universal tort jurisdiction over torture.[3608]

1082. OBJECTIONS AGAINST UNIVERSAL TORT JURISDICTION – Against the argument that universal tort jurisdiction is less intrusive than universal criminal jurisdiction, it has been submitted that foreign States may in practice take as much issue with States exercising tort jurisdiction as with States exercising criminal jurisdiction.[3609] Although private plaintiffs may have brought a tort case, a judge, *i.e.*, a State actor, indeed ultimately adjudicates it. It may even be argued that universal tort jurisdiction is in fact *more* intrusive than universal criminal jurisdiction, as any private person could file a lawsuit, however frivolous, without ever taking into account foreign policy consequences.[3610] Prosecutors, as State officials, will ordinarily strike a careful balance between justice and diplomatic concerns (although victims may cause a diplomatic stir by their mere filing of a complaint with a prosecutor, or in case of civil party petition, with an investigating magistrate).

1083. It has also been argued, that from a conceptual point of view, "the theory of universal jurisdiction hypothesizes that each nation is delegated the authority to act on behalf of the world community, not on behalf of particular victims."[3611] Against this, it could however be argued that nations, if exercising universal civil jurisdiction, do not act on behalf of particular victims, but merely provide an adjudicative forum assessing the merits of private claims. Against the related argument that civil litigation is aimed at redress of harm to particular victims, and not at deterrence and redress of breaches of the international order, it could be argued that such represents a very narrow understanding of the purposes and effects of civil litigation. If perpetrators of human rights violations may be subject to the writ of a forum State's courts and may be obliged to pay huge damages, they might possibly think twice before they commit the violations. Also, the recognition of accountability by a court may reveal a long-hidden truth and provide the impetus for full-fledged redress programs beneficial to all victims involved.[3612] In the next paragraph, the distinct advantages of tort jurisdiction will be discussed.

[3608] *See* X. YANG, "Universal Jurisdiction over Torture?", 64 *Cambridge Law Journal* 1, 3 (2005) ("In effect, the Court [of Appeals] asserted a universal tort jurisdiction … over foreign State officials in respect of allegations of systematic torture.").

[3609] *See* E. KONTOROVICH, "Implementing *Sosa* v. *Alvarez-Machain*: What Piracy Reveals About the Limits of the Alien Tort Statute", 80 *Notre Dame L. Rev.* 111, 160 (2004).

[3610] *Compare* the disadvantages of the U.S. private attorney-general system in regulatory cases (*see* subsection 6.13.2.). *See also* C.A. BRADLEY, "Universal Jurisdiction and U.S. Law", *U. Chi. Legal. F.* 323, 347 (2001); B. VAN SCHAACK, "Justice Without Borders: Universal Civil Jurisdiction", *ASIL Proc.* 120 (2005).

[3611] *See* C.A. BRADLEY, "Universal Jurisdiction and U.S. Law", *U. Chi. Legal. F.* 323, 346 (2001); B. VAN SCHAACK, "Justice Without Borders: Universal Civil Jurisdiction", *ASIL Proc.* 120 (2005) (stating that, with regard to universal civil jurisdiction "the agency theory of universal jurisdiction … is less compelling", because "[c]ivil suits may primarily vindicate private interests").

[3612] *See also* B. STEPHENS, "Translating *Filàrtiga*: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations", 27 *Yale J. Int'l L.* 1, 39, 51 (2002) (arguing that "[t]he goals of civil litigation closely parallel those sought in criminal prosecutions: punishment for past abuses; deterrence of future abuses; redress for victims, including compensation; and development of international law principles"). J. TERRY, "Taking *Filàrtiga* on the Road: Why Courts Outside the United States Should Accept Jurisdiction Over Actions Involving Torture

1084. ADVANTAGES OF CRIMINAL OVER TORT JURISDICTION – Universal tort litigation has important advantages over criminal litigation. While the State may have more resources to conduct a criminal investigation, States have usually little incentive to investigate gross human rights violations committed abroad under the universality principle.[3613] Indeed, States tend to devote their scarce prosecutorial resources to crimes in which they have an interest (ordinarily because these crimes have been committed within the territory, or at least have an effect on the territory).

1085. Fear of upsetting foreign States may also go a long way in explaining the reluctance of bystander States to prosecute gross human rights violations, violations that are usually committed by State actors.[3614] Authorizing victims to initiate civil proceedings could therefore increase the likelihood that perpetrators of gross human rights violations are brought to account. At the same time, international conflict may be reduced because of the State's limited involvement in civil suits. Criminal prosecutions and civil suits indeed differ considerably, not only in terms of their finality (retribution v. compensation), but also in terms of the role of the State. In civil suits, the State is involved in a non-partisan way in the person of the judge settling a dispute between private, *i.e.*, non-State, actors.[3615] By contrast, in criminal cases, State prosecutors (in the United States the U.S. Attorneys who are part of the executive branch) are the only persons authorized to initiate the prosecution. The greater involvement of the State in criminal prosecutions appears to be more likely to produce adverse effects on the conduct of foreign relations than the adjudicatory practice of civil judges.[3616]

1086. Adding to the attractiveness of universal tort jurisdiction is the low standard of the balance of probabilities sufficing for civil liability, as opposed to the high criminal law standard for conviction of guilt beyond reasonable doubt.[3617] Also, civil proceedings may be conducted in the absence of the defendant (resulting in a judgment *in absentia*), whereas the accused is ordinarily required to be present in a criminal proceeding (at least in the trial phase).[3618]

1087. Probably most importantly, in civil, unlike in criminal proceedings, the victims remain masters of the game, and could decide what evidence they present and

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Committed Abroad", in C. SCOTT (ed.), *Torture as Tort*, Oxford, Portland, Oregon, Hart, 2001, 112 (arguing that a civil remedy is "a means for providing a measure of self-respect, vindication and recognition for the victims" and may establish a formal record of the events that took place).

[3613] *See* J. TERRY, "Taking *Filàrtiga* on the Road: Why Courts Outside the United States Should Accept Jurisdiction Over Actions Involving Torture Committed Abroad", in C. SCOTT (ed.), *Torture as Tort*, Oxford, Portland, Oregon, Hart, 2001, 115.

[3614] *See, e.g.*, D.F. DONOVAN & A. ROBERTS, "The Emerging Recognition of Universal Civil Jurisdiction", 100 *A.J.I.L.* 142, 144 (2006).

[3615] *See also* B. VAN SCHAACK, "Justice Without Borders – Universal Civil Jurisdiction", *ASIL Proc.* 120, 121 (2005).

[3616] *Compare* H.M. OSOFSKY, "Domesticating International Criminal Law: Bringing Human Rights Violators to Justice", 107 *Yale L.J.* 191, 214 (1997).

[3617] *See* J. TERRY, "Taking *Filàrtiga* on the Road: Why Courts Outside the United States Should Accept Jurisdiction Over Actions Involving Torture Committed Abroad", in C. SCOTT (ed.), *Torture as Tort*, Oxford, Portland, Oregon, Hart, 2001, 115.

[3618] *Id.*

what redemptive story they want to tell. ALVAREZ put this argument elegantly as follows:

> "[C]ivil suits, controlled by plaintiff/victims and their chosen attorneys, and not prosecutors responsive to other agendas, may also be more effective in preserving a collective memory that is more sensitive to victims than some judicial accounts rendered in the course of criminal trials. Indeed, if studies about litigants' relative satisfactions with adversarial versus inquisitorial methods of criminal procedure are an accurate guide, it may be that having greater control of the process, including the selection of attorneys and the ability to discover and present one's own evidence and develop one's own strategy, is itself a value for victims, and one that is better met through civil suits such as those now occurring in United States courts."[3619]

Civil and criminal suits may be mutually reinforcing, irrespective of the place where the suits are brought. For instance, after an ATS suit was initiated in *Forti* v. *Suarez-Mason*,[3620] Argentina sought the extradition of Suarez-Mason from the United States. PAPPALARDO has argued that "rather than complicating U.S.-Argentine relations, the adjudication actually strengthened them since the *Forti* outcome complemented rather than hindered the Argentine justice system."[3621]

1088. CUSTOMARY INTERNATIONAL LAW – In *Jones* v. *Saudi Arabia* (2006), Lord Bingham of Cornill of the United Kingdom House of Lords stated that "there is no evidence that states have recognised or given effect to an international law obligation to exercise universal [tort] jurisdiction over claims arising from alleged breaches of peremptory norms of international law, nor is there any consensus of judicial and learned opinion that they should."[3622] This is no doubt true. Yet it is not because international law does not *oblige* State sto assume universal tort jurisdiction that it may not *authorize* them to do so. By and large, foreign protest against a State's jurisdictional assertions in the field of tort law has been absent.[3623] This surely boosts the legality of universal tort jurisdiction under customary international law, as the relevant State practice required for the crystallization of a jurisdictional norm of customary law need not solely consist of the practice of States asserting jurisdiction, but also of States not protesting against other States' jurisdictional assertions.

[3619] J.E. ALVAREZ, "Rush to Closure: Lessons of the *Tadic* judgment", 96 *Mich. L. Rev.* 2031, 2101-02 (1998) (footnotes omitted).
[3620] *Forti* v. *Suarez- Mason*, 672 F. Supp. 1531 (N.D. Cal. 1987).
[3621] V.A. PAPPALARDO, "Isolationism or Deference? The Alien Tort Claims Act and the Separation of Powers", 10 *Mich. J. Int'l L.* 886, 907 (1989).
[3622] *Jones* v. *Saudi Arabia* [2006] UKHL 26, § 27 (Lord Bingham of Cornhill).
[3623] *See, e.g.*, M.T. KAMMINGA, "Universal Civil Jurisdiction: Is It Legal? Is It Desirable?", *ASIL Proc.* 123, 124 (2005) ("An important indication … that the exercise of universal civil jurisdiction is not incompatible with international law derives from the fact that states whose nationsl or companies have been subjected to alien tort claims in the United States have not objected to this."); L. REYDAMS, "Universal Jurisdiction in Context", *ASIL Proc.* 118 (2005) ("Other nations for the most part took a neutral or resigned attitude vis-à-vis ATS, perhaps for lack of leverage over a notably independent judiciary of the most powerful country. International pressure and foreign policy considerations thus hardly bore on ATS litigation."). *Id.*, at 119 (stating that "[o]pposition against ATS is primarily domestic"). *See* on domestic U.S. opposition against ATS: Subsection 11.2.3.1.

Universal tort jurisdiction has therefore rightly been termed "an emerging principle" of international law.[3624]

1089. In the next two subsections, it will be shown how universal tort jurisdiction rose to prominence in the United States since the 1980s (section 11.2). It will also be shown that European States do not have tort mechanisms to deal with foreign human rights violations (section 11.3), but that such need not undercut the case for universal tort jurisdiction. Universal tort jurisdiction is arguably just a modality of universal jurisdiction that came to blossom in the United States because of the plaintiff-friendly U.S. *civil* procedure, whereas universal criminal jurisdiction came to blossom in Europe because of the plaintiff-friendly European *criminal* procedure. In this study's view, (reasonably exercised) universal jurisdiction is authorized under customary international law, be it in criminal or civil matters.

11.2. Universal tort jurisdiction in the United States

11.2.1. Introduction

1090. HUMAN RIGHTS TORT SUITS – In Europe, the United States may be faulted for failing to provide adequate remedies for human rights violations. The United States do indeed not entertain universal criminal jurisdiction over violations of international humanitarian law or human rights law.[3625] In addition, they have not ratified the First Optional Protocol to the ICCPR (which grants private individuals the rights to file individual communications or complaints with the Human Rights Committee), and have refused to accept Article 41 ICCPR (which recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the Covenant).[3626] More generally, the United States may be criticized for giving equivocal support to the cause of human rights. Their opposition against the 1989 Convention on the Rights of the Child, and their non-ratification of the 1998 Rome Statute of the International Criminal Court are often cited in this context.

U.S. support for international human rights remedies may indeed be ambiguous. Nonetheless, in one area, U.S. practice relating to international human rights remedies stands out, if compared with foreign States' practice: the United States has been at the forefront of using *tort law* as a method of bringing perpetrators of human rights violations committed abroad to book in the courts of bystander States.[3627]

[3624] *See* D.F. DONOVAN, "Universal Civil Jurisdiction – the Next Frontier; Introductory Remarks", *ASIL Proc.* 117 (2005); D.F. DONOVAN & A. ROBERTS, "The Emerging Recognition of Universal Civil Jurisdiction", 100 *A.J.I.L.* 142 (2006).

[3625] While the American Torture Convention Implementation Act authorizes U.S. federal courts to hear criminal torture cases under the universality principle (18 U.S.C. § 2340), no such cases have yet reached the courts.

[3626] *Compare* P.-Y. HSU, "Should Congress Repeal the Alien Tort Claims Act?", 28 *S. Ill. U. L.J.* 579, 594 (2004) (wondering out loud how such could be squared with the practice of U.S. courts to enter civil human rights suits under the ATS).

[3627] *See, e.g.*, K.L. BOYD, "Universal Jurisdiction and Structural Reasonableness", 40 *Tex. Int'l L.J.* 1, 43 (2004) ("U.S. courts have assumed a critical role in the transnational dialogue, particularly in the area of human rights law under which domestic institutions enforce international obligations.")

1091. ALIEN TORT STATUTE – Under the Alien Tort Statute (ATS) or the Alien Tort Claims Act (ATCA), a statute dating back to 1789, "[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."[3628] Since the seminal 1980 *Filartiga* case, the first case in which the ATS was relied upon for human rights purposes,[3629] U.S. courts have heard a host of civil suits relating to human rights violations brought by foreign plaintiffs against either foreign or U.S. defendants. If U.S. courts hear tort claims filed by foreign plaintiffs against foreign defendants relating to a tort committed abroad, they in effect exercise universal jurisdiction, because the tort nor the tortfeasor has a nexus with the United States.

1092. TORTURE VICTIM PROTECTION ACT – Aside from the ATS, one other U.S. statute provides for universal tort jurisdiction. The Torture Victims Protection Act (TVPA, 1992) provides a cause of action for any victim of torture and extrajudicial killing, wherever committed.[3630] According to its *travaux préparatoires*, the TVPA was not meant to replace the ATS. It only created "an unambiguous and modern basis for a cause of action" for torture and summary execution.[3631] Its enactment was inspired by the desire to "mak[e] sure that torturers and death squads will no longer have safe haven in the United States".[3632] Unlike the ATS, the TVPA permits U.S. citizens to sue, requires exhaustion of domestic remedies[3633] and contains a statute of limitations[3634]. It may be noted that before the enactment of the TVPA, U.S. federal courts addressed torture cases under the ATS. What is more, the ATS was 'rediscovered' in a torture case (*Filartiga*).[3635]

1093. FACILITATING FEATURES OF THE U.S. LEGAL SYSTEM – In an article in the *Yale Journal of International Law*, Beth STEPHENS, an academic and ATS litigator, has clarified why universal tort jurisdiction over human rights violations has gained such traction in the United States.[3636] STEPHENS argues that a number of features of the American legal system make it singularly appropriate and attractive for human rights tort suits by foreign victims. Firstly, requirements of personal

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[3628] 28 U.S.C. § 1350 (1988).

[3629] The ATS was barely used for almost two centuries. *See IIT* v. *Vencap*, 519 F.2d 1001, 1015 (2d Cir. 1975) (stating that "[in 1960] we could find only one case where jurisdiction under [the ATCA] had been sustained, in that instance violation of a treaty, *Bolchos* v. *Darrell*, 3 Fed. Cas. No. 1, 607, p. 810 (D.S.C. 1795); there is now one more. *See Abdul-Rahman Omar Adra* v. *Clift*, 195 F.Supp. 857, 863-65 (D.Md. 1961)").

[3630] Pub. L. 102-256, 12 March 1992, 106 Stat. 73. *See* in particular Section 2 (a) of the TVPA ("An individual who, under actual or apparent authority, or color of law, of any foreign nation: (1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or (2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.").

[3631] H.R. Rep. No. 367, 102d Cong., 1st Sess., at 3 (1992).

[3632] S. Rep. No. 249, 102 Cong., 1st Sess., at 3 (1992). The TVPA is an apparent implementation of Article 14 of the 1984 UN Convention Against Torture and Other Cruel, Human and Degrading Treatment or Punishment, which provides torture victims with a right to a remedy under national law.

[3633] Section 2 (b) of the TVPA.

[3634] *Id.*, Section 2 (c). ATS claims are not subject to a statute of limitations in the ATS. The Ninth Circuit has however introduced the 10-year limitation contained in the TVPA in ATS litigation. *Deutsch v. Turner Corp.*, 317 F.3d 1005 (9th Cir. 2003).

[3635] *Filartiga* v. *Pena-Irala*, 630 F.2d 876 (2d Cir. 1980). *See also Abebe Jiri* v. *Negewo*, 72 F.3d 844 (11th Cir. 1996), *cert. denied* 117 S. Ct. 96 (1996).

[3636] B. STEPHENS, "Translating *Filartiga*: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations", 27 *Yale J. Int'l L.* 1 (2002).

jurisdiction in the United States are extremely liberal, with minimum contacts with, and transitory (tag) presence in the U.S. sufficing for there to be jurisdiction over a person who allegedly committed human rights violations abroad.[3637] Secondly, tort litigation is not an arcane or technical matter in the United States. On the contrary, it is used as means of promoting social reform, as the 1950s and 1960s U.S. civil rights litigation aptly illustrates, and is therefore, from a policy impact perspective, "public" rather than "private" law litigation.[3638] Seasoned in domestic civil rights litigation, American law firms and non-profit litigation offices may be willing to seize international human rights litigation as a means of bringing about worldwide change in States' human rights records. Thirdly, a number of procedural advantages, which are gratefully used by foreign plaintiffs in regulatory (antitrust or securities) litigation as well, add to the lustre of the U.S. legal system, notably the practice of contingency fees, the possibility of obtaining punitive damages, and the availability of wide-ranging discovery powers.[3639]

1094. OPENING THE FLOODGATES OF THE U.S. LEGAL SYSTEM? – The nature of U.S. civil litigation may supposedly ensure plaintiffs a greater chance of success in a civil suit under the ATS than complainants in *criminal* suits in Europe, primarily because of a lower standard of proof and the wide-ranging discovery powers for the victims.[3640] The rediscovery of the ATS in *Filartiga* has nevertheless not opened a Pandora's box. U.S. federal courts have not been overwhelmed by an avalanche of human rights suits, although critics have argued otherwise.[3641] A survey conducted by BOYD in 2004 showed that district courts in only seven of the eleven circuits, and only four circuit courts, had reached an ATS judgment.[3642] In light of the sheer amount of human rights violations worldwide, the number of cases brought under the ATS seems remarkably small after all.[3643]

[3637] *Id.*, at 11-12. It may be noted that, if a defendant flees the U.S. after personal jurisdiction has been established, the U.S. lawsuit can proceed. *See e.g. Kadic* v. *Karadzic*, 70 F.3d 232, at 247 (2nd Cir. 1995); *Xuncax* v. *Gramajo*, 886 F. Supp. 162 (D. Mass. 1995). The trial judge will then eventually render a judgment by default, which is enforceable in the U.S. Other States may also be willing to enforce the U.S. judgment. Most cases under the ATS however involve individual defendants who live in the U.S. or companies that have a presence in the U.S., and not defendants who are temporarily present in the U.S. *See* B. STEPHENS, "Expanding Remedies for Human Rights Abuses: Civil Litigation in Domestic Courts", 40 *German Yearbook of International Law* 117, 133-134 (1997). Before *Filartiga* (1980), tag jurisdiction was generally dismissed by the doctrine. The rediscovery of the ATS by the countries seems interestingly to have gone together with a rediscovery of tag jurisdiction by the doctrine. *See* P.R. DUBINSKY, "Human Rights Law Meets Private Law Harmonization: The Coming Conflict", 30 *Yale J. Int'l L.* 211, 264-65 (2005).

[3638] *See* B. STEPHENS, "Translating *Filartiga*: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations", 27 *Yale J. Int'l L.* 1, 12-14 (2002).

[3639] *Id.*, at 14-16.

[3640] *See* J.F. MURPHY, "Civil Liability for the Commission of International Crimes as an Alternative to Criminal Prosecution", 12 *Harvard Hum. Rts. J.* 1, 47 (1999).

[3641] *See* in particular G.C. HUFBAUER & N.K. MITROKOSTAS, *Awakening monster: the Alien Tort Statute of 1789*, Washington, DC, Institute for International Economics, 2003, viii + 86 p.

[3642] *See* K.L. BOYD, "Universal Jurisdiction and Structural Reasonableness", 40 *Tex. Int'l L.J.* 1, 5 n. 26 (2004). *See* in the context of the application of the ATS to corporate defendants: M.P. GIBNEY, "On the Need for an International Civil Court", 26-FALL *Fletcher F. World Aff.* 47, 53-54 (2002); B. STEPHENS, "Upsetting Checks and Balances: The Bush Administration's Efforts to Limit Human Rights Litigation", 17 *Harv. Hum. Rts. J.* 169, 179 (2004) (noting that approximately 38 cases against corporate defendants have been filed under the ATS, but that only five had, as of 2004, survived motions to dismiss).

[3643] *See* E. KONTOROVICH, "Implementing Sosa v. Alvarez-Machain: What Piracy Reveals About the Limits of the Alien Tort Statute", 80 *Notre Dame L. Rev.* 111, 117 (2004) (fearing at pp.124-125

1095. PRESUMPTION AGAINST EXTRATERRITORIALITY – In chapter 11.1, it has been argued that universal tort jurisdiction is probably authorized by international law, even though they are no specific international law instruments dealing with the matter. In the United States, federal courts have not reviewed the international legality of the ATS, since U.S. courts typically do not review acts of Congress in light of international law. Statutes that are illegal under public international law might thus still be applied by U.S. courts. U.S. courts however routinely apply the presumption against extraterritoriality so as to limit the geographical reach of a statute. Under this presumption, statutes are only to be applied extraterritorially if Congress has made clear its intent to do so. ATS courts have however never analyzed the ATS in terms of the presumption against extraterritoriality.[3644] One court even appeared to find the intent of Congress irrelevant.[3645] U.S. courts arguably presuppose that extraterritorial jurisdiction flows naturally from the granting of a cause of action for violations of the law of nations,[3646] or that Congress's silence in the aftermath of *Filàrtiga* equals endorsement of the judgment.[3647]

It could be argued that the Framers of the ATS could as well have had in mind a cause of action for violations of the law of nations committed in *U.S. territory* against aliens, or at least a cause for violations committed abroad by *aliens against U.S. citizens*, or *U.S. citizens against aliens*. KONTOROVICH for instance has submitted that in *Sosa* (2004), the U.S. Supreme Court at least impliedly relied on a supposed presumption against extraterritoriality, where the Court held that "the subject of those collateral consequences [of making international rules privately actionable] is itself a reason for a high bar to new private causes of action for violating international law, for the potential implications for the foreign relations of the United States of recognizing such causes should make courts particularly wary of impinging on the

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however that, since the Supreme Court approved of ATS jurisdiction in the *Sosa* judgment (2004), "the United States may turn out to be the nation that most frequently and broadly exercises universal jurisdiction"); L. DHOOGE, "The Alien Tort Claims Act and the modern transnational enterprise: deconstructing the mythology of judicial activism", 35 *Georgetown J. Int'l L.* 3, 68 (2004).

[3644] *See* J. JARVIS, "A New Paradigm for the Alien Tort Statute Under Extraterritoriality and the Universality Principle", 30 *Pepp. L. Rev.* 671, 700, 705 (2003) (arguing that the "words of the ATS are terse" and "do not contain any indication the statute was intended to be used beyond U.S. territory); *Id.*, at 718 ("Courts may seek and find the law of nations by consulting numerous sources. But can the courts, absent express authority from Congress, also use universal jurisdiction?"); K.L. BOYD, "Universal Jurisdiction and Structural Reasonableness", 40 *Tex. Int'l L.J.* 1, 33-35 (2004) (holding nonetheless that "since no court has ruled on the matter, the presumption remains a possible affirmative defense to check universal civil jurisdiction").

[3645] *Wiwa* v. *Dutch Petroleum Co.*, 226 F.3d 88, 104, n. 10 (2d Cir. 2000) ("Whatever the intent of the original legislators … the text of the [ATS] seems to reach claims for international human rights abuses occurring abroad.").

[3646] *See, e.g., In re Estate of Marcos, Human Rights Litig.*, 978 F.2d 493, 500 (9th Cir.) ("[W]e are constrained by what § 1350 shows on its face: no limitations as to the citizenship of the defendant, or the locus of the injury.")

[3647] *Contra Sosa* v. *Alvarez-Machain*, 124 S. Ct. 2739, 2763 (2004): "Congress as a body has done nothing to promote [private human rights] suits. Several times, indeed, the Senate has expressly declined to give the federal courts the task of interpreting and applying international human rights law, as when its ratification of the International Covenant on Civil and Political Rights declared that the substantive provisions of the document were not self-executing. 138 Cong. Rec. 8071 (1992)."

discretion of the Legislative and Executive Branches in managing foreign affairs."[3648] It may however be submitted that KONTOROVICH confounded justiciability and the presumption against extraterritoriality. Indeed, the quoted holding is rather concerned with the question of whether federal courts should actually hear particular cases legitimately before them than with any perceived intent of Congress to restrict the territorial scope of the ATS upon enacting the statute. In subsection 10.2.3, the application of justiciability doctrines in the context of ATS litigation will be discussed at length.

1096. SUBSTANTIVE NORMS – This analysis of the scope of the ATS is only concerned with issues of jurisdiction. The substantive legal norms that are applied by the federal courts in ATS cases will not be discussed, although, from the viewpoint of international law, some interesting developments have taken place, for instance the reliance on the "under the color of law" and the "aiding and abetting" standard for assessing individual (often corporate) liability.[3649]

1097. AMENDING THE ATS – Because the scope of the ATS is potentially overbroad, a scope which the courts may not be in the capacity to meaningfully limit, U.S. Senator Diane Feinstein introduced corrective legislation in the Senate on October 17, 2005.[3650] Some provisions of the Feinstein bill however unduly limited the scope of the ATS. This led to fierce protests from non-governmental organizations[3651] and Senator Feinstein's eventual withdrawal of her bill on October 26, 2005.[3652] Especially the provision that empowered the President to block any ATS

[3648] 124 S.Ct. 2763. *See* E. KONTOROVICH, "Implementing *Sosa v. Alvarez-Machain*: What Piracy Reveals About the Limits of the Alien Tort Statute", 80 *Notre Dame L. Rev.* 111, 129 (2004) (also submitting that, while the Supreme Court ruled that the ATS confers jurisdiction over cases brought by aliens suing under certain causes of action comparable to the historical paradigms of 1789, such a holding "is distinct from the question of whether the ATS grants the district courts universal jurisdiction over such offenses., and arguing that "[universal jurisdiction] does not automatically accompany human rights offenses when they become part of a nation's substantive law.").

[3649] *See, e.g.*, *Doe* v. *Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal 1997) (denial of motion to dismiss). (holding that "private actors may be liable for violations of international law even absent state action."). *Contra Doe* v. *Unocal Corp.*, 110 F.Supp. 2d 1294, 1310 (C.D. Cal. 2000), reversed by *Doe* v. *Unocal*, 2002 WL. Under the "under color of law" standard, private actors may traditionally be found liable for human rights violations if they are "clothed with the authority of [the] law" (*United States* v. *Classic*, 313 U.S. 299, 326 (1941)). The "under color of law" standard is codified in U.S. federal law ("Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . ." 42 U.S.C. § 1983 (1988)). See for the "aiding and abetting" standard: *Doe* v. *Unocal*, 2002 WL 31063976 at 10 (9th Cir. Dec. 3, 2001) (defining "aiding and abetting" as providing "knowing practical assistance or encouragement which has a substantial effect on the perpetration of the crime"). If corporations commit human rights violations as joint actors with the State, ATS courts could hold them to account under the color of law standard.

[3650] Bill to amend 28 U.S.C. § 1350, 109th Congress, 1st Session, S. 1874, October 17, 2005.

[3651] *See, e.g.*, www.laborrights.org/projects/corporate/feinsteinupdate102505.htm.

[3652] *See* for the withdrawal letter to Arlen Specter, Chairman of the Senate Judiciary Committee, available at www.nathannewman.org/laborblog/archive/Alien%20Tort.pdf (with Senator Feinstein stating: "I believe that the legislation in its present form calls for refinement in light of concerns raised by human rights advocates, and thus a hearing or other action by the Committee on this bill would be premature.")

case,[3653] and the exclusion of bringing suits against aliens "if a foreign state is responsible for committing the tort in question within its sovereign territory"[3654] (which might exclude any action against State actors, although it is mostly these actors who are responsible for international crimes) gave rise to concern. Other restrictions that human rights groups took exception with included the restriction of the definition of slavery,[3655] the exclusion of those who aid, abet, and conspire to commit the alleged tort from liability (only "direct participants" would incur liability),[3656] the requirement of specific intent to commit the alleged tort,[3657] the prohibition of contingency fee arrangements (which may deprive cash-strapped victims of human rights violations from their day in court),[3658] and the introduction of a 10-year statute of limitations[3659]. [3660] It remains to be seen whether revised legislation will be introduced, or whether Congress will for the time being trust the courts applying the ATS.

11.2.2. Sosa v. Alvarez-Machain

1098. CLARIFYING THE INTERNATIONAL NORMS ACTIONABLE UNDER THE ATS – Questions relating to the scope of the ATS came for the first time before the U.S. Supreme Court in *Sosa* v. *Alvarez-Machain* (2004).[3661] For our purposes, *Sosa* is important in that it determines what norms are actionable under the ATS. *Sosa* ascertained to what extent the U.S. Congress allowed federal courts to entertain tort suits for violations of the law of nations. Put differently, in international law terms, *Sosa* clarified over what violations ATS courts could exercise universal tort jurisdiction.

1099. In *Sosa*, the Supreme Court ruled that the First Congress, when enacting the ATS in 1789, would have expected federal courts to retain its capacity to recognize private claims under federal common law for violations of any international norm with "definite content and acceptance among civilized nations, comparable with the historical paradigms in 1789".[3662] In so doing, the Supreme Court appeared to vindicate *Filàrtiga*, the seminal ATS case, and its progeny's dynamic interpretation of the ATS.[3663] In 1980, the *Filartiga* court indeed held that "it is clear that courts must

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[3653] Amended 28 U.S.C. § 1350 (e) provided that "[n]o court in the United States shall proceed in considering the merits of a claim … if the President, or a designee of the President, adequately certifies to the court in writing that such exercise of jurisdiction will have a negative impact on the foreign policy interests of the United States."

[3654] 28 U.S.C. § 1350 (a) *in fine.*

[3655] Amended 28 U.S.C. § 1350 (b) (7).

[3656] Amended 28 U.S.C. § 1350 (a).

[3657] *Id.*

[3658] Amended 28 U.S.C. § 1350 (g).

[3659] Amended 28 U.S.C. § 1350 (h).

[3660] *See* Letter of the Executive Director of the International Labor Rights Fund to Senator Feinstein, October 26, 2005 available at http://www.laborrights.org/projects/corporate/ATSFeisteinLetterOct05.pdf.

[3661] 124 S.Ct. 2739 (2004).

[3662] *Id.*, at 2765.

[3663] *Id.*, at 2766 ("This limit upon judicial recognition is generally consistent with the reasoning of many of the courts and judges who faced the issue before it reached this Court" citing *Filartiga*, 630 F.2d at 890 ("[F]or purposes of civil liability, the torturer has become-- like the pirate and slave trader before him--*hostis humani generis*, an enemy of all mankind"); *Tel-Oren*, 726 F.2d at 781 (Edwards, J., concurring) (suggesting that the "limits of section 1350's reach" be defined by "a handful of heinous actions--each of which violates definable, universal and obligatory norms"); see also *In re Estate of*

interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today"[3664] and that "well-established, universally recognized norms of international law,"[3665] are actionable, as opposed to "idiosyncratic legal rules."[3666] After *Filartiga*, other courts held that the violation of an international norm of a "specific, universal and obligatory" character should be at stake.[3667]

1100. The Supreme Court failed to clarify how the "definite content and acceptance among civilized nations, comparable with the historical paradigms" of contemporary international law norms ought to be assessed.[3668] What is a given is that not all crimes under customary international law are actionable under the ATS.[3669]

Marcos Human Rights Litigation, 25 F.3d 1467, 1475 (9th Cir. 1994) ("Actionable violations of international law must be of a norm that is specific, universal, and obligatory")). *See also Flores* v. *S. Peru Copper Corp.*, 253 F.Supp. 2d 510, 523 (S.D.N.Y. 2002) (holding that a high degree of international consensus is required and that it is "not for judges, however humane and sensitive or callous and unfeeling, to determine which specific acts … are so 'egregious' that they become the subject of [ATS] litigation", dismissing a claim alleging a violation of a customary international law norm against pollution).

[3664] 630 F.2d at 881.

[3665] *Id.*, at 888.

[3666] *Id.*, at 881.

[3667] *Doe* v. *Unocal Corp.*, 2002 US App. LEXIS 19263, *23 (9th Cir. 2002); *Forti* v. *Suarez-Mason*, 672 F. Supp. 1531 (N.D. Cal. 1987); *Beanal* v. *FreeportMcMoran, Inc.*, 969 F. Supp. 362 (E.D. La. 1997). Before the *Alvarez-Machain* judgment, courts characterized disappearance, torture, summary execution, arbitrary detention (*Forti* v. *Suarez-Mason*, 672 F. Supp. 1531 (N.D. Cal. 1987); 694 F. Supp. 707 (N.D. Cal. 1988)), cruel, inhuman or degrading treatment as violations of the law of nations and crimes against international humanitarian law (*Kadic*, 70 F.3d 241-244) as subject to ATS jurisdiction. The Supreme Court in *Alvarez-Machain* however dismissed arbitrary detention, at least the kind of arbitrary detention Alvarez was subject to. The Court held that Alvarez cited too little authority that his relatively brief, *i.e.*, non-prolonged, detention in Mexico was indeed at odds with customary international law. The Court did not address the question whether the extraterritorial arrest of Alvarez as such amounted to a violation of customary international law. This is not surprising, as the Court upheld the legality of this arrest in a 1992 decision.

[3668] *See also* E. KONTOROVICH, "Implementing *Sosa v. Alvarez-Machain*: What Piracy Reveals About the Limits of the Alien Tort Statute", 80 *Notre Dame L. Rev.* 111, 113 (2004) (arguing that the Supreme Court did not set out "a clear method for determining whether a customary international law norm sufficiently resembles the Blackstonian offenses [*i.e.*, the 1789 paradigms], leaving the "ultimate criteria" for future resolution.").

[3669] *Filartiga* could still be construed to authorize the actionability of *any* violation of customary international law *See Filartiga*, 630 F.2d 885 ("The constitutional basis for the Alien Tort Statute is the law of nations, which has always been part of the federal common law."). It should be pointed out that a problem may arise as to crimes incorporated into treaties. Although U.S. federal courts could arguably derive rights of action from treaties as part of the law of nations (the U.S. Constitution refers to both the "law of nations" and "treaties". Article 3 (2) of the U.S. Constitution provides that the federal judicial power extends to all cases arising under the Constitution, the Laws of the U.S. and *Treaties*, whereas Article 1 (8) (10) of the U.S. Constitution grants Congress the power to define offences against the law of nations. Treaties can be considered as a category of the law of nations or international law), they will often be barred from doing so since treaties only create enforceable rights in the U.S. if they are self-executing (*Foster* v. *Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829) (Marshall, C.J.); *United States* v. *Percheman*, 32 U.S. (7 Pet.) 51 (1833); *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 244-55 (1796)). In *Sosa*, the Court ruled that federal courts "have no congressional mandate to seek out and define new and debatable violations of the law of nations" (124 S.Ct. 2739 (2004)), referring in that context to the Senate's declaration that the substantive provisions of the ICCPR were not self-executing (138 Cong. Rec. 8071 (1992)). Under *Sosa*, federal courts may be precluded from bypassing the requirement that treaties be self-executing by applying customary international law, as they have at

Only to the extent that they are in terms of their specificity comparable to the 1789 paradigms, will the ATS provide a cause of action. In stating so, the Supreme Court probably casts a wider net than the customary international law on universal criminal jurisdiction, which (only) authorizes universal jurisdiction over *jus cogens* offences, does,[3670] although it might appear desirable, from the perspective of the consistency of universal jurisdiction under international law, to have the same (*jus cogens*) offences actionable under both civil and criminal law.[3671]

1101. CONCURRING OPINION JUSTICE BREYER – In his concurring opinion in *Sosa*, Justice BREYER seemed to tighten the net somewhat, where he held, drawing a parallel between universal criminal and universal tort jurisdiction, that "[t]oday international law will sometimes similarly reflect not only substantive agreement as to certain universally condemned behavior but also procedural agreement that universal jurisdiction exists to prosecute a subset of that behavior. […] That subset includes torture, genocide, crimes against humanity, and war crimes."[3672] Yet he appeared to left the door ajar for a wider set of norms where he advanced the traditional 'the greater includes the lesser' view, namely that the international law authorization of universal criminal jurisdiction over core crimes "suggests that universal tort jurisdiction would be no more threatening."[3673] At any rate, federal courts looking for more practical guidance may, relying on Justice BREYER's opinion, more easily discard claims involving environmental violations, child labor violations, forced labor, expropriation of property, murder, denial of rights to organize union activity, arbitrary arrest and detention, racial discrimination and loss of enjoyment of political rights, *i.e.*, crimes that are not 'core crimes' that give rise to universal criminal jurisdiction under international law. Moreover, Justice BREYER's opinion has the potential to bring together the criminal and civil strands of universal jurisdiction, and thus to harmonize transatlantic practice in this field, by identifying one set of actionable norms: core crimes against international law.

1102. FEINSTEIN BILL – The bill introduced in the U.S. Senate by Senator Feinstein on October 17, 2005 also goes some way to bridge the criminal-civil divide in terms of the actionable norms. Under the proposal, the district courts would only have original and exclusive jurisdiction of any civil action brought by an alien asserting a claim over a limited number of violations of the law of nations: torture, extrajudicial killing, genocide, piracy, slavery, or slave trading.[3674] These violations arguably coincide with the violations of international law generally considered as violations of *jus cogens* norms, although war crimes and crimes against humanity

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times done in the past. (*Al Odah v. United States*, 321 F.3d, 1134, 1145-47 (D.C. Cir. 2003) (Randolph, J. concurring).

[3670] *See* K.L. BOYD, "Universal Jurisdiction and Structural Reasonableness", 40 *Tex. Int'l L.J.* 1, 37 (2004). *See however* the following cases quoted by the Supreme Court: *In re Estate of Marcos Human Rights Litigation*, 25 F.3d 1467 (CA9 1994) (forced disappearance, summary execution and torture); *Filartiga* v. *Pena-Irala*, 630 F.2d 876 (2nd Cir. 1980) (torture); *Kadic* v. *Karadzic*, 70 F.3d 232 (2d Cir. 1995) (genocide). *Contra*: *Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 811 (1985).

[3671] *See* M.T. KAMMINGA, "Universal Civil Jurisdiction: Is It Legal? Is It Desirable?", *ASIL Proc.* 123, 125 (2005).

[3672] 124 S. Ct. 2783 (also stating that "recognition of universal jurisdiction in respect to a limited set of norms is consistent with principles of international comity").

[3673] *Id.*

[3674] Bill to amend 28 U.S.C. § 1350, 109th Congress, 1st Session, S. 1874, October 17, 2005.

ought to be included as well in the list. The bill may be credited with bringing the offences over which universal tort jurisdiction under the ATS is authorized in line with the offences over which universal criminal jurisdiction is authorized under international law. Nonetheless, enumerating the crimes on which an ATS action could be based may cut off ATS litigation from evolving international law relating to the crimes which could give rise to universal jurisdiction.

1103. ONLY PIRACY? – Not all commentators believe that *Sosa* casts a wide net. KONTOROVICH for instance has argued that the sort of modern human rights offences that are usually litigated under the ATS ought to be comparable to the features of the historical paradigm of piracy. The other two paradigms would practically be irrelevant because the underlying crimes – safe conducts and offences against ambassadors – are (were), unlike piracy and the present-day human rights offences giving rising to ATS claims, committed *in the United States* against foreigners whom the forum state had promised to protect.[3675] After discussing at length the features of piracy, KONTOROVICH concluded that the modern human rights norms are not substantially comparable to piracy and, thus, do not pass *Sosa*'s historical test.[3676]

It may be submitted, with respect, that this is a mistaken view. It may well be that the six features of piracy identified by KONTOROVICH (uniform condemnation, narrowly-defined offence, uniform punishment and double jeopardy, private actors who reject sovereign protection, *locus delicti* makes enforcement difficult, directly threatens or harms nations) set them apart from the features of modern human rights offences, and may render the foundations of universal jurisdiction over these offenses 'hollow'[3677]. However, the Supreme Court did not state that private claims under federal common law ought to rest on a *norm comparable* to the historical paradigms, but only that such claims ought to rest "on a norm of international character accepted by the civilized world and defined *with a specificity comparable* to the features of the 18th-century paradigms."[3678] If a contemporary norm is as widely accepted and specific as the 18th-century paradigms, would it be actionable under the ATS, even if it were to have an entirely different substantive content than these paradigms. This could also be gleaned from the Supreme Court's endorsement of the *Filartiga* judgment, in which the court held that torture is comparable to piracy, as both are committed by *hostes humani generis.*[3679]

11.2.3. Jurisdictional restraint in ATS litigation

[3675] E. KONTOROVICH, "Implementing *Sosa v. Alvarez-Machain*: What Piracy Reveals About the Limits of the Alien Tort Statute", 80 *Notre Dame L. Rev.* 111, 132 (2004) (noting that a universal jurisdiction prosecution "by a third-party state would do nothing to repair relations between the injuring and victim states.").
[3676] *Id.*, at 136-61.
[3677] *See* E. KONTOROVICH, "The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation", 45 *Harv. Int'l L.J.* 183-237 (2004).
[3678] 124 S.Ct. 2762 (emphasis added). *See also id.*, at 2765 ("we are persuaded that federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when [the ATS] was enacted.").
[3679] *Filartiga*, 630 F.2d 890.

1104. CRITICISM OF ATS LITIGATION – While foreign criticism of ATS litigation has been fairly mute,[3680] ATS litigation has been under sustained attack within the United States. ATS litigation has been denounced for its judicial imperialism and its impact on the conduct of U.S. foreign policy and on U.S. economic interests abroad.[3681] Also, it arguably overloads the federal judicial system and may amount to a purely political instrument aimed at capturing the attention of the public.[3682]

1105. DOCTRINES OF JURISDICTIONAL RESTRAINT – Critics of the ATS appear to gloss over the fact that, in order to limit the reach of the ATS, U.S. courts have employed a variety of restraining doctrines (derived from ordinary transnational civil litigation in the United States), based on reasonableness and the availability of a nexus. Reviewing 90 human rights cases brought since the 1990s, BOYD concluded in 2004 that 80 pct. of them had been dismissed on the basis of these doctrines,[3683] which led her to state that "the current structure of human rights litigation in the United States makes it virtually impossible that exercising universal jurisdiction in this country will have any detrimental "collateral consequences" to foreign relations, to foreign policy, or to the sacrosanct separation of powers".[3684]

The main U.S. doctrines of jurisdictional restraint are the political question doctrine, the act of State doctrine (the 'justiciability' doctrines), the *forum non conveniens* doctrine and the doctrine of international comity (the 'prudential' doctrines). These doctrines are geared to limiting the diplomatic fall-out of transnational litigation in U.S. courts, but are not based on public international law. Instead, they are a U.S.-grown staple which – and this applies to the justiciability doctrines in particular – belongs to the branch of U.S. constitutional law known as 'U.S. foreign relations law', a branch of the law that determines the primacy of the executive and legislative branches, *i.e.*, the political branches, over the judiciary as to the conduct of foreign relations (a primacy that is held by the U.S. Supreme Court to derive from the U.S. Constitution)[3685]. Given the potential adverse impact of ATS judgments on the foreign relations of the United States, these doctrines advise the courts to defer to the executive branch in sensitive, politically charged cases.

[3680] *See however* INTERNATIONAL COURT OF JUSTICE, *Arrest Warrant* (2002), joint separate opinion of Judges HIGGINS, KOOIJMANS and BUERGENTHAL, § 48 (discussing the ATS and noting that "[w]hile this unilateral exercise of the function of guardian of international values has been much commented on, it has not attracted the approbation of States generally.").

[3681] *See e.g.* G.C. HUFBAUER & N.K. MITROKOSTAS, *Awakening Monster: The Alien Tort Statute of 178*9, Washington, D.C., Institute for International Economics, 2003, 45-56 (urging Congress to act).

[3682] *See, e.g.*, unfavourably, *Tel-Oren*, 726 F.2d at 826 (Robb, J., concurring) ("[T]he certain results of judicial recognition of jurisdiction over cases such as this one hare embarrassment to the nation, the transformation of trials for the exposition of political propaganda, and debasement of commonly accepted notions of civilized conduct."). *See, e.g.*, favourably, A.-M. SLAUGHTER & D.L. BOSCO, "Alternative Justice: Facilitated by Little-Known 18th-Century Law", May 2001, available at http://crimesofwar.org/tribun-mag/mag_relate_alternative.html; K.L. BOYD, "The Inconvenience of Victims: Abolishing *Forum non Conveniens* in U.S. Human Rights Litigation", 39 *Va. J. Int'l L.* 41, 83 (1998).

[3683] *See* K.L. BOYD, "Universal Jurisdiction and Structural Reasonableness", 40 *Tex. Int'l L.J.* 1, 2 (2004).

[3684] *Id.*, at 45.

[3685] *See Oetjen* v. *Central Leather Co.*, 246 U.S. 297, 302 (1918) ("The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative – 'the political' – Departments").

11.2.3.a. Political question doctrine – deference to the executive branch

1106. POLITICAL QUESTION DOCTRINE – It is a long-standing principle of U.S. constitutional law that courts should not hear cases involving political questions. In *Baker* v. *Carr*,[3686] the Supreme Court set forth six factors rendering a dispute a nonjusticiable political question.[3687] In theory, if one factor exists, a dispute may be nonjusticiable – which makes the political question an important check on the justiciability of politically sensitive cases.[3688] Cases that have political overtones do however not *per se* involve political questions, and may thus not warrant the application of the political question doctrine.[3689] Nonetheless, the mere possibility of interference with U.S. foreign policy interests may suffice.[3690]

1107. ECONOMIC EXTRATERRITORIALITY – In view of the limited role the political question doctrine plays in the field of extraterritorial economic regulation and the extraterritorial application of criminal law in the United States, it will only be discussed here in the context of universal jurisdiction over gross violation of human rights under the ATS.

[3686] 369 U.S. 186 (1962).

[3687] *Baker* v. *Carr* represents the modern-day political question doctrine. The origins of the political question doctrine can however be traced back to the seminal *Marbury* v. *Madison* judgment (5 U.S. 137, 164-66 (1803) ("Questions, in their nature political ... can never be made in this court"). The six factors put forth by the Supreme Court in *Baker* v. *Carr* are:
"(1) a textually demonstrable constitutional commitment of the issue to a coordinate political department; or
(2) a lack of judicially discoverable and manageable standards for resolving it; or
(3) the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or
(4) the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or
(5) an unusual need for unquestioning adherence to a political decision already made; or
(6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question." (369 U.S. 217 (1962)).

[3688] *See* K.L. BOYD, "Universal Jurisdiction and Structural Reasonableness", 40 *Tex. Int'l L.J.* 1, 15 (2004).

[3689] *See, Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d 774, 798 (D.C. Cir. 1984) (Edwards, J., concurring) ("[T]he political question doctrine is a very limited basis for nonjusticiability. It certainly does not provide the judiciary with a carte blanche license to block the adjudication of difficult or controversial cases."); *Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d 774, 823-27 (D.C. Cir. 1984) (Robb, J., concurring) (holding that questions involving international terrorism cal for standards that "defy judicial application"); *Japan Whaling Association* v. *American Cetacean Society*, 478 U.S. 221, 230 (1986) ("[U]nder the Constitution, one of the Judiciary's characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones."); *Baker* v. *Carr*, 369 U.S. 186, 211 (1962) ("[I]t is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance"); *Id.*, at 217 (the political question doctrine "is one of 'political questions,' not of political cases."); *Kadic*, 70 F.3d at 248-250; *Sarei* v. *Rio Tinto*, 221 F. Supp. 2d at 1194; *Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44, 49 (2d Cir.1991); *Presbyterian Church of Sudan*, 244 F. Supp. 2d at 346 ("[Defendant] presents no factual or logical argument as to why the mere existence of certain U.S. diplomatic overtures towards Sudan should prevent this case from proceeding. Indeed, as the world's foremost superpower, the United States has complex diplomatic relationships with virtually every country. This fact, without more, does not militate in favor of dismissal. Nothing in [defendant]'s brief or exhibits supports its contention that adjudicating this case would have a detrimental effect on United States-Sudan relations").

[3690] S*arei* v. *Rio Tinto PLC.*, 221 F. Supp. 2d 1116, 1191 (C.D. Cal. 2002).

In the field of extraterritorial economic regulation and extraterritorial criminal law, the political question doctrine plays a modest role because the interests of the political branches are not implicated to the extent they are in the field of human rights. It comes as no surprise that deference to the executive branch's views of the propriety of a particular court's adjudicatory jurisdiction does not figure prominently in the factors to be used in an interest-balancing analysis. To be true, in the 1979 *Mannington Mills* antitrust case, Judge Weis put forward as a factor to be taken into account in weighing the interests involved the "[p]ossible effect upon foreign relations if the court exercises jurisdiction and grants relief",[3691] yet in the influential § 403 of the Restatement (Third) of Foreign Relations Law (1987) – setting forth the jurisdictional rule of reason – this factor is not included.[3692] LOWENFELD, the main drafter of § 403 justified this, in an anticipatory fashion in his 1979 Hague Lecture, on the ground that deference to the executive might be premised on overly vague, politicized and manipulable standards.[3693] Indeed, allowing the executive to play a role in private jurisdictional conflicts may frustrate the legitimate expectations and the predictability of the law,[3694] as the executive's position usually only takes shape *after* the parties have entered into an agreement. Yet also in the field of criminal law, which is *public* law after all, do courts only rarely find that the extraterritorial application jeopardizes the political branches' conduct of foreign relations.[3695]

1108. APPLYING THE POLITICAL QUESTION DOCTRINE TO ATS LITIGATION – In ATS litigation, political questions may arise because human rights suits may affect the conduct of foreign relations, which is, from a constitutional perspective, the prerogative of the executive branch of government. The question arises, however, whether a wholesale application of the political question doctrine to human rights suits is warranted.

It has been argued that only two *Baker* factors are relevant to ATS suits, namely (1) "a textually demonstrable constitutional commitment of the issue to a coordinate political department", and (2) a lack of judicially discoverable and manageable standards for resolving it", with the four other prudential factors generally being inapposite in ATS suits, unless the courts would "seriously interfere with important governmental interests" asserted by the political branch prior to the courts' hearing the case.[3696] Even the said two factors would only have very limited application to ATS suits, the first factor in practice being limited to wartime reparation decisions

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[3691] 595 F.2d at 1297-98.

[3692] The views of the executive branch may however be subsumed under factor (c) of § 403 (2) ("the importance of regulation to the regulating state").

[3693] A.F. LOWENFELD, "Public Law in the International Arena: Conflict of Laws, International Law, and Some Suggestions for Their Interaction", 163 *Recueil des Cours* 311, 411 (1979-II).

[3694] *Compare* A. BIANCHI, Reply to Professor Maier, in K.M. MEESSEN (ed.), *Extraterritorial Jurisdiction in Theory and Practice*, London/The Hague/Boston, Kluwer, 1996, 74, 85.

[3695] *See* E.S. PODGOR, ""Defensive Territoriality": a New Paradigm for the Prosecution of Extraterritorial Business Crimes", 31 *Ga. J. Int'l & Comp. L.* 1, 7 (2002); *United States* v. *Trapilo*, 130 F.3d 547, 549 (2d Cir.) (finding, in a wire fraud case, that "[t]he simple fact that the scheme to defraud involves a foreign sovereign's revenue laws does not draw our inquiry into forbidden waters reserved exclusively to the legislative and the executive branches of our government"). *Contra*: *United States* v. *Boots*, 80 F.3d 580, 587-88 (1st Cir. 1996) (expressing concern with interference in "the legislative and executive branches' exercise of their foreign policymaking powers").

[3696] *See* B.C. FREE, "Awaiting *Doe* v. *Exxon Mobil Corp.*: Advocating the Cautious Use of Executive Opinions in Alien Tort Claims Litigation", 12 *Pac. Rim L. & Pol'y J.* 467, 493-96 (2003); *Kadic* v. *Karadzic*, 70 F.3d 232, 249 (2d Cir. 1995).

(possibly in application of a treaty) constitutionally committed to the executive branch,[3697] and the second factor effectively being weakened by Congress having provided a clear cause of action for ATS suits.[3698] As far as the second factor is concerned however, it appears that the mere grant of ATS jurisdiction to the courts does not of itself preclude the application of the political question doctrine, particularly in view of the malleability of "the law of nations". Yet after the Supreme Court's clarification of the potentially actionable norms of international law in *Sosa*, it is possible that the political question doctrine will only have limited use, as "less well-defined violations of international law or those involving practices that are not universally condemned" are supposedly no longer actionable under the ATS after *Sosa*.[3699] Hitherto, the political question doctrine has nonetheless proved a powerful tool to limit the reach of the ATS

1109. DEFERENCE TO THE VIEWS OF THE EXECUTIVE – The main question surrounding the application of the political question doctrine to ATS suits is whether courts should defer to the opinions of the executive branch on the appropriateness of such suits in light of their impact on foreign policy. Explicit executive opinions on justiciability often reach the courts. The executive branch submits statements of interest either *sua sponte*[3700] or after being solicited by the courts, as happened in the *Kadic* v. *Karadzic* case,[3701] the *ExxonMobil* case[3702] and the *Falun Gong* case[3703].

[3697] *Iwanowa* v. *Ford Motor Co.*, 67 F. Supp. 2d 424, 485-86 (D.N.J. 1999) (ruling that "[t]he executive branch has always addressed claims for [war] reparations as claims between governments"); *Burger-Fischer* v. *Degussa AG*, 65 F.Supp. 2d 248 (D.N.J. 1999) (in application of the Convention on the Settlement of Matters Arising out of the War and the Occupation); *Hwang Geum Joo* v. *Japan*, 332 F.3d 679, 681 (D.C. Cir. 2003) (1951 Treaty of Peace between Japan and the Allied Powers), *vacated by* 124 S. Ct. 2835 (2004).

[3698] *See* B.C. FREE, "Awaiting *Doe* v. *Exxon Mobil Corp.*: Advocating the Cautious Use of Executive Opinions in Alien Tort Claims Litigation", 12 *Pac. Rim L. & Pol'y J.* 467, 493-96 (2003)

[3699] I draw the quotation from DHOOGE, who argued that the political question doctrine precisely has application in these cases. *See* L.J. DHOOGE, "The Alien Tort Claims Act and the Modern Transnational Enterprise: Deconstructing the Mythology of Judicial Activism", 35 *Geo. J. Int'l L.* 3, 92 (2003). *Compare Sarei* v. *Rio Tinto*, 221 F. Supp. 2d at 1195 ("[T]he fact that Congress enacted 28 U.S.C. § 1350, which provides that federal courts "shall" have jurisdiction over claims within its ambit, does not speak to the applicability of the political question doctrine.").

[3700] Foreign governments may also *sua sponte* file a statement of interest. *See, e.g.*, *Sarei* v. *Rio Tinto PLC*, 221 F. Supp. 2d 1116, 1178-84, 1202-03 (C.D. Cal. 2002) (statement of interests filed by the U.S. government and the government of Papua New Guinea); Brief of *amicus curiae* of the European Commission in *Sosa* v. *Alvarez-Machain* in support of neither party, available at http://www.nosafehaven.org/_legal/atca_oth_EurComSupportingSosa.pdf

[3701] 70 F.3d 232, 250 (2nd Cir.) (relying on the Government's statement of interest in deciding justiciability).

[3702] Letter from W.H. Taft, IV, Legal Adviser to the Department of State, to Judge Louis F. Oberdorfer, United States District Court for the District of Columbia, July 29, 2002, available at http://www.laborrights.org/projects/corporate/exxon/stateexxonmobil.pdf.

[3703] Letter from W.H. Taft, IV, Legal Adviser to the Department of State, to Robert D. McCallum, Assistant Attorney General, U.S. Department of Justice, September 25, 2002, solicited by U.S. Magistrate Judge Edward M. Chen of the Northern District of California *Re Doe, et al.* v. *Liu Qi, et al.*, and *Plaintiff A, et al.*, v. *Xia Deren*, Civil Nos. C 02-0672 CW (EMC) and C 02-0695 CW (EMC) (N.D. Cal.), available at http://www.state.gov/documents/organization/57535.pdf. In the same case: Statement of the Government of the People's Republic of China on "Falun Gong" Unwarranted Lawsuits (Sept. 2002), filed as an attachment to Notice of Filing or Original Statement by the Chinese Government, *Jane Doe I* v. *Liu Qi*, No. C 02-0672 (EMC) (N.D. Cal. Oct. 2, 2002).

Proponents of deference to the executive branch have submitted that, if courts were to adjudicate cases against the will of the executive, they would violate the separation of powers.[3704] It could however be argued with equal force that precisely "[e]xcessive deference to executive conclusions upsets the delicate balance of constitutional powers" and may "enable politicization of the judiciary".[3705] Opponents of a liberal interpretation of the political question doctrine in ATS suits, and thus proponents of judicial (as opposed to political) supremacy over justiciability of ATS claims, have invoked the will of Congress, the *third* branch of government, which the executive is required to defer to, so as to support their argument.[3706] Notably the legislative history of the TVPA in cited in this context.[3707] Although Congress only held that the TVPA would not repeal the ATS, and not that ATS courts should not defer to statements of the executive, it is no less true that deferral to the executive's views on justiciability of ATS claims could in practice deprive the ATS of any practical meaning, and in effect repeal the statute. It may therefore appear warranted to rely upon Congress's assessment of the propriety of ATS suits instead of on the whim of a particular administration pursuing a partisan political agenda.[3708] At a minimum, for purposes of legal certainty, a more rule-based approach to justiciability questions is preferable over an approach dictated by considerations of political expediency.[3709] In reality, ATS courts have not consistently deferred to the executive's view, although in most

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[3704] *See Sarei* v. *Rio Tinto PLC*, 221 F.Supp. 2d 1116, 1181-82 (C.D. Cal. 2002) (the court "may not assess whether the policy articulated is wise or unwise, or whether it is based on misinformation or faulty reasoning") (citation omitted).

[3705] *See* B.C. FREE, "Awaiting *Doe* v. *Exxon Mobil Corp.*: Advocating the Cautious Use of Executive Opinions in Alien Tort Claims Litigation", 12 *Pac. Rim L. & Pol'y J.* 467, 481 and 484 (2003) (citing the divergent views of different Administrations, with Democratic Administrations under Presidents Carter and Clinton supporting ATS suits, and Republican Administrations under Presidents Reagan and especially Bush, *jr.*, opposing ATS suits). There are quite some precedents endorsing the independence of the judiciary *vis-à-vis* the executive. *See, e.g.*, *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952) (ruling that the seizure of U.S. steel mills during the Korean war violated the Constitution); *First National City Bank* v. *Banco Nacional de Cuba* (406 U.S. 759 (1972) (holding that courts are not bound by so-called Bernstein letters, *i.e.*, communications of the State Department that it approved a court's jurisdiction); *Id.*, at 773 (Douglas, J., dissenting) (stating that a rule of obligatory deference to the executive branch's views would render the court "a mere errand boy for the Executive Branch which may choose to pick some people's chestnuts from the fire, but not others'"); *Id.*, at 790 (Brennan, J., dissenting) ("[T]he representations of the Department of State are entitled to weight for the light they shed on the permutation and combination of factors underlying the act of state doctrine. But they cannot be determinative."); *W.S. Kirkpatrick & Co.* v. *Environmental Tectonics Corp.*, 493 U.S. 400, 409 (1990) ("Courts in the United States have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them.").

[3706] *See, e.g.*, *Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d 774, 789 (D.C. Cir. 1984) (Edwards, J., concurring) ("If Congress determined that aliens should be permitted to bring actions in federal courts, only Congress is authorized to decide that those actions 'exacerbate tensions' and should not be heard.").

[3707] H.R. Rep. No. 102-367, at 4 (1991) (the ATS "should remain intact to permit suits based on other norms that already exist or may ripen into rules of customary international law"); S. Rep. No. 102-249, at 3 (1991) ("Section 1350 has other important uses and should not be replaced.").

[3708] *Compare Trajano* v. *Marcos*, 978 F.2d 493, 500 (9th Cir. 1992) (arguing that the government's conflicting position "in different cases and by different administrations is not a definitive statement by which we are bound."); L. LONDIS, "The Corporate Face of the Alien Tort Claims Act: How an Old Statute Mandates a New Understanding of Global Interdependence", 57 *Me. L. Rev.* 141, 192 (2005) ("[T]he Statements [of the Executive Branch] do not necessarily speak to the proper legal response under domestic and international law, but reflect instead the political philosophy of a given administration.").

[3709] *See* B. STEPHENS, "Upsetting Checks and Balances: The Bush Administration's Efforts to Limit Human Rights Litigation", 17 *Harv. Hum. Rts. J.* 169, 196 (2004).

instances they have[3710] because the stakes of non-deferral are potentially high in matters of foreign relations.[3711]

1110. FICKLE ATS POSITIONS OF SUCCESSIVE U.S. ADMINISTRATIONS – The Executive Branch's positions on the propriety of ATS suits have greatly changed over the years. During the Carter Administration, the State and Justice Departments stated in a joint memorandum filed with the court in *Filartiga* that "[l]ike many other areas affecting international relations, the protection of fundamental human rights is not committed exclusively to the political branches", and that "there is little danger that judicial enforcement will impair our foreign policy efforts. To the contrary, a refusal to recognize a private cause of action in these circumstances might seriously damage the credibility of our nation's commitment to the protection of human rights."[3712] The Clinton Administration similarly supported ATS litigation in its Statements of Interest in *Kadic* v. *Karadzic* (1995)[3713] and *National Coalition Government of Burma* v. *Unocal* (1997)[3714]. Democratic Administrations seemed to believe that private ATS litigation did not harm U.S. foreign policy or the U.S. interest writ large.[3715]

[3710] *See* K.L. BOYD, "Universal Jurisdiction and Structural Reasonableness", 40 *Tex. Int'l L.J.* 1, 26-27 (2004) (stating that "[t]he direct intervention of the executive branch will not be ignored and is usually deferred to by the court"). *See for* instances of non-deferral, *e.g.*: *Kadic* v. *Karadzic*, 70 F.3d 232, 250 (2d Cir. 1995) ("[E]ven an assertion of the political question doctrine by the Executive Branch, entitled to respectful consideration, would not necessarily preclude adjudication." In this case, in a Statement of Interest, the United States had however expressly disclaimed any concern that the political question doctrine should be invoked to prevent the litigation of these lawsuits: "Although there might be instances in which federal courts are asked to issue rulings under the Alien Tort Statute or the Torture Victim Protection Act that might raise a political question, this is not one of them."); *In re Nazi Era Cases Against German Defendants Litig.*, 129 F.Supp.2d 370, 380 (D.N.J. 2001) ("the Statement of Interests [of the Executive Branch] is non-binding on the Court"). *See for* instances of deferral: *Sarei* v. *Rio Tinto PLC*, 221 F.Supp. 2d 1116, 1181-82 (C.D. Cal. 2002) (deferring to the State Department's opinion that the *Sarei* lawsuit "would risk a potentially serious adverse impact on the [Papua New Guinean peace process], and hence on the conduct of [U.S.] foreign policy", because a non-deferral would probably "have the potential to embarrass the executive branch in the conduct of foreign relations, an executive branch which had submitted that it is not for the court to "assess whether the policy articulated is wise or unwise, or whether it is based on misinformation"); *Id.*, at 1192 (pointing out that "plaintiffs have not cited, and the court has not found, a single case in which a court permitted a lawsuit to proceed in the face of an expression of concern such as that communicated by the State Department here. This is probably because to do so would have the potential to embarrass the executive branch in the conduct of its foreign relations …"); *Plaintiffs A, B, C, D, E, F* v. *Jiang Zemin*, 282 F.Supp. 2d 875 (N.D. Ill. 2003) (deferring to the executive's determination that the former Chinese President was immune from prosecution); *Hwang Geum Joo* v. *Japan*, 413 F.3d 45 (D.C. Cir. 2005); *Bancoult* v. *McNamara*, 445 F.3d 427 (D.C. Cir. 2006); *Schneider* v. *Kissinger*, 412 F.3d 190, 194, 199 (2005); *Gonzalez-Vera* v. *Kissinger*, No. 05-5017, pp. 7-8 (D.C. Cir. 9 June 2006) (arguing that challenging "drastic measures taken by the United States and [former U.S. Secretary of State and National Security Adviser Henry] Kissinger in order to implement United States policy with respect to Chile" would require the court "to delve into questions of policy "textually committed to a coordinate branch of government", and that "[w]hatever Kissinger did as National Security Advisor or Secretary of State "can hardly be called anything other than foreign policy").

[3711] *See* L. LONDIS, "The Corporate Face of the Alien Tort Claims Act: How an Old Statute Mandates a New Understanding of Global Interdependence", 57 *Me. L. Rev.* 141, 192 (2005).

[3712] Memorandum for the United States Submitted to the Court of Appeals for the Second Circuit, Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980), published in 19 *I.L.M.* 585, 603-04 (1980).

[3713] *Kadic* v. *Karadzic*, 70 F.3d 239-40 (citing Statement of Interest of the U.S. Government at 5-13) ("The Executive Branch has emphatically restated in this litigation its position that private persons may be found liable under the Alien Tort Act for acts of genocide, war crimes, and other violations of international humanitarian law.").

[3714] *National Coalition Government of Burma* v. *Unocal, Inc.*, 176 F.R.D. 329, 362 (C.D. Cal. 1997) ("[T]he Department can state that at this time adjudication of the claims based on allegations of torture

The Republican George W. Bush Administration (2001-), by contrast, faced with increasing ATS litigation against (U.S.-based) corporate defendants and foreign government officials, has vehemently opposed ATS litigation, and urged deference of the courts to its opinions on the propriety of ATS suits, as it did in other fields of the law as well (*e.g.*, the detention of enemy combatants in the war on terror)[3716]. It has filed briefs in, amongst others, litigation against Unocal and ExxonMobil, and an *amicus curiae* brief with the Supreme Court in *Sosa* v. *Alvarez-Machain*.[3717] The Bush Administration's stance may involve a good deal of partisan politics, rather than foreign policy or separation of powers concerns, since ATS litigation, and tort litigation in general, is a major source of income for trial lawyers, the main financiers of the Democratic Party, and a major burden on multinational corporations, the main financiers of the Republican Party.[3718] In some instances, ATS litigation indeed seemed consistent with U.S. foreign policy, so that other concerns probably came into play.[3719]

1111. PROTECTING U.S. CORPORATIONS: EQUATING ECONOMIC INTERESTS AND FOREIGN POLICY INTERESTS – In order to cloak economic interests in a foreign policy form acceptable for purposes of a separation of powers analysis, the Bush Administration has, as LONDIS pointed out, equated "stable state relationships with a

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and slavery would not prejudice or impede the conduct of U.S. foreign relations with the current government of Burma. I would appreciate if you would transmit this foreign policy view to the court in the appropriate form.").

[3715] *See* B. STEPHENS, "Upsetting Checks and Balances: The Bush Administration's Efforts to Limit Human Rights Litigation", 17 *Harv. Hum. Rts. J.* 169, 177-78 (2004).

[3716] *Id.*, at 203-205.

[3717] *See, e.g.* Brief for United States of America as Amicus Curiae at 4 and 20, Doe v. Unocal Corp. (9th Cir. 2002) (Nos. 00-56603 & 00-56628), available at http://www.lchr.org/Issues/ATCA/atca_02.pdf
(arguing that "it is the function of the political Branches, not the courts, to respond … to bring about change in [antidemocratic policies and human rights violations]" and that ATS litigation interferes with the "plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations to decide the important complicated, delicate and manifold problems of foreign relations."); Letter from W.H. TAFT, IV, Legal Adviser to the Department of State, to Judge Louis F. Oberdorfer, United States District Court for the District of Columbia, 29 July 2002, in the *Doe* v. *ExxonMobil* litigation, available at http://www.laborrights.org/projects/corporate/exxon/stateexxonmobil.pdf. *Sosa*, www.nosafehaven.org

[3718] *The Economist*, October 16, 2004, p. 48. Against this background, and obviously also to boost Iraqi reconstruction efforts, President Bush signed an Executive Order in 2003 to exempt corporations operating in the petroleum sector in Iraq from "any attachment, judgment, decree, lien, execution, garnishment, or other judicial process", *i.e.*, from any legal liability, including liability under the ATS (Exec. Order. No. 13,303, 68 Fed. Reg. 31,931).

[3719] *See* B. STEPHENS, "Upsetting Checks and Balances: The Bush Administration's Efforts to Limit Human Rights Litigation", 17 *Harv. Hum. Rts. J.* 169, 182 (2004). It may be noted that in some instances, a refusal to dismiss an ATS suit may not be in line with the executive branch's declared policy, but correspond to the policy of that other political branch, the legislative branch, or even to the policy of other parts of the executive branch. *Id.*, at 199-202 (2004) (contrasting the opposition of the Bush Administration to ATS litigation against Chinese officials in the *Falun Gong* case with a State Department Report (2002) and a House resolution (2002) condemning the Chinese Government's persecution of Falun Gong members, and concluding that "[t]he Chinese case reveals that the battle over the political question doctrine is at least in part a battle *between* the two political branches", and that, when "the federal government does not speak with one voice … there is no unusual need for deference or unanimity").

productive world economy."[3720] It may be argued that this equation is unacceptable and should be rejected.

At bottom, the Bush Administration, espousing the neo-liberal creed of deregulation, seems to believe that economic activity and investment by U.S. corporations spurs economic growth, which furthers political and economic stability, stability which in turn is more conducive to respect for human rights.[3721] Litigation against corporations, and the ensuing divestment would undercut the economic and social emancipation of developing countries, which is precisely brought about by corporate economic activity. If emancipation in developing countries grinds to a halt due to foreign litigation, these countries are likely to retaliate against the United States, for instance by refusing to cooperate in the fight against international terrorism.[3722]

1112. The link between potential economic divestment as a result of ATS litigation and U.S. foreign policy appears tenuous. U.S. corporations may suffer from (the risk of) litigation, yet a drop in their profits need not translate into a threat to U.S. foreign policy.[3723] Only when there is clear evidence of possible foreign retaliation as a result of ATS litigation could deferral be legitimately considered by a U.S. court hearing a tort claim arising under the ATS. Indeed, not economic divestment – which surely harms U.S. interests – but retaliatory action raises foreign policy concerns that may restrain the exercise of the jurisdiction statutorily bestowed on U.S. federal courts.

The link between economic divestment and foreign retaliatory action against U.S. foreign policy interests is not a given. It is not fanciful that States may support ATS litigation against foreign corporations whose activities undermine labor and environmental rights within their territory.[3724] Even if they do not support it, they will not necessarily consider sanctions against the United States, for instance because they are cognizant of the separation of powers between the judiciary and the executive branch in the United States (which implies that the opinions of the judiciary do not as a matter of course reflect those of the executive branch), or because other foreign

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[3720] L. LONDIS, "The Corporate Face of the Alien Tort Claims Act: How an Old Statute Mandates a New Understanding of Global Interdependence", 57 *Me. L. Rev.* 141, 187 (2005). *See also* B. STEPHENS, "Upsetting Checks and Balances: The Bush Administration's Efforts to Limit Human Rights Litigation", 17 *Harv. Hum. Rts. J.* 169, 202 (2004) ("[P]redictions about the impact of the litigation appear far more subjective than factual, more designed to protect powerful defendants than to protect U.S. foreign policy.").

[3721] Letter from W.H. TAFT, IV, Legal Adviser to the Department of State, to Judge Louis F. Oberdorfer, United States District Court for the District of Columbia, 29 July 2002, in the *Doe* v. *ExxonMobil* litigation, available at http://www.laborrights.org/projects/corporate/exxon/stateexxonmobil.pdf.

[3722] *Id.*

[3723] *Compare* L. LONDIS, "The Corporate Face of the Alien Tort Claims Act: How an Old Statute Mandates a New Understanding of Global Interdependence", 57 *Me. L. Rev.* 141, 197 (2005) ("arguing that "the economic impact of ruling on [a case of a tort in violation of the law of nations brought before a U.S. federal court] should remain outside of the court's calculus").

[3724] Developing States have indeed brought lawsuits in their own courts against foreign corporations for violation of labor and environmental standards. In 2005 for instance, Indonesia charged an executive of Newmont Mining Corp., a U.S.-based corporation, with dumping toxic waste into a bay, as a result of which dozens of residents on the island of Sulawesi purportedly developed skin diseases and tumors. On February 16, 2006, Indonesia and Newmont reached an out-of-court settlement which required Newmont to pay 30 million $ in damages. Case history available at http://www.globalresponse.org/history.php?gra=3/04.

corporations (which may not be liable under the ATS, *e.g.*, because U.S. courts lack personal jurisdiction over them) are willing to replace the divesting U.S. corporations.

1113. If the threat of retaliation is the only controlling factor, it remains to be seen how the credibility of the threat could be ascertained. As under the prudential political question doctrine, U.S. courts defer to the U.S. executive branch, and not directly to the foreign government launching the threat, this problem is particularly acute. The U.S. executive branch may exaggerate the threat of retaliation to protect the economic interests of major U.S. corporations (and indirectly the financial interests of the political party making up the administration) rather than genuine foreign policy concerns. U.S. courts should therefore be entitled to second-guess the executive branch and avoid abuse of the latter's foreign policy prerogative.[3725] Evidence of an explicit threat by a foreign State could be an important yardstick to be used in assessing the executive branch's determination. Admittedly, the U.S. executive branch could coax a foreign State into explicitly threatening the U.S. with retaliatory action. The explicit foreign threat, engineered by the U.S., then merely serves as a pretext for protecting U.S. corporate interests. An analysis of the political machinations underlying the actual shaping of a foreign threat does however not seem to be incumbent upon the courts.

1114. PROTECTING FOREIGN OFFICIALS – Also in cases not involving U.S. corporations as defendants has the Department of State under the tenure of President Bush submitted its views on the propriety of ATS suits. In a case brought by members of the Falun Gong movement against two Chinese officials, the Legal Adviser to the Department of Justice specifically warned against entertaining ATS suits against foreign officials lest such may provoke reciprocal action by foreign States against U.S. officials. It is worth reprinting this argument here, as it may apply in any ATS lawsuit against a foreign official:

> "We ask the Court in particular to take into account the potential for reciprocal treatment of United States officials by foreign courts in efforts to challenge U.S. government policy. In addressing these cases, the Court should bear in mind a potential future suit by individuals (including foreign nationals) in a foreign court against U.S. officials for alleged violations of customary international law in carrying out their official functions under the Constitution, laws and programs of the United States (e.g., with respect to capital punishment, or for complicity in human rights abuses by conducting foreign relations with foreign regimes accused of those abuses). The Court should bear in mind the potential that the United States Government will intervene on behalf of its interests in such cases."[3726]

[3725] *Compare* B. STEPHENS, "Upsetting Checks and Balances: The Bush Administration's Efforts to Limit Human Rights Litigation", 17 *Harv. Hum. Rts. J.* 169, 191 (2004) ("Despite the executive branch's leadership role in foreign affairs, the judiciary is constitutionally required to assess the credibility of executive branch assertions about justiciability, and to refuse to rely on those assertions that are not well-grounded."). *Id.*, at 195 (suggesting marginal appreciation of the executive branch's views: "[T]he courts should review the evidence as to the substance [a particular foreign] policy and assess whether the evidence presented by the executive branch supports the result it requests."). *Id.*, at 196 ("When executive branch predictions of dire consequences appear implausible, the judiciary is on firm ground in evaluating those allegations with care.").

[3726] Statement of Interest of the United States, filed in *Doe* v. *Liu Qi*, No. C 02-0672 CW (EMC) (Sept. 26, 2002), available at http://www.state.gov/documents/organization/57535.pdf (also hinting at the

The fear of reciprocation, and more generally, the concern to protect U.S. officials and servicemembers from lawsuits, hit a raw nerve in the United States. Not only do they explain the Department of State's distrust of ATS litigation, epitomized by its views on the propriety of litigation against Chinese officials in the *Falun Gong* case, they also explain American opposition against the exercise of universal *criminal* jurisdiction, and the U.S. stance against the International Criminal Court (U.S. support for which would legitimize the Court's asserting jurisdiction over U.S. nationals). In specific ATS cases however, it might be argued that the argument of reciprocity should not be entitled to too much weight, as entertaining human rights suits against foreign officials does not directly and as a matter of course provoke possible retaliatory action by a foreign State, unless of course that State has explicitly threatened to sue or prosecute U.S. officials under its domestic law.

11.2.3.b. Act of State doctrine

1115. ACT OF STATE DOCTRINE – Aside from the political question doctrine, the act of State doctrine is routinely invoked in ATS suits. Under the act of State doctrine, courts ought to refrain from passing judgment on the acts of a foreign State within its territory.[3727] It arises "when a court *must decide* – that is, when the outcome of the case turns upon – the effect of official action by a foreign sovereign."[3728] The act of State doctrine, which the Supreme Court believes has 'constitutional underpinnings',[3729] is linked to comity, sovereignty and the principle of territoriality.[3730] In recent times it is mainly premised on the judiciary's respect for the executive's prerogative in the conduct of foreign relations.[3731] This institutional

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"potentially serious adverse foreign policy consequences that [ATS] litigation against Chinese officials can generate", which "can serve to detract from, or interfere with, the Executive Branch's conduct of foreign policy").

[3727] *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. at 428 (1964); *Underhill* v. *Hernandez*, 168 U.S. 250, 252 (1897) (holding that a court in one country should no "sit in judgment on the acts of the government of another, done within its own territory"). The act of State doctrine has its roots in England, where it was first invoked in *Blad v. Bamfield*, 3 Swans. 604, 36 Eng. Rep. 992 (1684) (cited in *Sabbatino*, 376 U.S. at 416).

[3728] *W.S. Kirkpatrick & Co.* v. *Envtl. Tectonics Corp.*, 493 U.S. 400, 406 (1990).

[3729] *Sabbatino*, 376 U.S. at 423 and 427-28.

[3730] *Underhill v. Hernandez*, 168 U.S. 252; *Oetjen* v. *Central Leather Co.*, 246 U.S. 297, 303-04 (1918) (stating that the act of State doctrine "rests … upon the highest considerations of international comity and expediency"); *Sabbatino*, 376 U.S. at 422-423 ("Although it is, of course, true that United States courts apply international law as part of our own in appropriate circumstances, the public law of nations can hardly dictate to a country which is in theory wronged how to treat that wrong within its domestic borders").

[3731] *Sabbatino*, 376 U.S. 423 (linking comity with the national interest by stating that "[t]he doctrine as formulated in past decisions expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere"); *Alfred Dunhill of London, Inc. v. Cuba*, 425 U.S. 682, 697 (1976); *International Association of Machinists & Aerospace Workers v. OPEC*, 649 F.2d 1354, 1358-61 (9th Cir.1981), *cert. denied*, 454 U.S. 1163 (1982); *Hunt v. Mobil Oil Corp.*, 550 F.2d 68, 77-79 (2d Cir. 1977), *cert. denied*, 434 U.S. 984 (1977); *Timberlane Lumber Co. v. Bank of America, N.T. & S.A.*, 549 F.2d 597, 605-08 (9th Cir.1976); *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1292 (3d Cir.1979) (noting "a shift in focus from the notions of sovereignty and the dignity of independent nations ... to concerns for preserving the 'basic relationships between branches of government in a system of separation of powers,' and not hindering the executive's conduct of foreign policy by judicial review or oversight of foreign acts."); *W.S. Kirkpatrick & Co.* v. *Envtl. Tectonics Corp.*, 110 S.Ct. 701, 704 (1990) ("We once

competence approach makes it less analyzable in international law terms, and may "subordinate[ ] the policy of uniformity [flowing from an international law approach] to the *ad hoc* political judgment of the executive branch."[3732] In view of its closeness to the comity doctrine and the political question doctrine (which is also premised on the constitutional principle of separation of powers), it is unclear whether the act of State doctrine actually sheds additional light on justiciability questions.[3733] In practice, when applying the act of State doctrine, courts balance sovereign interests, although under the most recent view of the doctrine, they actually balance the U.S. interest in adjudication and the U.S. interest in deference to the interests of the U.S. political branches. The latter interests are often the interests of foreign governments made their own by the U.S. political branches for diplomatic reasons. The lighter the latter interests weigh, the greater the case for rejecting the application of the act of State doctrine is.[3734]

The act of State doctrine may have the *effect* of avoiding normative competency conflicts between sovereigns,[3735] although its main purpose is the related concern of not upsetting the conduct of foreign relations constitutionally allotted to the political branches. The act of State doctrine may thus *indirectly* vindicate comity.[3736] It may be noted that the political branches may clarify that adjudication does not harm their prerogatives by issuing statements of interests.[3737] They could also provide or imply in the statute concerned that the act of State doctrine does not apply,[3738] since the doctrine is not required by the Constitution.[3739]

1116. ACT OF STATE DOCTRINE APPLIED TO ATS SUITS – ATS cases may possibly imply the passing of judgment on the acts of a foreign State, much more than other cases of extraterritoriality (in the economic field in particular) may, as the

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viewed the [act of State] doctrine as an expression of international law, resting upon "the highest considerations of international comity and expediency" We have more recently described, however, as a consequence of domestic separation of powers …") (citation omitted). *See also* M.D. RAMSEY, "Escaping 'International Comity'", 83 *Iowa L. Rev.* 893, 913 (1998). In *Sosa*, the Supreme Court appeared to emphasize both prongs, without however explicitly referring to the act of State doctrine ("[T]he potential implications for the foreign relations of the United States of recognizing [private causes of action] should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs. It is one thing for American courts to enforce constitutional limits on our own State and Federal Governments' power, but quite another to consider suits under rules that would go so far as to claim a limit on the power of foreign governments over their own citizens, and to hold that a foreign government or its agent has transgressed those limits", citing *Sabbatino*, 376 U.S. 431-32) (124 S.Ct. 2763).

[3732] *See* J.R. PAUL, "Comity in International Law", 32 *Harv. Int'l L.J.* 1, 69 (1991).

[3733] *Compare Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d 774, 803 (D.C. Cir. 1984) (Bork, J., concurring) ("The same separation of powers principles are reflected in the political question doctrine"); V.A. PAPPALARDO, "Isolationism or Deference? The Alien Tort Claims Act and the Separation of Powers", 10 *Mich. J. Int'l L.* 886, 903 (1989) (referring to the separation of powers as the "common philosophical underpinnings" of both the act of State and political question doctrines).

[3734] *See* K.L. BOYD, "Universal Jurisdiction and Structural Reasonableness", 40 *Tex. Int'l L.J.* 1, 22 (2004); *Sabbatino*, 376 U.S. 428; *Republic of the Philippines* v. *Marcos*, 806 F. Supp. 344, 359 (2d Cir. 1986) (stating that "when a state comes into our courts and asks that our courts scrutinize its actions, the justification for application of the doctrine may well be significantly weaker").

[3735] *See* M.D. RAMSEY, "Escaping 'International Comity'", 83 *Iowa L. Rev.* 893, 913, 914 (1998).

[3736] *Id.*, at 916.

[3737] *See, e.g.*, *First Nat'l City Bank* v. *Banco Nacional de Cuba*, 406 U.S. 759, 764-70 (1972).

[3738] See for a statute explicitly overriding the act of State doctrine: Helms-Burton Act, Title III. See for a statute possibly implicitly overriding the doctrine: the TVPA.

[3739] § 443(2) of the Restatement.

defendant is not unlikely to be a state official or a person otherwise linked to a foreign State. The courts in *Filartiga* and *Kadic*, along with academic commentators, have however held that acts of torture and crimes against international humanitarian law – which ordinarily violate the territorial State's own laws – could not properly be characterized as acts of State.[3740] The *Kadic* court implied, citing *Sabbatino*, that the doctrine only applied "in a context […] in which world opinion was sharply divided".[3741] This would effectively preclude the application of the act of State doctrine to ATS suits, as world opinion can hardly be divided on violations of the law of nations,[3742] especially after the Supreme Court's clarifications in *Sosa* (2004). BOYD however believes that the act of State doctrine still provides an important structural check on ATS litigation,[3743] noting that traditionally, the act of State doctrine also protects acts that are illegal under international law from judicial scrutiny.[3744]

In *Sarei* v. *Rio Tinto*, the court applied the act of State doctrine to activities by a private defendant authorized by an agreement with a foreign State,[3745] although it could be argued more persuasively that the ATS did not provide a cause of action for racial discrimination and environmental tort (the violations upon which the claims in *Sarei* were based), given the absence of a norm of customary international law with definite content and acceptance among civilized nations. It may even be argued that, as a general matter, the act of State doctrine does not have an autonomous meaning for ATS purposes, as it duplicates the quest for the contours of "violations of the law of nations" – which is not a question of justiciability – and the political question doctrine[3746].

[3740] *Filartiga*, 630 F.2d at 889; *Kadic*, 70 F.3d at 250 ("[W]e doubt that the acts of even a state official, taken in violation of a nation's fundamental law and wholly unratified by that nation's government, could properly e characterized as an act of state."); *compare* in the context of a comity analysis *Sarei* v. *Rio Tinto*, 221 F. Supp. 2d 1116, 1207 (C.D. Cal. 2002) ("The fact that the conduct in which defendants engaged is alleged to constitute war crimes and crimes against humanity argues strongly in favor of the retention of jurisdiction."); § 443(c) of the Restatement (Third) of Foreign Relations law (stating that the act of State doctrine does not apply to human rights violations "since the accepted law of international human rights law is well-established and contemplates external scrutiny of such acts."). *See also* V.A. PAPPALARDO, "Isolationism or Deference? The Alien Tort Claims Act and the Separation of Powers", 10 *Mich. J. Int'l L.* 886, 906 (1989) ("Adjudication of an action in tort for torture … does not constitute an explicit condemnation of an official government policy, since the alleged torturer's individual actions, as opposed to his government's policies, are at issue in the adjudication."); B. STEPHENS, "Upsetting Checks and Balances: The Bush Administration's Efforts to Limit Human Rights Litigation", 17 *Harv. Hum. Rts. J.* 169, 193 and 200 (2004).

[3741] *Kadic*, 70 F.3d at 250.

[3742] *See also* B. STEPHENS, "Upsetting Checks and Balances: The Bush Administration's Efforts to Limit Human Rights Litigation", 17 *Harv. Hum. Rts. J.* 169, 202 (2004) (arguing that "the world community as a whole has pre-judged … human rights abuses … and has concluded that they are never permitted").

[3743] K.L. BOYD, "Universal Jurisdiction and Structural Reasonableness", 40 *Tex. Int'l L.J.* 1, 23 (2004).

[3744] Citing *Banco de España* v. *Fed. Reserve Bank of N.Y.*, 114 F.2d 438, 444 (2d Cir. 1940 ("So long as the act is the act of the foreign sovereign, it matters not how grossly the sovereign has transgressed its own laws."); *French* v. *Banco Nacional de Cuba*, 23 N.Y.2d 46, 52 (N.Y. 1968).

[3745] *Sarei* v. *Rio Tinto*, 221 F. Supp. 2d 1116, 1186-88 (C.D. Cal. 2002).

[3746] The *Sarei* court seems to admit this. 221 F. Supp. 2d at 1190 ("The Statement of Interest filed by the Department of State does not directly indicate whether it believes any of the act of state, political question or international comity doctrines applies."); *Id.*, at 1196 ("[T]he court notes that the same separation of powers principles that inform the act of state doctrine underlie the political question doctrine", citing *Banco Nacional de Cuba*, , 406 U.S. at 785-93 (1972) (Brennan, J., dissenting) (noting that the act of state doctrine, as articulated in *Sabbatino*, is equivalent to the political question doctrine)

11.2.3.c. Forum non conveniens

1117. LOCAL REMEDIES RULE – While most human rights conventions that provide a remedy for victims of human rights violations before international supervisory mechanisms condition the right to invoke a remedy on the victims having exhausted domestic remedies, the ATS does not explicitly confer this requirement, which is, to be true, not a general international law principle. U.S. courts have however consistently, at least implicitly, made their ATS jurisdiction dependent on the plaintiffs' showing that they exhausted available remedies in their home State.[3747] Often, the doctrine of *forum non conveniens* is resorted to in this context.

1118. *FORUM NON CONVENIENS* IN ATS LITIGATION – *Forum non conveniens* arguments have taken on a particular significance in ATS suits. The plaintiffs are often foreigners, the acts complained of are committed abroad and most evidence is located abroad, thereby rendering a U.S. court possibly an 'inconvenient' forum. A *forum non conveniens* defense is indeed routinely invoked in ATS litigation, and suits with only a slight nexus with the U.S., have been dismissed on *forum non conveniens* grounds.[3748] In some cases, courts dismiss the suit, but reopen it when the alternative forum fails to provide a remedy or when the defendant reneges on his promise to consent to the jurisdiction of an alternative forum.[3749] The nature of the *forum non conveniens* doctrine will be discussed in the context of ATS litigation, and not elsewhere in this book, because the doctrine is traditionally hardly or not applied in transnational regulatory cases.[3750]

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and *Trajano v. Marcos,* Nos. 86-2448, 86-15039, 1989 WL 76894, *2 (9th Cir. July 10, 1989) (Unpub.Disp.) ("The act of state doctrine is the foreign relations equivalent of the political question doctrine"). *Compare Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d 774, 804 (D.C. Cir. 1984) (Bork, J., concurring) ("[T]o the extent the act of state doctrine is based predominantly, if not exclusively, on separation of powers concerns (as it has increasingly come to be), its own rationale might justify extending it to cover the acts of such entities as the PLO where adjudication of the validity of those acts would present problems of judicial competence and of judicial interference with foreign relations. Such an extension would bring the act of state doctrine closer, especially in its flexibility, to the political question doctrine.").

[3747] *See* B. STEPHENS, "Expanding Remedies for Human Rights Abuses: Civil Litigation in Domestic Courts", 40 *German Yearbook of International Law* 117, 133-134 (1997). *Contra*: *Sarei v. Rio Tinto, Sarei* v. *Rio Tinto PLC,* 221 F.Supp. 2d 1116 (C.D. Cal. 2002).

[3748] A.K. SHORT, "Is the Alien Tort Statute Sacrosanct? Retaining Forum Non Conveniens in Human Rights Litigation", 33 *N.Y.U. J. Int'l L. & Pol.* 1001, 1053 (2001) (concluding therefore that "the doctrine of *forum non conveniens* provides a useful check on the possible overextension of federal court subject matter jurisdiction in cases with few meaningful ties to the United States"); *See, e.g., Aguinda* v. *Texaco, Inc.*, 142 F. Supp. 2d 534, 554 (S.D.N.Y. 2001) ("[E]ven if one assumes for the sake of argument the hypothesis that Texaco participated in a violation of international law that would support the claim here brought under the ATCA, neither that assumption nor any of the other considerations special to these cases materially alters the balance of private and public interest factors that, as previously discussed, 'tilt[s] strongly in favor of trial in the foreign forum, …".

[3749] *Aguinda*, 142 F. Supp. 2d at 539; *Jota* v. *Texaco, Inc.*, 157 F.3d 153, 159 (2d Cir. 1998).

[3750] *See, e.g., Indus. Inv. Dev. Corp.* v. *Mitsui & Co.*, 671 F.2d 876, 890-91 (5th Cir. 1982); *Laker Airways Ltd.* v. *Pan Am. World Airways*, 568 F. Supp. 811, 818 (D.D.C. 1983)). Recent court decisions have nevertheless applied the *forum non conveniens* doctrine. *See* H.L. BUXBAUM, "Jurisdictional Conflict in Global Antitrust Enforcement", 16 *Loy. Consumer L. Rev.* 365, 375, n. 38 (2004)). *See Capital Currency Exchange, N.V.* v. *Nat'l Westminster Bank PLC*, 155 F.3d 603, 610 (2d Cir. 1998) (antitrust law); *Howe* v. *Goldcorp Inv., Ltd.*, 946 F.2d 944 (1st Cir. 1991); *Allstate Life Ins. Co.* v. *Linter Group Ltd.*, 994 F.2d 996 (2d Cir. 1993); *Alfadda* v. *Fenn*, 159 F.3d 41 (2d Cir. 1998) (securities

1119. ORIGINS OF *FORUM NON CONVENIENS* – Like the prudential doctrines, the doctrine of *forum non conveniens* was not developed in ATS litigation, but in ordinary civil litigation. Just as the comity doctrine, it has its roots in Scotland, where it was since 1610 known as the doctrine of '*forum competens*'[3751], before its name was changed in *forum non conveniens* at the end of the 19th century.[3752] Pursuant to *forum non conveniens*, courts would refrain, as a matter of discretion rather than of law,[3753] from exercising their jurisdiction, if doing so would further the ends of both convenience and justice.[3754] Importantly, while *forum non conveniens* exists in England,[3755] it is almost entirely absent from continental European civil litigation practice. This may be attributable to the absence of transient or tag jurisdiction, which is considered as exorbitant in continental Europe (an absence which obviates the need for the application of the *forum non conveniens* doctrine), and to European courts' preference for jurisdictional bright-line rules.[3756]

1120. *FORUM NON CONVENIENS* IN THE UNITED STATES – In the United States, courts have applied the doctrine in maritime[3757] and later other cases since the end of the 19th century, without however naming it *forum non conveniens*. Only with *Gulf Oil Corp.* v. *Gilbert*, a 1947 case, did the Supreme Court provide guidance for lower courts on the *forum non conveniens* analysis, setting forth a number of private and public interest factors to be weighed.[3758] The *forum non conveniens* doctrine as developed in *Gilbert*, a domestic case, was in 1981 applied by the Supreme Court in an international context in *Piper Aircraft* v. *Reyno*.[3759]

1121. ADEQUACY OF ALTERNATIVE FORUM – Under *forum non conveniens*, as an initial matter, the court has to determine if an adequate alternative forum exists.[3760] An alternative forum is generally adequate if: (1) the defendants are subject to service

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law); *Transunion Corp.* v. *Pepsico, Inc.*, 811 F.2d 127 (2d Cir. 1987) (RICO); *CSR Ltd.* v. *Fed. Ins. Co.*, 141 F.Supp. 2d 484 (D.N.J. 2001) (antitrust).

[3751] *See Vernor* v. *Elvies*, 11 Dict. of Dec. 4788 (Scot. Sess. Cas. 2nd Div. 1610), cited in A.K. SHORT, "Is the Alien Tort Statute Sacrosanct? Retaining *Forum Non Conveniens* in Human Rights Litigation", 33 *N.Y.U. J. Int'l L. & Pol.* 1001, 1014, n. 63 (2001).

[3752] The term *forum non competens* is confusing, since, under the doctrine, the *forum* is actually competent, but declines to exercise its jurisdiction as a matter of discretion. The leading modern Scottish *forum non conveniens* case is *La Société du Gaz de Paris* v. *La Société Anonyme de Navigation « Les Armateurs Français »*, [1926] Sess. Cas. (H.L.) 13. A.K. SHORT, *supra*, "Is the Alien Tort Statute Sacrosanct? Retaining *Forum Non Conveniens* in Human Rights Litigation", 33 *N.Y.U. J. Int'l L. & Pol.* 1001, 1016 (2001).

[3753] *See* B. PEARCE, "The Comity Doctrine as a Barrier to Judicial Jurisdiction: A U.S.-E.U. Comparison", 30 *Stan. J. Int'l L.* 525, 552 (1994).

[3754] *La Société du Gaz de Paris* v. *La Société Anonyme de Navigation « Les Armateurs Français »*, [1926] Sess. Cas. (H.L.) 13, 17 and 22. A.K. SHORT, "Is the Alien Tort Statute Sacrosanct? Retaining *Forum Non Conveniens* in Human Rights Litigation", 33 *N.Y.U. J. Int'l L. & Pol.* 1001, 1016 (2001).

[3755] *See* B. PEARCE, "The Comity Doctrine as a Barrier to Judicial Jurisdiction: A U.S.-E.U. Comparison", 30 *Stan. J. Int'l L.* 525, 555-56 (1994) (observing however that English courts only weigh private interests, not sovereign interests).

[3756] *Id.*, at 554-55.

[3757] *See* in particular *The Belgenland*, 114 U.S. 355, 365-66 (1885) (noting that jurisdiction over disputes arising under the common law of nations was "beyond dispute: the only question [was] whether it [would be] expedient to exercise it").

[3758] 330 U.S. 501 (1947).

[3759] 454 U.S. 235 (1981).

[3760] *Piper*, 454 U.S. at 254 n. 22; *Gilbert*, 330 U.S. at 506-07.

of process there; and (2) the forum permits litigation of the subject matter of the dispute.[3761] The determination of adequacy often revolves around the question of whether the foreign plaintiffs have exhausted domestic remedies,[3762] but is not limited to that, as existing domestic remedies could indeed be inadequate. Domestic remedies may however be adequate even if they differ from U.S. remedies. This implies that the alternative forum need not provide for class actions, contingency fee counsel or wide-ranging discovery powers.[3763] If an adequate alternative forum is deemed to exist – which is often the case as an alternative forum is only be considered to be inadequate if it is "so clearly inadequate or unsatisfactory that it is no remedy at all" – [3764] the court proceeds with a weighing of public and private interests relevant to the case. If not, dismissal on the basis of *forum non conveniens* is never warranted, even if the interests involved could weigh in favour of the foreign forum. In ATS cases, the adequacy of the alternative forum is often premised on the absence of corruption or government abuse,[3765] the protection of minority rights,[3766] the absence of potential physical harm to the plaintiff,[3767] or the actual availability of a functioning judicial system.[3768]

The inquiry into the adequacy of the alternative forum in ATS litigation resembles the inquiry undertaken by the International Criminal Court and some European national

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[3761] *Bank of Credit and Commerce International (OVERSEAS) Ltd. v. State Bank of Pakistan*, 273 F.3d 241 (2d Cir.2001); *Bodner* v. *Banque Paribas*, 114 F. Supp. 2d 117, 132 (E.D.N.Y. 2000) (requiring defendants moving to dismiss on *forum non conveniens* grounds that "(1) ([t]hey are amenable to process in the alternative forum, and (2) the subject matter of the lawsuit is cognizable in the alternative forum so as to provide plaintiffs [a remedy]").

[3762] *See* K.L. BOYD, "Universal Jurisdiction and Structural Reasonableness", 40 *Tex. Int'l L.J.* 1, 19 (2004). Senator Feinstein proposed to codify the exhaustion of remedies rule in her bill to amend 28 U.S.C. § 1350 that she introduced in the Senate, 109th Congress, 1st Session, S. 1874, October 17, 2005: "Exhaustion of Remedies – A district court shall abstain from the exercise of jurisdiction over a civil action described in subsection (a) if the claimant has not exhausted adequate and available remedies in the place in which the injury occurred. Adequate and available remedies include those available through local courts, claims tribunals, and similar legal processes." (amended Sec. 1350 (d)). The bill was later withdrawn.

[3763] *Sequihua* v. *Texaco, Inc.*, 847 F. Supp. 61, 64 (S.D. Tex. 1994) ("Ecuador is an adequate and available forum even though it may not provide the same benefits as the American system."); *Aguinda*, 142 F. Supp. 2d at 540-41 (finding that Ecuador is not an inadequate forum because it did not recognize class actions and did not grant injunction remedies to the extent that the U.S. did); *Sarei*, 221 F. Supp. 2d at 1171 ("Nonetheless, the court finds that the unavailability of class actions and contingency fee counsel (if indeed such counsel are unavailable), as well as constraints on discovery, do not render Papua New Guinea an inadequate forum for *forum non conveniens* purposes.").

[3764] *Piper Aircraft*, 454 U.S. at 254; A.K. SHORT, "Is the Alien Tort Statute Sacrosanct? Retaining Forum Non Conveniens in Human Rights Litigation", 33 *N.Y.U. J. Int'l L. & Pol.* 1001, 1048-49 (2001) (noting that "[t]he adequacy prong has proven to be a significant impediment to many defendants seeking dismissal under the doctrine").

[3765] *See, e.g.*, *Abiola* v. *Abubakaer*, 267 F. Supp. 2d 907, 918 (N.D. Ill. 2003); *Sarei*, 221 F. Supp. 2d at 1165-71; *Eastman Kodak* v. *Kavlin*, 978 F. Supp. 1078, 1086-87 (S.D. Fla. 1997) (noting the "apparent lack of redressibility for individual litigants", and the "easily manipulable" justice system in Bolivia).

[3766] *See, e.g.*, *Presbyterian Church of Sudan* v. *Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 335-38 (S.D.N.Y. 2003).

[3767] *See, e.g.*, *Cabiri* v. *Assassie-Gyimah*, 921 F. Supp. 1189, 1198-99 (S.D.N.Y. 1996) (noting that the "plaintiff is highly unlikely to obtain justice in Ghanaian courts" and "would unnecessarily [be] put in harm's way" if he were to return to Ghana).

[3768] *See, e.g.*, *Kadic* v. *Karadzic*, 70 F.3d 232, 250-51 (2d Cir. 1995) ("[I]t seems evident that the courts of the former Yugoslavia, either in Serbia or war-torn Bosnia, are not now available to entertain plaintiffs' claims, even if circumstances concerning the location of witnesses and documents were presented that were sufficient to overcome the plaintiffs' preference for a United States forum.")

criminal courts, applying the complementarity or subsidiarity principle, into the adequacy of the investigations and prosecutions in the territorial or national State. Using different doctrines, U.S. civil courts and European criminal courts dealing with human rights violations both actually inquire whether another State with a stronger nexus to the case is able or willing to genuinely hear it. Unlike European courts, U.S. courts may more readily conclude that the alternative forum is adequate,[3769] possibly because the adequacy test is only the first step of the *forum non conveniens* analysis, and also because of a long-standing reluctance of U.S. courts to supervise the integrity of foreign courts[3770]. In most ATS cases, however, the separation of the second step – the interest-balancing test set out in the next paragraph – and the first step – the adequacy of the alternative foreign forum – appears artificial.

1122. WEIGHING PRIVATE AND PUBLIC INTERESTS – If a foreign forum is considered to be inadequate, dismissal is only warranted if the balance of private and public interest factors is in favour of dismissal. The Supreme Court identified in *Gilbert* as private interest factors to be weighed in a *forum non conveniens* analysis: "the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive" and "enforcibility of a judgment is one is obtained."[3771]

The *Gilbert* court listed as public interest factors: "[a]dministrative difficulties [that] follow for courts when litigation is piled up in congested centers instead of being handled at its origin", the imposition of jury duty "upon the people of a community which has no relation to the litigation", the "local interest in having localized controversies decided at home" instead holding a trial in a remote State "where [the court] can learn of it by report only", and the appropriateness, in having the trial in a forum that is at home with the law "that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself."[3772] The possibility of a change in substantive law is not a factor in the *forum non conveniens* inquiry.[3773]

[3769] The adequacy standard is indeed strict, since "an American court will refrain from condemning as inadequate a legal remedy afforded by the courts of another nation unless it appears that such remedy is 'so clearly inadequate that it is no remedy at all.". *Flores* v. *S. Peru Copper Corp.*, 253 F. Supp. 2d 510, 539 (S.D.N.Y. 2002) (quoting *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235, 254 (1981)); L. LONDIS, "The Corporate Face of the Alien Tort Claims Act: How an Old Statute Mandates a New Understanding of Global Interdependence", 57 *Me. L. Rev.* 141, 181 (2005) (pointing out, drawing on the *Flores* judgment, that "the standards that the foreign forum must meet to be considered "adequate" are woefully low").

[3770] *Flores* v. *S. Peru Copper Corp.*, 253 F. Supp. 2d 510, 539 (S.D.N.Y. 2002), quoting *PT United Can Co.*, 138 F.3d at 73 (ruling that "considerations of comity preclude a court from adversely judging the quality of a foreign justice system absent a showing of inadequate procedural safeguards, so such a finding is rare") (citation omitted); *Blanco v. Banco Industrial de Venezuela, S.A.*, 997 F.2d 974, 982 (2d Cir.1993) ("[W]e have repeatedly emphasized that it is not the business of our courts to assume the responsibility for supervising the integrity of the judicial system of another sovereign nation.") (citations and internal quotation marks omitted); *Sussman v. Bank of Israel*, 801 F.Supp. 1068 (S.D.N.Y.1992) ("[I]t will be a black day for comity among sovereign nations when a court of one country, because of a perceived 'negative predisposition,' declares the incompetence or worse of another nation's judicial system.").

[3771] *Gilbert*, 330 U.S. at 508.

[3772] *Id.*, at 508-509.

[3773] *Piper*, 454 U.S. at 247.

It is important to note that the operation of the said factors is such that "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed".[3774] Only when "defendants have made a clear showing of facts which ... establish such oppression and vexation of a defendant as to be out of proportion to plaintiff's convenience, which may be shown to be slight or nonexistent...."[3775] will a *forum non conveniens* defense be accepted. However, when the plaintiff is foreign, deference to plaintiff's choice "is much less reasonable".[3776] In ATS suits, the foreign plaintiff's choice of a U.S. forum will thus usually deserve less deference. Nonetheless, the defendant, not the plaintiff, continues to bear the burden of establishing that the presumption in favour of the U.S. forum should be overcome in view of the interests involved.

1123. WEIGHING SOVEREIGN INTERESTS? – While the balancing process inherent in a *forum non conveniens* analysis has historically focused on fairness to the individual, courts have recently also weighed sovereign interests, elaborating on one of the factors set forth by the *Gilbert* court, the "local interest in having localized controversies decided at home."[3777] If sovereign interests are balanced, a *forum non conveniens* analysis edges closer toward a comity analysis.[3778] Sovereign interests may even override the wishes of foreign plaintiffs or the convenience of the parties, *i.e.*, the traditional *forum non conveniens* factors.[3779] Comity and *forum non conveniens* are therefore often alternatively invoked by the courts in order to ensure that the sovereignty of foreign nations is respected by a restriction of the reach of U.S. laws.[3780]

In ATS litigation, courts frequently balance sovereign interests under the *forum non conveniens* doctrine, weighing the foreign State's obvious interest to have human rights violations, which are often committed by State actors, adjudicated on a territorial basis, and the U.S. interest in adjudication.[3781] The inclusion of sovereign, 'political' interests in *forum non conveniens* interest-balancing has been welcomed by some authors,[3782] and denounced by others.[3783] Critics have in particular argued that it

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[3774] *Id.*, at 508.
[3775] *Cheng v. Boeing Co.*, 708 F.2d 1406, 1410 (9th Cir.1983).
[3776] *Piper*, 454 U.S. 255-56.
[3777] 330 U.S. 508. *See, e.g.*, *Harrison* v. *Wyeth Lab Div. of Am. Home Prods. Corp.*, 510 F.Supp. 1, 5 (E.D. Pa. 1980) (holding that "the forum is to apply the policy of the jurisdiction most intimately concerned with the outcome of the particular litigation"); *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India in Dec. 1984*, 634 F.Supp. 842, 848 (S.D.N.Y.).
[3778] A.K. SHORT, "Is the Alien Tort Statute Sacrosanct? Retaining Forum Non Conveniens in Human Rights Litigation", 33 *N.Y.U. J. Int'l L. & Pol.* 1001, 1019 (2001) (pointing out under a *forum non conveniens* analysis, the interests and views of foreign officials are taken into account).
[3779] *See* B. PEARCE, "The Comity Doctrine as a Barrier to Judicial Jurisdiction: A U.S.-E.U. Comparison", 30 *Stan. J. Int'l L.* 525, 552-53 (1994) (noting that suits may be even dismissed in case the plaintiff brought suit against a corporate defendant in the State of its incorporation).
[3780] *Id.*, at 551.
[3781] *See, e.g.*, *Sarei* v. *Rio Tinto PLC*, 221 F. Supp. 2d 1116, 1181, 1183-84, 1199 (C.D. Cal. 2002); *Eastman Kodak Co.* v. *Kavlin*, 978 F. Supp. 1078, 1084 (S.D. Fla. 1997) (holding that "[i]f Bolivia's courts do not have a surpassingly greater interest in their own integrity than do the American courts, then the public interest factor is meaningless"); K.L. BOYD, "Universal Jurisdiction and Structural Reasonableness", 40 *Tex. Int'l L.J.* 1, 17-18 (2004);
[3782] *See* A.K. SHORT, "Is the Alien Tort Statute Sacrosanct? Retaining Forum Non Conveniens in Human Rights Litigation", 33 *N.Y.U. J. Int'l L. & Pol.* 1001, 1082-1090 (2001) (calling for a formal recognition of sovereign interests in the *forum non conveniens* analysis, proposing to weigh the

obscures the analysis used to dismiss a plaintiff's claims, lower the adequacy standards that the foreign forum must meet, and in effect shift the burden of proof from the defendants to the plaintiffs.[3784] Whereas under traditional *forum non conveniens* analysis, the plaintiff's choice of (a U.S.) forum would only be set aside in exceptional circumstances, under the *forum non conveniens* analysis emphasizing sovereign interests, her choice would only be respected if it did not harm the interests of another State. It remains to be seen whether one should actually cry foul, as indeed, a focus on sovereign interests by ATS courts merely magnifies the *Gilbert* court's decades-old "local interest" balancing factor.[3785] Moreover, if sovereign interests were not invoked in a *forum non conveniens* analysis, they will surely be in the context of the political question, comity and act of State doctrine.[3786] And if they were not directly invoked as factors in the *forum non conveniens* analysis, such an analysis may certainly have the *effect* of reducing the risk of international conflicts, an effect which doctrines that lay emphasis on (domestic and foreign) sovereign interests precisely envisage.[3787]

1124. APPLYING A RULE OF REASON? – If sovereign interests are also factored into a *forum non conveniens* analysis, the question may logically be asked whether there is no need of merging the different restraining doctrines employed in ATS litigation. A possible standard used after merger could then be the rule of reason, set forth in § 403 of the Restatement, which makes a finding of jurisdiction dependent upon weighing the different interests involved, precisely the method used by the restraining doctrines.[3788] Hitherto, courts have hardly referred to § 403 in the context of ATS litigation, possibly because this section was actually drawn with a view to mediating conflicts arising in antitrust litigation. However, as § 403 has a general scope of application, it could certainly be applied in the context of private human rights litigation.

1125. ABOLISHING *FORUM NON CONVENIENS* IN ATS LITIGATION? – Although ATS claims, as tort claims, are in principle subject to a *forum non conveniens* analysis, it has been submitted that the analysis could not, or at least not to the same extent, be invoked in ATS claims because of the unique interests associated with

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transitional justice interests of the foreign State against the U.S. interests in adjudication, U.S. interests which may relate to the U.S. nationality of a defendant corporation, the possible threat to the conduct of U.S. foreign relations, or the observation that the foreign State is able and willing to hear the human rights claim).

[3783] *See* L. LONDIS, "The Corporate Face of the Alien Tort Claims Act: How an Old Statute Mandates a New Understanding of Global Interdependence", 57 *Me. L. Rev.* 141, 181 (2005).

[3784] *Id.*, at 185.

[3785] An emphasis on the "local interest" balancing factor has however been considered to be inappropriate in the context of ATS litigation, "since countries share a *global* interest in the enforcement of international law". *See, e.g.*, K.L. BOYD, "The Inconvenience of Victims: Abolishing *Forum non Conveniens* in U.S. Human Rights Litigation", 39 *Va. J. Int'l L.* 41, 72, 87 (1998). *See infra* on the abolishment of *forum non conveniens* in ATS litigation.

[3786] *Compare id.* (stating that "reluctance to interfere in the internal affairs of a foreign sovereign … serves as a harbinger of prudential doctrines to come").

[3787] *See* A.K. SHORT, "Is the Alien Tort Statute Sacrosanct? Retaining Forum Non Conveniens in Human Rights Litigation", 33 *N.Y.U. J. Int'l L. & Pol.* 1001, 1063-64 (2001).

[3788] The question may arise whether appeals courts should, when applying § 403, review cases *de novo* (which happens when reviewing decision reached on the basis of the prudential doctrines), or only under the abuse of discretion standard (which is used to review *forum non conveniens* analyses of lower courts). *Compare* K.L. BOYD, "The Inconvenience of Victims: Abolishing *Forum non Conveniens* in U.S. Human Rights Litigation", 39 *Va. J. Int'l L.* 41, 85 (1998).

them.[3789] This argument is understandable in view of the high incidence of dismissals of ATS suits on *forum non conveniens* grounds, dismissals which are often based on evidentiary problems given the fact that the human rights abuses took entirely place overseas[3790]. For the proponents of abolishing *forum non conveniens* in ATS suits, this is clear proof that "[t]he balance of convenience factors [is] heavily weighed against foreign plaintiffs, undermining the federal statutory scheme which encourages aliens to seek civil redress in U.S. courts for wrongs occurring on foreign soil."[3791]

1126. Especially the Second Circuit takes a view which is rather sceptical of the use of *forum non conveniens* in ATS cases. In the 1998 case of *Jota v. Texaco, Inc.*, it recognized the plaintiff's argument that "to dismiss ... [a claim pursuant to the ATCA under *forum non conveniens*] would frustrate Congress's intent to provide a federal forum for aliens suing domestic entities for violation of the law of nations."[3792] In the 2000 *Wiwa* case then, it held there to be "a policy interest implicit in [U.S.] federal statutory law in providing a forum for adjudication of claims of violations of the law of nations"[3793] which should be taken into account in the balancing of competing interests under a *forum non conveniens* analysis. The California district court in *Sarei* v. *Rio Tinto*, a 2002 case, based itself on the *Wiwa* decision to deny defendants' motion to dismiss the U.S. action in favor of a Papua New Guinean forum.[3794]

In *Wiwa*, the Second Circuit premised its reasoning on the enactment of the Torture Victim Prevention Act (TVPA) in 1991. The TVPA created an unambiguous cause of action for torture as an act committed in violation of the law of nations. Unlike the ATS, the TVPA grants plaintiffs substantive rights, and does not merely grant the district courts "jurisdiction" to hear claims. The Second Circuit therefore believed that the TVPA would "represent a more direct recognition that the interests of the United States are involved in the eradication of torture",[3795] and that the ATS would have changed along the lines of the TVPA as far as torture claims were concerned.[3796] A

[3789] *See, e.g.*, K.L. BOYD, "The Inconvenience of Victims: Abolishing *Forum non Conveniens* in U.S. Human Rights Litigation", 39 *Va. J. Int'l L.* 41 (1998), citing *inter alia Cabiri* v. *Assassie-Gyimah*, 921 F. Supp. 1189, 1199 (S.D.N.Y. 1996) (ruling that "[s]ince [the] action is brought pursuant to United States case law and statutes, namely the Alien Tort Claims Act and the Torture Act, this Court has an interest in having the issues of law presented decided by a United States court.").

[3790] *Contra* K.L. BOYD, "The Inconvenience of Victims: Abolishing *Forum non Conveniens* in U.S. Human Rights Litigation", 39 *Va. J. Int'l L.* 41, 71 (1998) (arguing that "[t]he doctrine appears to be not a convenience doctrine at all, but rather an outcome determination which could mask more nefarious motives such as xenophobia, a desire to protect multinational corporations for injuries in foreign countries, or fears of dealing with difficult issues of foreign law.").

[3791] *Id.*, at 48.

[3792] *Jota v. Texaco, Inc.*, 157 F.3d 153, 159 (2d Cir.1998),

[3793] *Wiwa* v. *Royal Dutch Petroleum Co.*, 226 F.3d 88, 100 (2d Cir. 2000).

[3794] *Sarei*, 221 F. Supp. 2d at 1175 ("The court believes such a result is particularly appropriate given that the case is brought under the ATCA and alleges violations of international law," citing *Wiwa*, 226 F.3d at 106).

[3795] Citing *Wiwa*, 226 F.3d at 105 (2d Cir. 2000).

[3796] *Wiwa*, 226 F.3d at 106 (2d Cir. 2000) ("The new formulations of the Torture Victim Protection Act convey the message that torture committed under color of law of a foreign nation in violation of international law is "our business," as such conduct not only violates the standards of international law but also as a consequence violates our domestic law. In the legislative history of the TVPA, Congress noted that universal condemnation of human rights abuses "provide[s] scant comfort" to the numerous victims of gross violations if they are without a forum to remedy the wrong. House Report at 3, 1992 U.S.C.C.A.N. at 85. This passage supports plaintiffs' contention that in passing the Torture Victim

reduced reliance on *forum non conveniens* in ATS torture litigation in particular would be a logical result of the enactment of the TVPA.

1127. The *Wiwa* holding should probably not be extrapolated to other human rights claims under the ATS.[3797] Nonetheless, the court advanced an argument relating to the hardship possibly encountered by victims of torture offenses which could easily apply to other human rights litigation:

> One of the difficulties that confront victims of torture under color of a nation's law is the enormous difficulty of bringing suits to vindicate such abuses. Most likely, the victims cannot sue in the place where the torture occurred. Indeed, in many instances, the victim would be endangered merely by returning to that place. It is not easy to bring such suits in the courts of another nation. Courts are often inhospitable. Such suits are generally time consuming, burdensome, and difficult to administer. In addition, because they assert outrageous conduct on the part of another nation, such suits may embarrass the government of the nation in whose courts they are brought. Finally, because characteristically neither the plaintiffs nor the defendants are ostensibly either protected or governed by the domestic law of the forum nation, courts often regard such suits as "not our business."[3798]

Accordingly, in the *Wiwa* court's view, because of practical complications and the territorial State's possible lack of integrity in hearing a human rights claim, the advantages provided by litigation in U.S. courts would outweigh the advantages of litigation in the territorial State, and an exception of *forum non conveniens* would seem unlikely to be accepted by a U.S. court. The *Wiwa* court did however not go as far as outright prohibiting a *forum non conveniens* analysis. Indeed, for torture claims arising under the ATS, it did not exclude a *Gilbert*-style interest-balancing test, thus allowing the defense of *forum non conveniens* to continue carrying weight: "[t]he TVPA in our view expresses a policy favoring our courts' exercise of the jurisdiction conferred by the ATCA in cases of torture unless the defendant has fully met the burden of showing that the *Gilbert* factors "tilt[ ] strongly in favor of trial in the foreign forum.""[3799] In the 2002 *Flores* case, the District Court for the Southern

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Prevention Act, Congress has expressed a policy of U.S. law favoring the adjudication of such suits in U.S. courts. If in cases of torture in violation of international law our courts exercise their jurisdiction conferred by the 1789 Act only for as long as it takes to dismiss the case for *forum non conveniens*, we will have done little to enforce the standards of the law of nations.").

[3797] *See* for a critical appraisal of the *Wiwa* case: A.K. SHORT, "Is the Alien Tort Statute Sacrosanct? Retaining Forum Non Conveniens in Human Rights Litigation", 33 *N.Y.U. J. Int'l L. & Pol.* 1001, 1027-1045 (2001).

[3798] *Wiwa*, 226 F.3d at 105 (2d Cir. 2000).

[3799] *Wiwa*, 226 F.3d at 106 (2d Cir. 2000). The use of the phrase "fully met" could be interpreted to denote an enhanced burden for the defendant: only when he has "fully met" the burden of showing that the *forum non conveniens* factors "tilt[ ] strongly in favor of trial in the foreign forum.", will the plaintiffs' choice of forum be overridden. In *Flores v. Southern Peru Copper Corp.* however, the District Court for the Southern District of New York doubted whether the Second Circuit intended that implication. *See* 253 F.Supp.2d 510, 529 (S.D.N.Y. 2002) ("The most comfort plaintiffs can derive from the quoted discussion in *Wiwa* is a suggestion that when the Second Circuit used the phrase "*fully* met" with reference to the defendant's burden, instead of just saying "met," the court implied without stating directly that a defendant in a TVPA case bore an enhanced *forum non conveniens* burden. But this interpretation is Delphic at best, and I am not at all sure that the court of appeals intended that

District of New York, which falls under the Second Circuit, recognized the role that *forum non conveniens* is to play in ATS suits after *Wiwa*.[3800] Only an unlikely amendment of the ATS may possibly abolish *forum non conveniens* in ATS litigation.[3801]

11.2.3.d. Comity

1128. LIMITED ROLE IN ATS SUITS – Comity, the meaning and scope of which has been discussed at length in chapter 5.1, plays a limited (although increasing) role in ATS litigation, possibly because the foreign interests it protects are already sufficiently protected by other prudential and justiciability doctrines. It is never autonomously invoked in ATS suits. An important difference between the comity doctrine on the one hand, and the political question and the act of State doctrines on the other hand, is that the former doctrine *directly* weighs sovereign interests, whereas on the basis of the latter doctrines, foreign sovereign interests are *mediated* by the U.S. political branches.

1129. TRUE CONFLICTS – Especially in case of a *Hartford Fire*-style true conflict between U.S. law and foreign law will the comity doctrine carry weight. *Sarei* v. *Rio Tinto PLC* for instance, a 2002 case involving human rights and environmental tort claims, was dismissed by the court, *inter alia*, because of a true conflict between the ATS and Papua New Guinea law which prohibited and made it a criminal offence for citizens to undertake or pursue legal proceedings in a foreign court over compensation claims arising from mining or petroleum projects in Papua New Guinea.[3802] Similarly, *Iwanowa* v. *Ford Motor Co.*, a Holocaust human rights case, was dismissed by the court because of a direct conflict with the position taken by the German Federal Government that foreign citizens may not assert direct claims for war-time forced labor against private companies, but should instead pursue their claims by way of agreements between nations.[3803]

1130. OTHER CONFLICTS – Also in the absence of a true conflict may comity play a role. In *Sequihua* v. *Texaco, Inc.*, the court ruled that the case should be

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implication. In any event, *Wiwa* cannot possibly be read to hold that *forum non conveniens* does not apply at all to ATCA-TVPA cases.")

[3800] *Flores v. Southern Peru Copper Corp.***,** 253 F.Supp.2d 510, 529 (S.D.N.Y. 2002) ("Thus in *Wiwa* the Second Circuit squarely rejected the notion, even in cases of torture, that the *forum non conveniens* doctrine is asphyxiated by the rarefied ATCA atmosphere. On the contrary, the doctrine breathes, perhaps even with a strength not "significantly diminished"; and certain it is that the court of appeals instructed the district court, on remand of *Wiwa's* ATCA-TVPA torture action, to submit the case to traditional *forum non conveniens* analysis."). *Id.*, at 531 ("For the present … the decisions of the Second Circuit furnish no authority for the plaintiffs' argument that the presence of an ATCA claim in a complaint renders the doctrine of *forum non conveniens* entirely inapplicable to the case.").

[3801] *See* K.L. BOYD, "The Inconvenience of Victims: Abolishing *Forum non Conveniens* in U.S. Human Rights Litigation", 39 *Va. J. Int'l L.* 41, 87 (1998). Senator Feinstein's proposal to codify the exhaustion of remedies rule in her bill to amend the ATS (Senate, 109th Congress, 1st Session, S. 1874, October 17, 200) does not bode well for an outright abolition of *forum non conveniens*. In a section titled "Exhaustion of Remedies", which clearly refers to *forum non conveniens* analyses, the bill proposes: "A district court shall abstain from the exercise of jurisdiction over a civil action described in subsection (a) if the claimant has not exhausted adequate and available remedies in the place in which the injury occurred. Adequate and available remedies include those available through local courts, claims tribunals, and similar legal processes." (amended Sec. 1350 (d)).

[3802] *Sarei*, 221 F. Supp. 2d at 1201-04.

[3803] *Iwanowa* v. *Ford Motor Co.*, 67 F. Supp. 424, 489-91 (D.N.J. 1999).

dismissed on the basis of comity, *inter alia* because "the challenged conduct [was] regulated by the Republic of Ecuador and exercise of jurisdiction by this Court would interfere with Ecuador's sovereign right to control its own environment and resources …"[3804] In *Presbyterian Church of Sudan* v. *Talisman Energy, Inc.*, by contrast, the court rejected the defendant's request not to assert jurisdiction on comity grounds, amongst others, because **"**international comity is a fundamentally discretionary act and is not obligatory".[3805]

11.2.3.e. Foreign sovereign immunities

1131. FSIA – As gross human rights violations are often committed by the State or by State actors, the danger looms large that foreign sovereign immunities, either under domestic or international law, may bar suits by victims of such violations. The immunity defence indeed serves as a major check on ATS litigation, especially since U.S. courts have construed the U.S. Foreign Sovereign Immunities Act (FSIA)[3806] as covering immunity of both States and individual State actors. It comes as no surprise that victims of human rights violations committed abroad have increasingly sued non-State actors, such as private corporations, who could not rely on a foreign sovereign immunity defence.[3807]

While the FSIA contains some commercial exceptions to the jurisdictional immunity of States,[3808] it contains none for gross human rights violations. Relying on the plain language of the FSIA, U.S. courts have consistently upheld the immunity of States for such violations. They did not consider the fact that human rights violations could be characterized as violations of customary international law or *jus cogens* to be sufficient to trump jurisdictional immunities.[3809]

[3804] *Sequihua* v. *Texaco, Inc.*, 847 F.Supp. 61, 63 (S.D. Tex. 1994).

[3805] *Presbyterian Church of Sudan* v. *Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 341-42 (S.D.N.Y. 2003).

[3806] 28 U.S.C. § 1602 *et seq.* Foreign sovereign immunities were recognized by U.S. courts as early as 1812. *See The Schooner Exchange* v. *M'Faddon*, 11 U.S. (7 Cranch) 116 (1812). They are "a matter of grace and comity on the part of the United States, and not a restriction imposed by the Constitution." (*Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 486 (1983).

[3807] *See* M. ROSEN, "The Alien Tort Claims Act and the Foreign Sovereign Immunities Act: A Policy Solution", 6 *Cardozo J. Int'l & Comp. L.* 461, 512 (1998).

[3808] 28 U.S.C. § 1605. Also, there is no immunity in cases "in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources … for such an act", provided that "the claimant or victim [is] … a national of the United States … when the act upon which the claim is based occurred," and "the foreign state was … designated as a state sponsor of terrorism". (§ 221(a)(1)(c) of the Antiterrorism and Effective Death Penalty Act of 1996 (P.L. 104-132).

[3809] *Martin* v. *South Africa*, 836 F.2d 91 (1987); *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989) (holding that the FSIA did not provide an exception for foreign governments violating customary international law, and thus dismissing a suit by a Liberan company owning an oil tanker destroyed by the Argentine military against Argentina); *Von Dardel* v. *U.S.S.R.*, 736 F. Supp. 1 (D.D.C. 1990); *Sidermine de Blake* v. *Republic of Argentina*, 965 F.2d 699, 718-19 (9th Cir. 1992) ("[T]he FSIA does not specifically provide for an exception to sovereign immunity based on jus cogens … [T]he Amerada Hess Court … was so emphatic in its pronouncement "that immunity is granted in those cases involving alleged violations of international law that do not come within one of the FSIA's exceptions," and specific in its formulation and method of approach, … that we conclude that if violations of jus cogens committed outside the United States are to be exceptions to immunity, Congress must make them so."); *Denegri* v. *Republic of Chile*, 1992 WL 91914, at *3-4 (D.D.C. Apr. 6, 1992) (holding that "Congress did not intend violations of jus cogens to come within the waiver exception of the FSIA"); *Saudi Arabia* v. *Nelson*, 507 U.S. 349, 351 (1993); *Princz* v. *Fed. Republic of*

1132. INDIVIDUAL IMMUNITIES – In spite of the plain text of the FSIA, which only grants State immunity to a foreign State and any "political subdivision of a foreign State or an angency or instrumentality of a foreign State"[3810] and thus on its face seems to exclude individual State actors, federal courts have upheld State immunity over such actors.[3811] In ATS cases however, immunity for individual foreign State actors has not been much of an issue.[3812] In the seminal ATS *Filartiga* case for instance, the defendant, a Paraguayan police officer, a defence based on foreign sovereign immunity was not addressed.[3813]

If individual immunities were to exist for human rights suits under U.S. law, they could be lifted if such is supported, or at least not opposed, by the U.S. executive branch and the foreign government of which the protected person is a national. In the case against former Philippine president Ferdinand Marcos, Marcos's foreign sovereign immunity defense was dismissed based on a letter from a Philippine minister, which stated that "Marcos may be held liable for acts done as President, during his incumbency, when such acts, like torture, inhuman treatment of detainees, etc. are clearly in violation of existing law … the government or its officials may notvalidly claim state immunity for acts committed against a private party in violation of existing law."[3814] In the same case, it was held that foreign sovereign immunities do not come into play in human rights suits because the alleged human rights violations could impossibly be attributed to the State, an argument which echoes the arguments advanced in the *Pinochet* litigation in the United Kingdom.[3815]

The view that certain human rights violations could not be attributed to the State for purposes of foreign sovereign immunities (which need not imply that they could not

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Germany, 26 F.3d 1166, 1173-74 (D.C. Cir. 1994); *Smith* v. *Socialist People's Libyan Arab Jamahiriya*, 101 F.3d 239, 242-44 (2nd Cir. 1996); *Sampson* v. *Fed. Republic of Germany*, 250, 250 F.3d 1145, 1150-51 (7th Cir. 2001); *Hwang Geum Joo* v. *Japan*, 332 F.3d 679 (D.C. Cir. 2003); *Plaintiffs A, B, C, D, E, F* v. *Jiang Zemin*, 282 F.Supp. 2d 875, 883 (N.D. Ill. 2003).

[3810] 28 U.S.C. § 1603.

[3811] *Chuidian* v. *Philippine Nat'l Bank*, 912 F.2d 1095, 1101 (9th Cir. 1990) (holding that "[w]hile section 1603(b) may not explicitly include individuals within its definition of foreign instrumentalities, neither does it expressly exclude them."). *See also* cases cited in M. ROSEN, "The Alien Tort Claims Act and the Foreign Sovereign Immunities Act: A Policy Solution", 6 *Cardozo J. Int'l & Comp. L.* 461, 500 n 267 (1998) (regretting individual immunity under the FSIA). *Contra Republic of Philippines* v. *Marcos*, 665 F. Supp. 793, 797 (N.D. Cal. 1987) (holding that the FSIA "is not intended to apply to natural persons, except perhaps to the extent that they may personify a sovereign. Even then, it appears that the FSIA was not intended to apply to individual sovereigns, but rather that they would be covered by separate head-of-state doctrine.").

[3812] Whatever the availability of individual immunities, there is however little doubt that functional immunities of State actors (immunity of heads of State and Ministers of Foreign Affairs) will be duly upheld by U.S. courts.

[3813] *Filartiga* v. *Pena-Irala*, 630 F.2d 876, 889 (2nd Cir. 1980) (noting "in passing, however, that we doubt whether action by a state official in violation of the Constitution and laws of the Republic of Paraguay, and whoilly ungratified by that nation's government, could properly be characterized as an act of state," and thus hinting at the unavailability of a foreign sovereign immunity defense for private acts).

[3814] *In re Estate of Marcos, Human Rights Litig.*, 25 F.3d 1467, 1472 (9th Cir. 1994).

[3815] *Trajano v. Marcos (In re Estate of Marcos Human Rights Litig.)*, 978 F.2d 493, 502 (9th Cir. 1992) ("Although Marcos-Manotoc's default concedes that she controlled the military intelligence personnel who tortured and murdered Trajano, and in turn that she was acting under color of the martial law declared by then-President Marcos, we have concluded that her actions were not those of the Republic of the Philippines for purposes of sovereign immunity under Chuidian.").

be attributed to the State for purposes of State responsibility)[3816] has informed the lifting of these immunities if suit is brought against a foreign official for torture or extrajudicial killing. Under the Torture Victim Protection Act (TVPA, 1991), individual immunities will not be granted where a foreign official has acted under "actual or apparent authority, or color of law" of a foreign national.[3817] It has been argued that the TVPA's approach to immunities could be extrapolated to ATS suits,[3818] yet there is no case-law on the issue. At any rate, the fact that the immunity defense may no longer be available in human rights suits, which has been characterized by Lord Hoffmann as "contrary to customary international law and the [2004 UN] Immunity Convention",[3819] may not make a great difference. If a court's denial of a motion to dismiss based on sovereign immunity were to harm U.S. foreign relations, the political question doctrine will readily be invoked. This doctrine has the same underpinnings as the foreign sovereign immunities defense: ensuring that the courts do not usurp on the executive's prerogative on the conduct of foreign relations; U.S. courts have looked to the executive branch for guidance on both immunity and the application of the political question doctrine.[3820]

11.2.4. Reasonable ATS jurisdiction

1133. In this section 11.2, it has been shown that U.S. federal courts' exercise of universal tort jurisdiction over violations of the law of nations has so far survived major political challenges because of the restraining doctrines the courts use when establishing their jurisdiction. In almost every ATS case, defendants move to dismiss on the basis of the political question, act of State, *forum non conveniens*, comity, and foreign sovereign immunity doctrines. Moreover, personal jurisdiction could only be established in case there are at least minimal contacts with the United States. Accordingly, unlike in European criminal cases, the U.S. exercise of universal jurisdiction *in absentia* is not possible (although it may be noted that the threshold for a finding of personal jurisdiction is rather low).[3821] U.S. courts examine the merits of every jurisdictional objection in detail. They will establish their jurisdiction only if hearing the case is reasonable. Reasonableness requires that hearing the case not interfere in the executive branch's conduct of foreign relations, that an adequate forum abroad be unavailable, that foreign sovereign interests not be trampled upon, and that the defendant be entitled to sovereign immunity as a foreign State (actor). Accordingly, the bar for a finding of jurisdiction in ATS cases is high, and U.S. federal courts could thus hardly be considered as the world's civil human rights courts. Clearly, European States may draw lessons from this practice of jurisdictional

[3816] *See* Article 7 of the Draft Articles on State Responsibility, adopted by the International Law Commission (2001), available at http://www.un.org/law/ilc/reports/2001/2001report.htm ("The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions."). *See also Jones* v. *Saudi Arabia* [2006] UKHL 26, § 78 (Lord Hoffmann).
[3817] 28 U.S.C. § 1350(2)(a).
[3818] *See* K.L. BOYD, "Universal Jurisdiction and Structural Reasonableness", 40 *Tex. Int'l L.J.* 1, 30 (2004).
[3819] *Jones* v. *Saudi Arabia* [2006] UKHL 26, § 99 (Lord Hoffmann).
[3820] *United States* v. *Noriega*, 117 F.3d 1206, 1212 (11th Cir. 1997); *Leutwyler* v. *Office of Her Majesty Queen Rania Al-Abdullah*, 184 F. Supp. 2d 277, 280, 286 (S.D.N.Y. 2001); *Plaintiffs A, B, C, D, E, F* v. *Jiang Zemin*, 282 F.Supp. 2d 875, 883 (N.D. Ill. 2003).
[3821] *See* B. VAN SCHAACK, "Justice Without Borders – Universal Civil Jurisdiction", *ASIL Proc.* 120, 121 (2005).

restraint – which nevertheless allows legitimate cases to move forward – in criminal cases.[3822] In the next chapter 11.3, it will be examined whether there are possibilities under European law to exercise universal jurisdiction in civil cases. In chapter 10, European practice in the field of universal criminal jurisdiction has already been discussed extensively.

11.3. Universal tort jurisdiction in Europe

1134. In Europe, universal tort jurisdiction is absent from the legal landscape. Europeans seem to rely solely on universal criminal jurisdiction (and international criminal tribunals) as a means of bringing perpetrators of human rights violation to account. From a technical perspective, possibilities for the exercise of universal tort jurisdiction are extremely narrow, given the importance of the *locus delicti* rule in tort matters. In the absence of an ATS-like statutory instrument supplanting this rule, pursuant to which the place where the harmful event occurred determines both jurisdiction and applicable law, only human rights violations committed in Europe could give rise to tort liability in European courts (subsection 11.3.1). This conceptual hurdle has greatly restrained European State practice in the field of universal tort jurisdiction (subsection 11.3.2). In the United Kingdom, British plaintiffs have recently attempted to convince the courts of the necessity of establishing tort jurisdiction over acts of torture committed in the Middle East, yet the courts succeeded in sidestepping the jurisdictional issue by invoking foreign sovereign immunity. Chances of having universal tort jurisdiction established in Europe are slim, given the dismissive view of such jurisdiction taken by European governments in their *amicus curiae* briefs in *Sosa* v. *Alvarez-Machain* (2004), a case under the U.S. Alien Tort Statute. It may even be doubted whether the introduction of universal tort jurisdiction in Europe is actually desirable, given the radical overhaul of the European procedural system with which such introduction may need to be accompanied.

11.3.1. Possibilities of exercising universal tort jurisdiction under European law

1135. *LOCUS DELICTI* RULE – Under Article 5.2 of the EC Council Regulation on Jurisdiction in Civil and Commercial Matters (EEX-Regulation 2001),[3823] "the place where the harmful event occurred or may occur" determines the jurisdiction of the courts in tort matters in the European Community. Unlike U.S. law, European law does not recognize tag or transient jurisdiction, *i.e.*, jurisdiction premised on the temporary presence of the defendant in the territory of the forum State.[3824] Human rights tort claims typically involve defendants who are not domiciled in the forum State and did not commit their tortious act in the forum State, but may temporarily be present in the forum State. Whereas U.S. courts may exercise personal jurisdiction

[3822] *Id.*, at 121 (arguing that the U.S. doctrines "create a reasonableness test for extraterritorial exercises of jurisdiction and protect against the sort of overreaching most criticized in criminal context").
[3823] Council Regulation 44/2001, 22 December 2000, *O.J.* 2001, 16 January 2001, L 12/1.
[3824] *See* B. STEPHENS, "Expanding Remedies for Human Rights Abuses: Civil Litigation in Domestic Courts", 40 *German Yearbook of International Law* 1997, 117, 133; B. STEPHENS, "Translating Filartiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations", 27 *Yale J. Int'l L.* 1, 22-23 (2002)

over these defendants,[3825] European courts will demur, if at least they stick conservatively to the *locus delicti* rule.[3826]

1136. CRIMINAL COURTS EXERCISING UNIVERSAL TORT JURISDICTION – Both the *locus delicti* rule as the European legal climate seem to be anathema to hearing tort claims for human rights violations under the universality principle. However, Europeans courts might hear such claims when they address the criminal aspect of a human rights violation under the universality principle. Indeed, a number of European States allow victims to join their action for damages to the criminal (public) action.[3827] This has obvious advantages for the victims in terms of evidence-taking – they can benefit from the prosecutor's or investigating magistrate's investigations – and may offset the inconveniences stemming from the inadequacy of the European civil procedure law of evidence-taking, which lacks the discovery powers granted by U.S. law to the parties.

In terms of jurisdiction, the possibility of filing a civil action as an adjunct to a criminal action has been seized as supporting the assumption that the rules of criminal jurisdiction apply for both the civil and the criminal action, even if under the competency rules of civil jurisdiction, the court would not have competence.[3828] Justice BREYER for instance, in his concurring opinion in the *Sosa* decision of the U.S. Supreme Court in 2004, predicated the legality of universal tort jurisdiction on the observation that "criminal courts of many nations combine civil and criminal proceedings", and that thus, if criminal courts could exercise universal jurisdiction over the criminal aspects of the case, they could also do so over the civil aspects.[3829]

Article 18 (3) of the Hague Draft Convention on Jurisdiction in Civil and Commercial Matters supports the assumption, albeit limited to criminal jurisdiction derived from an international *treaty* (as arguably opposed to customary international law), where it states that universal civil jurisdiction may obtain over "a serious crime under international law, provided that this State has established its criminal jurisdiction over that crime in accordance with an international treaty to which it is a party and that the claim is for civil compensatory damages for death or serious bodily injury arising from that crime."[3830]

[3825] *See, e.g.*, *Burnham* v. *Superior Court of California*, 495 U.S. 604 (1990); *Kadic* v. *Karadzic*, 70 F.3d 232, at 247 (2nd Cir. 1995).

[3826] *See* however Article 1 of the Belgian Code of Private International Law (2004), which seems to leave the door open for universal tort jurisdiction if no other forum is available to hear the complaint: "Irrespective of the other provisions of the present Code, Belgian judges have jurisdiction when the case has narrow links with Belgium and when proceedings abroad seem to be impossible or when it would be unreasonable to request that the proceedings are intiated abroad " The requirement of "narrow links with Belgium" may however render the exercise of genuine universal jurisdiction in Belgium elusive.

[3827] The infamous Belgian Genocide Act for instance, which was adopted as a special *criminal* law, did not exclude the possibility of a civil party joining the criminal action. Belgium, France

[3828] *See* C. KESSEDJIAN, "Les actions civiles pour violation des droits de l'homme – Aspects du droit international privé", November 2003, *offprint*, at 12.

[3829] *Sosa* v. *Alvarez-Machain*, 124 S.Ct. 2739, 2783 (2004) (BREYER, J., concurring).

[3830] HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, October 30, 1999, Preliminary Document No. 11 (August 2000), available at www.hcch.net/upload/wop/jdgmpd11.pdf.

1137. ARTICLE 5.4 EEX-REGULATION – The Member States of the EU did not need to await the harmonization of the rules of judicial jurisdiction in civil and commercial matters, as such had already happened in large measure with the adoption of the Brussels Convention, which gave way to the EEX-Regulation.[3831] Article 5.4 of the Regulation may strengthen the argument that the competency rules for torts follow these for criminal offences, as this provision authorizes plaintiffs to sue a person domiciled in a Member State to be sued in another Member State "as regards a civil claim for damages or restitution which is based on an act giving rise to criminal proceedings, in the court seized of those proceedings, to the extent that that court has jurisdiction under its own law to entertain civil proceedings".

Problems as to the application of Article 5.4 of the EEX-Regulation for our purposes may however arise. For one thing, a criminal court may lack jurisdiction to entertain civil proceedings. For another, the defendant (the perpetrator of the human rights violation) will usually not be domiciled in an EU Member State, as human rights violations are mostly committed in developing countries by residents of these countries.[3832] Article 5.4 of Regulation 44/2001 may only have practical value for the initiation of proceedings against corporate defendants incorporated in an EU Member State.

1138. CIVIL COURTS EXERCISING UNIVERSAL TORT JURISDICTION – European civil courts, hearing tort claims on an autonomous basis, may not be able to fully rely on the favourable rules of international criminal jurisdiction. They may be hard-pressed to disregard the classical *locus delicti* rule of jurisdiction in civil cases, irrespective of the fact that a criminal court has previously addressed the criminal aspects of the case or not.[3833] Nonetheless, although civil courts are obliged to adjudicate the civil action on the basis of the rules of private law, including the rules of private international law, the prohibition of gross violations of international humanitarian law and human rights law as a *jus cogens* norm may serve to supplant the classical private international law rule that tort claims are only actionable in the place where the tort has been committed.[3834]

In EC law, there is probably only one, and admittedly rather limited, legal basis for the initiation of independent civil proceedings based on the universality principle, not

[3831] Council Regulation 44/2001, 22 December 2000, *O.J.* 2001, 16 January 2001, L 12/1.

[3832] It has therefore been proposed to allow the *victim* to initiate proceedings if she is domiciled in an EU Member State at the time of the initiation of the proceedings. *See* C. KESSEDJIAN, "Les actions civiles pour violation des droits de l'homme – Aspects du droit international privé", November 2003, *offprint*, at 16.

[3833] It may be noted that the situation of a civil court hearing a tort claim relating to an underlying criminal offence will, unlike in the United States, not arise when the defendant has previously been acquitted by a criminal court, since the civil court is required to abide by the outcome of the criminal proceedings (when the criminal proceedings are underway, the civil proceedings are generally stayed pending the decision in the criminal case).

[3834] *See* J. TERRY, "Taking *Filàrtiga* on the Road: Why Courts Outside the United States Should Accept Jurisdiction Over Actions Involving Torture Committed Abroad", in C. SCOTT (ed.), *Torture as Tort*, Oxford, Portland, Oregon, Hart, 2001, 119-20 (submitting that the prohibition against torture as a *jus cogens* norm "help[s] solidify the basis upon which a foreign court can take jurisdiction over torture committed abroad," even in the absence of domestic legislation. Article 7(1) of the Belgian Genocide Act for instance, which read that "[t]he Belgian [criminal] courts have jurisdiction to take cognizance of the offences listed in this law, regardless of the place where they have been committed", may arguably also have provided the legal basis for civil jurisdiction by the criminal courts.

surprisingly an application of the theory of piercing the corporate veil. By virtue of Article 5.5 of the EEX-Regulation, such proceedings could be initiated against an EC parent company "as regards a dispute arising out of the operations of a branch, agency or other establishment, in the courts for the place in which the branch, agency or other establishment is situated." On that basis, for instance, the French parent of a Belgian subsidiary could be sued in Belgium as regards a dispute arising out of the operations of the latter. KESSEDJIAN has pointed out, relying on a 1995 ECJ judgment, that the dispute need not arise out of the operations of the subsidiary conducted within the EC.[3835] The French parent of a Belgian subsidiary that has allegedly committed human rights violations in say, Indonesia, could thus be hauled before Belgian courts under EC Regulation 44/2001, which is directly applicable in EU Member States.

1139. LACK OF STATUTORY AUTHORIZATION AS A DISINCENTIVE TO EXERCISE JURISDICTION – The lack of explicit statutory authorization to exercise tort jurisdiction over human rights torts obviously serves as a major disincentive for European courts to hear such torts.[3836] *Supra*, it has been argued that the case for universal tort jurisdiction may be supported by the *jus cogens* prohibition of the actionable norms under the universality principle. Basing jurisdiction directly on international law instead of on domestic law may however create legitimacy problems.[3837] It may be doubted whether unelected judges could arrogate powers of law-creation that in a representative democracy ought to belong to the legislature (even if such law-creation draws on existing rules 'created' by the international community, which are perceived as valid norms of permissive jurisdiction under customary international law).

1140. APPLICABLE LAW – Assuming that European courts could establish universal jurisdiction over tort claims, another question to be solved relates to the applicable law. Under traditional conflict-of-law rules, the applicable law in tort cases is the law of the place where the harmful event occurred (*lex loci delicti*). This implies that the forum is barred from applying its own law, which might put the plaintiff at a disadvantage since the law of the place where the tort took place may well not recognize the facts as a tort, or otherwise impose restrictive conditions on the granting of damages – although courts may possibly apply *ordre public* exceptions.[3838] In ATS cases, problems as to the applicable law do ordinarily not arise, with U.S. courts often applying U.S. law or international law to the case.

11.3.2. European State practice

[3835] *See* C. KESSEDJIAN, "Les actions civiles pour violation des droits de l'homme – Aspects du droit international privé", November 2003, *offprint*, at 16, relying on *Lloyd's* v. *Campenon Bernard*, C439/93, 6 April 1995, *Rec.* I-961. Reproduced in C. KESSEDJIAN, "Les actions civiles pour violation des droits de l'homme, aspects de droit international privé », in *Travaux du comité français de droit international privé*, années 2002-2003, 2003-2004, p. 151 *et seq.* (2005)

[3836] *See* B. STEPHENS, "Translating *Filàrtiga*: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations", 27 *Yale J. Int'l L.* 1, 33 (2002) (submitting that "in the absence of a domestic statute authorizing [human rights tort] claims, some domestic systems would be reluctant to find a cause of action based upon international norms").

[3837] *See, e.g.*, C. SCOTT, "Translating Torture into Transnational Tort: Conceptual Divides in the Debate on Corporate Accountability for Human Rights Harms", in C. SCOTT (ed.), *Torture as Tort*, Oxford, Portland, Oregon, Hart, 2001, 57.

[3838] *See* B. STEPHENS, "Translating *Filartiga*: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations", 27 *Yale J. Int'l L.* 1, 32 (2002).

1141. ABSENCE OF STATE PRACTICE – It comes as no surprise that, in the absence of a favourable jurisdictional framework, European States have not exercised universal tort jurisdiction. If State practice is lacking, it is difficult to argue that there is a norm of universal tort jurisdiction under European customary international law. What is more, there is State practice in the form of statements of European governments and the European Commission that casts doubt on the existence of any such norm. In this part, the botched attempts by plaintiffs of human rights violations commited abroad to have tort jurisdiction over such violations recognized by English courts will be discussed. An analysis of the *amicus curiae* briefs of European Governments and the European Commission filed with the U.S. Supreme Court in the *Sosa* v. *Alvarez-Machain* case, a universal tort jurisdiction case, will follow.

In the 1990s, plaintiffs discovered English courts as attractive fora for hearing tort claims alleging torture committed abroad. They however failed in their attempts to have the courts rule in their favour. The cases do not so much revolve around the issue of jurisdiction, but around the even more preliminary issue of foreign sovereign immunity. They are nevertheless worth discussing here, because they reveal on openness, albeit a very limited one, to universal tort jurisdiction. .

11.3.2.a. England

1142. *AL-ADSANI* – In *Al-Adsani* v. *Government of Kuwait and Others* (1995), the plaintiff claimed damages before the English High Court, alleging that he was detained and tortured by officials of the Government of Kuwait at the instigation of a member of the royal family of Kuwait.[3839] The High Court gave leave to serve the proceedings upon three individual Kuwaiti defendants in the case outside England. The proceedings against the Government of Kuwait were eventually dismissed on the ground of State immunity,[3840] a dismissal which was later upheld by the European Court of Human Rights[3841].

[3839] High Court, Queen's Bench Division, *Al-Adsani* v. *Government of Kuwait and Others*, 15 March 1995 (Mantell, J.), 103 *ILR* 420; Court of Appeal, 12 March 1996, 107 *ILR* 536.

[3840] Court of Appeal, England, *Al-Adsani* v. *Government of Kuwait and Others*, 12 March 1996, 107 *ILR* 536.

[3841] *Al-Adsani* v. *United Kingdom* [2001] ECHR 761, para. 61 (21 November 2001) ("While the Court accepts … that the prohibition of torture has achieved the status of a peremptory norm in international law, it observes that the present case concerns not, as in *Furundzija* and *Pinochet*, the criminal liability of an individual for alleged acts of torture, but the immunity of a State in a civil suit for damages in respect of acts of torture within the territory of that State. Notwithstanding the special character of the prohibition of torture in international law, the Court is unable to discern in the international instruments, judicial authorities or other materials before it any firm basis for concluding that, as a matter of international law, a State no longer enjoys immunity from civil suit in the courts of another State where acts of torture are alleged. In particular, the Court observes that none of the primary international instruments referred to (Article 5 of the Universal Declaration of Human Rights, Article 7 of the International Covenant on Civil and Political Rights and Articles 2 and 4 of the UN Convention) relates to civil proceedings or to State immunity."). *Contra* joint dissenting opinion of Judges Rozakis and Caflisch, paras. 2-4 ("The Court's majority do not seem on the other hand to deny that the rules on State immunity, customary or conventional, do not belong to the category of *jus cogens* … The acceptance therefore of the *jus cogens* nature of the prohibition of torture entails that a State allegedly violating it cannot invoke hierarchically lower rules (in this case, those on State immunity) to avoid the consequences of the illegality of its actions … "[T]he distinction made by the majority between civil and criminal proceedings, concerning the effect of the rule of the prohibition of torture, is not consonant with the very essence of the operation of the *jus cogens* rules."); dissenting opinion Judge Ferrari Bravo; dissenting opinion Judge Loucaides. The Court did not address the legality of universal

One might infer that, by giving leave to serve the proceedings upon the foreign defendants, the High Court was exercising universal tort jurisdiction. At closer look, one has to admit that this was not the case however. For one thing, Al-Adsani had dual British-Kuwaiti citizenship, so that, borrowing from criminal jurisdiction terminology, jurisdiction could be justified under the passive personality principle (although this international law principle is not relied upon in English criminal law). For another, and more importantly, Al-Adsani supported his claim by arguing that the psychological injuries he had suffered as a result of the ill-treatment by government agents in Kuwait, were exacerbated by the threats which he had received *once in England*. The Court only accepted that the injuries resulting from threats *in England* could give rise to English jurisdiction, as could be inferred from its statement that "this relatively minor head of claim may have been introduced simply to overcome problems of service and jurisdiction."[3842] As jurisdiction was arguably premised on the *locus delicti* rule of judicial jurisdiction,[3843] which confers jurisdiction on the courts were the tort was committed, *in casu* England, the foreign torture claim was only *indirectly* actionable in English courts on the basis of injuries suffered abroad being exacerbated by acts done in England. *Al-Adsani* is therefore based on the territoriality principle, and not on the universality principle. The United Kingdom could thus oppose (broad) assertions of U.S. universal tort jurisdiction in its *amicus curiae* brief in *Sosa*, discussed in subsection 10.3.2.b, without the risk of being accused of hypocrisy.

1143. JONES – After *Al-Adsani*, it was only a matter of time before plaintiffs filed a tort suit for human rights violations committed entirely abroad. In *Jones v. Saudi Arabia*, British victims of torture committed by Saudi Arabian officials filed suit in the United Kingdom against Saudi Arabia and its officials deemed responsible for the acts of torture. Again however, the issue of jurisdiction was eclipsed by the issue of foreign sovereign immunity. On June 14, 2006, the House of Lords ruled that both Saudi Arabia and its officials acting in their official capacity were immune from suit in the United Kingdom.[3844] In so doing, it foreclosed the possibilities of universal

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tort jurisdiction. The concurring opinion of Judge Pellonpää however betrays a certain hostility toward universal tort jurisdiction on grounds of refugee policy, where it is stated that "had the minority's view prevailed [the view that immunity does not serve as a bar to tort jurisdiction over torture offences] … precisely those States which so far have been most liberal in accepting refugees and asylum-seekers, would have had imposed upon them the additional burden of guaranteeing access to a court for the determination of perhaps hundreds of refugees' civil claims for compensation for alleged torture", which might have "a "chilling effect" on the readiness of the Contracting States to accept refugees – a consequence which I would not totally exclude …").

[3842] 103 *ILR* 432. *See also* 107 *ILR* 544 ("Turning to the acts committed in England, the Judge said that he was satisfied that threats had been made, that they occurred within the United Kingdom and that personal injury had resulted from them."). 107 *ILR* 550 (Ward, J.) ("I would … accept for this purpose that if threats were uttered they caused some further injury.").

[3843] *See* for the current (European law) regime of jurisdiction over tort claims: Article 5 (3) of the EEX-Regulation.

[3844] *Jones* v. *Saudi Arabia*, [2006] UKHL 26. While after *Al-Adsani*, it was clear that foreign States were immune from suit for torture, it was unclear whether foreign State officials would also be entitled to state immunity. Like the FSIA, the 1978 State Immunity Act on its face only addressed States and their organs, not individuals (*see* Article 14(1) of the State Immunity Act). Lord Bingham of Cornhill held that "[t]here is, however, a wealth of authority to show that in such case the foreign state is entitled to claim immunity for its servants as it could if sued itself. The foreign state's right to immunity cannot be circumvented by suing its servants or agents." ([2006] UKHL 26, § 10, pointing in particular to Article 2(1)(b)(iv) of the UN Convention on Jurisdictional Immunities of States and Their

tort jurisdiction over torture offences in English courts, as torture *stricto sensu* could only be committed by State actors, who would at the same time be entitled to State immunity. Indeed, taking issue with the Court of Appeals in *Jones* – which held that only the State, but not individual State actors were entitled to immunity, since torture could not constitute an official act – the House of Lords held: "The court asserted what was in effect a universal tort jurisdiction in cases of official torture for which there was no adequate foundation in any international convention, state practice or scholarly consensus, and apparently by reference to a consideration (the absence of a remedy in the foreign State [[2004] EWCA Civil 1394, § 97 (Mance, LJ)]) which is, I think, novel. Despite the sympathy that one must of course feel for the claimants if their complaints are true, international law, representing the law binding on other nations and not just our own, cannot be established in this way."[3845]

1144. After *Jones*, it remains unclear whether English courts could exercise universal tort jurisdiction over other offences by persons who do not enjoy foreign sovereign immunity. If the opinion of Lord Justice Mance of the Court of Appeal (Civil Division) in *Jones* (2004) is anything to go by, there is no reason for optimism. Mance did not believe that, in spite of his rejection of the defence of State immunity, as a result of his judgment, "England will become a forum of choice for the bringing of claims for torture committed throughout the world."[3846] Mance listed four reasons, which are well worth reprinting here as they point to English scepticism toward the assumption of universal jurisdiction, even among the more progressive members of the judiciary:

> "First, it is always necessary in any English suit to establish some basis within ordinary domestic rules upon which it is technically possible for the English courts to exercise jurisdiction.
> Second, where such a basis exists, the appropriateness and proportionality of exercising such jurisdiction can arise as a matter of discretion. I have in this judgment mentioned certain factors that could be relevant. They include considering whether there is a more suitable alternative forum as well as the general undesirability of adjudicating upon issues in this country, in circumstances under which a defendant is unlikely to appear here and in which any civil judgment is unlikely to be enforceable but which would involve sensitive investigation of activities of officials alleged to have taken place within a foreign state (…).
> Third, even where proceedings can be served here without obtaining leave to serve out of the jurisdiction, that will usually mean the defendant is here. If the defendant is only served while here transiently, then … the courts would need to consider competing considerations and possibly competing principles.

Property, adopted on 16 December 2004, which states that "State" also means "representatives of the State acting in that capacity"). Lord Bingham admitted that in *Pinochet*, immunity was not upheld, but distinguished that case from *Jones* "since it concerned criminal proceedings falling squarely within the universal criminal jurisdiction mandated by the Torture Convention …" ([2006] UKHL 26, § 19). He went on to say that upholding immunity for State servants and agents "is not shown to disproportionate as inconsistent with a peremptory norm of international law" (*Id.*, § 28), and that "a civil action against individual torturers based on acts of official torture does indirectly implead th e state since their acts are attributable to it" (*Id.*, § 31).

[3845] *Jones* v. *Saudi Arabia*, [2006] UKHL 26, § 34 (citation omitted).

[3846] [2004] EWCA Civil 1394, § 97 (Mance, LJ).

> Fourth, however powerful the desire to establish the fact of alleged torture, there are likely in practice to be limits to the extent to which claims for torture are brought in jurisdictions which have no connection with the alleged torture or the alleged individual torturer where no practical recourse is likely to follow."[3847]

Clearly, Mance's first caveat relates to the *locus delicti* rule, which is also in England a basic role of jurisdiction in tort matters, in the absence of an ATS-like statute which unambiguously confers jurisdiction over gross human rights violations on the courts. The second caveat mirrors the U.S. doctrines of jurisdictional restraint in ATS litigation, hinting at the *forum non conveniens* doctrine when referring to a "more suitable alternative forum", and to the U.S. comity, act of State, and political question doctrines when warning of the "sensitive investigation of activities of officials alleged to have taken place within a foreign state". The third argument questions the appropriateness of transient or tag jurisdiction, which is an important procedural characteristic of ATS litigation, where it has precisely seen a renaissance.[3848] The fourth caveat, finally, betrays a deep-rooted suspicision of assuming jurisdiction over human rights claims "brought in jurisdictions which have no connection with the alleged torture or the alleged individual torturer", *i.e.*, universal jurisdiction. In light of these caveat, it may be assumed that, even if the hurdle of foreign sovereign immunity were overcome, plaintiffs will face an uphill struggle to convince English courts of the appropriateness and legality of exercising universal tort jurisdiction.

11.3.2.b. European amicus curiae briefs in Sosa v. Alvarez-Machain (U.S. Supreme Court)

1145. In the case of *Sosa* v. *Alvarez-Machain*, a case on the reach of the Alien Tort Statute decided by the U.S. Supreme Court in 2004, discussed in chapter 11.2.2, a number of European countries and the European Commission filed *amicus curiae* briefs urging the Supreme Court to exercise restraint. These briefs betray skepticism to universal tort jurisdiction. While they may not serve the international law case for universal tort jurisdiction, European objections should not be overstated: the *amicus curiae* briefs should be viewed as calls for a *reasonable* exercise of universal tort jurisdiction, rather than as calls for repealing such jurisdiction.

1146. UNITED KINGDOM AND SWITZERLAND – In their joint brief, the United Kingdom and Switzerland seemed to cast doubt on the international legality of the principle of universal tort jurisdiction. They considered it "inconsistent with international law and the practice of other nations", pointing out that "[i]nternational law does not […] recognize universal civil jurisdiction for any category of cases at all, unless the relevant states have consented to it in a treaty or it has been accepted in customary international law."[3849] Sticking to the *locus delicti* rule of judicial

[3847] *Id.*

[3848] *See* P.R. DUBINSKY, "Human Rights Law Meets Private Law Harmonization: The Coming Conflict", 30 *Yale J. Int'l L.* 211, 264-65 (2005).

[3849] Id., at p. 6. The United Kingdom and Switzerland could not discern relevant treaty or customary international law governing the matter, except perhaps in piracy cases. *Id.*, at p. 6, note 7. Piracy cases are special cases, in that piracy is typically a crime committed by private persons and not by State agents. The lack of State involvement in the crimes lowers the threshold for universal (tort) jurisdiction.

jurisdiction, they argued that "tort rules and allowable recoveries are important legislative and judicial decisions that each sovereign should be allowed to make for its nationals and others within its jurisdiction."[3850]

1147. Elsewhere in their brief however, they seemed rather to take issue with a *broad assertion* of universal tort jurisdiction over human rights violations:

> "While the Governments recognize that those who commit human rights violations should be held accountable, they believe that *any broad assertion of jurisdiction* to provide civil remedies in national courts for such violations perpetrated against aliens in foreign places is inconsistent with international law and the practice of other nations and may indeed undermine efforts to promote such rights and their protection […] The Governments are concerned that *an expansive reading of jurisdiction* by one country will undermine the policy choices made by other sovereign nations with regard to a proper vindication of rights and redress of wrongs."[3851]

Arguably, the United Kingdom and Switzerland may not oppose universal tort jurisdiction *as such*, but only universal tort jurisdiction that is exercised *unreasonably*. In the brief, it becomes soon clear *what* the United Kingdom and Switzerland consider to be an unreasonable exercise of jurisdiction. On p. 14, they voice their concerns over the exercise of jurisdiction over (their) corporations, which could be sued in the United States for their assistance and support for human rights violations committed by States (who cannot be sued abroad for reasons of sovereign immunity). The brief therefore appears not as an indictment of the principle universal tort jurisdiction, but as an indictment of the substantive standards of corporate liability used by U.S. courts under the ATS, standards pursuant to which corporations may incur liability for violations in which they allegedly connived but which they did not directly commit.[3852]

1148. EUROPEAN COMMISSION – The European Commission was in its *amicus curiae* brief[3853] less harsh for universal tort jurisdiction. It did not cast doubt on the international legality of the principle,[3854] but mainly requested the Supreme Court to pay heed to the local remedies rule and the complementary nature of universal jurisdiction.[3855] In the Commission's view, States should primarily exercise jurisdiction pursuant to the traditional bases of jurisdiction, along the lines of the complementarity principle as enshrined in the Statute for the International Criminal Court. Only when these States are unwilling or unable to provide effective remedies

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[3850] *Id.*, p. 23.
[3851] Brief of the Governments of the Commonwealth of Australia, the Swiss Confederation and the United Kingdom of Great Britain and Northern Ireland as *amici curiae* in support of the petitioner, U.S. Supreme Court, *Sosa v. Alvarez-Machain*, 23 January 2004, at p. 2, available at http://www.nosafehaven.org/_legal/atca_con_AUSsupportingSosa.pdf (emphasis added).
[3852] *See* n 3649.
[3853] Brief of *amicus curiae* of the European Commission in *Sosa* v. *Alvarez-Machain* in support of neither party, available at http://www.nosafehaven.org/_legal/atca_oth_EurComSupportingSosa.pdf. Tthe constitutionality under European law of this brief may be open to doubt. *See* C. RYNGAERT, "The European Commission's Amicus Curiae Brief in the Alvarez-Machain Case", *International Law Forum* 2004, nr. 6, 55-60.
[3854] *See also* L. REYDAMS, "Universal Jurisdiction in Context", *ASIL Proc.* 118 (2005).
[3855] EC *amicus curiae* brief, at pp. 24-26.

would U.S. courts be entitled to establish jurisdiction. This is exactly the position that this study has defended in the chapter on universal criminal jurisdiction (subsection 10.11.3). It surely makes sense to apply the same standard of reasonableness in civil suits for gross human rights violations as in criminal suits.

As noted in subsection 11.2.4, U.S. federal courts hearing ATS claims already apply a stringent reasonableness analysis, including application of the prudential doctrines of *forum non conveniens* and comity, which factor in the complementarity analysis that the Commission advocates. There is no evidence that U.S. courts have not deferred to the territorial or personal State that was able and willing to hear the tort claim. Quite likely, the Commission only called upon U.S. courts not to abandon their cautious approach to finding jurisdiction under the ATS,[3856] without advocating a new jurisdictional formula.

11.4. Concluding remarks

1149. Having clarified U.S. federal courts' experience with the Alien Tort Statute and European States' reluctance to exercise universal tort jurisdiction, it may now be appropriate to formulate some concluding remarks. If anything, the apparent transatlantic divide over universal tort jurisdiction begs for further rationalization (subsection 11.4.1). It will be shown that U.S. civil courts are more attractive for foreign plaintiffs than European civil courts. Nuance is apt, however: U.S. courts have exercised far-reaching restraint in ATS cases, although this has not noticeably dented their attractiveness. European States could surely draw lessons from U.S. practice (subsection 11.4.2). Jurisdictional restraint has, not surprisingly, resulted in few judgments on the merits. Nonetheless, it may be argued that a judgment on the merits, and, thus, a finding that the defendant was indeed liable for a human rights violation committed abroad, is not the primary objective of plaintiffs in civil suits under the universality principle. They may rather consider the mere filing of a suit for foreign human rights injuries as a useful vehicle for raising public *awareness* of their plight (subsection 11.4.3). Finally, the prospects for the establishment of an Internatonal Civil Court will be assessed (subsection 11.4.4).

11.4.1. A transatlantic divide over universal tort jurisdiction

1150. Observing different attitudes toward the exercise of universal tort jurisdiction in the U.S. and Europe does not require deep digging. It may however be useful to recapitulate how this apparent divide came about. As already hinted at in subsection 11.2.1, the U.S. legal system boasts a number of procedural and systemic niceties that make it the beloved forum for foreign plaintiffs alleging human rights torts, such as the wide-ranging discovery (evidence-taking) powers that the parties enjoy, the admissibility of tag jurisdiction, the U.S. tradition of pro bono tort litigation, and statutory language supplanting the prohibitive *locus delicti* rule of tort jurisdiction. A legal system lacking such facilitating characteristics, such as the European legal system, is not an attractive system for victims of human rights

[3856] The absence of direct criticism of ATS litigation could also be gleaned from the Commission's discussion of the substantive law standards used by U.S. courts, where the Commission limits itself to re-affirming the evolution that the international law basis of the U.S. standards has undergone. *Id.*, at 5-11.

violations intent on obtaining damages.[3857] Not surprisingly, these victims have shunned European courts and flocked to U.S. federal courts. Conversely, as the European criminal system provides for universal jurisdiction over violations of human rights law and international humanitarian law to an extent unknown in the United States, victims have spared themselves the effort of persuading the U.S. Attorneys (public prosecutors) to initiate criminal proceedings, and have instead placed their trust, as simple complainants or as recognized "civil parties", in European prosecutors, investigating magistrates, and courts.

It seems that human rights litigation adapts to the features of a particular legal environment, or put differently, norms of international human rights and humanitarian law "are implemented in the legal "language" appropriate to national systems"[3858]. In this context, STEPHENS has submitted that the "varied domestic procedures all implement the common mandate to hold accountable those who violate internationally protected human rights and thus fall within the reach of universal jurisdiction."[3859] Universal criminal jurisdiction is therefore not superior to universal tort litigation. The curious species of universal jurisdiction merely adjusts, chameleon-like, to the environment in which it is found. It could thrive in the U.S. and the European legal system alike, since both of them boast a mild legal climate conducive to its growth.

1151. In light of the foregoing, an expansion of the availability of universal tort jurisdiction to Europe, which seems warranted in light of certain advantages of civil over criminal human rights litigation, should not be contemplated without transposing the facilitating features of U.S. litigation as well, if universal tort jurisdiction is not to be a still-born child. This transposition, which requires an overhaul of the European legal system and tradition which is not limited to universal tort jurisdiction, may possibly constitute too high a hurdle to be taken.[3860]

11.4.2. Drawing lessons from jurisdictional restraint in ATS litigation

1152. In the more than 25 years that have passed since the seminal *Filartiga* ATS case, U.S. courts hearing ATS claims have developed a number of doctrines of jurisdictional restraint that have succeeding in charting the ATS through troubled waters. The existing doctrines have almost invariably produced an outcome that was satisfactory in terms of international relations and foreign policy. There is no solid evidence that ATS suits have been met with meaningful criticism from abroad or anyhow hampered U.S. diplomatic efforts.[3861] On the contrary, it has been argued that

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[3857] *See* B. STEPHENS, "Translating *Filartiga*: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations", 27 *Yale J. Int'l L.* 1, 26 (2002) (arguing, *inter alia*, that "[t]he absence of punitive damage awards [in continental Europe] accounts in part for the discomfort expressed by human rights advocates in other countries who see a civil damage award as an inadequate response to morally repugnant human rights abuses").

[3858] *Id.*, at 34.

[3859] *Id.*, at 35.

[3860] *See also* M.T. KAMMINGA, "Universal Civil Jurisdiction: Is It Legal? Is It Desirable?", *ASIL Proc.* 123, 125 (2005).

[3861] *See* L.J. DHOOGE, "The Alien Tort Claims Act and the Modern Transnational Enterprise: Deconstructing the Mythology of Judicial Activism", 35 *Geo. J. Int'l L.* 3, 80 (2003) ("ATCA critics have not identified a single foreign policy crisis directly attributable to such litigation. Critics are also unable to identify a single instance of foreign retaliation …").

ATS opinions are usually consistent with the State Department's assessment of the human rights situation in the country concerned.[3862]

1153. If U.S. restraining doctrines ("structural checks") could adequately weed out cases motivated by politics, it might be submitted that European States, which have been grappling with the desired reach of their universal jurisdiction laws, might be well-advised to take a closer look at ATS litigation – something which has hitherto barely happened.[3863] Conversely, U.S. courts could draw lessons from European States' espousal of principles limiting the exercise of jurisdiction, such as the rules adopted by Belgium in the face of foreign protests (which led Belgium to repeal its initially overbroad act concerning violations of international humanitarian law) – although given the historical hostility of U.S. courts toward taking into account the practices of foreign courts for purposes of U.S. adjudication, such may remain wishful thinking. The doctrines of jurisdictional restraint used in European criminal jurisdiction and U.S. tort litigation seem to converge of late, informed as they are by the basic principle of subsidiarity or complementarity, pursuant to which European and U.S. courts only step in when a State with a stronger nexus with the case fails to adequately exercise its jurisdiction.

1154. It may be be noted here that the use of restraining doctrines is often targeted by human rights advocates, because these doctrines might deprive victims of human rights violations of their day in court. Restraining doctrines could, however, actually further long-term compliance with international human rights, in that they shift the responsibility of prosecution, investigation and adjudication to the territorial State. Only if the territorial State is allowed and encouraged to mete out justice itself, will it put in place an appropriate judicial framework to deal with human rights violations committed on its soil. The development of a territorial rule of law will in turn contribute to the progressive development of the international law of human rights, and prevent abuses from again taking place.[3864] Obviously, in an imperfect world, in which not all States are able and willing to hear complaints regarding human rights abuses committed in their territory, the progressive development of international human rights law will be a joint effort of all national courts, even if these courts are the courts of mere bystander States, such as U.S. federal courts applying the ATS.

[3862] *Id.*, at 81 (citing Wiwa, 226 F.3d at 92 (Nigeria), Rodriquez, 256 F. Supp. 2d at 1262-64 (Colombia), Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289, 296 and 343 (S.D.N.Y. 2003) (Sudan), and Eastman Kodak Co. v. Kavlin, 978 F. Supp. 1078, 1090-92 (S.D. Fla. 1997) (Bolivia); Doe v. Unocal Corp., 963 F. Supp. 880, 893 (C.D. Cal. 1997) (Burma). It has even been submitted that U.S. diplomacy would be hampered if the political branches were to thwart ATS suits on political and non-principled grounds. *See* V.A. PAPPALARDO, "Isolationism or Deference? The Alien Tort Claims Act and the Separation of Powers", 10 *Mich. J. Int'l L.* 886, 905-906 (1989) (noting that "the executive's "embarrassment" would actually increase if it were forced to take affirmative action every time a universally accepted norm of customary international law was presented in a federal court.").

[3863] *See* B. STEPHENS, "Translating Filartiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations", 27 *Yale J. Int'l L.* 1, 3 (2002) (noting that *Filartiga*, the seminal ATS case, "has been cited in only a handful of foreign judicial opinions, none of which actually applied the doctrine").

[3864] *See* A.K. SHORT, "Is the Alien Tort Statute Sacrosanct? Retaining Forum Non Conveniens in Human Rights Litigation", 33 *N.Y.U. J. Int'l L. & Pol.* 1001, 1072-77 (2001).

11.4.3. Raising awareness: the main objective of civil suits

1155. Both in Europe and the United States, full-fledged trials resulting in an actual conviction or acquittal, or a duty to pay damages, are scarce. This enforcement gap has been invoked by critics as a reason to do away with the possibility of initiating human rights suits, in particular because these suits are often only political and public relations statements.[3865] Taking the example of an ATS suit, the mere filing of a suit, even if such does not result in a judgment, may satisfy the plaintiffs, because it raises awareness of particular human rights issues with public opinion and the government. The fact that a judge throws out a case then is sometimes a minor inconvenience for the plaintiffs. What really matters for them is that the alleged human rights violations have made national and international headlines, and that the victims can tell their own story.[3866] While the same may hold true for complainants in European criminal proceedings arising under the universality principle,[3867] it takes on a particular significance in the United States, where ATS suits piggyback on the American tradition of using tort litigation as a means of furthering the public interest, with the actual monetary success of the litigation being only a secondary concern.[3868]

1156. There is no reason to do away with privately initiated human rights litigation because private suits would only amount to PR stunts. Victims could certainly have a legitimate interest in obtaining a mere liability judgment without actual enforcement. In both domestic and transnational cases, civil as well as criminal,

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[3865] *See, e.g.*, P.-Y. HSU, "Should Congress Repeal the Alien Tort Claims Act?", 28 *S. Ill. U. L.J.* 579, 592-93 (2004) (noting that money judgments only "serve as a constraint on [human rights violators'] freedom to enter the United States for fear that the U.S. courts would attach their assets", and do not have any deterrent effect on future human rights violations."); *Id.*, at 594 ("[I]f [capturing public attention] is the only positive result under the ATCA claims at this is all plaintiffs want, it may not be worth it for the U.S. courts to adjudicate such claims."). *Compare* J.F. MURPHY, "Civil Liability for the Commission of International Crimes as an Alternative to Criminal Prosecution", 12 *Harvard Hum. Rts. J.* 1, 31 (1999) (labeling ATS judgments "pyrrhic victories"). ATS judgments have not been enforced abroad (*Id.*, at 32), although in principle they could be. *See also* S.R. RATNER & J.S. ABRAMS, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy*, Oxford, Clarendon Press, 1997, at 211 ("[O]btaining a judgment against the defendant affords the plaintiff an opportunity to pursue any of the defendant's assets uncovered in jurisdictions willing to enforce the judgment.").

[3866] *See also* L. MCGREGOR, "The Need to Resolve the Paradoxes of the Civil Dimension of Universal Jurisdiction" *ASIL Proc.* 125, 126 (2005). In common law countries, where victims do not enjoy extensive rights in criminal proceeding, the possibility for victims to tell their own story in the course of a *civil* proceeding may be seen as a boon. *Compare* J. TERRY, "Taking *Filàrtiga* on the Road: Why Courts Outside the United States Should Accept Jurisdiction Over Actions Involving Torture Committed Abroad", in C. SCOTT (ed.), *Torture as Tort*, Oxford, Portland, Oregon, Hart, 2001, at 113.

[3867] When the Spanish National Court decided in January 2006 to investigate whether Chinese officials had indeed committed genocide in Tibet, it was widely believed that the likelihood that the Chinese would ever appear before a Spanish court was very small. This did not seem to bother one of the Tibetan complainants though: "Just the fact that the National Court has agreed to take the case is a great success … Spain may not have sufficient power to force China to justice, but at least the Spanish people will know what Tibetans are suffering." *See* L. ABEND & G. PINGREE, "Spanish Court Looks at Tibetan Genocide Claims", *Christian Science Monitor*, March 2, 2006.

[3868] *Compare* B. STEPHENS, "Translating *Filartiga*: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations", 27 *Yale J. Int'l L.* 1, 14 (2002) (arguing that the "trend of public interest litigation predisposes the U.S. public, judiciary, and legal advocates to view civil litigation as a potential means to realize large-scale policy goals and hold accountable perpetrators of egregious abuses, *whether or not such litigation results in an enforceable judgment*") (emphasis added).

having been heard and even vindicated by judicial authorities is often more than victims could have ever dreamed of, and may amount to a form of relief in itself.[3869]

1157. There is nonetheless a danger inherent in the PR character of private human rights litigation. Victims ordinarily need pressure groups in the forum State to provide financial and legal support for their suits. These groups often have their own agenda. For political, religious or emotional reasons, they may prefer to support victims of certain conflicts over victims of other conflicts. Victims of 'forgotten conflicts', however legitimate their case is, may be neglected altogether. It may however seriously be doubted whether public human rights litigation could fill this gap, since a successful prosecution often depends on support from the very NGOs that neglect certain victims. Moreover, in States where the executive branch maintains a firm grip on State prosecutors, prosecutorial priority may be a function of the lobbying power of particular victim groups.

11.4.4. Towards an International Civil Court?

1158. In the field of criminal law, the International Criminal Court may in due course obviate the need for high-profile national prosecutions under the universality principle. The International Criminal Court has also the power to grant compensation to victims.[3870] No court or commission, however, has the authority to grant compensation to victims of gross human rights violations, possibly because States might view international civil remedies – contrary to what this study has argued in chapter 11.1 – as more intrusive than international criminal remedies.[3871] It has been argued that, now, the time is a ripe for an International Civil Court, alongside the International Criminal Court. Such a court would have jurisdiction to adjudicate tort claims for gross human rights violations, similar to the sort of claims arising under the ATS.[3872] Under one proposal, the International Civil Court would also have jurisdiction over States.[3873] Against that court's alleged lack of teeth, it has been argued that States generally comply with the rulings of the European Court of Human Rights.[3874] Under another, more modest proposal, the United States ought to draft a convention that would require State Parties to adopt national legislation that would

[3869] *See* S.R. RATNER & J.S. ABRAMS, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy*, Oxford, Clarendon Press, 1997, 211 (1997) ("While civil suits do not lead to the same degree of accountability as a criminal process, they do offer a way of seeking justice and represent one form of authoritative adjudication of legal issues relating to human rights violations. Even if defendants flee the jurisdiction, such suits still bring attention to past atrocities, provide victims with a forum to present their claims, and deprive the defendants of foreign refuge in the countries where the cases are brought.").

[3870] Article 75.1 of the Statute of the International Criminal Court ("The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.").

[3871] *See* M.T. KAMMINGA, "Universal Civil Jurisdiction: Is It Legal? Is It Desirable?", *ASIL Proc.* 123, 124 (2005).

[3872] *See* M.P. GIBNEY, "On the Need for an International Civil Court", 26-FALL *Fletcher F. World Aff.* 47 (2002).

[3873] *Id.*, at 55.

[3874] *Id.*

permit civil human rights suits.[3875] This convention could also facilitate the enforcement in one State of money judgments rendered by the courts of another State[3876] and permit reference to an international tribunal of disputes over the interpretation and application of the convention.[3877] Clearly, the latter proposal stands more chance of success, although the failed negotiations over a Hague Convention on Jurisdiction have proved otherwise. For the time being, it appears that victims of human rights violations will have to count on national civil and criminal courts, on non-judicial national compensation mechanisms, and on the International Criminal Court's Victims Trust Fund, so as to obtain reparation.

PART III: A NEW PERSPECTIVE ON THE INTERNATIONAL LAW OF JURISDICTION

1159. An in-depth study of the law of jurisdiction in different fields of the law has been given in this dissertation. It would be hardly surprising if the reader is somewhat confused at this point. She may surely be forgiven for entertaining only a superficial interest, if any, in the law applicable to cross-border takeovers,[3878] the interplay between domestic criminal law and the UN Torture Convention in France,[3879] or concerns over U.S. discovery of materials for use in a foreign proceeding.[3880] The specialized (criminal, antitrust, financial, procedural …) lawyer will, it is hoped, be able to draw on this study to clarify problems that she encounters in her daily practice or research. The international lawyer, or more broadly anyone interested in international affairs, will mainly be interested in what causes States to unilaterally exercise jurisdiction, and whether there is a general theory of jurisdiction (or jurisdictional restraint) under international law that could be used in an indefinite number of future cases where issues of jurisdiction arise, irrespective of the particular field of the law. For her, this final part will be most useful.

1160. In this part, the basic problem posed by the unilateral exercise of jurisdiction will be restated. It will be shown how in an era of economic and value globalization, the exercise of unilateral jurisdiction by single States has become nearly inevitable (part III.1). Unilateral jurisdiction has its obvious discontents, in terms of foreign sovereignty being encroached upon, and the democratic choices of foreign citizens being sidelined (part III.2). It may be expected that States would spontaneously scale down their jurisdictional assertions because not doing so might encourage other States to exercise jurisdiction in a manner detrimental to the formers' interests. In practice, however, this reciprocity maxim does not serve as a built-in mechanism of restraint, because of discrepancies in power and the level of regulation

[3875] J.F. MURPHY, "Civil Liability for the Commission of International Crimes as an Alternative to Criminal Prosecution", 12 *Harvard Hum. Rts. J.* 1, 53-55 (1999).
[3876] *Id.*, at 54 (arguing however that this requirement may "be subject to certain exceptions in the event of judgments rendered under circumstances that offended fundamental international norms of due process and fairness or other strong public policy of the state requested to locate assets and enforce the judgment.").
[3877] *Id.*
[3878] Chapter 7.4.
[3879] Chapter 10.5.
[3880] Chapter 9.7.

(part III.3). In light of the discontents of the unilateral exercise of jurisdiction and the difficulties of circumscribing it, it could be submitted that a multilaterally agreed upon substantive solution may be more appropriate. In part III.4, the tenets of substantivism will be set out. It will be argued that internationally harmonized laws are, in terms of fairness, not necessarily preferable over the unilateral exercise of jurisdiction.

1161. In parts III.5 and III.6, this study's preferred approach to solving jurisdictional questions will be proposed. This approach is two-pronged. For one, States should not rashly exercise their jurisdiction, but rather consult with relevant actors – both State and private actors – and take their concerns into account before doing so. For another, when exercising jurisdiction, States should act in accordance with the subsidiarity principle. In the interests of the international community, they should only apply their laws to a foreign situation if another State – with presumably the stronger nexus to that situation – fails to adequately deal with it. Yet this should also imply that a State is *entitled* to exercise jurisdiction if the other State is unable or unwilling to tackle a situation that is, on aggregate, harmful to the regulatory interests of the international community. By putting emphasis on global economic and value interests, this theory of jurisdiction departs from the classical understanding of the law of jurisdiction as a law that protects the interests of sovereign States.

1162. In final part III.7, the threads of jurisdiction will be connected from a transatlantic perspective. This perspective has been a main research focus throughout the study, and therefore deserves a conclusion of its own. In this conclusion, it will be explained, in broad strokes, how the transatlantic gap over jurisdiction, in the field of economic law as well as human rights law, has opened up, and how it gradually diminished. It will be shown how differences in jurisdictional ambit between the United States and Europe are largely attributable to differences in substantive policy. As it exceeds the scope of this study to elaborate on substantive policy differences as to the societal role of antitrust policy, capital markets regulation, wide-ranging evidence-taking powers for private parties, or international criminal justice, no specific recommendations will be issued as to which direction the U.S. or Europe should steer. It will only be stated that if the U.S. or Europe decides to apply its laws to foreign situations (believing such serves its policy interests), it should do so reasonably, and in full respect of the principle of subsidiarity.

III.1. Inevitability

1163. INEVITABILITY – In an era of globalization, the exercise of extraterritorial jurisdiction is often inevitable. The expansion of commercial and financial inter-State links has increased the vulnerability of States to adverse domestic effects of foreign activities. Not infrequently, these activities are condoned or encouraged by the States in which they take place, because they further their interests. This may happen in the field of antitrust law, where States face an incentive not to clamp down on export cartels or on mergers in the export industry. It may also happen in the field of securities law, when States believe that setting low standard may attract certain issuers and investors. Sometimes, the territorial State does not consider a particular activity to be harmful. This could occur in the field of securities law, where, for legitimate economic reasons, some States do for instance not consider insider-trading to be an evil, or do not deem stringent corporate governance regulation to be

necessary to ensure the smooth functioning of capital markets. It could also occur in the field of export controls, where some States, unlike others, fail to see merit in imposing an economic embargo upon a foreign State. In this part, a new method to solve conflicts arising from one State favouring regulation, and another opposing it, will be proposed.

Not only in the economic field has the exercise of unilateral jurisdiction become nearly inevitable. The 20th century has seen the weaving of a web of transnational business links, but also the rise of an international human rights movement. Under pressure of this movement, the world's values have become increasingly globalized. Substantive international norms of human rights and international humanitarian law have been globally adopted. At the same time, the international community has seen to it that the transgression of the most basic of these norms would not go unpunished. It is generally accepted now that violations of *jus cogens* are amenable to universal jurisdiction, *i.e.*, jurisdiction exercised by a State without any nexus to the violation whatsoever. The breakthrough of morality in international law and the international community's desire to bring perpetrators of the gravest crimes to justice have made it almost inevitable that single States shoulder part of the enforcement burden by unilaterally exercising jurisdiction over these crimes.

1164. U.S. V. EUROPE – Typically, the United States finds itself on the side that *wants* stricter regulation, and Europe on the side that *opposes* stricter regulation. This results in the U.S. exercising extraterritorial jurisdiction, or put differently, applying its own strict economic laws extraterritorially more frequently than European countries do. As far as extraterritorial liability for core crimes against international law is concerned however, the situation is different, and *prima facie* confusing. Both the United States and Europe intend to make sure that perpetrators of *jus cogens* violations do not go unpunished, yet the U.S. only provides for tort liability for such violations, and Europe only for criminal liability. In III.7, the transatlantic rift over extraterritorial jurisdiction will further be examined.

III.2. The discontents of extraterritoriality

1165. UNILATERALISM – Extraterritorial jurisdiction is the fruit of a deeply rooted international scepticism. It is based on a conviction that foreign States and international venues are unable to dispense justice in an acceptable manner. Often, extraterritoriality is informed by a vague sense of superiority or exceptionality of domestic law *vis-à-vis* foreign law. Especially in the economic field, States tend to rely on the exercise of extraterritorial jurisdiction because it confers benefits on them which could not be acquired through multilateral negotiations, which inherently compel them to make concessions and accommodate other nations. Because States, when unilaterally exercising jurisdiction, tend to disregard foreign nations' interests, protest by foreign States often ensues. In the worst case scenario, blocking statutes are adopted, economic pressure is brought to bear, and the state of international relations in general deteriorates.

1166. DEMOCRACY – Although the exercise of extraterritorial jurisdiction accords with the realities of economic and value globalization, it may violate some established principles of international law, such as sovereignty, non-intervention, comity, and sovereign equality. Foreign protests based on these principles reflect a

sense of non-representation in how these laws are shaped, or put differently reflect uneasiness about the democratic content of laws that are applied extraterritorially. It is interesting to look at extraterritoriality through the lens of democracy, because democracy is a principle that, unlike the other principles cited, protects the interests of individuals and not just sovereign States.[3881] From the vantage point of democracy, assertions of extraterritorial jurisdiction impose laws on legal subjects who did not participate in the making or changing of these laws.[3882] The makers of extraterritorial laws are thus not accountable to the people that are governed by them.[3883] From the perspective of foreign persons, these laws are mere commands lacking the communicative texture that makes laws legitimate.[3884]

1167. Nuance is however appropriate. For one thing, in the field of universal jurisdiction in particular, many States have consented to the exercise of universal jurisdiction over certain offences, either on a conventional or customary basis.[3885] For another, States that condone or encourage activities on their territory that are harmful to another State's interests, *e.g.*, terrorist activities aimed at the overthrow of a foreign regime, or business-restrictive practices that dislodge the economies of foreign States, could hardly be said to exercise their democratic rights. By failing to prohibit such activities, they in effect supplant a foreign State's own legitimate democratic choices with what they consider to be appropriate for that State.[3886] It is defensible then to

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[3881] *See* on the democratic principle as a nascent principle of international law: J. WOUTERS, B. DE MEESTER & C. RYNGAERT, "Democracy and International Law", *Netherlands Yearbook of International Law* 2004, 137-198.

[3882] *See, e.g.*, G. BYKHOVSKY, "An Argument Against Assertion of Universal Jurisdiction by Individual States", 21 *Wisconsin J. Int'l L.* 161, 184 (2003); S. STEVENS, "The Increased Aggression of the EC Commission in Extraterritorial Enforcement of the Merger Regulation and Its Impact on Transatlantic Cooperation in Antitrust", 29 *Syracuse J. Int'l L. & Com.* 263 (2002) (pointing out that "[t]he particular problem posed by extraterritorial enforcement of merger controls is that the enforcing agency is by definition regulating the conduct of firms that are neither incorporated in nor established on its territory, *and who have significantly less political clout*") (emphasis added).

[3883] *See* M.P. GIBNEY, "The Extraterritorial Application of U.S. Law: The Perversion of Democratic Governance, the Reversal of Institutional Roles, and the Imperative of Establishing Normative Principles", 19 *B.C. Int'l & Comp. L. Rev.* 297, 306 (1996); M.D. VANCEA, "Exporting U.S. Corporate Governance Standards Through the Sarbanes-Oxley Act: Unilateralism or Cooperation?", 53 *Duke L.J.* 833, 834 (2003-2004).

[3884] *See* J. HABERMAS, transl. W. Rehg, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, Cambridge, Polity Press, 1996, xliii + 631 p.

[3885] *See* D.F. ORENTLICHER, "Whose Justice? Reconciling Universal Jurisdiction with Democratic Principles", 92 *Georgetown L. J.* 1057, 1133-34 (2004) (adding that "clearly-framed mandates also empower courts to assert universal jurisdiction in circumstances where its legitimacy should not be doubted."). It may also be pointed out that the exercise of universal jurisdiction by bystander States may encourage the territorial State to come to terms with its past and facilitate a transition to democracy. *See* on the effect of the *Pinochet* proceedings, *inter alia* in Chile itself: N. ROHT-ARRIAZA, The *Pinochet Effect*: *Transnational Justice* in the *Age* of *Human Rights*, Philadelphia, PA, University of Pennsylvania Press, 2005, xiii + 256 p.

[3886] For DODGE, for instance, the argument that asserting extraterritorial jurisdiction is at loggerheads with the principle of democracy – which requires that citizens only be subject to laws enacted by their democratically elected representatives – carries less weight than the argument that States never regulate neutrally and, drawing on the theory of comparative advantages, naturally favor their own net exporters to the detriment of net importers by allowing the former to engage in business restrictive practices. W.S. DODGE, "Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism", 39 Harv. Int'l L.J. 101, 156-57 (1998) (also noting in note 322 that States representing the underregulated net exporters act as extraterritorially as States representing the net importers regulating the practices of the net exporters). From an economic perspective, a self-interested State with the strongest links to a certain activity, such as a merger, may indeed reasonably choose not to

authorize the foreign State to clamp down on foreign harmful activities through the exercise of extraterritorial jurisdiction by default.

1168. Both consent and bad faith undercut the objection that extraterritoriality is at odds with the principles of democracy and representation. Nonetheless, in typical cases of extraterritoriality, the territorial State has a legitimate interest in not prohibiting or investigating certain activities, *e.g.*, it may clear an international merger on grounds of economic efficiency, it may prefer self-regulation by issuers and audit firms over government regulation, or it may grant amnesty to high-ranking alleged perpetrators of crimes against international humanitarian law because it believes that only a pledge of non-prosecution may cause them to lay down arms. Therefore, the democratic deficiencies of extraterritorial jurisdiction should be taken seriously.

1169. OVERCOMING DEMOCRATIC OBJECTIONS – The democratic deficit of extraterritoriality could possibly be overcome when legislatures, courts, and regulators embark on a dialogue with foreign corporations (the subjects of regulation), regulators, and courts, either through institutionalized channels, or through *amicus curiae* briefs or statements of interest, when exercising jurisdiction over foreign situations.[3887] Traditionally, business regulators have day-to-day working contacts with their foreign counterparts, so that a measure of representation of foreign sovereign interests may seep into the formers' decision to give extraterritorial application to domestic laws. Courts by contrast have sometimes displayed fervent judicial activism and failed to heed the democratic interests of foreign States, primarily because they do not have organized contacts with foreign States or their representatives. In part III.5, a system of international jurisdiction will be propounded in which courts develop, through transnational judicial networks, a much more active working relationship with foreign regulators, courts, and private actors. Such a relationship might further reciprocal understanding of each others' concerns and organically restrain jurisdictional assertions.

III.3. The reciprocity maxim and its limits

1170. RECIPROCITY – If States exercise extraterritorial jurisdiction, it seems to be a matter of common sense to state that when so doing, they ought to be guided by the maxim of reciprocity, pursuant to which one only does to another what one tolerates that the other would do to one.[3888] Fear of reciprocity may inform a practice in which States and their organs restrain their jurisdictional assertions. It could be argued then that cooperative mechanisms and networks are superfluous, in that States, acting in their rational self-interest, will take foreign interests duly in account, because the tables might soon be turned and their nationals may find themselves subject to similar jurisdictional assertion by another State.

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regulate that activity because it increases its own national wealth, although it decreases a foreign State's national wealth and possibly overall global wealth. *See also* A.F. LOWENFELD, Book Review of Ebb, International Business, Regulation and Protection, 78 *Harv. L. Rev.* 1699, 1703-04 (1965).

[3887] Historically, legislatures, such as the U.S. Congress, have not been very willing to increase the accountability of their extraterritorial acts, especially in the economic field, because they lack direct contacts with foreign corporations. *See* M.D. VANCEA, "Exporting U.S. Corporate Governance Standards Through the Sarbanes-Oxley Act: Unilateralism or Cooperation?", 53 *Duke L.J.* 833, 834, n. 8 (2003-2004).

[3888] *See* G. SCHUSTER, *Die internationale Anwendung des Börsenrechts*, Berlin, Springer, 1996, 692.

1171. POWER AND OPEN ECONOMIES – In practice, however, reciprocity might not serve as a restraining principle.[3889] Indeed, in spite of the formal equality of States, some States are much more powerful than others in terms of political, economic and military clout. Powerful States may at times face (ineffective) protests by other States if they regulate extraterritorially, but differences in relative power ensure that they will almost never have to face extraterritorial regulation by other, weaker States. Moreover, because prescriptive jurisdiction could only be effective if it is matched with enforcement jurisdiction – which is under the current international law rules only permissible if *territorially* exercised – only States on whose territory considerable foreign assets are located, which could be seized if foreign corporations refuse to pay the compensation or fine imposed by the regulating State, will exercise extraterritorial jurisdiction.[3890] States with considerable foreign assets are ordinarily large States that are open to foreign trade and investment. Accordingly, for powerful States (or groups of States) with a large and open economy, such as the United States and the European Union, the specter of reciprocity does not serve as an incentive for restraining their jurisdictional assertions.[3891]

1172. LEVEL OF REGULATION – Power does however not fully explain why reciprocity does not restrict extraterritorial jurisdiction in the field of economic law. Reciprocity does also not work there because States that regulate extraterritorially typically boast a higher level of regulation on a wide range of issues. It is logically impossible for States regulating extraterritorially to harbour fears for the extraterritorial application of another State's permissive regulatory framework. European issuers may fear the application of strict U.S. disclosure standards in the field of international securities when they list on U.S. stock exchanges. Yet obviously, U.S. issuers are not afraid of relaxed European disclosure standards when they list on European stock exchanges, quite to the contrary. By the same token, Japanese antitrust conspirators fear the long arm of U.S. antitrust laws, but U.S. antitrust conspirators do not fear the application of more relaxed Japanese antitrust laws when they are already subject to stringent U.S. regulation.[3892] Especially when a State's economic regulation in its entirety is stricter than other States' regulation,[3893]

[3889] *See, e.g.*, J.H.J. BOURGEOIS, "EEC Control over International Mergers", 10 *Yb. European Law* 1990, 103, 128 ("[R]estraint on the part of the [European] Community to allow a merger that is in the interest of a trading partner of the Community might not be matched by the same restraint of its main trading partners *vis-à-vis* a merger that is in the interest of the Community.").

[3890] *See* W.S. DODGE, "The Structural Rules of Transnational Law", 97 *Am. Soc'y Int'l L. Proc.* 317, 318 (2003) (pointing out that "[t]his may explain why the United States has historically favoured the extraterritorial application of antitrust law, while other countries have been more resistant."); D. KUKOVEC, "International Antitrust – What Law in Action?", 15 *Ind. Int'l & Comp. L. Rev.* 1, 5 (2004). States could however conclude conventions on enforcing antitrust judgments abroad. *See* W.S. DODGE, "Antitrust and the Draft Hague Judgments", 32 *Law & Pol'y in Int'l Bus.* 363, 387-89 (2001).

[3891] *See* M.P. GIBNEY, "The Extraterritorial Application of U.S. Law: The Perversion of Democratic Governance, the Reversal of Institutional Roles, and the Imperative of Establishing Normative Principles", 19 *B.C. Int'l & Comp. L. Rev.* 297, 306 (1996).

[3892] Unless they are engaged in an export cartel, in which case they may be exempted from U.S. antitrust laws.

[3893] The application of strict rules in one field of the law may not inoculate a State against the reciprocal application of strict rules by a foreign State in another field of the law. The argument of reciprocity may thus carry force only if one does not focus on the content of one particular law, but instead rephrases reciprocity as a maxim pursuant to which a State only asserts its jurisdiction over a subject-matter with a particular impact, if that State accepts the exercise of jurisdiction by another State over the same or *another* subject-matter, but with a similar impact.

reciprocity does not serve as a powerful tool of jurisdictional restraint.[3894] This explains why the U.S. tends to exercise extraterritorial jurisdiction more often than other States. To the workings of U.S. power, another explanation is added: the fact that U.S. economic regulation is stricter than foreign economic regulation. It will not be examined here whether both explanations are somehow interrelated (whether strict economic regulation makes a State powerful, or whether a powerful State tends to set high standards of economic regulation).

1173. LACK OF EXPOSURE – Another explanation of why reciprocity does not work is that it is at times unlikely that the nationals of the State exercising extraterritorial jurisdiction over another State's nationals will ever be subject to the writ of the latter State's laws. This holds in particular true in the field of universal jurisdiction over core crimes. The enthusiasm with which European States have embraced the universality principle to bring perpetrators of core crimes committed in developing countries to account may partly be explained by the unlikelihood of European States' nationals ever being tried by developing nations' courts (because these courts purportedly lack the resources to do so, because European nations do not have that many troops – who typically commit core crimes – deployed overseas, or because it is believed that developing countries will fail to get hold of alleged perpetrators).

1174. ROLE OF RECIPROCITY – Although reciprocity is not as powerful a tool of jurisdictional restraint as an idealist might assume it is, it nonetheless plays a role in international practice. The U.S. Government for instance has been far less gung-ho about universal jurisdiction, including universal tort jurisdiction exercised under the Alien Tort Statute, fearing that it may encourage other countries, developing and European countries alike, to put on trial U.S. service-members.[3895] Moreover, in the field of economic law, powerful States have tended not to criticize other powerful States' jurisdictional assertions on grounds of their incompatibility with the international law of jurisdiction, because such might tie their own hands in the future.[3896] Instead, criticism is typically couched in terms of substantive law requirements not being met, or in terms of economic policy and efficiency goals. An

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[3894] *Compare* G. SCHUSTER, *Die internationale Anwendung des Börsenrechts*, Berlin, Springer, 1996, 692.

[3895] *See* Statement of Interest of the United States, filed in *Doe* v. *Liu Qi* (an ATS case against a Chinese official), No. C 02-0672 CW (EMC) (Sept. 26, 2002), available at http://www.state.gov/documents/organization/57535.pdf ("We ask the Court in particular to take into account the potential for reciprocal treatment of United States officials by foreign courts in efforts to challenge U.S. government policy. In addressing these cases, the Court should bear in mind a potential future suit by individuals (including foreign nationals) in a foreign court against U.S. officials for alleged violations of customary international law in carrying out their official functions under the Constitution, laws and programs of the United States (e.g., with respect to capital punishment, or for complicity in human rights abuses by conducting foreign relations with foreign regimes accused of those abuses). The Court should bear in mind the potential that the United States Government will intervene on behalf of its interests in such cases.").

[3896] *Compare* F.A. MANN, "The Doctrine of Jurisdiction in International Law", 111 *R.C.A.D.I.* 1, 48 (1964-I) (noting "the universality or mutuality of the character of jurisdiction", and pointing out that "any contact believed to warrant application of a State's law to a foreign transaction will be an equally strong warrant for another State to apply its law to a transaction in the legislating State"); G. SCHUSTER, *Die internationale Anwendung des Börsenrechts*, Berlin, Springer, 1996, 73 (noting that "diejenigen Staaten, die ihr Wirtschaftsrecht auf das Auswirkungsprinzip gestützt, sei es ausdrücklich oder der Sache nach, extraterritorial anwenden, sich gegenüber gleichem Verhalten anderer Staaten nicht auf den Standpunkt stellen können, dies sei völkerrechtswidrig.").

unfortunate consequence of States' reluctance to use international law arguments is obviously that, given the absence of relevant State practice and *opinio juris*, developing a customary international law-based jurisdictional framework is an uphill struggle.[3897] If States do not oppose another State's jurisdictional assertion on public international law grounds, this ineluctably leads to the conclusion that the assertion is legal under international law. Yet it is not because an assertion is legal, that it is also appropriate or in the best interests of the international community. In parts III.5 and III.6, a solution for the problems posed by the apparent international legality of concurrent jurisdiction – several States being allowed under international law to exercise their jurisdiction over one and the same legal situation on the same or different jurisdictional grounds – will be proposed. In the next part III.4, it will be examined whether a substantive (multilateral, cooperative, harmonization-oriented …) solution to transnational regulatory problems would not be preferable over a system of unilateral jurisdiction, however reasonable this might be.

III.4. Substantivism

1175. DEFENDING NATIONAL INTERESTS – If the reciprocity maxim does not inform jurisdictional restraint, the question arises how States could be impelled to restrict the geographical reach of their laws. For one thing, obviously, the lack of prosecutorial and judicial resources may cause them to do so.[3898] States' patchy record of prosecution of core crimes against international law is surely attributable to insufficient political will to commit adequate resources to the investigation and prosecution of such crimes. While it has been submitted that core crimes violate obligations *erga omnes* which every State has an interest in upholding,[3899] States do in practice not consider it to be a function of the State to ensure that global justice is done. On the other hand, if foreign situations directly affect States' well-being or the well-being of their citizens, they may not feel very much constrained to apply their laws to these situations. This happens for instance if foreign price-fixing conspiracies raise consumer prices within their territory, if foreign securities fraud affects the interests of their investors, if other States do not go along with an economic boycott of a rogue State, if foreign-based materials could be used as evidence in a domestic proceeding, or if a crime has been committed outside its borders by or against one of its nationals. Jurisdictional restraint may only appear feasible if the foreign conduct over which jurisdiction could (or should) be claimed does not directly harm the forum State's interests.[3900] In other situations, the political will to apply national laws extraterritorially, informed by nationalist feelings, will often be mustered, even

[3897] *See* K.M. MEESSEN, "Schadensersatz bei weltweiten Kartellen: Folgerungen aus dem Endurteil im Empagran-Fall", 55 *WuW* 1115, 1121 (2005), and chapter 6.14.
[3898] *See, e.g.*, S.E. BURNETT, "U.S. Judicial Imperialism Post "Empagran v. F. Hoffmann-Laroche"?: Conflicts of Jurisdiction and International Comity in Extraterritorial Antitrust", 18 *Emory Int'l L. Rev.* 555, 616 (2004) (arguing that too liberally an exercise of antitrust jurisdiction over foreign conspiracies may strain the judicial system of the U.S.).
[3899] *See* chapter 10.1.5.
[3900] The international community's experience with universal jurisdiction has however shown that even when the forum State's interests are not directly harmed, jurisdictional restraint does not occur as a matter of course. This has at times angered foreign nations (*see* the country study conducted in chapter 10).

though, from a global perspective, the exercise of jurisdiction (unlike the exercise of jurisdiction over core crimes against international law) might not be desirable.[3901]

1176. SHIFT TO SUBSTANTIVISM – Because assertions of extraterritorial jurisdiction are usually aimed at promoting national sovereign interests, and restraint is therefore difficult to impose (with the concomitant inconveniences for the international community), regulators and academia have recently shifted the emphasis from the exercise of unilateral jurisdiction to harmonization of economic laws, transnational cooperation in the enforcement of these laws, and even to the establishment of international regulators and institutions (III.4.1 – III.4.2.). It is claimed that this 'shift to substantivism' moves beyond the fruitless debate over sovereignty – a debate in which any State somehow affected by a situation, either positively or negatively, brandishes its own 'sovereignty' to fend off the other's assertions. It is also claimed that, if internationally standardized substantive rules and procedures are increasingly used, normative competency conflicts will soon belong to the past, and legal certainty for private actors will ensue.[3902]

1177. In this subsection, it will be argued that substantivism may fail to deliver all benefits ascribed to it because of the dubious process in which substantive international law may come into being (III.4.3). To put it differently, this subsection traces the *limits* of an approach that intends to supplant *procedural* international law, *i.e.*, a law based on delimiting States' spheres of competence (the law of jurisdiction), with *substantive* international law, *i.e.*, an international *jus commune* of substantive rules and procedures. It will be submitted that the international community, and its weaker members in particular, may, on balance, sometimes be better off with a rule-based framework of international jurisdiction than with common substantive rules and procedures oozing the interests of the powerful. As will be set out in parts III.5 and III.6, this rule-based framework should be guided by the principle of subsidiarity, which ought to be given shape through transnational government and judicial networks.

III.4.1. The substantivist approach

1178. Extraterritorial jurisdiction may not adequately work. Because State actors primarily defend the interests of their State of allegiance, they tend to exercise jurisdiction if such serves their narrowly-defined economic interests, regardless of global harm of the jurisdictional assertion. To justify their jurisdictional assertions, they invoke sovereignty-related links, typically based on territoriality, yet they may fail to take into account *other* nations' sovereignty-related links. They may either believe that public international law does not require them do so, or they may claim that, methodologically, they defer to the State with the stronger links (even if such is not always borne out in practice).

[3901] The exercise of universal jurisdiction over crimes against international humanitarian law may, from a global perspective, however not always be desirable either, because it may discourage the territorial State from putting in place the rule of law, or because it may complicate long-term perspectives for peace and political reconciliation, to which amnesties could, amongst others, contribute. *See* in particular the U.S. objections against international criminal justice (chapter 10.11.2).

[3902] *See, e.g.*, H. KRONKE, "Capital Markets and Conflict of Laws", 286 *R.C.A.D.I.* 245, 380 (2000) ("In order to provide predicable and standard solutions for problems arising on truly transnational capital markets the development of uniform law ("hard" and "soft") solutions will be inevitable.").

1179. Ideally, to a particular transnational situation, the *best law* should be applied, irrespective of whether that situation could be tied, almost mechanically, to a particular sovereign. BUXBAUM has termed the better law approach a 'substantivist approach', because it operates on the basis of "a choice-of-law methodology whose goal is to select the better law in any given case" through an analysis of the substantive content of laws.[3903] Admittedly, in disputes over the reach of a State's laws before national regulators and courts, substantive analysis may play a role, yet it will typically do so within the straitjacket based on sovereignty and territoriality. Under traditional public international law and choice-of-law theory, a situation is indeed tied to a sovereign on the basis of formal, essentially desubstantivized connecting (territorial) factors,[3904] and the law of the sovereign with the strongest nexus will be applied. Substantivism however requires that 'the better law' be applied to a particular situation. The better law is not necessarily the law of the State with arguably the strongest link to the situation. It is not a particularized or *phenomenal* law, but a law which is, from an economic, social, cultural … perspective, the best *noumenal* law to apply. The better law may not to be found in existing legal systems, but is to be developed by concurring rational minds.

1180. The better law approach requires policy choices for which courts are ill-equipped. For constitutional reasons (the separation of powers), they are indeed not allowed to apply what they believe is the best law for a situation. Under rules of private international law, they are only allowed to apply the law of the particular State with which the situation has the strongest, usually territorial, nexus. In regulatory matters of antitrust and securities, the choice-of-law analysis moreover typically only yields the application of forum law, because one State does not apply another State's public laws.[3905] Far from applying the best law, courts will then apply no law at

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[3903] *See* in particular H.L. BUXBAUM, "Conflict of Economic Laws: From Sovereignty to Substance", 42 *Va. J. Int'l L.* 931, 957 (2002).

[3904] *Compare id.*, at 956-57. A unilateral jurisdictional approach would consider the substantive content of potentially applicable law to determine whether the law is applicable (*Id.*). Under this approach, the substantive content of the law is analyzed through the lens of the interest of the sovereign in having the situation regulated by its own law. Either the legal situation implicates important regulatory interests of the sovereign embodied in its own law, and then this law is applied, or the situation does not implicate any such interests, and then the law is not applied, nor is any foreign law.
A multilateral jurisdictional approach weighs the relative interests of each sovereign in regulating the legal situation by, for instance, examining the extent to which another State may have an interest in regulating the activity (Section 403 (g) of the Restatement Third of U.S. Foreign Relations Law) and the likelihood of conflict with regulation by another State (Section 403 (h) of the Restatement). This may require an analysis of the substantive content of the foreign regulation, if any, but such an analysis is not aimed at identifying the best law to govern the situation but only at identifying the best of the available laws of the States concerned by the legal situation, thus at identifying a particular jurisdiction the laws of which are applied to the exclusion of the laws of another jurisdiction.

[3905] *See The Antelope*, 23 U.S. (10 Wheat.) 66, 123 (1825) (Marshall, C.J.), ("The Courts of no country execute the penal laws of another"); *Guiness* v. *Miller*, 291 F.769, 770 (S.D.N.Y. 1923) ("[N]o court can enforce any law but that of its own sovereign."); *United States v. Aluminium Corp. of America*, 148 F.2d 416, 443 (2d Cir. 1945) ("[A]s a court of the United States, we cannot look beyond our own law."). DODGE attributes the unwillingness to apply foreign law not only to the public law taboo, as epitomized by *The Antelope*, but also to the absence of a federal question in case U.S. federal law does not apply – which deprives the federal courts of jurisdiction. W.S. DODGE, "Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism", 39 *Harv. Int'l L.J.* 101, 109, n 40 (1998). *Contra* this received wisdom: A.F. LOWENFELD, "International Litigation and the Quest for Reasonableness", 245 *R.C.A.D.I.* 9, 30 (1994-I). *See* for statutes that nonetheless provide for the

all.[3906] Arguably, adequate solutions to transnational regulatory problems should not be devised by courts, but by the political branches, by national regulatory agencies that have a day-to-day contact with their foreign counterparts, or by international institutions. Agencies may cooperate in the enforcement of their national laws and thus ensure that law is applied in a manner which is both effective and respectful of each involved State's substantive policy choices. In addition, if sufficient international support could be mustered, negotiations on the harmonization of national laws could be started, either on a bilateral basis, or on a multilateral basis, possibly in the framework of an international institution (*e.g.*, OECD, WTO).[3907] In practical terms then, substantivism may be defined as a method of developing and applying the best law through harmonization and cooperation efforts which de-emphasize rules of choice-of-law and jurisdiction informed by territorial linkage.[3908]

III.4.2. Substantivism in practice

1181. A shift from jurisdiction to substantivism is clearly discernible in recent international practice. The doctrine as well has focused more on international economic cooperation than on international economic jurisdiction.[3909] At the outset it should however be noted that a substantivist approach will appeal to national authorities only if it serves their national interests. This explains why harmonization and cooperation have only occurred where harmonized law sufficiently resembles domestic law,[3910] or when the benefits obtained from harmonization and cooperation clearly outweigh the benefits of a traditional jurisdictional approach.[3911]

1182. SECURITIES AND ANTITRUST – Since the early 1980s, securities regulators have embarked upon a course that resolves international regulatory conflicts through cooperation and harmonization.[3912] Antitrust regulators followed

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application of another State's antitrust laws by the forum: Article 137 of the Swiss Private International Law Code; Article 99, § 2, 2° of the Belgian Private International Law Code.

[3906] The court will dismiss the antitrust or securities case if it opines that another State's laws should apply. There is no guarantee that the case will be dealt with by the other State.

[3907] *See, e.g.*, U. DRAETTA, "The International Jurisdiction of the E.U. Commission in the Merger Control Area", *R.D.A.I.* 201, 208 (2000).

[3908] *See* H.L. BUXBAUM, "Conflict of Economic Laws: From Sovereignty to Substance", 42 *Va. J. Int'l L.* 931, 962-66 (2002). *See also* H. KRONKE, "Capital Markets and Conflict of Laws", 286 *R.C.A.D.I.* 245, 377 (2000) ("[C]ommonality in the sense of harmonized substantive law would seem to be the proper choice if application of *one* domestic set of rules by virtue of its determination through conflicts rules over-stretches the conceptual bases of those substantive rules, for example because they are envisaging one physical location.").

[3909] *See* S. WEBER WALLER, "The Twilight of Comity", 38 *Colum. J. Transnat'l L.* 563, 579 (2000).

[3910] *See* H.L. BUXBAUM, "Conflict of Economic Laws: From Sovereignty to Substance", 42 *Va. J. Int'l L.* 931, 957, 964 (2002).

[3911] As a general matter, the United States will enter into international agreements if these agreements sufficiently reflect pre-existing domestic law (*see, e.g.*, in the field of environmental law, N. PURVIS, "Europe and Japan misread Kerry on Kyoto", *International Herald Tribune*, 5 April 5 2004), while European States will support international regimes because they protect them from the unilateralism of stronger States, the United States in particular (*see* R.A. KAGAN, *Of Paradise and Power: America and Europe in the New World Order*, New York, Knopf, 2003, 103 p.).

[3912] *See* for a detailed overview on international cooperation and assistance in the field of securities law: M.D MANN & W.P. BARRY, "Developments in the Internationalization of Securities Enforcement", Practising Law Institute, Corporate Law and Practice Handbook Series, PLI Order Number 3011, May 2004, 355, 365 *et seq.* The U.S. Securities Exchange Commission (SEC) for instance partly relies on harmonized international accounting standards instead of on U.S. standards, giving up the requirement of U.S. GAAP reconciliation.

suit in the 1990s.[3913] Typically, States entered into bilateral memoranda of understanding providing for information-sharing and mutual assistance. While these memoranda still recognize unilateral assertions of jurisdiction by States – as they are precisely aimed at making these assertions more efficient – they are an application of substantivist theory in that the particular law of a sovereign, while still nominally applied, unravels in the face of the reciprocal international enforcement framework set forth in the memoranda.

1183. FAILURE OF SUBSTANTIVISM – Outside the field of antitrust and securities law, the substantivist approach has largely failed so far, because international economic transactions may be "too multifarious to be amenable to a comprehensive scheme of multilateral treaties."[3914] Yet also antitrust and securities substantivism has been limited. In practice, it only governs the relations between industrialized nations, and is mainly limited to information-sharing, positive comity,[3915] and conditional reciprocity.[3916] The outcome of bilateral cooperation between the United States and Europe, which is in the field of international merger review at an all-time high, is not *per se* in the interests of the interests if third countries. One could imagine a situation of U.S. and European regulators clearing a transatlantic merger in the export industry which distorts competitive conditions in developing nations, without the opinion of these nations being heard in the joint review procedure. Substantive bilateral antitrust cooperation may then reduce global

[3913] *See* in particular AGREEMENT REGARDING THE APPLICATION OF COMPETITION LAWS BETWEEN THE GOVERNMENT OF THE UNITED STATES AND THE COMMISSION OF THE EUROPEAN COMMUNITIES, 4 *CMLR* 823 (1991); 30 *ILM* 1487, *O.J.* L 132 (1995); AGREEMENT BETWEEN THE EUROPEAN COMMUNITIES AND THE GOVERNMENT OF THE UNITED STATES OF AMERICA ON THE APPLICATION OF THE POSITIVE COMITY PRINCIPLES IN THE ENFORCEMENT OF THEIR COMPETITION LAWS, *O.J.* L 173/28, 1998; 4 *C.M.L.R.* 502 (1999). *See* for an overview of U.S. cooperative agreements and interagency cooperation: S.E. BURNETT, "U.S. Judicial Imperialism Post "Empagran v. F. Hoffmann-Laroche"?: Conflicts of Jurisdiction and International Comity in Extraterritorial Antitrust", 18 *Emory Int'l L. Rev.* 555, 629-636 (2004) (noting that by entering into formal and informal regimes, the U.S. will bolster the efficiency of its own antitrust regulatory regime).

[3914] X., Note, "Predictability and Comity: Toward Common Principles of Extraterritorial Jurisdiction", 98 *Harv. L. Rev.* 1310, 1322 and 1325-26 (1985). *See also* A.T. GUZMAN, "Choice of Law: New Foundations", 90 *Geo. L.J.* 883, 933 (2002) ("Agreement over substantive areas of law has proven to be extremely difficult to achieve"). *See also* A. BIANCHI, Reply to Professor Maier, in K.M. MEESSEN (ed.), *Extraterritorial Jurisdiction in Theory and Practice*, London/The Hague/Boston, Kluwer, 1996, 74, 81 (holding that conflicts of jurisdiction cannot always be resolved by means of international agreements); A.V. LOWE, "The Problems of Extraterritorial Jurisdiction: Economic Sovereignty and the Search for a Solution", 34 *I.C.L.Q.* 724, 731 (1985) (stating that "[a]s long as there are important national policies which diverge to such an extent that harmonization is not possible, the problem [of extraterritorial jurisdiction] will remain").

[3915] *See* Article III of the 1998 Comity Agreement between the U.S. and the European Union. Whereas negative comity refers to the regulating state refraining from exercising jurisdiction because another State's interests may be more important (*i.e.*, the traditional comity concept of jurisdictional restraint), positive comity refers to the competition authorities of a requesting party "requesting the competition authorities of a requested party to investigate and, if warranted, to remedy anticompetitive activities in accordance with the requested party's competition laws". *See* Article III of the 1998 Comity Agreement between the U.S. and the European Union.

[3916] *See* the exemptions from the Sarbanes-Oxley Act granted by the SEC and the PCAOB, and the exemptions to be granted under the EC Statutory Audit Directive (Subsections 7.6.2.c. and 7.6.3). Commonality (full harmonization) in the field of capital markets law has actually been deemed illusive by one of its main advocates, who instead believed that only reciprocity would be feasible. *See* H. KRONKE, "Capital Markets and Conflict of Laws", 286 *R.C.A.D.I.* 245, 378 (2000).

welfare.[3917] A global antitrust regime has been advocated,[3918] but has so far proved elusive because a negotiated solution will possibly only be achievable with transfer payments. The interests of developing and developed countries are indeed diametrically opposed, with developing countries having an interest in stringent antitrust regulation (having a lot of consumers, but few producers), and developed countries having no such interest (having a lot of producers, but relatively few producers).[3919]

1184. INTERNATIONAL HUMANITARIAN LAW – International humanitarian law is probably the only branch of the law examined in this study where substantivism seems to have largely succeeded. National humanitarian laws hardly differ from each other, as humanitarian law is, and has been, at least since the late 19th century, *international* humanitarian law.[3920] Codified humanitarian law was thus since its very inception *substantive* international law. A next substantivist step was undertaken when, toward the end of the 20th century, *international* repressive mechanisms, applying the same substantive international law, were set up. The establishment of the permanent International Criminal Court (ICC) in particular constitutes a major breakthrough in the international enforcement of international humanitarian law. In the wake of the adoption of the Statute of the ICC, substantivism has been taken another step further, when States overhauled their national laws concerning humanitarian law, and inserted the bulk of the Statute's criminalizations into their domestic law.[3921] This process has however not eased international tension regarding

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[3917] *See* R.E. FALVEY & P.J. LLOYD, "An Economic Analysis of Extraterritoriality", Centre for Research on Globalisation and Labour Markets, School of Economics, University of Nottingham (UK), Research Paper 99/3, p. 15, available at www.nottingham.ac.uk/economics/leverhulme/reserach_paper/99_3.pdf; A.T. GUZMAN, "The Case for International Antitrust", 22 *Berkeley J. Int'l L.* 355, 362 (2004) (noting that "a decision on whether to bring a case in the United States or the EU may be quite different from what is in the interests of a developing country").

[3918] *See for example* P. TORREMANS, "Extraterritorial Application of E.C. and U.S. Competition Law", 21 *E. L. Rev.* 280, 292 (1996); M. MATSUSHITA, "International Cooperation in the Enforcement of Competition Policy", 1 *Washington University Global Studies Law Review* 463 (2002); K. VON FINCKENSTEIN, "International Antitrust Policy and the International Competition Network", in B. HAWK (ed.), *International Antitrust Law & Policy*, Annual Proceedings of the Fordham Corporate Law Institute, 2002, Chapter 3; M.E. JANOW, "Observations on Two Multilateral Venues: The International Competition Network (ICN) and the WTO", in B. HAWK (ed.), *id.*, 2002, Chapter 4; D. VOILLEMOT & A. THILLIER, "WTO and Competition Rules", in B. HAWK (ed.), *id.*, 1999, Chapter 4.

[3919] *See* A.T. GUZMAN, "Choice of Law: New Foundations", 90 *Geo. L.J.* 883, 936 (2002).

[3920] The United States was the first State to codify the laws of war in the Lieber Code (1863), reprinted in D. SCHINDLER & J. TOMAN, *The Laws of Armed Conflicts*, The Hague, Martinus Nijhoff, 1988, pp.3-23. International codification ensued in 1899, 1907, 1949 and 1977, when respectively the Hague and Geneva Conventions (including Additional Protocols) with respect to the laws of war were adopted. In 1948, a Genocide Convention was adopted. *See* for a chronological overview of efforts at codification of international humanitarian law: http://www.icrc.org/ihl.nsf/INTRO?OpenView

[3921] *See* notably German Code of Crimes against International Law, *Völkerstrafgesetzbuch*, 2002 *Bundesgesetzblatt* (BGBl.) Teil 1, at 2254; English translation available at http://www.iuscrim.mpg.de/forsch/legaltext/vstgbleng.pdf; Dutch Act of 19 June 2003 containing rules concerning serious violations of international humanitarian law (*Wet Internationale Misdrijven*); English translation available at http://www.minbuza.nl/default.asp?CMS_ITEM=48969E53AB41497BB614E6E9EAABF9E0X3X35905X73; Belgian Act of 5 August 2003 concerning grave violations of international humanitarian law, *Moniteur belge* 7 August 2003; English International Criminal Court Act 2001, full text available at http://www.hmso.gov.uk/acts/acts2001/20010017.htm. *See* for a discussion of the Belgian criminalizations in light of the ICC criminalizations: J. WOUTERS & C. RYNGAERT, "De strafbaarstelling van misdaden tegen het internationaal humanitair recht in het Belgisch materieel

the extraterritorial or international application of international humanitarian law, primarily because some concepts of the law of war, such as necessity and proportionality, are open to (possibly abusive) interpretation. The emphasis is mainly put on *economic* law here, because substantive harmonization and coordination has not yet been fully achieved in that field of the law (because the substantive content of this law, unlike humanitarian law, differs widely among States in the first place), and as will be argued in the next subsection, not necessarily regrettably so.

III.4.3. The limits of substantivism

1185. If substantivism could not be achieved, only (extraterritorial) jurisdiction will ensure that a State's interests are sufficiently accounted for. The question arises however whether even if substantivism *could* be achieved, it should be preferred over the unilateral exercise of jurisdiction. International cooperation may seem desirable because it allows all States concerned to have their voice heard. Yet in practice, the glorification of the benefits of substantivism has obscured the reality that international consultations, or the emphasis put on it, may at times produce outcomes that hardly serve the interests of justice and equity. It may be wondered aloud whether, under some circumstances, the (reasonable) exercise of (extraterritorial) jurisdiction should not be maintained.

1186. ECONOMIC ANALYSIS – From an economic perspective, substantive solutions have the drawback that they are expensive. The transaction costs of the unilateral exercise of jurisdiction may be lower than these of multilateral solutions, because the exercise of jurisdiction does not require cumbersome inter-State negotiations.[3922] In the long run, the economic benefits of an encompassing substantive regime may possibly outweigh its initial inconveniences.[3923] Yet if a particular regulatory controversy is insulated, *e.g.*, a controversy over how the international community should respond to a global price-fixing conspiracy producing worldwide effects, enforcement costs could be considerably cut if one State is willing to shoulder the burden by establishing its jurisdiction over the conspiracy. If States were to gather around the negotiating table in search of a solution which is acceptable to all States concerned and which requires implementation and enforcement, costs will tend to soar.[3924] The cost factor 'time' should not be overlooked either, not only from an economic viewpoint but also from the perspective of justice. In case of private enforcement of antitrust law for instance, asking the plaintiff to wait, possibly *ad calendas graecas*, until a multilateral solution has been worked out between the various States whose interests are affected, appears unjust, since this may violate the plaintiff's right to a hearing in a reasonable time, and amount to a denial of justice if a solution ultimately proves elusive. It is in this context that Professor MEESSEN has argued that, if negotiations fail, the courts should be able to exercise their

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strafrecht in het licht van het Statuut van het Internationaal Strafgerechtshof" in X., *België en het Internationaal Strafgerechtshof: Complementariteit en Samenwerking*, Brussel, Bruylant, 2005, 37-74.

[3922] *See* G. SCHUSTER, *Die internationale Anwendung des Börsenrechts*, Berlin, Springer, 1996, 683.

[3923] *See* H. KRONKE, "Capital Markets and Conflict of Laws", 286 *R.C.A.D.I.* 245, 377 (2000) (supporting substantivism on the ground that "the absence of predictability because of lacking (harmonized or uniform) substantive rules tends to increase transaction costs").

[3924] By the same token, it may appear efficient to allow *one State* instead of a variety of States to exercise jurisdiction over a transnational situation. *See* H.L. BUXBAUM, "Transnational Regulatory Litigation", 46 *Va. J. Int'l L.* 251, 272 (2006).

jurisdiction.[3925] It may even be submitted that, if an acceptable negotiated solution could from the outset not reasonably be expected, the courts should not stay their proceedings, but dispense justice as swiftly as possible, with due respect for foreign interests under the jurisdictional rule of reason.

1187. FAIRNESS ANALYSIS – Substantive solutions may also undercut justice at another level: at the level of fairness between States.[3926] It has been argued that the exercise of extraterritorial jurisdiction may be an instrument of the powerful, because only powerful States do not have to brace themselves for retaliatory action by a foreign State upon asserting jurisdiction in a manner detrimental to that State. Powerful States also tend to ascribe the rise of their power to the quality of their own laws. Viewing these laws as exceptionally good, such States may messianically apply their laws extraterritorially, and impose them upon weaker, purportedly 'uncivilized' nations.[3927] Reliance on harmonization and cooperation may however be no less based on power than reliance on extraterritorial jurisdiction is. Harmonization is not achieved nor does cooperation take place in a power-free environment. Parties to international agreements may only formally be equal.[3928] In the real world, the more powerful parties will usually heavily weigh on the substantive outcome of a negotiating process. This might produce a regime that favors the interests of the powerful to the detriment of those of the weaker.[3929] In the WTO for instance, conference rules provide for equal treatment of all parties, but do not apply to

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[3925] *See* K.M. MEESSEN, "Antitrust Jurisdiction under Customary International Law", 78 *A.J.I.L.* 783, 806 (1984).

[3926] *See* H.L. BUXBAUM, "Conflict of Economic Laws: From Sovereignty to Substance", 42 *Va. J. Int'l L.* 931, 973-76 (2002).

[3927] Notably in the field of securities laws has the United States behaved as a benevolent hegemon taking on a duty to stamp out the universal evil of securities fraud. *See* J.D. KELLY, "Let There Be Fraud (Abroad): A Proposal for a New U.S. Jurisprudence With Regard to the Extraterritorial Application of the Anti-Fraud Provisions of the 1933 and 1934 Securities Acts", 28 *Law & Pol'y Int'l Bus.* 477, 491 (1997). The enactment of the Sarbanes-Oxley Act by the United States in 2002, an act which sets forth a number of stringent corporate governance requirements, may have been informed by the view that U.S. capital markets regulation is exceptionally good, and should be an example to follow for other nations. *See* E. Fleischman, former SEC Commissioner, quoted in "Uncle Sam Wants You", *South China Morning Post*, 6 September 2002, at 1 ("It's as though they were saying that in the light of the globalisation of markets, we the Congress and the SEC have no choice but to shoulder the burden of policing the market activities of companies, investment banks and the accounting and legal professionals wherever those activities take place.")

[3928] Historically however, not even this formal equality was guaranteed. While nowadays all States have the right to participate in the treaty-making process, in earlier times only the great powers were invited to international conferences, the outcome of which smaller States had to abide by. *See* M.C.W. PINTO, "Democratization of International Relations and its Implications for Development and Application of International Law", in N. AL-NAUIMI & R. MEESE (eds.), *International Legal Issues Arising under the United Nations Decade of International Law*, Den Haag, Kluwer Law International, 1995, 1260.

[3929] *See* A. BIANCHI, Reply to Professor Maier, in K.M. MEESSEN (ed.), *Extraterritorial Jurisdiction in Theory and Practice*, London/The Hague/Boston, Kluwer, 1996, 74, 82 (submitting that "[i]n order to attract investments or pushed by other policy reasons, weaker states may be forced to accept the impositions of more powerful states"); J. KAFFANKE, "Nationales Wirtschaftsrecht und internationaler Sachverhalt", 27 *Archiv des Völkerrechts* 129, 141 (1989) ("Würde eine solche [politische] Lösung nicht gerade die Situation provozieren, dass der Stärkere den Schwächeren über den Tisch ziehen würde? Sind dann nicht ausserrechtlichen und unkontrollierbaren Einflüssen Tür und Tor geöffnet?"); H.L. BUXBAUM, "Transnational Regulatory Litigation", 46 *Va. J. Int'l L.* 251, 304 (2006) ("The political realities of the negotiating process lead to convergence around the policies of the more powerful states, with the restult that one may question the international legitimacy of the norms adopted.") (footnotes omitted).

informal consultations.[3930] In informal "green room"-consultations, between the industrialized "Quad-countries" often manage to build a consensus which they present as a "take it or leave it"-package to the other Member States.[3931] As a general matter, richer and larger States have more access to information than poorer and smaller States. A large number of developing countries do also not have the necessary expertise to influence the negotiations and thus to ultimately enter into agreements that should be supposed to serve their interests.[3932] It has therefore been argued, not unjustifiably, that current substantive international law oozes Western bias because of Western domination over the making of international law.[3933]

With respect to the economic laws that have been given extraterritorial application, the antitrust and securities laws, this holds all the more true since, even as we write, quite some developing countries do not even have or enforce laws that regulate competitive conditions or punish securities fraud. Because these States are not familiar with highly specialized business regulation, they risk swallowing whatever expert nations propose them. The proliferation of insider-trading prohibitions has for instance largely been steered by bilateral memoranda of understanding negotiated between the United States, historically the first champion of laws prohibiting insider-trading, and other (industrialized) nations that did not have such laws. These memoranda typically provided for cooperation in the enforcement of U.S. securities laws, and provided for mechanisms for dealing with U.S. discovery requests.[3934] As an instrument of soft pressure, they cajoled the other party into inserting insider-trading prohibitions into their own laws, and thus harmonized insider-trading law largely on U.S. terms. Proposals for 'substantivizing' other fields of economic law, *e.g.*, setting up an international merger review authority, ought therefore be viewed with suspicion, for it is not unreasonable that the small States will stand to lose.[3935]

1188. EXTRATERRITORIALITY AND SUBSTANTIVISM WORKING IN TANDEM – Accordingly, in terms of their results, extraterritorial jurisdiction and substantive solutions may not differ that much. Both may coax weaker States into adapting their laws in ways desired by the powerful State. Often, extraterritorial jurisdiction and substantive solutions actually work in tandem. The initial exercise of extraterritorial

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[3930] *See* for criticism of this method, *e.g.* WTO Watch, "NGOs Call on Trade Ministers to Reject Closed WTO Process", http://www.globalpolicy.org/ngos/int/wto/2002/1104reject.htm (last visited on 31 July 2006).

[3931] A breakthrough in WTO negotiations is often dependent on an initial deal brokered during quadrilateral negotiations between the United States, the European Union, Canada and Japan. *See* http://www.wto.org/english/thewto_e/whatis_e/tif_e/org3_e.htm (last visited on 31 July 2006).

[3932] *See* more extensively, notably in the context of WTO negotiations: J. WOUTERS, B. DE MEESTER & C. RYNGAERT, "Democracy and International Law", *N.Y.I.L.* 137-198 (2004).

[3933] *See* E. KWAKWA, "Regulating the International Economy: What Role for the State?", in M. BYERS (ed.), *The Role of Law in International Politics*, Oxford/New York, Oxford University Press, 2000, 227-246.

[3934] *See* on U.S. negotiating practice in the field of insider-trading: D.C. LANGEVOORT, "Cross-Border Insider Trading", 19 *Dick. J. Int'l L.* 161 (2000-2001). The first such memorandum was signed with Switzerland after conflict had arisen over the application of U.S. discovery laws to documents located in Switzerland in the insider-trading case of *SEC* v. *Banca della Svizzera Italiana*, 92 F.R.D. 111 (1981).

[3935] *Compare* U. DRAETTA, "Need for Better Trans-atlantic Co-operation in the field of Merger Control", *R.D.A.I.* 557, 565 (2002) (stating that establishing such an authority will be impossible anyway "because large States will fear that they will not have enough influence on this international merger control authority and small States will fear that their influence will be minimal").

jurisdiction by a State may serve as a tactical prelude to later cooperation and harmonization agreements serving the interests of that State, especially in case foreign nations left the regulatory field fallow. The process of cooperation and harmonization in the field of securities law may serve to illustrate this. Because of the U.S. emphasis on fair and open capital markets, tight U.S. regulation of securities transactions has also extended to foreign transactions.[3936] In a typical situation, after initially fully asserting its jurisdiction over foreign transactions, the United States gradually grants exemptions in order not to cause a head-on collision with foreign nations but also, shrewdly, to win over the hearts and minds of these nations for the substance of what is not exempted. Magnanimity on the part of the hegemon may persuade States with underdeveloped regulatory frameworks to embrace readymade solutions provided by the U.S. This may result in organic harmonization – States spontaneously adopting similar laws – or in organized harmonization – States entering into international agreements dealing with the matter. Either way, the final harmonized rules will reflect U.S. rules and their underlying values.

In the field of corporate governance, one curiously observes the U.S. firstly aggressively brandishing the threat of unconditional application of the U.S. Sarbanes-Oxley Act (2002), European corporations and the European Commission reacting furiously,[3937] the U.S. regulatory agencies accommodating foreign concerns (2002-2005), and the European Union in due course enacting its own directive on statutory audit, with its own accommodations for foreign audit firms (2006).[3938] Although the substantive provisions of the U.S. act and the EU do not wholly coincide, it is hard to resist the conclusion that the EU was considerably influenced by the strengthening of the law in the United States. In sum, while the extraterritorial application of the Sarbanes-Oxley Act may initially have produced some resentment overseas, it may also have paved the way for a U.S.-driven transatlantic 'convergence' of corporate governance standards.[3939]

III.5. Devising a jurisdictional framework: using transnational regulatory and judicial networks

1189. REVISITING EXTRATERRITORIALITY – It has been argued that substantivism, while having theoretical appeal, may serve, like extraterritorial jurisdiction, as a transmission belt for the interests of the powerful. In the case of cooperative solutions, this happens much more implicitly than in the case of extraterritorial jurisdiction, which typically meets with stiff resistance from foreign nations. Yet once one scratches below the surface, the cooperative brilliance may fade, and substantivism turns out to be a false friend. KAFFANKE even termed it "die

[3936] *See* the seminal case of *Schoenbaum* v. *Firstbrook*, 405 F.2d 200 (2d Cir. 1968) (court applying the antifraud provisions of the U.S. Securities Exchange Act to foreign securities transactions producing effects in the United States).
[3937] *See* Letter of EU Internal Market Commissioner F. BOLKESTEIN to W. DONALDSON, Chairman of the SEC, April 24, 2003, available at http://www.iasplus.com/resource/letterfbdonaldson.pdf.
[3938] Directive 2006/43/EC of the European Parliament and of the Council of 17 May 2006 on statutory audits of annual accounts and consolidated accounts, *O.J.* L 157/87 (2006). *See* on its international aspects: Chapter XI of the directive (Articles 44-47).
[3939] Against this convergence on U.S. terms: A. SCHAUB, "Europe and US Must Guard Against Regulatory Clashes", *IFLR* 20, 21 (July 2004) (stating that "[w]hat we must absolutely avoid is the establishment of a type of first-mover regulatory advantage: that is, setting a standard and then compelling the other to match it.").

schlechteste aller denkbaren Lösungen."[3940] Bereft of its illusions, States then face a choice between plague and cholera, between extraterritorial jurisdiction and international 'cooperation', between international friction and unfairness. For all the – justified – griping about unilateral extraterritorial jurisdiction, it re-emerges in the debate over just international economic regulation. It is hesitantly claimed that the exercise of extraterritorial jurisdiction may sometimes produce more equitable results than cooperative solutions.[3941]

1190. DEVISING A JURISDICTIONAL FRAMEWORK – Admittedly, it has been shown how extraterritorial jurisdiction – on which substantive solutions may possibly piggyback – is as much, or even more, part of a game of power as substantivism is. A system in which the U.S., and to a lesser extent the EU, bully developing nations by applying their laws to situations arising outside their territory but purportedly producing adverse domestic effects, is surely not attractive for this world's downtrodden. One would indeed be hard-pressed to advocate a system in which the European Commission is allowed to block the merger of South African corporations, to the detriment of thousands of poor South African workers, as happened in the *Gencor* case.[3942] However, if one could devise a rigorous rule-based system of international jurisdiction, modulated depending on the subject-matter to be regulated, to which all States have to adhere, weaker countries are more likely to go along with it. Such a system, administered by independent courts, may restrict powerful States' sphere of action and delegitimize their protest against weaker States' own jurisdictional assertions.[3943]

1191. SERVING THE INTERESTS OF THE WEAK – For weaker States, stringent and elaborate rules of jurisdiction may not only serve as defenses against powerful States' unwarranted assertions or as tools enabling them to actively promote their own interests by engaging themselves in extraterritorial jurisdiction. Weaker States may also use such rules to their advantage in the course of substantive processes. As BIANCHI pointed out, "[t]he bargaining position of weaker states might be stronger if it is perceived as conforming with accepted principles and rules of international law."[3944] Developed jurisdictional principles may serve to pressure the powerful into drawing up an international agreement that takes the interests of the weak sufficiently into account: if the agreement were to be considered as unfair by the weak, they could

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[3940] J. KAFFANKE, "Nationales Wirtschaftsrecht und internationaler Sachverhalt", 27 *Archiv des Völkerrechts* 129, 140 (1989) (stating that "die Uberlassung der rechtlichen Fragen solcher Konflikte [over extraterritorial jurisdiction] an die politischen oder diplomatischen Entscheidungsträger die schlechteste aller denkbaren Lösungen darstellt.").

[3941] *Compare* H.L. BUXBAUM, "Conflict of Economic Laws: From Sovereignty to Substance", 42 *Va. J. Int'l L.* 931, 975 (2002) ("[T]his process [of substantivism] may be criticized on foreign relations grounds in that it replaces "neutral" consideration of competing laws in the individual case with the application of law reflecting non-neutral values.").

[3942] Commission, Case IV/M.619, decision 97/26/EC of 24 April 24 1996, *O.J.* L11/30 (1997) (finding that the merger would create a position of collective dominance incompatible with the common market); European Court of First Instance, *Gencor Ltd v. Commission*, Case T-102/96, 1999, *E.C.R* .II-753 (approving of the Commission's jurisdictional assertion)

[3943] *Compare* J. KAFFANKE, "Nationales Wirtschaftsrecht und internationaler Sachverhalt", 27 *Archiv des Völkerrechts* 129, 140 (1989) ("Die Lokalisierung der Entscheidung bei den Gerichten ist nachgerade die Versicherung dafür, dass die Einflussmöglichkeit von Interessengruppen so beschränkt wie möglich bleibt.").

[3944] *See* A. BIANCHI, Reply to Professor Maier, in K.M. MEESSEN (ed.), *Extraterritorial Jurisdiction in Theory and Practice*, London/The Hague/Boston, Kluwer, 1996, 74, 82.

leave the negotiating table and legitimately resort to exercising unilateral extraterritorial jurisdiction. Thus, the limits which substantivism faces could be overcome if substantivism is buttressed by a framework of international jurisdiction.

1192. TREATIES ON JURISDICTION – The question now is how such a framework of international jurisdiction should be developed. Clearly, while there may be some guiding principles applicable across-the-board, every field of the law ought to be subject to its own specific jurisdictional rules.[3945] Antitrust regulators do indeed not face the same problems as securities regulators, let alone human rights courts do. An attractive option, which confers considerable legal certainty, is the conclusion of treaties on every subject matter.[3946] These treaties could spell out the maximal reach of a State's laws. Yet because a treaty could impossibly anticipate the variety of problems arising in the real world, because exempting foreign corporations from regulation may jeopardize the principle of equality before the law,[3947] and because States may be unwilling to tie their own hands too much, such a treaty, if any could be agreed upon at all, is likely to feature a flexible 'reasonableness' or 'comity' test. Comity being essentially a discretionary concept, the parties to the treaty will tend to apply the comity test in their favor,[3948] and apply effects-based jurisdiction as they see

[3945] *See, e.g.*, the Restatement (Third) of U.S. Foreign Relations Law (1987), which sets forth the general principles of jurisdiction and reasonableness in §§ 402-403, and features specific sections on tax (§§ 411-413), foreign subsidiaries (§ 414), antitrust (§ 415), securities (§ 416), foreign sovereign compulsion (§ 441), and transnational discovery (§ 442).

[3946] *See, e.g.*, Policy Statement of the International Chamber of Commerce, "Extraterritoriality and business", 13 July 2006, Document 103-33/5 (on file with the author) ("ICC … encourages governments to explore the feasibility of an international convention on the extraterritorial application of national laws providing for means of resolving extraterritoriality disputes, where appropriate, by way of consultation, cooperation, conciliation, or arbitration."). It may be noted that an overarching convention on criminal jurisdiction, as proposed by the HARVARD RESEARCH ON INTERNATIONAL LAW, "Draft Convention on Jurisdiction with Respect to Crime", 29 *A.J.I.L.* 439 (1935), has never materialized.

[3947] Exempting foreign conspiracies or mergers causing exactly the same effects in the regulating State as domestic restrictive practices may be a hard sell for a domestic constituency. In private suits, it is unlikely that enforcement authorities will be willing to cast aside imperative domestic law in an international agreement. *Compare* J. SCHWARZE, "Die extraterritoriale Anwendbarkeit des EG-Wettbewerbsrechts – vom Durchführungsprinzip zum Prinzip der qualifizierten Auswirkung", in: J. SCHWARZE (ed.), *Europäisches Wettbewerbsrechts im Zeichen der Globalisierung*, Baden-Baden, Nomos, 2002, at 59-60; A.V. LOWE, "The Problems of Extraterritorial Jurisdiction: Economic Sovereignty and the Search for a Solution", 34 *I.C.L.Q.* 724, 729 (1985) (arguing that it is "questionable as a matter of legal principle how far foreign policy considerations should be allowed to affect the enforcement of what are, after all, private rights being asserted in such litigation."); J.R. ATWOOD, "Positive Comity – Is It a Positive Step?", in B. HAWK (ed.), 1992 *Fordham Corporate Law Institute*, 79, 87 (1993) ("It is not realistic to expect one government to prosecute its citizens solely for the benefit of another. It is no accident that his has not happened in the past, and it is unlikely to happen in the future.").

[3948] *Compare* M.C. FRANKER, "Restoration: International Merger Review in the Wake of General Electric/Honeywell and the Triumphant Return of Negative Comity", 36 *Geo. Wash. Int'l L. Rev.* 877, 901 (2004) ("[E]ven if positive comity were extended to merger review, it would achieve only the desired effect to the extent that "both parties have similar interests in the cessation of certain anticompetitive practices."); J. KAFFANKE, "Nationales Wirtschaftsrecht und internationaler Sachverhalt", 27 *Archiv des Völkerrechts* 129, 142 (1989) ("Es ist kaum damit zu rechnen, dass in solchen Abmachungen in jeder Hinsicht konkrete und bestimmte Begriffe verwendet werden würden. Was innerhalb der jahrzehntelangen akademischen Auseinandersetzung und Erörterung nicht gelungen ist, wird nun kaum von solchen Verhandlungen geleistet werden.").

fit,[3949] a deficit from which the current transatlantic antitrust Comity Agreements (1991/1998) suffer as well.[3950] The role of international agreements in bringing more predictability to the exercise of jurisdiction should thus not be overestimated.

1193. TRANSNATIONAL NETWORKS OF COOPERATION – How to proceed then? As a matter of logic, before States start negotiations on an international agreement on jurisdiction, they should make sure that their regulators and courts are willing to rise above nationalist reflexes and exercise jurisdictional restraint if another State's sovereignty is encroached upon. It has been shown above that there is apparently not much cause for optimism given the tendency of courts and regulators to pull for the home crowd. However, in an era of "the global village" in which economic and government actors are increasingly wired, and informal transnational government and judicial networks emerge, courts and regulators are much more connected with their foreign counterparts than they previously were;[3951] a 'global administrative space' emerges.[3952] Stronger contacts and better information typically result in a greater understanding of each other's legitimate concerns.[3953] At the regulatory level, as aptly displayed in the field of corporate governance regulation, the positive results are undeniable: a system in which regulators mutually recognize each other's oversight mechanisms, subject to a number of safeguards, is gradually being put in place. In auditing regulation, solutions to jurisdictional conflicts were hammered out in an informal dialogue between U.S. and European regulators, and a burdensome diplomatic procedure was avoided. This dialogue at the same time facilitated the convergence of substantive norms.[3954]

1194. In the field of antitrust law as well has informal dialogue been heavily relied upon of late. Because U.S. and European regulators work together on a daily basis, there have been no major conflicts over antitrust jurisdiction since the early 1990s. At the *judicial* level, this process of mutual understanding culminated, for the time being, in the 2004 antitrust decision of the U.S. Supreme Court in the *Empagran Vitamins* case. Influenced by a number of *amicus curiae* briefs from foreign governments (United Kingdom, Netherlands, Germany, Belgium, Canada, Japan), the Court stated that it is to be assumed that the U.S. Congress takes "the legitimate sovereign interests of other nations into account"[3955] when assessing the reach of U.S.

[3949] *See* B. GOLDMAN, "Les effects juridiques extra-territoriaux de la politique de la concurrence", *Rev. Marché Commun* 612, 618-19 (1972).

[3950] *See* D. KUKOVEC, "International Antitrust – What Law in Action?", 15 *Ind. Int'l & Comp. L. Rev.* 1, 20 (2004) (arguing, in the context of merger control, that regulators, applying comity, are invited to weigh unquantifiable interests of such societal subgroups as consumers, competitors, and employees).

[3951] *See* on government networks in particular A.M. SLAUGHTER, "Governing the Global Economy through Government Networks", in M. BYERS, *The Role of Law in International Politics*, Oxford, Oxford University Press, 2000, 177-205.

[3952] *See* N. KRISCH & B. KINGSBURY, *Global Governance and Global Administrative Law in the International Legal Order*, 17 *E.J.I.L.* 1 (2006) (defining a 'global administrative space' as "a space in which the strict dichotomy between domestic and international levels has largely broken down, in which administrative functions are performed in often complex interplays between officials and institutions on different levels, and in which regulation may be highly effective despite its predominantly non-binding forms.").

[3953] Through cooperation, State sovereignty may evaporate, yet at the same time, State agencies may "gain instrumental power over the forms of conduct subject to regulation. *See* H.L. BUXBAUM, "Transnational Regulatory Litigation", 46 *Va. J. Int'l L.* 251, 308 (2006).

[3954] *See* A. SCHAUB, "Europe and US Must Guard Against Regulatory Clashes", *IFLR* 20 (July 2004).

[3955] *F. Hoffman-La Roche Ltd. et al.* v. *Empagran S.A. et al.*, 124 S. Ct. 2359, 2366 (2004).

law, and avoids extending this reach when such would create a "serious risk of interference with a foreign nation's ability independently to regulate its own commercial affairs."[3956] In an important departure from the past, in *Empagran*, America's highest court thus held that it expects courts to take foreign sovereign interests adequately into account. In 1993, the Supreme Court still stated in the *Hartford Fire Insurance* case that foreign policies and laws should not be heeded by U.S. courts when giving extraterritorial application to the antitrust laws, unless the foreign State compels a conduct which U.S. law prohibits (or *vice versa*),[3957] an approach which the European courts also take.[3958] As a fish tends to rot from the head down, as the Russian proverb has it, courts duly restricted the comity analysis to a "true conflict" or "foreign sovereign compulsion" analysis in the 1990s.[3959] That reasonableness has now resurfaced[3960] as high up in the judicial hierarchy as the U.S. Supreme Court testifies to a belief that courts *could* and *should* take foreign sovereign interests into account, and may limit the reach of a State's laws accordingly.

1195. Thanks to the increased transnational contacts between governments, regulators and courts, a reciprocal and principled practice of States exercising reasonable jurisdiction may emerge. From a methodological perspective, it is important in this respect that States, before asserting jurisdiction, allow or even ask other States, including weaker States, to voice their concerns, and take them into account as a matter of good neighborship.[3961] Obviously, this cooperative process may take place more smoothly on the basis of a facilitating transnational framework than on the basis of *ad hoc* cooperation through *amicus curiae* briefs or statements of interests. It would be useful if States were to designate official points of contact to which foreign courts could address their inquiries.

A U.S. court, facing a problem of antitrust involving a European corporation, could then inquire with an EU office in Brussels whether the EU would have qualms about a particular jurisdictional assertion (apart from inquiring with the U.S. executive branch whether this assertion would not raise a non-justiciable political – foreign policy – question). To that effect, the existing Comity Agreements between the United States and the European Community could be revised. Where as for now they only provide

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[3956] *Id.*, at 2367.

[3957] *Hartford Fire Insurance Co.* v. *California*, 509 U.S. 764 (1993)

[3958] European Court of Justice, *A. Ahlstrom Osakeyhtio and others v. Commission* (*Wood Pulp*), 1988 E.C.R. 5244, § 20 ("There is not, in this case, any contradiction between the conduct required by the United States and that required by the Community since the [American] Webb Pomerene Act merely exempts the conclusion of export cartels from the application of United States anti-trust laws but does not require such cartels to be concluded."); European Court of First Instance, *Gencor* v. *Commission*, 1999 E.C.R., II-00753, § 103, citing ECJ, *Wood Pulp*, § 20 (noting "that there was no conflict between the course of action required by the South African Government and that required by the Community, given that […] the South African competition authorities simply concluded that the concentration agreement did not give rise to any competition policy concerns, without required that such an agreement be entered into.").

[3959] *See, e.g., United States v. Nippon Paper Industries Co.*, 109 F.3d 1 (1st Cir. 1997) (applying the *Hartford Fire* doctrine to criminal antitrust suits).

[3960] Interest-balancing was introduced in U.S. antitrust law in the late 1970s in *Timberlane Lumber Co. v. Bank of America, N.T. & S.A.*, 549 F.2d 597, 605-08 (9th Cir.1976); *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1292 (3d Cir.1979).

[3961] In addition, courts may rely on a "transnational community of jurists" disciplining unilateral assertions of jurisdiction. *See* D.F. ORENTLICHER, "Whose Justice? Reconciling Universal Jurisdiction with Democratic Principles", 92 *Georgetown L. J.* 1057, 1133-34 (2004).

for cooperation between antitrust regulatory agencies, they could in future also provide for information exchange between courts and regulatory agencies, or even between courts only.[3962] At the global level, the International Competition Network may obviously play an important role in antitrust cooperation.[3963] Regulatory cooperation within this network, which groups both developed and developing countries, could be enhanced,[3964] and members could possibly open in it up for courts.

By the same token, a European court that has received a complaint alleging gross human rights violations committed in a foreign country should be able to contact the territorial State, or the national State of the foreign offender if different, for more information about the facts and the investigations underway. In the situation of gross human rights violations, bystander States could also be contacted, because for various reasons (prosecutorial capacity and expertise, cultural affinity, availability of witnesses …), these States may have a stronger prosecutorial interest and be a better adjudicatory forum. They may also have information that is useful for the prosecuting State, for instance because witnesses or co-suspects have fled to their territory. Encouragingly, in the European Union, a special network of points of contact in respect of persons responsible for genocide, crimes against humanity and war crimes has recently been put in place on the basis of a Council decision of 2002.[3965]

1196. DEVELOPING PUBLIC INTERNATIONAL LAW THROUGH TRANSNATIONAL NETWORKS – It appears no wishful thinking to expect that the eventual decision of a court that has sought and/or received the opinion of other States concerned, through judicial networks, will echo other States' comments. Interestingly, from a public international law perspective, that decision, if it is subsequently not criticized by other States, may instantly come to reflect customary international law in the particular field of the law where the decision is taken,[3966] or at least be indicative of an emerging consensus, because it is based on consent.[3967] If the same issue arises again, States may rely on that decision as constitutive of (emerging) international law – although, admittedly, fact patterns may differ considerably, and thus complicate the legal-precedential value of the decision.

[3962] If courts could transnationally communicate with each other, jurisdictional deadlock stemming from parallel proceedings and reciprocal anti-suit injunctions, as arose in the infamous *Laker Airways* litigation in the 1980s in the United States and the United Kingdom, could be prevented. *See Laker Airways Ltd. v. Sabena*, 731 F.2d 909 D.C. Cir. (1984); *British Airways Board* v. *Laker Airways Ltd.*, [1984] 3 WLR 410; [1985] A.C. 58.

[3963] *See* http://www.internationalcompetitionnetwork.org. This network was established in 2001.

[3964] Policy Statement of the International Chamber of Commerce, "Extraterritoriality and business", 13 July 2006, Document 103-33/5, recommendation nr. 4 (on file with the author). So far, the network has mainly formulated policy proposals for its members (national enforcement agencies).

[3965] Council Decision of 13 June 2002 setting up a European network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes, *O.J.* L 167/1 (2002).

[3966] *See, e.g.*, K.M. MEESSEN, "Schadensersatz bei weltweiten Kartellen: Folgerungen aus dem Endurteil im Empagran-Fall", 55 *WuW* 1115, 1118-1119 (2005) (arguing that the rule which the U.S. Supreme Court set forth in *Empagran* (no jurisdiction for a State over foreign-based harm caused by a global cartel on the sole ground that inflated prices paid in that State were necessary for the cartel's success) represents a rule of instant customary international law, because six foreign governments were involved in the *Empagran* proceedings as *amici curiae* and advocated the sort of jurisdictional restraint espoused by the Supreme Court and the D.C. Circuit.).

[3967] *See* on consent and the "new sovereignty" in the framework of transnational regulatory litigation *also* H.L. BUXBAUM, "Transnational Regulatory Litigation", 46 *Va. J. Int'l L.* 251, 308-16 (2006).

Minimalists might argue that law formed in this fashion could only bind the States involved in the initial court decision. This is however an overly strict view of international law formation. International law may arguably also crystallize if States do not protest against a State's jurisdictional assertion over a situation which, on its face, concerns only one or a few other States directly. If States intend to oppose the crystallization of a norm of customary international law, they ought to object to *any* decision which might contain such a norm that might *in future* purportedly work to the detriment of their interests. Therefore, the European Commission, Australia, Switzerland, and the United Kingdom, have recently filed *amicus curiae* briefs with the U.S. Supreme Court in the case of *Sosa* v. *Alvarez-Machain* (2004), a case concerning the exercise of universal tort jurisdiction under the U.S. Alien Tort Statute over the arbitrary arrest of a Mexican by a U.S. official in Mexico.[3968] The *Sosa* case did in no way directly impinge on the intervening States' sovereignty interests, but because its outcome undeniably influenced the legal position of their corporations doing business in far-flung countries where human rights are routinely trampled upon, they prospectively intervened so as to deny the validity of a norm of customary international law that would authorize States to liberally exercise universal tort jurisdiction.

States might nowadays be expected to screen court decisions of which the dispositive part might cause them concern. The recent launch of a databank on international law in domestic courts may greatly facilitate their work (presumably the work of their Foreign Ministries).[3969] Ideally, States should intervene when the trial is pending, so that they could still influence the outcome. A relatively brief period during which States may express their objections against the outcome may however be reserved. After that period, ignorance may no longer be an acceptable defense. Objections raised against an analogous jurisdictional assertion after the period expired should not be taken into account by the asserting State.

1197. CONCLUDING REMARKS – Accordingly, a viable system of extraterritorial jurisdiction could be devised in which the legality of every single assertion is a function of the level of – reasonable – foreign protest timely aimed at it. While this system should surely take note of the glass ceiling constituted by the pervasive role of political power, low-threshold contacts among courts and regulators of different States through government networks may go a long way in circumscribing it. Power politics could not thrive in a communicative setting which considers all participants to be equal partners and fosters mutual understanding. Extraterritorial jurisdiction has its limits, but possibly less so than ill-conceived substantive solutions putting the weak at a systematic disadvantage. This is not to say that substantivism has *inherent* limits. It has not. This is only to invite negotiators, of weak and strong States alike, to ascertain whether a substantive solution is also a just solution. If States

[3968] 124 S.Ct. 2739 (2004). Brief of *amicus curiae* of the European Commission in *Sosa* v. *Alvarez-Machain* in support of neither party, available at http://www.nosafehaven.org/_legal/atca_oth_EurComSupportingSosa.pdf; Brief of the Governments of the Commonwealth of Australia, the Swiss Confederation and the United Kingdom of Great Britain and Northern Ireland as *amici curiae* in support of the petitioner, U.S. Supreme Court, *Sosa v. Alvarez-Machain*, 23 January 2004, at p. 2, available at http://www.nosafehaven.org/_legal/atca_con_AUSsupportingSosa.pdf. *See also* C. RYNGAERT, "The European Commission's Amicus Curiae Brief in the Alvarez-Machain Case", *International Law Forum* 2004, nr. 6, 55-60.

[3969] *See* Oxford Reports on International Law in Domestic Courts, available at http://ildc.oup.semcs.net.

are able to find common ground without abrogating the legitimate rights of the weaker among them, a substantive solution may be preferable.[3970] If they are not, a system of cooperative unilateral jurisdiction is an attractive alternative.

III.6. Subsidiarity

1198. It has been shown in the previous subsection that a *reasonable* exercise of jurisdiction could spontaneously spring from a network of transnational government and judicial cooperation. States will inform other States – and relevant private actors – that they intend to exercise jurisdiction over a particular situation. Foreign nations will comment on the proposed assertions, and the asserting States will presumably take foreign concerns into account. The question now arises whether there is a method of assessing the propriety of foreign nations' concerns. It may be well be that, even if an institutionalized cooperative framework has been put in place, different nations' jurisdictional and policy concerns may appear irreconcilable. Would the principle of jurisdictional reasonableness then require the asserting State to defer as a matter of course to the views of the protesting State? In this subsection, it will be argued that deference should not be required in every situation in which foreign nations have raised red flags. Instead, the principle of subsidiarity will be advanced as a method to solve jurisdictional problems. Under this principle, if on the part of the protesting State genuine unwillingness or inability to deal with a situation could be established, the asserting State has the right to unilaterally exercise jurisdiction over that situation in the global interest, even in the face of foreign protest. Foreign unwillingness or inability thus serves as a necessary but also sufficient precondition for a State to exercise jurisdiction.

III.6.1. The Schutzzweck-based rule of reason

1199. Before this study will propose the principle of jurisdictional subsidiarity, some recapitulation, relating to the principle of jurisdictional reasonableness, may be apt. In chapter 5, it has been argued that only "enlightened self-interest" and "voluntary self-limitation" will restrain the exercise of jurisdiction,[3971] especially when the forum State is a powerful State which is not exposed to pressure by foreign States. A jurisdictional rule of reason would not be endowed with customary international law status, and States would be allowed to promote their interests by exercising jurisdiction as they please. It has been submitted in chapter 5 that this state of the law, which is actually the state of the law as

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[3970] The Statute of the International Criminal Court (ICC) has been hailed as one of the great creations of international law. In practice however, the ICC may put weaker, developing nations at a systematic disadvantage because they are disproportionately unable to prosecute and investigate situations in which international crimes occur. Developing nations may prefer the exercise of universal jurisdiction by single States, because they are better able to influence these States on a bilateral basis. *Compare* M. MORRIS, "High Crimes and Misconceptions: the ICC and non-Party States", 64 *Law & Contemp. Probs.* 13 (2001) (employing this as a main argument against the delegation of universal jurisdiction to an unwieldy ICC which States could hardly influence). France for instance abandoned its proceedings against Congolese officials in the *Congo Beach* case after the Republic of Congo filed a complaint with the International Court of Justice. Congo's request is available at http://www.icj-cij.org/icjwww/idocket/icof/icoforder/icof_iapplication_20020209.pdf. *See for* the annulment of the proceedings in France: *Chambre d'Instruction Criminelle*, Paris, 22 November 2004, not published.

[3971] *See* K.M. MEESSEN, "Antitrust Jurisdiction Under Customary International Law", 78 *A.J.I.L.* 783, 800-801 (1984).

enunciated by the Permanent Court of International Justice in the 1927 *Lotus* case, is not satisfactory, because it fails to adequately resolve normative competency conflicts. It has instead been proposed to employ the German *Schutzzweck* doctrine so as to restrain the exercise of jurisdiction. Under this doctrine, the reach of every law is a function of the protective substantive content of that law. This implies that every law, or every legal provision, has its own particular geographical scope of application, and that thus, the reach of one provision is not readily transposable to another provision. There is no denying that, if reasonableness is formed organically along the lines sketched in the previous subsection, this compartmentalized approach to jurisdiction will, rightly, be followed as well.

1200. In chapters 6 to 11, the reach of the law in the field of antitrust, securities, boycott legislation, discovery, and core crimes against international law, in the United States and Europe, has been examined in great detail. Every chapter has concluded with an interim conclusion setting forth how the exercise of jurisdiction should be organized. In antitrust matters, it has been argued that an encompassing comity analysis, espoused by U.S. federal courts in the late 1970s,[3972] but later rejected by the U.S. Supreme Court in 1993,[3973] and by European courts,[3974] should be enthroned again. In that context, the U.S. Supreme Court's decision in the 2004 *Empagran* case has been saluted.[3975] In securities matters, it has been submitted that the State of the exchange where the securities are traded should enjoy primary jurisdiction (domestic-traded test), although limited exceptions for nationality-, effects- or conduct-based jurisdiction could be provided for. Securities registration and corporate governance regulations should as far as reasonably possible exempt foreign issuers and audit firms from too heavy a (duplicative) regulatory burden. Secondary boycotts serving a State's idiosyncratic foreign policy interests have been rejected as violating international law. Instead, it has been proposed to put in place multilaterally organized sanctions regimes. U.S. courts have been called upon to restrain their requests for the production of foreign-based materials (extraterritorial discovery) to information that is really necessary, and to take due account of foreign nations' concerns over their judicial sovereignty being encroached upon. And while this study has encouraged States to exercise universal jurisdiction over core crimes against international law, even *in absentia*, it has disapproved of assertions of jurisdiction over cases that the territorial or national State are able and willing to investigate and prosecute, lest the development of the rule of law in the latter (typically developing) State be impeded.

III.6.2. A transversal application of the subsidiarity principle

1201. It may appear that, in accordance with the *Schutzzweck* doctrine, every single field of the law, and even every single provision of every single field, have their own geographical reach, without there being any overarching principles that go substantively further than the ill-defined 'principle of jurisdictional reasonableness'.

[3972] *Timberlane Lumber Co. v. Bank of America, N.T. & S.A.*, 549 F.2d 597, 605-08 (9th Cir.1976); *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1292 (3d Cir.1979).
[3973] *Hartford Fire Insurance Co.* v. *California*, 509 U.S. 764 (1993).
[3974] European Court of Justice, *A. Ahlstrom Osakeyhtio and others* v. *Commission* (*Wood Pulp*), 1988 E.C.R. 5244, § 20; European Court of First Instance, *Gencor* v. *Commission*, 1999 E.C.R., II-00753, § 103.
[3975] *F. Hoffman-La Roche Ltd. et al.* v. *Empagran S.A. et al.*, 124 S. Ct. 2359 (2004).

Is the international law of jurisdiction indeed to be compartmentalized, and do different substantive fields of the law, in light of their own regulatory purpose, follow their own jurisdictional dynamic of what is reasonable? One is tempted to answer in the affirmative to this question. However, there seems to be a substantive dynamic at work, sometimes overtly, sometimes covertly, that is already guiding States, and should be guiding them to an ever greater extent, in almost all fields of the law studied: the dynamic of the subsidiarity principle.

1202. DEFINITION AND ORIGINS – Under the subsidiarity principle as understood here, a State may only exercise its jurisdiction if another State with a purportedly stronger nexus to the case fails to do so in ways that are reasonably acceptable to the would-be regulating State or to the international community at large.[3976] Subsidiarity presupposes that all States have an interest in clamping down on activities that are harmful to States, and the international community. Although it is a modern concept, its roots could be traced to GROTIUS, who argued in his *De jure belli ac pacis* that the territorial State, *i.e.*, the State with arguably the strongest nexus to a situation, is under an obligation to prosecute offences committed within its territory, and that accordingly, if it fails to live up to this obligation, other States are entitled to step in, on a subsidiary basis, so as to protect their interests:

> "But since established governments were formed, it has been a settled rule, to leave the offences of individuals, which affect their own community, to those states themselves, or tho their rulers, to punish or pardon them at their discretion. But they have not the same plenary authority, or discretion, respecting offences, which affect society at large, and which other independent states or their rulers have a right to punish, in the same manner, as in every country popular actions are allowed for certain misdemeanours. Much less is any state at liberty to pass over in any of his subjects crimes affecting other independent states or sovereigns. On which account any sovereign state or prince has a right to require another power to punish any of its subjects offending in the above named respect : a right essential to the dignity and security of all governments."[3977]

1203. Under this Grotian maxim, States agree beforehand, in a state of nature if one could say so, to grant the territorial State the primary responsibility to establish jurisdiction over activities that potentially harm the interests of other nations (*i.e.*, for our purposes primarily the economic activities that have adverse effects on foreign nations' economies, such as the foreign antitrust violations and the foreign fraudulent securities transactions producing domestic effects which have been examined at length in this study), and other harmed States a secondary or subsidiary responsibility. Moreover, under another, related Grotian maxim, bystander States may assume this subsidiary responsibility also in respect of crimes, wherever committed, which qualify

[3976] In the law of federal systems or integrated international organizations, subsidiarity has a different, although not unrelated meaning. It implies that the federal entity or the international organization may only take action if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the entities of the federation or the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the federal entity or the international organization. *See* in particular Article 5, § 2 of the Treaty Establishing the European Community.

[3977] H. GROTIUS, *De jure belli ac pacis*, translated by A.C. Campbell as *The Rights of War and Peace*, M. Walter Dunne, London, 1901, lib. 2, c. 21, No. 3.

by virtue of their particular heinousness as violations of the laws of nature and the *jus gentium*:

> "It is proper also to observe that kings and those who are possessed of sovereign power have a right to exact punishment not only for injuries affecting immediately themselves or their own subjects, but for gross violations of the law of nature and of nations, done to other states and subjects."[3978]

1204. Under the subsidiarity principle, States with the strongest nexus to the case forfeit their right of protest against other States' jurisdictional assertions over that case, if the former States fail to adequately deal with it. However, if these States could advance a good reason for not dealing with the case, deference might be warranted. A good reason is a reason that is not informed by nationalistic calculation but is instead an objective reason that an (imaginary) global regulator would arguably take into account when deciding on whether or not to deal with a particular internationally relevant activity. Under the principle of subsidiarity, sovereignty becomes a relative notion. States should not blindly defer to foreign nations' sovereignty-based arguments against a jurisdictional assertion:[3979] such arguments are only valid provided that they link up with the interests and values of the international community.[3980] This method implies that one State's regulators and courts pass judgment on other regulatory agencies' and courts' quality and willingness to prosecute globally harmful conduct.[3981] It may be anathema to a State-centred conception of international law, yet, ultimately, it is a most appropriate way to enhance global welfare with minimal transaction costs.

[3978] *Id.*, l. 2, c. 20, No. 40.

[3979] *See also* H.L. BUXBAUM, "Transnational Regulatory Litigation", 46 *Va. J. Int'l L.* 251, 311 (2006) ("Because reading [*amicus curiae* briefs citing foreign relations problems] as blanket objections to all transnational regulatory litigation in U.S. courts would entirely foreclose the advantages of such litigation … a more differentiated mechanism is required.").

[3980] *Compare id.*, 253 (stating that "traditional jurisdictional rules unnecessarily foreclose valid arguments for marshaling the resources of national courts in order to improve the global welfare"). *Id.*, 255 (arguing that U.S. federal courts, applying regulatory law, "seek to apply a shared norm, in domestic courts, for the benefit of the international community"). BUXBAUM advocates an expanded role for national courts in transnational regulatory litigation in her study, just as this study does. However, she restricts the application of regulatory law to transnational litigation to the situation of substantively similar laws in the relevant jurisdictions. *Id.*, at 270 (submitting that "the primary source of [the conflict engendered by the extraterritorial application of domestic law] is differences in substance between the law applied and the law of the other country or countries involved", and that in the cases she describes as "transnational regulatory litigation", "the regulatory community shares the rule applied; thus, the cases do not present the situation where conduct would be permitted in a foreign jurisdiction but forbidden under U.S. law"). *Id.*, at 298-99. In this study's view, however, courts should be entitled to exercise jurisdiction over a particular conduct even if a rule is not shared, provided that it is established that the conduct harms the interests of the international community. Deciding otherwise would mandate States to become safe-havens from where wrongdoers could prey on foreign markets while remaining scot-free on the ground that their conduct is allowed in the territorial State.

[3981] *Compare* A.M. SLAUGHTER, « A Global Community of Courts », 44 *Harv. Int'l L.J.* 191 (2003) (« Over the longer term, a distinct doctrine of 'judicial comity' will emerge : a set of principles designed to guide courts in giving deference to foreign courts as a matter of respect owed judges by judges, rather than in terms of the more general national interest as balanced against the foreign nation's interest. At the same time, judges are willing to judge the performance and quality of fellow judges in judicial systems that do no measure up to minimum standards of international justice. »).

III.6.2.a. Core crimes against international law

1205. Drawing on the theory advanced in this study, States that fail to genuinely investigate and prosecute crimes against humanity committed in their territory or by their nationals do ordinarily not have the right of protest against the exercise of subsidiary universal jurisdiction by bystander States. It may nonetheless happen that the benefits of non-prosecution of such crimes outweigh the benefits of prosecution, in terms of long-term prospects for sustainable peace and political reconciliation. The territorial or national State then has the right of protest against a bystander State's jurisdictional assertion, and the bystander State should defer to the former State if, after having consulted with relevant stakeholders (governments, victims groups, rebel groups, NGO's) and the International Criminal Court through the proposed judicial networks, prosecuting is indeed not in the global (or regional) interest. Of all the fields of law examined in this study, it is only in the field of core crimes against international law that the principle of subsidiarity has been explicitly relied upon, notably by courts and prosecutors in Spain and Germany. As far as the prosecution of core crimes is concerned, the principle of subsidiarity, which has been said to be inherent in the very concept of universal jurisdiction,[3982] may be crystallizing as a norm of customary international law.[3983]

III.6.2.b. Common crimes

1206. The subsidiarity principle may also apply to common crimes over which extraterritorial jurisdiction may be exercised under the accepted principles of criminal jurisdiction discussed in chapter 4 (active personality, passive personality, protective, and representational principle). While the asserting State may have a stronger interest in prosecuting offenders under these principles than under the universality principle, and while it has been argued that public international law does not prioritize the bases of jurisdiction,[3984] from a criminal policy perspective it is nevertheless arguable that the territorial State should enjoy primacy of jurisdiction, in light of its access to evidence and of *its* public order being violated to a greater extent than a foreign State's public order. Only if the territorial State fails to adequately prosecute the offender, should other States be allowed to step in, relying on the above-mentioned principles. The subsidiarity principle implies that, even if the offender is in custody of a non-territorial State, that State should extradite him or her to the territorial State, if at least it is able and willing to prosecute the offender. In exceptional circumstances, the non-territorial State may enjoy concurring primary jurisdiction with the territorial State, *e.g.*, in case of an offence committed *by* a national of the former State *against* a national of the former State (cumulative application of the active and passive personality principle). In general however, the territorial State should be entitled to legitimately oppose *any* assertion of jurisdiction by another State over an act committed within the territory of the former State, if at least the latter State is willing to adequately prosecute the act concerned, or if the act is not an offence under territorial law.[3985]

[3982] *See, e.g.*, A. SANCHEZ LEGIDO, "Spanish Practice in the Area of Universal Jurisdiction", 8 *Spanish Yb. Int'l L.* 17, 38, 41 (2001-02).
[3983] *See* chapter 10.11.3.
[3984] *See* chapter 4.6.
[3985] As demonstrated in the country study conducted in chapter 4, States ordinarily subject the exercise of extraterritorial criminal jurisdiction to a double criminality requirement. This reflects an *opinio juris*

III.6.2.c. Economic law

1207. In the field of economic law, the subsidiarity principle is not as straightforward a principle to apply as in the field of criminal law. Legitimate rights of protest are available on a wider scale there. Because harmful economic practices originating in one State do not violate *jus cogens*, other States that are not directly harmed by them are, in accordance with the first Grotian maxim cited *supra* and the harm test advanced in chapter 2,[3986] not entitled to exercise jurisdiction in the first place. Yet even States that *are*, one way or the other, harmed by these practices, do not have an absolute subsidiary right to exercise jurisdiction over them if the State with the strongest (territorial) nexus to the economic activity fails to deal with them. They should refrain from doing so when such is not in the interest of the international community. Unlike most common crimes, which are crimes anywhere and are thus globally despicable, economic activities may be harmful to one State, but at the same time beneficial to another, and even to the international community at large.[3987]

Relying on international interests is an important departure from classical jurisdictional theory, which delimits spheres of jurisdiction on the basis of State connections or interests, and solves normative competency conflicts on the basis of a formal balancing of such connections and interests. Under the principle advocated here, connections and interests are not the primary factors guiding the jurisdictional analysis. Instead, States are invited to ascertain whether regulation, or non-regulation, of a situation that has transnational repercussions, would be *in the global interest*. The State which has the strongest nexus to the case has the primary right to conduct the global interest analysis, yet if it does so disingenuously and replaces it with a *national* interest analysis, other States, with a somewhat weaker nexus to the case, are authorized to step in and exercise jurisdiction on a subsidiary basis.

III.6.2.d. Antitrust law

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that the exercise of jurisdiction over acts that are not offences in the territorial State is excessive. If States fail to respect the double criminality requirement and exercise 'subsidiary' extraterritorial jurisdiction over such acts, under the mistaken assumption that the territorial State is not able and willing to prosecute, the territorial State has a right of protest, because that State, and no other, enjoys primacy of jurisdiction to decide whether or not to criminalize conduct carried out in its territory. A more complicated question is whether the territorial State has also a right of protest if it decides, on a discretionary basis, *not* to prosecute conduct which it has criminalized. Usually, scarcity of prosecutorial resources explains a State's refusal to prosecute, so that protest against another State's willingness to commit resources will not arise. It may however happen that a decision not to prosecute is informed by criminal-political policies rather than by budgetary constraints. A State may for instance condone drug use even if its law on the books prohibits it. It may be argued that a foreign State could not legitimately invoke the principle of subsidiarity so as to prosecute one of its nationals who used drugs in the territory of the former State. If a State's decision not to deal with certain territorial acts appears reasonable to a rational mind, from the viewpoint of that State's own society, foreign States should not be allowed to second-guess it, for the territorial State is in that situation not *genuinely* unable or unwilling to investigate or prosecute the offence.

[3986] *See also* the harm test discussed chapter 2.2.3.

[3987] Serious economic crimes, such as antitrust conspiracies, may however surely be globally despicable. *See* as early as 1969: B. GOLDMAN, "Les champs d'application territoriale des lois sur la concurrence", 128 *R.C.A.D.I.* 631, 703 (1969-III). *See also* next footnote.

1208. In the field of antitrust law, according to this principle, cartel and merger activity ought to be condoned when such produces global economic benefits (an outcome which is more likely in the case of merger activity),[3988] and to be clamped down on when it does not. The State where the cartel has been formed or where the merging corporations are located may be said to have primary jurisdiction in this respect, because, under the first Grotian maxim, it is incumbent upon that State to ensure that offences taking place or originating in their territory are adequately dealt with. Other States, on whose economies the anticompetitive effects of foreign practices are felt, are authorized to prohibit these practices on a subsidiary basis if the territorial State fails to do so, by exercising 'extraterritorial' jurisdiction. States which do not sustain substantial injuries from purportedly harmful foreign practices do not have jurisdiction, because without harm there can be no legitimate jurisdiction. The State where the anticompetitive agreement was formed or where the merging corporations are (or one of them is) located, is authorized to protest against another State's jurisdictional assertion, but, in order to be effective, these protests should not be couched in terms of a desire to create a national champion in a particular industrial sector (unless the global economic benefits of the creation of such a champion outweigh the drawbacks) or a desire not to have its territorial sovereignty encroached upon by other States (for, as LOWENFELD argued, "talk of "sovereignty" clouds, it does not illuminate").[3989] It may be noted that an acceptable defense could be a State's credible offer to commence investigations and enforce competition law locally.[3990]

III.6.2.e. Securities law

1209. In the field of securities fraud, the State of the stock exchange on which the securities are traded ordinarily enjoys primary jurisdiction, because the impact of securities fraud is likely to be the strongest in that State, and national

[3988] It is, doubtless, unlikely that hard-core cartels will produce global economic effects. *See* H.L. BUXBAUM, "Transnational Regulatory Litigation", 46 *Va. J. Int'l L.* 251, 300 (2006) (noting that "a shared view emerges on the question of [the desirability of punishing] hard-core price-fixing"). Yet it has also been argued that other antitrust violations are *per se* internationally undesirable and should thus be internationally illegal. *See* U. DRAETTA, "Need for Better Trans-atlantic Co-operation in the field of Merger Control", *Revue de droit des affaires internationales* 557, 566 (2002) (stating that "antitrust behavior, where global in nature, should not be treated differently than other kinds of global illegal conduct (environmental crimes, drug trafficking, international corruption, insider trading, money laundering, etc.)"). For our analysis, this may imply that a State who has primary jurisdiction over restrictive business practices could not legitimately protest against other States' exercise of subsidiary jurisdiction over such practices, if it has been proved that the former State was genuinely unable and unwilling to clamp down on the practices.

[3989] A.F. LOWENFELD, "International Litigation and the Quest for Reasonableness", 245 *R.C.A.D.I* 9, 307 (1994-I). In economic law, almost any jurisdictional assertion could be indeed be justified under the territorial principle, the bedrock of the sovereignty concept. *See* P.J. KUYPER, "The European Community and the U.S. Pipeline Embargo: Comments on Comments", *G.Y.I.L.* 72, 93 (1984). *See also* D.W. Jackson, "Sovereignty, Transnational Constraints, and Universal Criminal Jurisdiction", in M.L. VOLCANSEK & J.F. STACK, Jr. (eds.), *Courts Crossing Borders: Blurring the Lines of Sovereignty*, Durham, NC, Carolina Academia Press, 2005, 159 ("[Sovereignty] is a fickle world whose meanings most often have been socially constructed for instrumental purposes.").

[3990] *See also* H.L. BUXBAUM, "Transnational Regulatory Litigation", 46 *Va. J. Int'l L.* 251, 316 (2006) ("Having objected to U.S. litigation on the basis of conflicts with its own regulatory scheme … a foreign country might be less willing to leave the conduct unregulated. Thus, even if the claims of certain foreign purchasers were not ultimately litigated in U.S. court, their filing could potentially highlight the local enforcement of internationally shared standards of conduct and thereby improve global regulation overall.").

financial regulators monitor their own territorial financial markets more intensively than foreign markets. The States where the effects of the fraud are felt, where the conduct takes place, or whose nationals were involved in the fraud, enjoy subsidiary jurisdiction, *i.e.*, jurisdiction that only obtains if the State where the relevant stock exchange is located fails to adequately deal with the fraudulent transaction. As has been argued in chapter 7.3.5, the latter States may exceptionally enjoy primary jurisdiction if they are able to make the case that the fraudulent securities transaction has stronger effects on them than on the State of the stock exchange.

If the exchange-based system to jurisdiction is applied to securities registration and corporate governance regulation, this might imply that States have primary jurisdiction to set rules for issuers, including foreign issuers, listed on a stock exchange located in their territory, and their public accounting firms, including foreign such firms, since it is in the interest of investors trading securities on this exchange to have full and fair disclosure of the corporate situation of *any* issuer, whether domestic or foreign. However, foreign issuers are typically already listed on a stock exchange in their home State, and have, accordingly, already to comply with home country regulations. In this situation, in view of the nexus of both incorporation and listing, the foreign State should enjoy primary jurisdiction. The State on whose stock-exchange the securities are cross-listed enjoys subsidiary jurisdiction: it should only impose burdens on foreign corporations if the foreign State is unable or unwilling to adequately regulate them. That the foreign State does not have the same regulations is not a sufficient argument for a State to apply its own laws indiscriminately. Only if the regulatory protective purpose (*Schutzzweck*) could not be met through reliance on home country regulation should it step in. At the same time however, the State asserting its jurisdiction should ascertain whether its high level of regulation is from a global perspective actually justified, and in particular whether other, more deregulated systems could not achieve the same level of capital market integrity. Less far-reaching disclosure, internal controls, and auditor independence do, in terms of evilness, surely not measure up to such practices as fraudulent securities transactions and hard-core cartels that no State could reasonably condone. Rational States could reasonably differ over the number of reports that issuers should annually file, the number of independent directors which issuers should have, and whether and what activities beyond their core audit activities auditors should be authorized to perform. States should therefore be very circumspect in exercising subsidiary jurisdiction in the field of securities registration and corporate governance. They should only do so when a foreign corporation is blatantly underregulated in its home State. Encouragingly and rightly so, foreign corporations have in recent times been granted wide-ranging exemptions from U.S. and EC securities and corporate governance regulations.

III.6.2.f. Secondary boycotts

1210. As far as boycott legislation is concerned, every State has the primary and arguably exclusive right to decide on whether are not to impose an economic embargo on a foreign State. A third State does not have jurisdiction to impose a secondary boycott that requires corporations of the former State to comply with the boycott laws of the latter. Subsidiarity does not come into play here, because a State's decision not to impose sanctions against another State (on the grounds that that State's isolation is not desirable or that sanctions are not a useful tool to pressure it into

adapting its behaviour) constitutes a legitimate decision of a State which another State is not entitled to second-guess. Only when the Security Council adopts a resolution under Chapter VII of the UN Charter may States be required to comply with a boycott regime. Secondary boycotts are acceptable only in the exceptional situation of a major security threat being posed by State X against State Y, with third States shipping goods to State X that considerably strengthen its military capabilities. This situation is likely to arise only in times of war or quasi-war,[3991] and not in peace time.

III.6.2.g. Extraterritorial discovery

1211. In the field of transnational evidence-taking, the State where the documents or witnesses are located has the primary right to decide whether these documents will be produced, or witnesses deposed, for use in a foreign proceeding. Yet, in accordance with the first Grotian maxim, they should not allow their territory to be used as a safe haven where wrongdoers could hide their materials from foreign courts and regulators. States should therefore honour other States' reasonable requests for judicial cooperation. They are authorized to reject such requests if their content reflects a particular State's idiosyncratic views on how evidence should be produced by the parties to a dispute. States could thus reject too broadly framed judicial assistance requests, such as requests for the production of materials which most States do not consider as relevant for the solution of the underlying dispute ('fishing expeditions'). If the requested State is however unable and unwilling to cooperate with reasonable requests by the requesting State, the latter State is entitled to exercise jurisdiction on a subsidiary basis by unilaterally ordering discovery from a person over whom it could establish personal jurisdiction.

III.6.3. From nexus to international interests

1212. Enlightened international lawyers have traditionally argued that jurisdictional conflicts ought to be solved by attaching a legal situation to the State with the strongest nexus to that situation.[3992] They deemed it irrelevant whether the State with that nexus had a legitimate reason to apply or not to apply its laws to that situation. As soon as the nexus requirement was met, the chosen State could regulate, or not regulate, at will. Underlying this theory was the view that the international community has no interest in ensuring that the ideal level of international regulation, beneficial to the common good, is achieved, or that perpetrators of serious offences are brought to justice. In this study, the importance of the nexus factor has been recognized. However, it has been argued that States should not be allowed to hide behind the nexus veil by allowing activities that harm the interests of other States or the international community. It has been proposed to lift that veil if the State with the strongest nexus to the case is unable or unwilling to adequately deal with an internationally or transnationally relevant situation. In the absence of a global regulator, other States that are harmed by that situation should be entitled to

[3991] *See, e.g.*, Section 5(b) of the Trading with the Enemy Act of 1917, 40 Stat. 411. U.S. Treasury Public Circulary No. 18, March 30, 1942, 7 Fed. Reg. 2503 (April 1, 1942) (U.S. Treasury including at the height of the Second World War in the category "persons subject to the jurisdiction of the United States" set forth in the Trading with the Enemy Act of 1917 "any corporation or other entity, wherever organized or doing business, owned or controlled by [U.S.] persons.").

[3992] The rule of reason enshrined in Section 403 of the U.S. Restatement of Foreign Relations Law discussed in chapter 5 was exactly aimed at doing so.

subsidiarily exercise jurisdiction in the interest of the international community.[3993] Unilateral jurisdiction then in fact becomes an internationally cooperative exercise, with States stepping in where other States unjustifiably fail to establish their jurisdiction.[3994]

1213. TOWARDS SUBSIDIARY JURISDICTION – Obviously, current State practice may sometimes be a far cry from these theoretical musings. Yet in several fields of the law, there is undeniably a process under way that increasingly emphasizes subsidiarity. This is clearest in the field of gross human rights violations. In Europe, prosecutors and courts tend to limit their assertions of universal criminal jurisdiction over such violations when foreign States are able and willing to investigate and prosecute. In the United States, federal courts exercising universal tort jurisdiction under the Alien Tort Statute over these violations defer to another State when that State provides an alternative and adequate forum (*forum non conveniens* analysis). Yet even in antitrust law, where hard and fast rules of jurisdiction have always proved so elusive, change is noticeable. For one, the 1998 transatlantic comity agreement on antitrust enforcement cooperation sets forth that a party may ask the other party to clamp down on a particular businesses restrictive practice (positive comity),[3995] it being understood that the one party could subsidiarily exercise its jurisdiction if the other fails to genuinely investigate and prosecute the practice. For another, there is a lively discussion going on in the United States now, in the aftermath of the U.S. Supreme Court's decision in the 2004 *Empagran* case, relating to the question whether, from a global antitrust deterrence perspective, the United States should not have a right or duty to dismantle foreign-based hardcore cartels producing global, including U.S., harm, when States with a stronger nexus to the cartels do not muster the resources or willingness to do so.[3996]

1214. SOLVING THE JURISDICTIONAL CONUNDRUM – Taking the insights of the last two subsections together, one arrives at what may be this study's main recommendation to solve the conundrum of jurisdiction. As far as possible, States should seek and take into account comments by relevant foreign actors on their proposed jurisdictional assertions. Yet *heeding* foreign concerns should not be synonymous with *deferring* to foreign concerns. The modern law of jurisdiction may

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[3993] Core crimes against international law may be considered to violate *erga omnes* obligations. Any State may therefore said to be harmed by such violations, and thus to have an interest in prosecuting them. *See* chapter 10.1.

[3994] Unilateral jurisdiction may not only become cooperative on the basis of a customary international law subsidiarity principle, but also on the basis of treaties (*e.g.*, the anti-terrorism treaties providing for universal jurisdiction under an *aut dedere aut judicare* clause). In addition, a plaintiff alleging harm sustained abroad could legitimately choose an 'extraterritorial' forum to bring his claim because of his residence in that State or his familiarity with applicable law, at least if the foreign forum could secure personal jurisdiction over the defendant. The reach of that State's laws need not undermine the protective policies underlying the territorial State's laws, because if the foreign forum were not available, the plaintiff may possibly not have brought a suit at all. This would not have furthered the regulatory interests of the territorial State. *Compare* G.B. BORN, "A Reappraisal of the Extraterritorial Reach of U.S. Law", 24 *Law & Pol. Int'l Bus.* 1, 77 (1992) (pointing out that the Supreme Court's decision in *Aramco*, which confined Title VII of the Civil Rights Act of 1964 to U.S. territory, "arguably detracted from the efficacy of Saudi Arabia's own prohibitions against employment discrimination, which Boureslan [the plaintiff in the case] likely could not effectively invoke once he had been forced to return to the United States.").

[3995] Article III of the 1998 Positive Comity Agreement. *See* chapter 6.8.

[3996] *See* chapter 6.10.2.

have put too heavy an emphasis on techniques of jurisdictional *restraint*, and may have cast legitimate assertions of jurisdiction in a negative light. This is not to say that a return to the almost unfettered jurisdictional discretion of *Lotus* is apt. It is certainly not, primarily because the *Lotus* holding was informed by considerations of State sovereignty: requiring States to restrain their jurisdictional assertions was considered to be an unwarranted assault on their sovereign prerogatives.[3997] This study recognizes the importance of sovereignty in international law, yet it advocates a jurisdictional system in which the interests of the *international community*, and not of single 'sovereign' States, become center-stage. In the absence of an internationally centralized law enforcer, States should be entitled to exercise *subsidiary* 'extraterritorial' jurisdiction over situations which other States, with a greater nexus to them, fail to adequately deal with.

III.7. A transatlantic gap over jurisdiction

1215. U.S.-EU PERSPECTIVE – This study has taken a particular interest in examining different attitudes toward jurisdiction across the Atlantic. This final part has so far devoted its attention to developing a new general theory of jurisdiction. Reference has been made to differences between the United States and Europe as to the exercise of jurisdiction. Yet, obviously, this study, in light of one of its main research purposes, could not do without a systematic overview an either real or imaginary transatlantic gap over jurisdiction. Presenting this overview is what will be attempted in this subsection.

1216. U.S. PREDOMINANCE – It has been a starting thesis that the United States is more of a jurisdictional bully, if one could say so, than Europe.[3998] Throughout this study, the thesis that the U.S. tends to exercise jurisdiction without due regard for foreign nations' concerns, has been largely vindicated. Two chapters, on secondary boycotts (chapter 8) and extraterritorial discovery (chapter 9), have even been wholly devoted to U.S. jurisdictional assertions, with the European position on the issue being merely cast in terms of opposition against U.S. jurisdiction. Yet in the other chapters as well, attention has been devoted disproportionately to U.S. practice (with the notable exception of universal criminal jurisdiction) – with Europe playing second fiddle as far as engaging itself in 'extraterritorial' jurisdiction is concerned, and often being reduced to objecting to U.S. jurisdictional assertions (in the field of antitrust law in particular).

The question ineluctably arises why it is that the United States has been so active in exercising jurisdiction over foreign situations, especially in the field of economic law. After all, the United States is a common law country and inherited upon gaining independence in the late 18th century an English legal practice which was outright hostile to geographically expanding the ambit of the law beyond a State's boundaries. It will be argued in this subsection that it was primarily the development of a truly international economy that caused the U.S. in the mid-20th century to shed the constraints imposed on it by its English heritage (part III.7.1), a heritage which proved, at the European level, surprisingly influential regarding the 'extraterritorial' application of EC competition law until the late 20th century (part III.7.2). The scope

[3997] *See* chapter 2.1.
[3998] *See* chapter 1.2.

ratione loci of EC competition law may nowadays be quite similar to the scope of U.S. antitrust law. Still, the U.S. remains at the forefront of the expansion of the reach of economic laws, primarily because strict economic regulation is so much emphasized in the United States. The application of the 2002 U.S. Sarbanes-Oxley corporate governance law to European issuers and their auditors may serve to illustrate this.[3999] One is tempted to believe that the U.S. considers its jurisdictional assertions to be justified on the ground that the underlying substantive economic laws are exceptionally good (part III.7.3). U.S. exceptionalism may also explain the U.S. attitude toward the universal prosecution of core crimes against international law, which most European States believe is a moral imperative, but which the U.S. is not particularly supportive of. It will be shown how the reach of a State's universality laws is not a function of the restraint posed or latitude granted by public international law, but rather by substantive policy choices (part III.7.4).

III.7.1. Shedding common law restrictions on the exercise of economic jurisdiction in the United States

1217. In sections 3.1 and 3.2, it has been demonstrated how the law of jurisdiction developed historically along different lines. In continental Europe, territoriality only became the main principle of jurisdictional order in the 18th century, although exceptions to it, mainly based on the personality principle, were, and still are, rife. In contrast, it was very early in English legal history, in the Middle Ages, that territoriality obtained an almost unassailable status as the bedrock principle of jurisdiction, to which exceptions should not be allowed, for reasons related to English judicial organization (the jury system and the law of evidence). As of today, there are few possibilities to exercise jurisdiction over foreign situations under English law. The ambit of U.S. criminal law is, like the ambit of English criminal law and in line with the system of U.S. judicial organization (which is largely based on the English system), fairly modest as well. Compared to continental Europe, there are few possibilities for exercising nationality-based, protective, representative, or universal jurisdiction in the U.S.

1218. However, jurisdiction was historically almost exclusively studied in a criminal law context, and not in an economic context. The U.S. has precisely expanded the ambit of its *economic* laws. The reach of a State's civil laws was studied throughout history, but in the context of conflict of laws (private international law) rather than of international jurisdiction.[4000] Economic law, which is a mix of both

[3999] *See* chapter 7.6.

[4000] *See* 3.1 on the doctrine of the Italian statutists, and the comity doctrine (*see also* 5.1) as proposed by Ulrik HUBER, which were mainly concerned with justifying how the territorial State could give effect to another State's laws in its territory. HUBER's comity doctrine was later however rediscovered as a tool of jurisdictional restraint, especially in the field of U.S. economic law. It was argued that the asserting State should take the interests of other States into account when promoting its interests extraterritorially. *See* chapter 5 (jurisdictional rule of reason).
Some 20th century commentators stated that international law only poses limits to the reach of a State's criminal laws, but not to the reach of a State's *civil* laws. *See* G. FITZMAURICE, "The General Principles of International Law", 92 *R.C.A.D.I.* 1, 218 (1957-II) (arguing that "public international law does not effect any delimitation of spheres of competence in the civil sphere, and seems to leave the matter entirely to private international law – that is to say in effect to the States themselves for determination, each in accordance with its own internal law"); M. AKEHURST, "Jurisdiction in International Law", 46 *B.Y.I.L.* 145, 172 (1972-73) ("It is hard to resist the conclusions that … customary international law imposes no limits on the jurisdiction of municipal courts in civil trials.").

private (civil) and public (regulatory) law, has historically not been studied at all, because it only came into being in the late 19th century, during the second Industrial Revolution. Because of the different challenges presented by the rapid development of the national, and later international, economy, solutions to jurisdictional questions arisen in a different time and in a different context were seen as unsatisfactory. In the 20th century, the U.S. economy was seen as under threat from foreign business restrictive practices and foreign securities fraud, and courts, often in purely private disputes, duly applied U.S. antitrust and securities laws to foreign situations.

From a legal perspective, although it required a stretch, U.S. jurisdictional assertions were justified under the objective (or at times subjective) territorial principle. Throughout the 19th century, U.S. courts had explored the jurisdictional possibilities of this principle in a criminal law context, because territoriality was the only principle under which a jurisdictional assertion could be justified.[4001] In the 20th century, it was argued that U.S. jurisdiction over foreign antitrust violations and securities fraud that had a territorial impact (effect) in the United States could be justified under the objective territorial principle, and that U.S. jurisdiction over U.S. securities fraud (conduct) that caused effects abroad could be justified under the subjective territorial principle. The implicit assumption was that preying on foreign economic markets was conceptually not very different from the textbook criminal law situation of a man shooting a gun across a frontier.[4002]

III.7.2. Shedding common law restrictions on the exercise of antitrust jurisdiction in Europe

1219. Remarkably, the evolution toward applying the objective territorial principle in international economic law, antitrust law in particular, did not occur in England, as much a common law country as the United States. In subsection 3.4.1 it has been shown how England stuck rigidly, until the late 20th century, to a conduct-based, and later terminatory, approach to (criminal) jurisdiction, pursuant to which English jurisdiction only obtains when the criminal conduct takes place in England. Because the territorial economic effects of a foreign antitrust violation did not qualify as territorial conduct, effects-based antitrust jurisdiction failed to take roots in England, and led to fierce conflicts with the United States. What is more, because of the influence that England was able to wield over the formation of extraterritorial jurisdiction in EC competition matters, the English view on jurisdiction came to represent the European view, sidelining more progressive views held for instance in Germany.[4003]

1220. In the seminal *Dyestuffs* case, a cartel case which reached the European Court of Justice in 1972, in which ICI, an English corporation, numbered among the defendants, the United Kingdom, at that time not yet an EU Member State filed an *Aide Mémoire* with the European Commission, rejecting the Commission's effects-based jurisdictional assertions over ICI as incompatible with public international

[4001] *See* chapter 3.4.1 and 3.4.2.
[4002] *See however* D. EDWARD, "The Practice of the Community Institutions in Relation to Extraterritorial Application of EEC Competition Law", in R. BIEBER & G. RESS (eds.), *The Dynamics of EC Law*, Baden-Baden, Nomos, 1987, 355, 356.
[4003] German antitrust law provides for effects-based jurisdiction since 1957 (*Auswirkungsprinzip*). *See* chapter 6.5.1

law.[4004] The *Aide Mémoire* was instrumental in persuading the ECJ (but not the Advocate General) not to apply the effects doctrine to the *Dyestuffs* case. Instead, the Court applied the rather uncontroversial economic entity doctrine, a doctrine long known in corporate law, under which the restrictive acts of ICI's EC-based subsidiary were imputed to ICI itself. When the ambit of EC competition law came again before the ECJ in *Wood Pulp* (1988), a case in which the cartelists had no EC subsidiaries, the United Kingdom was again able to influence the decision, albeit less openly. Heeding English concerns, the ECJ, unlike the Advocate General, did not apply the effects doctrine to the case – a doctrine which was anathema to the English law of jurisdiction – but the implementation doctrine.[4005] Using this doctrine, the ECJ brought the jurisdictionally relevant *conduct* inside the Community, holding that by selling directly into the Community, the cartel agreement was *implemented* inside the Community, and did not merely cause *effects* there. The implementation doctrine, while being a novelty in EC law, has undeniably its roots in England, where an English court held as early as 1876, in the case of *Regina* v. *Keyn*, that not the locus of the effects, but the locus of the criminal act itself was decisive for purposes of jurisdiction.[4006]

1221. In practice, the reach of EC competition law nowadays hardly differs from the reach of U.S. antitrust law. The ECJ's implementation doctrine has been considered to be almost co-terminous with the effects doctrine, and the European Commission itself relies on the effects doctrine, as it had already done in *Dyestuffs*. In the field of international merger control, effects jurisdiction was eventually approved of by the European Court of First Instance in the *Gencor* merger case (1999). Like the U.S. Department of Justice, the Commission appears to apply the comity principle and thus to defer to other nations if their regulatory interests are stronger. And like the U.S. Supreme Court in *Hartford Fire Insurance* (1993), the highest EU courts have seemingly limited the comity analysis to an analysis of foreign sovereign compulsion (deferring only when a foreign State compels a particular conduct which EC competition law prohibits, or *vice versa*).[4007] Possibly, the initial reluctance to embrace the U.S.–style jurisdictional notions was only partly informed by English objections, and mainly by the fact that aggressive (international) antitrust enforcement did not have priority in Europe. Nonetheless, it should not be forgotten that, since the late 1960s, the European Commission has survived all legal challenges to its claiming jurisdiction over foreign conspirators. There is no evidence that the EC has considered itself to be shackled by such presumably restrictive court doctrines as the economic entity and implementation doctrines.

[4004] *Aide Mémoire* of the United Kingdom Government, October 20, 1969, on the *Dyestuffs* case, reprinted as Annex B to the *Report of the Committee on Extraterritorial Application of Restrictive Trade Legislation*, International Law Association, Report of the Fifty-Fourth Conference 184, 185-86 (1970) ("The Commission will be aware that certain claims to exercise extra-territorial jurisdiction in antitrust proceedings have given rise to serious and continuing disputes between Western European Governments (including the Governments of some EEC member-states) and the United States Government, inasmuch as these claims have been based on grounds which the Western European Governments consider to be unsupported by public international law.").

[4005] See L. IDOT, Note *Wood Pulp, Rev. trim. dr. europ.* 345, 359 (1989) ("D'une prudence peut-être trop excessive, [the ECJ] a évité de prendre parti sur la "théorie des effects" que seul le gouvernement britannique persiste à combattre.").

[4006] L.R. 2 Ex. Div. 63 (1876). *See* chapter 3.4.1.

[4007] *See* chapters 5.5 and 6.7.

III.7.3. U.S. exceptionalism and strict economic regulation

1222. It has been shown that it took some time before Europe applied its competition laws to foreign situations affecting its economy. This is attributable to the lesser importance that stringent competition laws and policy may have had in Europe[4008] rather than to a belief that effects-based jurisdiction was illegal under international law, or to a perception that in a world dominated by the United States, Europe could not get away with exercising such jurisdiction. This, the lack of interest in strict economic regulation or enforcement, is also apparent in the field of securities and corporate governance. The unique importance of capital market regulation in the United States may indeed go a long way in explaining why the arm of U.S. securities laws has been much longer than the arm of European securities laws.[4009] Because European securities law was historically underdeveloped, there was not much of an arm that could be stretched. The prohibition of insider-trading only became a priority in the 1980s, and binding corporate governance rules are still being introduced as we write. In the U.S., strict capital market regulation harks back to the Great Depression, during which the 1933 Securities Act and the 1934 Securities Exchange Act were adopted by Congress. In 1968, the antifraud provisions of these acts were for the first time given extraterritorial application by the Second Circuit (which ruled that jurisdiction obtained over foreign securities transactions that affected U.S. investors).[4010] It remains to be seen whether Europe will follow suit. Theoretically, there are fairly wide legal possibilities for exercising jurisdiction over cross-border securities misrepresentation and insider-trading,[4011] yet there is hardly any European enforcement practice on the issue. In sum, in much of economic regulation, the U.S. could be seen as an "early mover", and the efficiency of U.S. economic regulation inspired – and still inspires – other States to follow suit sooner or later.[4012]

1223. Only as far as U.S.-imposed secondary boycotts are concerned have U.S. assertions of extraterritorial economic jurisdiction been informed by bare-knuckle power politics – with the attendant failure of such boycotts. In the field of antitrust and securities law, buttressed by the law of discovery, by contrast, the transatlantic gap over jurisdiction might be explained by different transatlantic attitudes to economic regulation rather than to the workings of power. At the

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[4008] *See, e.g.*, B. GROSSFELD & C.P. ROGERS, "A Shared Values Approach to Jurisdictional Conflicts in International Economic Law", 32 *I.C.L.Q.* 931 (1983).

[4009] Conversely, the importance of labor legislation in continental Europe could logically inform the longer arm of European labor law. In 1980, EC Commissioner Vredeling indeed unveiled a plan pursuant to which the management of a foreign parent would have to furnish each of its EC subsidiaries with advance notice of certain decisions, in the interests of EC employees. In the mid-1980s, the plan was abandoned. In 1994, a more modest directive – the European Works Council Directive 94/95, *O.J.* L 254/64 (1994) – was adopted. However, also in the field of company law did the EC plan in the early 1980s to issue rules with a certain extraterritorial effect, namely rules requiring the publication of consolidated financial statements that would reveal non-European activities. This plan prompted the proposal of a U.S. bill which declared the disclosure of business secrets to be "inconsistent with international law and comity". H.R. 4339, 97th Cong., 1st Sess. (1981), and S. 1592, 97th Cong., 1st Sess. (1981). *See* D.F. VAGTS, "A Turnabout in Extraterritoriality", 76 *A.J.I.L.* 591 (1982)

[4010] *Schoenbaum* v. *Firstbrook*, 405 F.2d 200 (2d Cir. 1968).

[4011] *See* chapters 7.2.1 and 7.2.3.

[4012] See with respect to the Sarbanes-Oxley Act: E. TAFARA, "Sarbanes-Oxley: a Race to the Top", *IFLR* 12, 13 (September 2006) ("The U.S. was merely an early mover with respect to a series of gaps that began to appear in the protections to investors provided by various global regulatory frameworks.").

international level, this translated in the United States having traditionally had little confidence in foreign regulation of situations that implicated substantial U.S. interests, and thus applying its laws to such situations. This attitude betrays a certain U.S. economic exceptionalism, a lingering belief that U.S. economic regulation, perceived as tighter, is necessarily better than foreign regulation, perceived as laxer.[4013] U.S. exceptionalism was in due course often vindicated by foreign nations' adoption of economic standards similar to U.S. standards.[4014] If power had a role to play in this respect, it was mainly as 'soft power', or the global attractiveness of the U.S. capitalist model.[4015] Interestingly, because global harmonization of substantive economic law, modelled on U.S. standards, may have been the ultimate goal of U.S. jurisdictional assertions,[4016] extraterritoriality was allowed to override objections relating to the accompanying temporary stemming of the free movement of goods and services,[4017] which is the heart of capitalism, and has traditionally been cherished by U.S. liberal internationalists as a prerequisite for the world's overall progress.

III.7.4. The transatlantic gap over international criminal justice

1224. U.S. exceptionalism is not only limited to economic regulation. The United States tends to regard itself as an exceptional nation in all respects, or in John WINTHROP's famous words, as "a city upon a hill".[4018] The U.S. is therefore unlikely to accept the extraterritorial application of other States' "bad laws". As noted in part III.3, the United States has not been hindered by such "bad laws" in the economic field, because the level of economic regulation abroad is lower than in the United States, and the extraterritorial application of such regulation by foreign States would thus have served no purpose. Outside the economic field, there are however "bad laws out there" that are potentially stricter than U.S. laws and thus pose a threat to U.S.

[4013] *Contra* U.S. antitrust exceptionalism in the field of antitrust law, *see e.g.*, I. SEIDL-HOHENVELDERN, "Völkerrechtliche Grenzen bei der Anwendung des Kartellrechts", 17 *A.W.D.* 53, 57 (1971).

[4014] It has been argued that, in European competition law, this happened when the ECJ rendered its *Dyestuffs* judgment in 1973. *See* on this decision chapter 6.4.2. *See* J. ULLMER BAILLY, Comment on *Dyestuffs*, 14 *Harv. Int'l L.J.* 621, 630 (1973) ("The Court's articulation of the issues in terms of economic policies and its use of concepts developed under American antitrust law may well be pointing in the direction taken by the United States, which has traditionally accorded national priority to its competition policy … but there remains a definite question of how far the Court will go in its support of the toughening stance taken by the Commission in its admittedly American-influenced campaing against anticompetitive behavior in the EEC.") (footnotes omitted).

[4015] *See* on soft power: J.S. NYE *jr.*, *Soft Power: The Means to Success in World Politics*, New York, NY, PublicAffairs, 2004, xvi + 191 p.

[4016] *See* W.S. DODGE, "Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism", 39 *Harv. Int'l L.J.* 101 (1998) (arguing that unilateral jurisdiction grants the U.S. the bargaining chips during multilateral negotiations).

[4017] Foreign economic actors will tend to avoid commercial intercourse with the U.S. or U.S. actors for fear of becoming subject to U.S. laws. This has particularly happened in the field of securities law, where U.S. investors are routinely excluded from foreign offerings. It has *inter alia* informed the adoption of Regulation S by the SEC in 1990. *See* 7.3.2 and 7.6.1. *See* for a European voice fearing a hampering of trade liberalization through extraterritorial jurisdiction: J. FRISINGER, "Die Anwendung des EWG-Wettbewerbsrechts auf Unternehmen mit Sitz in Drittstaaten", *A.W.D.* 553, 559 (1972) (stating dass "eine weitgehende extraterritoriale Anwendung und Durchsetzung des EWG-Wettbewerbsrechts weder mit den Grundsätzen des Völkerrechts *noch mit der sich entwickelnden Liberalisierung des Welthandels vereinbare ware*.") (emphasis added).

[4018] *See* on the influence of John Winthrop, the first (Puritan) governor of Massachusetts in the 17th century and 'America's first great man': E.S. MORGAN, *The Genuine Article*, New York, W.W. Norton & Company, 2004, pp. 5 *et seq.*

interests. This is notably the case in the field of universal jurisdiction over core crimes against international law, as exercised by European States since the late 1990s. Although these crimes are generally also crimes under U.S. law, they are hardly or not amenable to universal criminal jurisdiction in the United States.[4019]

1225. An easy explanation for U.S. reluctance to espouse universal jurisdiction is that the common law system of criminal procedure does not lend itself to the exercise of extraterritorial jurisdiction. Yet since the United Kingdom started to exercise universal jurisdiction over torture, and the United States itself has exercised universal jurisdiction over terrorist offences, this argument has become less persuasive. U.S. opposition against universal jurisdiction may now be mainly informed by foreign policy considerations, in particular the belief that exercising jurisdiction may encourage other States to bring U.S. nationals, particularly U.S. service-members, before their own courts, and the belief that an international criminal justice may impede the chances of success of long-term political reconciliation in post-conflict societies.[4020] Because universal jurisdiction over core crimes misunderstands "the appropriate roles of force, diplomacy, and power in the world", it has therefore been described as "not just bad analysis, but bad and potentially dangerous policy,"[4021] which the United States should vehemently oppose. (U.S.) power may thus play a considerable role in the field of universal criminal jurisdiction over core crimes. It goes a long way in explaining why Belgium repealed its progressive law concerning the prosecution of these crimes in August 2003,[4022] and why German prosecutors have treaded lightly when applying their Code of Crimes against International Law.[4023]

1226. In the final analysis, the transatlantic gap over universal jurisdiction over core crimes may, like the gap over economic jurisdiction, be explicable on grounds of substantive law and policy rather than on grounds of international law. Where the long arm of U.S. antitrust, securities and discovery law, is a logical outgrowth of the U.S. emphasis laid on strict antitrust and capital markets regulation, and on maximum disclosure of evidence, the long arm of European universal jurisdiction laws is a logical outgrowth of the idea that criminal justice, even dispensed by bystander States, may be uniquely important in ensuring post-conflict reconciliation.[4024] European experience with two disastrous world wars, and with the

[4019] *See* chapter 10.10.
[4020] *See* chapter 10.11.2.
[4021] *See* J.R. BOLTON, "The Risks and Weaknesses of the International Criminal Court from America's Perspective", 64 *Law & Contemp. Probs.* 167, 175 (2001). BOLTON's observations applied in particular to the International Criminal Court, but could be applied to international criminal justice in general, including universal jurisdiction. *See* chapter 10.10.4.
[4022] *See* chapter 10.4.
[4023] *See* chapter 10.2.
[4024] European support for (international) criminal justice in post-conflict situations may have historical roots in European countries' dealings with conflicts that occurred on their own territory. Especially after the Second World War, quite some European countries were eager to prosecute those who collaborated with the German occupier. *See, e.g.*, for repression in Belgium: L. HUYSE, S. DHONT, P. DEPUYDT, K. HOFLACK, I. VANHOREN, *Onverwerkt verleden. Collaboratie en repressie in België 1942-1952*, Leuven, Kritak, 1991, 312 p. The United States, by contrast, seems not to have put a high premium on criminal justice in conflicts that took place within their territory. After the Civil War (1861-1865), for instance, traitors or war criminals were hardly prosecuted, because such would not have served politicial reconciliation, and would have hampered the ravaged country's reconstruction. Amnesties were offered to Confederate citizens by the Confiscation Act of 1862, and by the Amnesty

recent Balkan wars, have surely fuelled European States' conviction that basic human rights should be strictly upheld, and that European States have a historical calling to ensure that human rights standards are also enforced overseas.

1227. Like in Europe, human rights are an important aspect of how foreign policy is shaped in the United States. What is more, the United States tends to portray itself as an exceptional nation in which the pursuit of happiness is a function of human rights, democracy, and freedom. Like, as argued in part III.7.3, it has been a U.S. goal to spread U.S. concepts of economic freedom through extraterritorial jurisdiction, it has also long since been a stated goal of U.S. foreign policy to promote human rights in foreign nations through a variety of sticks and carrots,[4025] including the exercise of universal tort jurisdiction under the Alien Tort Statute (ATS).[4026] Yet, unlike Europe, the U.S. political branches may put a higher premium on local justice mechanisms to deal with local human rights violations. In addition, U.S. human rights policy is probably more Janus-faced than European policy is, with *Realpolitische* foreign policy concerns at times overriding lofty human rights goals. The recent torture memos and the Guantanamo Bay scandal are only the latest illustrations thereof. In the field of jurisdiction, the George W. Bush Administration has spared no effort to discredit ATS litigation in the United States – which for reasons related to the procedural advantages of U.S. tort law *vis-à-vis* European tort law sprang up there, and not in Europe –[4027] on the grounds that it might jeopardize the foreign policy prerogative of the executive branch and may expose U.S. service-members to jurisdictional countermeasures.[4028]

III.8. Final concluding remarks

1228. This study has started with a quote by Professor MEESSEN: "The function of scholars of international law offers less opportunity for creative thinking

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Proclamation of December 8, 1863. After Confederate General Lee surrendered on April 9, 1865, a stipulation allowed his man and officers "to return to their homes, not to be disturbed by United States authority so long as they observe their paroles and the laws in force where they may reside." On May 29, 1865, the President granted amnesty to those who would take an oath of allegiance. High-ranking Confederate officers had to apply for individual pardons, but these were liberally granted. To cap it all, the Congressional Amnesty Act of May 1872 allowed Southern leaders to hold office again. *See also* S. KUTLER, *Judicial Power and Reconstruction Politics*, Chicago, University of Chicago Press, 1968. It remains nevertheless to be seen whether the amnesties granted during the Civil War and post-Civil War Reconstruction Era foreshadowed the United States' 21st century misgivings about international criminal justice. *See* email conversation with Mark Freeman, Head of Office, International Center for Transitional Justice Brussels, September 3, 2006.

[4025] *See* M. IGNATIEFF (ed.), *American Exceptionalism and Human Rights*, Princeton, Princeton University Press, 2005, 353 p. A foreign human rights policy is developed by the U.S. State Department's Bureau on Democracy, Human Rights and Labor, which oversees the Human Rights and Democracy Fund. *See* http://www.state.gov/g/drl/democ.

[4026] *See* Memorandum for the United States Submitted to the Court of Appeals for the Second Circuit, *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), published in 19 *I.L.M.* 585, 603-04 (1980) (stating that "a refusal to recognize a private cause of action in these circumstances might seriously damage the credibility of our nation's commitment to the protection of human rights.")

[4027] *See* chapter 11.4.

[4028] *See* chapter 11.2.3.1. It has also been argued, in line with the liberal internationalist agenda of the United States mentioned *supra*, that universal jurisdiction may lead to global isolationism, as the possibility of foreign prosecutions may persuade State officials not to leave their country. *See* G. BYKHOVSKY, "An Argument Against Assertion of Universal Jurisdiction by Individual States", 21 *Wisconsin J. Int'l L.* 161, 184 (2003)

[compared to scholars of conflict of laws]: they may compile and analyze state practice, but they cannot replace it with their own concepts."[4029] This study, which has primarily looked at the phenomenon of jurisdiction through a (public) international law lens, has rejected that limiting claim. While the current state of the international law of jurisdiction has been described at length on the basis of State practice, a consistent *doctrine* of jurisdiction has been developed, on the basis of both State practice and rational thinking. The exercise of jurisdiction is in practice often characterized by a sheer lack of objectivity – which is not surprising as States, when *unilaterally* asserting jurisdiction – will almost variably emphasize their own interests over foreign States' interests. A doctrine that gives States almost unlimited discretion to exercise jurisdicition as they see fit – the doctrine that was seemingly coined by the Permanent Court of International Justice in the 1927 *Lotus* case – is not workable, because it justifies the exercise of concurrent jurisdiction and allows powerful States to outmaneuver weaker ones.

1229. It has been shown that there are no hard and fast rules of public international law that limit States' jurisdictional assertions and confer jurisdiction on the State with the strongest nexus to a situation. Nonetheless, it has also been shown that there are a number of international law principles that may serve to restrain the exercise of jurisdiction when the legitimate rights of other States would be encroached upon. The principles of non-intervention, sovereign equality, equity, proportionality, and the prohibition of abuse of law, have been cited in this context. While these principles are typically used in a non-jurisdictional context, this should, given their generic nature, not exclude their application to the law of jurisdiction. In chapter 5, the use of a jurisdictional rule of reason, as set forth in § 403 of the Restatement (Third) of U.S. Foreign Relations Law, has therefore been advocated, pursuant to which States are entitled to exercise jurisdiction only if they do so reasonably. The jurisdictional rule of reason may not be a rule *de lege lata*, for there is insufficient evidence that States, if they restrained their jurisdictional assertions, have done so because *international law* obliged them to do so. Yet undeniably, a system of international jurisdiction is only viable if States balance *their* regulatory interests with the interests of *other* affected foreign nations, as if they were a global regulator who objectively assesses the merits of any one State's legal and policy interests. Jurisdictional reasonableness has been the main focus throughout this study, and has been applied consistently to the different fields of the law studied.

1230. In the final part of this study, the principle of jurisdictional reasonableness has been given more 'body'. For one, it has been argued that reasonable jurisdiction could emerge through transnational communicative networks wiring State, international, and private actors. For another, it has been shown how States, in different legal contexts, if a situation has a stronger nexus to another State, tend to apply their own laws only on a *subsidiary* basis. This principle of subsidiarity serves to restrain the exercise of jurisdiction by giving the State with the strongest nexus the *primary* right to exercise jurisdiction. If the 'primary' State fails to exercise jurisdiction, even if, from a global perspective, such were desirable, the 'subsidiary' State has the right – and, it may be argued, sometimes the duty – to step in, in the interest of the global community. Such a jurisdictional system connects sovereign

[4029] *See* K.M. MEESSEN, "Antitrust Jurisdiction under Customary International Law", 78 *A.J.I.L.* 783, 790 (1984).

interests – on which the law of jurisdiction was traditionally based – with global interests, and ensures that impunity and globally harmful underregulation do not arise. Sovereignty then becomes a "relative" concept: international law and the international interest determine when States could invoke it.[4030] If, finally, States, regulators, courts and various legal practitioners are searching for one useful jurisdictional rule of thumb in this study, it is this one: the State with the strongest nexus to a situation is entitled to exercise its jurisdiction, yet if it fails to adequately do so, another State with a weaker nexus (and in the case of violations of *jus cogens* without a nexus) may step in, provided that its exercise of jurisdiction serves the global interest.

[4030] *See* on the concept of relative sovereignty: H. AUFRICHT, "On Relative Sovereignty", parts I and II, 30 *Cornell L.Q.* 137 and 318 (1944-45).

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