A. Introduction

I. Purpose and Scope of the Study

The concept of extraterritorial jurisdiction evokes very different emotions. Some may be fearful because it reminds them of imperialism and hegemonic claims. Others may be alarmed, because they view extraterritorial jurisdiction as a desperate response by States to the forces of globalization chipping away at their regulatory capacities. Others again may be hopeful, because extraterritorial jurisdiction provides a timely answer to pressing global challenges without the need for the dreaded international consensus.

This diversity of perspectives is certainly remarkable, given that at first glance, extraterritorial jurisdiction is merely an inconspicuous technical legal concept. The exercise of extraterritorial jurisdiction is subject to rules of international law. In fact, according to Hans Kelsen, it is one of the 'essential functions' of international law to limit the spheres of validity of national legal orders.[1] The limits to the competences of States have been traditionally drawn by the principle of sovereign equality of States. Therefore, according to this model, State power is generally territorially bounded and the exercise of extraterritorial jurisdiction as an exception should only be valid when some other legitimizing principle in international law is satisfied. The functionality of this system depends on two separate but intertwined premises that lie at the heart of the system: First, that it is possible to precisely locate the limits of territorially bounded State power, that is, the boundary between territoriality and extraterritoriality, and second, that it is possible to define such other principles, as exceptions to territoriality, that reasonably establish the legitimacy of extraterritorial jurisdictional assertions.

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1 Hans Kelsen, *Principles of international law* (Rinehart and Co 1952), 94; Very similar language can be found in the seminal treatise by Frederick A Mann, 'The Doctrine of Jurisdiction in International Law' (1964) 111 Recueil des Cours 1, 15, who states that '[j]urisdiction, it thus appears, is concerned with what has been described as one of the most fundamental functions of public international law, viz. the function of regulating and delimiting the respective competences of States'.

For a very long time, States and international law scholars believed they had found satisfactory determinations with regard to both of these premises. There was of course debate regarding the details, in particular in relation to the first question. In the field of criminal law, arguments around the proper geographical reach of law may be traced back at least to medieval Europe.[2] And even in the area of law, which may be termed commercial regulation,[3] issues of extraterritorial jurisdiction have featured prominently as early as the 1909 Supreme Court case in *American Banana*.[4] Despite these debates, the international law doctrine on jurisdiction has remained surprisingly resilient and its underlying assumptions have only undergone small changes.[5] Even in 2006, the International Law Commission felt that the law was settled enough to propose the elaboration of a draft instrument on extraterritorial jurisdiction.[6]

This draft instrument never materialized. To be fair, it is almost certain that any draft instrument elaborated in 2006 would have become obsolete by now. In fact, it does not take a tremendous amount of fantasy to see that the tectonic shifts occurring around the world must eventually impact the international law on jurisdiction. Without getting into terminological debates, what has happened in the meantime can be aptly described with the word 'globalization'. Globalization is not a purely economic phenomenon, although the globalization of markets, including the increased movement of capital and labour across borders and the consolidation of multinational corporations, is one important manifestation of the process.[7]

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2 Cedric Ryngaert, *Jurisdiction in International Law* (Oxford Monographs in International Law, Second edition), 52 – 53.

3 There seems to be no internationally accepted term to describe the body of law concerned with the regulation of business enterprises with the purpose to uphold the public order and certain public values. Different States have different historical practices in this regard. The term commercial regulation was adopted from the International Law Commission, *Report of the International Law Commission on the Work of its Fifty-eighth Session* (UN Doc A 61/10, 2006), at 526.

4 *American Banana Co. v United Fruit Co.*, 213 US 347 (1909).

5 The arguably most ground-breaking contribution within these debates may have been the *Restatement (Third) of the Foreign Relations Law of the United States* (American Law Inst. Publ 1987), which was largely prompted by US jurisprudence on the reach of US antitrust regulation.

6 International Law Commission (n 3), at 517.

7 On the term of 'globalization', see Günther Handl, 'Extra-Territoriality and Transnational Legal Authority' in Günther Handl, Joachim Zekoll and Peer Zumbansen (eds), *Beyond Territoriality: Transnational Legal Authority in an Age of Globalization* (Queen Mary studies in international law. Martinus Nijhofff Publishers 2012), 3.

However, this process has led to new challenges as well, such as the rise of transnational criminal activities and perhaps even more acute, the climate crisis as a truly global threat to humanity. All of these phenomena have been enabled, amplified and shaped through the relentless technological progress and in particular, the advent of the internet.[8]

This study focuses on a related aspect, namely that globalization as a *de facto* development has also caused a globalization of regulation.[9] This is to be understood as the process, by which powerful States advance a particular domestic moral or political stance through the use of unilateral regulation.[10] This is not an entirely new phenomenon, as already the development of extraterritorial antitrust regulations could be regarded as the 'exportation' of a particular ideal of competition. However, in this instance, the regulations remedied the economic order within domestic territory, which was under threat from external conduct.[11] Increasingly however, States also resort to regulation when the primary objective is

8 The internet in particular has posed difficult challenges to the allocation of jurisdiction in international law and prompted a sometimes radical discourse, see David R Johnson and David. Post, 'Law and Borders: The Rise of Law in Cyberspace' (1996) 48 Stanford Law Review 1367.

9 See for the relevance of this globalization of regulation: John Braithwaite and Peter Drahos, *Global Business Regulation* (Cambridge Univ. Press 2000), 8.

10 William Magnuson, 'Unilateral Corporate Regulation' (2016) 17 Chicago Journal of Interanational Law 521, 524. Unilateral extraterritorial jurisdiction is sometimes praised as a possible solution to some of the most pressing global problems of our time, see: Nico Krisch, 'The Decay of Consent: International Law in an Age of Global Public Goods' (2014) 108 AJIL 1; Joanne Scott, 'Extraterritoriality and Territorial Extension in EU Law' (2013) 62 AJCL 87; Cedric Ryngaert, *Unilateral Jurisdiction and Global Values: Oratie in verkorte vorm uitgesproken bij de aanvaarding van het ambt van hoogleraar Internationaal Publiekrecht aan de Faculteit Recht, Economie, Bestuur en Organisatie van de Univ. Utrecht op maandag 30 maart 2015* (Eleven International 2015). However, this position is forcefully criticized by B. S Chimni, 'The international law of jurisdiction: A TWAIL perspective' (2022) 35(1) Leiden Journal of International Law 29; Furthermore, some authors also view extraterritorial jurisdiction as a threat to consent-based international efforts undermining a progressive development of the international community, see Austen L Parrish, 'Reclaiming International Law from Extraterritoriality' (2009) 93 Minnesota Law Review 815.

11 The United States realized that in a wholly integrated market, it was not enough to simply regulate conduct within US territory but that conspiracies between third State companies could also cause significant adverse effects on domestic competition; see further: Karl M Meessen, 'Antitrust Jurisdiction under Customary International Law' (1984) 78 AJIL 783; David J Gerber, 'The Extraterritorial Application of the German Antitrust Laws' (1983) 77(4) AJIL 756.

not to mitigate adverse domestic effects. States have met these more demanding regulatory objectives with the design of more complex regulatory mechanisms.

Under these circumstances, this study seeks to answer two research questions: First, this study intends to establish whether the territoriality-based system of jurisdiction is still capable of providing order in international relations by delimiting regulatory competences between States. The answer to this question depends on whether the first premise laid out in the second paragraph above still holds true in light of globalization: Is it possible to define normatively consistent boundaries of territoriality to be respected by States? Or are States, in their pursuit of political and legal goals, exploiting and disregarding the system? Second, this study also seeks to answer how, in light of the necessary progressive development of the law, extraterritorial jurisdiction can be adequately reconceptualised to account for the increasing importance of interests beyond State sovereignty. Because considering the normative upheaval brought about by globalization, this study questions the validity of the second premise laid out above, that the recognized exceptions to the principle of territoriality can reasonably legitimize extraterritorial jurisdiction.

There has been an impressive amount of writing on the topic of extraterritorial jurisdiction in recent years.[12] In relation to the first research question, other scholars have doubted the effectiveness of the territoriality-based system of jurisdiction in light of modern technological developments.[13] However, this study is novel because its results will be derived from a strict analysis of actual practice of States and certain regional organizations such as the European Union (**EU**) in four diverse regulatory areas, economic sanctions, export control, transnational anti-corruption and business and human rights. If, with regard to these reference areas, the territoriality-based system of jurisdiction is found to provide no consistent

12 See for instance: International Bar Association, *Report of the Task Force on Extraterritorial Jurisdiction* (International Bar Association 2008).

13 Dan J B Svantesson, *Solving the Internet Jurisdiction Puzzle* (Oxford University Press 2017); see also: Paul S Berman, *Global Legal Pluralism: A Jurisprudence of Law beyond Border* (1. publ, Cambridge Univ. Press 2012), at 44 compares the, in his view, futile efforts of law academics to solve the jurisdictional challenges posed by the internet to the *streetlight* effect:
'[…] a police officer sees a drunk man searching in vain under a streetlight for his keys and asks whether he is sure he lost them there. The drunk replies, no, he lost them across the street. The officer, incredulous, asks then why he is searching here, and the drunk replies, "the light is so much brighter here."'.

allocation of regulatory competences between States, a general conclusion may be drawn to answer the first research question. In relation to the second research question, a number of studies have argued that State jurisdiction should be receptive to considerations apart from State sovereignty.[14] However, this study advances a novel perspective by highlighting the hybrid nature of extraterritorial jurisdiction in that it also concerns the exercise of public authority *vis-à-vis* individuals.

Therefore, this study argues that although the territoriality-based system of jurisdiction seems to be a logical way of allocating regulatory competences between States, in practice, it now fails to deliver on its main promise: order. The formal boundaries of territoriality are not normatively consistent and States either exploit or disregard the system in their pursuit of political and legal interests. However, the necessary progressive development of the law provides a chance to reconceive extraterritorial jurisdiction not only as a function of State sovereignty, but more broadly as an exercise of public authority, the legitimacy of which also depends on the relationship between the regulating State and the addressee and the international community at large.

II. Structure of the Argument

To arrive from the two research questions to the thesis proposed, this study necessarily has to engage with the current rules of jurisdiction in international law. On the one hand, the first part of the thesis claims that the formal, territoriality-based system of jurisdiction has become increasingly unsustainable because it is not possible to define, in a normatively consistent way, the boundaries of territoriality. On the other hand, the second part of the thesis argues that within the traditional system, it is not possible to account for certain interests which are relevant in determining the legitimacy of jurisdictional assertions.

Therefore, this study needs to ascertain how currently under international law, territoriality is separated from extraterritoriality and in the latter case, which principles, exceptionally, allow for the exercise of jurisdiction. According to Art. 36 (2) Statute of the International Court of Justice (**ICJ**), this task requires an analysis of relevant legal sources, i.e., treaties, customary international law and general principles. Treaty law in

14 See in this regard: Ryngaert, *Jurisdiction in International Law* (n 2); Alex Mills, 'Rethinking Jurisdiction in International Law' (2014) 84 BYIL 187.

the field of jurisdiction is scarce: No generally binding instrument exists and only few rules about the scope of jurisdiction are included in treaties dealing with specific areas of international law.[15] Therefore, customary international law will serve as the most important authority. However, establishing customary international law would require the proof of both a general practice[16] and *opinio iuris* in a comprehensive manner that far exceeds the scope of this research.[17] Thus, this research can only analyse exemplary practice and will recourse to the academic work of other commentators to establish the content of the international law rules on jurisdiction.

In a next step, in order to argue that the rules just ascertained do not deliver normatively consistent results in practice, actual exercises of jurisdiction by States and the EU in the selected research areas will be examined. To determine the general practice, this research reviews a large number of official documents, ranging from legislation, administrative determinations, court decisions and other judicial documents including *amicus curiae* briefs to verbal acts such as protests and affirmations through diplomatic notes as well as other communications.[18] The case studies chosen for research are among the most outrageous claims of extraterritorial jurisdiction or those that elicited the greatest reaction by other States and academic commentators. Precisely these cases put the traditional doctrine to a breaking test, while also highlighting the host of interests that should be taken into account when exercising jurisdiction. This focus explains why this research is primarily (though by no means exclusively[19]) con-

15 See for instance Art. 42 of the United Nations Convention against Corruption (adopted 11 December 2003, entered into force 14 December 2005) 2349 UNTS 41 ('UNCAC').

16 The requirement of a 'general practice' for the establishment of customary international law refers primarily to State practice. In this regard, the practice of the European Union may be equated to the practice of its member States in those subject matters in which the member States have transferred exclusive competence to the European Union, see International Law Commission, *Draft Conclusions on Identification of Customary International Law, with Commentaries* (UN Doc A/73/10, 2018), Conclusion 4 para. 2 and Commentary (6) thereto. For the sake of simplicity, any reference to 'State practice' in this study also includes practice of the European Union.

17 ICJ, *North Sea Continental Shelf Cases (Fed Rep of Germany v Netherlands)* [1969] ICJ Rep 3, 44.

18 James Crawford and Ian Brownlie, *Brownlie's Principles of Public International Law* (Eighth edition, Oxford University Press 2012), at 24.

19 In particular, China is just beginning to exercise extraterritorial jurisdiction, e.g. through the Chinese Anti-Monopoly Law, see Michael Faure and Xinzhu Zhang,

cerned with studying US law and the law of a number of European States as well as of the EU, as it is generally powerful States or trading blocs that have acted at the forefront of transnational regulation.[20] This analysis will provide insight into the legal bases, practical instruments and arguments relied upon by States in justifying their exercises or rejections of certain exercises of jurisdiction. To prove the argument, these State actions are to be normatively assessed under the jurisdictional rules of international law already ascertained. In doing so, two phenomena dominate: First that States deliberately resort to exercises of jurisdiction, which, although they may formally rely on a territorial basis, allow States to unilaterally set regulations with a global reach contrary to the ordering purpose of the territoriality-based system of jurisdiction; and second, that States disregard the system entirely: They promote or contest such measures not based on considerations of territoriality, but on political convenience.

Finally, in the necessary search for an alternative to that dysfunctional system, the study advocates for a change in perspective: While traditionally, the legitimacy of exercises of jurisdiction has been solely mediated by considerations of State sovereignty, the specific hybrid nature of extraterritorial jurisdiction, in that it also directly affects individual interests, brings it functionally much closer to domestic public regulation. This realization has normative ramifications, because domestic public law knows other bases of legitimacy and establishes other limits on the exercise of public authority than State sovereignty. These bases of legitimacy and limits are to be transferred to the transnational context of extraterritorial jurisdiction. Finally, it has always been my hope that this study will have actual application beyond the immediately studied cases and areas of reference. Therefore, this study will translate these considerations of legitimacy and limits into practically applicable variables and tests.

Thus, the structure of this research is as follows:

The remainder of this part A will clarify some definitions of the terms and concepts most commonly used in this study. Part B ascertains the current rules of international law on State jurisdiction. It does so by reviewing scholarly commentary as well as some influential practice, beginning inevitably with the seminal judgment of the Permanent Court

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'Towards an Extraterritorial Application of the Chinese Anti-Monopoly Law that Avoids Trade Conflicts' (2013) 45 The George Washington International Law Review 101.

20 Ryngaert, *Jurisdiction in International Law* (n 2), 3.

of International Justice (**PCIJ**) in *Lotus*,[21] before turning to the classical bases of jurisdiction accepted under general international law. Part C, the bulk to this research, is dedicated to analysing the relevant practice of States and the EU and assessing this practice against the norms of international law just ascertained. This part concludes that in the face of modern regulatory efforts, it is not possible to define, in a normatively consistent way, the boundaries of territoriality. Finally, part D proposes a functional perspective to extraterritorial jurisdiction as an alternative to the territoriality-based system and for that, draws upon domestic public law concepts of legitimacy and limits, before translating these considerations into a new practical framework. Part E concludes.

III. Concepts and Definitions

1. State Jurisdiction and State Sovereignty

So far, this study has pretended that concepts such as jurisdiction, territoriality and extraterritoriality or State sovereignty are self-explanatory. They are certainly not. However, in a first attempt at definition, jurisdiction, as referred to in this research, means the 'the lawful power of a State to define and enforce the rights and duties, and control the conduct, of natural and juridical persons'.[22] How a State chooses to exercise this power is primarily a domestic issue. It may be subject to constitutional rules such as the division of power into a legislative, executive and judicial branch. Jurisdiction only becomes a concern of international law when, in exceptional cases, its exercise may affect the relationship between multiple sovereigns. This relationship is affected when a State projects its legal authority to a situation, which is (also) connected to or in the interest of another State. In these cases, jurisdiction becomes an international law inquiry about the requirements and the scope of the power of a State to regulate conduct in relation to other interested States.

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21 PCIJ, *S.S. Lotus (France v Turkey)* [1927] PCIJ Rep Series A No 10.

22 Bernard H Oxman, 'Jurisdiction of States' in R. Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (Oxford University Press), para. 3. It is difficult to provide an exact definition of 'jurisdiction', see for instance Ryngaert, *Jurisdiction in International Law* (n 2) at 5, who notes that although most international lawyers have an inkling of its meaning, the definition is not self-evident.

There is no easy answer to this inquiry. As indicated, most commentators agree that the fundamental principle of State sovereignty provides an apt starting point of analysis. Sovereignty is expressed both in the independence and authority of States to act internally and in the entitlement of a State to freedom from external interventions.[23] The exercise of jurisdiction is a function of sovereignty. At the same time however, it is also limited by sovereignty, in the sense that assertions of jurisdiction have to respect the equal sovereignty of other States, that is, they must not unduly encroach on such sovereignty.[24] This international law principle of non-intervention, the prohibition to interfere with the domestic affairs of another State, therefore forms one of the outer limits to exercises of jurisdiction. It is important to note however, that while plenty of domestic assertions of jurisdiction affect other sovereigns, only few of them actually conflict with the legal principle of non-intervention.

Under the currently dominant account of jurisdiction in international law, the principles of sovereignty and non-intervention are more than just the doctrinal basis. Correct understanding of these principles may have practical consequences as well. On the one hand, the paramount importance of territorial sovereignty for ordering modern State relations is reflected in the equally powerful jurisdictional basis of territoriality. The exercise of regulatory power was historically confined exclusively to persons, property and conduct within the territory of the State.[25] Today still, it serves as the primary reference to exercises of authority. On the other hand, however, principles of sovereignty and non-intervention are also reflected in the exceptional bases of jurisdiction. In fact, there are some exercises of jurisdiction that, even though they do not concern an entirely territorial situation within the regulating State, are nonetheless not exclusively domestic affairs of another State. This is the case when a State exercises jurisdiction in relation to its own nationals or to protect a vital national interest, particularly the functioning of government. These aspects, just like territoriality, are equally connected to the very core of

23 John H Jackson, 'Sovereignty – Modern: A new Approach to an Outdated Concept' (2003) 97(4) AJIL 782, 786; Eyal Benvenisti, 'Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders' (2013) 107(2) AJIL 295 characterizes sovereignty as traditionally conceived as 'akin to owning a large estate separated from other properties by rivers or deserts'.

24 Mann (n 1), 30; Markus Volz, *Extraterritoriale Terrorismusbekämpfung* (Tübinger Schriften zum internationalen und europäischen Recht Bd. 86, Duncker & Humblot 2007), 40.

25 See International Law Commission (n 3), at 516.

statehood, namely the existence of a State population and an independent government.[26] When a State exercises jurisdiction based on one of these principles, even if doing so affects interests of another State, there will be no *prima facie* violation of the principle of non-intervention.

2. Extraterritoriality and Extraterritorial Jurisdiction

It has already been noted that the exercise of jurisdiction generally becomes controversial under international law only when it affects the relationship between multiple sovereigns. In diplomatic exchanges between States, this potentially contentious exercise of authority is frequently referred to as 'extraterritorial jurisdiction'.[27] We have already drawn some considerations with regard to the term 'jurisdiction', so that this section seeks to shed some light on the 'extraterritorial' part. A report by the International Law Commission defines 'extraterritoriality' as 'the area beyond [the] territory [of a State], including its land, internal waters, territorial sea as well as the adjacent airspace'.[28] However, when international law scholars speak about extraterritoriality, they are rarely interested in the physical dimensions of 'extraterritoriality', but rather, they want to know whether a certain act of a State constitutes an exercise of 'extraterritorial jurisdiction'.[29]

Historically, a clear example for the exercise of extraterritorial jurisdiction was provided by the practice of Western States in maintaining consular courts abroad. Here, all the elements involved were 'extraterritorial'. There was a domestic authority located abroad, which was defining and enforcing the rights and duties, and controlling the conduct of certain persons within the territory of another State.[30] The situation becomes much

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26 Charlotte Beaucillon, 'Practice Makes Perfect, Eventually? Unilateral State Sanctions and the Extraterritorial Effects of National Legislation' in Natalino Ronzitti (ed), *Coercive Diplomacy, Sanctions and International Law* (Brill Nijhoff 2016), 16.

27 Marko Milanovic, 'From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties' (2008) 8(3) HRLRev 411, at 421 remarks that 'practically the entirety of the law of (prescriptive) jurisdiction is about the exceptions to territoriality'.

28 See International Law Commission (n 3), 518.

29 Scott (n 10), notes at 89 that, 'There is uncertainty and disagreement about what counts, and what should count, as a territorial connection for the purpose of distinguishing between the exercise of territorial and extraterritorial jurisdiction'.

30 Eileen P Scully, *Bargaining with the State from Afar: American Citizenship in Treaty Port China, 1844-1942* (Columbia University Press 2012), 6 – 7.

more difficult, however, when not all the elements of an assertion of jurisdiction are so clearly 'extraterritorial'. Take the example of a cross-border shooting, is it the State, where the perpetrator is located, or the State where the victim is located, that is exercising 'extraterritorial jurisdiction', or is it possibly both, or none of them? This depends on whether 'extraterritorial jurisdiction' requires that all of the elements involved are 'extraterritorial' such as in the case of consular jurisdiction, or whether it is enough that one of the elements is 'extraterritorial'. And if only the 'extraterritoriality' of one element suffices, which element is the relevant one? In the situation of the cross-border shooting, is it the location of the perpetrator or the location of the victim? How should international law determine which element is the relevant one?

It is easy to realize that in our modern, globalized world, where any action taken anywhere could have repercussions anywhere else, answering these crucial questions is immensely difficult. In fact, these are essentially normative questions with possibly more than one set of reasonable answers. Thus, when States, but also academic commentators, employ the term 'extraterritorial jurisdiction', unless they explicitly explain their particular understanding, they may be, and in fact often are, referring to wholly different circumstances. There is a second, related issue with the term 'extraterritorial jurisdiction'. The concept itself does not imply any normative consequences under international law: Depending on the circumstances, the exercises of jurisdiction by a State *vis-à-vis* persons or conduct abroad may even be generally permissive, for instance if a State prescribes rules for its own nationals.[31]

Despite this normative fuzziness, the term 'extraterritorial jurisdiction' in practice almost always carries a negative connotation. States generally use this term to describe situations, in which one State feels that the action of another State infringes on its domestic interests.[32] Thus, 'extraterritorial jurisdiction' in these instances is often used as a political statement and a hardly concealed claim for arguing that some assertion of authority is deemed excessive in scope or illegal under international law. This is unfortunate because, as was just argued, 'extraterritorial jurisdiction' is in itself a normatively neutral concept. However, particularly in contested cases, 'extraterritorial jurisdiction' is almost never meant to describe such other-

31 See on this principle below at B.I.2c) Active Personality.

32 Hannah L Buxbaum, 'Territory, Territoriality, and the Resolution of Jurisdictional Conflict' (2009) 57(3) AJCL, 635; Ryngaert, *Jurisdiction in International Law* (n 2), 7.

wise permissive assertions of authority, but is used solely to demarcate the political fault line between territoriality and extraterritoriality.

Two observations can be made already at this point: First, in an attempt to strengthen terminological clarity, for the remainder of this research, the term 'extraterritorial jurisdiction' will be used in a broad and politically neutral sense, which in itself does not allow any conclusions about its normative permissibility. Rather, 'extraterritorial jurisdiction' is a shorthand statement that simply describes all exercises of jurisdiction, which (not necessarily exclusively) affect the rights and duties, or incentivize or regulate the conduct of natural and juridical persons outside the territory of the State. Second, the study of 'extraterritorial jurisdiction' is a task requiring immense precision. Any successful argument on jurisdiction under international law must move beyond labels – these should be used as sparingly as possible – and instead look behind the façade of the measures in question. This research intends to do so.

3. The Concept of Jurisdiction in International Human Rights Treaties

Jurisdiction, as a concept under general international law to negatively delimit the spheres of authority between States must not be confused with the equally controversial notion of jurisdiction in international human rights law. Human rights treaties regularly include clauses that limit their reach to situations 'within their jurisdiction'[33] or 'within its territory and subject to its jurisdiction'.[34] As a first reflex, it would not be far-fetched to think that 'jurisdiction' in this respect refers to the same concept of 'jurisdiction' under general international law that was just discussed above. Thus the scope of international human rights treaties would coincide with the lawful authority of States to define and enforce rules. However, the treaty bodies nowadays largely follow a different interpretation for the concept of jurisdiction for the purpose of international human rights protection (although the matter is still in flux and the treaty bodies themselves have not devised a coherent line of interpretation yet).[35]

The distinction between the two concepts was of course deliberate and, to a certain degree, necessary. After all, jurisdiction as referred to in international human rights treaties fulfils a different function than jurisdiction

33 Art. 1 ECHR.
34 Art. 2 (1) ICCPR.
35 Milanovic (n 27), 417.

under general international law. If a person is found to be within the jurisdiction of a State, then that State is obliged to extend the human rights guaranteed in the treaty to that person, less it will incur international responsibility.[36] Put simply, jurisdiction in international human rights law is a concept to delimit the spheres of State legal *obligation* while jurisdiction in general international law delimits the spheres of State *competence*. However, despite the seemingly bright-line distinction put out here, the two notions have been confused by even the most eminent judges of the European Court of Human Rights (**ECtHR**).[37] What makes this matter particularly difficult is that both conceptions of jurisdiction take 'territoriality' as their default, but also allow for 'extraterritoriality' in exceptional circumstances.

In international human rights law, the extraterritoriality inquiry concerns whether certain 'extraterritorial' State acts trigger the application of human rights treaties and extension of obligations under these treaties to persons or circumstances located abroad. There are two categories of circumstances that are generally accepted in this regard and they are both related to factual power: Either, the State exercises effective control over foreign territory (such as in the case of occupation) or the State exercises effective control over an individual person abroad.[38] On the other hand, in general international law, the inquiry concerns something different, namely, whether a State has the authority to exercise extraterritorial jurisdiction, i.e. whether certain 'extraterritorial' acts are lawful in the first place. The answer to this question depends on the kind of State action and on the existence of certain connections between the State and the subject matter in question. Therefore, for instance in the case of detaining an individual on foreign territory, it is possible that jurisdiction exists for the purpose of triggering the applicability of an international human rights treaty, while at the same time, the acting State cannot claim the lawful exercise of jurisdiction under general international law. While this result may seem strange at the first moment, it becomes comprehensible when one remembers that the concept of jurisdiction under international human rights law is concerned with factual power while the concept under general interna-

36 Ryngaert, *Jurisdiction in International Law* (n 2), 22.

37 See on this Milanovic (n 27), 417 discussing the relevant passages of ECtHR, *Banković and others v Belgium and others*, App No 52207/99, Decision of 12 December 2001, paras. 59–61.

38 See also Barbara Cooreman, *Global Environmental Protection through Trade: A Systematic Approach to Extraterritoriality* (Edward Elgar Publishing 2017), 116 – 117.

tional law refers to lawful authority.[39] Since this research is concerned with determining the scope of legal authority of States the concept of jurisdiction under international human rights law will generally not be further addressed.[40]

4. Categories of State Jurisdiction

For purposes of international law, the traditional doctrine distinguishes between different categories of jurisdiction depending on the nature of the underlying State act to be analysed. Typically in Anglo-Saxon literature, three categories are defined, which, at first sight, roughly resemble the separation of governmental powers into legislative, judicial and executive aspects.[41] These are termed jurisdiction to prescribe, i.e. the power of a State 'to make law applicable to persons, property or conduct', jurisdiction to adjudicate, i.e. the power 'to apply law to persons or things, in particular through the process of its courts or administrative tribunals', and jurisdiction to enforce, i.e. the power 'to compel compliance with law'.[42]

In this sense, jurisdiction to prescribe encompasses not only rules through legislation or executive regulations, but also through a determination of a court or an order of the executive branch, typically by the administration.[43] Thus, jurisdiction to prescribe is engaged when a new antitrust law is enacted as well as when the European Commission finds the behaviour of an individual corporation to be abusive. However, in these cases, the distinction between jurisdiction to prescribe and jurisdiction to enforce may become controversial. This is particularly the case, when a foreigner is fined or subjected to other non-forcible sanctions by a domestic administrative body or court for engaging in prohibited conduct.

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39 Milanovic (n 27), 417.

40 An exception hereto will be discussed in the area of business and human rights, where a trend has emerged which seeks to merge the two notions, see below at C.V.3b) Extraterritorial Jurisdiction as a Matter of Obligation.

41 *Restatement (Third) of the Foreign Relations Law of the United States* (n 5), comment *a*) to § 401.

42 *Restatement (Fourth) of the Foreign Relations Law of the United States* (American Law Inst. Publ 2018), § 401; see also Oxman (n 22); Michael B Akehurst, 'Jurisdiction in International Law' (1972-73) 46 BYIL 145, 145.

43 Werner Meng, *Extraterritoriale Jurisdiktion im öffentlichen Wirtschaftsrecht: Extraterritorial Jurisdiction in Public Economic Law* (Beiträge zum ausländischen öffentlichen Recht und Völkerrecht vol 119, Springer 1994), 6.

Here, it could be argued that these sanctions are levied in order to compel the foreigner to comply with a certain rule and thus, that these acts should be properly seen as an exercise of enforcement jurisdiction. On the other hand, one may view the imposition of a fine as yet another prescriptive rule, non-compliance of which may eventually trigger the use of forcible measures by a State, for instance, the seizure of domestic property and only that seizure should be categorized as an actual exercise of enforcement jurisdiction.

This issue is far from purely academic as the requirements for the assertion of prescriptive and enforcement jurisdiction under international law are quite different. In particular, it is widely accepted that, absent express consent of the affected State for instance through a treaty, enforcement outside State territory is generally prohibited by the principle of non-intervention. This consequence has led some commentators to view enforcement jurisdiction more narrowly to only encompass acts that directly bring about a change in the physical or legal situation concerned, typical examples may be the seizure of assets, the search of an apartment or the imprisonment of an individual.[44] However, as will be seen in later parts, even this seemingly bright-line rule may not bring about ultimate clarity in distinguishing between the two categories of jurisdiction. There is a second well accepted rule in relation to enforcement jurisdiction apart from strict territoriality, namely that the enforcement of a rule is only legal under international law if the enforcing State could lawfully prescribe the underlying rule in the first place.[45] Thus, even when a State undoubtedly has the authority of enforcement, for instance by imprisoning an individual present within domestic territory, the exercise of jurisdiction may still be illegal if the imprisonment is based on a law for which the State cannot claim prescriptive jurisdiction.[46]

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44 In this sense: Ryngaert, *Jurisdiction in International Law* (n 2), 9; Akehurst (n 42), 145 – 151; see also OLG Rostock, Order of 29 February 2008, I Ws 60/08: the court held that summoning the accused living abroad to trial under threat of sanctions does not violate international law if the sanctions will only be enforced domestically.

45 Oxman (n 22), para. 5.

46 *The Restatement (Fourth) of the Foreign Relations Law of the United States* (n 42), § 401, Reporters' notes 3 follows a different approach: 'A state may exercise jurisdiction to enforce although it lacks jurisdiction to prescribe and to adjudicate. For instance, it is common for one state to arrest and extradite a criminal defendant for trial under the substantive law of another state.'.

Adjudicative jurisdiction, as already mentioned, is equivalent to the jurisdiction of courts over persons, in the United States also known as *in personam* jurisdiction. In continental European literature, the status of adjudicative jurisdiction as a stand-alone category is sometimes doubted as the activity of courts may usually be subsumed either as prescription, i.e. when a court makes a legal determination *vis-à-vis* a certain situation, or enforcement, for instance when an individual is sentenced to imprisonment.[47] However, even though the activity of courts thus follows the same rules of prescriptive and enforcement jurisdiction as other State action, there is still some value in acknowledging the particularities of adjudicative jurisdiction. In this regard, it is important to understand that establishing procedure over persons or a certain situation may not necessarily entail the application of domestic law to these persons or the situation. Thus, a court may decide that it has judicial jurisdiction to try a case with one or more foreign parties, but it may still, based on choice-of-law rules, apply foreign law more appropriate to the case. Here, the reach of prescriptive jurisdiction may be intertwined with the choice-of-law problem. This is a particularly pertinent issue in US-style regulatory litigation, where private parties may sue each other for the infringement of what is essentially public administrative law. Thus, even though a US court may exercise judicial jurisdiction over foreign litigants, it may nonetheless determine that the reach of the domestic securities fraud legislation is limited by international law rules on prescriptive jurisdiction and therefore, that it may only apply foreign law to the situation.[48]

The value of the distinction between the three types of jurisdiction is sometimes doubted in general.[49] However, with regard to the traditional doctrine of jurisdiction, it seems necessary to uphold the distinction because the general prohibition of enforcement action on foreign territory is one of the more solid rules in this area. The remainder of this research is thus overwhelmingly concerned with questions of prescriptive jurisdiction and will refer to issues of enforcement only when it is necessary for overall understanding or when distinguishing between the two categories poses particular challenges.

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47 See for instance Meng, *Extraterritoriale Jurisdiktion im öffentlichen Wirtschaftsrecht* (n 43), 9 – 10; Volz (n 24), 43 – 44; Cooreman (n 37), 85 – 86.

48 Antony J Colangelo, 'Spatial Legality' (2012) 107 Northwestern University Law Review 69, 73; Ryngaert, *Jurisdiction in International Law* (n 2), 16.

49 Oxman (n 22), para. 6.

5. Regulation, Public Law and Jurisdiction

This research is fundamentally concerned with using the lens of jurisdiction within the normative framework of international law to study particular phenomena and mechanisms of 'regulation'. At this point, one might already question whether 'jurisdiction', with its three different facets of prescription, enforcement and adjudication, is, within the context of international law, actually synonymous with 'regulation'. Several commentators at least seem to use the terms 'extraterritorial jurisdiction' and 'extraterritorial regulation' interchangeably.[50] It seems therefore necessary, on the one hand, to distinguish 'regulation' from other acts of States as well as from other types of governance, and on the other hand, to examine whether certain types of 'regulation' are outside the scope of jurisdictional rules under international law.

On a highly abstract level, 'regulation' may be defined as 'any process or set of processes by which norms are established, the behaviour of those subject to the norms monitored or fed-back into the regime, and for which there are mechanisms for holding the behaviour of regulated actors within the acceptable limits of the regime (whether by enforcement action or by some other mechanism)'.[51] Within domestic legal systems for instance, norms may be set by a representative public body and monitored through some administrative agency. Finally, the monitored behaviour and the standard set by the norm are re-aligned by sanctioning breaches of the norms through the police and court system. For domestic legal systems therefore, regulation generally entails the 'creation of public authoritative obligations on private parties to act or to refrain from acting in certain

50 See in particular, Austen L Parrish, 'Evading Legislative Jurisdiction' (2012) 87 Notre Dame Law Review 1673, 6: 'Legislative jurisdiction refers to Congress's authority to prescribe or regulate conduct'; Vaughan Lowe and Christopher Staker, 'Jurisdiction' in Malcolm D Evans (ed), *International Law* (5th ed. Oxford University Press 2018), 289: 'States regulate conduct in this sense in a variety of ways […]. Thus, the legislature may lay down rules by statute […]. States also regulate conduct by means of the decisions of their courts, which may order litigating parties to do or abstain from doing certain things. So, too, may the State's administrative bodies, which may apply rules concerning, for example, the issuance of licences […]. All of these activities are in principle regulated by the rules of international law concerning jurisdiction'.

51 Colin Scott, 'Analysing Regulatory Space: Fragmented Resources and Institutional Design' [2001] PL 329, 331.

ways or the establishment or facilitation of authoritative measures to enforce such duties'.[52]

However, the creation and enforcement of norms is not the only instrument for a State to shape society. In large parts, States also intervene into the daily life of private citizens by directly providing services and goods, (re-)distributing benefits (characteristic for the welfare State), information, or the adoption of public policies short of binding law. As these examples already illustrate there is much 'governance', steering and directing a particular society, outside of regulation.[53] More fundamentally however, ordering through governance may involve more, in particular private, actors (though they play an increasingly important role in traditional regulation as well), and instruments apart from law such as private contracts.

The considerations above explain why the terms jurisdiction and regulation are so closely intertwined. In fact, while States may also be offended by, say, the non-recognition of a legal foreign marriage, protests have mostly ensued over foreign overreach in the form of command-and-control. Questions of jurisdiction are so essential to international relations between States because they concern a fundamental issue, the allocation of regulatory, that is, public authority between sovereigns. This characterisation also explains why in the last decades, jurisdictional conflicts have been mostly confined to the area of public law, which is precisely the body of law within domestic systems concerned with the (not necessarily only hierarchical) relationship between the State and the individual.

Because of this relationship between regulation and public law, and between regulation and jurisdiction under international law, the question might arise whether international law is also relevant for other areas of law, in particular private law. For instance, it has been strongly argued that public and private matters follow two different set of rules because one is concerned with issues of private fairness while the other deals with the allocation of regulatory authority between States.[54] However, this strict division between the two areas of jurisdictional law has come under some critique in recent years for being artificial as different legal systems draw

52 Jacob Katz Cogan, 'The Regulatory Turn in International Law' (2011) 52(2) HarvIntlLJ 322, 324.

53 Eric L Windholz, *Governing through Regulation: Public Policy, Regulation and the Law* (Routledge critical studies in public management, Routledge Taylor & Francis Group 2018), 5.

54 Akehurst (n 42), at 177: 'It is hard to resist the conclusion that […] customary international law imposes no limits on the jurisdiction of municipal courts in civil trials'.

the line between private law and public law differently and it may come down to cultural peculiarities whether one State chooses to adopt tort law or criminal law as instrument in order to enforce regulatory standards. Moreover, private law also increasingly reflects considerations of public policy.[55] Finally, even ordinary civil jurisdiction is ultimately reinforced through public sanctions so that there should be no great difference in treatment, a point acknowledged by Crawford.[56] The better arguments thus support the view that in principle, international law also poses limits to exercises of jurisdiction in private, non-regulatory law.

It should be noted however, that this conclusion may not mean that domestic legal systems need to set precisely the same limits for the exercise of jurisdiction within all bodies of law.[57] Indeed, as will be demonstrated throughout this research, the precise jurisdictional limits may differ according to the particular subject matter and design of the regulatory mechanism. For instance, US practice indicates that States may treat the extraterritorial scope of 'true' regulatory law different than the scope of criminal law. Stigall, examining the jurisprudence of US courts, observes that considerations of reasonableness and comity feature prominently in the regulatory context of antitrust regulation whereas individual due process provides an additional yardstick for criminal trials.[58] As a starting point however, even though they may vary to a certain extent in their precise application between areas and bodies of law, there are some common principles handling the exercise of prescriptive jurisdiction in general. It is to these principles that the next part of this research turns.

55 *Restatement (Fourth) of the Foreign Relations Law of the United States* (n 42), § 407, reporters' notes 5; Svantesson (n 13), 84 – 85.

56 Crawford and Brownlie (n 18), 471 – 472.

57 *The Restatement (Fourth) of the Foreign Relations Law of the United States* (n 42), § 407, reporters' notes 5 argues that indeed the limitations under customary international law are different for public and private matters.

58 Stigall (n 58), 372.