B. Prescriptive Jurisdiction in Public International Law

I. General Approaches

1. The Case of the S.S. Lotus

To whom may a State extend its laws and conversely, when does a State asserting authority exceed its jurisdictional limits? It is fair to suggest that this question has been the subject of scholarly debate for centuries as it arguably touches the core of the sovereignty of States.[59] Given the status and practical relevance of this issue, it may be surprising that judicial guidance in the form of decisions by the PCIJ or the ICJ remain scarce. Thus, almost a hundred years later, the case of reference for the question of jurisdiction in public international law remains the *Lotus* judgment of the PCIJ in 1927. Factually, the well-known case concerned a collision on the high seas between a French and a Turkish vessel, causing the death of eight Turkish nationals on board the Turkish ship. After the French ship had put into a port in Istanbul, Turkish authorities prosecuted and detained the responsible French officer on board the French ship. France heavily protested the Turkish actions on the ground that under international law, Turkey was not entitled to extend its criminal law to an occurrence on a foreign ship on the high seas.

In relation to jurisdiction, the Court's first proposition, that the enforcement jurisdiction of a State is in principle limited to its own territory, is uncontroversial and widely accepted.[60] However, the same cannot be said about its second proposition with regard to the core issue of the case at hand, that of prescriptive jurisdiction. On this issue, France contended that, for the Turkish courts to have jurisdiction, Turkey must point to some title recognized under international law in its favour. Conversely, Turkey argued the exact opposite view, that unless a contradicting princi-

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59 See for a summary of the historical development: Hans-Jörg Ziegenhain, *Extraterritoriale Rechtsanwendung und die Bedeutung des Genuine-Link-Erfordernisses: Eine Darstellung der deutschen und amerikanischen Staatenpraxis* (Zugl.: München, Univ. Diss. 1991/92. Münchener Universitätsschriften Reihe der Juristischen Fakultät vol 92, Beck 1992), 28.

60 *S.S. Lotus (France v Turkey)* (n 20), 18 – 19.

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ple of international law existed, it could exercise jurisdiction as it saw fit.[61] Both arguments are rooted in the sovereignty of States, the French one emphasizing the principle of sovereign equality of the affected State while the Turkish one reaffirming the sovereign independence of the State prescribing rules for extraterritorial conduct. In principle, these arguments of the two parties before the Court laid the foundation for the two possible approaches to State jurisdiction in international law. As is well known, the PCIJ decided in an 8 to 7 vote in favour of the Turkish standpoint. Recalling the voluntary nature of international law, the court held:

> '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 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.'[62]

Commentators have generally interpreted this statement as indicating that the reach of a State's prescriptive jurisdiction is presumed to be unlimited, unless a positive rule of international law to the contrary exists.[63] Under this reading, the PCIJ decision in *Lotus* has been on the receiving end of heavy criticism.[64] From a theoretical perspective, it has been argued that the judgement concedes the sovereign independence of the State exercising jurisdiction too much weight. Considering the equally important

61 Ibid., 18.
62 Ibid., 19.
63 Lowe and Staker (n 50), 295; however, see for an alternative reading of the judgement: An Hertogen, 'Letting Lotus Bloom' (2015) 26(4) EJIL 901.
64 Mann (n 1), 35 and Hertogen, 'Letting Lotus Bloom' (n 63), 903, both indicating further critiques in the literature and jurisprudence.

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principle of sovereign equality, it would make no sense if in the case of concurrent jurisdiction between two sovereign States, one of the two was generally given primacy over the other.[65] In addition, from a practical point of view, States objecting the assertion of excessive jurisdiction by another State have rarely pointed to a specific prohibition against that assertion but rather simply disputed the existence of a right of the other State. In relation to this argument, it should also be noted that the establishment of a customary prohibitive norm before any concrete assertion of jurisdiction would be difficult in practice, as States would have to engage in abstract declarations of *opinio iuris* in order to do so.[66]

However, as one author has pointed out, the opposite view, that a State has to demonstrate a precise rule allowing the exercise of jurisdiction in any given case would be equally unworkable in practice. Under this assumption, a State would have to violate international law every time a new extraterritorial threat requiring regulation comes into existence.[67] Academic opinion has thus led to the development of something of a middle way, in that the State exercising jurisdiction has to demonstrate the existence of a sufficient connection or a genuine link between the State and the person or conduct it seeks to regulate through one of the permissive principles.[68] This view also closely aligns with actual State practice although States that rely on controversial exercises of jurisdiction still often fall back on *Lotus* as the only judgement in this matter by a major international court.[69] In this respect therefore, *Lotus* is still of lasting influence for the doctrine in international law as it stands today.

2. The Permissive Principles Approach under Customary International Law

As already indicated, for practical reasons, States did not follow the presumed freedom to act approach of the *Lotus* judgment and instead generally exercised their prescriptive jurisdiction based on the existence of certain permissive principles that mediate a sufficient connection between the

65 Volz (n 24), 49; Lowe and Staker (n 50), 295.
66 Volz (n 24), 50.
67 Ryngaert, *Jurisdiction in International Law* (n 2), 29 – 30.
68 Lowe and Staker (n 50), 295 – 296; Crawford and Brownlie (n 18), 457.
69 ICJ, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* [2002] ICJ Rep 3 (2002) Counter Memorial of the Kingdom of Belgium, 28 September 2001, 94 – 95.

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State and the circumstances to be regulated.[70] Naturally, this prompted the question, which principles can be considered strong enough to legitimize an exercise of extraterritorial jurisdiction. The Harvard Research Draft Convention on Jurisdiction with Respect to Crime (hereinafter: Harvard Research Draft) provided the most influential answer to this inquiry.[71] It established and defined five such links, which are now interchangeably called 'bases of jurisdiction' or 'principles of jurisdiction', namely territoriality, nationality, the protective principle, universality and passive personality, in this order. Although these principles of jurisdiction are not entirely static, they currently form the widely accepted framework for the allocation of regulatory power between States.[72] Any normative assessment of certain jurisdictional assertions is conducted against this background.

However, despite the dominance of these principles in theory and practice, their exact scope and contours, and sometimes their status under customary international law are to some extent subject to debate. The following sections are therefore dedicated to shed some light on the content of each of these principles and the more contentious issues around them. However, one more principle has made it into this brief theoretical overview, which has to do with the steady expansion of the territorial principle through the acceptance of merely territorial effects as a legitimate connection. Because this modern effects doctrine brings with it issues distinct from those identified under the territoriality principle, it seemed appropriate to discuss these developments under a separate heading.

a) Territoriality

If jurisdiction is an aspect of sovereignty, then territorial sovereignty, as an aspect of statehood, must necessarily manifest itself in jurisdiction over all persons, property and conduct within that territory.[73] This principle, territoriality, is generally considered the most common and least controversial basis of jurisdiction. The territory of a State includes its land, its internal waters, its territorial sea, which extends up to 12 nautical miles from its

70 Mann (n 1), 49; Volz (n 24), 57 – 60.

71 'Harvard Research Draft Convention on Jurisdiction with Respect to Crime' (1935) 29 Supp AJIL 439.

72 On the lasting influence oft he Harvard Research Draft, see Svantesson (n 13), 24 – 29.

73 In similar language, Mann (n 1), 30; Buxbaum (n 32), 631 – 632; see already above at A.III.1. State Jurisdiction and State Sovereignty.

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coast, and its airspace. Within this area, a State's jurisdiction is plenary and it may impose the entirety of its laws, be they criminal, economic, social or other laws, not only on its citizens, but also on anyone else found within the State.[74] With regard to its coastal sea however, a State's jurisdiction is somewhat limited by the rules of the law of the sea. In particular, foreign vessels enjoy a right to innocent passage, which may only be regulated for certain purposes.[75]

aa) The Territoriality Principle and Cross-border Criminal Offenses

The application of the territoriality principle becomes more complicated in practice when the conduct to be regulated occurs partially within the territory of one State and partially within another, that is, when the conduct straddles multiple territorial jurisdictions. For instance, in the famous 1988 *Lockerbie* incident, it was suspected that the bomb was loaded aboard the aircraft in Malta while the eventual explosion took place in the skies over Lockerbie, Scotland.[76] Here, and in similar cases, both the State where the conduct was initiated and the State where it was completed may have legitimate claims to territorial jurisdiction. In Anglo-Saxon scholarship, the terms subjective territoriality and objective territoriality are frequently used in the context of international criminal law. While subjective territoriality denotes a State's jurisdiction over an offense which occurred or was initiated within its territory but has consequences in another State, objective territoriality refers to the exercise of jurisdiction over an offense that was initiated abroad, but where the result of the offense is felt within domestic territory.[77] The Harvard Research Draft combined the two theories and proposed that a State may assert territorial jurisdiction

74 Lowe and Staker (n 50), 296.

75 *Restatement (Fourth) of the Foreign Relations Law of the United States* (n 42), § 408, comment b. More recently, in an interesting intersection between the law of the sea and the customary international law on State jurisdiction, the issue of port State jurisdiction, exercised to influence conditions extraterritorially, has garnered increased scholarly attention; see on this issue Cedric Ryngaert and Henrik Ringbom, 'Introduction: Port State Jurisdiction: Challenges and Potential' (2016) 31(3) The International Journal of Marine and Coastal Law 379.

76 High Court of the Justiciary at Camp Zeist, *Her Majesty's Advocate v Abdelbaset Ali Mohmed Al Megrahi and Al Amin Khalifa Fhimah* (Case No. 1475/99), Opinion of 31 January 2001, para. 82.

77 Christopher Blakesley, 'Extraterritorial Jurisdiction' in M. C Bassioni (ed), *International Criminal Law* (3rd ed. Martinus Nijhoff Publishers 2008), 96 – 108.

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if a crime is committed either 'in whole or in part' within the territory, which requires, more specifically, that any essential constituent element of the crime is consummated domestically.[78] This constituent elements approach is well established beyond the Harvard Research Draft so that in practice, multiple States may legitimately assert jurisdiction over cross-border offenses such as the one forming the basis of the *Lockerbie* incident.[79]

bb) The US Presumption against Extraterritoriality

Because US State practice, which forms a significant part of the analysis of case studies below, frequently includes aggressive assertions of extraterritorial jurisdiction, it seems worth to take a closer look at how the territoriality principle is interpreted in US domestic law. The guiding consideration in this regard is the presumption against extraterritoriality, a domestic principle that has its roots in the canon of statutory construction that 'an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains'.[80] Because international law on jurisdiction was rather territoriality-centred around the eighteenth and nineteenth century, courts in the United States were supposed to interpret federal statutory provisions to apply only within US territorial jurisdiction. Later however, the presumption was detached from its international law roots and instead found justification in the notion that Congress primarily legislates with domestic conditions in mind.[81] Therefore, the presumption could be rebutted if there is a clear indication of congressional intent that a certain statute should apply extraterritorially.[82] If such an intent is found, courts have to defer to Congress even if the application of law in question would exceed the limits of jurisdiction under customary international law.[83] With particular relevance to our first case study below, the presump-

78 Harvard Research Draft (n 71), 495.

79 Akehurst (n 42), 152; Lowe and Staker (n 50), 297.

80 *Murray v Schooner Charming Betsy*, 6 US 2 Cranch 64, 118, 2 L Ed 208 (1804).

81 See on this: *Restatement (Fourth) of the Foreign Relations Law of the United States* (n 42), § 404, reporters' notes 1.

82 *EEOC v Arabian American Oil Co.*, 499 US 244, 248 (1991).

83 A question different from the courts' application of the presumption against extraterritoriality is whether Congress has authority to legislate for extraterritorial circumstances in the first place. Under US Constitution, Congress has such powers in a number of areas, see Antony J Colangelo, 'A Unified Approach to Extraterritoriality' (2011) 97 Virginia Law Review 1019, 1047 – 1050.

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tion may be rebutted with regard to laws imposing foreign policy based economic sanctions, where the legislator's main concern is interpreted as to defend the United States against foreign behaviour.[84]

If the presumption against extraterritoriality is not rebutted, then a court may still apply the statute if it determines that the application of the provision to the specific set of facts at hand is actually to be considered domestic and not extraterritorial under US law. According to recent jurisprudence on the presumption, courts have to look to the 'focus' of a statutory provision, and if that 'focus' occurs within the United States, then application of this statute would be considered domestic. The 'focus' in this sense might consist of the transaction, the conduct, or the injury.[85] For instance, in *RJR Nabisco, Inc. v European Community*, the EC sued RJR Nabisco, Inc. under the Racketeer Influenced and Corrupt Organizations Act (**RICO**), alleging that RJR had engaged in a global money-laundering conspiracy. However, the Supreme Court ultimately ruled against the European Community (**EC**) on the grounds that the presumption against extraterritoriality was not rebutted in the first step and that the focus of the RICO was the injury sustained by the plaintiff. However, because the EC suffered no US domestic injuries to its business or property, application of the provision to these facts would be impermissibly extraterritorial.[86] On the other hand, when the 'focus' of a statutory provision is on the injuries or effects suffered, it may allow for extraterritorial application even if the conduct occurred completely abroad, which is precisely the US standpoint in relation to the effects principle in competition law.

b) The Effects Principle

According to the effects principle, a State may exercise jurisdiction with respect to conduct occurring outside its territory, but which has an effect, subject to certain qualifications, within its territory.[87] While continental European scholars tend to interpret the effects doctrine as a variation of objective territoriality,[88] it is treated as a separate basis of jurisdiction

84 *United States v Zarrab*, No. 15-cr-867, 2016 WL 6820737 (SDNY 2016), 18.
85 *Morrison v National Australia Bank Ltd.*, 561 US 247, 261 – 265 (2010).
86 *RJR Nabisco, Inc. v European Community*, 136 S Ct 2090, 2108 – 2111 (2016).
87 Austen L Parrish, 'The Effects Test: Extraterritoriality's Fifth Business' (2008) 61 Vanderbilt Law Review 1455, 1457 – 1458.
88 See for instance the categorization in Volz (n 24), 74; Cooreman (n 38), 92; Ryngaert, *Unilateral Jurisdiction and Global Values* (n 10), 82 – 84.

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particularly in the United States.[89] The PCIJ, in its judgement in *Lotus*, referred interchangeably either to 'effects' or 'territoriality' when discussing the Turkish assertion of jurisdiction over the collision on the high seas leading to deaths on board the Turkish ship (which was then assimilated to Turkish territory).[90] The differing views have no implication for the content of this principle. However, it is clear that the legitimacy of the effects principle is often discussed by comparing its application to the more obvious applications of objective territoriality, such as when the State of the victim exercises jurisdiction over the offender in the case of a cross-border shooting. Historically, it has been most controversial whether anticompetitive behaviour that caused detrimental domestic effects are comparable to the situation such as the one presented in *Lotus*.

aa) The Effects Principle in Competition Law

Typically, the 1945 US decision in *Alcoa* is identified as the starting point of the debate. In that case, the question was whether US law extended to the conduct of a group of foreign companies that had agreed on an aluminium production quota, which caused a shortage of production and thus might have affected the level of aluminium imports to the United States. In response, the court famously held that: 'it 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.'[91] While the detailed facts of the case and the judgement were complicated, the basic principle set out in this decision is clear: At least in the area of antitrust, the exercise of jurisdiction does not necessarily depend on the commission of physical acts within domestic territory, but rather, effects or possibly the intent to produce effects would suffice.[92]

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89 *Restatement (Fourth) of the Foreign Relations Law of the United States* (n 42), § 409, reporters' notes 5: 'By addressing effects jurisdiction in a separate section from territorial jurisdiction, this Restatement reflects the evolution of the effects principle into a distinct basis for jurisdiction to prescribe under customary international law'.

90 *S.S. Lotus (France v Turkey)* (n 20), 23.

91 *United States v Aluminum Corp of America* 148 F 2d 416, 443 (2d Cir 1945).

92 For a more detailed analysis of the case including its factual background, see Florian Wagner-von Papp, 'Competition Law and Extraterritoriality' in Ariel

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While the effects principle has gained widespread recognition in US jurisprudence since then, its precise scope is yet unsettled. For instance, it is unclear how qualified the effects have to be to trigger the application of the principle. Logic dictates that not any effect, however miniscule, should lead to the assertion of jurisdiction against foreign companies as the progressive integration of global commerce means that anything happening anywhere possibly results in effects everywhere else.[93] For instance, the Foreign Trade Antitrust Improvements Act of 1982 requires that effects be 'direct, substantial, and reasonably foreseeable'.[94] The US Supreme Court in *Hartford Fire*[95] as well as the Third Restatement on Foreign Relations Law only relied on the qualification 'substantial',[96] while the Fourth Restatement uses the somewhat cryptic formulation that the effects have to be 'substantial' in a way that 'creates a genuine connection between the conduct and the prescribing state'.[97]

Another somewhat contentious issue relates to the subjective component to trigger the application of the effects doctrine: Is the intent to produce effects alone sufficient or must there have been actual effects? The decisions in *Aloca* and *Hartford Fire* at least seem to suggest that the two requirements need to be satisfied cumulatively.[98] If both intent and effects need to be present, it is equally unsettled whether intent refers to 'subjective' intent, which encompasses an element of volition or desire to cause effects, or 'objective' intent, which may only require that the effects were 'reasonably foreseeable'.[99]

Outside of the United States, the application of the effects doctrine has initially been met with scepticism and outright protest. In particular,

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Ezrachi (ed), *Research handbook on international competition law* (Elgar 2012), 23 – 26 and Akehurst (n 42), 193 – 194.

93 See for instance Wagner-von Papp (n 92), 28; Akehurst (n 42), 198.

94 Foreign Trade Antitrust Improvements Act of 1982, Title IV of Pub.L. 97–290, 96 Stat 1246, § 402, codified at 15 U.S.C. § 6a.

95 *Hartford Fire Insurance v California* 509 US 764, 796 (1993).

96 *Restatement (Third) of the Foreign Relations Law of the United States* (n 5), § 402 comment d.

97 *Restatement (Fourth) of the Foreign Relations Law of the United States* (n 42), § 409, comment a.

98 In *Hartford Fire Insurance v California* 509 US 764, 796 (1993), the Supreme Court stated that: 'it is well established by now 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'. However, contrast this approach to *Restatement (Third) of the Foreign Relations Law of the United States* (n 5), § 402 comment d.

99 See on this Wagner-von Papp (n 92), 27 – 28.

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the United Kingdom, partly as a response to a private suit initiated by a US company against an international cartel in the *Uranium Antitrust Litigation*, adopted the Protection of Trading Interests Act of 1980, intended to block US exercise of extraterritorial jurisdiction in commercial matters.[100] Other nations including Canada, Australia and Japan have voiced their opposition through diplomatic protests and *amicus curiae* briefs.[101] However, the exercise of jurisdiction in competition matters against foreign companies based on effects has gained ground and many countries have since then adopted regulations similar to the ones in the United States, including countries that originally opposed this principle.[102] Of the major economies, at least China,[103] Japan,[104] and Germany[105] have explicitly endorsed effects based jurisdiction in legislation.

The position of the EU *vis-à-vis* the effects principle has been somewhat more complicated: The Commission has supported the application of the effects principle at least since 1969 in the famous *Dyestuffs* case, in which it commenced proceedings against a company based outside the European Economic Community (**EEC**) for alleged price-fixing through its Belgian subsidiary.[106] However, the jurisprudence of the Court of Justice of the

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100 For a detailed analysis of the background and provisions of this Act, see A.V Lowe, 'Blocking Extraterritorial Jurisdiction: The British Protection of Trading Interests Act, 1980' (1981) 75 AJIL 257.

101 Cf the State practice listed in *Restatement (Fourth) of the Foreign Relations Law of the United States* (n 42), § 409, Reporters' Notes 2.

102 See Wagner-von Papp (n 92), 41.

103 Anti-Monopoly Law of the People's Republic of China, Art. 2, available at http://www.gov.cn/flfg/2007-08/30/content_732591.htm, last accessed on 13 April 2022; see also the analysis provided by Zhenguo Wu, 'Perspectives on the Chinese Anti-Monopoly Law' (2008) 75(1) Antitrust Law Journal 73, 102 – 103. For an application of the Law to foreign companies, see MOFCOM Announcement No. 46 of 2014 on Decisions of Anti-monopoly Review to Prohibit Concentration of Undertakings by Prohibiting Maersk, MSC and CMA CGM from Establishing a Network Center, http://english.mofcom.gov.cn/article/policyrelease/buwei/201407/20140700663862.shtml, last accessed on 13 April 2022.

104 See for a discussion of the situation in Japan, Marek Martyniszyn, 'Japanese Approaches to Extraterritoriality in Competition Law' (2017) 66(03) ICLQ 747.

105 Act Against Restraints on Competition, § 185 para 2, English translation available at https://www.gesetze-im-internet.de/englisch_gwb/index.html, last accessed on 13 April 2022; for a prominent discussion of the limits of the effects principle, see Kammergericht, Order of 1 July 1983, Kart. 16/82, reported in WuW/E OLG 3051 (*Philip Morris Inc. v Bundeskartellamt*) and the analysis by Buxbaum (n 32), 658.

106 *Dyestuffs*, (Case IV/26278) Commission Decision 69/243/EEC [1969], OJ L 195/11; the EEC later became the European Community.

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European Union (**CJEU**) has been more ambiguous. Without outright rejecting the Commission's arguments (which were also supported by Advocate General Mayras[107]), the court chose to establish jurisdiction not through the effects principle but instead to rely on an economic entity theory by attributing the (territorial) actions of the EEC subsidiary to its non-EEC parent company.[108] Similarly, in its next significant decision on the extraterritorial reach of EU competition law, the *Wood Pulp* case, the court failed to endorse the effects principle explicitly. Instead, the CJEU argued that the violation of competition law at hand consisted of two elements, namely the formation of an agreement and its implementation. Therefore, as long as the implementation of the concerted action occurred on EU territory through agents, branches and subsidiaries, it was immaterial that the agreement itself was formed outside the EU.[109]

Commentators have long observed that the decision in *Wood Pulp* and the wide interpretation of conduct with the 'implementation doctrine' brought the position of the EU much closer to the effects principle than the name suggested.[110] However, it was only in 2017 in *Intel v Commission* that the CJEU formally recognized effects, qualified by the triad foreseeable, immediate and substantial, as an alternative to the implementation doctrine for establishing jurisdiction.[111] While the CJEU did not clarify the precise contours of the test, the new approach significantly aligns EU and US positions on the effects principle in competition law.[112] Thus, given the widespread support for and application of this doctrine by practically all major economies, the Fourth Restatement's claim that the effects principle

107 CJEU, C-48/69, *Imperial Chemical Industries Ltd. v Commission of the European Communities* [1972] ECR 619, Opinion of AG Mayras, Part II.

108 CJEU, C-48/69, *Imperial Chemical Industries Ltd. v Commission of the European Communities* [1972] ECR 619, paras. 129 – 142.

109 CJEU, C-89/85, *Ahlström Osakeyhtiö and others v Commission of the European Communities* [1988] ECR 5193, paras. 16 – 17.

110 Alexander Layton and Angharad M Parry, 'Extraterritorial Jurisdiction: European Responses' (2004) 26 Houston Journal of International Law 309, 318; Wagner-von Papp (n 92), 44 – 46.

111 CJEU, C-413/14 P, *Intel Corp. v European Commission* [2017] ECLI:EU:C:2017:632, paras. 40 – 60.

112 Luca Prete, 'On Implementation and Effects: The Recent Case-law on the Territorial (or Extraterritorial?) Application of EU Competition Rules' [2018] Journal of European Competition Law & Practice 1, 6.

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forms part of customary international law is most likely correct at least in the area of competition law.[113]

bb) The Effects Principle in Other Areas of Substantive Law

Although the effects principle has been extensively developed and used in the context of competition law, since *Alcoa*, its application has also diffused into other substantive areas of regulation. For instance, multiple judicial opinions and academic commentators have considered the principle as a possible basis for extraterritorial environmental protection. The leading decision in this regard may be the US *Trail Smelter* case, which concerned a factory in Canada located approximately 10 miles from the US-Canadian border. Over some time, the operator of the factory, Teck Cominco, discharged hazardous waste into the Columbia River, which was eventually carried downstream across the border into the United States. Subsequently, private members of a tribe inhabiting the area filed suit against Teck Cominco, seeking to compel the company to conduct an investigation and feasibility study with regard to clean-up actions according to US environmental protection law.[114] The district court gave judgement for the plaintiff and the circuit court affirmed on appeal.[115] The reasoning of the district court is of particular salience for the purposes of this study. Clarifying that US laws generally are meant to apply only within the territorial jurisdiction of the United States, it finds precedent for an exception to this rule where such a limitation of the scope of the statute would result in adverse effects within the United States. With this

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113 *Restatement (Fourth) of the Foreign Relations Law of the United States* (n 42), § 409; Jack L Goldsmith, 'Against Cyberanarchy' (1998) 65(4) The University of Chicago Law Review 1199, 1208; Wagner-von Papp (n 92), 41; Volz (n 24), 80 – 82. Meng, *Extraterritoriale Jurisdiktion im öffentlichen Wirtschaftsrecht* (n 43), at 479 – 482 argues that at least the States participating in the practice have formed particular customary international law among them. However, other commentators are more cautious: Cooreman (n 38), 101 – 102; Danielle Ireland-Piper, *Accountability in Extraterritoriality: A Comparative and International Law Perspective* (Edward Elgar Publishing 2017), 36 – 37; Ryngaert, *Jurisdiction in International Law* (n 2), 82 – 84; Lowe and Staker (n 50), 298; Menno T Kamminga, 'Extraterritoriality' in R. Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (Oxford University Press), para. 15.

114 *Pakootas v Teck Cominco Metals, Ltd.*, CV-04–256-AAM, 2004 WL 2578982 (ED Wash. 8 November 2004).

115 *Pakootas v Teck Cominco Metals, Ltd.*, 452 F 3d 1066 (9th Cir 2006).

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argumentation, the district court clearly embraced the application of the effects principle to transboundary environmental harms.[116]

The possible ramifications of transferring the effects doctrine to environmental regulation are significant. As Advocate General Kokott has pointed out in her opinion on the CJEU case *Air Transport Association of America and Others*, 'pollution knows no boundaries and […] greenhouse gases contribute towards climate change worldwide irrespective of where they are emitted; they can have effects on the environment and climate in every State and association of States, including the European Union.'[117] Some academic commentators have adopted this line of reasoning and highlighted the potential of the effects principle to legitimize unilateral interventions in the face of the global challenge climate change.[118] However, there are serious doubts about this line of interpretation in relation to both its normative foundation and its possible ramifications. Can it really be said that the emission of each ton of CO2 anywhere in the world causes a direct, substantial and foreseeable environmental harm everywhere else? And if one accepts this proposition, is it truly desirable that any State can regulate emissions occurring anywhere in the world unilaterally?

116 However, although the appellate court followed the decision on appeal, it did so on rather convoluted grounds and rejected extraterritoriality altogether. According to the 9th Circuit, because the waste came to be accumulated in the Columbia River in the US, and because waste sites could qualify as 'facilities' under the applicable law, the fact that the hazardous material was discharged in Canada did not matter at all. The issue was thus interpreted as purely domestic in nature, see *Pakootas v Teck Cominco Metals, Ltd.*, 452 F 3d 1066, 1074 – 1075 (9th Cir 2006). For a more detailed discussion of the judgements, see Jonathan R Nash, 'The Curious Legal Landscape of the Extraterritoriality of US Environmental Laws' 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).

117 CJEU, C-366/10, *Air Transport Association of America and Others v Secretary of State for Energy and Climate* Change [2011] ECR I-13755, Opinion of AG Kokott, para. 154.

118 Eckard Rehbinder, 'Extra-Territoriality of Pollution Control Laws from a European Perspective' 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), 158 – 159; Natalie L Dobson and Cedric Ryngaert, 'Provocative Climate Protection: EU "Extraterritorial" Regulation of Maritime Emissions' (2017) 66(02) ICLQ 295, 327 – 330.

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c) Active Personality

States may extend their prescriptive jurisdiction to their own nationals abroad. This principle is firmly established under international law and in fact, it is arguably the oldest type of jurisdiction, developed before rulers had managed to consolidate their control over territory to a degree where it was possible to assert jurisdiction based on territoriality.[119] Active personality jurisdiction has particular importance in the area of criminal law, where many States (especially from a civil law tradition) prohibit the extradition of their own nationals,[120] and thus, without the assertion of extraterritorial jurisdiction, offenders may be able to evade any possible prosecution by returning to their home country after committing a crime abroad and before local authorities take enforcement actions.[121] In practice however, States often limit the exercise of nationality-based jurisdiction, for instance to serious crimes which carry a minimum punishment of a certain level or to crimes that are subject to extradition. Other States may require the satisfaction of dual criminality, which means active personality jurisdiction for crimes abroad is only exercised if the conduct concerned is considered criminal also in the place of commission. However, these limitations seem not to stem from a legal obligation but rather reflect considerations of international comity, and indeed, the practice among States in this regard differs widely.[122]

Although the exercise of nationality-based jurisdiction is almost universally recognized, international law itself is generally neutral towards the grant of nationality to natural persons. Rather, this determination is in the discretion of each nation's own laws, despite the fact that the ICJ has

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119 For more on this: Ryngaert, *Jurisdiction in International Law* (n 2), 107; Richard T Ford, 'Law's Territory (a History of Jurisdiction)' (1999) 97 Michigan Law Review 843, 873.

120 Blakesley (n 77), 117.

121 Ibid.

122 For the dual criminality criterion, see for instance: BGH, Order of 26 March 2009, StB 20/08, reported in NJW 2010, 385; See further Tobias Dietrich, *Die Erstreckung der Strafbarkeit auf Auslandssachverhalte nach § 35 AWG: Die Vereinbarkeit von § 35 AWG mit dem Völkerrecht* (Zugl.: München, Univ. Diss. 2013. Schriftenreihe Studien zum Völker- und Europarecht vol 121, Kovač 2014); However, Klaus Pottmeyer, 'Die Strafbarkeit von Auslandstaten nach dem Kriegswaffenkontroll- und dem Außenwirtschaftsrecht' [1992] Neue Zeitschrift für Strafrecht 57, 59 – 60 argues that dual criminality is required under international law principles.

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recognized certain limitations to this freedom in the *Nottebohm* case.[123] Apart from nationals *stricto sensu*, the active personality principle has been gradually expanded to cover also (permanent) resident aliens as a result of increased mobility.[124] While laws in private matters, such as succession, divorce and in some cases torts have long recognized residency as an alternative connecting factor, this principle is also increasingly applied in criminal and regulatory laws. By way of example, both the US Foreign Corrupt Practices Act (**FCPA**) and the UK Bribery Act 2010 apply to citizens as well as to residents. Such expansions have not caused protests by other States and now seem to be rather firmly established in international law.[125]

Of particular importance to international economic regulations, the active personality principle also applies to corporations, although how their nationality is determined is more controversial under international law. The two most widely accepted criteria for this purpose are (1) the corporation's place of incorporation and (2) its centre of control or seat of management.[126] However, the United States in particular has at times included subsidiaries and branches abroad that are controlled by US shareholders into the category of corporate nationals and thus extended its jurisdictional reach based on active personality. Subjecting foreign branches to active personality jurisdiction seems to have caused little diplomatic backlash, presumably because branches are not distinct juridical entities and it is thus plausible to attach the nationality of the corporate parent to them.[127] On the other hand, the same rationale does not apply to subsidiaries, as the incorporation in a foreign State creates more legal distance between the domestic shareholders and the subsidiary. Thus, US assertions of juris-

123 ICJ, *Nottebohm, Second Phase (Liechtenstein v Guatemala)* [1955] ICJ Rep 4; The two most common bases are to grant nationality to anyone born in the territory (ius soli) or to anyone who descended from nationals of that State (ius sanguinis); in addition, most States allow for naturalization, see Lowe and Staker (n 50), 299.

124 Ibid., 325.

125 However, Ireland-Piper, *Accountability in Extraterritoriality* (n 113), at 26 correctly observes that this extension is not without problems, given that residents, unlike nationals, have no right to vote for parliament and are disadvantaged in other areas of law. Thus, the legitimacy of asserting extraterritorial jurisdiction over mere residents is questionable.

126 ICJ, *Barcelona Traction Light and Power Co, Ltd. (Belgium v Spain)* [1970] ICJ Rep 3 (1970), para. 70.

127 *Restatement (Third) of the Foreign Relations Law of the United States* (n 5), § 414, comment a.

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diction based on this principle have prompted critical responses by the countries where the subsidiaries were incorporated.[128] Commentators have also largely rejected this sort of 'control doctrine' and either regarded it as generally incompatible with international law[129] or subjected its exercise to a number of criteria to reflect its exceptional character.[130]

d) Passive Personality

Unlike the active personality principle, jurisdictional assertions on the basis that the victim of an offense carries a certain nationality are more controversial under international law.[131] The rationale for this caution is that ordinarily, the perpetrator of a crime will not be able to know the victim's nationality and thus cannot anticipate that the laws of a certain State will apply to his conduct. In an increasingly diverse world, someone committing a crime in an urban centre would thus need to be familiar with the laws of potentially all nations or risk being subjected to wholly unexpected enforcement measures.[132] Despite these theoretical concerns, State practice has increasingly featured the assertion of jurisdiction based on the passive personality principle, at least for particular categories of offenses. For instance, this is the case for acts of terrorism, where victims are often specifically chosen for their nationality as well as attacks on diplomatic representatives and other officials of the State. While one of the earliest international protests against the assertion of extraterritorial jurisdiction, the 1886 *Cutting* case, had passive personality as its central matter, States today have largely acquiesced to such exercise.[133] Thus, in

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128 For conflicts in the field of economic sanctions, see below at C.II.2. The Extension of Personality-based Jurisdiction to Foreign Subsidiaries.

129 Ryngaert, *Jurisdiction in International Law* (n 2), 108; Beaucillon (n 26), 116 – 118.

130 *Restatement (Third) of the Foreign Relations Law of the United States* (n 5), § 414 (2) (b).

131 Mann (n 1), 92 considered passive personality an 'excess of jurisdiction'.

132 This example is drawn from *S.S. Lotus (France v Turkey)* (n 20), Dissenting Opinion of Judge Moore, 92.

133 In the *Cutting* case, the US national Cutting had allegedly libelled a Mexican citizen in a paper published in Texas and was subsequently seized by Mexican authorities when he was visiting that country. The US Secretary of State strongly protested this assertion arguing that international law did not recognize this basis for jurisdiction. In particular, it would expose US citizens to indefinite criminal responsibility with regard to foreigners on domestic territory, see the

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principle, the literature and jurisprudence now accept passive personality as a valid basis of jurisdiction though its precise scope is still unclear.[134]

Similar to the active personality principle, jurisdiction based on the victim's nationality is often accompanied by a number of requirements limiting its exercise. For instance, the criminal law of Germany only extends its scope of application to extraterritorial cases based on passive personality if dual criminality is satisfied.[135] This requirement does indeed refute some of the concerns argued above, as the perpetrator may be expected to know the laws of the place where he is currently residing.[136] Other restrictions may require the territorial presence of the offender or executive consent for prosecutions based on this principle. However, just as with active personality, those limitations seem to be applied out of international comity rather than a sense of legal obligation.[137]

e) The Protective Principle

Applying the protective principle, States may exercise jurisdiction over conduct occurring abroad that poses a danger to the State's fundamental interests, including its security, integrity, sovereignty or important governmental functions.[138] In theory, the protective principle differs from the effects doctrine in that the prescribing State does not need to show actual or even intended effects on domestic territory as long as the conduct is directed against the above-mentioned interests.[139] In practice however, the distinctions may be blurry, in particular because what precisely constitutes a fundamental national interest satisfying the protective principle is uncer-

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reports of this case in the 1887 Papers relating to the Foreign Relations of the United States (1888), 751, https://history.state.gov/historicaldocuments/frus1887/d491, last accessed on 13 April 2022; see also Blakesley (n 77), 123.

134 For this jurisprudence, see *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (n 69), Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, 77, para. 47.

135 German Criminal Code (Strafgesetzbuch), § 7.

136 Oxman (n 22), para. 33.

137 *Restatement (Fourth) of the Foreign Relations Law of the United States* (n 42), § 411 reporters' notes 2.

138 Blakesley (n 77), 108; Ireland-Piper, *Accountability in Extraterritoriality* (n 113), 33.

139 *Restatement (Fourth) of the Foreign Relations Law of the United States* (n 42), § 412 reporters' notes 1; Blakesley (n 77), 109.

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tain and up to the definition of each individual State.[140] Still, there seems to exist a consensus at least over certain crimes such as treason, espionage and counterfeiting of State documents or currency. Equally uncontroversial has been the extension of the protective principle to conspiracies to evade the State's immigration or customs laws as well as perjury against consular officials.[141]

In US jurisprudence, the principle is also invoked frequently in cases related to narcotics trafficking by foreigners or other crimes on the high seas. The jurisprudence in this area is complex as the factual circumstances vary and there seems to be no consensus among the different Circuits about the role of international law in the normative analysis regarding the jurisdictional assertions against foreigners outside US territory.[142] However, the decisions that do mention international law frequently resort to the protective principle to establish the required nexus between the conduct on the high seas and the United States. For instance, *Peterson* argues that drug trafficking presented so severe a threat to the ability of the nation to properly function that the protective principle could be applied in this instance.[143] The protective principle is preferred over objective territoriality or the effects doctrine in these cases '[…]because it is often difficult to prove beyond a reasonable doubt that a vessel seized on the high seas carrying contraband was headed for the United States.'[144] Despite the possibly very extensive reach of US jurisdiction in these matters, foreign States have largely acquiesced to this practice, as enforcement is frequently directed against vessels which are either stateless or where the flag State has consented to the exercise of jurisdiction.[145] Additionally, the status of large-scale narcotics trafficking as an almost universally condemned practice may also bolster US jurisdictional claims.[146]

140 On this point, Volz (n 24), 93 – 94; See also the examples provided by Akehurst (n 42), 158 – 159; Philip Uecker, *Extraterritoriale Regelungshoheit im Datenschutzrecht* (Frankfurter Studien zum Datenschutz vol 52, 1. Auflage, Nomos 2017), 57 – 60 argues that the protective principle may also serve as a possible basis for extraterritorial data protection legislation.

141 See for instance Blakesley (n 77), 108 – 109; *Restatement (Fourth) of the Foreign Relations Law of the United States* (n 42), § 412.

142 See the lengthy analysis by Stigall (n 58), 347 – 368.

143 *United States v Peterson*, 812 F 2d 486, 493 – 494 (9th Cir 1987); See also *United States v Angola*, 514 F Supp 933, 935 – 936 (SD Florida 1981).

144 *United States v Gonzales*, 776 F 2d 931 (11th Cir 1985), para. 42.

145 See the practice in Stigall (n 58), 347 – 368.

146 *United States v Gonzales*, 776 F 2d 931 (11th Cir 1985), para. 42.

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Finally, it is contentious whether the protective principle serves as a possible jurisdictional basis for extraterritorial trade restrictions, boycotts and embargoes premised on foreign policy or national security issues. Among others, this point has been argued (albeit briefly) by the German Federal Court of Justice in a case concerning material supplies for the Iranian nuclear programme.[147] It is also regularly invoked by the United States in relation to its export control and economic sanctions measures.[148] The literature has viewed the exercise of extraterritorial jurisdiction based on the protective principle critically and accepted this extension only in cases, in which sufficient evidence of a direct threat to national security through the regulated transaction could be proven.[149] Indeed, this limitation seems to be necessary to prevent an abuse of the principle as a tool to advance convenient economic objectives.[150] Thus, while particular contributions to known terrorist organizations or programmes of weapons of mass destruction may be accessible to the protective principle, the vast amount of export control and economic sanctions policies seem to fall short of this quality.[151]

f) The Universality Principle

It has been argued that the principles of jurisdiction are derivatives of the definition of statehood. Territoriality, active and passive personality as well as the protective principle mirror the fact that a State under international law must necessarily possess a territory, a population and an independent

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147 See BGH, Order of 26. 3. 2009 StB 20/08, reported in NJW 2010, 385.

148 For US secondary boycotts, see below C.II.4. Secondary Trade Boycotts.

149 Ryngaert, *Jurisdiction in International Law* (n 2), 118; Dieter Holthausen, 'Die Strafbarkeit von Auslandstaten Deutscher und das völkerrechtliche Interventionsverbot' [1992] NJW 214, 215 with regard to the extraterritorial support of programmes of weapons of mass destruction; in this sense also Akehurst (n 42), 159.

150 See on this point Akehurst (n 42), 158 with regard to US re-export controls targeting the Soviet Block.

151 See for instance Jeffrey A Meyer, 'Second Thoughts on Secondary Sanctions' (2009) 30(3) University of Pennsylvania Journal of International Law 905, 909: 'The United States itself is prone to exaggerated claims that secondary sanctions measures can be justified by the protective or effects jurisdictional principles, even when these measures aim to redress […] conduct that occurs in distant lands and that has no real prospect of jeopardizing the safety of or causing any substantial effect in the United States.'.

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government that may exercise its international law personality.[152] Under this conception, the status of the universality principle has always been somewhat dubious as it allows for the exercise of jurisdiction based solely on the nature of the conduct in question, without the presence of any aspect related to State sovereignty, such as the nationality of the perpetrator, the place of commission or whether the conduct is directed against a fundamental interest of the State.[153] Therefore, controversies and a certain doctrinal fuzziness regarding the legitimacy and scope of this principle under international law still exist, a fact that is exacerbated by the dearth of State practice in the actual exercise of universal jurisdiction.[154] In addition, while the domestic legislation of a growing number of States establishes universal jurisdiction over certain types of crimes, this may not provide conclusive evidence over the status of universality under customary international law since these laws are often based (also) on treaties.[155] Since 2009 therefore, the scope and application of the principle of universal jurisdiction has featured annually on the agenda of the General Assembly of the United Nations (**UN**) and the Secretary General is tasked with collecting information and observations on State practice of this principle.[156] The possible outcome of this project is yet unclear.

The principle of universal jurisdiction is best established, and most commonly applied in criminal law. Because of its atypical nature – it does not require any connection between the conduct and the State exercising

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152 Armand L de Mestral and T. Gruchalla-Wesierski, *Extraterritorial application of export control legislation: Canada and the USA* (Research study/ Canadian Council of International Law vol 1, Nijhoff 1990), 18.

153 Roger O'Keefe, 'Universal Jurisdiction: Clarifying the Basic Concept' (2004) 2(3) JICJ 735, at 745 defines universal jurisdiction as 'prescriptive jurisdiction over offenses committed abroad by persons who, at the time of commission, are non-resident aliens, where such offenses are not deemed to constitute threats to the fundamental interests of the prescribing state or, in appropriate cases, to give rise to effects within its territory'; a similar definition is provided by the Institut de droit international, Universal Criminal Jurisdiction with regard to the Crime of Genocide, Crimes against Humanity and War Crimes, Resolution of 26 August 2005.

154 See Ryngaert, *Jurisdiction in International Law* (n 2), 129 – 132.

155 This is argued by Sienho Yee, 'Universal Jurisdiction: Concept, Logic, and Reality' (2011) 10(3) Chinese Journal of International Law 503; however, the *Restatement (Fourth) of the Foreign Relations Law of the United States* (n 42), § 413 reporters' notes 2 points out that these treaties may indirectly support universal jurisdiction in customary international law.

156 See for instance: General Assembly, The scope and application of the principle of universal jurisdiction, Resolution of 20 December 2018, A/Res/73/208.

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jurisdiction – the list of crimes amenable to universality is necessarily limited.[157] Precisely which specific offences trigger the application of this principle is subject to debate within jurisprudence and literature, but most commentators seem to agree that at least piracy, war crimes (consisting of grave breaches of provisions of the Geneva Conventions) and crimes against humanity including genocide belong to this category.[158] This is also reflected in the domestic legislation of a growing number of States.[159] However, there is great controversy surrounding the question whether under international law, universal jurisdiction covers terrorism or at least specific acts of terrorism. With regard to the former, problems already arise because no prevailing definition of the concept of terrorism as such exists.[160] Nonetheless, US commentators in particular have applied univer-

157 Multiple theories have been offered to justify the raison d'être of the universality principle: The most common explanation suggests that some types of conduct are so morally reprehensible that every State has a legitimate interest in their repression, see Lowe and Staker (n 50), 302; Ryngaert, *Jurisdiction in International Law* (n 2), 127; Ireland-Piper, *Accountability in Extraterritoriality* (n 113), 29. However, this theory may not explain why one of the most established crimes subject to universal jurisdiction is piracy, an act, which may involve relatively minor use of force and may not be more morally reprehensible than for instance common murder. This anomaly is often explained by the fact that it was easy for pirates to evade the jurisdiction of any State and that therefore, universal jurisdiction was *necessary* in order to bring these persons to justice, see Lowe and Staker (n 50), 302 and Yee (n 155), para. 4.

158 ICJ, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (n 69), Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, paras. 61 – 65; *Israel v Eichmann*, 36 International Law Reports 277, 289 – 304, Isr. S. Ct. (1962); Principle 2(1) of the Princeton Principles on Universal Jurisdiction (2001), https://lapa.princeton.edu/hosteddocs/unive_jur.pdf, last accessed on 13 April 2022; Lowe and Staker (n 50), 302; Stephen G Coughlan and others, *Law Beyond Borders: Extraterritorial Jurisdiction in an Age of Globalization* (Irwin Law; Canadian Electronic Library 2014), 37 – 38; Ilias Bantekas, 'Criminal Jurisdiction of States under International Law' in R. Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (Oxford University Press), paras. 23 and 28.

159 See for instance 18 U.S.C. § 1091 (genocide); 18 U.S.C. §§ 1583 – 1584, 1596 (slavery); German Code of Crimes against International Law 2002, § 1; Canadian Crimes Against Humanity and War Crimes Act (S.C. 2000, c. 24), § 6(1); Australian Criminal Code Act 1995, §§ 15.4 with 238.117.

160 This was the main argument of the Second Circuit for rejecting the application of the universality principle to an act of terrorism, *United States v Yousef*, 327 F 3d 56 (2d Cir 2003) at 108.

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sality to certain specific terrorist acts, among others hijacking of aircrafts and hostage taking.[161]

Another source of great controversy or at least misunderstanding relates to whether universal jurisdiction may be exercised *in absentia*, that is, in relation to an accused who is not territorially present. The origin of this debate was laid down in the *Arrest Warrant* case before the ICJ, where the various separate and dissenting opinions of the members of the Court found different answers to the normative permissibility of universal jurisdiction *in absentia*.[162] While there is little practice of States explicitly exercising universal jurisdiction without the accused being present in domestic territory, this is not necessarily an indication that such exercises are prohibited under customary international law.[163] Rather, as is pointed out by a number of commentators, there seems to be no logical need for a distinct concept of universal jurisdiction *in absentia* and the members of the ICJ analysing this issue have most likely conflated prescriptive, adjudicative and enforcement jurisdiction. The principle of universality only relates to jurisdiction to prescribe, where, as the principle suggests, it is irrelevant whether the accused is within domestic territory or not at the time of the commission of the crime. However, whether the accused is within domestic territory for the purposes of a trial or the execution of an arrest warrant only concerns the legitimate exercise of adjudicative or enforcement jurisdiction, an issue distinct from that of prescription.[164] Thus, as O'Keefe has correctly pointed out, 'as a matter of international law, if universal jurisdiction is permissible, than its exercise *in absentia* is logically permissible also'.[165]

The true reason for the international scepticism with regard to the initiation of criminal proceedings, such as issuing an arrest warrant or

161 *Restatement (Fourth) of the Foreign Relations Law of the United States* (n 42), § 402 reporters' notes 10; Blakesley (n 77), 124 – 136.

162 See for instance: *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (n 69), Separate Opinion of Judge Guillaume, para. 12 ('Universal jurisdiction *in absentia* as applied in the present case is unknown to international law.'); Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, para. 59 ('[…] a State may choose to exercise a universal criminal jurisdiction *in absentia* […]); Dissenting Opinion of Judge Van den Wyngaert, paras. 54 – 56.

163 Ryngaert, *Jurisdiction in International Law* (n 2), 133 – 134; *Restatement (Fourth) of the Foreign Relations Law of the United States* (n 42), § 413 reporters' notes 1.

164 *Restatement (Fourth) of the Foreign Relations Law of the United States* (n 42), § 413 reporters' notes 1; Colangelo, 'Spatial Legality' (n 48), 92.

165 O'Keefe (n 153), 750.

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conducting a trial *in absentia*, against persons not present in domestic territory is likely that it potentially raises delicate questions of international stability.[166] Since these proceedings are based on universal prescriptive jurisdiction, in theory, a large number of States may decide to concurrently initiate criminal proceedings over the same person. Additionally, assertions of universal jurisdiction at times target high-ranking State officials and are thus often politically sensitive.[167] However, the better solution to these issues would be not to create an artificial jurisdictional category of universal jurisdiction *in absentia*, but rather to limit such exercises based on established principles of restraints or through other domestic mechanisms.[168]

Lastly, with regard to the principle of universality, it is contentious whether this jurisdictional basis has any application outside of the field of criminal law. In particular, this issue is debated in the closely related area of tort law where universality may function as a vehicle to redress victims of international wrongs who may otherwise not be able to initiate suit in the State where such crimes were committed. However, these questions have gained practical relevance almost only in relation to the US Alien Tort Statute (**ATS**) and its application to corporate wrongdoing, so that they are best discussed jointly with other issues in the area of business and human rights.[169]

3. Treaty-based Extensions of Jurisdiction

In practice, customary international law principles of State jurisdiction are complemented by an increasing net of treaties allowing or requiring the parties to exercise jurisdiction with respect to certain conduct of common concern. Generally, these treaties define and criminalize certain offenses, such as the financing of terrorism[170] or bribery[171], before setting out the

166 See on this point, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (n 69), Dissenting Opinion of Judge Van den Wyngaert, para. 56.
167 However, Ryngaert, *Jurisdiction in International Law* (n 2), 131 notes that the conflict potential is overblown.
168 See for suggestions: ibid., 134 – 135.
169 See below at C.V.5c) Comparative Normative Analysis.
170 International Convention for the Suppression of the Financing of Terrorism (adopted 9 December 1999, entered into force 10 January 2000) 2178 UNTS 197, Resolution A/RES/54/109 (‘Terrorist Financing Convention’).
171 UNCAC (n 15).

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circumstances, in which State parties shall or may establish jurisdiction. Typically, these situations reflect the ordinary basis under customary international law such as territoriality and nationality, including when the offense is committed in the territory of the State, on board a vessel flying the flag of the State or an aircraft registered under the laws of the State, or when a national of the State commits the offense. Some treaties also allow for jurisdiction based on variations of the protective principle, such as when the offense is directed against a State or government facility abroad or when the offense is committed in order to compel the State to do or abstain from doing something.[172]

More importantly however, such treaties also often contain a provision that allows a State to establish jurisdiction over anyone, regardless of the location where the offense was committed, the nationality of the perpetrator or the direction of the offense, if the individual is found within domestic territory and the State does not extradite this person to another State claiming jurisdiction.[173] This concept is known as *aut dedere aut iudicare* (extradite or prosecute) and serves to ensure that the alleged offender may not escape prosecution anywhere. Because this basis allows a State to exercise jurisdiction without any connection to the facts of the underlying offense, it is sometimes termed 'conditional'[174] or 'quasi'-universal jurisdiction.[175] While in principle, such treaty-based obligations only apply *inter partes*, States have often implemented these provisions in domestic law without differentiating between nationals of party and non-party States.[176] Theoretically, a State that relies on such a provision to prosecute a national of a foreign State which is not a party to the convention at issue could thus possibly face diplomatic protests. In reality however, there have been no such protests to date,[177] which may bolster the argument that such treaties indeed often deal with issues of common concern to which even non-party States generally subscribe. As will be seen, the existence of a treaty regulating a certain set of conduct makes the assertion of extraterri-

172 Terrorist Financing Convention, Art. 7(2)(b) and (c).
173 Ibid., Art. 7(4); Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (adopted 23 September 1971, entered into force 26 January 1973) 974 UNTS 177, Art. 5(2).
174 Coughlan and others (n 158), 38.
175 Volz (n 24), 100; Crawford and Brownlie (n 18), 469.
176 *Restatement (Fourth) of the Foreign Relations Law of the United States* (n 42), § 413, reporters' notes 2.
177 Lowe and Staker (n 50), 304.

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torial jurisdiction in this area much less contentious, even if the treaty does not have universal adoption.

4. Territoriality-based Jurisdiction and the Internet

This study argues that the boundaries of territoriality as the cornerstone of the traditional doctrine in international law are not capable of providing order with regard to complex mechanisms of modern commercial regulation. However, the growing complexity of regulatory design is not the only significant challenge to the currently dominant jurisdictional framework. In the last few decades, giant leaps in internet technology, from e-commerce to social media to cloud computing have posed another formidable challenge. While cross-border information flows and transactions have long existed, there is no doubt that the rise of the internet has exacerbated the issue. First, it is only through the internet that every person connected to it is able to communicate simultaneously to anyone else in the world. Second, these communications, information and data may be 'located' in or 'transiting' through servers in one or more third countries distinct from the location of the sender and the (intended receiver). Because of its stark contrasts to the physical world, early commentators had thus occasionally argued for the recognition of a 'Cyberspace' that required a distinct set of rules different from traditional territorial legal authority.[178] However, States had (as expected) little interest in such conceptions.[179] Quite the opposite, actual practice shows that States are undertaking immense efforts across different substantive areas to tame the internet so that the question, which State is entitled to regulate which online activity, has become increasingly salient.[180]

One of the earliest cases that rose to prominence by highlighting the conflict potential of asserting jurisdiction over cross-border internet matters was the *Yahoo* case.[181] In that case, two French Jewish organizations

178 Johnson and Post (n 8).

179 Paul S Berman, 'The Globalization of Jurisdiction' (2002) 151 University of Pennsylvania Law Review, 315 – 316.

180 Uta Kohl, 'Jurisdiction in Cyberspace' in Nikolaos K Tsagourias and Russell Buchan (eds), *Research Handbook on International Law and Cyberspace* (Research handbooks in international law, Paperback edition 2017. Edward Elgar Publishing 2015), 35.

181 Tribunal de Grande Instance de Paris, Ordonnance de référé, 22 May 2000, *UEJF et Licra v Yahoo! Inc. et Yahoo France*, and Tribunal de Grande Instance de Paris,

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sued Yahoo! Inc., a US corporation and its French subsidiary for permitting French internet users access to Yahoo's auction site, which allowed these users to purchase Nazi artefacts contrary to France's prohibition on the sale and distribution of Nazi-memorabilia. In its decision, the Paris Court ordered that Yahoo! Inc. and its French subsidiary to undertake all necessary measures to prevent any access of French users to Yahoo auction sites that sell artefacts sympathetic to Nazism or that might amount to Holocaust denial. While this order was uncontroversial with regard to yahoo.fr, which was dedicated to French users, its extension to yahoo.com, which arguably had a much stronger connection to the United States, proved problematic. Yahoo! Inc. argued that the court order was impermissibly extraterritorial and that to comply with the order, it needed to remove such content from its servers altogether, an action, which may run afoul of the First Amendment of the US Constitution. The French court, on the other hand, considered relevant the fact that French users could potentially access yahoo.com in addition to yahoo.fr, so that the site also had to comply with French law.

Normatively, this assertion of jurisdiction based on the mere accessibility of a website within the State may be interpreted as a variation of the objective territoriality or the effects principle.[182] However, this interpretation seems to be very expansive, as, in fact, the majority of websites are retrievable all over the world and jurisdiction based on accessibility would thus come close to universality.[183] These concerns also have likely guided the California Court petitioned by Yahoo! Inc. in the case mentioned above, which declared the French order unenforceable in the United States.[184] However, decisions like *Yahoo* are far from being an anomaly and several States have exercised jurisdiction under this wide effects theory despite the possible ramifications, in particular in morally highly loaded cases.[185]

Ordonnance de référé, 20 November 2000, *UEJF et Licra v Yahoo! Inc. et Yahoo France*.

182 Kohl, 'Jurisdiction in Cyberspace' (n 180), 47; Stefanie Schmahl, 'Zwischenstaatliche Kompetenzabgrenzung im Cyberspace' (2009) 47 Archiv des Völkerrechts 284, 305; Stefano Battini, 'Globalisation and Extraterritorial Regulation: An Unexceptional Exception' in Gordon Anthony, Jean-Bernard Auby and Morison John (eds), *Values in Global Administrative Law* (Hart 2011), 70.

183 This is also noted by Ryngaert, *Jurisdiction in International Law* (n 2), 80.

184 *Yahoo! Inc v La Ligue Contre Le Racisme et l'Antisémitisme*, 169 F Supp 2d 1181, 1186 (ND Cal 2001).

185 See for instance, for Germany, BGH, Judgment of 12 December 2000, 1 StR 184/00, reported in NJW 2001 (*Töben*), 624 and for the UK, *R v Perrin* (2002)

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Nonetheless, similar to the development in competition law, States have at times tried to limit the application of their laws in internet matters through the additional requirement of intention. Under this variation, jurisdiction may not be premised solely upon the accessibility of a website in a certain State, but rather, the website must have been specifically targeting users in that State.[186] This is arguably the approach taken in the new EU General Data Protection Regulation (**GDPR**), the territorial scope of which is extended to foreign enterprises only if they process data in relation to the offering of goods and services to residents in the Union or to the monitoring of the behaviour of such residents within the Union.[187] This test sometimes also provides the yardstick in US jurisprudence on finding jurisdiction over defendants based on contact over the internet. Thus, in a case concerning prohibited online gambling in the State of New York, the court repeatedly alluded to the fact that the foreign defendants actively targeted residents within the State and undertook no efforts to exclude identifiable New Yorkers from their advertising efforts.[188] However, even this reference to intention or targeting may in the end prove unworkable in practice, as there are no reliable criteria for assessing this question. For instance, one commonly cited requirement, that the website appears in the language of the target user, is increasingly less meaningful, given the development of automatic translation tools.[189]

The second possible issue with jurisdiction in the internet era is that not only is data accessible anywhere in the world, but it may be stored in or transiting through States that have no connection to the sender, the receiver or the content of the communication. In the context of export control regulation, one could thus imagine a Swedish engineer sending an email containing sensitive technical data to a researcher in Russia, using a service where the email is stored on a US based server. While this action

EWCA Crim. 747 (22 March 2002); see also Schmahl (n 182), 299 – 304 and Kohl, 'Jurisdiction in Cyberspace' (n 180), 38 – 44.

186 See for more on this: Thomas Schultz, 'Carving up the Internet: Jurisdiction, Legal Orders, and the Private/Public International Law Interface' (2008) 19(4) EJIL 799, 816 – 819.

187 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L 119/1, Art. 3.

188 *People v World Interactive Gaming Corp*, 714 NYS 2d, 844 (1999); See also Kohl, 'Jurisdiction in Cyberspace' (n 180), 47; Berman, 'The Globalization of Jurisdiction' (n 179), 412 – 420.

189 Berman, 'The Globalization of Jurisdiction' (n 179), 420.

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may be innocuous in Sweden, the content of the email may be illegal in the United States.[190] In these cases, the question arises whether the State, where such data is located in or transiting through, in our case the United States, may claim jurisdiction, even though it has only a marginal connection to the facts and the Swedish engineer possibly may not even know that his or her email would pass through the United States.[191] That strict territoriality would lead to potentially arbitrary results in these cases was also recognized by the predecessor of the GDPR, the jurisdictional provision of which explicitly excluded foreign operators when they use 'equipment' within the EU solely for the purpose of a transit through Union territory.[192]

The geographically arbitrary storage of data, an increasingly important problem in the age of cloud computing and, most recently, blockchain, has potential ramifications for the exercise of enforcement jurisdiction as well. This issue is best illustrated through the *Microsoft Ireland* saga, in which US prosecutors, in a drug-trafficking related investigation, obtained a warrant directing Microsoft to produce the content of the email account of one of its customers. While Microsoft turned over information stored in the United States, it refused to provide (the more relevant) communications stored in its datacentres in Ireland, arguing that these were outside the jurisdictional reach of US law enforcement.[193] However, the magistrate judge deciding on the warrant did not follow this reasoning. On the issue of extraterritoriality, the judge pointed out that the warrant 'does not criminalize conduct taking place in a foreign country; it does not involve the deployment of American law enforcement personnel abroad; it does not require even the physical presence of service provider employees at the location where data are stored. At least in this instance, it places

190 See also the similar example provided by Svantesson (n 13), 33.

191 Compare this to the very similar problem posed by international wire transfers denominated in US dollars examined below at C.II.3. Territoriality and US Dollar Transactions by non-US Financial Institutions.

192 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, Art. 4(1)(c).

193 *In re Warrant to Search a Certain E–Mail Account Controlled and Maintained by Microsoft Corp.*, 15 F Supp 3d 466, 470 (SDNY 2014): 'Microsoft's argument is simple […]. Federal courts are without authority to issue warrants for the search and seizure of property outside the territorial limits of the United States. Therefore, Microsoft concludes, to the extent that the warrant here requires acquisition of information from Dublin, it is unauthorized and must be quashed.'.

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obligations only on the service provider to act within the United States.'[194] This decision was reversed on appeal, in which the Second Circuit found the domestic presumption against extraterritoriality to apply to the legislation at issue while also considering the possible Irish and EU interests in the case at hand.[195] The case was then set to be argued in front of the Supreme Court. However, in the meantime the United States passed a law explicitly including extraterritorial communication into the scope of such warrants,[196] so that at least from the perspective of US domestic law, the issue was rendered moot.[197]

Examining this case under the lens of public international law, the crucial question is whether the original warrant ordering Microsoft to produce communication stored in Ireland engaged the United States' (strictly prohibited) extraterritorial jurisdiction to enforce. There seems to be some divergence on this issue. While both Ireland and the EU protested the warrant by way of *amicus curiae* briefs,[198] several European States as well as Australia and Canada allow domestic law enforcement to compel the production of data stored abroad.[199] It is important to remember here that, as a matter of law, enlisting Microsoft as an intermediary to perform the actual production of the communications in question should be treated no differently than if US agencies had decided to directly access the servers in Ireland themselves, as Microsoft would simply be acting as a proxy to these agencies. Having established this, the question turns to whether governmental access of communication located abroad constitutes exterritorial enforcement. Even here, State practice is diverse as it could be argued that no State agent has to physically enter foreign territory when accessing foreign equipment and thus that no enforcement happens on foreign soil.[200] However, it would certainly be doctrinally more correct

194 *In re Warrant to Search a Certain E–Mail Account Controlled and Maintained by Microsoft Corp,* 15 F Supp 3d 466, 475 – 476 (SDNY 2014).

195 *In re Warrant to Search a Certain E–Mail Account Controlled and Maintained by Microsoft Corp,* 829 F 3d 197, 221 (2d Cir 2016).

196 Clarifying Lawful Overseas Use of Data Act, Pub. L. 115–141, s 103(a)(1).

197 *United States v Microsoft Corp.,* 138 S Ct 1186 (2018).

198 *United States v Microsoft Corp.,* 138 S Ct 1186 (2018), Brief of the European Commission on Behalf of the European Union as *amicus curiae* in Support of neither Party and Brief for Ireland as *amicus curiae* in Support of neither Party.

199 Reference is made to the table included in Robert J Currie, 'Cross-Border Evidence Gathering in Transnational Criminal Investigation: Is the Microsoft Ireland Case the "Next Frontier"?' (2017) 54 Canadian Yearbook of international Law 63, 93.

200 Ryngaert, *Jurisdiction in International Law* (n 2), 82.

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to assume the opposite, that remote data access is essentially the digital version of the case when police officers physically seize a letter located in a foreign State. Support for this notion can also be found in Art. 32 of the Cybercrime Convention,[201] which allows for trans-border access outside of mutual legal assistance only if the information is publicly available or if the information holder gives its consent. While these principles define international law *de lege lata*, this is not to say that they may not change in the near future due to technological advances: At about the same time as the *Microsoft Ireland* case, Google found itself in a similar dispute. However, unlike Microsoft, Google uses dynamic cloud technologies that constantly ‘move’ the data around different datacentres worldwide so that it might be impossible to precisely predict the physical location of any communication at any given time.[202] In these cases, where mutual legal assistance is close to impossible, States may feel the urge to redefine the boundaries of extraterritorial enforcement jurisdiction to allow for more efficient transnational criminal investigations.

II. Principles Restraining the Exercise of Jurisdiction

As the analysis above has shown, it is not only possible but also permitted under principles of international law that multiple States assert jurisdiction over the same behaviour by the same actor, i.e. concurrent jurisdiction. For instance, this would be the case if a national of State A residing in State B perpetrated a crime, over which State B exercised jurisdiction based on the territoriality principle and State A based on the active nationality principle. Similarly, concurrent jurisdiction would also be possible in the case of anti-competitive behaviour, which is initiated in one State, but which has effects in another State. The solution to these situations may be found in substantive harmonization efforts or mutual cooperation, which

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201 Convention on Cybercrime, (adopted 23 November 2001, entered into force 1 July 2004) ETS No. 185 (‘Cybercrime Convention’).

202 *In re Search Warrant No. 16–1061-M to Google*, 232 F Supp 3d 708, 712 (ED Pa. 2017): ‘Google operates a state-of-the-art intelligent network that, with respect to some types of data, including some of the data at issue in this case, automatically moves data from one location on Google's network to another as frequently as needed to optimize for performance, reliability, and other efficiencies. As a result, the country or countries in which specific user data, or components of that data, is located may change.’.

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may prevent such conflicts in the first place.[203] However, beyond that, several authors have studied whether specific rules of customary international law or general principles exist that require States to moderate their exercises of jurisdiction in light of possible conflicts with other States.[204] For instance, in the first example above, a satisfactory solution could involve one State deferring its jurisdictional claim to the claim of the other State.[205] To reframe the issue, this chapter looks at whether under international law, *after* a jurisdictional link for prescriptive jurisdiction has been established, other restraining principles exist to avoid or to arbitrate provocative, excessive or conflicting exercises of jurisdictions.

The result of this investigation will necessarily influence the normative analysis to be carried out in part C. However, it should already be noted here that while there is no dearth of proposals in this regard, none of the principles examined below, with the possible exception of the principle of genuine link, has found general acceptance in the international law on jurisdiction. In practice therefore, there are currently no adequate mechanisms to limit assertions of jurisdiction once it can be shown that these assertions are based on one of the permissive principles.

Theoretically however, international law knows a number of general principles to restrain exercises of power. Three of these are examined in section 1: the requirement of a genuine link, the prohibition of abuse of rights and the concept of proportionality. While the two latter concepts are somewhat established in other areas of international law, they are rarely applied within the context of extraterritorial jurisdiction. In addition to these general principles, international comity has featured as a nebulous but prominent concept on arbitrating conflicting exercises of jurisdiction since the seventeenth century. Closer analysis, however, reveals the limited usefulness of comity in practice, particularly because of its discretionary status (section 2). Finally, this chapter looks at the principle of 'reasonableness', which in a way was the rediscovery of comity by US Courts in the area of antitrust litigation in the 1970s. The development culminated in the Restatement on Foreign Relations Law (Third), which included a 'rule of reason', requiring States asserting jurisdiction

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203 International Bar Association (n 12), 22.

204 For example: Meng, *Extraterritoriale Jurisdiktion im öffentlichen Wirtschaftsrecht* (n 43), 648; Ryngaert, *Jurisdiction in International Law* (n 2), 145.

205 It is no coincidence that this issue bears resemblance to conflict-of-laws and several proposals to solve this issue draw heavily from conflict-of-laws principles, Buxbaum (n 32), 631, 647.

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to balance their interests against other possibly conflicting interests.[206] According to the Restatement, application of this rule of reason was not only morally desirable, but truly mandated by customary international law. However, the pronunciation of such a reasonableness test has been vehemently criticized and it is doubtable, whether it actually forms part of international law *de lege lata* (section 3).

1. Limitations according to General Principles in International Law

a) Genuine Link

In international law, the test of a 'genuine link' or 'genuine connection' is most commonly associated with the ICJ judgment in the *Nottebohm* case, which dealt with the requirements for a State to exercise diplomatic protection for one of its citizens abroad. According to *Nottebohm*, this power may be limited if the naturalized citizen has no real links with the State exercising diplomatic protection.[207] Deciding whether Mr Nottebohm retained sufficient connections with Liechtenstein for this purpose, the Court looked to a variety of factors, including his habitual residence, the centre of his interest and his family ties.[208] From there, the test of genuine connection has found its way into the rules regarding prescriptive jurisdiction, which is not surprising considering that both bodies of laws concern the legitimacy of certain acts of a State outside its territory, be it the exercise of diplomatic protection or extraterritorial jurisdiction.[209] In both of these instances, the existence of a genuine connection between the subject and the State may serve as a useful yardstick.

This requirement, though it operates differently than the one discussed in *Nottebohm*, is now widely interpreted as a fundamental notion behind the customary international law framework of prescriptive jurisdiction.[210] While assertions of jurisdiction are generally measured against the permissive principles explored above, such as territoriality and nationality, the

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206 *Restatement (Third) of the Foreign Relations Law of the United States* (n 5), § 403 (1).

207 *Nottebohm, Second Phase (Liechtenstein v Guatemala)* (n 122), 22; see on this interpretation, Lowe and Staker (n 50), 300.

208 *Nottebohm, Second Phase (Liechtenstein v Guatemala)* (n 122), 22.

209 Gunnar Schuster, *Die internationale Anwendung des Börsenrechts* (Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, Springer 1996), 41.

210 See already above at B.I.1. The Case of the S.S. Lotus.

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test of 'genuine connection' always lurks behind every jurisdictional analysis. Hypothetically therefore, it may function as an additional principle of restraint when it can be shown that a particular exercise of *prima facie* permissible jurisdiction does not satisfy that requirement or that another State applying its laws to the same situation can also rely on a (possibly more) genuine connection.[211] Ryngaert for instance argues that this criterion may provide a useful restraint to reject some of the most egregious forms of extraterritorial jurisdiction based on particularly fleeting connections.[212] This principle may prove particularly useful in relation to the ephemeral territorial connections and effects in internet jurisdiction.[213] In practice however, it may be difficult to dismiss exercises of extraterritorial jurisdiction for a lack of 'genuine connection', because the application of this test presupposes that one of the recognized jurisdictional bases has been satisfied, which necessarily indicates some sort of connection between the State and the regulated circumstance.

b) Abuse of Rights

Several authors have suggested that the principle of abuse of rights may serve as a general limitation on States in their exercise of jurisdiction.[214] Abuse of rights is generally well established in the domestic legal systems of civil-law countries. For instance, German private law recognizes and prohibits a variety of instances where the exercise of an existing right solely causes detriment to another party or where such exercise does not advance

211 In this sense in particular: Bernhard Grossfeld and C. P Rogers, 'A Shared Values Approach to Jurisdictional Conflicts in International Economic Law' (1983) 32(4) ICLQ 931, 945.

212 Ryngaert, *Jurisdiction in International Law* (n 2), 157.

213 Schultz (n 186), at 815 claims that in the case of internet jurisdiction, '[t]he [required] genuine link between the state and the activity needs to be taken to a higher threshold'; see also *Restatement (Fourth) of the Foreign Relations Law of the United States* (n 42), § 409, comment a, which, for the establishment of effects based jurisdiction, requires a 'genuine connection between the conduct and the prescribing state'; see also above at B.I.4. Territoriality-based Jurisdiction and the Internet.

214 Akehurst (n 42), 188 – 190; Ryngaert, *Jurisdiction in International Law* (n 2), 160 – 161; Meng, *Extraterritoriale Jurisdiktion im öffentlichen Wirtschaftsrecht* (n 43), 589 – 595; Ireland-Piper, *Accountability in Extraterritoriality* (n 113), 56 – 64.

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any legitimate interest of the acting party.[215] It is less well-known in common-law systems, although Ireland-Piper argues that in fact, a number of common-law legal concepts serve essentially the same function or are based on the same basic notion.[216] Given the divergence in recognition in different legal systems, the status of abuse of rights as a 'general principle of law' according to Art. 38(1)(c) of the Statute of the ICJ is somewhat contested.[217] Nonetheless, the principle has found its way into multiple international law documents: Its clearest expression is included in Art. 300 United Nations Convention on the Law of the Sea, which obliges States to 'exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right.'[218] Moreover, the Word Trade Organization (**WTO**) Appellate Body has interpreted Art. XX of the General Agreement on Tariffs and Trade (**GATT**) as an expression of good faith, including a prohibition on *abus de droit*.[219] Several judgments of the PCIJ have equally considered this principle.[220]

While the principle thus has some application at least in the law of the sea and international trade law, its status and content in relation to the law of jurisdiction is unclear. According to Akehurst, abuse of rights could serve to limit jurisdiction in two instances. First, even when a State satisfies some basis of prescriptive jurisdiction, it is not entirely free with regard to the content of the regulation, as it would be contrary to international law if the legislation is designed solely to produce mischief in another country without advancing any legitimate State interest. He gives the example of a hypothetical law that requires all UK citizens to drive on the left-hand side of the road in foreign countries, which, although it could be based on the active personality principle, would violate the principle of abuse of

215 See in particular, German Civil Code (Bürgerliches Gesetzbuch), § 226 and § 242.

216 Ireland-Piper, *Accountability in Extraterritoriality* (n 113), 60 – 62.

217 Alexandre Kiss, 'Abuse of Rights' in R. Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (Oxford University Press), paras. 9 – 10; Meng, *Extraterritoriale Jurisdiktion im öffentlichen Wirtschaftsrecht* (n 43), 589 – 595.

218 United Nations Convention on the Law of the Sea (adopted 10 December 2082, entered into force 16 November 1994) 1833 UNTS 3.

219 WTO Appellate Body, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS58/AB/R (1998), para. 158.

220 PCIJ, *Free Zones of Upper Savoy and the District of Gex, Second Phase (France v Switzerland)* [1930] PCIJ Rep Series A No 24, 12 and *Certain German Interests in Polish Upper Silesia (Germany v Poland)* (Merits) [1926] PCIJ Rep Series A No 7, 30 and 37 – 38.

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rights.[221] While this hypothetical example certainly has some charm, it is hard to imagine that States in practice would actually adopt such obviously abusive laws. More realistic in practice is Akehurst's second proposition that an abuse of rights also exists when a regulation, although it advances some legitimate interest of the State, does so illegitimately at the expense of other States.[222] In this second variation, the doctrine of abuse of rights closely resembles the principle of proportionality, which is discussed in more detail below.[223]

De lege ferenda, Ireland-Piper proposes the application of the principle of abuse of rights to extraterritoriality in the area of criminal law, where the specific content of the principle is linked to requirements of the rule of law. In her view, both principles are connected by the common objective of restraining the arbitrary exercise of power and discretion.[224] Accordingly, when an exercise of extraterritorial jurisdiction is inconsistent with the rule of law, which in her specific perspective on criminal law has a strong focus on the protection of individual rights, such exercise may also amount to an abuse of rights.[225] This approach is commendable as it highlights the important positions of individuals, which, as we will see, are often neglected in the discourse on State jurisdiction.

c) Proportionality

Similar to the principle of abuse of rights, proportionality is a concept widely established in the domestic legal systems of civil-law countries, which has also gained a wide range of applications in international law. This principle is invoked among others in the context of countermeasures and self-defence, international humanitarian law, international and regional arrangements of human rights protection, international trade law and

221 Akehurst (n 42), 188 – 190.
222 Ibid., 188 – 190.
223 Ryngaert, *Jurisdiction in International Law* (n 2), 161; See below at B.II.1c) Proportionality.
224 Ireland-Piper, *Accountability in Extraterritoriality* (n 113), 70.
225 Ibid., at 67 – 70 proposes three basic criteria for the rule of law that (1), '[t]he law must be readily knowable, and certain and clear', (2), '[t]he law should be applied to all people equally, and operate uniformly in circumstances that are not materially different' and (3), '[t]here must be some capacity for judicial review of executive action'.

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investment arbitration.[226] For instance, the ECtHR has made proportionality one of the cornerstones of the analysis of possible breaches of human rights, stating that any restriction 'imposed in this sphere must be proportionate to the legitimate aim pursued'.[227] Similarly in international humanitarian law, proportionality provides the yardstick for determining whether an attack is illegally indiscriminate, which is the case when the incidental loss of civilian life 'would be excessive in relation to the concrete and direct military advantage anticipated'.[228] Finally, a WTO panel has regarded the proportionality of countermeasures as a general principle of international law, which also finds application in the specific context of the suspension of trade concessions.[229]

It is not surprising therefore, that this principle has also been discussed as a possible restraint against the excessive exercise of extraterritorial jurisdiction. This has happened particularly in Germany, where constitutional law doctrine puts a strong focus on proportionality. According to doctrine, this principle encompasses four different elements, the pursuit of a legitimate objective, the general suitability of the measure to achieve this objective, that the measure is necessary (i.e. the least restrictive measure) in order to achieve this objective and that the measure is properly related in size or degree to that objective.[230] Under this conception, proportionality has proved a useful starting point to restrain the exercise of jurisdiction in German law for at least two reasons. First, it offers a clear structure for identifying and rationalizing the underlying competing interests to any jurisdictional assertion, which is a prerequisite for a successful balancing between those interests. For instance, this may involve the regulatory interest of the State asserting jurisdiction on the one hand and the interest of non-interference by the affected State as well as the interest of the affected individual on the other hand. And second, proportionality draws the atten-

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226 Anne Peters, 'Verhältnismäßigkeit als globales Verfassungsprinzip' in Björnstjern Baade and others (eds), *Verhältnismässigkeit im Völkerrecht* (Jus Internationale et Europaeum vol 116. Mohr Siebeck 2016), 2 – 3.

227 ECtHR, *Handyside v United Kingdom,* App No 5493/72, Judgment of 7 December 1976, paras. 46–49.

228 Additional Protocol I to the Geneva Conventions (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3, Art. 51(5)(b).

229 WTO, Decision by the Arbitrators, *EC – Regime for the importation, sale and distribution of bananas, Recourse to arbitration by the EC under Article 22.6 of the DSU*, WT/DS27/ARB (1999), para. 6.16.

230 Alec S Sweet and Jud Mathews, 'Proportionality Balancing and Global Constitutionalism' (2008) 47(1) Columbia Journal of Transnational Law 72, 75.

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tion not only to *what* objective a measure is pursuing (which is also the main test under the principle of abuse of rights), but also to *how* this is done, i.e. to the degree of intrusiveness of the extraterritorial measure and to the question, whether less restrictive measures may be designed in a given case.[231]

The decision of the German Kammergericht in *Philip Morris/Rothmans* provides a brilliant example of how these aspects function in practice. In this case, the Court had to consider an order of the Federal Cartel Office preventing the merger of two global companies. The Court reasoned that principles of jurisdictional restraint, either based on reasonableness or on the principle of abuse of rights, may apply here. However, following domestic tradition, it then essentially indulged in a proportionality analysis. Accordingly, it had to consider and balance the domestic interest of upholding competition on the one hand against the interest not to interfere in foreign affairs on the other hand.[232] The key aspect in this case was then found to be the test of necessity, which requires the State, among measures equally effective to reach the objective, to choose the one that is least restrictive to the competing interest. Based on this test, the Court rejected the order of the Federal Cartel Office as excessive because it would have been sufficient to limit the order solely to the German subsidiaries of these two companies.[233] However, the Court drew on domestic, not international, doctrine to reach its conclusion and to date, this decision remains an outlier in the jurisprudence on merger control.[234] Rather, similar to the principle of abuse of rights, there is no indication that proportionality has found acceptance in international law as a concept restraining exercises of jurisdiction legitimized by one of the permissive bases.

2. Comity

Historically, the roots of the concept of comity can be traced back to seventeenth century Holland. Originally, comity referred to the discretionary act of a State to recognize the laws of another State in the forum, which

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231 This point is also made by Dobson and Ryngaert (n 118), 331.

232 Kammergericht, Order of 1 July 1983, Kart. 16/82, reported in WuW/E OLG 3051 (*Philip Morris Inc. v Bundeskartellamt*), 3058.

233 Ibid., 3057; see on this also: Meng, *Extraterritoriale Jurisdiktion im öffentlichen Wirtschaftsrecht* (n 43), 417.

234 For more examples on how the principle of proportionality might function in practice, see: ibid., 614 – 616.

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was treated as a matter of courtesy.[235] This was also the meaning given to comity by the US Supreme Court in its decision in *Hilton v Cuyot*, which considered the recognition and enforcement of awards rendered in France.[236] Thus, comity was less a principle of restraint upon a State exercising extraterritorial jurisdiction, but rather one of expansion in relation to the exercise of jurisdiction by another State.[237] In any event, even back then, the doctrine of comity was attributed the capability to resolve conflicts of laws in the absence of treaty provisions. With regard to civil and commercial disputes, the subsequent development of complex rules of private international law largely supplanted the application of comity. In the sphere of regulatory antitrust disputes however, US courts rediscovered comity in the 1970s as a principle to solve conflicts of laws not within the territorial State, but because of the extraterritorial application of domestic laws.[238]

Nonetheless, comity remains a somewhat difficult concept for solving issues of concurrent prescriptive jurisdiction. The main reason is the ambiguous nature and status of the principle. According to *Hilton v Cuyot* and a number of commentators, comity is no hard rule of law, but at the same time, it is also more than mere courtesy and goodwill.[239] More precisely, it seems to denote an objective custom, but undertaken out of a moral conviction rather than *opinio iuris*, which would turn it into customary international law. This interpretation is in line with some passages of the Restatement (Fourth), which categorizes different US jurisprudential techniques to limit the scope of extraterritorial jurisdiction as not required by

235 Harold G Maier, 'Jurisdictional Rules in Customary International Law' in Karl M Meessen (ed), *Extraterritorial Jurisdiction in Theory and Practice* (Kluwer Law Internat 1996), 64, 70.

236 *Hilton v Guyot*, 159 US 113, 163 – 4 (1895).

237 Reuven S Avi-Yonah, 'National Regulation of Multinational Enterprises: An Essay on Comity, Extraterritoriality, and Harmonization' (2003) 42(1) Columbia Journal of Transnational Law 5, at 12 uses comity in a similar sense when he discusses the exercise of extraterritorial jurisdiction *vis-à-vis* multinational enterprises: Under his conception of comity, certain instances would require the extension of jurisdiction beyond the local entity of the corporation to the entire global enterprise.

238 See below at B.II 3. Reasonableness.

239 Ryngaert, *Jurisdiction in International Law* (n 2), 148; Crawford and Brownlie (n 18), 485; Jörn A Kämmerer, 'Comity' in R. Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (Oxford University Press), paras. 5 – 6; Ireland-Piper, *Accountability in Extraterritoriality* (n 113), 40 – 41; Coughlan and others (n 158), 43.

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customary international law, but rather as matters of domestic comity.[240] Thus, the usefulness of this concept in international law is rather limited as its precise content is unclear and in any case, its application is subject to the discretion of the legislator or court.[241]

In this regard, Mestral and Gruchalla-Wesierski have made an interesting observation: In retaining the original purpose of comity as a tool to solve issues of conflicts of laws, the principle may encourage States, when they design regulations with extraterritorial application, to prescribe not domestic law, but the forum law of the addressees of the regulation.[242] This is for example the approach taken by the EU Timber Regulation, which prohibits the placement into the EU market of illegally harvested timber, whereas illegality is to be defined according to the law of the exporting country.[243] While it is unclear whether this provision was inspired by considerations of comity, in practice, it certainly does mitigate the potential for jurisdictional conflicts between States as well as the burden on affected individuals. Interpreted this way, comity as a choice-of-law doctrine may retain some significance.

3. Reasonableness

One of the most contested issues surrounding the traditional doctrine of State jurisdiction concerns the question whether the exercise of jurisdiction is subject to an overarching restraint of 'reasonableness', what the content of such a principle may be and whether this principle forms part of customary international law. Judge Fitzmaurice, in his separate opinion in *Barcelona Traction*, hinted at the existence of such rule of reason when he argued

> 'that, under present conditions, international law does not impose hard and fast rules on States delimiting spheres of national jurisdiction […]. It does however (a) postulate the existence of limits […] and (b) involve for every State an obligation to exercise moderation and

240 *Restatement (Fourth) of the Foreign Relations Law of the United States* (n 42), § 402, reporters' notes 3.

241 Ireland-Piper, *Accountability in Extraterritoriality* (n 113), 40 – 41.

242 Mestral and Gruchalla-Wesierski (n 152), 39.

243 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market, Art. 2(g).

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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.'[244]

The most audacious and certainly most controversial proposal, however, has been formulated by the previous Restatement (Third) of Foreign Relations Law. According to its infamous § 403(1), even if one of the traditional bases of jurisdiction has been satisfied, States have to, through the evaluation of a number of factors, determine whether the exercise of jurisdiction would be unreasonable in the specific case, and, if it so determines, decline to exercise such unreasonable jurisdiction.[245] § 403(2) then goes on to provide a (non-exhaustive) list of eight such criteria, including the link of the activity to be regulated to the territory of the State, the connections between the regulating State and the person principally responsible for the activity, the character of the activity, the existence of justified expectations that might be hurt by the regulation and the likelihood of conflict with regulation by another State.[246] Finally, according to § 403(3), in the case that two States may concurrently exercise jurisdiction reasonably and the two prescriptions conflict with each other, each State has the obligation to balance its own interest against that of the other State, and defer its own jurisdiction if the interest of the other State is clearly greater.[247]

This principle of reasonableness as articulated in the Restatement (Third) and its specific operationalization through a multi-factor balancing test were inspired by a limited number of court decisions in US antitrust law in the 1970s. In the wake of the expanding effects principle and its potential to cause international discord, the Ninth Circuit in *Timberlane* argued that as a matter of international comity and fairness, showing an effect on US commerce alone was not in itself sufficient for the exercise of jurisdiction. Rather, a more comprehensive approach was necessary, which the Ninth Circuit summarized as a case-by-case interest balancing drawn from the field of conflict of laws, which included a list of factors similar to that contained in the Restatement (Third).[248] This approach was

244 *Barcelona Traction Light and Power Co, Ltd. (Belgium v Spain)* (n 126), Separate Opinion of Judge Fitzmaurice, para. 70.
245 *Restatement (Third) of the Foreign Relations Law of the United States* (n 5), § 403(1).
246 Ibid., § 403(2).
247 Ibid., § 403(3).
248 *Timberlane Lumber Co. v Bank of America NT & SA*, 549 F 2d 597, 611 – 615 (9th Cir 1976).

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later repeated in the case concerning *Mannington Mills*[249] and finally found its way into the Restatement (Third), however, not only as a matter of international comity, but as a true principle of customary international law.

Commentators have criticized both the content of the principle of reasonableness and its characterization as a rule of customary international law. Interest balancing, it has been argued, is futile without the existence of an objective standard against which the conflicting interests of the States exercising jurisdiction may be assessed.[250] Moreover, the open formulation of § 403(2) of the Restatement (Third) makes the results of its application wholly unforeseeable and diminishes its value in solving conflicts of concurring jurisdiction.[251] In relation to its status as a rule of customary international law, multiple authors have correctly pointed out that the Restatement (Third) almost exclusively examined US State practice in the area of antitrust regulation.[252] However, even in the United States, that practice is not uniform,[253] while there is even less support for the application of reasonableness as a principle of jurisdictional restraint in other States.[254] For these reasons, the recent Restatement (Fourth), departing from the previous edition, also rejected such an interest-balancing test as a requirement of customary international law.[255]

However, rejecting reasonableness as a rule of customary international law as embodied in the Restatement (Third) does not entail the non-existence of that principle as such. Meng, for instance, describes reasonable-

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249 *Mannington Mills v Congoleum Corp*, 595 F 2d 1287, 1297 (3d Cir 1979).

250 Meng, *Extraterritoriale Jurisdiktion im öffentlichen Wirtschaftsrecht* (n 43), 623; similarly, Rain Liivoja, 'Review of "Jurisdiction in International Law" by Cedric Ryngaert' (2008) 19 Finnish Yearbook of International Law 397, 400.

251 Ryngaert, *Jurisdiction in International Law* (n 2), 185: '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'; Ireland-Piper, *Accountability in Extraterritoriality* (n 113), 45; Volz (n 24), 55 – 56.

252 Meng, *Extraterritoriale Jurisdiktion im öffentlichen Wirtschaftsrecht* (n 43), 629 – 630; Ryngaert, *Jurisdiction in International Law* (n 2), 167.

253 See *Hartford Fire Insurance Co v California*, 509 US 764, 798 (1993).

254 However, for one significant example of a non-US court applying the rule of reason as a matter of customary international law, see Kammergericht, Order of 1 July 1983, Kart. 16/82, reported in WuW/E OLG 3051 (*Philip Morris Inc. v Bundeskartellamt*).

255 *Restatement (Fourth) of the Foreign Relations Law of the United States* (n 42), § 407, reporters' notes 6.

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ness as a methodological requirement for the interpretation and construction of norms, on par with other methodological aspects such as logic. In his view, the principle limits the discretion of States in the exercise of their rights in light of the purposes of those rights. In other words, an exercise of jurisdiction may be unreasonable, if the objective of such exercise is inappropriate. Defined as such, this principle seems to reflect a case of abuse of rights.[256] In a similar vein, Ryngaert argues that a more specific rule of reason for the exercise of jurisdiction may be informed by certain general principles of international law, such as non-interference, proportionality and equity.[257] *De lege ferenda*, he imagines that a new rule of reason could put the interests of the international community centre stage and allow for the 'subsidiary' exercise of extraterritorial jurisdiction if doing so furthers those interests.[258] However, as customary international law currently stands, the existence of such a specific rule of reason requiring interest balancing for the exercise of jurisdiction seems doubtful. Rather, as both Meng and Ryngaert argue, and as this study will show in the next part, restraints on extraterritorial jurisdiction *de lege lata* may be rather scarce.

256 Meng, *Extraterritoriale Jurisdiktion im öffentlichen Wirtschaftsrecht* (n 43), 597.
257 Ryngaert, *Jurisdiction in International Law* (n 2), 182.
258 Ibid., 230.

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