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ЛЕКЦИИ ЛЕТНЕЙ ШКОЛЫ ПО МЕЖДУНАРОДНОМУ ПУБЛИЧНОМУ ПРАВУ

Национальная юрисдикция и международное право

Седрик Рейнгарт

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National Jurisdiction and International Law

Cedric Ryngaert

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The present publication contains the text of lectures by Cedric Ryngaert on the topic “National Jurisdiction and International Law”, delivered by him within the frames of the Summer School on Public International Law 2020.

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Дорогие друзья!

Центр международных и сравнительно-правовых исследований продолжает публикацию лекций, прочитанных в рамках Летней Школы по международному публичному праву.

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В 2020 году Летняя Школа состоялась в третий раз. В связи с пандемией COVID-19 она прошла в онлайн-формате на отдельно разработанной платформе. Специальные курсы были посвящены теме «Национальная юрисдикция и международное право». Их прочитали Седрик Рейнгарт («Национальная юрисдикция и международное право»), Алина Мирон («Экстерриториальная юрисдикция: концепция и пределы»), Филиппа Вэбб («Иммунитет государства и его должностных лиц от иностранной юрисдикции»), Манфред Даустер («Осуществление уголовной юрисдикции Германии и международное право»), Роман Анатольевич Колодкин («Национальная юрисдикция и Конвенция ООН по морскому праву»). Общий курс международного публичного права прочёл сэр Майкл Вуд.

Центр международных и сравнительно-правовых исследований выражает благодарность членам Консультативного совета Летней Школы: Р. А. Колодкину, С. М. Пунжину, Л. А. Скотникову, Б. Р. Тузмухамедову — и всем, кто внёс вклад в реализацию этой идеи, в том числе АО «Газпромбанк» за финансовую поддержку проекта.

Dear friends,

The International and Comparative Law Research Center continues publication of lectures delivered within the Summer School on Public International Law.

The Summer School is a project of the Center aimed at providing those learning, working, or aspiring to work in the sphere of international law, with an opportunity to obtain advanced knowledge of the subject and encouraging participants to engage in independent research. The Summer School's curriculum is comprised of lectures and seminars of the general and special courses under one umbrella theme delivered by leading international law experts, as well as of independent and collective studying.

In 2020, the Summer School was held for the third time. Due to the COVID-19 pandemic, it was held on a tailor-made online platform. The Special Courses were devoted to the topic "National Jurisdiction and International Law". The courses were delivered by Cedric Ryngaert ("National Jurisdiction and International Law"), Alina Miron ("Extraterritorial Jurisdiction: Concept and Limits"), Philippa Webb ("Immunity of States and their Officials from Foreign Jurisdiction"), Manfred Dauster ("Exercise of Criminal Jurisdiction by Germany and International Law"), and Roman Kolodkin ("National Jurisdiction and UNCLOS"). The General Course on Public International Law was delivered by Sir Michael Wood.

The International and Comparative Law Research Center wishes to express its appreciation to the members of the Advisory Board — Roman Kolodkin, Sergey Punzhin, Leonid Skotnikov, and Bakhtiyar Tuzmukhamedov — as well as others who helped implement the project, including Gazprombank (JSC) for their financial support.

Седрик Рейнгарт

Профессор Седрик Рейнгарт является заведующим кафедрой международного публичного права в Утрехтском университете (Нидерланды) и заведующим кафедрой международного и европейского права в Школе права Утрехтского университета. Он является автором таких работ, как Jurisdiction in International Law, Jurisdiction over Antitrust Violations in International Law, Selfless Intervention: The Exercise of Jurisdiction in the Common Interest и др. В 2012 году профессор Рейнгарт получил Премию Анри Ролена за работу по вопросам юрисдикции в международном праве. Он был содокладчиком комитета Ассоциации международного права по негосударственным субъектам в 2007–2014 гг. В настоящее время он является главным редактором журналов Netherlands International Law Review и Utrecht Law Review. Ранее профессор Рейнгарт был доцентом международного права в университете Лювена, руководителем проекта международного исследовательского сообщества по негосударственным субъектам и участвовал в двух проектах EU COST. Он также преподавал международное право в Королевской военной академии в Брюсселе.

Cedric Ryngaert

Prof. Dr. Cedric Ryngaert is Chair of Public International Law at Utrecht University (Netherlands) and Head of the Department of International and European Law of the University's Law School. Among other publications, he authored Jurisdiction in International Law, Jurisdiction over Antitrust Violations in International Law, and Selfless Intervention: The Exercise of Jurisdiction in the Common Interest. In 2012, Prof. Ryngaert obtained the Prix Henri Rolin for his work on jurisdiction. He was co-rapporteur of the International Law Association's Committee on Non-State Actors in 2007–2014. Currently, he is an editor-in-chief of the Netherlands International Law Review and the Utrecht Law Review. Earlier, Prof. Ryngaert was Associate Professor of International Law at Leuven University, a project leader of an international research community on non-state actors, and was involved in two EU COST actions. He has also taught international law at the Royal Military Academy in Brussels.

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PREFACE

It was my pleasure to lecture on the law of jurisdiction at the Moscow Summer School on Public International Law, 10–14 August 2020. This contribution consists of the written versions of the five lectures I gave during the summer school.

The law of jurisdiction is a vast topic, even if limited to the law of prescriptive State jurisdiction which is the focus of my contribution. Therefore, choices had to be made. One lecture is devoted to general, conceptual issues, whereas the other four lectures pertain to specific issue-areas: sanctions, corporate human rights abuses, the Internet (including online data protection), and the environment. These issue-areas have been chosen because of their current societal relevance and because they show increased jurisdictional activity.

For this contribution, I draw upon earlier work, but I do not just reproduce it. I have included references to earlier work where appropriate.

I extend my thanks to the staff of the Moscow International and Comparative Law Research Center, and especially to Prof. Roman Kolodkin and Egor Fedorov.

The research which resulted in this publication has partly been funded by the European Research Council under the Starting Grant Scheme (Proposal 336230 – UNIJURIS) and the Dutch Organization for Scientific Research under the VIDI Scheme (No. 016.135.322).

Utrecht, 13 August 2020

LECTURE 1:

General Issues of the Law of Jurisdiction

In this introductory lecture, I address four general issues of the international law of jurisdiction: (1) the concept of jurisdiction; (2) the principles governing enforcement jurisdiction; (3) the (permissive) principles governing prescriptive jurisdiction; and (4) the concept of jurisdiction in human rights law (which pertains to the extraterritorial application of human rights treaties).

The Concept of Jurisdiction

The term "jurisdiction" is derived from the Latin *juris-dicere*: "stating the law". The focus of my lectures is the law of *State jurisdiction*. In international law, the law of State jurisdiction pertains to the legal authority or power of the State to lay down and enforce its law. However, jurisdiction has other meanings in international law. It can refer to the jurisdiction of *international courts and tribunals*. For instance, the International Court of Justice (ICJ) does not have compulsory jurisdiction. Rather, jurisdiction is conferred *ad hoc*, through a compromissory treaty clause, or on the basis of a unilateral declaration of acceptance, to which sometimes reservations are appended.[1] As the Court's jurisdiction over a dispute is not always fully clear, parties may haggle about jurisdictional issues, which the ICJ can address in a separate judgment on preliminary objections. Jurisdiction can also refer to the question of whether an individual "falls within the jurisdiction" of a State for purposes of the application of international human rights treaties.

[1] Occasionally, this state of affairs has led to pleas for compulsory jurisdiction, see, e.g., G.L. Scott and C.L. Carr, "The ICJ and Compulsory Jurisdiction: The Case for Closing the Clause 81" (1987) 81 Am. J. Int'l L. 57.

The question here is whether States owe human rights *obligations* towards individuals, possibly outside their territory. I will return to this question in Section 5 of this lecture. For now, I will proceed with the concept of State jurisdiction, which is concerned with authorization and prohibitions rather than obligations.

The literature generally distinguishes between three types of State jurisdiction: (1) prescriptive or legislative jurisdiction, which is concerned with the authority to enact laws; (2) enforcement jurisdiction, which is concerned with the authority to enforce laws; (3) adjudicatory jurisdiction, i.e., the authority to apply laws in actual court cases.[2] In my lectures, I will mainly focus on prescriptive jurisdiction, but I will occasionally refer to the other types of jurisdiction.

A State's jurisdiction is primarily territorial. This means that a State can enact laws governing events in its own territory. Conversely, it means that a State cannot normally enact laws governing events outside its territory. Exceptionally, however, States can exercise *extraterritorial jurisdiction*, on the basis of either consent of the territorial State or recognized principles of (prescriptive) jurisdiction.

Jurisdiction is closely related to the concept of *sovereignty*. Because a state is sovereign, it can exercise its authority, or legally speaking its jurisdiction. At the same time, each time a State exercises its jurisdiction, it affirms its sovereignty. Accordingly, sovereignty and jurisdiction are co-constitutive.

Jurisdiction is also closely related to the principle of *non-intervention*. Pursuant to this principle, States are not allowed to intervene in the affairs of other states, meaning that they should not influence the policy of other States by coercion.[3] The jurisdiction

[2] See notably Section 401 of the Restatement (Fourth) of US Foreign Relations Law (2018).
[3] ICJ, *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v United States of America*), Judgment of 27 June 1986, ICJ Reports 1986; M. Jamnejad and M. Wood, "The Principle of Non-intervention" (2009) 22(2) LJIL 345.

that is exercised in relation to extraterritorial events is potentially problematic under the principle of non-intervention: one State exercises authority over events taking place in another State's territory, thereby potentially interfering in the latter's internal affairs.

Jurisdiction is a staple of textbooks of public international law. Typically, an entire chapter is devoted to the topic. However, there is little international case law clarifying the concept. The leading case regarding prescriptive jurisdiction remains the *Lotus* case decided by the Permanent Court of International Justice (PCIJ) in 1927.[4] This case concerned the exercise of criminal jurisdiction by Turkey over the officer of the watch of a French steamer which caused a collision on the high seas, as a result of which a Turkish vessel sank and Turkish sailors perished. France challenged Turkey's jurisdiction before the PCIJ, but the Court eventually ruled in Turkey's favor. In essence, the Court ruled that States can exercise prescriptive jurisdiction how they see fit unless there is a prohibitive rule to the contrary.[5] As the Court was unable to identify such a prohibitive rule, Turkey's assertion was valid. *Lotus* evinces a *laissez-faire* approach to jurisdiction: what is not prohibited, is allowed.[6]

It is of note that, subsequent to *Lotus*, treaty law opted for another solution: the 1958 and 1982 law of the sea treaties provide for exclusive jurisdiction for the flag State of the vessel causing the collision (or the state of nationality of the master).[7] Also in

[4] PCIJ, *Case of the SS Lotus* (*France v Turkey*) (1927) *P.C.I.J.*, Ser. A, No. 10.
[5] *Lotus*, pp. 18–19.
[6] This has returned in later ICJ case law. See, e.g., *Kosovo*, *Advisory opinion*, ICGJ 423 (*ICJ* 2010), 22nd July 2010 (ruling that a declaration of independence is not internationally unlawful, as international law does not prohibit it).
[7] Currently, Article 97 of the UN Convention on the Law of the Sea ("In the event of a collision or any other incident of navigation concerning a ship on the high seas, involving the penal or disciplinary responsibility of the master or of any other person in the service of the ship, no penal or disciplinary proceedings may be instituted against such person except before the judicial or administrative authorities either of the flag State or of the State of which such person is a national"). Accordingly, if this incident arised today, France — and not Turkey — would have jurisdiction.

the criminal law, the jurisdictional liberalism of *Lotus* has largely been abandoned, ever since scholars at Harvard University drafted a convention on criminal jurisdiction shortly after *Lotus* (1935),[8] which was based on a *permissive principles* approach. Under this approach, States can only exercise jurisdiction if they can rely on a specific principle permitting jurisdiction, namely territoriality, nationality, security, or universality. The permissive principles approach became the dominant approach: when justifying their exercise of jurisdiction, States indeed typically refer to a permissive principle.[9]

An overarching convention on the law of jurisdiction has not yet materialized. This means that the general law of jurisdiction remains customary in nature, as one of the few fields of international law. However, sectoral international or transnational criminal law conventions sometimes have elaborate jurisdictional clauses, allowing or, in rare cases, even mandating the exercise of jurisdiction over particular offenses, such as torture, war crimes, terrorism, corruption, and drug trafficking.[10] These conventions and their jurisdictional clauses are obviously not binding for States that are not parties.

Enforcement Jurisdiction

In the *Lotus* case, the PCIJ laid down not only the principles of prescriptive jurisdiction but also those governing *enforcement* jurisdiction. These principles are still valid today. According to the PCIJ, extraterritorial enforcement jurisdiction is prohibited,

[8] *Draft Convention on Jurisdiction with Respect to Crime*, 29 AJIL 439 (1935).
[9] C. Ryngaert, *Jurisdiction in International Law* (2nd ed, OUP 2015), Chapter 2.2.
[10] See, e.g., Article 5(2) of the UN Torture Convention ("Each State Party shall … take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him to another state having jurisdiction").

unless there is a permissive rule to the contrary.[11] This means that enforcement jurisdiction is, in principle, limited to a State's territory. States cannot send their police or military forces abroad, for instance, to apprehend a suspect — that is unless the territorial State gives its consent. Consent can be given either *ad hoc* or on the basis of prior arrangements.

Over the years, questions have arisen over whether this prohibition of enforcement jurisdiction is absolute or not (are there exceptions to it?), and over the scope of the prohibition.

States have sometimes exercised extraterritorial enforcement jurisdiction in respect of suspects of particularly heinous crimes, such as genocide and terrorism. This may lead some to believe that such actions are lawful. Most notoriously, in 1960, Israeli secret services spirited away Adolf Eichmann, the "bookkeeper of the Nazis", from a safehouse in Argentina. In 2011, US special forces killed Osama Bin Laden, the head of Al Qaeda in Pakistan, whereas in 2019, they killed Abu Bakr al-Baghdadi, the leader of IS, in Syria. These practices do not evidence the existence of a customary norm allowing extraterritorial enforcement jurisdiction in exceptional cases. The abduction of Eichmann was condemned by the UN Security Council,[12] the killing of Bin Laden may have been authorized by a secret treaty between Pakistan and the US (which allowed the US to operate in the Pakistani territory to liquidate terrorists), and al-Baghdadi may have been a legitimate target under the laws of war (international humanitarian law), as the US was embroiled in an armed conflict with IS.

There does not appear to be sufficient international practice allowing for an exception based on the gravity of the crime, meaning that the *Lotus* prohibition of enforcement jurisdiction still

[11] *Lotus*, pp. 18–19.
[12] *Security Council* resolution 138 (1960) [Question relating to the case of *Adolf Eichmann*].

stands. This does not mean that it is never violated. Apart from the *Eichmann* example, the example of *Alvarez Machain* can be given. Dr. Alvarez Machain, a Mexican national, was abducted from Mexico by US law-enforcement agents on the grounds that he was complicit in the murder of a US agent. The US Supreme Court went on to rule that this abduction violated international law (although not the US extradition treaty with Mexico), but that he could nevertheless stand trial in the US.[13]

Regarding *the scope of the prohibition* of enforcement jurisdiction**,** the question has recently arisen whether it extends to the "de-territorialized" cyberspace. In particular: can law-enforcement agencies remotely access data in the cloud, on a server or computer abroad, and can they compel Internet service providers (intermediaries) to provide data located abroad? These rather specific issues will be addressed in the third lecture on jurisdiction and the Internet.

Prescriptive Jurisdiction

While enforcement jurisdiction is in principle exclusively territorial, this does not apply to prescriptive jurisdiction. Even after *Lotus*, there are legal options for States to exercise their prescriptive jurisdiction on a non-territorial basis. At least since the adoption of the aforementioned Harvard Draft, States are allowed to exercise their jurisdiction on the basis of a principle which explicitly permits them to do so. These permissive principles have been developed in criminal law, but have also been applied outside criminal law.

(a) Territoriality

The first principle is the territoriality principle**,** pursuant to which States can exercise jurisdiction over offenses committed in

[13] *United States v Alvarez-Machain,* 504 US 655 (1992).

their territory, regardless of the nationality of the perpetrator. This principle may seem self-evident, but it is less so if crimes cross borders, and elements of the offense are situated in multiple States.

In cases of transnational crime, most states espouse a "constituent elements" approach, also called the "ubiquity" principle. This means that a State has jurisdiction as soon as one constituent element of the crime takes place in its territory. This could be the initiation of the crime (subjective territoriality), or the completion of the crime (objective territoriality). Thus, if someone in Kazakhstan shoots across the border with Russia, and kills someone in Russia, both Kazakhstan and Russia will have jurisdiction on the basis of the territoriality principle.

A variation of the objective territorial principle is the *effects doctrine*, which is sometimes considered as a separate principle of jurisdiction.[14] Pursuant to the effects doctrine, jurisdiction is obtained on the basis of the territorial effects of a foreign act, regardless of whether these effects are a constituent element of an offense. This effects doctrine has mostly been developed in antitrust or competition law. Notably, the US and the European States have claimed jurisdiction over foreign-based cartels affecting competition on their markets. This practice was upheld by the US Supreme Court[15] and by EU courts.[16]

(b) Personality

The second principle is the personality principle. This principle consists of the active personality or nationality principle, and the passive personality principle.

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[14] Section 409 of Restatement (Fourth) of US Foreign Relations Law (2018).
[15] *United States v Alcoa*, 148 F.2d 416 (2d Cir. *1945*).
[16] Court of Justice of the EU, *Wood pulp, Osakeyhtiö and ors v Commission of the European Communities* (1988) ECR 5193; Court of Justice of the EU, *Intel Corporation Inc v European Commission*, Case C-413/14 P EU:C:*2017*:632 (2017).

Under the *active personality* principle, States can exercise jurisdiction over crimes committed by their own nationals abroad. Often, States require dual criminality, which means that the act also needs to be punishable in the foreign State — although this does not seem to be a requirement under international law. The historic rationale for the adoption of this principle is that States often do not extradite their own nationals who are accused of committing a crime abroad. As in such cases, the territorial forum cannot exercise jurisdiction, an impunity gap opens up, which can be closed by allowing the State of nationality to exercise jurisdiction.

Under the *passive personality principle*, States can exercise jurisdiction over crimes committed *against* their nationals abroad. In the past, many States were reluctant to embrace such jurisdiction. However, these days, many States allow for the exercise of passive personality-based jurisdiction, typically over more serious crimes and subject to a dual criminality requirement. The passive personality principle was relied on in the MH17 trial in the Netherlands, as many Dutch nationals died in that 2014 MH17 airplane crash in Ukraine. Ukraine, for that matter, later concluded a treaty with the Netherlands, allowing for the transfer of its territorial jurisdiction to the NL.[17] This means that Dutch courts also have jurisdiction over crimes committed against non-Dutch nationals on board the MH17.

(c) Security

The third principle is the protective or security principle. Under this principle, States can exercise jurisdiction over offenses against the political independence and security of the State. It is, for instance, invoked in the context of extraterritorial sanctions, which the US tends to justify on the grounds of national security. I will discuss this in the second lecture. The US also espouses a broad

[17] Agreement between the Kingdom of the Netherlands and Ukraine on International Legal Cooperation regarding Crimes connected with the Downing of Malaysia Airlines Flight MH17 on 17 July 2014, Tallinn, 7 July 2017.

reading of the protective principle in other contexts, e.g., when charging drug-traffickers arrested on the high seas.[18]

(d) Universality

Under the universality principle, States can exercise jurisdiction regardless of connection (such as territoriality or nationality), but simply on the basis of the gravity of the crime. Offenses that are amenable to universal jurisdiction include genocide, war crimes, crimes against humanity, and torture. In practice, universal jurisdiction is not as universal as one may think. States typically exercise such jurisdiction only if the suspect is voluntarily present in the territory, meaning that a territorial connection *ex post facto* is required. In this context, it should be pointed out that particular State obligations to exercise universal jurisdiction, pursuant to treaty-based *aut dedere aut judicare* clauses,[19] are only triggered once the suspect is found in the territory. Once the suspect is found, the territorial State has the option to prosecute or extradite him.[20]

(e) Relationship Between the Various Principles

In light of the principles of territorial sovereignty and non-intervention, one may tend to believe that, among the aforementioned permissive principles, the territoriality principle is the most important one. However, legally speaking, there is no

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[18] *United States v Cardales*, 168 F.3d 548, 553 (1st Cir. 1999); *United States v Sinisterra*, No. 06-15824, 2007 WL 1695698, at *3 (11th Cir. 2007).

[19] Article 5(2) of the UN Torture Convention; Article 49 of the 1949 Geneva Convention I, Article 50 of the 1949 Geneva Convention II, Article 129 of the 1949 Geneva Convention III and Article 146 of the 1949 Geneva Convention IV; Article 4(b) of the Convention on Offences Committed on Board Aircraft, Tokyo, 14 September 1963, 220 UNTS 10106; Article 6(2)(b) of the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Rome, 10 March 1988, 222 UNTS 29004. Not everyone agrees, however, that *aut dedere aut judicare*-based jurisdiction is a form of universal jurisdiction. See on the non-existence of universal jurisdiction: M. Garrod, "Unraveling the Confused Relationship Between Treaty Obligations to Extradite or Prosecute and 'Universal Jurisdiction' in the Light of the *Habré Case*" (2018) 59 *Harvard International Law Journal* 125.

[20] ICJ, Questions Relating to the Obligation to Prosecute or Extradite (*Belgium v Senegal*), Judgment, ICJ Reports 2012, p. 422.

hierarchy among the permissive principles. Certainly, territoriality is the cornerstone of the law of jurisdiction, and from a criminal policy perspective, territoriality is often preferable, as the local public order has been disturbed by crime, and the evidence tends to be located in the territory of the crime scene. But territoriality is not a trump card: as a matter of international law, States that can rely on another jurisdictional principle do not have to give up their claims in the face of another State's claim of territorial jurisdiction.

As there is no hierarchy among jurisdictional principles, there may be overlapping jurisdiction, as multiple states may have jurisdiction over one and the same event. The international tensions that could thus arise could be solved by requiring that States only exercise their jurisdiction when they have a substantial — or the most substantial — connection to the event,[21] or by requiring that they exercise their jurisdiction "reasonably", i.e., by taking into account foreign States' interests.[22] However, the exercise of "reasonable" jurisdiction is no hard requirement under international law.

The Concept of Jurisdiction in Human Rights Treaties

As stated previously, the concept of jurisdiction has multiple meanings. While these lectures will focus on (discretionary) *State jurisdiction,* it makes sense to briefly unpack the concept of jurisdiction in the context of State obligations under human rights treaties. This aspect of the law of jurisdiction has recently been given ample attention in legal scholarship and practice.[23]

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[21] See Section 407 Restatement (Fourth) ("Customary international law permits exercises of prescriptive jurisdiction if there is a genuine connection between the subject of the regulation and the state seeking to regulate"). The provision goes on to state that "[t]he genuine connection usually rests on a specific connection between the state and the subject being regulated".

[22] C. Ryngaert, *Jurisdiction in International Law* (2nd ed, OUP 2015), Chapter V.

[23] See for a seminal study: M. Milanovic, *Extraterritorial Application of Human Rights Treaties* (OUP 2011).

A number of regional and global human rights treaties have a jurisdictional clause. Article 1 of the European Convention on Human Rights (ECHR), for instance, provides: "The High Contracting Parties shall secure to everyone *within their jurisdiction* the rights and freedoms defined in Section I of this Convention" (emphasis added). The term "jurisdiction" in such a clause does not refer to the kind of State authorizations to exercise the jurisdiction which I have discussed before. Rather, it points to human rights obligations, which States have with regard to particular persons, in practice persons outside the Contracting Parties' territory. Accordingly, jurisdiction in human rights treaties is about the geographic or extraterritorial scope of application of the treaties.

The extraterritorial application of human rights treaties has notably been addressed by the European Court of Human Rights (ECtHR) in a long line of cases. Just like in general public international law, the basic principle is that jurisdiction is territorial. However, exceptionally, it could be extraterritorial, meaning that the State may have obligations towards persons outside the State. The case law of the ECtHR on the extraterritorial application of the Convention is very case-specific. However, three models could be distinguished.[24] The first model is based on territorial control: persons fall within a foreign State's jurisdiction insofar as the latter effectively controls the territory of another State.[25] The second model is based on personal, State-agent control: persons fall within the jurisdiction of a State when that State exercises authority over them, e.g., when State security forces arrest a person abroad.[26] The third model is a combination of the first and the second model: persons fall within the jurisdiction of a State if that State "assumes the exercise of some of the public powers normally to be exercised by a sovereign government".[27]

[24] The ECtHR study service has identified many more categories. See ECtHR, "Extraterritorial jurisdiction of States Parties to the European Convention on Human Rights", Factsheet July 2018. I limit myself to the basic ones.
[25] *Bankovic v Belgium et al.*, App no 52207/99 ECHR 2001-XII.
[26] *Öcalan v Turkey* [2003], App no. 46221/99.
[27] *Al-Skeini and Others v United Kingdom* [2011], Application No. 55721/07.

The case law on extraterritoriality has mainly developed in a military context. It is not entirely clear what extraterritorial obligations States incur in other contexts. Recently, the German Constitutional Court (2020), in a case of State surveillance of foreign citizens, did *not* rely on the ECtHR's jurisdictional categories. Instead, it held that Germany has human rights obligations towards any person, including persons abroad, as soon as it has the capacity to interfere with their human rights.[28] Basak Cali has characterized the German Constitutional Court's model as a "control over rights doctrine" for extraterritorial jurisdiction.[29] At the time of writing, the ECtHR had not yet endorsed this doctrine.

Concluding Observations

In this first lecture, I have presented a number of basic issues of the law of jurisdiction. I have argued that the concept of jurisdiction has multiple meanings, but that I will focus on the law of State jurisdiction and in particular the law of prescriptive jurisdiction. I have introduced the seminal *Lotus* case and argued that the case still holds particular relevance for the law of enforcement jurisdiction, which prohibits extraterritorial enforcement. However, I have submitted that the liberal *Lotus dictum* on prescriptive jurisdiction has been supplanted by a stricter approach, which only allows jurisdiction to be exercised on the basis of the permissive principles of territoriality, personality, security, and universality. At the end of the lecture, I briefly addressed the concept of jurisdiction in human rights treaties. This concept is partly based on the concept of State jurisdiction given its focus on territoriality, but as it is concerned with the structure of human rights obligations, it has developed more or less autonomously in the jurisprudence of human rights courts, in particular the European Court of Human Rights.

[28] German Constitutional Court, Judgment of 19 May 2020, 1 BvR 2835/17.
[29] B. Cali, "Has 'Control over rights doctrine' for extra-territorial jurisdiction come of age? Karlsruhe, too, has spoken, now it's Strasbourg's turn", *EJIL:Talk!* 21 July 2020.

LECTURE 2:

Extraterritorial Sanctions

In the first lecture, I addressed some general issues of the law of jurisdiction. In the remainder of this course, I will address jurisdictional challenges which arise in specific issue areas. This lecture is about the imposition of "extraterritorial" sanctions, especially by the United States.[30] It consists of two parts. The first part ascertains whether extraterritorial sanctions are lawful under the international law of jurisdiction. The second part examines how states adversely affected by — possibly unlawful — extraterritorial sanctions can respond.

Sanctions are measures aimed at coercing foreign states or entities to change course. A distinction is made between multilateral and unilateral sanctions. The former are imposed by the international community, typically the UN Security Council. The latter are imposed by individual States or regional organizations, such as the European Union (EU). Another distinction is made between primary and secondary sanctions. Primary sanctions prohibit or regulate economic relations between the enacting State and the target State. Secondary sanctions, in contrast, are imposed by an enacting State and prohibit or regulate economic relations between, on the one hand, a third State or third State operators, and on the other hand, the target State. They are the focus of this lecture. I use a broad notion of secondary sanctions as encompassing monetary penalties, as well as cutting off foreign parties from access to US financial and commercial markets.

[30] This lecture draws upon T. Ruys and C. Ryngaert, "Secondary Sanctions: a Weapon out of Control?", forthcoming in *British Yearbook of International Law* 2020.

In reality, mostly the US has imposed secondary sanctions. It has done so to increase the effect of primary sanctions, which could be undermined if third state operators could just supplant US operators in deals with sanctions targets. As secondary sanctions aim to regulate economic activities between third States, inevitably they have an extraterritorial aspect. Such sanctions have a major impact on foreign States and non-US persons.

However, having an adverse impact is not the same as being internationally unlawful. I argue in this lecture that sanctions which limit non-US persons' access to the US economic or financial system fall within the sovereignty of the US and are not governed by the international law of jurisdiction. However, sanctions which go beyond access restrictions and involve penalties such as fines and asset seizure *are* governed by the law of jurisdiction. They are only lawful if there is a substantial connection (nexus) to the US. Such a connection may arguably be lacking in practice.

The argument which I make in this lecture is limited to the (general) customary international law of jurisdiction. I acknowledge that secondary sanctions may engage and violate more specific obligations under international law, such as the law of the World Trade Organization (WTO). I will not elaborate on this, but a detailed analysis of the WTO compatibility of secondary sanctions can be found in an article which I co-authored with Tom Ruys.[31] Secondary sanctions may also violate some general principles of international law, such as non-intervention, abuse of rights, proportionality, and reasonableness. I will not elaborate on these either.

Secondary Sanctions as Access Restrictions

Some matters remain within the regulatory competence of States and are not governed by international law. The classic

[31] Id., part IV.

examples are border control and access to the territory.[32] Foreign persons have no entitlement under international law to access a State's territory unless such access has been provided for on the basis of particular agreements (e.g., EU treaties providing for free movement of persons). Accordingly, making use of their sovereign prerogatives to control access to the territory, States can deny access to the territory to foreign individuals, but also to vessels and corporations. As I will elaborate on in Lecture 4, it is widely accepted that States have the discretion to deny port entry to vessels even in relation to extraterritorial conduct, such as engaging in illegal, unreported, or unsustainable fishing on the high seas.[33] Similarly, corporations have no general right of access to foreign markets, e.g., to tap foreign capital markets, to bid for contracts (e.g., public procurement), or to acquire property in a foreign territory.

Many US secondary sanctions in fact amount to such access restrictions. The Iran sanctions, for instance, consist of the denial of loans, credits, and licenses, or prohibitions on government procurement and transactions in foreign exchange, or exclusion from the US of corporate officers.[34] These measures amount to mere denials of *privileges* that were previously granted to foreign persons. Arguably, such sanctions fall within the sovereignty of the US and do not fall afoul of the international law of jurisdiction. Of course, this is not to deny their adverse effect. For instance, the US prohibition of U-turn transactions, which bans non-US persons to use US correspondent bank accounts in relation to transactions

[32] ICJ, *Dispute regarding Navigational and Related Rights (Costa Rica v Nicaragua)*, Judgment, ICJ Reports 2009, p. 213, para. 113 ("The power of a State to issue or refuse visas is a practical expression of the prerogative which each State has to control entry by non-nationals into its territory").

[33] In another example, the UAE has recently denied port entry to foreign vessels coming from or going to Qatar, after severing diplomatic ties with Qatar entry to foreign vessels coming from or going to Qatar. See HFW, "The Qatari restrictions: implications for the shipping sector", June 2017, *Lexology*, <https://www.lexology.com/library/detail.aspx?g=fa9d77f7-44ac-4962-aac8-97de2e4f9874>.

[34] US Congressional Research Service, "Iran Sanctions", p. 17.

with sanctioned persons, is in practice a major sanction, as many contracts, such as in the energy sector, are denominated in US dollars.

Secondary Sanctions Going Beyond the Denial of Access

While access restrictions fall within the sovereignty of the enacting State, sovereignty does *not* cover measures that go beyond the removal of the privilege of access, such as measures *penalizing* foreign actors in relation to extraterritorial conduct. US authorities impose sizable civil and even criminal penalties on non-US persons for violations of secondary sanctions laws. In the largest settlement ever, BNP Paribas committed to pay 8.9 billion USD to US law-enforcement agencies in relation to sanctions violations.[35] At the time of writing, Huawei and its Chief Financial Officer were charged on the ground that they "willfully conducted millions of dollars in transactions that were in direct violation of the Iranian Transactions and Sanctions Regulations", by misrepresenting and lying about these transactions to the US Government.[36] Such measures *are* arguably subject to the law of jurisdiction, and a sufficient connection between the regulated subject-matter and the US should be demonstrated. Under the law of prescriptive jurisdiction, as set out in the first lecture, relevant connections are territoriality, personality, security, and universality.

I will now briefly look at four main triggers used by the US for the application of the aforementioned sanctions, and review their legality in light of the permissive principles of prescriptive jurisdiction. The four triggers are (a) control by a US company, (b) use of US technology, (c) use of the US financial system, and (d) trafficking in confiscated US property.

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[35] Available at <https://www.treasury.gov/press-center/press-releases/Pages/jl2447.aspx>.
[36] See for the US indictment of 24 January 2019: <https://www.justice.gov/opa/press-release/file/1125021/download>.

(a) US Control

Some sanctions regulations apply to US-owned or -controlled foreign entities rather than just US persons. The US Office for Foreign Assets Control (OFAC), which administers US sanctions, states in this respect: "Civil penalties for the US-owned or -controlled foreign entity's violation …, attempted violation, conspiracy to violate, or causing of a violation shall apply to the US person that owns or controls such entity to the same extent that they would apply to a US person for the same conduct".[37] However, international law does not support the extension of the nationality principle to entities that are *controlled* by US nationals but are incorporated in another State. Indeed, in international law, nationality is based on the place of incorporation rather than the nationality of its shareholders.[38]

(b) Re-Exportation of US-Origin Items

The US also imposes sanctions on foreign re-exportation of US-origin items, often technology. This practice goes back to the 1980 "Soviet Pipeline Regulations", which prohibited the re-exportation of US-origin parts, components, or materials to the Soviet Union.[39] Currently, various sanctions regimes provide for sanctions on re-exportation.[40] They have recently been vigorously enforced. However, such sanctions appear to violate international law, as goods have no

[37] United States, Department of the Treasury, OFAC's Frequently Asked Questions (FAQ) Index: https://www.treasury.gov/resource-center/faqs/sanctions/pages/ques_index.aspx no 621.

[38] ICJ, *Case Concerning The Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* (Preliminary Objections, Second Phase) [1970] ICJ Rep 3, para. 184.

[39] "European Community: Note and Comments on the Amendments of 22 June 1982 to the Export Administration Act, Presented to the United States Department of State on 12 August 1982", 21 ILM 891, 895.

[40] See, e.g., the Iran sanctions regulations, 31 C.F.R. §560.205(a) ("the reexportation from a third country, directly or indirectly, by a other than a , of any goods, technology, or services that have been exported from the is prohibited, if: [u]ndertaken with knowledge or reason to know that the reexportation is intended specifically for or the; and [t]he exportation of such goods, technology, or services from the to was subject to export application requirements"). Note that this rule does not apply if US origin items are less than 10 pct. of the value of the item.

nationality. Hence, they cannot be justified under the personality principle.

(c) Using the US Financial System

The US has also imposed heavy fines, typically under the guise of settlements, on foreign banks, on the ground that they "facilitated access to the US financial system for targets of primary sanctions", such as Iran.[41] The US cites the territoriality principle to justify these sanctions.[42] However, the territorial connection, namely access to the US financial system, is in reality rather tenuous and incidental to the essentially foreign character of the economic transaction. In fact, as soon as an economic operator uses or transfers US dollars, he exposes himself to US sanctions. US jurisdiction over such transactions may be characterized as currency-based jurisdiction, a ground of jurisdiction which is however not internationally accepted.

(d) Trafficking in US Property

A fourth jurisdictional trigger is "trafficking in US property". The Helms-Burton Act, which has strengthened the US Cuba boycott, creates a private cause of action in US courts for US nationals against any person "trafficking" in the confiscated property.[43] The provisions in the Act (Title III) lay dormant for a long time, but have recently become relevant again as President Trump has reactivated Title III. The first cases have been brought in US courts, but so far they

[41] See, e.g., the settlement between the US and the French bank BNP in 2014, citing a "systemic practice of concealing, removing, omitting, or obscuring references to information about US-sanctioned parties in 3,897 financial and trade transactions routed to or through banks in the United States" in apparent violation of various US sanctions regulations. Available at <https://www.treasury.gov/press-center/press-releases/Pages/jl2447.aspx>.

[42] United States, District Court, *United States v Reza Zarrab*, Decision & Order, 17 October 2016, 15 Cr. 867 (RMB) (SDNY 2016), holding that transferring funds through a US bank amounts to an "exportation of services from the United States".

[43] 22 U.S.C. §§6021–6091.

have been unsuccessful.[44] Jurisdiction based on trafficking in US property is widely considered as unlawful, as the link with the US is too remote.[45] Also, the nationality of the "victims" of the confiscation is not a relevant jurisdictional consideration in civil (as opposed to criminal) proceedings.

(e) The Protective Principle

Obviously, the US could potentially justify many of its jurisdictional assertions under the protective principle, by arguing that the prohibited transactions jeopardize its national security — even if there were no other links with the US.[46] However, national security is not a blank check: States cannot invoke just any remote threat to justify an assertion under the protective principle. Instead, the threat should be objectively determinable, or at least the sanction should be proportionate to the perceived threat.[47] It is doubtful whether this is the case for the two most important US sanctions regimes, regarding Iran and Cuba.

Interim Conclusion

We can conclude from the foregoing analysis that access restrictions fall within US sovereignty and are not governed by the law of jurisdiction. However, the imposition of civil and criminal penalties *is* governed by the law of jurisdiction. Reviewing the

[44] E.g., *Daniel A. Gonzalez v Amazon.com and Susshi*, No. 19-23988-Civ-Scola (S.D. Fla. March 10, 2020) ECF Nos. 13, 14.
[45] European Commission, "Report on United States Barriers to Trade and Investment" (November 2002), p. 5.
[46] E.g., United States, District Court, *United States v Reza Zarrab*, Decision & Order, 17 October 2016, 15 Cr. 867 (RMB) (SDNY 2016) (if the "issue of extraterritoriality were to be reached, Zarrab's argument that IEEPA and [the Iranian Sanctions and Transactions Regulations — ISTR] do not apply extraterritorially would likely prove unpersuasive [where the] law at issue is aimed at protecting the right of the government to defend itself").
[47] See also the WTO panel's decision regarding the security exception of Article XXI GATT in *Russia-Measures Concerning Traffic in Transit* (5 April 2019), WT/DS512/R.

relevant connections relied on by the US, I conclude that these are too tenuous to ground reliance on an accepted permissive principle of jurisdiction. Accordingly, at least some US secondary sanctions appear to violate international law.[48]

The subsequent issue is what can be done about this. With the exception of the WTO Dispute-Settlement Mechanism, available international dispute-settlement mechanisms are few and far between. As a result, States may be tempted to enforce compliance with international law in a decentralized fashion by responding unilaterally to US sanctions. A possible response is a *blocking statute*, which, *inter alia*, bars persons under their jurisdiction from complying with US sanctions. Below, the EU's Blocking Regulation will be discussed, followed by an overview of some other mechanisms which "victims" of US secondary sanctions can make use of.

The EU Blocking Regulation

In 2018, US President Trump denounced the Joint Comprehensive Plan of Action (JCPOA), i.e., the agreement on the nuclear disarmament of Iran, which was concluded in 2015 by Iran, the USA, China, Russia, the EU, the UK, France, and Germany. The immediate consequence of Trump's denunciation was the reinstatement of US restrictions — sanctions — on commercial interactions with Iran, which had been temporarily suspended in the context of the JCPOA. These sanctions also have an extraterritorial effect, as they bar third-State persons from engaging in certain business transactions with Iranian counterparts.

In order to counter the adverse effects of the reinstated US sanctions against Iran, the EU reactivated its "Blocking

[48] Note that the US has relied on equally tenuous connections under the Foreign Corrupt Practices Act (FCPA), but the difference is that there are international conventions which explicitly give broad jurisdictional grants to states to address corruption. These do not exist in relation to sanctions.

Regulation", i.e., Regulation 2271/96,[49] which, at the time, it had adopted in response to US secondary sanctions against Cuba and Iran. The Blocking Statute lay dormant for a long time after the US had committed to suspending some of the sanctions for EU businesses. This time around, however, the US does not appear to be so accommodating. Accordingly, the Regulation is likely to be effectively applied.

The aim of the Regulation is to protect EU persons from the consequences of secondary sanctions, to safeguard the external economic relations of the EU, and ultimately, as far as Iran is concerned, to stabilize the Middle East through free trade. The Regulation creates a number of duties and rights for EU persons, the most eye-catching of which are the prohibition from complying with US sanctions and the claw-back right. These will be discussed in turn.

(a) The Compliance Prohibition

The EU Blocking Regulation prohibits EU persons from complying with US sanctions,[50] even if, in so doing, they expose themselves to US enforcement measures. However, the problem is how to prove that an EU person gives effect to US sanctions when he stops trading with Iran. An EU person halting trade with Iran may relatively easily justify this decision on business grounds, in which case the compliance prohibition does not apply. So far, there has only been one case of public enforcement, in Austria. In 2007, a US investor wanted to take over an Austrian bank, which had Cuban customers. Under US law, US investors could not have contacts with Cuban interests. In the hope to be taken over, the Austrian bank shut down the accounts of its Cuban customers. Upon learning this, Austrian authorities started a procedure on the basis of the Blocking

[49] Council Regulation (EC) No. 2271/96 of 22 November 1996 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom [1996] OJ L 309/1.
[50] Id., Article 5.

Regulation. This was halted, however, after the Austrian bank was exempted from compliance with US law by US authorities.[51] The Cubans could keep their accounts, and the bank was taken over.

Even where the compliance prohibition does apply, it is doubtful whether it has any deterrent effect. As sanctions in the US are typically heavier than in Europe, EU persons may tend to comply with US rather than European sanctions. In any event, economic contacts between the EU and Iran have seriously diminished since 2018,[52] demonstrating the limited effectiveness of the EU Blocking Statute. At the time of writing, a request for a preliminary ruling was pending with the EU Court of Justice, which may clarify the scope of the compliance prohibition.[53]

(b) The Claw-Back Provision

The Blocking Regulation also provides for private enforcement right for EU persons adversely affected by US sanctions.[54] Due to sovereign immunity, it is not possible to sue the US itself, but only other private persons whose compliance with US sanctions harms an EU person.

The precise scope of this claw-back provision is unclear, as there is no judicial precedent yet. It lends itself mostly to litigation against parties withdrawing from financing agreements or supply

[51] Austria, Foreign Ministry, "Foreign Ministry Ceases Investigations against BAWAG Bank" (21 June 2007) <https://www.bmeia.gv.at/en/the-ministry/press/announcements/2007/foreign-ministry-ceases-investigations-against-bawag-bank/>.

[52] European Commission, "Trade in Goods With Iran", 8 May 2020, available at https://webgate.ec.europa.eu/isdb_results/factsheets/country/details_iran_en.pdf (showing that EU imports from Iran had decreased by 92.8 pct. and exports from the EU to Iran by 49.4 pct.).

[53] *Bank Melli Iran v Telekom Deutschland GmbH*, Case C-124/20 Request for a preliminary ruling, lodged 5 March 2020.

[54] Blocking Regulation, Article 6 (giving EU persons the right to obtain recovery "from the natural or legal person or any other entity causing the damages or from any person acting on its behalf or intermediary").

contracts. Think, for instance, of two EU companies A and B, which have an agreement to export gold to Iran. Company A has a parent in the US and withdraws from the agreement for fear of violating US sanctions. B suffers harm from A's withdrawal and seeks recovery against A under the Blocking Regulation's claw-back provision.

Other Response Mechanisms

The EU Blocking Regulation suffers from a number of problems. The EU prohibition to comply with US sanctions penalizes EU companies instead of protecting them. Moreover, EU companies can still choose to comply with US sanctions, and just accept the lighter European sanctions. The problem with claw-back is that a trader can perhaps obtain compensation, but claw-back does not magically create opportunities for that trader to continue business transactions with Iran, as such transactions may remain subject to US sanctions. Therefore, other strategies, which aim at safeguarding trade with US sanctions targets, may have to be explored.

De-dollarization is one such strategy. As the dollar is the world's reserve currency, and the US exercises some sort of "dollar-based jurisdiction" (see *supra*), the US claims the power to regulate transactions in US dollars. On paper, a relatively easy solution would be for traders to replace the US dollar with the euro or the Chinese RMB, i.e., to "de-dollarize" the world economy. In case of de-dollarization, traders and financial institutions no longer have to use the US financial system, and are, accordingly, no longer subject to US sanctions. However, this is a long-term perspective, as businesses should trust the stability of other currencies.

Another mechanism, which is currently pioneered, is the establishment of a "special purpose vehicle" (SPV) to maintain financial transactions between third States. In 2019, an Instrument in Support of Trade Exchanges (INSTEX) was adopted to facilitate trade between the EU and Iran. In essence, under this instrument,

goods are "bartered" between Iranian and European companies, without direct financial transactions between the EU and Iran, and without using US dollars. However, the US could consider such a SPV as circumventing US sanctions regimes, and still impose sanctions on the companies involved. Given this risk, INSTEX appears to be most suitable for smaller companies with no connections to the US. At first, it will be used for humanitarian goods (such as nutrition and medical goods), which are in principle not subject to US sanctions in the first place.[55]

Concluding Observations

In this lecture, I have argued that US secondary "extraterritorial" sanctions consisting of access denials fall within US sovereignty and do not violate the customary international law of prescriptive jurisdiction. At the same time, measures consisting of criminal and civil penalties imposed on foreign persons conducting trade with US sanctions targets violate the international law of prescriptive jurisdiction, insofar as the US can only demonstrate a weak connection with the subject-matter. I have argued that the jurisdictional triggers typically used by the US are based on too weak a connection, thus rendering them presumptively unlawful under international law. I then turned to mechanisms which affected States can rely on to mitigate the impact of US sanctions, and eventually to bring the US to its senses. In particular, I have explored the potential held by blocking statutes, specifically the EU Blocking Regulation, de-dollarization, and special purpose vehicles. These mechanisms all come with their own drawbacks. Ultimately, perhaps only a US realization that its far-reaching secondary sanctions do not serve US interests — as they may cause foreign investors to turn their backs on US markets — may defuse the current tensions.

[55] See for the first transaction: A. Brzozowski, "EU's INSTEX mechanism facilitates first transaction with pandemic-hit Iran", *Euractiv.com*, 1 April 2020.

LECTURE 3:

"Extraterritorial" Criminal Jurisdiction Over Business and Human Rights Abuses

In a globalized world, transnational corporations are active in multiple States. A parent company may be incorporated in one State, whereas the production of a particular good sold by the company is taken care of by a foreign subsidiary. During this production process, human rights and environmental abuses may take place: labor conditions may be substandard, production facilities pollute the adjacent environment, or security personnel beat up demonstrators. The question has arisen whether transnational corporations, in particular parent companies, could be held liable in relation to such extraterritorial harm, as well as whether home States or other third States have jurisdiction over such cases.

Issues of liability and jurisdiction in relation to extraterritorial corporate human rights abuses have been addressed quite extensively in the field of tort (private) law.[56] However, relatively little attention has been paid to criminal law as a remedy. In this lecture, I will focus on how third States can exercise criminal jurisdiction over business and human rights (BHR) abuses taking place abroad.[57] Before inquiring into the doctrinal options to exercise jurisdiction, I will first analyze the role allotted to the criminal law in international BHR instruments, ascertain why the criminal law has not been a popular accountability tool, and introduce some basic criminal liability concepts.

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[56] C. van Dam, "Tort Law and Human Rights: Brothers in Arms On the Role of Tort Law in the Area of Business and Human Rights" (2011) 2 JETL 221; E Aristova, "Tort Litigation against Transnational Corporations in the English Courts: The Challenge of Jurisdiction" (2018) 14(2) Utrecht Law Review 6–21.

[57] In so doing, I rely on C. Ryngaert, "Accountability for Corporate Human Rights Abuses Lessons from the Possible Exercise of Dutch National Criminal Jurisdiction over Multinational Corporations" (2018) 29 *Criminal Law Forum* 1–24.

The Role of the Criminal Law in International BHR Instruments

The UN Guiding Principles on Business and Human Rights (2011) acknowledge the importance of accountability and access to a remedy for extraterritorial corporate human rights abuses.[58] In the meantime, tort suits alleging corporate human rights abuses abroad have been initiated in multiple jurisdictions.[59] However, criminal accountability appears to be lagging behind: corporations are, by and large, *not* prosecuted for international crimes or gross human rights violations. Individual businessmen, in contrast, have at times been prosecuted, notably for complicity in international crimes.[60]

That corporations tend not to be prosecuted for alleged abuses is, at least in part, attributable to the relative absence of strong emphasis by intergovernmental organizations on the criminal law as an attractive accountability tool. Notably, the UN Guiding Principles, the 2016 resolution on "Business and human rights" of the UN Human Rights Council, nor the 2016 EU Council conclusions on business and human rights mention criminal liability.[61]

Still, the European Parliament and the Council of Europe have called on their member States to make better use of the criminal law as a BHR accountability tool. The European Parliament has called "on the Member States to tackle legal,

[58] UN Guiding Principles, Pillar III.

[59] See, e.g., UK Supreme Court, *Vedanta Resources PLC and another (Appellants) v Lungowe and others (Respondents)*. Judgment of 10 April 2019, [2019] UKSC 20; Court of Appeal The Hague, *A.F. Akpan v Royal Dutch Shell, plc*, judgment of 18 December 2015, ECLI:NL:GHDHA:2015:3587.

[60] E.g., Court of Appeal The Hague, van Anraat, judgment of 9 May 2007, ECLI:NL:GHSGR:2007:BA4676; Court of Appeal Den Bosch, Kouwenhoven, judgment of 21 April 2019, ECLI:NL:GHSHE:2017:1760.

[61] Although the Commentary does so nine times. Also, some National Action Plans on Business and Human Rights mention the potential of the criminal law.

procedural and practical obstacles that prevent the prosecuting authorities from investigating and prosecuting companies and/or their representatives involved in crimes linked to human rights abuses".[62] The Council of Europe, for its part, has called on member States "to establish criminal or equivalent liability for the commission of crimes under international law caused by business enterprises, treaty-based offences, and other offences constituting serious human rights abuses involving business enterprises".[63] The Council referred to a duty to prosecute where warranted by the outcome of an investigation, and stated that any decision not to start an investigation must be sufficiently reasoned.[64] Most recently, Article 6(7)-(8) of the Draft for a Legally Binding Instrument for Business and Human Rights (a business and human rights treaty),[65] provides that "[s]ubject to their domestic law, State Parties shall ensure that their domestic legislation provides for criminal, civil, or administrative liability of legal persons for [international and transnational] offences", and that "[s]uch liability shall be without prejudice to the criminal liability under the applicable domestic law of the natural persons who have committed the offences".

In some quarters, clearly, the added value of criminal prosecution of corporations, rather than just corporate officers, is acknowledged. This is for good reason, as from a criminal policy perspective, corporate liability is advisable in case a particular corporate culture has encouraged the commission of violations, and individualized contributions are difficult to isolate (i.e., an "organizational or holistic liability" model).

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[62] European Parliament resolution of 25 October 2016 on corporate liability for serious human rights abuses in third countries (2015/2315(INI)) (2016).
[63] Recommendation of the Committee of Ministers of the Council of Europe on human rights and business, CM/Rec(2016)3, 2 March 2016.
[64] Id.
[65] OEIGWG Chairmanship Revised Draft 16 July 2019, Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and other Business Enterprises.

Nine Reasons for the Lack of Popularity of the Criminal Law

Before looking into liability and jurisdictional issues, I will first ascertain *why* the criminal law has not been popular so far as a BHR accountability tool. I identify nine reasons.

First, not all human rights violations qualify as violations of criminal law. This means that not all BHR violations can be prosecuted, e.g., violations of labor rights, or discrimination.

Second, criminal law requires the action of a (State) public prosecutor. As prosecutors tend to have discretion, they do not always take action. When exercising their discretion, they may fail to give priority to complicated economic crimes with a transnational dimension. Moreover, big business and politics may be closely entwined. As a result, prosecutors may take action at their own peril. Tort litigation is at a distinct advantage *vis-à-vis* the criminal law in this respect, as in tort cases, victims have the direct right to sue tortfeasors.

Third, securing a criminal conviction is based on a standard of proof that is higher than in civil cases. This burden may be so difficult to discharge that prosecutors may not even try to bring a case before a judge and discontinue proceedings early on.

Fourth, the criminal law may be too blunt a mechanism to hold corporations to account for BHR abuses. This can be called the "dark side of virtue": the criminal law may look like an attractive accountability avenue, but in fact affects innocent stakeholders. Shareholders may see the value of the corporation reduced, workers may see the corporation closed, and consumers may see corporations passing on fines to them. In light of these potential (unintended) consequences, instead of prosecution, organizational compliance programs may be more attractive, possibly in combination with deferred prosecution.[66]

[66] See, e.g., UK Serious Fraud Office, Deferred Prosecution Agreements, available at <https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/deferred-prosecution-agreements/>.

Fifth, not all States know the concept of corporate criminal liability. This has impacted the drafters' choice not to include corporate liability in Article 25 of the Statute of the International Criminal Court.[67] It remains the case that such States may have at their disposal cognate, quasi-criminal (administrative law) concepts to hold corporations accountable.

Sixth, in light of the principle of legal certainty, the criminal law may not be the appropriate tool to sanction BHR violations. In the BHR context, the criminal law often sanctions violations of vaguely defined human rights duties of care. Hence, the corporation may possibly not predict when exactly it violates the law.

Seventh, the retributivist goal of criminal law may be ill-suited to repair the damage done to victims. The UN Guiding Principles emphasize victims' right to reparation as an aspect of victims' access to a remedy, and it may not be fully clear how a conviction can be seen as "reparation" — although it is certainly true that victims may consider a criminal conviction to be an appropriate remedy. In some jurisdictions, for that matter, criminal courts can also decide on claims for damages.

Eighth, some corporations may be considered as no more than empty shells. They may have few assets within the jurisdiction to satisfy a judgment, and it is challenging to enforce criminal judgments abroad. Also, corporations may be just an extension of one or more natural persons, in which case it may make more sense to prosecute the individual businessmen.

Ninth, prosecutors may face daunting investigative obstacles in extraterritorial cases, where foreign States may not be able or willing to cooperate, for political reasons, because they lack capacity, or because they do not know the concept of corporate criminal liability.

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[67] D. Stoitchkova, *Towards Corporate Liability in International Criminal Law* (Intersentia 2010).

A tenth reason could be "jurisdiction". However, as I will explain, jurisdiction need not be problematic. In fact, there are plenty of opportunities under the nationality and territoriality principles. Instead, the *practical* challenges of exercising jurisdiction abound, related to evidence-gathering, lack of resources, lack of expertise, and political interference. These challenges have been highlighted in a report of the International Corporate Accountability Roundtable and Amnesty International.[68]

Liability

For a proper understanding of criminal jurisdiction in a BHR context, it is necessary to have a basic understanding of liability issues.

The starting point for the analysis is that corporate human rights abuses typically result from organizational failures. These are failures to take precautionary measures in relation to the risk of abuse abroad, where the abuse itself is committed by *other* persons. Duty of care standards capture such failures. The duty of care is well-developed in tort law[69] and can be relied on in BHR tort litigation.[70] However, the criminal law also addresses duty of care violations that could be relevant in a BHR context, like wrongful death, culpable arson or explosion, failing to assist a person in lethal danger, or failing to tend to a person in need. This means, for instance, that a Dutch corporation could be liable for failing to prevent the conduct of its subsidiary abroad that led to the death of an employee. The guiding question is

[68] International Corporate Accountability Roundtable and Amnesty International, *Commerce, Crime, and Human Rights: Closing the Prosecution Gap*, report 2016, available at <http://www.commercecrimehumanrights.org/>.
[69] M. Lunney, D. Nolan and K. Oliphant, *Tort Law: Text and Materials* (6th ed, OUP 2017), Chapter 9.
[70] D. Cassel, "Outlining the Case for a Common Law Duty of Care of Business to Exercise Human Rights Due Diligence" (2016) 1 Bus. & Hum. Rts. J. 179.

whether it was reasonably possible for the corporation to take precautionary measures, in light of the information available to it, in light of the information which it could reasonably gather, and in light of the influence the corporation could exert on other actors.

The scope of the duty of care in BHR cases cannot be established in the abstract. Always, an *in concreto* application is required, in light of the specific circumstances of the case and the nature of the actor(s) involved. That said, in BHR cases, courts can look at corporate social responsibility due diligence guidances.[71] These guidances inform the corporation's duty of care and could lead to the establishment of liability.

Duty of care norms are open-ended. They give the flexibility to apply the criminal law to cases that were not originally foreseen by the legislature, e.g., BHR cases. Such norms need not be in tension with the principle of legal certainty, as multinationals are aware, or should be aware of BHR best practices, even if the latter are technically not binding.

Aside from duty of care violations, exceptionally, the conduct of (an agent of a) subsidiary could be directly attributed to a parent company. However, as this may amount to the negation of the separate legal personalities of parent and subsidiary, it should only be done in case of abuse, i.e., when the parent sets up a subsidiary with a view to evading accountability for BHR violations, or when the parent gives direct orders to employees of the subsidiary.

Finally, corporations could be held liable for complicity, i.e., aiding and assisting another actor, such as a State or an armed group,

[71] These vary per industrial sector. See notably the OECD due diligence guidance for responsible supply chains (2016, focusing on the extractive sector); OECD due diligence guidance for responsible supply chains in the garment and footwear sector (2017).

in the commission of (international) crimes.[72] The French *Lafarge* case is a case in point. In 2011, a criminal complaint was filed in French courts against the French cement company Lafarge. The complaint alleged that the company was complicit in war crimes, crimes against humanity, and financing of a terrorist enterprise, on the grounds that it cooperated with armed groups, such as IS, in Syria. The case is ongoing.[73]

Jurisdiction

Having set the stage, let us now turn to the jurisdictional issues. I divide this section into four parts. Parts (a)-(c) examine to what extent the permissive principles of prescriptive jurisdiction lend themselves to application in the context of BHR abuses allegedly committed by corporations. Part (d) looks through a jurisdictional lens at three specific offenses that may lend themselves well for holding corporations accountable for BHR abuses.

(a) The Nationality Principle

In the first scenario, a duty of care violation is committed by a parent corporation in relation to extraterritorial harm (which may have been directly caused by a subsidiary over which the parent failed to exercise sufficient control). Under the nationality principle, the home State of that parent corporation normally has jurisdiction. Pursuant to this principle, only the nationality of the

[72] Complicity is a particularly relevant category of international criminal law. See Article 25(3)(c) of the ICC Statute: "In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person … For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission".

[73] In 2019, a French appeals court dropped the crimes against humanity charges against Lafarge, but an appeal has been filed with the Supreme Court. For a timeline of the case: <https://www.business-humanrights.org/en/lafarge-lawsuit-re-complicity-in-crimes-against-humanity-in-syria>.

corporation counts; the geographic place of the violation does not matter. As we discussed in the first lecture, some States require dual criminality, meaning that the act should be punishable in the forum State and the foreign State. However, dual criminality is not required for all crimes. Moreover, dual criminality is not required if the duty of care violation is committed *in the forum State,* e.g., at corporate headquarters — in which case the territoriality principle applies.

There may appear a jurisdictional problem in case of direct attribution to a local corporation of foreign acts of a foreign legal person, in which case a meaningful connection to the home State may in fact be lacking. Arguably, in such a situation, the jurisdictional issue should be separated from the liability issue. Jurisdiction will exist on a *prima facie* basis, simply on the basis of the nationality of the corporation, even if it may be unlikely that the corporation will eventually be held liable.

(b) Territoriality

Under the territoriality principle, there is territorial jurisdiction in case of an act or omission in the forum State. This applies not only to local corporations acting in the territory of the forum State but also to *foreign corporations*. Think, for instance, of a Swiss corporation holding a management meeting at Amsterdam Airport in relation to activities of an overseas subsidiary, and, during this meeting, failing to take reasonable precautions in respect of the risk of extraterritorial harm. On the basis of an imputation model, the Netherlands would have territorial jurisdiction over the corporation on the grounds that a corporate representative acted in the Dutch territory.

In the global economy in which transnational corporations operate, however, territoriality is not unproblematic. These corporations have jurisdictionally relevant territorial connections with multiple States. Also, BHR abuses may take place in different

States, as decision-making and harmful activity may be spread globally. Drawing on the substantial connection requirement in the law of jurisdiction, one could suggest that there is only jurisdiction in case of a substantial act or omission of corporate agents in the forum State. There would be no jurisdiction if the territorial connection is only incidental, e.g., sending an email through a local server. Some might even say that a corporation only acts territorially where its center of main interest lies, especially in case of organizational failure. Under this model, just a management meeting or a territorial act of a corporate representative would not suffice. Instead, acts in the territory of the State of the corporation's center of main interest are required to ground jurisdiction. The center of main interest is different from the corporation's place of registration for that matter.

(c) Universality

As explained in the first lecture, there is universal jurisdiction over a limited number of offenses, such as core crimes against international law. In that lecture, it was also noted that most States require the presence of the alleged perpetrator in the territory before jurisdiction can be exercised. This presence requirement is particularly problematic in a corporate BHR context: when exactly is a corporation "present" in the territory? Is it the presence of an employee, a senior decision-maker, a subsidiary, branch, office, production facility, principal place of business, center of main interest? In practice, the issue has not yet arisen.

(d) Relevant Offenses

Let us now turn our attention to three offenses that may be particularly promising for holding corporations liable for BHR abuses: money laundering, participation in an international criminal organization, and profiting from human trafficking. I will draw on Dutch legal practice, but these offenses (may) also exist in other

States. Accordingly, the analysis has wider geographic application. As I will show, these offenses have a territorial connection with the Netherlands, even if they relate to extraterritorial activity. Thus, jurisdiction can be established on the basis of the territorial principle.

First, in the case of transnational money laundering, a corporation launders money domestically generated by criminal activity abroad. Territorial jurisdiction is established on the ground that the laundering activity takes place in the territory of the forum State, regardless of the fact that the underlying criminal activity was extraterritorial in nature. Money laundering was relied on in the Swiss Argor Heraeus case, in which a Swiss corporation was accused of refining "conflict gold" from the Democratic Republic of the Congo. A Swiss prosecutor could easily establish his jurisdiction, but eventually decided not to further pursue the case. Even if he had identified some due diligence failures, there was, in his view, "no reason to believe that the company had been aware of the criminal origin of the gold".[74]

Second, in case of participation in a transnational criminal organization, a local corporation participates in foreign schemes involving human rights abuses violations by foreign actors. Again, territorial jurisdiction can be established on the ground that the participation took place in or from the territory of the forum State. In 2017, Dutch NGO SMX Collective filed a complaint against Rabobank in relation to a US subsidiary laundering money from Mexican drug cartels, which allegedly engaged in crimes against humanity and torture.[75] As Rabobank participated from the Netherlands in the alleged scheme, there is no jurisdictional problem. The main

[74] See for an overview of the case: Trial / Open Society Justice Initiative / Conflict Awareness Project, "Swiss decision to close Argor case encourages 'head in the sand' attitude", news release June 2, 2015.

[75] Prakken d'Oliveira Lawyers, "Criminal complaint against Rabobank Group on account of money laundering and participation in a criminal organization", news release 2 February 2017.

challenge concerns liability. Did Rabobank NL (rather than just Rabobank US) contribute to the offense? Was Rabobank NL aware of the commission of the offense? Did it knowingly and willingly advance or further the commission of their offense? So far, the public prosecutor has not formally communicated his decision in this case.

A third offense is profiting from human trafficking. Article 10(2)(b) of the EU Human Trafficking Directive (2011) provides, in the jurisdictional provision of the Directive, as follows: "A Member State shall inform the Commission where it decides to establish further jurisdiction over the offences [of human trafficking] committed outside its territory, *inter alia*, where the offense is committed for the benefit of a legal person established in its territory".[76] On the basis of this provision, EU member States have the option to exercise their jurisdiction over corporations which "profit from" human trafficking. The Netherlands is one of the member States which has done so. Article 273(1)(6) of the Dutch Penal Code (an article which in fact predated the adoption of the EU Directive) considers persons guilty of human trafficking, *inter alia*, when they deliberately take advantage of the exploitation of another person. For jurisdiction to be established over this offense, it does not matter where the exploitation occurred; what matters is that a person over whom a State has territorial or personal jurisdiction profits from the exploitation. On the basis of Article 273(1)(6) of the Dutch Penal Code, a criminal complaint was filed against a Dutch corporation purchasing ships built on Polish shipyards, allegedly by North Korean "slave laborers".[77]

[76] Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, *OJ L 101/1 (2011)*.
[77] "North Korean worker seeks Dutch shipbuilder's prosecution over labor abuses", *Reuters* 8 November 2018.

Concluding Observations

In this lecture, I have argued that there are plenty of legal options to prosecute corporations for committed BHR abuses. However, by and large, they have not yet been tested. It will require courage from prosecutors to go after dodgy corporations. Also, prosecutors should be given sufficient resources to investigate extraterritorial crime. It remains the case that problems of international cooperation, in relation to evidence-gathering, may sometimes be difficult to overcome. In any event, States should realize that they have positive obligations (duties to protect) under international human rights law to provide victims access to a remedy,[78] which could arguably consist of a criminal law conviction.

[78] See also Opinion of the European Union Agency for Fundamental Rights, "Improving access to remedy in the area of business and human rights at the EU level", FRA Opinion 1/2017.

LECTURE 4:

Jurisdiction Over the Internet

The Internet is a virtual place. It spans the globe and has connections with almost all countries. The question then is: who rules the Internet? In the absence of global arrangements, the answer is that States do, individually. However, what kind of jurisdiction do they have over the Internet? There was a time in the 1990s when cyber-anarchists believed that the Internet was not subject to regulation by States.[79] Nowadays, however, the consensus is that States can regulate aspects of the Internet, and in fact, increasingly do so.[80] It remains somewhat elusive, however, what limits the law of jurisdiction precisely imposes on States' regulation of the Internet. This is the challenge, which I take up in this lecture.

The lecture consists of two parts. In the first, theoretical part, I draw attention to the historical continuity between past transnational communities and contemporary Internet-based technological communities which may challenge territorial State jurisdiction. In the second, doctrinal part, I show how States currently struggle to apply their laws to Internet activity. I do so by giving a number of examples of recent jurisdictional battles, mainly involving the EU, the jurisdiction with which I am most familiar.

[79] D.R. Johnson and D.R. Post, "Law and Borders: The Rise of Law in Cyberspace" (1996) 48 Stanford Law Review 1367–1402.
[80] J. Goldsmith and T. Wu, *Who Controls the Internet?* (OUP 2003).

The Historical Continuity Between Past Transnational Communities and Contemporary Internet-Based Technological Communities[81]

Cyberspace has an inherently transnational and even de-territorialized character. As such, it challenges the principle of territoriality, the bedrock principle of the law of jurisdiction. One should realize, however, that territoriality, as a principle of global public order, is itself of relatively recent vintage. Historicizing territoriality allows us to see continuity between contemporary Internet-based technological communities and the transnational communities of the past.

Basing jurisdiction on the territory, or the territorially circumscribed nation-State, while currently dominant, is not necessarily *natural*. With this I mean that jurisdictional discourses could also be based on alternative ordering principles, such as community. Reliance on the territory and the nation-State as the most relevant jurisdictional linchpin is in fact the result of the happenstance confluence of a number of specific circumstances in the Modern Age, such as the development of the science of cartography, which allowed for the drawing of more certain boundaries. Historically, however, jurisdiction was based on personal relations: on kinship, and tribal or community bonds. Obviously, at one point in the Early Modern Age, territoriality entrenched itself.[82] However, even then, community-based jurisdiction did not entirely disappear. Merchant and Craft Guilds continued to set their own rules well into the Modern Age, the long-distance trade continued to be governed by non-state law (*lex mercatoria*), and chartered corporations (e.g., the British corporations settling America, or the Dutch East India Company).

[81] This part draws on C. Ryngaert and M. Zoetekouw, "The End of Territory?: The Re-Emergence of Community as a Principle of Jurisdictional Order in the Internet Era", in U. Kohl, *The Net and the Nation State* (CUP 2017), 185–201.

[82] See J. Branch, The Cartographic State: Maps, Territory, and the Origins of Sovereignty (CUP 2013).

These old forms of community jurisdiction presaged recent Internet-based technological communities, which live or want to live under their laws. Online marketplaces operate on the basis of bylaws, pursuant to which traders can be sanctioned in case of bad behavior. Corporations have developed virtual games that are governed by their own rules, the content of which may be very different from State rules, while for players such rules may be more "real" than State law. Such online communities are content to live in the shadow of the State, meaning that the jurisdiction of the State law continues to operate in the background. Customers, traders, and players can still bring contractual disputes before State courts, even if they may not be inclined to do so in light of additional transaction costs.

However, some technology corporations have gone further and have challenged the very power of the State to regulate their activities. Instead, they may prefer the virtual communities which they create to be governed by their own laws, without State jurisdiction lurking in the background. Uber, for instance, openly challenged State regulation and continued to operate its services in various States which had declared its ride-hailing service illegal, until it had to back down due to the threat of harsh penalties.[83] Google, for its part, has had a long fractious relationship with regulators, especially in Europe. Claiming to be a US company, it opposed the EU's jurisdiction to impose de-indexing orders, based on the right to be forgotten, before its hand was finally forced by the Court of Justice of the EU in the 2014 *Google Spain* decision.[84] Still, even after this decision, Google itself largely decides on whether or not to grant requests for de-indexing, with few court challenges taking place and courts tending to side with

[83] Uber pays $2.6M to settle historical charges it violated Dutch taxi laws, *TechCrunch*, 8 March 2019.

[84] *Google Spain*, *Google Spain SL and Google Incorporated v Agencia Española de Protección de Datos ("AEPD") and Costeja González*, Judgment, reference for a preliminary ruling, Case C-131/12, ECLI:EU:C:2014:317.

Google.[85] Other technology entrepreneurs have been even more outspoken in their opposition to State territorial regulation. The Seasteading Institute, for instance, builds "startup communities that float on the ocean with any measure of political autonomy".[86] As we write, however, seasteading communities cannot fully escape State jurisdiction. Nationally-flagged seastead vessels remain subject to flag State jurisdiction and seasteads in a State's exclusive economic zone may be subject to that State's jurisdiction.[87]

More generally, it seems that governments are pushing back against tech giants' overweening ambitions. At the time of writing, in a primer, the bosses of the four tech giants Facebook, Google, Apple, and Amazon gave evidence to members of the US Congress, possibly paving the way for more regulation of their activities.[88]

State Jurisdiction Over the Internet

The Internet is not just a virtual phenomenon. To function properly, it needs physical infrastructure, such as cables, computers, and servers, as well as real-life people making use of the Internet. These items and persons are located *somewhere*, in a State's territory.

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[85] See, e.g., DW, "Google victory in German top court over right to be forgotten", 27 July 2020 (German Federal Court of Justice rejecting plaintiffs' appeals over privacy concerns).

[86] Available at <https://www.seasteading.org/about/>.

[87] O. Shane Balloun, "The True Obstacle to the Autonomy of Seasteads: American Law Enforcement Jurisdiction over Homesteads on the High Seas", 24 U.S.F. Mar. L. J. 409 (2012). French Polynesia initially lent a sympathetic ear to the development of seasteads off the coast of Tahiti, but backed out of the deal in 2016, fearing tech colonialism. See "An island nation that told a libertarian 'seasteading' group it could build a floating city has pulled out of the deal", *BusinessInsider* 31 October 2016. Also, other States are less than keen on seasteads off their costs. In a heavy-handed action, the Thai Navy raided a seastead off the coast of Phuket. See "This is why the Thai navy busted a 'seasteading' American", *Navy Times* 18 April 2019.

[88] "Tech giants Facebook, Google, Apple and Amazon to face Congress", *BBC News* 29 July 2020.

Thus, States can claim and have claimed territorial jurisdiction over various online activities.

Let me give the example of the gathering of personal data, the protection of which rises to the level of a fundamental right in the EU.[89] In EU data protection, a State's jurisdiction is often based on the fact that a State's territorially-based citizens or residents are "targeted" by foreign-based Internet service providers which offer services or sell products, and acquire personal data in the process. Article 4 of the (now defunct) EU Data Protection Directive (DPD) was quite clear that the Directive applied if a foreign-based data controller, through an establishment, carried out activities in the territory of an EU member State, or "for purposes of processing personal data makes use of equipment, automated or otherwise, situated on the territory of the said member state".[90] The aforementioned *Google Spain* decision of the Court of Justice of the EU, which upheld the right to be forgotten (the right to erasure), was jurisdictionally based on the latter provision.

The jurisdictional scope of the DPD was clearly based on the territoriality principle. In contrast, the currently applicable Article 3 of the EU General Data Protection Directive (GDPR)[91]

[89] Article 8 of the EU Charter of Fundamental Rights ("1. Everyone has the right to the protection of personal data concerning him or her. 2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified. 3. Compliance with these rules shall be subject to control by an independent authority").

[90] 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, *OJ L 281/31* (1995), Article 3.

[91] 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), *OJ L 119/1*, 4 May 2016.

does not as such use the word "territory" in explaining its scope of application:

> 1. This Regulation applies to the processing of personal data in the context of the activities of an establishment of a controller or a processor in the Union, regardless of whether the processing takes place in the Union or not.
>
> 2. This Regulation applies to the processing of personal data of data subjects who are in the Union by a controller or processor not established in the Union, where the processing activities are related to:
>
> (a) the offering of goods or services, irrespective of whether a payment of the data subject is required, to such data subjects in the Union; or
>
> (b) the monitoring of their behavior as far as their behavior takes place within the Union.

However, the use of the term "data subjects in the Union" arguably refers to "residency" in the Union. This is a combination of personality and territoriality. Moreover, Article 3 of the GDPR bears the title "territorial scope", which suggests that the provision is based on the territoriality principle, just like Article 4 of the DPD.

On the basis of the jurisdictional clause in EU data protection law, all Internet intermediaries offering services in the EU, or monitoring the behavior of EU data subjects, have to comply with EU law, which requires a high level of data protection.[92] This has created particular burdens for foreign firms, in whose home jurisdiction lower standards may apply. At the same time, these firms have sometimes tended to apply

[92] See for an overview European Union Agency for Fundamental Rights and Council of Europe, *Handbook on European Data Protection Law* (2018).

EU data protection standards also when offering services in other jurisdictions.[93] In turn, other jurisdictions have adopted data protection legislation that is inspired by high EU standards, thereby disseminating EU law all over the globe. This process has been described as the "Brussels effect":[94] Brussels-made EU data protection law is swiftly becoming the gold standard of data protection and impacts private operators' global practices, as well as foreign law.

Recent Jurisdictional Battles

The EU GDPR may have drawn the contours of State jurisdiction as to (online) personal data protection, but it has not provided all the answers to jurisdictional questions that may arise. As technology is constantly developing, the law of jurisdiction is (re-)interpreted, evolves, and develops. The development of the law is brought most starkly into relief when looking at high court decisions. In this part, I will discuss three recent decisions of the EU Court of Justice (2019-2020) which have clarified, or at least attempted to clarify, the jurisdictional scope of online data protection rules or rules concerned with the online protection of a person's reputation. Subsequently, I will discuss a jurisdictional development that is taking place not in the courts, but through new legislation, concerning the possibilities for (criminal) law-enforcement agencies to access data held abroad.

[93] Compare "Exclusive: Facebook CEO stops short of extending European privacy globally', *Reuters* 3 April 2018 ("Facebook Inc Chief Executive Mark Zuckerberg said on Tuesday that he agreed 'in spirit' with a strict new European Union law on data privacy but stopped short of committing to it as the standard for the social network across the world").

[94] A. Bradford, *The Brussels Effect. How the European Union Rules the World* (OUP 2020) (revealing "the EU's unique power to influence global corporations and set the rules of the game while acting alone"). The Brussels Effect can also be witnessed in other areas, such as consumer protection and environmental protection.

(a) Google v CNIL: The Geographic Scope of Implementation of the Right to Be Forgotten

After *Google Spain*, already mentioned several times, it was not fully clear what the geographic scope of implementation of the right to be forgotten was. More in particular, when a person's request to be de-indexed from a list of Google search results is granted, does Google have to delist that person only in his own country, meaning that only users in that country will see the redacted results? Or does the scope of implementation extend EU-wide, meaning that users in the entire EU will see the redacted results? Or should the right be applied worldwide (global implementation), meaning that everyone will see the redacted results? This question led to a prolonged dispute between Google and the French Data Protection Authority CNIL. The dispute eventually came before the Court of Justice of the EU, which, in a 2019 judgment, opted for the second, regional model (limitation to the EU territory).[95] The Court held that "there is no obligation under EU law, for a search engine operator who grants a request for de-referencing made by a data subject, as the case may be, following an injunction from a supervisory or judicial authority of a Member State, to carry out such a de-referencing on all the versions of its search engine", but that instead "the de-referencing in question is, in principle, supposed to be carried out in respect of all the Member States".[96] The Court arguably decided against global implementation because such an extension of jurisdiction would not be reasonable and would unduly impinge on foreign nations' interests. The Court indeed noted that "numerous third States do not recognize the right to de-referencing or have a different approach to that right", and that "the balance between the right to privacy and the protection of personal data, on the one hand, and the freedom of information of internet users, on the other, is likely to vary significantly around the world".[97] Nevertheless, the Court

[95] Court of Justice of the EU, *Google v CNIL*, Case C-507/17, 24 September 2019.
[96] Id., paras. 64, 66.
[97] Id., paras. 59–60.

left the door open for purely local or for universal implementation, thereby not fully dispelling legal uncertainty in the field.[98]

(b) Glawischnig: Global Take-Down Orders

Similar questions concerning the geographic scope of implementation also arise with respect to taking down requests regarding the content considered defamatory. In the *Glawischnig* case, some people had posted messages on Facebook labeling the former chair of Austria's Green Party a "lousy traitor", "corrupt oaf", or member of a "fascist party". Similar posts had subsequently spread over the Internet. The woman in question, Ms. Glawischnig, considered this to be defamatory language and requested that Facebook take down such posts. But what should be the scope of implementation of such orders? Should one make sure that these posts cannot be seen in Austria? Or should no one at all see them? In a 2019 judgment, somewhat surprisingly, the Court of Justice of the EU opted for global implementation.[99] Interpreting the relevant EU Directive on Electronic Commerce,[100] the Court held as follows: "Directive 2000/31 does not make provision in that regard for any limitation, including a territorial limitation, on the scope of the measures which Member States are entitled to adopt in accordance with that directive. Directive 2000/31 does not preclude those injunction measures from producing effects worldwide … It is up to Member States to ensure that the measures which they adopt and which produce effects worldwide take due account of those rules".[101] This implies that Facebook should take down the relevant posts everywhere. Obviously, this decision has alarmed free speech

[98] See C. Ryngaert and M. Taylor, "Implementing the right to erasure: the judgment of the EU Court of Justice in Google v CNIL", RENFORCE Blog, 8 October 2019.
[99] Court of Justice of the EU, *Glawischnig*, Case C-18/18, 3 October 2019.
[100] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market ("Directive on electronic commerce") (OJ 2000 L 178, p. 1).
[101] *Glawischnig*, paras. 49–52.

advocates, especially in the US, which is wary of the kind of "global censorship" which the *Glawischnig* judgment could spawn.[102]

(c) The Schrems Cases: The Illegality of Data Transfers

Global tech firms easily transfer their customers' data from one jurisdiction to another. As many Big Tech players are US companies, such data may end up in the US, where they could possibly be subject to US surveillance operations. In two cases before EU courts, Austrian privacy activist Max Schrems challenged the legality of the transfer of EU subjects' data to the US (by Facebook in the case). In both cases, the Court of Justice of the EU ruled in his favor, thereby severely complicating data transfers from the EU to the US, but also to other jurisdictions which have a lower level of data protection. In so ruling, the Court can be considered as exercising a form of extraterritorial jurisdiction, in the sense that data originating in the EU remain subject to EU legal protection, even after being transferred abroad.[103]

Schrems I concerned the validity of a decision of the European Commission declaring that the US provided adequate data protection guarantees ("Safe Harbor"). The Court of Justice of the EU invalidated this Safe Harbor framework, as it allowed the US to unlawfully interfere (via surveillance measures) in the protection of EU subjects' data, and failed to offer such subjects sufficient remedies.[104]

After *Schrems I*, the EU and the US aspired to strengthen data protection guarantees through a "Privacy Shield".[105] However,

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[102] E.g., J. Daskal, "A European Court Decision May Usher in Global Censorship", *Slate* 3 October 2019.

[103] See K. Propp and P. Swire, "Geopolitical Implications of the European Court's Schrems II Decision", *Lawfare Blog*, 17 July 2020 (considering this to be "a nakedly extraterritorial assertion of EU jurisdiction").

[104] *Schrems v Data Protection Commissioner* (C-362/14) EU:C:2015:650 (06 October 2015).

[105] Available at <https://www.privacyshield.gov/>.

in *Schrems II*, the Court of Justice of the EU also invalidated the Commission decision on the Privacy Shield, on the grounds that US law-enforcement requirements still prevail over data protection guarantees, that the legal power of US agencies lacks limitations, and that EU data subjects have insufficient remedies at their disposal in the US.[106] In addition, the Court decided that private data controllers who transfer data under "standard contractual clauses" (i.e., contractual arrangements which bind the sender and the receiver of data) "are required to verify, prior to any transfer, whether the level of protection required by EU law is respected in the third country concerned".[107] The upshot of *Schrems II* is that both the EU Commission *and* private economic operators should make sure that they only transfer data to other jurisdictions provided that these offer data protection which is at least equivalent to that offered in the EU itself. Understandably, this may greatly complicate data transfers to other countries, many of whom, if not most, offer a level of protection that may well be lower than in the EU.[108]

As the EU courts in *Schrems* make data transfers contingent on a marked improvement of the quality of US law, they could be seen as coercing a foreign State to adopt a particular policy, in violation of the principle of non-intervention. US voices have indeed been scathing in their indictment of the *Schrems* decisions. Stewart Baker, for instance, former general counsel of the US National Security Agency, considered the *Schrems II* decision as "gobsmacking in its mix of judicial imperialism and Eurocentric hypocrisy", and thought it "astonishing that a European court would assume it has authority to kill or cripple critical American intelligence programs by raising the threat of massive sanctions on American companies".[109] Clearly,

[106] *Data Protection Commissioner v Facebook Ireland Limited, Maximillian Schrems* (Case C-311/18, "Schrems II"), Judgment of 16 July 2020, paras. 164–197.
[107] Id., para. 142.
[108] See for the first comment: C. Kuner, "The Schrems II judgment of the Court of Justice and the future of data transfer regulation", *European Law Blog*, 17 July 2020.
[109] S.A. Baker, "How Can the US Respond to Schrems II?", *Lawfare Blog*, 21 July 2020.

Baker believes that the EU Court is engaging in jurisdictional overreach.[110]

It bears notice, however, that this wide reach of EU data protection legislation is partly based on the characterization of EU data protection as a fundamental right in the EU. Precisely because it is a fundamental right, the EU institutions are arguably under an obligation towards EU citizens to protect this right also extraterritorially.[111] However, whether such extraterritorial protection will always be successful remains to be seen. Reflecting on *Schrems II*, Jennifer Daskal harbored serious doubts as to whether US intelligence agencies would change their practices just because the Court of Justice of the EU demands so.[112]

(d) Law-Enforcement in Cyberspace

Also in the criminal law, battles over the scope of jurisdiction in the online sphere are ongoing. I will limit myself here to enforcement jurisdiction. One of the main challenges for national law-enforcement agencies is how to access digital data held abroad, e.g., on a computer or server abroad. Normally, if a law-enforcement agency wishes to access such data, it needs to file a request with the State where the data are located. A number of treaties on mutual legal assistance have been signed for this purpose. However, a request does not guarantee that a State will obtain the data.

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[110] At the time of writing, the US had not yet officially reacted. On 16 July 2020, US Secretary of Commerce Wilbur Ross stated that the US Government was "still studying the decision to fully understand its practical impacts". Note, however, that the US had intervened in the case "with the aim of providing the court with a full understanding of US national security data access laws and practices and how such measures meet, and in most cases exceed, the rules governing such access in foreign jurisdictions, including in Europe". US Secretary of Commerce Wilbur Ross Statement on Schrems II Ruling and the Importance of EU-US Data Flows, Office of Public Affairs, 16 July 2020.

[111] C. Ryngaert & M. Taylor, "The GDPR as Global Data Protection Regulation?" (2020) 114 AJIL Unbound 5–9.

[112] J. Daskal, "What Comes Next: The Aftermath of European Court's Blow to Transatlantic Data Transfers", *Just Security,* 17 July 2020.

Moreover, processing such requests tends to take considerable time. Sometimes, agencies do not even know where the data are exactly ("loss of location"). Thus, the question has arisen whether law-enforcement agencies could compel a locally incorporated Internet intermediary to disclose the data stored abroad. Could the US agencies order Microsoft, a US-based corporation, to disclose data linked to a Hotmail account (controlled by Microsoft) stored on a server in Ireland? This was the question addressed by US courts in the *Microsoft Ireland* case. Courts were divided on the issue. A District Court found in favor of the law-enforcement agencies and upheld the warrant to produce the data, whereas the Court of Appeals found in favor of Microsoft and invalidated the warrant.[113] The case was brought before the US Supreme Court, which vacated the appeals decision, however, after the US Congress adopted the CLOUD Act.[114] Under the CLOUD Act, US federal law-enforcement agencies can issue a warrant compelling US-based Internet intermediaries to provide data stored on foreign servers. The EU is currently mulling a similar regulation.[115] Proponents of the international lawfulness of such production orders may claim that they do not amount to extraterritorial enforcement jurisdiction, as they are directed at Internet intermediaries based in the State's own territory.

Concluding Observations

In this lecture, I have argued that the online sphere, in spite of its de-territorialized nature, is increasingly regulated by States. Jurisdictionally speaking, States base their regulation on the territoriality principle, or on another substantial connection to the State, such as the location of data subjects or the incorporation of

[113] *Microsoft Corp. v United States*, 829 F.3d 197 (2d Cir. 2016).
[114] *United States v Microsoft Corp.*, 584 U.S., 138 S. Ct. 1186 (2018); Clarifying Lawful Overseas Use of Data Act or CLOUD Act (H.R. 4943).
[115] European Commission, Proposal for a Regulation of the European Parliament and of the Council on European Production and Preservation Orders for electronic evidence in criminal matters, COM/2018/225 final — 2018/0108 (COD).

an Internet intermediary. Jurisdictional assertions in the online sphere have met with relatively foreign governmental protest, quite probably because they have an impact on foreign private operators (the tech giants) rather than on foreign governments themselves. As under customary international law, only governmental actions and reactions are relevant State practice, one may be led to believe that expansive jurisdictional assertions, e.g., of the EU, are lawful. The lawfulness of some of these assertions may be boosted insofar as they protect fundamental rights. However, to the extent that a State's or the EU's expansive jurisdiction impinges directly on foreign governmental interests, e.g., on the US surveillance activities at issue in *Schrems II*, foreign government pushback may be expected.

LECTURE 5:

Jurisdiction and the Environment

The world faces unprecedented environmental challenges, ranging from climate change to plastic pollution and the threat of mass extinction. Treaties have been concluded to protect various environmental concerns, but they may lack ambition or strong enforcement mechanisms. Individual States or regional organizations like the EU may fill this regulatory and enforcement gap by exercising unilateral jurisdiction over foreign persons (typically private economic operators) threatening global or extraterritorial environmental concerns.

I will divide this lecture into two parts. The first part addresses environmental issues on land, including climate change. The second part addresses environmental issues at sea, such as marine pollution and illegal, unreported and unsustainable fishing (IUU fishing).[116]

In the first part, I will focus on trade restrictive measures serving environmental objectives, thereby analyzing the relationship between the law of the World Trade Organization (WTO) and environmental protection. In the second part, I will focus on environmental regulation and enforcement by non-flag States, in particular port States, i.e., States at whose ports foreign-flagged vessels call.

Environmental Protection on Land

The starting point of the analysis is that there are acute global environmental challenges, such as climate change, long-range

[116] For this lecture, I draw on Chapters 5.2 and 5.3 of C. Ryngaert, *Selfless Intervention* (OUP 2020).

air pollution, loss of biodiversity (species extinction), overfishing, and exploitation of farm animals. There is a collective action problem in relation to these common concerns, meaning that the international community does not take (sufficient) action to cope with environmental challenges. Admittedly, there may be international legal instruments, but there is an ambition gap and enforcement mechanisms leave to be desired. For instance, while the Paris Agreement (2015) is an important treaty aiming to limit global warming, (1) it may not be sufficiently ambitious, (2) the commitments which States have undertaken under the Agreement (the "Intended Nationally Determined Contributions"[117]) are not met,[118] and (3) the Agreement lacks strong enforcement powers.

In this part, I explain that "extraterritorial" jurisdictional assertions in the environmental field often amount to the territorial extension of domestic environmental regulation (Section a). Accordingly, they may, at least *prima facie*, be captured by the territoriality principle. However, as such assertions often restrict international trade, their compatibility with WTO law needs to be examined. I argue that WTO law leaves room for the protection of (global) environmental concerns (Section b). It is unclear whether WTO law requires a jurisdictional link with the regulating State (Section c), but there is no denying that it imposes reasonableness-inspired limitations on trade-related environmental measures (Section d).

(a) Territorial Extension of Domestic Environmental Regulation

To speed up environmental protection where international regulation and enforcement are lagging behind, States have decided "to go it alone", i.e., to act unilaterally, by exercising their jurisdiction

[117] Article 4 of the Paris Agreement: "Each Party shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve".
[118] UNEP, "Bridging the Gap — Enhancing Mitigation Ambition and Action at G20 Level and Globally", UNEP Emissions Gap Report 2019.

over foreign persons whose activities are considered as posing threats to the global environment. Typically, these "forward-looking" States have already quite strictly regulated the environmental concern at the internal legal level, i.e., they have already imposed strict obligations on their domestic operators. As "first movers" in the field of environmental protection, they subsequently desire to level the playing field, in order to protect the competitive opportunities of their own firms in the global marketplace.

States normally exercise unilateral jurisdiction by imposing domestic environmental obligations on third-country operators wishing to access territorial markets or having some other territorial link with the territory of the regulating State. Joanne Scott has captured this process conceptually as a "territorial extension" of domestic (or EU) law.[119] Territorial extension is a form of territorial jurisdiction that falls short of genuine extraterritorial jurisdiction, even though it produces indubitable extraterritorial effects.

The territorial link relied on by these proactive States often consists of a foreign operator's importation into, or offering in the territory of a product or service, which contributes to a global environmental problem, e.g., because its process and production method is environmentally unfriendly or violates animal welfare standards. Import conditions are imposed on these goods and services, and sometimes import is entirely banned. This way States and the EU have regulated, or plan to regulate international aviation,[120] shipping,[121] and industrial or agricultural production deemed unsustainable.[122]

[119] J. Scott, "Extraterritoriality and Territorial Extension in EU Law" (2014) 62 *American Journal of Comparative Law* 87–126.

[120] Directive 2008/101/EC of the European Parliament and of the Council of 19 November 2008 amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community, *OJ L 8/1 (2009)*.

[121] Regulation (EU) 2015/757 of the European Parliament and of the Council of 29 April 2015 on the monitoring, reporting and verification of carbon dioxide emissions from maritime transport, and amending Directive 2009/16/EC.

[122] E.g., Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources, *OJ L 328/82 (2018)*.

One of the leading court decisions on the legality of this practice is the judgment of the Court of Justice of the EU in the *ATA* case (2011), in which the Court decided that the Emissions Trading Scheme (ETS) under the EU Aviation Directive, which had been adopted as a mechanism to combat climate change, also applied to foreign airlines, even in relation to mileage outside the EU territory. The Court ruled that foreign airline companies also had to surrender ETS allowances in relation to flight stretches outside EU airspace, to the extent that their aircraft landed at, or departed from an EU airport. As such, according to the Court, this practice was justified by the jurisdictional principle of territoriality under customary international law.[123] On closer inspection, however, it appears that the Court derived its territorial prescriptive jurisdiction from the existence of territorial enforcement jurisdiction, thereby conflating two types of jurisdiction. The prescriptive jurisdiction which the Court exercises, or at least allows the EU institutions to exercise, is in fact partly *extraterritorial*: climate change is not limited to the EU's territory, but is a global problem. Therefore, the jurisdiction which the Court exercises could arguably be justified through a combined application of territoriality (climate change affects the EU) and universality (climate change is a global environmental concern).[124] I will return to this justification in Section (c).

(b) WTO Law and Global Environmental Concerns

As unilateral measures to protect the environment typically take the form of trade-restrictive measures, from an international law perspective, the main question is whether they are compatible with international trade law, in particular the law of the World Trade Organization (WTO).

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[123] CJEU, *Air Transport Association of America v Secretary of State for Energy and Climate Change.* Case No. C-366/10, Judgment of 21 December 2011, *EU*:C:*2011*:864, para. 101.

[124] C. Ryngaert and G. de Baere, "The ECJ's Judgment in Air Transport Association of America and the International Legal Context of the EU's Climate Change Policy", in *European Foreign Affairs Review* (2013), pp. 389–409.

Trade-restrictive environmental measures tend to regulate non-product related process and production methods (nPPMs): they do not regulate the product characteristics themselves, but the methods by which the product is processed and produced. There is more or less a consensus that the regulation of such nPPMs is a *prima facie* violation of WTO law, as it amounts to discrimination between like products.[125] For instance, cosmetics on which animal tests have been carried out, may be the same as cosmetics on which such tests have not been carried out.[126] It does not matter in this respect whether the EU or States pursue legitimate regulatory objectives, such as environmental protection: the product remains "like" and there is discrimination if trade restrictions are imposed on environmentally harmful products.

Still, such measures could be justified under public policy exceptions. In respect of trade in goods, these exceptions are laid down in Article XX of the GATT. Article XX of the GATT provides in relevant part:

> "Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
>
> (a) necessary to protect public morals;
>
> (b) necessary to protect human, animal or plant life or health;

[125] WTO, *European Communities — Measures Affecting Asbestos and Asbestos-Containing Products — Report of the Appellate Body* (5 April 2001) WT/DS135/AB/R, para. 101.

[126] That is, unless one were to emphasize consumer preferences, but it is unclear whether the majority of consumers have specific preferences in favor of non-animal tested products.

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption".

At first sight, these exceptions do not have a geographic limitation, which means that they can also be relied on in respect of (partly) extraterritorial or global concerns. However, this was not always self-evident in the case law of the GATT/WTO. The seminal *Tuna/Dolphin* case (1991) is a case in point. *Tuna/Dolphin* pertained to a GATT complaint filed by a number of States against trade restrictions imposed by the US on the import of tuna, insofar as the tuna was caught with nets that also (unintentionally) caught dolphins. The GATT panel sided with the complainants and rejected unilateral measures to further the purportedly global environmental interest of protecting dolphins. It held that such measures amounted to the imposition of norms by one State on another, and hence to coercion, implying a violation of the principle of non-intervention.[127]

However, some years later, this stance was overruled by the WTO Appellate Body (AB) in the *Shrimp/Turtle* case (1998). This case bore a striking resemblance to *Tuna/Dolphin*. In *Shrimp/Turtle*, the US had banned imports of shrimp, to the extent caught without turtle excluder devices. The AB ruled that this measure could be justified under Article XX(g) of the GATT, which pertains to the conservation of exhaustible natural resources.[128] In so ruling, the WTO AB allowed States to take trade measures for "extraterritorial" environmental purposes.

[127] Report of the Panel, *United States — Restrictions on Imports of Tuna*, DS21/R (September 3, 1991), GATT B.I.S.D. (39th Supp.) at 155 (1991) I.L.M. 1594 (1991); Report of the Panel, *United States — Restrictions on Imports of Tuna*, DS29/R (June 16, 1994), 33 I.L.M. 936 (1994).

[128] WTO AB, *United States — Import Prohibition of Certain Shrimp and Shrimp Products — Report of the Appellate Body* (12 October 1998) WT/DS58/AB/R.

(c) The Jurisdictional Link

After *Shrimp/Turtle*, it remained and still remains unclear whether a jurisdictional link is required between the regulating State or entity (e.g., the US or the EU) and the environmental issue at hand. The WTO panels and the AB have consistently refused to rule on the existence of an implicit jurisdictional clause. Still, in *Shrimp/Turtle*, the AB appeared to require a "sufficient nexus", at least under Article XX(g) of the GATT (conservation of exhaustible natural resources). In that case, the sea turtles were a migratory species, which at times found themselves in US waters, thereby creating a territorial link arguably grounding US territorial jurisdiction.

Such a territorial link is less obvious in case the problem which States want to tackle is global.

Do States have a jurisdictional nexus with global problems? In the case of climate change, for instance, it could be argued that this produces territorial effects in every single State, as climate change affects or will affect everyone. Pursuant to this argument, the territoriality principle could be relied on to justify trade-restrictive measures aimed at combating climate change. However, there may be no direct causal link between the regulated activity and the effects of climate change in the territorial State. Even if such a link could be established, the effects may not be substantial. Accordingly, on its own, the territorial effects doctrine may not justify the imposition of trade-restrictive measures against foreign climate-unfriendly activities. Their jurisdictional justification rather lies in a combination of territoriality and universality: States have jurisdiction, not just because their territory is adversely affected by climate change, but because climate change is a global environmental problem, a common concern of the international community.[129] On this basis, arguably States are allowed to impose

[129] See also B. Cooreman, *Global Environmental Protection through Trade* (Edward Elgar 2017).

taxes at the border on climate-unfriendly products (carbon border adjustment taxes),[130] and they can require that airlines reduce their emissions if they want to land on, or depart from their territory.

(d) Reasonable Jurisdiction

Territoriality and universality only establish a first-order jurisdictional link. In a second stage, it may have to be examined whether the jurisdictional assertion is *reasonable*.[131] While reasonableness may not rise to the level of a hard customary international law norm limiting the exercise of prescriptive jurisdiction, strikingly, elements of jurisdictional reasonableness can be found in Article XX of the GATT, which *is* binding on WTO member States. Notably, the *chapeau* of Article XX prohibits trade measures from being "applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade". In practice, this means that States should make serious efforts to negotiate before restricting trade for environmental purposes, that they should explore less trade-restrictive, reasonably available alternative measures that could realize the policy objective, and that they should not apply their own laws in a rigid and inflexible manner.[132] Instead, States may want to recognize foreign or international measures that provide protection comparable in effectiveness, pursuant to an equivalence standard. This way a balance is struck between the right of the importing State to set environmental standards and the right of the

[130] On 23 June 2020, the European Commission launched public consultations "on two initiatives that aim to maximise the impact of taxation in meeting the EU's climate goals". One of these initiatives is the creation of a Carbon Border Adjustment Mechanism (CBAM), with which "the price of imports would reflect more accurately their carbon content. This would ensure that the EU's green objectives are not undermined by production relocating to countries with less ambitious climate policies". Available at <https://ec.europa.eu/taxation_customs/news/commission-launches-public-consultations-energy-taxation-and-carbon-border-adjustment-mechanism_en>.

[131] C. Ryngaert, *Jurisdiction in International Law* (OUP 2015), Chapter 5.

[132] See further C. Ryngaert, *Selfless Intervention* (OUP 2020), Chapter 5.3.3.

exporting State to trade and to set its own level of environmental protection — a balance which is arguably at the heart of WTO law.

These limiting principles take on additional relevance if one interprets the "sufficient nexus" loosely, or abandons it altogether, in which case there may be no sizable jurisdictional limitation to trade-related environmental measures. The WTO *EC Seals* case is a case in point. *EC Seals* concerned an EU ban on the importation of seal-based products. The ban was imposed on the grounds that seals — largely outside the EU, e.g., in Canada — were killed in an inhumane fashion. Affected third countries challenged the ban before the WTO. While the AB eventually found the ban discriminatory, it upheld the principled legality of trade restrictions based on concerns of "public morality", a public policy exception laid down in Article XX of the GATT.[133] For the AB, it sufficed that the importing entity's (EU) consumers felt offended in their conception of public morals, even if the offensive act itself — the clubbing to death of seals — took place abroad.

The risk here is that *any* import restriction to protect extraterritorial concerns could potentially be justified under Article XX(a) of the GATT, as long as a State's consumers feel "morally offended" by what happens abroad. Obviously, one can take the legal pluralist position that States should be able to decide for themselves what concerns they find important. However, imperialism may loom large. Seen from another perspective, such a position may whitewash a powerful State's imposition of its own values on a weaker State. Indeed, Article XX(a) of the GATT does not require a State's consumers' moral considerations to be embedded in "international public morality".

[133] Appellate Body Report, *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R and WT/DS401/AB/R (May 22, 2014).

Even if one were to agree that, in principle, States can take such measures, it is important to be strict, in order to avert domination. Thus, one should inquire whether these consumer preferences are genuine, and thus whether a particular measure is "necessary to protect public morals". Also, one should inquire whether the regulatory design is even-handed, in accordance with the requirements of the *chapeau* of Article XX of the GATT.[134] Arguably, it also helps if there is an international consensus on the environmental concern, even if this is not a strict requirement.[135] In addition, States may want to take into account implementation difficulties faced by developing countries. They could do so under the principle of common but differentiated responsibilities,[136] which may require that an industrialized State either exempts operators from developing countries from its regulations or builds their capacity so that they can comply with the regulations.

(e) Interim Conclusion

In this part, I have shown that, at first sight, there is ample leeway for States to protect environmental concerns via trade measures. While such measures may amount to a *prima facie* violation of WTO law, they could be justified under public policy exceptions, such as under Article XX of the GATT. It is unclear whether States taking such measures need to prove a sufficient jurisdictional link. But even if they do, a broad construction of the "sufficient link" concept may allow most assertions to pass muster. Insofar as unilateral trade measures protect global environmental concerns, this can be applauded, as such measures may remedy international regulatory

[134] In *EC Seals*, the AB held that the requirements of the *chapeau* were not met, as the Regulation contained an exception for traditional indigenous hunting, and thus excluded animal welfare considerations in relation to these hunts. Id., para. 5.328.

[135] C. Ryngaert and M. Koekkoek, "Extraterritorial regulation of natural resources: a functional approach", in J. Wouters et al (eds), *Global Governance through Trade* (Edward Elgar Publishing 2015) 245–271.

[136] See for a seminal piece: C.D. Stone, "Common but Differentiated Responsibilities in International Law" (2004) 98 American Journal of International Law 276–301.

and enforcement deficits. However, in order to prevent abuse, strict scrutiny of the exact design of the measure is called for,[137] all the more so in case the concern is not global but local.

Environmental Protection at Sea: The Role of Port States

In the law of the sea, similar dynamics can be witnessed of States acting unilaterally to address global environmental concerns, such as pollution and IUU fishing. It is quite obvious that flag States and coastal States can take measures. Flag states have responsibilities to protect the marine environment from threats posed by ships flying their flag, whereas coastal states are entitled to protect the marine environment of maritime areas where they enjoy functional jurisdiction, such as in the exclusive economic zone. In this part, however, I will focus on the role of *port States*. Port States are the States in whose ports foreign-flagged vessels dock, e.g., for reparation or to unload cargo.

Port States can play a key role in strengthening marine environmental protection and combating IUU fishing. They can deny access to visiting foreign-flagged vessels engaging in harmful practices on the high seas, and they can take penal or administrative measures against ships and their crew in port. In so doing, they exercise *port State jurisdiction*. Such jurisdiction can fill the regulatory and enforcement gaps left by underperforming flag States. Some of these flag States may be flag of convenience States, i.e., States with low levels of environmental protection and which do not engage in vigorous enforcement.

The UN Convention on the Law of the Sea (UNCLOS) leaves room for port State measures, notably in the field of marine pollution. Article 211(3) of the UNCLOS refers to "States which establish

[137] N.L. Dobson, *Extraterritoriality and Climate Change Jurisdiction: Exploring EU Climate Protection under International Law* (Hart Publishing, forthcoming 2021) (advancing a "considerate design" theory).

particular requirements for the prevention, reduction and control of pollution of the marine environment as a condition for the entry of foreign vessels into their ports".[138] Regarding discharges, Article 218(1) of the UNCLOS provides that "[w]hen a vessel is voluntarily within a port or at an off-shore terminal of a State, that State may undertake investigations and, where the evidence so warrants, institute proceedings in respect of any discharge from that vessel outside the internal waters, territorial sea or exclusive economic zone of that State in violation of applicable international rules and standards established through the competent international organization or general diplomatic conference". Subject to a number of limitations, these provisions allow port States to impose entry conditions on foreign visiting vessels, and even to institute proceedings against such vessels in port.

While the UNCLOS itself does not provide for port State jurisdiction regarding IUU fishing, a separate agreement, negotiated under the auspices of the Food and Agricultural Organization (FAO), does so. The 2016 Port State Measures Agreement provides, among other things, that "[e]ach Party shall, in its capacity as a port State, apply this Agreement in respect of vessels not entitled to fly its flag that are seeking entry to its ports or are in one of its ports", and that "[e]ach Party shall inspect the number of vessels in its ports required to reach an annual level of inspections sufficient to achieve the objective of this Agreement".[139] Conspicuously, under this agreement, port State jurisdiction is not optional, but mandatory.

When exercising port State jurisdiction, port States can basically take two types of measures: denying port entry to a foreign-flagged vessel, and more onerous enforcement actions against the vessel in port. Port States can deny entry to ships which call at the port at will, even without giving reasons, as ports are part of their sovereign

[138] The provision requires these States to "give due publicity to such requirements" and "to communicate them to the competent international organization".
[139] Articles 3 and 12.1 of the Port State Measures Agreement.

territory. There is no right for foreign-flagged vessels to visit ports unless particular international agreements to this effect have been concluded. Entry denials can be very effective in furthering global environmental concerns, especially if the port State takes concerted action.[140] For lack of other docking places, vessels may have no other choice than to comply with port State regulations and eventually change their harmful activities on the high seas. For instance, if a vessel cannot unload its fish anywhere, it is likely to no longer engage in IUU fishing.

Alternatively, port States can take enforcement in action *in port*, after previously having authorized entry. In port, States can impose such measures as confiscation, forfeiture, arrest, detention, fines, and even imprisonment. In that case, however, they need to show that they have a substantial jurisdictional link with the events they regulate, in accordance with the law of prescriptive jurisdiction. It does not suffice in this respect that port States can exercise territorial enforcement jurisdiction over a vessel in port.

A substantial connection can be difficult to establish regarding events that occurred on the high seas, i.e., "extraterritorially". What often occurs, however, is that States "territorialize" extraterritorial events: they look for some territorial activity that allows them to exercise territorial jurisdiction in port. They may do so by prosecuting vessels for failing to present an accurate logbook, failing to meet construction standards in port, or importing fish illegally caught on the high seas.

When exercising port State jurisdiction, sometimes port states only enforce international standards, e.g., on IUU fishing.

[140] See, e.g., the Paris MoU on port State control, which consists of 27 participating maritime Administrations and covers the waters of the European coastal States and the North Atlantic basin from North America to Europe, and whose mission is "to eliminate the operation of sub-standard ships through a harmonized system of port State control". Available at <https://www.parismou.org/about-us/organisation>.

However, sometimes they go beyond such standards and act truly unilaterally. Such unilateralism in turn may trigger the development of international standards, as it adds a sense of urgency. For instance, US and EU requirements for tankers to have double hulls to reduce oil spills in case of collisions paved the way for stricter international regulation of tankers.[141] By the same token, the EU's imposition of a monitoring, reporting and verification system on foreign-flagged vessels visiting EU ports[142] put pressure on the International Maritime Organization to strengthen its own emissions standards.[143] This is also the case in aviation law: the aforementioned EU Aviation Directive, which applied extraterritorially, paved the way for the adoption of a regulation on limiting greenhouse gas emissions by the International Civil Aviation Organization.[144] In case the international regulation is deemed adequate or equivalent, the unilaterally acting State will often suspend or abandon its own regime, although during a certain period both regimes may co-exist.[145] The continuation of unilateral action may thus be contingent on the achievement of a satisfactory multilateral agreement.[146]

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[141] See C. Ryngaert, *Selfless Intervention* (OUP 2020), Chapter 5.2.5 for an elaborate discussion.

[142] Regulation (EU) 2015/757 of the European Parliament and of the Council of 29 April 2015 on the monitoring, reporting and verification of carbon dioxide emissions from maritime transport, and amending Directive 2009/16/EC.

[143] Amendments to MARPOL Annex VI on Data collection system for fuel oil consumption of ships, adopted by resolution MEPC.278(70), entered into force on 1 March 2018.

[144] Council decision on the position to be taken on behalf of the EU within the ICAO as regards the notification of voluntary participation in CORSIA from 1 January 2021 and the option selected for calculating aeroplane operators' offsetting requirements during the 2021-2023 period, Brussels, 23 June 2020.

[145] This is, for instance, the case for the EU Monitoring, Reporting and Verification of CO_2 emissions and the IMO Data Collection System on fuel consumption.

[146] See J. Scott and L. Rajamani, "EU Climate Change Unilateralism" (2012) 23 EJIL 469–494.

Concluding Observations

In this lecture, I have explained that States and especially the EU have not been coy about exercising partly extraterritorial jurisdiction in the environmental field. This willingness is informed by a desire to protect global common concerns, such as a stable climate, as well as by the wish to level the playing field for economic operators worldwide. States and regional organizations which have already subjected their own operators to strict environmental standards, may simply not tolerate that foreign operators are subject to laxer standards, especially not if the latter offer goods and services on domestic markets. It is the very importation of goods and services that allows States and the EU to impose and enforce stricter environmental regulations. I have argued in this lecture that such jurisdictional assertions could be justified under a combination of the territoriality and universality principles. However, WTO law sets particular limitations on such assertions.

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