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CONFLICTS OF JURISDICTION OVER ORDERS TO PRODUCE DOCUMENTS LOCATED ABROAD: REAPPRAISING "CONFLICT OF INTERNATIONAL JURISDICTION: ORDERING THE PRODUCTION OF DOCUMENTS IN VIOLATION OF THE LAW OF THE SITUS" (IVO ONKELINX 1971-I).

BY

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INTRODUCTION

In the 1971 edition of the *Revue belge de droit international*, Ivo Onkelinx published, as one of the first non-U.S. lawyers, an article on conflicts of jurisdiction as a result of the US ordering the production of documents located abroad, paying specific attention to the US discovery procedure in civil matters. (1) As a result of the internationalization of business organization in the 1950s and 1960s, the instances of cross-border discovery, and the attendant problems of international jurisdiction, were picking up indeed, as the large number of US court decisions discussed by Onkelinx testify to. Some of these decisions continue to be cited as precedent, and, somewhat surprisingly perhaps, many of the issues playing at the time have not lost their relevance. That being said, the factual and legal context surrounding court orders for the production of documents held abroad has changed somewhat. Firstly,

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(1) I. ONKELINX, "International Bevoegdheidsconflict: Het bevel Door de Amerikaanse Federale Rechtbanken tot Voorlegging van Documenten die Zich in Het Buitenland Bevinden", *RBDI* 1971, vol. 1, 73-117.

The article is in fact a Dutch translation of an English-language article published earlier as I. ONKELINX, "Conflict of International Jurisdiction: Ordering the Production of Documents in Violation of the Law of the Situs", *Northwestern University Law Review* 1969, vol. 64(4), 487-533. As many readers may not be Dutch-speaking, in the remainder of this article I will refer to the Nw. U. L. Rev version.

international conventions providing for the production of documents, both in civil and criminal matters, were concluded, thus requiring US courts to pay heed to the multilateral process. Secondly, the advent of the cyber-age has drastically limited reliance on written documents; discovery orders, subpoenas and warrants often concern digital files these days. Thirdly, concerns over data protection — a concept that was largely unknown in the 1960s — may serve to limit cross-border document and data transfer orders.

In this note, I discuss in Section 1 how, in spite of changing realities, the principles governing cross-border document production in civil matters, and their application in practice, have not fundamentally changed. I proceed in Section 2 to highlight the current extrapolation of these principles to criminal warrants to produce email content stored abroad. In Section 3, I lay out my argument that civil orders and criminal warrants to produce data located abroad are not necessarily internationally unlawful but that courts should take into account legal tools of restraint to prevent interstate tension, rights violations, and undue burdens on data controllers.

I. — The principles of cross-border document production in civil matters: continuity rather than change

In his 1971 article, Onkelinx identified four main principles in US court practice that have a bearing on court orders for cross-border document production. Two are expansive, two others are limiting. The expansive principles are (a) that a US court can order the production of documents held abroad when the US has personal jurisdiction over the person in possession or control of the material, (2) and (b) that US courts, when requested to order the production of documents held abroad, hardly take into account the possibility of alternative procedures achieving the same result. (3) The limiting principles are (a) that courts may take into account the hardship imposed on a person, including the possibility of criminal liability as a result of the person having to violate the criminal laws of a foreign country, (4) and (b) that courts should heed the principle of comity and factor in the interests of foreign nations. (5)

(2) *United States v. First National City Bank*, 396 F.2d 897, 900-01 (2d Cir. 1968).

(3) I. Onkelinx, 532-533.

(4) *Société internationale pour participations industrielles et commerciales S.A. v. Rogers*, which acknowledged that a plaintiff's failure to comply with a US order requiring it to violate US banking secrecy laws was not due to "willfulness, bad faith, or any fault of its own".

(5) See para. 40 of the US Restatement (Second) of US Foreign Relations Law, which, codifying some early 1960s case law of the Second Circuit, required the balancing of sovereign interests at stake in cross-border discovery orders. *In Re Chase Manhattan Bank*, 297 F.2d 611, 613 (2d Cir. 1962); *Ings v. Ferguson*, 282 F.2d 149, 151-52 (2d Cir. 1960).

These principles are still valid today. In 1983, the Second Circuit confirmed in *In Re Marc Rich and Co.*, that "[t]he test for the production of documents is control, not location." (6) This principle was codified in para. 442(1)(a) of the Restatement (Third) of Foreign Relations Law (1987), which provides that "[a] court or agency in the United States, when authorized by statute or rule of court, may order a person subject to its jurisdiction to produce documents, objects, or other information relevant to an action or investigation, even if the information or the person in possession of the information is outside the United States." It subsequently became a mainstay of US cross-border discovery practice. Sure enough, the legal context may have changed somewhat since in 1970, just after Onkelinx had written his article, the Hague Evidence Convention was signed, (7) *i.e.*, a document which provides for a cooperative, *multilateral* process of producing documents abroad, instead of the sort of *unilateral* discovery orders *imposed* upon a party. By and large, however, US courts have rarely relied on the procedures offered by Hague Evidence Convention, dismissing its procedures as too slow and cumbersome. In *Société nationale industrielle aerospatiale v. United States District Court for the Southern District of Iowa*, the US Supreme Court famously held that, given its defects, reliance on the Convention is not mandatory. (8) This clearly echoes US courts' pre-1970 disinterest in alternative evidence-taking procedures.

Aérospatiale further cemented the centrality of *comity* as a restraining device, where the court ruled that courts had to apply a balancing test when deciding on cross-border document production. (9) Still, in a particularly influential footnote in that judgment, the Supreme Court embraced a rather limited notion of comity, where, addressing the hardship imposed on parties, it wrote that the operation of foreign law "does not deprive an American court of the power to order a party subject to its jurisdiction to produce evidence even though the act of production may violate that law." (10) In the wake of *Aérospatiale*, US courts have with even more gusto engaged in interest-balancing which, in light of the footnote just cited, has not surprisingly suffered from a pro-forum bias; US interests are characteristically considered to outweigh foreign interests, and orders are issued despite possible penalties imposed on persons under foreign law. (11) Some observers have reacted to this state of affairs by lamenting this extant bias and have urged courts to pay more serious attention to the interests of foreign nations

(6) 707 F.2d 663, 667 (2d Cir. 1983).

(7) Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, 18 March 1970, *United Nations Treaty Series*, vol. 847, 241.

(8) 482 U.S. 522, 543-544 (1987).

(9) *Société nationale industrielle aérospatiale*, 482 U.S. 522, 544 n. 28 (1987).

(10) 482 U.S. 522, 544 n. 29 (1987).

(11) *E.g.*, *In Re Marc Rich and Co.*, 707 F.2d at 665.

in non-disclosure.(12) Others have proposed to get rid of inherently "subjective", "political", and "discretionary" interest-balancing altogether and have advocated plain judicial unilateralism,(13) possibly as a mechanism of forcing changes at the multilateral level, *e.g.*, making the Hague Evidence Convention more effective. The fact remains that, as we write, US courts pay relatively little attention to the concerns of foreign nations on whose territory the documents are found nor, for that matter, to the hardship caused to addressees of discovery orders that are caught between conflicting obligations (namely those under US law and under foreign secrecy, privacy, or blocking legislation). The idea seems to be that such orders are not an exercise of extraterritorial enforcement jurisdiction in that they are imposed on persons over whom US courts duly have personal jurisdiction. Such persons could thus be compelled to produce documents located abroad, insofar as they have factual possession or control over these documents — a principle that harks back to 1960s case-law also cited by Onkelinx.(14) From a policy perspective, this principle is justified by the consideration that US-based persons cannot simply enjoy the benefits of doing business in the US without bearing burdens in the form of legal obligations. Never mind apparently, that such burdens can at times be quite cumbersome, *e.g.*, where a US court orders a US-based bank to produce customers' bank records held by a foreign affiliate, or a technology giant to produce their clients' emails stored on a server abroad (see Section 2). Never mind that compliance with such orders risks creating liability under foreign law and upsetting foreign nations who might consider their sovereignty to be encroached upon.

Note finally that, while the *problématique* of cross-border orders for the production of documents is mostly a US phenomenon, it is not unique to the US. The Supreme Court of Ireland, to take one recent example, held that an Irish court could order the production of records from an Irish entity that were located abroad (records of accounts held by its customers) — thereby essentially applying the US-style control test.(15) Still, such orders may not be as intrusive as US court orders. For instance, the Irish court just cited required the exhaustion of alternative means of obtaining information and

(12) H. L. Buxbaum, "Assessing Sovereign Interests in Cross-Border Discovery Disputes: Lessons from *Aérospatiale*", *Texas International Law Journal*, vol. 38, 2003, 87-102. See American Bar Association Resolution 103 (2012).

(13) M. J. Smith, "Resolving the Cross-Border Discovery Catch-22", *Suffolk University Law Review*, vol. 47, 2014, 601-626. Dodge had earlier advocated such judicial unilateralism in the context of the extraterritorial application of substantive US law, notably antitrust law. See W. S. Dodge, "Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism", *Harvard International Law Journal*, vol. 39(1), 1998, 101-170.

(14) In particular, *United States v. First National City Bank*, 396 F.2d 897, 900-01 (2d Cir. 1968).

(15) *Walsh v. National Irish Bank* [2013] IESC 2

limited its order to the production of documents by a *branch* rather than a subsidiary with separate legal personality.(16)

II. — From document to digital content production: producing emails stored abroad

As set out in Section 1, in spite of concerns voiced by businesses over the years and foreign nations alike, US court practice has not really changed over years. The US court consensus seems to be that the US Supreme Court finally gave guidance, however vague, in *Aérospatiale* and that the principles enunciated in that decision just have to implemented. Thus, at least in civil and commercial matters, there is no longer a burning question of principle regarding the production of documents located abroad that needs to be solved. However, this does not apply to *criminal* matters. True, discovery is an evidentiary technique that is governed by the Federal Rules of Civil Procedure, but at the same time the subpoenas that are used to back up document production orders are also used in the criminal law. In particular, the question has arisen whether in our current cyber-age — which has witnessed the rise of powerful Internet Service Providers (ISPs, *i.e.*, internet intermediaries such as Microsoft, Google) controlling large amounts of data belonging to third parties — a subpoena-like warrant can be served on an ISP in possession of information held abroad. Can US authorities compel an ISP to disclose the content of one of its clients' emails stored on a server in a foreign jurisdiction?

Just like in the early years of cross-border discovery, concerns over the legality of such cross-border enforcement jurisdiction, and over the adverse impact on US-based persons' business activities have been voiced in respect of such warrants. Concern has arisen in particular about bypassing multilateral legal assistance treaties (MLATs) in criminal matters and about the global competitiveness of US Internet behemoths.(17) These concerns echo those earlier voiced with respect to the relationship between unilateral orders and reliance on the multilateral Hague Convention in civil and commercial

(16) As far as the latter limiting factor is concerned, it bears notice that, at least since 1952, US courts have not shied away from ordering a US parent to produce documents held by its subsidiary abroad, on the ground that a parent has control over its subsidiary when it can elect the majority of its directors. *In Re Investigation of World Arrangements*, 13 F.R.D. 280, 285 (D.D.C. 1952). See also Onkelinx, 504-505.

(17) N. Schultheis, "Warrants in the Clouds: How Extraterritorial Application of the Stored Communications Act Threatens the United States Cloud Storage Industry", *Brooklyn Journal of Corporate, Finance and Commercial Law*, vol. 9 (2015), 601-693. As a result of the long arm of US law, customers may possibly decide to no longer store data with US cloud service providers. To prevent this, Microsoft has been said to consider hosting data by a foreign partner company that would not be subject to US personal jurisdiction. See Matheson, "The Microsoft Warrant case: not just an Irish issue", Crossfire, 8 October 2014, http://crossfire.matheson.com/microsoft-warrant-case-just-irish-issue.

matters and the effect on the attractiveness of the US as a place of business for multinational conglomerates.

In what is probably the most high-profile dispute to date, at the time of writing a court case was pending before the US Court of Appeals of the Second Circuit regarding the permissibility of a court issuing a warrant to search an email account controlled and maintained by Microsoft on a server based in Ireland.(18) Microsoft is a US corporation and subject to the personal jurisdiction of US courts, but the question is, just like in the earlier discovery cases, whether this suffices for US courts, seized by a US criminal law-enforcement agency, to order Microsoft to produce the content of an email sent via the Microsoft-operated Hotmail software and stored abroad. At first sight, the issue is mainly one of statutory construction, and it is likely to be decided on this basis too: did Congress intend the 1986 Stored Communication Act (which extended Fourth Amendment privacy protection to Internet-stored information) to apply to digital content located outside the United States? On closer inspection, however, the case raises a host of more fundamental issues regarding the geographical limits of a state's investigative powers under the international law of jurisdiction, the relationship between unilateral action and multilateral cooperation, as well as the effect on individual privacy rights abroad.

III. — Assessing cross-border orders and warrants in light of international law

The *international lawyer* is obviously most interested in the international lawfulness of criminal warrants to produce data held abroad. Given the similarity of such warrants and orders — both compelling a person or corporation to disclose information under its control — it is apt to draw on the international evaluative framework developed earlier with respect to cross-border (civil) discovery, in particular the one offered by Onkelinx. Engaging with this framework will also allow me to reassess this framework's appropriateness in civil litigation. Thus, the aim of this last substantive section is to identify general principles that apply to orders and warrants compelling persons to produce information located abroad, irrespective of the characterization of the proceedings (criminal/civil) or the form in which the data are embedded (physical/digital).

In essence, Onkelinx argues that the lawfulness of cross-border enforcement orders is a function of there being in the first place *prescriptive* jurisdiction over the person to whom the order is addressed. He then goes on to

(18) After this article went to press, the Court of Appeals for the Second Circuit rendered its decision In the Matter of a Warrant to Search a Certain E-Mail Account Controlled and Maintained by Microsoft Corporation, *Microsoft v United States*, Judgment of 14 July 2016, Docket No. 14-2985.

distinguish between a number of situations.(19) None of these situations are directly applicable to the question raised in the Microsoft litigation as Onkelinx does not contemplate the possibility of an order directing *one person* to disclose *another person's* information under the former's control. One should realize that the warrant at issue does not order Microsoft to disclose its own information but information regarding a client's email stored abroad. In spite of this limitation, Onkelinx's scheme could still be extrapolated to our case. Indeed, his scheme would instruct us to inquire whether the client was already subject to US prescriptive jurisdiction as, arguably, prescriptive jurisdiction should be established before enforcement jurisdiction can be exercised.(20) Thus, a warrant can only be issued when prescriptive jurisdiction has been established prior to its issuance. It cannot be issued when the warrant is needed to gather the evidence *with a view to* establishing prescriptive jurisdiction.(21)

There is a certain logical attractiveness in this argument, but ultimately Onkelinx's approach to the question of international legality is suboptimal, as it risks being both over- and under-inclusive. On the one hand, it risks being over-inclusive in that it collapses the distinction between prescriptive jurisdiction and enforcement jurisdiction and allows for more intrusive enforcement as soon as the requirements for prescription are satisfied. On the other hand, it risks being under-inclusive in that it may considerably reduce the chances of prescriptive jurisdiction being established; without evidence, acquired through enforcement measures, the constitutive elements of the principles of prescriptive jurisdiction may never be proved. In the case at bar, Onkelinx's approach would probably veer towards over-inclusiveness, as the email account belonged to a person sought for drug offences that are, in all likelihood, amenable to US prescriptive jurisdiction under some version of the territoriality, protective, or even nationality principle.

Instead, the better international law approach is to consider orders or warrants to produce information located abroad to be presumptively justified where those controlling the information are subject to US personal jurisdiction. Indeed, the personal jurisdiction test under US law operates on the basis of a relatively strong nexus to the United States, especially after the US Supreme Court's decision in *Goodyear*.(22) It should not matter that the "owner" of the information (*e.g.*, the individual email account holder) does not have such contacts as (s)he is not the addressee of the order or

(19) Onkelinx, 489-501.

(20) Onkelinx, 499, relying on some earlier reports of the International Law Association.

(21) *E.g.*, effects in the United States under the effects doctrine, assuming that this doctrine is valid under international law.

(22) *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), *Goodyear Dunlop Tires Operations S.A. v. Brown*, 131 S. Ct. 2846 (2011).

warrant. (23) There is merit in not applying the presumption against extra-territoriality to such orders and warrants as these do not project substantive law abroad. (24) Thus, they should not be regarded as instantiations of prescriptive jurisdiction.

I am aware that this approach risks being over-inclusive, as it may allow for orders and warrants to produce information belonging to third parties which may have only a scant connection with the US. Because of this scant connection, individuals may be caught unawares, their privacy rights under foreign law may be violated, and foreign states on whose territory the information is found may consider their regulatory sovereignty to be trampled on. (25) These concerns deserve to be taken seriously. Accordingly, to counter the risk of over-inclusiveness, some techniques of restraint — "second order" principles of jurisdiction if you wish — are called for. First, US courts should bear the burden of proving that channels of multilateral cooperation regarding evidence-taking (Hague Convention, MLATs) are ineffective or unduly cumbersome if applied to the case. In this context, the applicability of a multilateral treaty is in itself not sufficient to exclude recourse to unilateral orders and warrants, as the counter-party to this treaty may, for no good reason, be unwilling to cooperate, or be unable to honor a request within a reasonable timeframe (*e.g.*, a short-term window of opportunity to get hold of important information may quickly pass, especially where data can be transferred to other jurisdictions with the click of a mouse). (26) Second, they should only issue orders and warrants when the disclosed information is likely to be of substantial assistance to the litigation or investigation (in this respect, a higher degree of relevancy than in purely domestic cases may be required). (27) Third, such orders and warrants may have to be restricted to information belonging to *US* persons, (28) for such persons have a stronger nexus with the US than foreigners, or at the very least parties and agencies

(23) *Contra In Re Microsoft*, brief Microsoft, 35 ("the place that the warrant is executed — where the emails are seized — determines whether the statute has extraterritorial application").

(24) In this sense see also *In Re Microsoft Corp., amicus curiae* brief, US Government, 33.

(25) See, *e.g.*, letter of V. Reding, Vice-President of the European Commission, 24 June 2014 (submitting that "the extraterritorial application of foreign laws (and orders to companies based thereon) may be in breach of international law and may impede the attainment of protection of individuals guaranteed in the [European] Union"). *In Re Microsoft Corp.*, Dkt. No. 7[1]-1. See at length on the alleged unlawfulness of extraterritorial warrants *In Re Microsoft Corp., amicus curiae* brief A. Colangelo. See also *In Re Microsoft Corp.*, brief Microsoft, 51 ("sovereign nations have interests in resisting all foreign intrusions, even if they involve remote computer access rather than boots on the ground").

(26) *In Re Microsoft Corp.*, brief US Government, p. 53. *Contra In Re Microsoft Corp., amicus curiae* brief MEP Albrecht.

(27) Note that the Stored Communications Act already requires "probable cause" for issuing a warrant. Possibly, "very probable cause" may be called for in respect of "extraterritorial" warrants.

(28) *E.g.*, The Law Enforcement Access to Data Stored Abroad Act, S. 2871, 113th Cong. (2014), "To amend title 18, United States Code, to safeguard data stored abroad from improper government access, and for other purposes."

should discharge a heavier burden of proving the relevance of the information sought from foreigners. (29) Fourth, privacy-sensitive information may have to be removed from documents and emails so as to ensure compliance with local data protection laws, especially those of the EU. (30) Fifth, US courts should give due consideration to foreign laws prohibiting disclosure to prevent persons from being subject to conflicting laws. (31) Deference is, however, only required when foreign law serves a legitimate policy objective (*e.g.*, data protection) and not when the foreign law has been adopted simply to frustrate US law-enforcement. Sixth, as far as criminal law-enforcement is concerned, warrants for the production of evidence located abroad should possibly be limited to more serious crimes. (32)

Concluding observations

This note has demonstrated that the principles governing the production of documents located abroad, identified by Ivo Onkelinx 45 years ago, have not lost their relevance. US courts continue to order persons to produce such documents under their control, as soon as they are within the personal jurisdiction of the US, irrespective of the location of the documents. While courts pay lip-service to comity, in practice foreign sovereign interests are hardly taken into account and multilateral procedures are often bypassed. Also arguments concerning norm conflicts catching private addressees of orders between the rock of compulsory discovery under US law and the hard place of foreign legal prohibitions tend to be relatively unsuccessful in US courts. The digital revolution has not changed this state of affairs: documents have simply become digital files, and are as such subject to cross-border (e-) discovery. What is new is that the principles of cross-border discovery are now also being applied, by analogy, to search warrants in the criminal law, where law-enforcers order ISPs to disclose their clients' emails stored abroad under a probable cause standard. Arguably, such warrants — just like civil orders — are *in principle* internationally lawful, yet a number of mitigating, second-order principles of jurisdiction should be taken into account to prevent international tension, the overburdening of private persons, and violations of privacy rights.

(29) X, Note to *In Re Warrant*, *Harv L Rev*, vol. 128 (2015), 1019-1026. Such a higher burden need possibly not be discharged in case it can be proved that an email user consciously evaded US law, *e.g.*, by giving false residence information, as a result of which his emails were stored on a server outside the US.

(30) Art. 29 Data Protection Working Party, Working Document 1/2009 on pre-trial discovery for cross border civil litigation, adopted on 11 February 2009, 00339/09/EN WP 158, 10.

(31) Note that the foreign state need not intervene in the US proceedings to assert or prove the conflict between US and foreign law. See in this respect *In Re Warrant, amicus curiae* brief Republic of Ireland, 6.

(32) X, Note to *In Re Warrant*, *Harv L Rev*, vol. 128 (2015), 2016.