

## Unilateral Jurisdiction and Global Values



# Unilateral Jurisdiction and Global Values

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This book is dedicated to Dominika and Sophie



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## Introduction: international law and cosmopolitanism\*

John Chipman Gray, a professor of property law at Harvard University, once said, about 100 years ago, that with the exception perhaps of theology, there is nothing about which so much nonsense has been written as international law.<sup>1</sup> Property lawyers, for all their vices, have not been the most vehement critics of international law, however. In particular international relations scholars steeped in the so-called 'realist tradition' have cast doubt on the existence of something called 'international law', by attacking the normative power and ordering potential of international law. Almost inevitably, the characterization of international law as 'non-existent' impacts on the *raison d'être* of international legal scholarship: what kind of discipline studies something that does not exist?

In spite of the manifold criticisms that have been levelled at international law, there is no denying that international law has proved resilient. International law is frequently used as a discourse in international relations, not just by academics but also by states. This tends to prove that it is a reality, at least a terminological one. A critical legal scholar can however not satisfy himself with the observation that states use the language international law in their reciprocal dealings. He should endeavour to understand whether international law has an impact on the conduct of international relations and what parameters influence engagement and compliance with international law. In addition, he may inquire whether

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1 JH Morgenthau, *Human Rights and Foreign Policy* (Vol 18, No 11, Council on Religion & International Affairs 1979).

international law spawns, or is based on, a value-based international community that shapes the policy preferences of states or other members. If such a value-based international community is proven to exist, one may venture to answer a next question: could states, as individual members of this community, also unilaterally further community values when other members fail to act jointly or separately? An aspect of this question is whether states could unilaterally exercise (prescriptive) *jurisdiction*, possibly with extraterritorial effects or overtones, to compensate for regulatory failures of the multilateral system. It is this sub-question which this study will address. Its aim is to identify opportunities and limits/obstacles to the exercise of unilateral jurisdiction in the common interest by states that have no, or at least not the strongest connection to a situation (sometimes denoted as ‘bystander states’). In doing so, it seeks to find entry points in the international law of jurisdiction for the realization of *cosmopolitanism*, a political-philosophical notion that the international community has a shared morality and that members of this community, whether states or individuals, have duties towards each other.<sup>2</sup>

Moral cosmopolitanism, or ‘global justice’ as it is sometimes denoted,<sup>3</sup> has gained particular prominence in political theory since the 1990s. More recently, international lawyers have taken notice too,<sup>4</sup> while not specifically focusing on the law of jurisdiction. The debate as to the relationship between international law and

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2 See for a fine account of cosmopolitanism: KA Appiah, *Cosmopolitanism: Ethics in a World of Strangers* (Allen Lane 2006).

3 E.g., T Brooks (ed), *New Waves in Global Justice* (Palgrave Macmillan 2014).

4 See notably R Pierik and W Werner (eds), *Cosmopolitanism in Context* (CUP 2010) (discussing the strained relationship between moral cosmopolitanism and institutional reality with respect to the protection of the global environment, the World Trade Organization, the UN system of collective security, the International Criminal Court, and transboundary migration); M Langford *et al.* (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social, and Cultural Rights in International Law* (CUP 2014) (asking if states possess extraterritorial obligations under existing international human rights law to respect and ensure economic, social, and cultural rights and how far those duties extend).

cosmopolitanism is hardly new, however. In fact, many international legal scholars are intuitive cosmopolitans who wish to reform the international legal system to make it more just and reflective of the common interests of the international community. Over the years, this reformist zeal has given rise to acrimonious exchanges between idealist and positivist international lawyers, or between idealist international lawyers and international relations realists. Positivists may accept that, to a certain extent, international law has incorporated cosmopolitan ideals, but they may assail idealists for mistaking international law for international morality and for denying the operation of the principle of state consent in the making and interpretation of international law. Realists may go one step further and deny the existence of any role for international law or morality in the conduct of international relations, even if moral norms have *on paper* integrated the international legal order.<sup>5</sup>

A fine example of the early debate between optimistic international lawyers and international relations scholars is the thought exchange, on the threshold of the Second World War, between EH Carr, one of the founding fathers of modern realism as an academic discipline, and Hersch Lauterpacht, one of the towering figures in 20<sup>th</sup> century international law, who later became a judge at the International Court of Justice. EH Carr published ‘The Twenty Years Crisis (1919-1939)’<sup>6</sup> in 1939, in fact just days after Nazi Germany’s invasion of Poland. In this book, he demolished legal-utopian ideas of world peace and stability, and showed – at first sight rather persuasively – that states’ desire to strengthen the national interest disables

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5 Such views have been particularly popular in the United States. See for an early characterization, at the beginning of the 20<sup>th</sup> century: Harvard University professor of property law John Chipman Gray’s statement that ‘with the exception perhaps of theology, there is nothing about which so much nonsense has been written as international law’, cited in HJ Morgenthau, ‘Human Rights and Foreign Policy’, in KW Thompson (ed), *Moral Dimensions of Foreign Policy* (Transaction Books 1994) 341.

6 EH Carr, *The Twenty Years’ Crisis 1919-1939: An Introduction to the Study of International Relations* (first published 1939, Macmillan 1995).

the ordering and civilizing ambitions of international law and morality. According to Carr, states – and their citizens – have no sympathy for the fate or plight of foreigners and thus do not consider themselves hamstrung by international rules, whether of a legal or moral nature, that limit their international scope of action.<sup>7</sup> Lauterpacht, the international lawyer, in contrast, admitted that the ‘capacity for interest and sympathy is naturally determined by the geographical factor’,<sup>8</sup> but was of the view that ‘enlightened self-interest [...] admits the advisability in given circumstances, of the sacrifice of an immediate sectional interest for the sake of the general interest’<sup>9</sup> and that society and law perform the function of ‘the creation of conditions and institutions for changing by proper political processes the existing law in accordance with equity and distributive justice’.<sup>10</sup>

This optimistic, Lauterpachtian notion of international law as a force for good has cast a long shadow. To this day, many contemporary international lawyers believe in the civilizing and ordering potential of international legal norms and a perceived ‘international community’ that goes beyond the accumulated interests of states.<sup>11</sup> Many international relations scholars, and a number of US-based realist international law scholars, have further developed Carr’s ideas on the impossibility of effective international law, let alone of cosmopolitanism. Stephen Krasner, one of the leading contemporary international relations scholars, assumes ‘that rulers want to stay in power and, being in power, they want to promote the security,

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7 *ibid* 209 (‘our normal attitude to foreigners is a complete negation of the absence of discrimination on irrelevant grounds which we have recognized as the principle of equality’).

8 H Lauterpacht and E Lauterpacht (eds), *International Law: Being the Collected Papers of Hersch Lauterpacht. The Law of Peace. International Law in General* (Vol 2, CUP 1975) 85.

9 *ibid* 88.

10 *ibid* 89-90.

11 JL Goldsmith and EA Posner, *The Limits of International Law* (OUP 2005) 205 (arguing that according to mainstream international law scholarship, states should ‘act internationally on the basis of global welfare rather than state welfare’).

prosperity, and values of their constituents' and that logics of consequences, reflecting power asymmetries, will normally prevail over logics of appropriateness, *i.e.*, compliance with international norms.<sup>12</sup> Accordingly, also in his view there is no such thing as an international legal system with constitutive rules.<sup>13</sup> Somewhat ironically, similar views are held by some international lawyers themselves, inspired by international relations and the law and economics approach, especially in the United States. In their acclaimed book *The Limits of International Law* (2005), Jack Goldsmith and Eric Posner strongly take issue with the so-called 'institutional turn in cosmopolitan theory', reasoning that voters have no widespread and intense cosmopolitan sentiments and will punish leaders who do harbour such sentiments.<sup>14</sup> This is an empirical assumption that may or not be true, but in any event grounds a nationalistic foreign policy paradigm that leaves committing to, and complying with, international law a function of the maximization of the welfare of the state. This is also the basic assumption of the law and economics approach to international law, which has become rather dominant in US international legal scholarship. As one of its flag-bearers, Andrew Guzman, observes in *How International Law Works* (2008): 'States do not concern themselves with the welfare of other states [...] [They] will only cooperate when doing so increases their own payoffs.'<sup>15</sup> This approach does not exclude the formation of, and compliance with, international law, but these are not based on an endogenous attractiveness of international legal norms but rather on a rational calculus, factoring in exogenous factors known as the 'three Rs': reciprocity,<sup>16</sup>

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12 SD Krasner, *Sovereignty: Organized Hypocrisy* (Princeton University Press 1999) 7-8.

13 *ibid* 229 ('[The international system] does not have constitutive rules, if such rules are conceived of as making some kinds of action possible and precluding others.').

14 JL Goldsmith and EA Posner, *The Limits of International Law* (OUP 2005) 212-9.

15 AT Guzman, *How International Law Works: A Rational Choice Theory* (OUP 2008) 17.

16 Reciprocity is a pull for compliance in that a state, by threatening to withdraw its own compliance with international law, encourages compliance by other states. Reciprocity does not always work well, however: as an incentive for compliance with

retaliation,<sup>17</sup> and – in particular – reputation.<sup>18</sup> This view is still rooted in a black-box approach to the state as a maximizer of some ill-defined national interest, but, unlike hard-core realists such as Carr and Krasner, it admits that states may in fact be rather far-sighted and decide to enter into and comply with international law, at least insofar as in a not-too-distant future, it will enjoy payoffs that are higher than those it would enjoy as a result of a failure to sign up to international law, or of non-compliance with existing obligations.<sup>19</sup> There is only limited room for cosmopolitanism in this view, as solidarity with non-nationals will not normally increase the payoffs for states.

All these international relations and law and economics-inspired scholars are essentially rehashing some tired philosophical views on the role of the state as a utility-maximizer in international relations, a state which has no qualms about violating legal commitments and does not normally have an interest in developing a morally just international legal framework. Spinoza, for instance, in his somewhat lesser known work *Tractatus Politicus*, published posthumously in 1677, already wrote that the relations between states are characterized by anarchy and lawlessness, that the state has no moral obligations towards other states, but only towards the individuals who compose it, and that the prosperity of the state

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international human rights and environmental obligations, it may lack credibility as there are no consequences for the violating state in case a bystander states withdraws its own compliance. Cf AT Guzman, *How International Law Works: A Rational Choice Theory* (OUP 2008) 45.

- 17 Retaliation is a pull for compliance if states are deterred from violating the law where they know that other states will punish them. However, as Pauwelyn has observed (J Pauwelyn, *Optimal Protection of International Law* (CUP 2008) 158), since states 'are hesitant to enter a regime with strict remedies and tough punishments', the overall cost of breach is minimized, and a compliance pull may not be generated.
- 18 AT Guzman, *How International Law Works: A Rational Choice Theory* (OUP 2008) 33 ('A good reputation is valuable because it makes promises more credible and, therefore, makes future cooperation both easier and less costly.').
- 19 AT Guzman, *How International Law Works: A Rational Choice Theory* (OUP 2008) 41.

trumps treaty compliance (*‘Imperii salus summa lex.’*).<sup>20</sup> Somewhat similarly, Hegel averred in his *Grundlinien der Philosophie des Rechts* (*‘Elements of the Philosophy of Right’*, 1820) that *‘[the state’s] government is [...] a matter of particular wisdom, not of universal providence’* and that it is animated not by *‘a universal (philanthropic) thought, but [by] its actually offended or threatened welfare in its specific particularity’*.<sup>21</sup> Bosanquet, for his part, echoed Spinoza and Hegel’s opinions in his 1899 publication *The Philosophical Theory of the State*, where he held that *‘[m]oral relations presuppose an organized life; but such a life is only within the state, not in relations between states and other communities’*.<sup>22</sup> These views – with perhaps the exception of Hegel<sup>23</sup> – essentially doubt the existence of an international community as a substrate for the development of international law, as states are only motivated to maximize their own welfare.

However, as the law and economics school has not failed to highlight, the maximization of a state’s welfare does not preclude the development of international law, as international law could, under the right conditions, indeed maximize the state’s welfare. Moreover, a state’s aspiration to maximize its own welfare does not exclude the maximization of *‘other states’* welfare through international law. In

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20 Tractatus Politicus, Chapter iii, 14, also discussed in H Lauterpacht and E Lauterpacht (eds), *International Law: Being the Collected Papers of Hersch Lauterpacht. The Law of Peace. International Law in General* (Vol 2, CUP 1975) 371-2.

21 GWF Hegel, *Elements of the Philosophy of Right*, (CUP 1991) para. 337 (adding that *‘[the state’s] concrete existence, rather than any of those many universal thoughts which are held to be moral commandments, can be the principle of its action and behaviour’*). See on the maximization of internal state welfare *ibid.*, para. 332: *‘independent states are primarily wholes which can satisfy their needs internally’*.

22 B Bosanquet, *The Philosophical Theory of the State* (4<sup>th</sup> edn, Macmillan 1930) 302.

23 Hegel appeared to believe that there was a role for international law in international relations through this belief in a *‘universal spirit’*. GWF Hegel, *Elements of the Philosophy of Right* (CUP 1991) para 340 (writing that universal spirit produces itself through a *‘dialectic of the finitude of these spirits’*, even if *‘[t]he principles of the spirits of nations are in general of a limited nature because of that particularity in which they have their objective actuality and self-consciousness’*).

fact, as early as 1770, Emmer de Vattel in his highly influential *Le droit des gens* ('The Law of Nations') while writing in Book I of this work that the state is under an obligation to preserve itself and its members, and has a right to 'everything necessary for its preservation',<sup>24</sup> laid down, in Book II, the duties of a nation for the preservation of others and the duty to contribute to the perfection of other states.<sup>25</sup> Vattel did not consider these duties to be contradictory. By the same token, contemporary political theorist Simon Caney refutes the notion that the state has a contractual duty towards its own people as an argument against duties towards other nations; he reasons that states are free to pursue their own ends and to discharge their duties towards their own citizens, but they should do so 'within the context of a fair overall framework', *i.e.* 'a set of parameters defined by a theory of justice'.<sup>26</sup>

In this view, international law is a set of norms that not only maximize the welfare of the individual states subscribing to them but also the welfare of all participating nations. This is essentially an institutional cosmopolitan view, pursuant to which domestic as well as international institutions purportedly have duties towards non-citizens. In a pure form of cosmopolitanism, states or institutions disappear, and individuals have ethical duties towards other individuals who are worse off, wherever on earth they may be. This strand has been advocated in a seminal 1972 article, spurred by a famine in Bangladesh caused by its bloody secession from Pakistan, in which moral philosopher Peter Singer posited that 'if it is in our power to prevent something bad from happening, without thereby sacrificing anything of comparable moral importance, we ought, morally, to do

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24 E De Vattel, *Le droit des gens* (Guillaumin 1863), Book I, Chapter II, paras. 16-8.

25 *ibid*, Book I, Chapter I, paras. 1-6. Justifying the latter duties toward others, he approvingly cites the Roman orator Cicero, who said in *De Officiis* that '[N]othing is more agreeable to nature, more capable of affording true satisfaction, than, in imitation of Hercules, to undertake even the most arduous and painful labours for the benefit and preservation of all nations.' (MT Cicero, *De Officiis* (University Press 1899) lib. iii. cap. 5, para. 1).

26 S Caney, *Justice Beyond Borders: A Global Political Theory* (OUP 2005) 139-40.



it', even when the person in need is geographically distant.<sup>27</sup> For Singer, it did not matter morally whether this person is a neighbour's child drowning in a pond ten yards from me or an unknown Bengali ten thousand miles away. But obviously, individual agency is not particularly practical. Therefore, subsequent global justice proponents have advocated mediating ethical duties via institutions, such as states or international organizations.<sup>28</sup> According to these advocates, who are steeped in a consequentialist ethical tradition, political institutions need to be oriented towards furthering cosmopolitan ideals and tackling collective action problems, such as protecting human rights and the environment, and ensuring distributive justice (in particular alleviating world poverty).<sup>29</sup>

The cosmopolitan views set out above stand in stark contrast with the realist assumption, or observation, that states are not interested in maximizing the interests of other states and their citizens. But at the same time, they accord with the reality of a vast legal-institutional machinery which states have developed over the years, a machinery that is indeed aimed at constraining state action in the field of human rights and the environment and at ensuring North-South financial transfers. A multitude of human rights and environmental treaties have been concluded, often coming with their own supervisory mechanisms, and a host of United Nations specialized agencies funnel Northern donor funds to the global South for development purposes.

Through multilateral agreements and institutions, states indeed appear to be willing to support cosmopolitan action. Cosmopolitans would claim that not nearly enough is being done in this respect.

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27 P Singer, 'Famine, Affluence and Morality', (1972) *Philosophy & Public Affairs* 229, 235.

28 E.g., MJ Green, 'Institutional Responsibility for Global Problems', (2002) 30 *Philosophical Topics* 79, 85-6.

29 S Caney, *Justice beyond Borders: A Global Political Theory* (OUP 2005) 159. See on poverty in particular T Pogge, *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms* (2<sup>nd</sup> edn, Polity Press 2008).

Realists, for their part, would claim that such legal arrangements are in fact toothless, and in reality do not (empirically) or even should not (normatively) constrain selfish state behaviour. For the international lawyer, these external views, which are both correct from their own perspectives, are sobering. They require us to question the morality and effectiveness of the current international legal system. But we cannot deny that the deficiencies ascribed to international law, somewhat counter-intuitively perhaps, precisely reinforce its existence. When international law is considered worth criticizing, it must be so because it exists, whatever ills may afflict it. The reform-minded international lawyer, adhering to the optimistic Lauterpachtian tradition of international legal scholarship, will subsequently ponder how international law could be improved, *e.g.*, become more cosmopolitan while remaining grounded in actual state practice so as not to become utopian.<sup>30</sup>

This is the challenge that I would like to take up in this study. I do not aim to compose a wide-ranging treatise on cosmopolitan international law or on how cosmopolitan ideals have been translated or should be translated in international law.<sup>31</sup> Instead, I would like to answer a more circumscribed question, related to the international law of prescriptive jurisdiction, from both a normative and an empirical point of view: (a) does the international legal system accommodate the exercise of unilateral jurisdiction in a cosmopolitan fashion by states or regional organizations such as the European Union and (b) are there indications in practice that such jurisdiction is indeed exercised?

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30 The most notable contribution to the theoretical debate as to the nature of international law has obviously been made by M Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (CUP 2006).

31 Reference is made again to this fine collection: R Pierik and W Werner (eds), *Cosmopolitanism in Context: Perspectives from International Law and Political Theory* (CUP 2010).

The limitation of my research object to the exercise of prescriptive jurisdiction means that I will only study the legal opportunities for, and limits to, states' (or the EU's) application of their laws to situations with a foreign component. Such application is sometimes denoted as 'extraterritorial' jurisdiction, although this term is not entirely apt. As will be seen throughout this study, when states act unilaterally in a cosmopolitan manner, they often do so on the basis of a *territorial* nexus, however weak it may be. For instance, states may exercise universal criminal jurisdiction over gross human rights violations insofar as the presumed perpetrator is present on their territory, or states may impose environmental requirements on foreign production processes insofar as the finished goods enter states' territory, at which point market access conditions are applied. For reasons of convenience, I will nevertheless use 'extraterritoriality' as shorthand for situations that have an extraterritorial *dimension*, which is typically the case with jurisdictional unilateralism. Furthermore, in this study, I will not focus on the lawfulness of extraterritorial enforcement jurisdiction, *i.e.* the enforcement of a state's laws abroad. This implies, for instance, that I will not address the legality of unilateral humanitarian intervention or the legality of special operations on foreign soil against terrorist targets. Enforcement jurisdiction falls within the scope of the study, however, to the extent that it is exercised territorially to enforce 'extraterritorial' legislation, *e.g.* where port state authorities impose sanctions on foreign-flagged vessels in respect of the latter's activities on the high seas.

In answering the research questions identified above, I will employ an eclectic methodology, relying on a combination of various methods and theories geared to answering the research questions. This 'toolkit' methodology is in accordance with recent insights from interdisciplinary work straddling international law and international relations.<sup>32</sup> To answer the empirical question – do states exercise

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32 See JL Dunoff and MA Pollack, 'Reviewing Two Decades of IL/IR Scholarship: What We've Learned, What's Next', in JL Dunoff and MA Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art*

jurisdiction in the global interest? – I will espouse the classic doctrinal methodologies drawn from legal positivism: identifying relevant state practice and *opinio juris* and analysing the discourse states officially use to justify their action. The thrust of the argument made in this study is however not doctrinal but *theoretical*. Embracing a *normative* perspective, I will ascertain whether the law of jurisdiction *should* evolve given (a) the decreasing relevance of state borders in an age of globalization and (b) the nagging enforcement deficit of substantive international law. Embracing a *reconstructionist* perspective, I will explore to what extent the law of jurisdiction, in light of its historical pedigree, can be open to cosmopolitan, community-based understandings. If the law of jurisdiction should indeed evolve in view of contemporary challenges, which I will claim, the final question is *how* it should precisely evolve, and, more particularly, how political theories of legitimacy, democracy, and public participation could inform, and have already informed, the imposition of jurisdictional restraints on cosmopolitan unilateralism. While such theoretical work is not normally done by positivist international lawyers, who would rather describe the existing law, it remains no less true that a normative, prescriptive, and reformist ambition is part and parcel of an international law tradition that aims at advancing the international legal order<sup>33</sup> and realizing just outcomes in accordance with human dignity and common values through broadly defined processes rather than strict formal rules.<sup>34</sup> Such

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33 JL Dunoff and MA Pollack, 'International Law and International Relations: Introducing an Interdisciplinary Dialogue', in JL Dunoff and MA Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (CUP 2012) 13.

34 See notably the New Haven, policy-oriented school of jurisprudence: WM Reisman *et al*, 'The New Haven School: A Brief Introduction', (2007) 32 *Yale J Int'l L* 575, 576 ('[L]aw is policy, but [the New Haven School] is an approach that is policy-oriented in a much broader sense. [...] It also undertakes to improve the performance of decision processes themselves and enhance their capacity to achieve outcomes more consonant with human dignity.'). Such an approach assumes that states are not just interested in maximizing their own narrowly-defined welfare, as international relations realists would claim. See for the seminal work of the New Haven School: MS McDougal and HD Lasswell, *The Identification and Appraisal of Diverse Systems of*

work draws heavily on normative political theory and philosophy and somewhat less on international relations, which has largely been empirically oriented.<sup>35</sup> Ultimately, however, this study, while drawing on other disciplines from the humanities and to a lesser extent the social sciences, remains one in law. Yet, to use the words of Howse and Teitel, it attempts to ‘imagin[e] the way in which the social and political world would look if the law’s aim was fully attained’,<sup>36</sup> an attempt that finds its roots in Kant’s ideas about the perfectibility of law, laid down most famously in his essay *Perpetual Peace* (1795).<sup>37</sup> While this perfectibility of positive law is an aspiration that may never be fully realized,<sup>38</sup> it should not keep us from trying.

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interested in maximizing their own narrowly-defined welfare, as international relations realists would claim. See for the seminal work of the New Haven School: MS McDougal and HD Lasswell, *The Identification and Appraisal of Diverse Systems of Public Order*, in MS McDougal et al (eds), *Studies in World Public Order* 3 (Martinus Nijhoff Publishers 1960). See for a critical reflection M Land, ‘Reflections on the New Haven School’, (2013-14) 58 NY L Sch L Rev 919.

- 35 See however the recent discovery of normative international political theory by international relations, making a debate with legal theory’s normativity possible, as cited in JL Dunoff and MA Pollack, ‘Reviewing Two Decades of IL/IR Scholarship: What We’ve Learned, What’s Next’, in JL Dunoff and MA Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (CUP 2012) 653. See for a forerunner: S Hoffmann, *Duties beyond Borders: On the Limits and Possibilities of Ethical International Politics* (Syracuse University Press 1981).
- 36 R Howse and R Teitel, ‘Does Humanity-Law Require (or Imply) a Progressive Theory of History? (and Other Questions for Martti Koskenniemi)’, (2013) 27 Temple Int’l & Comp L Rev 377, 379.
- 37 I Kant, *Perpetual Peace: a Philosophical Sketch* (1795), reprinted in HS Reiss (ed), *Kant: Political Writings* (1991).
- 38 See also R Pierik and W Werner, ‘Can Cosmopolitanism Survive Institutionalization?’, in R Pierik and W Werner (eds), *Cosmopolitanism in Context: Perspectives from International Law and Political Theory* (CUP 2010) 288-9 (calling it impossible and even undesirable to close the gap between moral cosmopolitanism and actual institutions, as the ‘actual effects of cosmopolitanism should be constantly revealed, discussed and re-examined’).



# 1 Sovereignty, jurisdiction, and consent

Advocates of unilateral cosmopolitanism should realize that, at least *prima facie*, their dreams of a just global order – with individuals and institutions, including states, assuming responsibility for all members of a perceived international community irrespective of purportedly artificial national borders – are in tension with a principle on which the entire temple of international law has been built: the principle of (territorial) sovereignty. The pedigree of this principle can be traced from the Peace of Westphalia of 1648, a series of treaties which ended the Thirty Years' War and introduced the concept of co-existing states with full internal and external sovereignty, until the present times.<sup>39</sup> It implies that final political authority and jurisdiction is exclusively vested in a territorially delimited political community.<sup>40</sup> The role of international law would then simply be to ensure that this sovereignty is not trampled on and that the territorial state-based system survives. In practice, state sovereignty has at times been violated when one state reasoned that respect for another state's sovereignty was not in its interest – which may lead one to question indeed whether sovereignty is not just organized hypocrisy. But it remains no less true that it is an enduring 'cognitive script' that guides the actions of participants in international relations<sup>41</sup> and requires them to at least pay lip-service to the principles of non-intervention and territoriality.

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39 See for a historical account: D Croxton, *Westphalia: The Last Christian Peace*, (Palgrave Macmillan 2013); and for a discussion of the influence of the Peace until the 20<sup>th</sup> century: L Gross, 'The Peace of Westphalia, 1648–1948', (1948) 42 AJIL 20.

40 See also SD Krasner, *Sovereignty: Organized Hypocrisy* (Princeton University Press 1999) 11.

41 *ibid* 69 (arguing that sovereignty – while being organized hypocrisy in his opinion – has proved remarkably 'durable in the sense that it has affected the talk and conception of rulers since at least the end of the 18th century, despite substantial changes in the international environment').

The law of jurisdiction is closely related to this principle of territorial sovereignty and may even be co-extensive with it. It contains rules of the road that limit the reach of a state's prescriptive, adjudicatory, and enforcement jurisdiction to the state's territorial boundaries, with some limited exceptions to protect and punish its own nationals (personality principle), its political independence (protective principle), and certain enemies of mankind (universality principle). The basic rule of territoriality and the limited extraterritorial exceptions to it are geared towards protecting the sovereignty and self-interest of states. This applies both in a positive and a negative sense: states are allowed to unilaterally project their power, but when so doing, they should not unduly interfere in other states' affairs.<sup>42</sup>

Jurisdictional rules may also be inspired by a utilitarian rationale based on efficiency and procedural economy.<sup>43</sup> From a domestic perspective, such rules prevent courts and prosecutors from wasting scarce state resources to address problems which are another state's concern. The presumption against extraterritoriality as it is applied in the United States – a canon of statutory construction pursuant to which the US Congress is presumed not to legislate extraterritoriality – appears to be largely based on this rationale.<sup>44</sup> The presumption may however incidentally also guard against sovereignty-based conflicts with foreign nations.<sup>45</sup> The

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42 Theoretically, reciprocity ensures that states will by and large respect the requirement of non-interference, although in reality, as a result of disparities of power, strong states have an incentive to extend their jurisdiction to the detriment of other states' sovereignty, without being hampered by a concern over adverse foreign reactions (notably the US, European states and the EU have been at the vanguard of exercising 'extraterritorial' jurisdiction).

43 A Addis, 'Community and Jurisdictional Authority', in G Handl, J Zekoll and P Zumbansen (eds), *Beyond Territoriality* (Martinus Nijhoff Publishers 2012) 16-7, appears to consider this efficiency-based *rationale* to be the main informant of the norms of jurisdiction, stating that 'jurisdictional norms emerge for the purpose of maximizing aggregate social welfare'.

44 C Ryngaert, *Jurisdiction in International Law* (2<sup>nd</sup> edn, OUP 2015) 69-70.

45 It is arguable that the limitation of the reach of US antitrust law in the US Supreme Court's *Empagran* decision (*E Hoffmann-La Roche Ltd v. Empagran SA*, 124 S Ct 2359 (2004)) and of US securities law in the Court's *Morrison* decision (*Morrison v.*



utilitarian rationale may only have a negative dimension, since it is aimed at limiting the reach of a state's laws.

These understandings of jurisdiction – which consider *states*, with *territorial* boundaries, as the primary units of analysis – are not particularly amenable to cosmopolitan action, as for cosmopolitans, *individuals*, making up an *international community* with common values, are the focus of attention.<sup>46</sup> Nevertheless, the law of jurisdiction may be, and is already, based, at least in part, on the rationale of 'corrective justice', *i.e.*, on the cosmopolitan notion that states owe ethically based duties towards citizens of other nations.<sup>47</sup> This ethical imperative has *already* grounded legal principles that allow, and – under certain circumstances – even *require* states to exercise so-called 'universal jurisdiction' over a number of treaty- and customary law-based international crimes, such as war crimes and

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- National Australia Bank*, 561 US 247 (2010)), were based on the wish to prevent abuse of the US court system to address global, rather than US-based, business fraud.
- 46 Cosmopolitans do not necessarily deny the existence, or use of states, but for them, states only have instrumental value, insofar as they contribute to the primary cosmopolitan ideal of realizing the worth of every human being. See R Pierik and W Werner, 'Introduction', in R Pierik and W Werner (eds), *Cosmopolitanism in Context: Perspectives from International Law and Political Theory* (CUP 2010) 4-5. Note that non-cosmopolitan moral philosophers, however, may well ascribe moral value to (territorially delimited) states. See, *e.g.*, M Frost, *Ethics in International Relations* (CUP 1996) 155 ('sovereign states and the system of sovereign states are necessary to the flourishing of individuals'). A similarly 'Hegelian' view is even embraced by John Rawls, whose theory on – national - justice cosmopolitans have applied to international relations. In one of his last works, *The Law of Peoples* (Harvard University Press 1999), Rawls adheres to a society of states approach to international morality, considering peoples organized in states as the primary units of analysis. This is reminiscent of the work of Frost and Hedley Bull, the main representative of the so-called English school in international relations, who similarly regarded the state-based system as the best system to realize justice. See H Bull, *The Anarchical Society: A Study of Order in World Politics* (Columbia University Press 1977) 287-8. Pierik and Werner have incisively observed that Rawls's approach is very much in keeping with the Westphalian structure of current international law: it gives pride of place to state sovereignty, self-determination, and the principle of non-intervention (*ibid* 8).
- 47 A Addis, 'Community and Jurisdictional Authority', in G Handl, J Zekoll and P Zumbansen (eds), *Beyond Territoriality* (Martinus Nijhoff Publishers 2012) 17.

torture,<sup>48</sup> in the absence of any territorial or personal link of the crime or the presumed offender with the asserting state.<sup>49</sup> At the same time, one could envisage that this notion of jurisdiction as corrective justice informs and justifies jurisdictional assertions beyond the sphere of international criminal law. To bring about a more just world, in keeping with the tenets of institutional cosmopolitanism laid out above, states may wish to regulate corporations' overseas business practices that adversely affect human rights or the environment or violate global anti-corruption standards; they may claim jurisdiction over foreign-flagged vessels docking in their ports, even in relation to activities on the high seas (e.g., illegal or unsustainable fisheries, or pollution of the marine environment); they may restrict or prohibit the importation of goods of which the foreign production process runs afoul of human rights standards or contributes to global warming; they may use remote technology to address global Internet criminality; or they may extend their data protection laws to data transferred or processed abroad.<sup>50</sup>

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48 Most doctrine argues that universal jurisdiction is lawful under customary international law. See C Ryngaert, *Jurisdiction in International Law* (2<sup>nd</sup> edn, OUP 2015) 129, referring to, e.g., A Zimmermann, 'Violations of Fundamental Norms of International Law and the Exercise of Universal Jurisdiction in Criminal Matters', in C Tomushat and J-M Thouvenin (eds), *The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes* (2006) 351 ('the exercise of universal jurisdiction regarding the three core crimes – genocide, crimes against humanity and war crimes – is indeed based on broad State practice'). Furthermore, Treaties such as the Geneva Conventions 1949 (Articles 49, 50, 129 and 146 respectively of GC I, II, III and IV) and the Torture Convention (Article 5(3)) do not explicitly prohibit the exercise of universal jurisdiction *in absentia*.

49 States may however require the presumed offender's posterior territorial presence for jurisdiction to be triggered. Also the operation of the *aut dedere aut judicare* clause that features in a number of international conventions is based on the presence of the offender within the territorial jurisdiction of the state, as States Parties to such conventions only have the choice to extradite or prosecute the presumed offender when the latter is present in their territory in the first place. See, e.g., Article 5(2) UN Torture Convention, New York, 10 December 1984, 1465 UNTS 85 ('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 [...]').

50 These are, as it happens, the PhD topics of seven of my PhD researchers on two five-year projects funded by the European Research Council and the Dutch Organization for Scientific Research.

When states or regional organizations such as the European Union thus flex their muscles, they exercise unilateral jurisdiction to protect some notion of ‘global values’ or ‘the common interest’.

Standard accounts of institutional cosmopolitanism have not directly addressed this kind of unilateral jurisdictional action. Instead, such accounts typically emphasize the role of *supranational institutions* as media to effectuate cosmopolitan duties. Possibly out of a disciplinary bias against sovereign statehood, international ethics – which may see the state as the problem rather than the solution to the world’s ills – largely shuns the state as a cosmopolitan duty-bearer. This bias is understandable: leaving the realization of global justice to individual states may well be a recipe for doing nothing, for – as pointed out above – electoral politics may render cosmopolitanism a non-starter. Even if individual states were to engage in cosmopolitan politics and regulation, an international cacophony of uncoordinated, overlapping, and competing state initiatives may see the light, resulting in turf wars and waste of scarce resources.<sup>51</sup> Worst of all, the strong may *impose* purported ‘universal values’ on the weak in violation of the principle of non-intervention.<sup>52</sup>

In an ideal world, of course, standard-setting, administrative, and enforcement competences are transferred to international institutions, which – to the extent possible – objectively decide on the allocation of resources to alleviate the plight of disenfranchised

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51 This is probably how we should understand Simon Caney’s warning that the more nations self-govern, the more players we have, and the more collective action problems are exacerbated (S Caney, *Justice Without Borders: A Global Political Theory* (OUP 2005) 175).

52 See notably the critique of universalism by world systems theorist IM Wallerstein, *European Universalism: The Rhetoric of Power* (The New Press 2006), arguing that ‘we are far from yet knowing what [global universal] values are’; that the creation of universal values requires ‘a structure that is far more egalitarian than any we have constructed up to now’ (at 28), and that ‘there is nothing so ethnocentric, so particularist, as the claim of universalism’ (at 40), citing Edward Said’s acclaimed 1978 monograph *Orientalism*, in which he warned for a universalism that masks power structures and inequalities.

people or to solve global environmental problems. But we live in a non-ideal world that remains dominated by states, for better or for worse. Global institutions may have been established, but they generally lack power and resources. Worse, they may become lackeys of powerful states capturing them to pursue their own interests; even if they are not, they may be unaccountable Leviathans intent on realizing their own political agenda. In light of the democratic deficit of international organizations,<sup>53</sup> it is even open to doubt whether empowering international institutions to realize global interests is desirable altogether.<sup>54</sup> Global constitutionalism, a theory which normally comes with strong multilateral institutions whose decisions are considered to be hierarchically higher than decisions resulting from domestic democratic processes,<sup>55</sup> should therefore be viewed with some suspicion, in spite of its theoretical appeal. It is better perhaps to leave room for pluralistic experimentation by the *loci* of democratic governance – states.<sup>56</sup> But whether or not international

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53 Discussing the democratic deficit of the EU see, e.g., A Follesdal and S Hix, 'Why There Is a Democratic Deficit in the EU: A Response to Majone and Moravcsik', (2006) 44 *JCMS* 533. Discussing the democratic deficit at the international level in general see, e.g., J Solana, H Born and H Hänggi (eds), *The 'Double Democratic Deficit': Parliamentary Accountability and the Use of Force under International Auspices* (Ashgate 2004).

54 See, e.g., E Benvenisti, 'Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders', (2013) 107 *AJIL* 295, 332 (inveighing against a strong supervisory role of international bodies on grounds of reliability and democratic legitimacy, arguing that intrusion into national policy-making raises serious legitimacy concerns, 'especially regarding the impartiality of global decision-makers and judges, their competence to make better judgment calls than the reviewed sovereigns, and the potentially stifling impact of their interventions on domestic democratic processes').

55 See for one of the leading advocates of international and European constitutionalism: J Habermas, 'The Crisis of the European Union in the Light of a Constitutionalization of International Law', (2012) 23 *EJIL* 335. See for a critical appraisal of global constitutionalism: M Rosenfeld, 'Is Global Constitutionalism Meaningful or Desirable?', (2014) 25 *EJIL* 177.

56 J Rubinfeld, 'Unilateralism and Constitutionalism', (2004) 79 *NYU L Rev* 1971, 2012 ('[i]nternational constitutionalism, which Habermas favors, does damage to the prospects for variation, experimentation, and pluralism that national democracy opens up').

institutions are normatively desirable, the fact remains that they are often powerless to tackle global governance challenges through international law. For this is the main problem besetting the current structure of international law: international law is a consent-based system, where every single state, irrespective of its size and power, in keeping with the principle of sovereign equality, can block progress on governance challenges regarding global public goods, values, and interests that require the participation of all, or at least a substantial number of members of the international community.<sup>57</sup>

Accordingly, the combined notions of sovereignty, territory, and consent militate against more far-reaching cosmopolitan action. This is not to deny that states have at times given their consent to pool their sovereignty with a view to tackling global problems. They have transferred competences to international institutions or have explicitly allowed each one of them to exercise jurisdiction over discrete international crimes. But the point made here is that these institutions may have a restrictive mandate at best and be powerless at worst and that the conferral of unilateral jurisdiction has only explicitly occurred with regard to a limited number of global problems rising to the level of international crimes. The other point is that states cannot just bypass the existing institutional solutions by acting unilaterally, as such action risks binding other states to norms without them having given consent. The inevitable upshot is that cosmopolitan action may be immobilized.

The ‘immobilizing’ or ‘anti-commons’ streak of consent may indeed seem self-evident.<sup>58</sup> However, it is recalled that liberal international

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57 N Krisch, ‘The Decay of Consent: International Law in an Age of Global Public Goods’, (2014) 108 AJIL 1. This may not apply to single-best effort global public goods, for the realization of which no aggregate effort is required, *e.g.*, geo-engineering techniques in which only one state, or a small group of states invests, but that may deliver benefits for the entire international community.

58 Cf E Benvenisti, ‘Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders’, (2013) 107 AJIL 295, 312 (writing that sovereignty is ‘potentially immobilizing’, and referring to an ‘anti-commons’ regime that requires everybody’s consent to achieve socially beneficial outcomes’).

theory traditionally sees the principle of consent and the freedom of states undergirding it as global welfare *maximizers*,<sup>59</sup> much in the same way as liberals, within a nation-state context, assume that individual freedom and choice, without (or with limited) collective intervention, furthers the public good.<sup>60</sup> But in reality, one cannot deny that, in light of the challenges facing humanity, this consensualism has proven its limits: the 'free exchange of entitlements' held by states, on which the liberal international system is based, fails to deliver the expected global benefits. For instance, international agreement has so far not been reached on a successor to the Kyoto Protocol in a way that would measure up to the challenge of combating climate change. Nor have international legal instruments substantially limited multinational corporations' scope of action, with the attendant externalities going partly unaddressed (*e.g.*, in terms of human rights violations).<sup>61</sup> If such collective action problems were to arise in a purely domestic setting, states could just address them by adopting laws, as the domestic law-making process does not require that the consent of every single citizen be secured; it suffices that a majority agrees. But this is obviously not how international law works, or at least not how states have wanted it to work.

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59 J Pauwelyn, *Optimal Protection of International Law* (CUP 2008) 198.

60 Reflecting on the consent-based structure of international law, Pauwelyn has observed that international law is in fact 'the prototype of a market-based property rule regime', which can be said to mirror our capitalist economy. J Pauwelyn, *Optimal Protection of International Law* (CUP 2008) 31.

61 Note that on 13 September 2013, during the 24th regular session of the UN Human Rights Council, Ecuador called upon the Council to recognize 'the necessity of moving forward towards a legally binding framework to regulate the work of transnational corporations and to provide appropriate protection, justice and remedy to the victims of human rights abuses directly resulting from or related to the activities of some transnational corporations and other businesses enterprises'. See Contribution of the Special Rapporteur on the right to food, Mr Olivier De Schutter, to the workshop 'Human Rights and Transnational Corporations: Paving the way for a legally binding instrument' convened by Ecuador, 11-12 March 2014, during the 25th session of the Human Rights Council, available at <[www.ohchr.org/Documents/Issues/Food/EcuadorMtgBusinessAndHR.pdf](http://www.ohchr.org/Documents/Issues/Food/EcuadorMtgBusinessAndHR.pdf)> (last visited on 19 March 2015).

In international law, there are hardly any constraints on property rules,<sup>62</sup> with the obvious negative externalities.

It is this failure of the international legal and institutional system that has informed calls for unilateral action in the global interest, action that overrides the principle of consent. Such action may appear to be a second-best option compared to consent-based, and supposedly more legitimate, multilateral action. But as Voltaire famously noted in his memoirs, *le mieux est l'ennemi du bien* ('the perfect is the enemy of the good'). Therefore, one could posit that states may exercise unilateral action to further the global interest, at least strategically, to up the ante until adequate multilateral action is taken. In that sense, unilateralism could be considered as a temporary mechanism of pressure.

Empowering individual states to further the global interest sits well with our current pluralistic and pluri-centric world, where different centers of power take experimental bottom-up global action, thereby providing best practices and inspiration for others to follow. The sociologist Saskia Sassen's work on global cities comes to mind here.<sup>63</sup> Moreover, some cosmopolitans themselves, wary of a Leviathan-like supreme world government responsible for dispensing global justice,<sup>64</sup> have admitted that 'there is a case for different institutions operating at different levels', which has the advantage of preventing the

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62 Limited exceptions are peremptory norms of international law (*jus cogens*), which invalidate treaties that violate such norms (see Articles 53 and 64 Vienna Convention on the Law of Treaties 1969), and the UN Security Council resolutions adopted under Chapter VII of the UN Charter, which, in accordance with Article 103 of the UN Charter, prevail over other legal commitments entered into by states parties to the UN Charter.

63 S Sassen, *The Global City: New York, London, Tokyo* (Princeton University Press 2013). This work chronicles how New York, London, and Tokyo became command centers for the global economy and in the process underwent a series of massive and parallel changes. What distinguishes Sassen's theoretical framework is the emphasis on the formation of cross-border dynamics through which these cities and the growing number of other global cities begin to form strategic transnational networks.

64 See already I Kant, *Perpetual Peace: a Philosophical Sketch* (1795), reprinted in HS Reiss (ed), *Kant: Political Writings* (1991) 102 (submitting that 'laws progressively lose their impact as the government increases its range, and a soulless despotism, after crushing the germs of goodness, will finally lapse into anarchy').

centralization of coercive power.<sup>65</sup> They may have in mind, in the first place, different international organizations addressing different policy issues and keeping each other in check. But there is no reason to exclude individual states from this pantheon. In fact, Kant saw *separate states* rather than international organizations as the cosmopolitan duty-bearers in *Perpetual Peace*.<sup>66</sup> Also Rawls defended the society of states in his approach to justice in *The Law of Peoples* (although then he famously went on to doubt the possibility of global justice and solidarity within a society of states that do not all share a liberal justice outlook).<sup>67</sup> Ultimately, as the state remains a – or even *the* – central actor in international law-making and -implementation, one has to make do with states as the primary cosmopolitan actors.<sup>68</sup>

It is posited in this study that states may give effect to their cosmopolitan duties by exercising unilateral, possibly extraterritorial jurisdiction to address the havoc wrought by the spoilers of global governance – assorted holdouts and free-riders.<sup>69</sup> States may recast

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65 S Caney, *Justice beyond Borders: A Global Political Theory* (OUP 2005) 163.

66 R Howse and R Teitel, 'Does Humanity-Law Require (or Imply) a Progressive Theory of History? (and Other Questions for Martti Koskenniemi)', (2013) 27 *Temple Int'l & Comp L Rev* 377, 383 (writing that 'according to Kant, we need the state as well as an order of cosmopolitan right where individuals can claim, as humans, to be treated in a certain way regardless of territorial boundaries', citing Kant's emphasis on the republican federation in *Perpetual Peace*); T Pogge, 'Cosmopolitanism and Sovereignty', (1992) *Ethics* 103.

67 J Rawls, *The Law of Peoples* (Harvard University Press 1999).

68 R Pierik and W Werner, 'Can Cosmopolitanism Survive Institutionalization?', in R Pierik and W Werner (eds), *Cosmopolitanism in Context: Perspectives from International Law and Political Theory* (CUP 2010) 283 (noting also that 'international treaties that embrace cosmopolitanism endow States with the primary task of guarding the interests of individuals and global society as a whole').

69 Compare the concept of state trustee sovereignty, suggested by Benvenisti (E Benvenisti, 'Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders', (2013) 107 *AJIL* 295, 326), considering state sovereignty as the locus for democratic decision-making, and a middle course between cosmopolitan and parochial approaches, while admitting primacy of domestic interests.

Note that when states act unilaterally in respect of global problems, they may never fully shed the parochialism inherent in democratic nationalism. I will return to this later.



global problems in local terms ‘in order to take advantage of local political or social resources’,<sup>70</sup> *e.g.* by locally suing foreign corporations participating in a global antitrust conspiracy, by prosecuting corporations engaging in foreign corrupt practices or foreign human rights violations, or by prosecuting individuals who committed atrocities abroad. In so doing, they may act as agents of the international community.

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70 HL Buxbaum, ‘National Jurisdiction and Global Business Networks’, (2010) 17 *Ind J Global Legal Stud* 165, 167.



## 2 Justifying unilateral jurisdiction: states as guardians of international community values

When a state desires to tackle global problems through the exercise of unilateral jurisdiction, from a justice perspective they may obviously want to ensure that others view these problems as global too, lest such jurisdiction be seen as illegitimate, self-serving, and intruding on other states' justified policy choices. It can be posited that the justification of a unilateral/extraterritorial measure hinges on the international community's recognition of the object of regulation (*e.g.*, a stable climate, human rights, sustainable fisheries, etc.) and thus on internationally shared values. When the international community has recognized an object as in need of protection, the assumption is that states may be justified in protecting this good unilaterally,<sup>71</sup> as

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71 Cf WTO, *US: Import Prohibition of Certain Shrimp and Shrimp Products – Report of the Appellate Body* (12 October 1998) WT/DS58/AB/R, para. 31 (observing that extraterritorial trade measures could in principle be justified when the measure concerns a shared resource, of which the value of its protection is as such recognized by the international community: '[g]iven the recent acknowledgement by the international community of the importance of concerted bilateral or multilateral action to protect living natural resources, and recalling the explicit recognition by WTO Members of the objective of sustainable development in the preamble of the WTO Agreement, we believe it is too late in the day to suppose that Article XX(g) of the GATT 1994 may be read as referring only to the conservation of exhaustible mineral or other non-living natural resources. Moreover, two adopted GATT 1947 panel reports previously found fish to be an "exhaustible natural resource" within the meaning of Article XX(g). We hold that, in line with the principle of effectiveness in treaty interpretation, measures to conserve exhaustible natural resources, whether living or non-living, may fall within Article XX(g).' (footnotes omitted). See also F Weiss, 'Extra-Territoriality in the Context of WTO Law', in G Handl, J Zekoll and P Zumbansen (eds), *Beyond Territoriality: Transnational Legal Authority in an Age of Globalization* (Martinus Nijhoff Publishers 2012) 481, (observing in respect of Article XX(g) GATT that trade-restrictive environmental measures adopted pursuant to

they are, *arguendo*, just vicariously enforcing community values. The international dimension encourages<sup>72</sup> and ‘multilateralizes’ unilateral action and nuances its interventionist character. Unilateralism and multilateralism should therefore not necessarily be seen as opposites: contextualized unilateralism may in fact resemble multilateralism, where the unilaterally acting actor enforces multilaterally shared norms and values.<sup>73</sup>

The persuasiveness of this thesis is obviously a function of the reality of such shared norms and of an international community of which the state purportedly is a guardian. The notion of ‘international community’ is a particularly elusive one. It is clear, however, that, to a large extent, this community is constructed as an ‘imagined community’,<sup>74</sup> a community of principle that transcends borders and of which the members do not know each other.<sup>75</sup> It can tentatively be defined as a community premised on common international

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multilateral environmental agreements are easier to justify than fully unilateral measures).

- 72 Cf D Bodansky, ‘What’s in a Concept? Global Public Goods, International Law, and Legitimacy’, (2012) 23 EJIL 651, 660 (citing the transformative effect of characterizing an obligation as an international one: ‘The existence of an international obligation [...] gives domestic actors both within and outside government a “hook” for their arguments.’).
- 73 R Pierik and W Werner, ‘Can Cosmopolitanism Survive Institutionalization?’, in R Pierik and W Werner (eds), *Cosmopolitanism in Context: Perspectives from International Law and Political Theory* (CUP 2010) 286, relying on JM Balkin, ‘Nested Oppositions’, (1990) 99 Yale LJ 1669 (drawing attention to the specific context in which conceptual opposites receive their meaning, and arguing that ‘in certain contexts concepts may appear to be radically opposed, while in others they may look quite similar’).
- 74 B Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (Verso Books 2006).
- 75 A Addis, ‘Community and Jurisdictional Authority’, in G Handl, J Zekoll and P Zumbansen (eds), *Beyond Territoriality* (Martinus Nijhoff Publishers 2012) 20. It is pointed out that the very fact that its members do not know each other has been used to discredit the notion of international community. See R Pierik and W Werner, ‘Introduction’, in R Pierik and W Werner (eds), *Cosmopolitanism in Context: Perspectives from International Law and Political Theory* (CUP 2010) 9-10 (citing the critique of cosmopolitanism that ‘humanity as a whole is too large and abstract to evoke genuine passions of unity, loyalty and obligation’).

interests that prevail over individual state interests. Implicit in this definition is that the international community may escape the requirement of strict state consent. From a positivistic point of view, this is problematic. Positivists, however, have been able to reconstruct a consent-based international community and have attached particular legal consequences to the characterization of norms as international community norms. These consequences do not necessarily include the exercise of unilateral jurisdiction, however. Moreover, the 'positivist' international community is a partial one that may include common values and interests to which states have given their explicit consent (Section 2.1). Such a limited community may fail to respond to contemporary global governance changes. In the face of this failure, global public goods arguments have recently captured the imagination of international legal scholars and have even been invoked to justify unilateral jurisdiction in respect of global problems (Section 2.2). These arguments are fairly convincing from a policy perspective, but it bears notice that they herald a return to naturalism. Such naturalism may inevitably fall prey to accusations of subjectivism and hegemonic imposition (Section 2.3), as well as of illegality (Section 2.4). It is argued that, ultimately however, there are few, if any, alternatives to natural law – as far as possible in an 'objectivized form' – as a justification for unilateral legal action aimed at furthering cosmopolitan ideals and addressing global governance challenges.

### 2.1 The international community: from naturalism to positivism

In international law, the best-known proponent of the international community and its interests is arguably former ICJ judge Bruno Simma, who defined international community interests as a 'consensus according to which respect for certain fundamental values is not to be left to the free disposition of states, individually or *inter se*, but is recognized and sanctioned by international law as a matter of concern to all states'.<sup>76</sup> There is an apparent tension within this

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<sup>76</sup> B Simma, 'From Bilateralism to Community Interest in International Law', in *Recueil des Cours (Collected Courses of the Hague Academy of International Law)* (Martinus

definition, namely between ‘consensus’ and the negative qualification of ‘the free disposition of states’, the latter referring to the hallowed principle of consent as the basis of international legal obligation. Somehow, an international consensus could crystallize regarding the protection of certain values, even if some individual states do not consent. In the dominant positivist paradigm of international law, this approach is problematic as it appears to posit that individual state consent could be overridden by an international consensus of which the precise source remains elusive and which, in essence, is of a *natural law* character.

These natural law roots of an ‘international community’ hark back to international lawyers such as Suarez, Grotius, Vattel, and

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Nijhoff Publishers 1997) 217, 233 (also expressly including environmental protection as a community interest). See against consensualism also ICJ, *Accordance with international law of the unilateral declaration of independence in respect of Kosovo* (Advisory Opinion) [2010] ICJ Rep 403, Declaration of Judge Simma (speaking out against ‘anachronistic, extremely consensualist vision of international law, expressed in the *Lotus* judgment’). Also other ICJ judges have not shied away from referring to the ‘international community’, including in their judicial opinions. Former ICJ Judge Mohammed Bedjaoui famously declared in the *Nuclear Weapons* advisory opinion that ‘[t]he resolutely positivist, voluntarist approach of international law [...] has been replaced by an objective conception of international law, a law more readily seen as the reflection of a collective juridical conscience and a response to the social necessities of States organised as a community’. See ICJ, *Legality of Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, Declaration of President Bedjaoui, 1345 para. 13. Current ICJ Judge Cançado Trindade even has the habit of appending lengthy individual, and often dissenting opinions to ICJ judgments, in which he criticizes the majority for taking the interests of the international community, humanity, or justice insufficiently into account (see, e.g., ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Dissenting opinion of Judge Cançado Trindade, para. 2: ‘I thus present with the utmost care the foundations of my own entirely dissenting position [...] guided above all by the ultimate goal of precisely the *realization of justice*’). In fact, many international lawyers have embarked on a reformist project to give the interests of the international community a more prominent place in the current legal system. M Koskeniemi, ‘International Law in a Post-Realist Era’, (1995) 16 *Austr YB Int’l L* 1, 1 (‘our discipline has implied a program for reforming the present international structures, perhaps to reflect better the “interests of the world community”’). Note that a journal is also named after it: *International Community Law Review*.

Lauterpacht, who assumed the existence of an ‘international society’ with a ‘general interest’.<sup>77</sup> Their problems with natural law are well-known: universal morality is subjective and can enable powerful states to articulate a particularist view of it while downplaying the potential conflict between conceptions of natural law held by different actors.<sup>78</sup> Grotius himself, for instance, opened his *Mare Liberum* with a vehement critique of the great maritime nations of the era, Spain and Portugal – whose hold on the oceans had to be broken to advance the maritime interests of the Dutch United Province – on the ground that they mistook their particularist justice conceptions for universal justice.<sup>79</sup> Invoking humanity or objective justice may just be a front for furthering one’s own subjective preferences and

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77 See for probably the earliest legal articulation: F Suarez, *Tractatus de Legibus ac Deo Legislatore* (1612), Book II, Chapter. 19, § 5) (‘Mankind, though divided into numerous nations and states, constitutes a political and moral unity bound up by charity and compassion; wherefore, though every republic or monarchy seems to be autonomous and self-sufficing, yet none of them is, but each of them needs the support and brotherhood of others, both in a material and a moral sense. Therefore they also need some common law organizing their conduct in this kind of society’). See also H Lauterpacht and E Lauterpacht (eds), *International Law: Being the Collected Papers of Hersch Lauterpacht. The Law of Peace. International Law in General* (Vol 2, CUP 1975) 88 (opining that the ‘relation of the state to the international community was not based on ‘self-sacrifice nor blind acceptance of the overriding superiority of the general interest of the international society, but enlightened self-interest which admits the advisability in given circumstances, of the sacrifice of an immediate sectional interest for the sake of the general interest’). Note that Lauterpacht did not explicitly state that there is an international community that could be dissociated from the consent of states; rather he urged states to consensually abandon narrow state interests for the sake of the general interest.

78 Z Bauman, *Postmodern Ethics* (Blackwell Publishing 1993) 42 (arguing that ‘there is more than one conception of universal morality, and that which of them prevails is relative to the strength of the powers that claim and hold the right to articulate it’); IM Wallerstein, *European Universalism: the Rhetoric of Power* (The New Press 2006) 45 (‘there are multiple versions of natural law that are quite regularly at direct odds with each other’); M Koskeniemi, ‘International Law in a Post-Realist Era’, (1995) 16 *Austr YB Int’l L* 1, 8-9 (‘Even if we agreed on the need to understand the international in terms of interests, we would have difficulty in identifying the subjects whose interests count. Is it States, or perhaps “peoples”, human beings or the global “community”?’).

79 H Grotius, *Mare Liberum*, translated from Latin by R Van Deman Magoffin as *The Freedom of the Seas, a Dissertation by Hugo Grotius* (OUP 1916) 1 (‘The delusion is as

interests.<sup>80</sup> Or as Proudhon and Schmitt have famously pointed out: ‘whoever invokes humanity, wants to cheat’.<sup>81</sup> Thus, the question is whether global values can really exist in a non-egalitarian world dominated by Western power in particular.<sup>82</sup> To be true, there is no denying that, as cosmopolitan political theorists posit, certain values are truly internationally shared. As Caney argued in *Justice Beyond Borders*, since there is a common human nature, there is often no principled disagreement regarding basic moral norms, which can be said to converge globally.<sup>83</sup> Communities may sometimes cherish other ideals, but this may be so because they face different scenarios and challenges<sup>84</sup> or because they may be misled by self-interested rulers.<sup>85</sup> Even where some divergence is noticeable,

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old as it is detestable with which many men, especially those who by their wealth and power exercise the greatest influence, persuade themselves, or as I rather believe, try to persuade themselves, that justice and injustice are distinguished the one from the other not by their own nature, but in some fashion merely by the opinion and the custom of mankind. Those men therefore think that both the laws and the semblance of equity were devised for the sole purpose of repressing the dissensions and rebellions of those persons born in a subordinate position, affirming meanwhile that they themselves, being placed in a high position, ought to dispense all justice in accordance with their own good pleasure, and that their pleasure ought to be bounded only by their own view of what is expedient. This opinion, absurd and unnatural as it clearly is, has gained considerable currency; but this should by no means occasion surprise, inasmuch as there has to be taken into consideration not only the common frailty of the human race by which we pursue not only vices and their purveyors, but also the arts of flatterers, to whom power is always exposed.’)

80 E.g., U Beck, ‘War Is Peace: On Post-National War’, (2005) 36 *Security Dialogue* 5, 15 (arguing that in so-called ‘humanitarian’ military interventions, state interests may play a larger role than humanitarian concerns).

81 C Schmitt, *The Concept of the Political* (University of Chicago Press 2007) 54.

82 IM Wallerstein, *European Universalism: The Rhetoric of Power* (The New Press 2006) 28 (noting that ‘we are far from yet knowing what [global universal] values are’, which requires ‘a structure that is far more egalitarian than any we have constructed up to now’), observing at 51 that Europeans have considered their universalist claim as a scientific ‘assertion of objective rules governing all phenomena at all moments of time’.

83 S Caney, *Justice beyond Borders: A Global Political Theory* (OUP 2005) 45-6.

84 *ibid.*

85 *ibid.* 49 (pointing out that some disagreement arises from error, selfishness, and indoctrination, and that ‘values can be justified to all persons when those persons’ reasoning is not distorted by self-interest, factual mistakes, complacency, and so on’).



this can be accommodated within a culturally sensitive universalist framework that affirms a pluralism of values.<sup>86</sup> Ultimately, however, a political/ethical conception of the international community and its values cannot escape the risk of subjective determinations.

To prevent such moral subjectivism, legal objectivity appears to be called for, which reconstructs the ‘international community’ on the basis of positive international law. When taking the latter perspective, it is undeniable that states have indeed established some version of an international community, although a relatively thin one at that, by entering into treaties affirming community interests that go beyond states’ (joint) immediate interests. Indeed, international human rights and environmental law treaties and customary norms protect interests that are considered as common to humanity. Instead of maximizing states’ interests, they limit states’ scope of action to the benefit of the true addressees of such treaties: individuals, the environment, and the global commons. Ultimately, the latter’s interests rather than the interests of states ground the international community. However, since individuals and the environment often do not have the power or capacity to call to account state violators of obligations laid down in such treaties, other states parties to the treaty have been given the power to invoke the responsibility of the violating state on behalf of the international community, or at least of the state parties to the relevant treaty. Sometimes, international institutions have been established to monitor and enforce the community interest, *e.g.*, human rights supervisory bodies and courts and international criminal tribunals.

A non-injured state’s ‘cosmopolitan’ right to unilaterally invoke another state’s responsibility in respect of violations of obligations owed to the international community is laid down, as a secondary rule of international law, in Article 48(1)(b) of the International Law Commission’s Draft articles on the Responsibility of States

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86 *ibid* 47 (citing Isaiah Berlin).

for Internationally Wrongful Acts (2001).<sup>87</sup> This article is a codification of the *erga omnes* obligations pioneered by the ICJ in the *Barcelona Traction* case (*Belgium v. Spain*, 1970), in which the Court held – developing an idea enunciated by Kant in his *Perpetual Peace* –<sup>88</sup> that ‘the obligations of a State towards the international community as a whole’ are ‘by their nature’ ‘the concern of all States’ and that ‘[i]n view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*’.<sup>89</sup> After giving some examples of *erga omnes* obligations – the prohibition of aggression and genocide, basic human rights, such as protection from slavery and racial discrimination – the Court proceeded to distinguish between obligations *erga omnes partes*, *i.e.* obligations only between parties to treaties, and *erga omnes*, *i.e.* obligations under general international law.<sup>90</sup>

The international community established by such obligations is necessarily a partial one, however. Given the abiding relevance of the principle of state consent to be bound by international legal norms, states are under no obligation to enter into treaties or to accept the validity of a customary norm of the general international

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87 This article provides that any state other than an injured state is entitled to invoke the responsibility of another state, among other scenarios, ‘if the obligation breached is owed to the international community as a whole’. The Articles also make reference to the ‘international community’ in Article 25(1) regarding necessity as a circumstance precluding wrongfulness: ‘Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act: (a) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and (b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.’ (emphasis added).

88 I Kant, *Perpetual Peace: A Philosophical Sketch* (1795), reprinted in HS Reiss (ed), *Kant: Political Writings* (1991) 107-8 (‘The peoples of the earth have [...] entered in varying degrees into a universal community, and it has developed to the point where a violation of rights in one part of the world is felt everywhere.’).

89 ICJ, *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)* (Merits) [1970] ICJ Rep 3, para. 33.

90 *ibid.*, para. 34 (‘Some of the corresponding rights of protection have entered into the body of general international law [...] others are conferred by international instruments of a universal or quasi-universal character.’).

law in the common interest. Thus, legally speaking, the international community we are referring to is a limited, consent-based one. As long as states do not formally sign up to legal commitments, they are not bound, and fellow states, posing as guardians of the international community, cannot invoke their responsibility, since legally such an international community does simply not exist beyond the treaty or customary law regime.

Clearly, this state of affairs may lead to serious collective action problems, where (major) states fail to join the protective legal regime, and global values accordingly do not enter the legal realm. But, truth be told, even the partial international community – or rather communities – established by law, are hardly beyond reproach when it comes to addressing collective action problems. Firstly, states joining treaty regimes protecting community interests often only pay lip-service to these interests; they may join out of reputational concerns rather than out of conviction.<sup>91</sup> Secondly, the *erga omnes* character of the community obligations in practice rarely has the consequence that bystander states invoke the responsibility of the violating state, for obvious political reasons.<sup>92</sup> And thirdly, invocation of responsibility, when it occurs, rarely has far-reaching consequences, as it is just a speech act naming and shaming an alleged violator.<sup>93</sup> It does not come with any enforcement powers,

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91 AT Guzman, *How International Law Works: A Rational Choice Theory* (OUP 2008), Chapter 3.

92 J Pauwelyn, *Optimal Protection of International Law* (CUP 2008) 190-1 (arguing that no one is willing to invoke the responsibility of others if they are not directly harmed, and that the ensuing collective action problem – no one protects the good – is the ‘result of the nature of the subject-matter’). See for a rare example of a state invoking another state’s responsibility for violating *erga omnes* obligations, even before the International Court of Justice: ICJ, *Questions Concerning the Obligation to Prosecute or Extradite (Belgium v. Senegal)* (Merits) [2012] ICJ Rep 422 (Belgium invoking the international responsibility of Senegal for failing to comply with the duty to either prosecute or extradite a presumed torturer present on Senegal’s territory).

93 Where a bystander state invokes another state’s responsibility before an international court, however, the chances that change is brought about are much higher, as non-compliance with binding decision has reputational repercussions for the state proved

except retorsions, unfriendly but lawful measures that states can take anyway, even in the absence of a prior breach.<sup>94</sup>

A contradiction may thus be discerned: although *erga omnes* treaties appear to offer a high level of protection to community values, and give more states the right to address a breach, in practice fewer take the initiative – or put differently, as Pauwelyn has observed, ‘the *actual* protection of international entitlements is [...] inversely related to how strongly international law *aims* or *pretends* to be protecting the entitlement’.<sup>95</sup> This is not to say that the norms enshrined in these treaties are not enforced. Sometimes international courts have been established to bring states or individuals to account, such as the European Court of Human Rights, which offers direct standing to individual plaintiffs, or the International Criminal Court, which has an independent prosecutor who can start investigations. And obviously, reputational concerns and fear of sanctions may exert a pull towards compliance. But it remains no less true that the international community obligations confirmed in such treaties are under-enforced.

In spite of the defects of the legal international community as we know it, the recognition of norms in which the ‘international

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wrong by the decision. See on the role of reputation in inducing compliance with international law: A Guzman, *How International Law Works* (OUP 2008). For example, after the ICJ rendered its judgment in *Belgium v. Senegal* and found that Senegal had violated its obligations under the UN Torture Convention, Senegal established Extraordinary Chambers within its criminal justice system, so as to bring the presumed torturer to justice. See Statute of the Extraordinary African Chambers within the courts of Senegal created to prosecute international crimes committed in Chad between 7 June 1982 and 1 December 1990 (Unofficial translation by Human Rights Watch), available at <[www.hrw.org/news/2013/09/02/statute-extraordinary-african-chambers](http://www.hrw.org/news/2013/09/02/statute-extraordinary-african-chambers)> (last visited on 17 March 2015).

94 Non-affected states cannot take countermeasures, only ‘lawful’ measures. See International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, 2001, Article 54. *Contra*: C Tams, *Enforcing Obligations Erga Omnes in International Law* (CUP 2005) 250.

95 J Pauwelyn, *Optimal Protection of International Law* (CUP 2008) 194-5.

community' and its constituent parts – states – have an interest is a watershed in international law, as it enables states not injured by violations of international law (*e.g.*, international human rights law) to act in a cosmopolitan fashion and represent the international community through the mechanism of invocation of state responsibility. This recognition may foster the legitimacy of the exercise of unilateral jurisdiction over the same violations.<sup>96</sup> Still, it would be a bridge too far to claim that it also grounds their legality. There is no denying that while treaties or customary norms have provided for extraterritorial jurisdiction over some such violations, *e.g.*, of basic human rights like the prohibition of torture,<sup>97</sup> other treaties or norms remain silent on their jurisdictional scope – thus demonstrating that the qualification of an obligation as *erga omnes* does not, as such, confer (universal) jurisdiction on a bystander state.

## **2.2 Unilateralism to supply global public goods: naturalism redux**

We have reached the *interim* conclusion that the formal international community conception based on *erga omnes* obligations fails to protect international community interests and to address collective action problems – even those which the *erga omnes* regime was precisely supposed to address. It overestimates the potential of the invocation of state responsibility as a remedial mechanism and does not give states a mandate to exercise unilateral jurisdiction to protect the said obligations. Ultimately, it remains based on the 'anti-commons' principle of consent, which allows states *not* to subscribe to a collective regime. In other words, we are confronted with the inherent limits of a purely positivist approach to international community interests. Faced with these limits, and in particular with the collective

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96 Cf D Bodansky, 'What's in a Concept? Global Public Goods, International Law, and Legitimacy', (2012) 23 EJIL 651, 653-4 (citing *erga omnes* obligations in respect of unilateral protection of global public goods).

97 Article 5 UN Torture Convention, New York, 10 December 1984, 1465 UNTS 85.

action problems relating to international community interests that have not (yet) risen to the level of international obligations, recent scholarship has cast the international community in non-legal *global public goods* terms, borrowing from institutional economics. This approach has drawn particular attention to *unilateral action* as a means of providing such goods, on the grounds that such action could arguably compensate for the multilateral regulatory failures flowing from the principle of state consent,<sup>98</sup> as well as the lack of third-party enforcement in international law.<sup>99</sup>

Global public goods could be defined as goods that are ‘non-rival’ and ‘non-excludable’, meaning that no-one can be excluded from their benefits and that consumption by one person does not diminish consumption by another. The provision of such goods is not self-evident, as prisoners’ dilemmas may prevent necessary multilateral action from being taken. Where individual states take action, other states may tend to free-ride, *i.e.*, failing to take action but hoping to profit from other states’ investment in providing global public goods. The potential for free-riding behaviour may ultimately discourage individual state action. However, if such action could bring free-riders within the state’s jurisdictional ambit through extraterritorial regulation, global public goods could yet be provided,

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98 JL Goldsmith and EA Posner, *The Limits of International Law* (OUP 2005) 87. N Krisch, ‘The Decay of Consent: International Law in an Age of Global Public Goods’, (2014) 108 AJIL 1, 2 (stating that unilateral action appears ‘more useful for problem solving and the effective exercise of power than formal institutions and the increasingly firm and demanding processes of multilateral treaty making’). *ibid* 4 (‘consent-based structure presents a structural bias against effective action on global public goods, especially given the large number of foreign states today’).

99 JL Goldsmith and EA Posner, *The Limits of International Law* (OUP 2005) 88 (observing that only bilateral retaliation, *e.g.*, in the context of the World Trade Organization, is taken in practice). It is conspicuous that Pauwelyn, after concluding that third-party enforcement does not work, suggests as alternatives robust community enforcement, direct standing for private parties, international procedure against individual criminals, and domestic courts, but not unilateral action (J Pauwelyn, *Optimal Protection of International Law* (CUP 2008) 196-7).

even without multilateral intervention. This is the promise held by unilateral jurisdiction.

As examples of global public goods, one may intuitively think of common resources or environmental goods, such as the world climate, the ozone layer, the prevention of pollution, fish stocks, and biodiversity. Such goods have in the past also been denoted as the ‘common concern of mankind’.<sup>100</sup> The under-provision of such goods is the typical result of ‘aggregate effort problems’, arguably the most serious challenge to global public goods,<sup>101</sup> the solution to which requires joint efforts of the international community.<sup>102</sup> However, also global ‘values’, such as human rights, peace, and accountability for international crimes,<sup>103</sup> could be considered as global public goods in a broad understanding of the term. Indeed, such values could be characterized as ‘weakest link’ public goods, the benefit of which is only provided in case all states participate.<sup>104</sup> One may argue that when a human right is secured to an individual, only this individual benefits, but then, precisely because human rights are the values on which the international community as such

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100 UN General Assembly, *Protection of global climate for present and future generations of mankind*, UN Doc A/RES/43/53 (1988), para. 1 (‘Recognizes that climate change is a common concern of mankind, since climate is an essential condition which sustains life on earth’); F Biermann, ‘“Common Concern of Humankind”: The Emergence of a New Concept of International Environmental Law’, (1996) *Archiv des Völkerrechts* 426, 449; T Cottier, ‘The Emerging Principle of Common Concern: A Brief Outline’, Working Paper No 2012/20, NCCR Trade Regulation (2012). Compare with the ‘common heritage of mankind’, a term used to denote in particular areas beyond national jurisdiction, such as the deep seabed and the celestial bodies. See, e.g., *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies*, 27 January 1967, 18 UST 2410, 610 UNTS 205.

101 G Shaffer, ‘International Law and Global Public Goods in a Legal Pluralist World’, (2012) 23 *EJIL* 669, 678.

102 S Barrett, *Why Cooperate? The Incentive to Supply Global Public Goods* (OUP 2007) 74-102.

103 See with respect to peace: JL Goldsmith and EA Posner, *The Limits of International Law* (OUP 2005) 87.

104 S Barrett, *Why Cooperate? The Incentive to Supply Global Public Goods* (OUP 2007) 47-73.

rests, respect for human rights, of every single person, can be said to also provide global public benefits.<sup>105</sup> Or as Shaffer has noted, ‘the effect of an increase in the protection of human dignity on moral sensibilities is neither excludable nor rivalrous’.<sup>106</sup>

At the end of the day, global public goods, if defined broadly, may be indistinguishable from what we perceive as ‘global problems’, *i.e.*, problems that concern the world at large, and ‘cannot be separated into different sub-problems that can be solved individually’.<sup>107</sup> In this respect, Ralph Michaels has usefully categorized global problems as ‘global by nature’ (*e.g.*, climate change and other collective action problems that need to be solved by aggregate efforts of the international community), ‘global by design’ (*e.g.*, the globally accessible Internet), and ‘global by definition’, even if these problems occur within one territory (*e.g.*, crimes against humanity, which are directed at humanity at large, and thus at what it means to be an international community).<sup>108</sup>

However collective action failures are precisely characterized, what unites these characterizations is that they pinpoint state consent and inaction, and ultimately *sovereignty*, as threats to the realization and protection of global public goods, global interests, or global values.<sup>109</sup> Arguably,

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105 D Bodansky, ‘What’s in a Concept? Global Public Goods, International Law, and Legitimacy’, (2012) 23 EJIL 651, 653 (‘human rights norms provide a private benefit to the individuals concerned, but they also provide public benefits to the international community’). *ibid* 661 (characterizing accountability for international crimes as a weakest link public good).

106 G Shaffer, ‘International Law and Global Public Goods in a Legal Pluralist World’, (2012) 23 EJIL 669, 682, *fn* 49, also holding that ‘[t]he right to life and human dignity can be viewed as yet another affected public good to the extent that it affects our moral sensibilities’.

107 R. Michaels, ‘Global Problems in Domestic Courts’, in S Muller *et al* (eds), *The Law of the Future and the Future of Law* (Torkel Opsahl 2011) 167.

108 *ibid* 171 (stating that a crime against humanity ‘is by definition de-territorialized, simply because humanity transcends all territoriality’, and terming it a ‘world event’).

109 See also M Koskeniemi, ‘What Use for Sovereignty Today?’, (2011) 1 Asian JIL 61 (writing that international lawyers have criticized sovereignty from a *functional* perspective on the ground that it fails to deal with global threats).



unilateral action may remedy these failures where one state (or group of states)<sup>110</sup> extends its jurisdiction to include within its ambit foreign-based persons subject to an overly permissive regulatory regime in their home/territorial state. States can do so by imposing stringent market access conditions in relation to foreign production processes, by denying foreign vessels access to ports or taking enforcement within the port, by creating domestic tort remedies for victims of overseas corporate ventures, by prosecuting international criminals, or even by taking enforcement action abroad (*e.g.*, humanitarian intervention, but also remote searches on foreign computers or servers). Such unilateral action could be based on a (territorial or personal) nexus with the asserting state, or on no nexus at all, but simply on the underlying global value or interest to be protected (*i.e.*, universality).

The economic global public goods approach attempts to bypass the subjectivity of natural law approaches to the common interest by casting global remedial action in efficiency or welfare-enhancing terms rather than in terms of the protection of 'values' shared by an ill-defined international community. However, this global public goods approach cannot entirely escape legitimacy problems flowing from subjective determinations, however, especially not when it informs unilateral action. Even where an objective, quasi-scientific consensus exists on the good to be protected, unilateral action can cause distributional effects that lack international legitimacy in the absence of multilateral consent. States exercising unilateral jurisdiction could thus single-handedly decide on a global distribution of resources, with major resource allocation shifts being brought about as a result of the choice for a specific jurisdictional trigger. For instance, a broadly defined territoriality principle which brings foreign economic operators within the ambit of the asserting state may shift important resources from these operators and their home states

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110 Or regional organizations such as the EU. For the sake of brevity 'state' will be used in the remainder of the argument.

to the asserting state.<sup>111</sup> The danger is real here that individual states will in reality be self-serving, by bringing about inward shifts of international resources under cover of defending the global interest. Having calculated the efforts required to address a global public good challenge, *e.g.*, reducing greenhouse gas emissions, individual states may well impose disproportionate burdens on *foreign* operators and states, *e.g.*, via market access requirements. Moreover, different global public goods and values may be in tension with each other.<sup>112</sup> Justice considerations, which are arguably served by prosecuting human rights offenders, even in the courts of bystander states, may be in tension with the imperative to create peace and reconciliation, which is arguably served by deferring or foregoing prosecution of high-ranking perpetrators with a vocal constituency. Climate change mitigation, which militates in favour of important emissions reductions, even if unilaterally imposed via market access requirements, may be in tension with the right to social and economic development, which precisely militates against such reductions.

Consequently, balancing conflicting public goods and values, as well as deciding on issues of burden-sharing, are inherent to global public goods-inspired unilateralism. They are essentially *moral choices* which states make in – what they believe is – the global interest. As a result, global public goods theory cannot escape the charge of subjectivism that has been levelled at natural law approaches to the international community. Whether this subjectivism truly carries the dangers that are sometimes ascribed to it – especially unilateral hegemonic imposition of the values and norms of the powerful on the weak – is the subject of the next section.

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111 See, *e.g.*, J Scott, ‘The New EU “Extraterritoriality”’, (2014) 51 Common Market L Rev 1343, with respect to the territorial extension of EU law (arguing that ‘the EU’s choice of trigger bears deeply upon the distribution of the burden of complying with EU law and upon how easy this burden is to evade’, and ‘also impacts significantly upon how great a contribution a measure may make to the attainment of its stated objectives as well as upon the distribution of the benefits that flow from EU law’).

112 D Bodansky, ‘What’s in a Concept? Global Public Goods, International Law, and Legitimacy’, (2012) 23 EJIL 651, 656 (submitting that ‘different actors will have different preferences about which norm to choose’, and that every choice will accordingly have distributive consequences).

### 2.3 Unilateralism as hegemonic action

The most potent political critique of cosmopolitanism, and *a fortiori* cosmopolitan unilateralism, is undoubtedly that its goal of ‘serving humanity’ is a thin veneer that can barely hide imperialist or hegemonic ambitions, *i.e.*, domination of one group over another (‘Whoever invokes humanity, wants to cheat.’).<sup>113</sup> But let us for a moment reflect on what hegemony actually means. In our times, thanks to Marxist writers such as Gramsci and Laclau, it has acquired an imperialist connotation of one society exercising power over a subordinate society, with the former forcing the latter to adapt to its own wishes and its own benefit.<sup>114</sup> Etymologically speaking, however, the Greek word ‘hegemon’ simply means ‘leadership’ or ‘rule’.<sup>115</sup> No one will gainsay that, in order to address global collective action problems, some leadership is needed. Such first movers may first want to push the envelope at the multilateral level. But when these efforts fail to bear fruit as a result of

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113 Unilateralism indeed generally remains a suspect word, conjuring up images of subjectivism at best and colonialism at worst. See, *e.g.*, J Habermas, ‘Interpreting the Fall of a Monument’, (2003) 4 German L J 701, 706 (‘justification through international law can, and should be replaced by the unilateral, world-ordering politics of a self-appointed hegemon’); R Pierik and W Werner, ‘Introduction’, in R Pierik and W Werner (eds), *Cosmopolitanism in Context: Perspectives from International Law and Political Theory* (CUP 2010), 9-10, citing the concern that cosmopolitanism may risk ‘becoming part and parcel of imperialistic policies’, and referring in this respect to C Douzinas, *Human Rights and the Empire* (Routledge 2007).

Note that the terms ‘imperialism’ and ‘hegemony’ have also been used in the context of extraterritorial jurisdiction, especially as exercised by the US. See U Mattei and J Lena, ‘US Jurisdiction over Conflict Arising Outside of the United States: Some Hegemonic Implications’, (2001) 24 Hastings Int’l and Com L Rev 381, 382 (‘[T]he expansionist thrust of the jurisdiction of US courts [...] may be viewed as a sort of legal imperialism.’).

114 E Laclau and M Chantal, *Hegemony and Socialist Strategy: Towards a Radical Democratic Politics* (1985).

115 In ancient Greek times ‘hegemony’ was notably used to denote one city-state’s exercise of leadership over a league of city-states. Sparta, for instance, was the hegemon of the Peloponnesian League (6<sup>th</sup>-4<sup>th</sup> century BC), Athens was the hegemon of the Delian League (5<sup>th</sup> century BC), and Macedonia was the hegemon of the League of Corinth (4<sup>th</sup> century BC). See, *e.g.*, *Encyclopaedia Britannica*, available at <[www.britannica.com/](http://www.britannica.com/)> (last visited on 19 March 2015).

anti-cosmopolitan action, unilateral action may be appropriate. Such action need not be hegemonic in the domination sense of the word. It is not aimed at subordinating foreign peoples; instead, it has emancipatory and empowering potential, in that it is protective of the human rights of the world's downtrodden or of a neglected natural environment.<sup>116</sup> In this understanding, hegemonism is simply co-terminous with leadership.

Obviously, unilateral action carries the risk of subjective determinations of global justice. But then, multilateral action is not necessarily a panacea: multilateral negotiations rarely take place in a power-free environment.<sup>117</sup> Sometimes, international institutional law legally entrenches power structures.<sup>118</sup> If not, every participant within multilateral settings may take his own hegemonic purpose with him/her and try to convince or force the other participants – sometimes successfully – to align with this purpose.<sup>119</sup> The end-result of such negotiations may well be un-cosmopolitan and biased in favour of a small group of states. The Third World Approach to International Law has precisely highlighted this: that multilaterally developed

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116 R Howse and R Teitel, 'Does Humanity-Law Require (or Imply) a Progressive Theory of History? (and Other Questions for Martti Koskenniemi)', (2013) 27 *Temple Int'l & Comp L Rev* 377, 384-5 (admitting that one may perhaps discern kinds of hegemonic power structures underlying or supporting 'law among liberal nations', but arguing that this need not be fatal to hopefulness concerning the direction of the cosmopolitan project, citing the *empowering* potential of cosmopolitanism as the most important point). *ibid* 385 (submitting that worrying on behalf of the non-West may in itself be 'a form of neo-colonial condescension').

117 See however for an ideal-typical description of a power-free deliberative democracy: J Habermas, *Between Facts and Norms* (MIT Press 1996).

118 Compare R Pierik and W Werner, 'Can Cosmopolitanism Survive Institutionalization?', in R Pierik and W Werner (eds), *Cosmopolitanism in Context: Perspectives from International Law and Political Theory* (CUP 2010) 285.

119 M Koskenniemi, 'Constitutionalism, Managerialism and the Ethos of Legal Education', (2007) 1 *EJIL* 1, 7 ('every purpose is hegemonic in the sense of seeking to describe the social world through its own vocabulary so that its own expertise would apply and its structural bias would become the rule'). *ibid* 4 ('every system, every regime is capable of extending to the whole world, covering everything from its own perspective, the combination of solipsism and empire that Kelsen detected in the project of the nation-State').

international law is structurally biased against developing states and favours developed states.<sup>120</sup> Against the backdrop of the factual inequalities of power among states, in an earlier publication I have argued that the exercise of extraterritorial jurisdiction could actually empower weaker states, as such unilateralism need not come with humiliating compromises.<sup>121</sup> It cannot be denied, however, that stronger rather than weaker states have so far had recourse to unilateral action, which may reinforce the image of unilateralism as a tool of the powerful, in particular the Western states (the US and European states).<sup>122</sup> Surely, the reality that the weak may suffer more intensely from retaliatory action taken by the powerful, serves as a strong disincentive to unilateral action by the weak.<sup>123</sup>

That the powerful are more likely to exercise unilateral jurisdiction does not mean, however, that, when so doing, they are necessarily intent on furthering their own interests. Powerful states could well

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120 See A Anghie and BS Chimni, 'Third World Approaches to International Law and Individual Responsibility in Internal Conflicts', (2003) 2 *Chinese J Int'l L* 77.

121 C Ryngaert, *Jurisdiction in International Law* (2<sup>nd</sup> edn, OUP 2015).

122 Extraterritoriality has historically mainly been used by the US, and less often by others (TL Putnam, 'Courts Without Borders: Domestic Sources of US Extraterritoriality in the Regulatory Sphere', (2009) 63 *Int'l Org* 459, 481). Koskenniemi has observed that Europeans do not behave as legal imperialists, as they 'do not have a plan for the world, it is hard enough to have a plan for ourselves' (M Koskenniemi, 'Perceptions of Justice: Walls and Bridges between Europe and the United States', (2004) 64 *ZaöRV* 305). It is questionable, however, whether it is really true that Americans rather than Europeans engage in legal imperialism. Rubinfeld, for instance, has argued that Europeans, more than Americans, under the banner of 'international constitutionalism', support universal rights and principles with little respect for local democratic processes. Americans, in contrast, would support a form of democratic constitutionalism 'answerable to the nation's project of political self-determination over time'. (J Rubinfeld, 'Unilateralism and Constitutionalism', (2004) 79 *NYU L Rev* 1971, 1999).

123 The lower risk of harmful retaliation is not the only factor explaining developed nations' inclination to exercise extraterritorial jurisdiction: developed nations also have stronger enforcement capacities, simply because they are wealthier, or because, when it comes to extraterritorial economic law, they are more integrated into global markets. See TL Putnam, 'Courts Without Borders: Domestic Sources of US Extraterritoriality in the Regulatory Sphere', (2009) 63 *Int'l Org* 459, 483.

use their stronger enforcement capacities to protect international community interests. In fact, precisely because they have more power and capacity, in accordance with the principle of common but differentiated responsibilities, it may be *incumbent* on them to do more than others to further the global interest, and thus to behave in – what may just in appearance be – a hegemonic fashion.<sup>124</sup> ‘Power’ should not be reified, or negatively stereotyped as militating against cosmopolitan action; rather, as Howse and Teitel have observed, ‘power’ may be a shifting reality, becoming intertwined with ‘humanity-law’.<sup>125</sup>

Admittedly, in practice, unilateral jurisdiction in the global interest is, at least in the socio-economic field, often only exercised when the integrity of domestic regulation is undermined, and domestic actors’ rights and interests are affected by foreign activity<sup>126</sup> (‘levelling the playing field’). This tends to create an impression of self-centeredness, arbitrariness,<sup>127</sup> exclusivity to the detriment of less powerful actors,<sup>128</sup>

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124 Cf K Coombes, ‘Universal Jurisdiction: A Means to End Impunity or a Threat to Friendly International Relations’, (2011) 43 *Geo Wash Int’l L Rev* 419, 457 (‘there is the danger that universal jurisdiction may be *perceived* as hegemonistic jurisdiction exercised mainly by some Western powers against persons from developing nations’) (emphasis added).

125 R Howse and R Teitel, ‘Does Humanity-Law Require (or Imply) a Progressive Theory of History? (and Other Questions for Martti Koskenniemi)’, (2013) 27 *Temple Int’l & Comp L Rev* 377, 396 (citing ‘the endlessly dynamic relation of law to social reality’).

126 TL Putnam, ‘Courts Without Borders: Domestic Sources of US Extraterritoriality in the Regulatory Sphere’, (2009) 63 *Int’l Org* 459, 468; J Turley, ‘When in Rome: Multinational Misconduct and the Presumption against Extraterritoriality’, (1990) 84 *Nw U L Rev* 598.

127 AJ Colangelo, ‘A Unified Approach to Extraterritoriality’, (2011) 97 *Va L Rev* 1019, 1107 (‘Unlike international law, other nations may not have consented to, say, unilateral projections of US securities or antitrust laws within their territories, and absent a US nexus, the choice of US law appears arbitrary.’).

128 N Krisch, ‘The Decay of Consent: International Law in an Age of Global Public Goods’, (2014) 108 *AJIL* 1, 31 (‘nonconsensualism [...] creates more exclusive decision-making structures that reduce the number of decision-makers’); *ibid* 39 (nonconsensualism ‘does away only with the consent of the less powerful, and it can easily become a tool of hierarchy and control’).

domination,<sup>129</sup> or outright legal imperialism.<sup>130</sup> But one should not forget that most of the time, these so-called ‘hegemonic’ actors may just be enforcing shared values or challenges of the international community, even if they have technically not yet risen to the level of public international law norms: there is undeniably a global interest in accountability for international crimes, transnational corruption, anti-trust conspiracies, securities fraud,<sup>131</sup> or in addressing climate change. These global interests are, moreover, often laid down in various binding or non-binding international instruments.<sup>132</sup> It is somewhat disingenuous then to blame states for enforcing these instruments.

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129 JA Meyer, ‘Dual Illegality and Geoambiguous Law: A New Rule for Extraterritorial Application of US Law’, (2010) 95 Minnesota L Rev 110, 111 (‘A superpower [the US] no longer bent on conquering more territory stands to benefit when it instead can unilaterally project its law and corresponding enforcement resources to regulate what people do in other countries.’).

130 K Raustiala, *Does the Constitution Follow the Flag? The Evolution of Extraterritoriality in American Law* (OUP 2009) 224 (submitting that extraterritorial jurisdiction ‘enabl[es] the United States to unilaterally manipulate legal difference so as to better serve its interests’ while ‘enhancing American power and interests on the world stage’).

131 HL Buxbaum, ‘Transnational Regulatory Litigation’, (2006) 46 Va J Int’l L 251, 255, 268, 298 (arguing that in ‘transnational regulatory litigation’ cases, the US domestic regulatory law that is applied extraterritorially, e.g., regarding antitrust, securities, and corruption, ‘reflects an internationally shared norm’). But see the opinion of Justice Breyer in the *Hoffmann-LaRoche* case, *F Hoffmann-LaRoche Ltd v. Empagran SA*, 542 US 155, 169 (‘where foreign injury is independent of domestic effects, Congress might have hoped that America’s antitrust laws [...] would commend themselves to other nations as well’ [...] ‘if America’s antitrust policies could not win their own way in the international marketplace for such ideas, Congress, we must assume, would not have tried to impose them, in an act of legal imperialism, through legislative fiat’).

132 See, e.g., UN General Assembly, United Nations Convention Against Corruption, 31 October 2003, UN Doc A/58/422; OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Paris, 21 November 1997; Kyoto Protocol to the UN Framework Convention on Climate Change, 11 December 1997; UN General Assembly, Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, United Nations, Treaty Series, Vol 78, p 277; UN General Assembly, Rome Statute of the International Criminal Court, 17 July 1998, ISBN 92-9227-227-6 (1998). See as regards cooperation in the field of antitrust law: the International Competition Network, which counts 104 competition agencies from 92 jurisdictions (See <[www.internationalcompetitionnetwork.org](http://www.internationalcompetitionnetwork.org)>

Such action cannot be captured by orthodox legal positivism, but nor can it by natural law. As legal and political instruments do not always confer unilateral jurisdictional authority to enforce the values enshrined in them, the exercise of such authority may transcend the explicit consent of states – thus undermining the main tenet of positivism. But as this authority is not made out of thin air, but finds its normative basis in international instruments and broadly defined international norms and policies, it can still be traced back to the consent of states. This consent may possibly not extend to procedural issues of enforcement, but the relevant issue is that it applies to the *substantive values* which states may subsequently want to enforce unilaterally. This view ties in well with recent anti-formalistic legal scholarship that emphasizes extra-positivist sources of international law authority, namely those based on substantive authority and effectiveness. Nijman and Nollkaemper put it as follows:

Part of the answer [as to who or what validates non-positive law sources of international law] is found in the fact that deformalization is a parallel development to the emergence of common values. International law does not (only) find its authority in binding rules and principles, *i.e.* in conformity with the positivist model, but is in a way more substantive since it is grounded on international norms as keepers of universal common *values* rather than as binding rules of positive international law. In this role, (binding or non-binding) international norms have authority because of the values they represent [...]<sup>133</sup>

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(last visited on 16 April 2015)). For cooperative networks in the field of securities/capital markets regulation: International Organization of Securities Commissions (IOSCO), the Financial Stability Board (FSB), the Council of Securities Regulators of the Americas (COSRA), and the Financial Action Task Force (FATF).

133 JE Nijman and A Nollkaemper, 'Beyond the Divide', in JE Nijman and A Nollkaemper (eds), *New Perspectives on the Divide between International and National Law* (OUP 2007) 353.



This reasoning allows us to justify unilateralism on the basis of a legalized form of Kantian, deontological ethics,<sup>134</sup> as an international norm arguably provides the requisite substantive authority for unilateral action. From a constructivist international relations perspective, such unilateralism may, theoretically at least, be likely to gain acceptance by states, as the existence of the international norm may serve a socializing function and influence the perception of legitimate behaviour.<sup>135</sup>

It may happen, however, that no such norm can be discerned, namely where prisoners' dilemmas have made any agreement on substantive norms well-nigh impossible – even if any reasonable person sees that collective action is urgently needed. Assume, for instance, that an international agreement on tackling climate change fails to materialize, even if all scientific evidence shows that collective action should be taken to avert a catastrophe. If states take unilateral remedial action, such action may not be justified on the basis of deontological ethics, let alone on the basis of classical international law, as there is simply no substantive norm to be enforced. The consequences of such action may, however, be globally beneficial and derive their legitimacy from a *consequentialist* or *utilitarian* ethical perspective, which takes into account an action's potential to enhance global welfare.<sup>136</sup> Given the challenges which humanity faces in terms of supplying global public goods and providing global

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134 I Kant, *Groundwork of the Metaphysics of Morals* (Harper and Row Publishers 1964).

135 JL Dunoff and MA Pollack, 'International Law and International Relations: Introducing an Interdisciplinary Dialogue', in JL Dunoff and MA Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (CUP 2012) 8, 12. See for an exposition of the relationship between constructivism and international law in the same volume: J Brunnée and SJ Toope, 'Constructivism in International Law', in JL Dunoff and MA Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (CUP 2012) 119–45.

136 See notably the works of the 19th century British philosophers Jeremy Bentham and John Stuart Mill, e.g., J Bentham, *Introduction to Principles of Morals and Legislation* (printed for publication 1780, published 1789) and JS Mill, *The Principles of Political Economy: With Some of Their Applications to Social Philosophy* (1848).

justice, value-based consequentialism may in certain circumstances arguably have to prevail over formal law.<sup>137</sup> Such a position finds its conceptual roots in Max Weber's 'ethics of responsibility',<sup>138</sup> and the New Haven policy-approach to international law which emphasizes legal *processes* over formal rules.<sup>139</sup> The important point made here is that it abandons explicit *consent*, the cornerstone of the positive international legal order as we know it. However, embracing the Grotian premise that international law needs to be progressively developed given its rudimentary state, international law is not, and cannot be, solely the product of the express will of states.<sup>140</sup> In the Grotian tradition, as also espoused by Hersch Lauterpacht, reason, ethics, and the law of nature may demand that international legal action be taken beyond the express will of states.<sup>141</sup> For our research object, this means that asserted hold-outs' resort to 'reasons of state' so as to block the taking of necessary multilateral action in the common interest should not be rewarded. In order to respond to such multilateral blockage, the development of international law should arguably be geared towards relaxing the principles of non-intervention and territorial jurisdiction, so that unilateral action could more easily be taken. I am cognizant of the dangers of domination and abuse that go with an authorization to act unilaterally. But at the

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137 *Contra*: M Koskenniemi, 'What Use for Sovereignty Today?', (2011) 1 Asian JIL 65 (denouncing the anti-formalist nature of contemporary global law, which in his view does no longer protect formal sovereignty, but replaces it by 'global systems of management' that render everything 'negotiable, revisable in view of attaining the right outcome').

138 M Weber, 'Politik als Beruf (1918/19)', in M Weber, *Gesammelte politische Schriften von Max Weber* (3rd edn, Tübingen 1971) 550 ('You should resist evil with force, otherwise you are responsible for its getting out of hand.').

139 *Contra*: M Koskenniemi, *The Gentle Civilizer of Nations* (CUP 2001) 485 (decrying this instrumentalism that replaces formal law by a wider standard policy guideline and the 'values of liberal democracy').

140 H Lauterpacht, 'The Grotian Tradition in International Law', (1946) 23 BYIL 1, 21.

141 *ibid* 21-2, relying on Grotius's *De Jure Belli ac Pacis* ('The significance of the law of nature in the treatise is that it is the ever-present source for supplementing the voluntary law of nations, for judging its adequacy in the light of ethics and reason, and for making the reader aware of the fact that the will of states cannot be the exclusive or even, in the last resort, the decisive source of the law of nations.').

end of the day, allowing action in the common interest may surely be preferable to prohibiting altogether. Later in this study, I will nevertheless deal at length with various techniques that mitigate the impact of unilateral action on foreign states and private actors.

#### 2.4 Anti-formalism and illegality

The upshot of the foregoing analysis is that, where states rely on natural law-based reasoning to either fill gaps in international law enforcement or to protect interests which are undeniably common, ultimately a measure of gratitude that they are willing to spend precious enforcement resources and endure foreign criticism when acting unilaterally in the global interest, may be called for.

This reasoning may sound convincing on policy grounds, but there is no denying that it is at loggerheads with the dominant positivist paradigm in international law, revolving around the principle of consent. In the absence of a clear conferral of jurisdiction by international law, the only justification of unilateral jurisdiction is simply that it is 'normatively desirable', in the sense that the protection of global values, global interests, or global public goods serves 'humanity' or the 'international community'. The latter concepts may not be further justified by recourse to the law, because either the law does not contain a jurisdictional authorization or because the relevant interest is not protected by (legal) norms in the first place. Put differently, the enforcement of international community interests may be *extraneous to the law* and, on that ground, engender opposition. Notably the extraterritorial overtones of unilateral action in the common interest are likely to be suspect and prone to contestation.

Accordingly, unilateral action vindicating community interests may be unlawful in a conservative, consent-based conception of international law – a conception that is not lacking adherents, especially not in international legal practice. However, even reasoning from a formalist perspective, it bears notice that in due course states may well accept other ordering principles, seizing a 'Grotian', paradigm-

shifting moment. In fact, this is how customary international law often changes: states start to act unilaterally in violation of an international norm, other states accept this action, and a new norm supplants the former. There are many examples of such at first sight ‘unfriendly’ unilateralism,<sup>142</sup> that was considered to be in violation of extant law, but was gradually accepted as a proper and lawful course of action. Iceland’s successful extension of its maritime zones from 1952 onwards, resulting in the so-called Cod Wars with the United Kingdom, is just one example of the exercise of unilateral jurisdiction arguably in the common interest, in the case protecting fish stocks from overfishing by foreign fleets.<sup>143</sup> This extension gradually crystallized as customary international law, in the form of the Exclusive Economic Zone to which every coastal state is entitled.<sup>144</sup> The extension of military enforcement jurisdiction after 9/11 through an expansive reading of the right to self-defense against non-state actors harboured by states, offers another example.<sup>145</sup> Such action was pioneered by the United States in Afghanistan and has recently been carried out against Islamic State positions in Syria and Libya, without meeting strong protest.<sup>146</sup> But as long as a

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142 M Hakimi, ‘Unfriendly Unilateralism’, (2014) 55 Harv Int’l L J 105.

143 It is self-evident that Iceland, being the coastal state, had itself a particularly strong economic interest in its jurisdictional claim – in the absence of which the claim would not have been made in the first place – but it remains no less true that the appropriation of a maritime zone by one state created ‘ownership’. Ownership provides incentives for responsible stewardship of resources. Somewhat paradoxically perhaps, this successful jurisdictional claim over one global public good – fisheries conservation – came at the cost of another global public good, the freedom of the high seas.

144 See currently Article 56 *et seq.*, UN General Assembly, Convention on the Law of the Sea, 10 December 1982 (UNCLOS).

145 *E.g.*, J Paust, who has argued that customary international law now allows for the exercise of self-defence against armed non-state actors where the state on whose territory the latter are present is unable or unwilling to adequately address the threat emanating from them. See, *e.g.*, J Paust, ‘Self-Defense Targetings of Non-State Actors and Permissibility of US Use of Drones in Pakistan’, (2010) 19 J Transnat L & Pol’y 237; *ibid.*, ‘Permissible Self-Defense Targeting and the Death of Bin Laden’, (2011) 39 Denver J Int’l L & Pol’y 569.

146 The only protest may have come from the Russian Federation, although it related to the lack of consent from the Syrian Government rather than the presumed illegality of the exercise of collective self-defence against non-state actors on the territory

unilateral claim of jurisdiction does *not* crystallize as customary law, or as treaty law for that matter, in a positivist understanding of international law, it will technically remain illegal under international law.

This does not mean, however, that claims of unilateral jurisdiction in the common interest are *per se* illegal. Some of these claims could well be justified under a treaty or customary law-based universality principle, or even on the basis of a (broadly defined) territoriality principle. But also such claims may ultimately find themselves in a no man's land between legality and illegality. Like any claim of cosmopolitan unilateralism, they are in tension with the time-honoured principle of territorial sovereignty and are likely to be opposed. For instance, African states and China have recently started to voice doubts over the lawfulness of universal jurisdiction over international crimes,<sup>147</sup> doubts which may well weaken the

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of a state unable or unwilling to address them: see The Moscow Times, Russia Slams US Air Strikes Against Islamic State in Syria, 23 September 2014, available at <[www.themoscowtimes.com/news/article/russia-slams-u-s-air-strikes-against-islamic-state-in-syria/507661.html](http://www.themoscowtimes.com/news/article/russia-slams-u-s-air-strikes-against-islamic-state-in-syria/507661.html)> (last visited on 19 March 2015), referring to the statement made by the Russian Foreign Ministry ('Any such action can be carried out only in accordance with international law. That implies not a formal, one-sided "notification" of airstrikes but the presence of explicit consent from the government of Syria or a corresponding UN Security Council decision.'). Note, however, President Obama's 2014 speech before the UN General Assembly, which appears to betray that the desired shift in the law has not fully occurred. See Remarks by president Obama in Address to the United Nations General Assembly, New York, 24 September 2014, available at <[www.whitehouse.gov/the-press-office/2014/09/24/remarks-president-obama-address-united-nations-general-assembly](http://www.whitehouse.gov/the-press-office/2014/09/24/remarks-president-obama-address-united-nations-general-assembly)> (last visited on 19 March 2015) (citing 'the failure of our international system to keep pace with an interconnected world', and the need to 'renew the international system', and arguing that 'we cannot rely on a rule book written for a different century').

147 See notably African Union, *Decision on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction*, AU Doc Assembly/AU/Dec.199(XI) (2008) para. 5(i); African Union, *Decision on the Abuse of the Principle of Universal Jurisdiction*, AU Doc Assembly /AU/11 (XIII) (2009) and African Union, *Decision on the Implementation of the Assembly Decision on the Abuse of the Principle of Universal Jurisdiction*, AU Doc Assembly/AU/3(XII) (2009) (holding that (the abuse of) the principle of universal jurisdiction is a development that could endanger international law, order and security). China argued that universal criminal jurisdiction only exists with respect to piracy. See Statement by Ms Guo Xiaomei, Counsellor and Legal

lawfulness of universal jurisdiction under customary international law.<sup>148</sup> Jurisdictional extensions of environmental or economic law in the common interest may be similarly problematic, as they are often just *nominally* based on territoriality. In the past, the extraterritorial application of US antitrust law, which was based on territorial effects in the United States, led to fierce protests – although arguably it was globally beneficial. More recently, the EU’s use of territoriality as a hook to reduce aviation emissions, and thus combat global climate change,<sup>149</sup> has come under severe criticism and has even forced the EU to back down and pursue a multilateral solution in the framework of the International Civil Aviation Organization.<sup>150</sup>

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Adviser of the Chinese Mission to the UN on the Scope and Application of the Principle of Universal Jurisdiction at the Sixth Committee of the 66th Session of the General Assembly, 12 October 2012; Statement by Mr Xiang Xin At the 69th Session of the UN General Assembly on the Scope and Application of the Principle of Universal Jurisdiction, 15 October 2014.

- 148 See, e.g., China’s reaction to an investigation launched in Spain with respect to crimes allegedly committed by Chinese officials: M Martina and R Birsel, ‘China denounces Spanish court’s Tibet case against ex-president’, Reuters, 14 October 2013, available at <<http://uk.reuters.com/article/2013/10/14/uk-china-spain-tibet-idUKBRE99D08W20131014>> (last visited on 19 March 2015). See for a comprehensive study on the tension between prosecution of international crimes, and state sovereignty, co-edited by a Chinese state official: M Bergsmo and L Yan (eds), *State Sovereignty and International Criminal Law* (Torkel Opsahl Academic EPublisher 2012).
- 149 Under its Aviation Directive (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 [2009] OJ L 8/3) the EU considered a foreign aircraft’s departing from, or landing at an aerodrome located within its territory, as a sufficient territorial nexus for the application of EU law to the entire flight trajectory, also outside EU airspace. The EU’s approach to territory was vindicated by the Court of Justice of the European Union as being in keeping with the territoriality principle under customary international law. See also G De Baere and C Ryngaert, ‘The ECJ’s Judgment in Air Transport Association of America and the International Legal Context of the EU’s Climate Change Policy’, (2013) 18 *European Foreign Affairs Review* 389.
- 150 The EU’s Aviation Directive has been challenged before the European Court of Justice by foreign air carriers on the ground that it is extraterritorial and violates the customary law principle of non-intervention. The plaintiffs were however rebuffed by the Court, which considered arrival or departure from an EU aerodrome to be a sufficient territorial connection for the exercise of territorial jurisdiction (see Case C-366/10, *Air Transport Association of America and Others v. Secretary of State for*

## 2.5 Concluding observations

Eventually, any assertion of cosmopolitan jurisdiction, whether or not it could *prima facie* be justified as a matter of positive international law, is likely to be opposed, simply because it fits poorly with the territorial or sovereignty-based structure of our Westphalian order. Westphalia carved the world up in discrete territorial units with exclusive territorial jurisdiction. Accordingly, in the Westphalian view, any assertion of jurisdiction that reaches beyond a state's borders, or cannot be linked to attributes of territorial sovereignty,<sup>151</sup> can only be suspicious.

In the next part, I will seek to develop an intellectual history of world jurisdictional order, with a view to ascertaining whether territory is inevitable or whether, instead, seeds of alternative (international) community-based understandings could be found of which the influence reaches to this very day.

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*Energy and Climate Change (ATA)*, Judgment of 21 December 2011, OJ C 49/7, 18 February 2012, para. 125; see for a critical appraisal: G De Baere and C Ryngaert, 'The ECJ's Judgment in Air Transport Association of America and the International Legal Context of the EU's Climate Change Policy', (2013) 18 *European Foreign Affairs Review* 389). Still, apparently because of concerns over jurisdictional overreach, the entry into force of the Directive was temporarily postponed in favour of finding a multilateral solution at the International Civil Aviation Organization (see European Commission, MEMO/12/854 (12 November 2012), stopping the clock of ETS and aviation emissions following last week's International Civil Aviation Organization (ICAO) Council) and later application of the Directive was limited to emissions generated within EU airspace (see Regulation (EU) No 421/2014 of the European Parliament and of the Council amending Directive 03/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community, in view of the implementation by 2020 of an international agreement applying a single global market-based measure to international aviation emissions [2014] OJ L 129/1).

<sup>151</sup> In the criminal law, active and passive personality-based jurisdiction and protective jurisdiction have gone largely unopposed, because they operate on the basis of a link to a territorially delimited sovereign state (nationality, respectively, security).





### 3 Territory and community ascending and descending: a historical and empirical reconstruction

In the previous section, I refuted the political critique that unilateral action is necessarily hegemonic and should therefore be shunned. Given the problems which the world faces, I cautiously supported cosmopolitan jurisdiction. In this section, I will address the main *legal* obstacle to unilateral action aimed at furthering global values, or the interests of a borderless international community: the hallowed territoriality principle. Pursuant to this principle, the cornerstone of world jurisdictional order, states are normally only allowed to address activities arising in their own territory. For a state to address foreign-based or -originating activities would unduly interfere in the internal affairs of another state, unless the state can rely on a permissive principle of extraterritorial jurisdiction.

International lawyers have tended to take territoriality as something natural or given, with their task being reduced to clarify its outer bounds. Asked to review whether a jurisdictional assertion is in keeping with the principle of territoriality, they would ascertain the strength of the territorial connection (conduct/effects) with the asserting state. They would conclude either that this connection is sufficiently strong, in which case the assertion is lawful, or that it is too weak, in which case the assertion is unlawful. Whether the connection is too strong or too weak is essentially an interpretative exercise, factoring in state practice and – more often than not – common sense. In this part, however, I will subject territoriality *as a principle* to critical scrutiny. Drawing on intellectual history, I will ascertain how territory came to occupy its current prominent place in international legal thinking and whether alternative conceptions

of jurisdiction could be imagined (Section 3.1). This reconstructive endeavor may open new *vistas* for community-based, including international community-based, contemporary understandings of the law of jurisdiction (Section 3.2).<sup>152</sup>

### 3.1 Territory and community historically reconstructed

A political geographer, Stuart Elden, has written this wonderful book, *The Birth of Territory*, which is not well-known in legal circles, but most insightfully clarifies how territory rose to prominence, and how alternative forms of ‘spatiality’ could be contemplated. This work shows that territory is, in essence, political technology that spatially delimits sovereignty; with the help of the science of cartography, it was used by modern rulers to establish a rational and administrative state that held a monopoly on coercion and violence within a given area.<sup>153</sup> Accordingly, the centrality of territoriality in the 1648 Peace of Westphalia – the ‘free exercise of territorial right, in ecclesiastical and political matters’ in the constituent parts of the ‘Holy Roman Empire’ –<sup>154</sup> was by no means an accident or a random choice; instead, it was the legal culmination of a centuries-long political, economic, and epistemic development, the roots of which may lie in the development of a land-based feudal system and the rediscovery of Roman law in the Middle Ages.<sup>155</sup>

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152 Compare also R Pierik and W Werner, ‘Can Cosmopolitanism Survive Institutionalization?’, in R Pierik and W Werner (eds), *Cosmopolitanism in Context: Perspectives from International Law and Political Theory* (CUP 2010) 286 (arguing that the deconstruction of established meanings with a constructive purpose can ‘give voice to suppressed narratives, and open up our mind to alternative ways of acting and thinking’).

153 See also M Weber, ‘Politik als Beruf’, in J Winckelmann, *Gesammelte Politische Schriften* (Mohr 1988) 510-1: ‘The state is that human community, which within a certain area or territory [...] has a monopoly of legitimate physical violence.’ (cited in S Elden, *The Birth of Territory* (University of Chicago Press 2013) 327, fn 42).

154 Treaty of Osnabrück, Article VIII, para. 1; and Treaty of Münster, para. 64 (cited in S Elden, *The Birth of Territory* (University of Chicago Press 2013) 312, fn 276).

155 See also JG Ruggie, ‘Territoriality and Beyond: Problematising Modernity in International Relations’, (1993) 47 *Int’l Org* 139. Note that this feudal system, which existed in Western Europe between the 10th and 14th century, indeed applied law to

To fully appreciate the meaning of territory as a jurisdictional principle, it is advisable to briefly trace its etymology. The earliest origins of territory can arguably be found in the work of the Roman Scholar Marcus Terentius Varro (116 BC – 27 BC), who defined ‘territorium’ as ‘[t]he place which is left near a *colonis* as a common property for the farmers [...] because it is trodden [territur] most.’<sup>156</sup> But the meaning of territory that has proved to be most enduring is the one associated with the state’s monopoly on coercion and force. This meaning was pioneered by the Roman military strategist Sextus Iulius Frontinus (ca. 35-103 AD), who defined a territory as ‘something established for the purpose of terrifying [terrendo] the enemy’.<sup>157</sup> As Sextus Pomponius pointed out a few decades later (138 AD), this ‘terrifying within the territory’ could also be carried out by a legal officer: ‘the territorium is the sum of the lands within the boundaries of a *civitas*, which some say is so named because the magistrate of a place has, within its boundaries, the right of terrifying, that is expelling’.<sup>158</sup> This role of territory was picked up by the influential Italian commentator of Roman law Bartolus de Saxoferrato (1313-1357), who was of the view that military occupation of a territory grounded authority over the same,<sup>159</sup> and then went on to give arguably one of the first definitions of jurisdiction, namely the ‘power to punish or fix the limits of the laws over the terrified place’.<sup>160</sup> The alleged nexus between terror and territory was

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land, or at least to ‘people in the place that they were’, but that ‘this geographical focus was scattered, vague, and often overlapping in terms of jurisdiction’ (S Elden, *The Birth of Territory* (University of Chicago Press 2013) 154-5).

156 Varro, ‘De Lingua Latina’, in *On the Latin Language*, translated by RG Kent (Latin-English edn, William Heinemann 1938) V, iv, 21 (cited in S Elden, *The Birth of Territory* (University of Chicago Press 2013) 63, fn 121).

157 Frontinus, *De controversiis*, 6, 7 (cited in S Elden, *The Birth of Territory* (University of Chicago Press 2013) 84, fn 340).

158 *Digest*, L.16.239 (cited in S Elden, *The Birth of Territory* (University of Chicago Press 2013) 222, fn 69).

159 *Digest*, L.16.239, para. 8; Bartolus, on *Codex*, 1.1, para. 46 (cited in S Elden, *The Birth of Territory* (University of Chicago Press 2013) 222, fn 66).

160 S Elden, *The Birth of Territory* (University of Chicago Press 2013) 222, fn 70.

later confirmed by Grotius<sup>161</sup> and implicitly also by Leibniz, who defined territory respectively jurisdiction, as the right respectively faculty of forcing or coercing.<sup>162</sup>

For our object of study, this nexus between jurisdiction and terror means that legal authority follows the exercise of *de facto* power over a territory, irrespective of how this power has been acquired. But then, it is key to understand that this ‘might makes right’ argument does not support the unlimited projection of power, *e.g.*, to defend a perceived global interest. After all, the spatial extension of the ruler’s jurisdiction is limited by its territory. As the well-known mediaeval commentator Baldus de Ubaldis (1327-1400) wrote, territory and jurisdiction go together ‘as mist to a swamp’.<sup>163</sup> Or, to put it in Elden’s words: ‘Territory is [...] not just the limit of the jurisdiction but its very definition.’<sup>164</sup> Accordingly, in the understanding of jurisdiction as it has evolved since the Middle Ages, there is in principle no room for extraterritorial jurisdiction. Early modern sovereignty theorist Jean Bodin (1530-1596) put it succinctly: ‘the magistrate has no power to command out of his own territory or jurisdiction’.<sup>165</sup> No exception was made for the protection of the global interest, as arguably at the time no ‘international community’ with ‘common interests’ existed.

That being said, as indicated earlier, territory is political technology that was and is used by the powers-that-be to entrench their interests. The ‘modern and rational’ discourse of territory was used in particular to do away with personal jurisdictional bonds between people and to create loyalty to ‘the state’.<sup>166</sup> And indeed, after 1648,

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161 *ibid* 238, fn 231.

162 *ibid* 318, fn 332.

163 *ibid* 148, fn 149.

164 *ibid* 232 (reflecting on Baldus).

165 *ibid* 267, fn 211.

166 Cf JG Ruggie, ‘Territoriality and Beyond: Problematizing Modernity in International Relations’, (1993) 47 *Int’l Org* 139, 151 (defining territorial rule in the modern state as the ‘consolidation of all parcelized and personalized authority into one public realm’).

such community-based loyalties gradually lost ordering power to the benefit of the state, to the extent that totalitarian regimes in the 20<sup>th</sup> century were even bent on destroying the family, the most natural community, through an elaborate system of snitching and denunciation (notably in the Soviet Union).<sup>167</sup> For the advocates of territoriality, a community-based jurisdictional system was seen as backward and irrational, and territory as modern and pacifying.<sup>168</sup> But historically, community (*societas*) rather than territory (*civitas*) was the dominant system of government, as pointed out by the father of modern anthropology, Morgan, in his 1877 book *Ancient Society*.<sup>169</sup> As Sassen wrote, rights were embedded ‘in classes of people rather than in territorially exclusive units’.<sup>170</sup> In pre-modern times, people obviously occupied territory, but the crucial thing is that it did not define them.<sup>171</sup> Even in relatively advanced societies, such as Ancient Greece, administrative divisions were community-based rather than territorial. The *demes* (units) of Attica did not have strict boundaries, and membership of these units was hereditary, based on kinship, rather than geographical. A person who moved would still belong to his father’s *deme*. Also the Greek *polis*, which we have come to view as a ‘city-state’, was essentially an association of citizens which happened to find themselves in one place, without strict boundaries.<sup>172</sup> Even in Rome, the Assembly was organized according to tribal lines, citizenship was based on descent rather than terri-

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167 See in particular the work of social-historian P Ginsborg, *Family Politics: Domestic Life, Devastation and Survival: 1900-1950* (Yale University Press 2014).

168 M Koskenniemi, ‘What Use for Sovereignty Today?’, (2011) 1 *Asian JIL* 65 (noting that – territorial – sovereignty served the practical purpose of pacifying European societies, apart from doing away with papal and imperial power).

169 LH Morgan, *Ancient Society; or, Researches in the Lines of Human Progress from Savagery, Through Barbarism to Civilization* (H Holt 1877).

170 S Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages* (Princeton University Press 2006) 32.

171 JG Ruggie, ‘Territoriality and Beyond: Problematizing Modernity in International Relations’, (1993) 47 *Int’l Org* 139, 149.

172 S Elden, *The Birth of Territory* (University of Chicago Press 2013) 31-7, discussing the administrative reforms by the statement Kleisthenes in the 6<sup>th</sup> century BC. See on the *polis*: *ibid* 45 (defining the *polis* as an ‘association of citizens having a constitution’).

torial residence, and the Roman *limes* were not fixed lines.<sup>173</sup> This personal, kinship-based conception of jurisdiction continued into the Middle Ages, but in the late Frankish period, a shift towards territoriality was noticeable, later accentuated by the establishment of a land-based feudal system. Epistemic changes (notably the transposition of the Roman law concept of ‘property’ to the field of international relations), the siding of cities with rational kings rather than capricious feudal lords,<sup>174</sup> and the development of cartography that allowed for unambiguous territorial demarcation ultimately sealed the fate of community-based understandings of jurisdiction in favour of territoriality. Still, in early modern times, merchant guilds continued to organize relatively autonomous jurisdictional powers over their members, and, importantly for our purposes, long-distance trade between cities and corporate groups flourished,<sup>175</sup> regulated by forms of non-territorial transnational law later known as the *lexmercatoria*.

This historical reconstruction demonstrates that territory is contingent and answering to practical exigencies that arose at the time.<sup>176</sup> This also means that other jurisdictional modes than territory can be envisaged, notably those based on community. Community-based jurisdiction was not limited by geography: community rulers had jurisdiction over their members wherever they found themselves. This irrelevance of geography is obviously most conspicuous with respect to nomadic tribes having no fixed abode and straddling different geographical areas. But also more developed communities may have a strong sense of self-identification, such as the various diasporas.<sup>177</sup>

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173 S Elden, *The Birth of Territory* (University of Chicago Press 2013) 53-4, 92.

174 S Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages* (Princeton University Press 2006) 47 (‘towns preferred the more rational, central administration of royal protection to that of lords’).

175 *ibid* 29.

176 M Koskenniemi, ‘What Use for Sovereignty Today?’, (2011) 1 *Asian JIL* 65 (noting that sovereignty was not considered valuable ‘because of some transcendental ideal embodies in it’).

177 Cf R Cohen, *Global Diasporas: An Introduction* (2<sup>nd</sup> edn, Routledge 2008).

Community-based jurisdiction also comes out most strongly in international trade relations as they developed from the late Middle Ages onwards, a development which ushered in the seemingly borderless and instantaneous capitalist world in which we currently live. Accordingly, seeds of a 'global community' could historically be found – although such a global community was a functionally differentiated one, with people identifying with their ethnic brethren and traders identifying with their peers, for particular purposes and life projects.

Seeds of a more encompassing international, and even universal, community could however also be found. Until 1806, so even after the 1648 Peace of Westphalia which affirmed the territorial princes' independence, the Christian world, also in its secular incarnation, used the fiction that the European particularized, territorial rulers were somehow subordinate to the Holy Roman Empire. This Empire, with the Emperor as its temporal head and the Pope as its spiritual head, was considered to be the successor of the borderless and 'universal' Roman Empire.<sup>178</sup> For Leibniz, the nominal hierarchical relationship between the Emperor and the territorial rulers translated in the former enjoying 'majesty', *i.e.*, a higher authority than the 'sovereignty' accruing to territorial rulers, although in practice the Emperor could not intervene in the internal affairs of the princes who behaved as emperors in their own right (*Rex in regnosuoest Imperator regni sui*).<sup>179</sup>

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178 J Gordley, 'Extra-territorial Legal Problems in a World without Nations: What the Medieval Jurists Could Teach Us', in G Handl, J Zekoll and P Zumbansen (eds), *Beyond Territoriality: Transnational Legal Authority in an Age of Globalization* (Martinus Nijhoff Publishers 2012) 40-1; F Kratochwil, 'Of Systems, Boundaries, and Territoriality: An Inquiry into the Formation of the State System', (1986) 39 *World Politics* 35-6 (submitting that the Roman *limes* was not a boundary, but only a temporary stopping place, indicating the end of the *Pax Romana*, and stating that boundaries existed only in private legal relations, with respect to property rights).

179 Leibniz, 'De Jure Suprematus', XI; and Leibniz, *Political Writings*, 117 (cited in S Elden, *The Birth of Territory* (University of Chicago Press 2013) 320). See also Leibniz, 'De Jure Suprematus', XIII (cited in *ibid* 318, fn 339) (submitting that the princes within the empire are as powerful 'in their territories as the Emperor in the

Theoretically speaking, when an empire has no boundaries, harbours universal aspirations, and does not recognize sovereign equality, public international law, including the law of jurisdiction, has no *raison d'être*; only imperial public law has.<sup>180</sup> This sheds new light on our research object. Territorial and jurisdictional limitations of cosmopolitan action could be overcome by casting such action in historical 'empire' terminology.<sup>181</sup> But then, such an unlimited empire has largely been a historical fiction. Naturally there were other polities beyond the Roman *limes*, and the Roman Empire never exercised absolute control within its own borders, leaving jurisdiction to local rulers.<sup>182</sup> Only *ontologically* these rival rulers were not acknowledged as valid legal entities. As such entities – notably relatively independent entities *within* the Empire – factually existed, however, the medieval commentators of Roman law texts sought to reconcile the ontological universality of the Empire with the empirical reality of a multitude of local territorial rulers. These writers recognized that there was only one law – the *ius commune*, deriving from Roman law – but also stated that the Emperor could give express or tacit permission for limited modifications to the general background rules, brought about by local territorial rulers.<sup>183</sup> Such rules were considered to

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Empire'). JG Ruggie, 'Territoriality and Beyond: Problematizing Modernity in International Relations', (1993) 47 Int'l Org 139, 152.

180 S Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages* (Princeton University Press 2006) 40.

181 Obviously, this language of empire and universalism comes with its own problems of equity, in particular as a result of Western European imperialism masking as a civilizing mission universalizing particularist normative claims. See IM Wallerstein, *European Universalism: The Rhetoric of Power* (The New Press 2006) 40-4, as well as later in this study.

182 S Elden, *The Birth of Territory* (University of Chicago Press 2013) 83. In this respect, Leibniz makes an interesting distinction between 'jurisdiction' and 'territory', defining the latter as the 'highest right of forcing or coercing' accruing to the territorial ruler (such as the Emperor), whereas jurisdiction would be 'the simple faculty of coercing' accruing to the 'lord of the village'. Leibniz, 'De Jure Suprematus', X, and Leibniz, *Political Writings*, 115-6 (cited in *ibid* 318, fn 330, 332).

183 J Gordley, 'Extra-Territorial Legal Problems in a World without Nations: What the Medieval Jurists Could Teach Us', in G Handl, J Zekoll and P Zumbansen (eds),



be only variations of the *ius commune*, which are ultimately based on a universally shared conception of justice. As Ruggie observed, the discreet political units indeed viewed themselves as ‘municipal embodiments of a universal moral community’.<sup>184</sup>

This goes to show that, at least in theory, a non-territorial ‘international community’ with a common morality was in existence from the times of the Roman Empire until the disappearance of the Holy Roman Empire. For the law, this meant that conflicts between territorial laws were in principle excluded. To be true, with the entrenchment of state power in modern times and the variation in legal rules, this assumption gradually proved to be a fiction. To deal with actual legal conflicts, the ‘conflict of laws’ or ‘private international law’ developed as a separate branch of the law, consisting of rules designating, on the basis of connecting factors, the legal system allowed to apply its laws to a transnational legal situation. But the important point to take from the existence of the Empire and its universalist aspirations is that territoriality – if it existed at all as a concept – was embedded in an international community with a common morality. From a jurisdictional perspective, for territorial rulers to apply their laws extraterritorially may then not be particularly problematic, as they may be said to enforce just one set of norms common to the international community.<sup>185</sup>

The epistemic continuity with modern-day cosmopolitan unilateralism, with states enforcing common norms and the common interest

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*Beyond Territoriality: Transnational Legal Authority in an Age of Globalization* (Martinus Nijhoff Publishers 2012) 43-4.

184 JG Ruggie, ‘Territoriality and Beyond: Problematizing Modernity in International Relations’, (1993) 47 *Int’l Org* 139, 150.

185 In this vein, indeed, the 12<sup>th</sup> century Italian ‘statutists’, *glossatores* of Roman law, did not frown upon extraterritoriality, allowing it in respect of personal statutes, e.g., laws concerning capacity or marriage, and to an extent also with respect to mixed statutes, e.g., concerning contracts. Real statutes, however, e.g., concerning property, were subject to territorial jurisdiction. Cf HE Yntema, ‘The Comity Doctrine’, (1966) 65 *Mich L Rev* 1, 9-16.

on behalf of a perceived international community, becomes evident. This is not particularly surprising, as structural continuity in history is the rule rather than the exception.<sup>186</sup> As Sassen observed, capabilities are multivalent, can actually jump tracks, and get ‘relodged in novel assemblages’.<sup>187</sup> For her, this meant that the capabilities of territorially sovereign states enabled the formation of particular global systems,<sup>188</sup> e.g., the financial system which is deeply imbricated with ‘global’ but nevertheless territorially based cities, such as London. For us, it means that cosmopolitan capacities encapsulated in the concept of ‘empire’ can reposition themselves within individual states serving as agents of an international community. This holds even if in an intermediate ‘nationalistic’ era (the 19<sup>th</sup> and the 20<sup>th</sup> century), a billiard-ball view of the international system was dominant, with territorially delimited states as unitary actors vying for power with each other in a zero-sum game anathema to any concept of common values.

### 3.2 The ‘end of geography’: towards contemporary community-based understandings of jurisdiction

Challenging the territorial, state-centrist view does not necessarily imply advocating cosmopolitanism and the existence of an international community, however. Progressive, post-realist scholarship<sup>189</sup> engaging with the ‘end of geography’<sup>190</sup> might simply make the empirical-sociological observation that state borders have become porous due to increased communication, as well as travel and

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186 S Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages* (Princeton University Press 2006) 4 (‘The “new” in history is rarely simply *ex nihilum*. It is deeply imbricated with the past, notably through path dependence [...]’).

187 *ibid* 11.

188 *ibid* 21.

189 Cf M Koskenniemi, ‘International Law in a Post-Realist Era, (1995) 16 *Aust YBIL* 1, 19 (observing that ‘the very drawing and blurring of conceptual-just like physical-boundaries by international law seems one of the most important fields of post-realist research’).

190 D Bethlehem, ‘The End of Geography: The Changing Nature of the International System and the Challenge to International Law’, (2014) 25 *EJIL* 9.

migration opportunities, and that, hence, individuals' primary allegiance is not, as matter of course, with the state in which they reside, or with their fellow nationals within that state's borders. Koskenniemi observed in this respect that interests cross national boundaries, and that 'as our identities are no longer determined by homogenous national backgrounds, we have come to live with partly conflicting, partly overlapping functional identities'.<sup>191</sup> Borders, in this view, are accidents of history, enclosing an arbitrarily bounded space that is no longer in keeping with the sociological reality of global human interdependency.<sup>192</sup>

Binder makes the point that there is no moral reason that individuals in such a place have a stronger interest in the welfare of others within the boundary than outside it,<sup>193</sup> as nearby violence, in another state, right across the border may sometimes pose a larger security threat than remote violence in the same state.<sup>194</sup> Moreover, individuals who form part of a dispersed social or ethnic group, e.g., a diaspora, might be more deeply affected by violence perpetrated against members of their own group abroad, than by local violence to which (also) other groups fall victim.<sup>195</sup> Jews in the Netherlands may perceive anti-Semitic attacks in France as more of a threat – even an existential one at that – than a burglary epidemic in the Netherlands, simply because such attacks by definition exclude non-Jews residing within the same territory. Therefore, from a deterrence perspective, there may be reason to depart from Lord Halsbury's famous *dictum* 'All Crime is local. The jurisdiction over crime belongs to the country where the crime is committed.'<sup>196</sup> Should criminal jurisdiction indeed remain

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191 M Koskenniemi, 'International Law in a Post-Realist Era', (1995) 16 Aust YBIL 1, 9.

192 M Koskenniemi, 'What Use for Sovereignty Today?', (2011) 1 Asian JIL 61.

193 G Binder, 'Authority to Proscribe and Punish International Crimes', (2013) 63 U To LJ 278, 294-5.

194 *ibid* 295.

195 *ibid*.

196 *MacLeod v. Att-Gen for New South Wales*, [1891] AC 455 at 458-9, Lord Halsbury LC.

structured along territorial lines or should, instead, transnational jurisdictional centres, possibly established *ad hoc* or based on joint community affiliation, be established, with the attendant resources for investigation, prosecution, and adjudication?

Similar ‘novel’ jurisdictional claims have been made with respect to other fields of the law as well, notably private, commercial, and administrative law, in particular by Paul Schiff Berman, a global legal pluralism scholar inspired by cultural anthropology. Berman observes that, owing to the changing social context, especially migration, place and culture have become disjointed,<sup>197</sup> and unified communities have become decoupled from physical location.<sup>198</sup> Accordingly, jurisdiction can be tied to communities, including transnational communities, rather than territorially delimited states.<sup>199</sup> Jurisdiction then becomes a function of which community has (the strongest) ties with the dispute.<sup>200</sup> Berman interestingly terms this approach ‘cosmopolitan’, however not in the sense that jurisdiction is exercised on behalf of the international community, but rather on behalf of *a community* that ‘can be detached from mere spatial [*i.e.*, territorial] location’.<sup>201</sup> Daniel Bethlehem, citing Thomas Friedman’s bestseller *The World is Flat* (in which Friedman makes the observation that, internationally, individuals and corporations directly engage with each other, without state intervention),<sup>202</sup> has similarly called for a more flexible conception of jurisdiction termed ‘deemed jurisdiction’, that moves the competence that is asserted ‘closer to the technical and away from the political’.<sup>203</sup>

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197 PS Berman, ‘From International Law to Law and Globalization’, (2005) 43 Col J Transnat’l L 485, 515.

198 PS Berman, ‘Conflict of Laws, Globalization, and Cosmopolitan Pluralism’, (2005) 51 Wayne L Rev 1105, 1109.

199 *ibid* 1110.

200 *ibid* 1115.

201 *ibid* 1113.

202 TL Freidman, *The World is Flat* (Farrar, Straus and Giroux 2005).

203 D Bethlehem, ‘The End of Geography: The Changing Nature of the International System and the Challenge to International Law’, (2014) 25 EJIL 9, 22.

These ‘neo-tribal’ jurisdictional views clearly echo the community-based conception of jurisdiction that, as described above, was dominant in pre-modern times. To use Sassen’s terminology, historical community jurisdiction capabilities have dislodged themselves from an existing pre-modern organizational logic (mainly based on kinship), jumped tracks laid by the territorial state, and repositioned themselves in post-modern ‘assemblages’ constituted by migratory movements and technological progress.<sup>204</sup> Global communities of various stripes have used or captured elements of territorial sovereignty to further their own interests, thereby redefining and eventually even undermining any viable notion of sovereignty.<sup>205</sup>

A non-territorial, community-based conception of jurisdiction may be particularly suitable for the current Internet age, which appears to make a mockery of existing geography.<sup>206</sup> Virtual communities have started to regulate themselves, thereby pre-empting state regulation or simply filling a regulatory void. But community-based jurisdiction could also imbricate itself with state-based jurisdictional structures, in the process fundamentally transmogrifying the state from a national interest maximizer to an entity that puts its territorial institutions at the disposal of a community-based or even cosmopolitan conception of global order.<sup>207</sup> For state regulation of transactions in cyberspace, this may mean abandoning the pretense that such transactions have specific territorial contacts, and instead

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204 Cf C Landauer, ‘The Ever-Ending Geography of International Law: The Changing Nature of the International System and the Challenge to International Law: A Reply to Daniel Bethlehem’, (2014) 25 EJIL 31, 34, reacting to Bethlehem, and observing that the challenges are real, but hardly new.

205 See also M Koskenniemi, ‘What Use for Sovereignty Today?’, (2011) 1 Asian JIL 63 (defining this process as ‘global governance’, or ‘rule by preferences and norms, regimes and practices that have no localizable centre or ethos and constantly penetrate and define what the “sovereignty” of our states is allowed to mean’).

206 D Bethlehem, ‘The End of Geography: The Changing Nature of the International System and the Challenge to International Law’, (2014) 25 EJIL 9, 15.

207 Cf S Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages* (Princeton University Press 2006) 30 (citing the ‘insertion of global projects into [...] nation-states with the purpose of forming global systems’ and the ‘denationalization of particular state capabilities’).

admitting that their effects are diffused over many centers.<sup>208</sup> This can of course imply that *any* state can exercise universal jurisdiction over such transactions.<sup>209</sup> More realistically, it implies that states should seek to identify the (non-physical) social bonds between a resident within the forum, and a foreign defendant.<sup>210</sup>

A fine illustration of how community-based jurisdiction should work in practice pertains to the application and implementation of local data protection legislation to foreign data controllers. In 2012, a Spanish court referred a question for a preliminary ruling to the Court of Justice of the European Union (CJEU), requesting it to rule on the ‘right to be forgotten’, in the case the right of a Spanish citizen to have his personal data removed from an index generated by US Internet search engine Google. In its judgment in this *Google Spain* case (2014), the CJEU ruled that this activity by Google fell within EU jurisdiction.<sup>211</sup> The Court technically applied a variation of the territorial ‘effects’ principle, where it held that the relevant provision of the EU Data Protection Directive ‘is to be interpreted as meaning that processing of personal data [the indexing or storage of information or data regarding the applicant, contained on third parties’ websites] is carried out in the context of the activities of an establishment of the controller [Google] on the territory of a Member State [Spain]’. The Court was obviously interpretatively bound by the four corners of the relevant provision, which refers to territory.<sup>212</sup> But

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208 PS Berman, ‘Global Legal Pluralism’, (2006) 80 S Cal L Rev 1155, 1182.

209 PS Berman, ‘From International Law to Law and Globalization’, (2005) 43 Col J Transnat’l L 485, 531.

210 Berman believes that this community-based limitation presents forum-shopping and overbroad transient-presence jurisdiction (PS Berman, ‘Conflict of Laws, Globalization, and Cosmopolitan Pluralism’, (2005) 51 Wayne L Rev 1105, 1131). At the same time, he believes that abandoning the requirement of a territorial connection is not necessarily disadvantageous for the defendant, as ‘defending in a lawsuit in a distant physical location is far less burdensome [...] than it once was’ (ibid 1130, citing, e.g., virtual courtrooms).

211 Case C-131/12, *Google Spain SL and Google Inc. v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*, Judgment of 13 May 2014 [not yet published].

212 Article 4(1)(a) 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 [1995] OJ L 281/31 provides: ‘Each Member State shall apply the national provisions it adopts pursuant to this

then, one may wonder whether it is not convoluted for the Court to bring Google US within the jurisdiction of the EU on the ground that its activities as the operator of the search engine and those of its establishment in an EU Member State – Google Spain’s promotion and sale of advertising space on behalf of Google – ‘are inextricably linked since the activities relating to the advertising space constitute the means of rendering the search engine at issue economically profitable and that engine is, at the same time, the means enabling those activities to be performed’.<sup>213</sup> Would it not be easier to simply use criteria such as ‘substantive community bond’<sup>214</sup> or de-territorialized ‘proximity’ between the foreign party and (a member of) the forum?<sup>215</sup> After all, there is an evident proximate link between Google and a person listed on an index generated by Google, wherever this person may be. As this person happened to be residing in Spain, the indexed website was hosted on a server in Spain, and the impugned conduct was published in a Spanish newspaper, it appears only logical that Spain – and the EU – would have jurisdiction. The same criteria of social proximity could be used with respect to the *implementation* of the *Google Spain* judgment, about which, unfortunately, the CJEU remained silent. In the cyber-world in which we live, purely territorial implementation – limiting the consequences of the judgment to searches via the top-level domain name google.es – would not serve a purpose, as the indexed websites at issue could simply be found by searching via google.com. Even a wider version of territoriality, known as geographical filtering, *i.e.*, blocking access to the data by users

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Directive to the processing of personal data where: (a) the processing is carried out in the context of the activities of an establishment of the controller on the territory of the Member State; when the same controller is established on the territory of several Member States, he must take the necessary measures to ensure that each of these establishments complies with the obligations laid down by the national law applicable.’

213 Case C-131/12, *Google Spain SL and Google Inc. v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*, Judgment of 13 May 2014 [not yet published], para. 56.

214 PS Berman, ‘Conflict of Laws, Globalization, and Cosmopolitan Pluralism’, (2005) 51 *Wayne L Rev* 1105, 1131 (referring to ‘substantive bonds formed between the member of the forum community and the territorially distant actor’).

215 G Handl, J Zekoll and P Zumbansen (eds), *Beyond Territoriality: Transnational Legal Authority in an Age of Globalization* (Martinus Nijhoff Publishers 2012) 347; S Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages* (Princeton University Press 2006) 395 (referring to ‘deterritorialized forms of proximity’).

within the territorial jurisdiction<sup>216</sup> – could easily be circumvented by tech wizards using proxy servers. Only a more ‘universalist’ model based on social proximity appears to be a viable solution to the implementation conundrum. Pursuant to this model, the defendant is required to block access universally, so that not a single user could access the data. While universalist in implementation, the model is not cosmopolitan in terms of prescription or adjudication: in principle, forum jurisdiction will only be triggered when a resident of the forum is adversely affected by Internet content (wherever originating or appearing).

The universalist implementation model was applied in *Equustek Solutions Inc. v. Jack* (2014), a judgment in which the Supreme Court of Canada, citing the ‘borderless electronic web of the internet’ and attendant effectiveness considerations, enjoined Google to remove all search results with respect to a corporation involved in a bait-and-switch operation, in which it advertised another – Canadian – corporation’s products on its website while selling its own.<sup>217</sup> It did so, however, only after weighing a number of non-territorial, community-based connecting factors, such as ‘whether the applicant has established a relationship with the third party [Google] such that it establishes that the third party [Google] is somehow involved in the acts complained of [inadvertently facilitating harm through its search engines]’.<sup>218</sup> This weighing exercise will inevitably be somewhat messy, with an ill-defined notion of ‘reasonableness’ being the guiding principle.<sup>219</sup> This constant search for balance, however, may be considered as the essence of jurisdiction, in Berman’s words, as ‘the locus for debates about the appropriate definition of community and the articulation of norms’.<sup>220</sup>

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216 See, e.g., Tribunal de Grande Instance de Paris, *Association “l’Union des Etudiant Juifs de France”, la “Ligue contre le Racisme et l’Antisémitisme” c. Yahoo! et Yahoo France*, 22 May 2000, No. RG: 00/05308, aff’d by Tribunal de Grande Instance de Paris, No RG: 00/05308, 20 November 2000 (ordering Yahoo! to block access requests originated from France to an auction page displaying Nazi paraphernalia Yahoo! hosted in the US).

217 Supreme Court of British Columbia, *Equustek Solutions Inc v. Jack*, 2014 BCSC 1063, paras. 148, 159.

218 *ibid.*, paras. 152, 154-5.

219 B Van Alsenoy and M Koekoek, ‘Internet and Jurisdiction after Google Spain: the Extra-Territorial Reach of the EU’s “Right to be Forgotten”’, forthcoming 2015 (on file with the author).

220 PS Berman, ‘Conflict of Laws, Globalization, and Cosmopolitan Pluralism’, (2005) 51 *Wayne L Rev* 1105, 1126.



One may be tempted to argue that community-based, including international community-based (cosmopolitan) models of jurisdiction do away with the concept of space. Berman, for instance, grounds community-based jurisdiction on the basis that ‘community affiliations are always plural and can be detached from mere spatial location’,<sup>221</sup> suggesting that such jurisdiction is non-spatial. Similarly, Catà Backer characterizes non-territorial regulatory communities as ‘spaceless’, meaning unconstrained by physical territory and instead based on joint interests.<sup>222</sup> All depends of course on how one defines the concept of ‘space’. It is posited here that any jurisdictional model is based on the concept of space, and that space can be conceived of as non-territorial as well. After all, as Richard Ford noted in ‘Law’s Territory (a History of Jurisdiction)’, jurisdiction denotes ‘a relationship between the government [broadly defined as a rule-setter and –adjudicator] and individuals [or resources], mediated by space’, with territory only acting as a *medium* of governance or regulatory power.<sup>223</sup> Contemplating other *media* requires us to be creative, and possibly somewhat counter-intuitively, imagine a-legal<sup>224</sup> concepts of space that go beyond the geographical representation of space on a map.<sup>225</sup>

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221 *ibid* 1113.

222 LC Backer ‘Governance without Government: An Overview’, in G Handl, J Zekoll and P Zumbansen (eds), *Beyond Territoriality: Transnational Legal Authority in an Age of Globalization* (Martinus Nijhoff Publishers 2012) 114.

223 RT Ford, ‘Law’s Territory (A History of Jurisdiction)’, (1999) 97 *Mich L Rev* 843, 904.

224 The concept of ‘a-legality’ reveals an actual or posited distribution of ‘ought-places’ – in our case territorial jurisdiction – as contingent, and envisages an alternative way of ordering legal space – in our case community-based jurisdiction – thereby transforming a legal order (H Lindahl, ‘A-Legality: Postnationalism and the Question of Legal Boundaries’, (2010) 73 *Modern L Rev* 30, 43).

225 RT Ford, ‘Law and Borders’, (2012) 64 *Ala L Rev* 123, 134 (observing that ‘we imagine that jurisdiction *is* the space drawn on a map, rather than a collection of rules that can be represented graphically on a map’, and noting that rules could also be represented non-graphically, based on parameters other than territory). See also PS Berman, ‘Conflict of Laws, Globalization, and Cosmopolitan Pluralism’, (2005) 51 *Wayne L Rev* 1105, 1109 (noting that ‘the idea of legal [territorial] jurisdiction [...] both reflects and reinforces social conceptions of space, distance, and identity’, and

Saint Augustine (354-430) once wrote: ‘If I tried to imagine something without dimensions [spatiis] it seemed to me that nothing remained.’<sup>226</sup> Sir Isaac Newton (1643-1727) similarly held: ‘No being exists or can exist which is not related to space in some way.’<sup>227</sup> A space is, however, not necessarily related to ‘territory’ or ‘place’,<sup>228</sup> and given the respective backgrounds of Augustine and Newton, one can assume that, indeed, they also included other manifestations than just territory in the notion of space. It is recalled that territory only ascended because of a confluence of material and epistemological factors in the early Modern Age.<sup>229</sup> Space can be territorialized for political purposes, as discussed above.<sup>230</sup> But other forms of spatiality that are less clearly delimited as territories or places<sup>231</sup> could be contemplated too. As René Descartes (1596-1650) noted, space geometrically denotes ‘extension in length, breadth and depth’.<sup>232</sup>

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thus suggesting that rival forms of jurisdiction could reflect and reinforce rival conceptions of space, distance, and identity).

- 226 Augustine, *Confessionum*, VII, I (cited in S Elden, *The Birth of Territory* (University of Chicago Press 2013) 110 fn 111)
- 227 I Newton ‘Gravitatione’, 91 (cited in S Elden, *The Birth of Territory* (University of Chicago Press 2013) 296, fn 146).
- 228 Newton wrote that ‘[p]lace is a part of space which something fills completely’ (ibid). This leaves open the question whether a place could be filled completely without being a material territory. Arguably, the high seas, and possibly the celestial bodies as well, could be defined as ‘places’ that are non-territorial, in the sense that they cannot be appropriated or occupied. But see Hildebrandt, noting that the high seas are not a place, but a *space* for passage and route to conduct trade and travel (M Hildebrandt, ‘Extraterritorial Jurisdiction to Enforce in Cyberspace? Bodin, Schmitt, Grotius in Cyberspace’, (2013) 63 U To L Rev 196, 214).
- 229 S Elden, *The Birth of Territory* (University of Chicago Press 2013) 7, referring to territory as a ‘particular and historically limited set of practices and ideas about the relation between place and power’.
- 230 See also L Farmer, ‘Territorial Jurisdiction and Criminalization’, (2013) 63 U To L J 225, 241 (‘territory is to be understood not as a natural but as a particular kind of legal space’).
- 231 Cf K Raustiala, *Does the Constitution Follow the Flag? The Evolution of Extraterritoriality in American Law* (OUP 2009) (submitting that ‘the organizing principle of modern government is *territoriality*’, defined as ‘the organization and exercise of power over defined blocs of space’).
- 232 R Descartes, *Principia Philosophiae*, AT vol VIII-I, 48 (cited in S Elden, *The Birth of Territory* (University of Chicago Press 2013) 289, fn 99).

Applied to the law of jurisdiction, space simply refers to the extension or projection of a political or social community's powers. This extension could be territorial, but need not be. Extension could also be engineered via non-territorial 'social' or 'community' space,<sup>233</sup> around which transnational legal authority coalesces, a form of authority that, as Handl has observed, is based on 'community expectations regarding the legitimate exercise of power transnationally'.<sup>234</sup> Such long-distance community spaces have become more relevant than in the past, as spatio-temporal dimensions have radically changed through technological and social evolutions allowing distant individuals and corporations to link up with each other almost in real-time.<sup>235</sup>

Non-territorial, self-regulating transnational communities, or even global legal orders that transcend a particular place still have, or occupy, a legal space. As legal philosopher Hans Lindahl argued: 'The law governs human behavior, and human behavior takes places in space'.<sup>236</sup> Such a legal space need not be, or even never is, a geographical surface, but as 'rather a concrete articulation of normative and physical dimensions'.<sup>237</sup> Just like territorial spaces, non-territorial spaces have bound-

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233 See for the notion of social space also A Addis, 'Community and Jurisdictional Authority', in G Handl, J Zekoll and P Zumbansen (eds), *Beyond Territoriality* (Martinus Nijhoff Publishers 2012) 32.

234 G Handl, J Zekoll and P Zumbansen (eds), *Beyond Territoriality: Transnational Legal Authority in an Age of Globalization* (Martinus Nijhoff Publishers 2012) 8, terming community expectations a 'tool for mapping the actual contours of [a] "transnational space"'. This transnational space need not take the shape of the exercise of extra-territorial jurisdiction, but could also be shaped by international organizations or transnational private regulation.

235 *Contra*: G Hanl, J Zekoll and P Zumbansen, *Beyond Territoriality: Transnational Authority in an Age of Globalization* (Martinus Nijhoff Publishers 2012) 341 (observing that in the past territoriality was workable and legitimate, since geographical space, distance and borders limited human activity).

236 H Lindahl, 'A-Legality: Postnationalism and the Question of Legal Boundaries', (2010) 73 *Modern L Rev* 30, 33.

237 *ibid* 36.

aries and are enclosed.<sup>238</sup> Even the Internet has borders, *e.g.*, passwords and registration requirements.<sup>239</sup>

While territory is an instantiation of space that allows the state to regulate the full range of human behaviour within the territorial boundaries, post-modern non-territorial legal spaces do not normally take on an absolute or monopolistic character. Instead, they are functionally differentiated from each other, governing and regulating only particular aspects of human behaviour. The combination of the functional differentiation of social spaces, and the reality that human beings find themselves in a physical place, makes it possible that different spaces impact on (distinct life projects of individuals in) the same territory.<sup>240</sup> Often, these spaces are also in need of territory to constitute themselves. Also cyberspace, the geography of which may at first sight render territory an extremely poor match,<sup>241</sup> has a territorial infrastructure, consisting of servers, cables, modems, and computers,<sup>242</sup> even if this infrastructure is used for virtual, long-distance communication that has nothing to do with the surrounding territory.<sup>243</sup> Accordingly, the new jurisdictional geography of the Internet could be characterized as a 'post-territorial' or 'heterotopian' spatiality,<sup>244</sup> a

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238 *ibid* 37 (describing self-closures as boundaries that delimit a common space as an inside, and a non-common space as an outside).

239 RT Ford, 'Law and Borders', (2012) 64 *Ala L Rev* 123, 126.

240 H Lindahl, 'A-Legality: Postnationalism and the Question of Legal Boundaries', (2010) 73 *Modern L Rev* 30, 36 ('if two distinct legal orders cover precisely the same geographical extension, human behavior that is relevant to one of these orders, in terms of the interests it defines as common, might be entirely immaterial to the other').

241 KA Meehan, 'The Continuing Conundrum of International Internet Jurisdiction', (2008) 31 *Boston College Int'l & Comp L Rev* 345, 349 (submitting that territoriality is poorly suited for internet regulation, as its geography is not as easily charted as in the analog world, which is an environment of geographic unanimity).

242 RT Ford, 'Law and Borders', (2012) 64 *Ala L Rev* 123, 123-4.

243 S Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages* (Princeton University Press 2006) 394; M Hildebrandt, 'Extraterritorial Jurisdiction to Enforce in Cyberspace? Bodin, Schmitt, Grotius in Cyberspace', (2013) 63 *U To L J* 196, 218 (referring to a (partial) territorialization of the Internet).

244 M Hildebrandt, 'Extraterritorial Jurisdiction to Enforce in Cyberspace? Bodin, Schmitt, Grotius in Cyberspace', (2013) 63 *U To L J* 196, 222-4. Hildebrandt observes

new spatio-temporal order that is reproduced through insertions in multiple territorial sites.<sup>245</sup>

A post-territorial spatiality, even if it is imbricated with the territorial, is also a post-national spatiality, as in the Westphalian concept, the notion of territory is co-extensive with the notion of the nation-state. When territory is no longer the spatial jurisdictional linchpin, one may even be left to wonder what role there still is for the state and state regulation. Some private law scholars, of which Peer Zumbansen could be considered as the flag-bearer, rather than conceptualizing forms of extraterritorial state jurisdiction, have posited that de-territorialization and the ascendancy of social space necessarily implies a loss of relevance for legal norms, classically conceived as territorial state-sanctioned regulation, in social interactions.<sup>246</sup> These norms would gradually be replaced by social norms developed by private actors partaking in the same, self-regulating transnational commu-

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that cyberspace is ‘a common good that cannot be separated from the territorial landscape it pervades’, a combination of online *and* offline spatiality that renders the boundaries of territory liquid. Drawing on the work of J Cohen, ‘Cyberspece As/And Space’, (2007) 107 Col L Rev 210, she suggests using the term ‘heterotopian’ spatiality, distinguishing it from utopian spatiality, pursuant to which cyberspace is fundamentally different from territory, and isotopian spatiality, pursuant to which territoriality can accommodate cyberspace. See for a representative of the utopian school: DR Johnson and D Post, ‘Law and Borders – The Rise of Law in Cyberspace’, (1996) 48 Stan L Rev 1367, noting a ‘legally significant border between cyberspace and the “real world”’. For a representative of the isotopian school, arguing that the Internet is not beyond territorial control: J Goldsmith, ‘Against Cyberanarchy’, (1998) 45 U Chi L Rev 1199, 1240.

245 S Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages* (Princeton University Press 2006) 378, 386 (defining the new global assemblages, such as global financial markets, as novel spatio-temporal orders, which are partly inserted in, arise from, or inhabit the national/territorial, but which are not simply national). *ibid* 387 (referring to the emergence of a ‘novel type of multisited territoriality’ that is opposed to the territoriality of the nation-state). *ibid* 381 (citing the ‘partial unbundling of national space’).

246 P Zumbansen, ‘Defining the Space of Transnational Law: Legal Theory, Global Governance and Legal Pluralism’, in G Handl, J Zekoll and P Zumbansen (eds), *Beyond Territoriality: Transnational Legal Authority in an Age of Globalization* (Martinus Nijhoff Publishers 2012) 59-60.

ities.<sup>247</sup> When these functionally differentiated communities are structurally coupled, these social norm systems can acquire systemic autonomy and supplant the state as the central *locus* of governance.<sup>248</sup>

### 3.3 Concluding observations

This study recognizes that this post-territorial, community-based spatiality could lead to the disappearance of ‘the state’ as a governance system and the emergence of non-state transnational governance, especially for economic transactions. It remains to be seen, however, whether fully autonomous non-state governance could adequately address extant global governance challenges, which require that economic non-state actors deal with the negative externalities caused by their profit-maximizing activities: will their self-regulatory activities go beyond green- or blue-washing? While acknowledging the important role to be assumed by transnational private authority in the 21<sup>st</sup> century,<sup>249</sup> this study is of the view that such authority is in need of flanking policies by public institutions, such as international organizations and states. As

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247 G-P Calliess and P Zumbansen, *Rough Consensus and Running Code: A Theory of Transnational Private Law* (Hart Publishing 2010). Such norms could be subsumed under a broad, pluralist conception of law as a set of norms guiding social behaviour, but it remains no less true that a full understanding of such norms, and their genesis, is beyond the toolkit of the lawyer, and rather belongs to the social science realm of research. See P Zumbansen, ‘Defining the Space of Transnational Law: Legal Theory, Global Governance and Legal Pluralism’, in G Handl, J Zekoll and P Zumbansen (eds), *Beyond Territoriality: Transnational Legal Authority in an Age of Globalization* (Martinus Nijhoff Publishers 2012) 59-60, noting the importance of sociology and anthropology in this respect, as these disciplinary perspectives ‘question the association of legal-rule creation with a territorially-fixed place’.

248 LC Backer, ‘Governance without Government: An Overview’, in G Handl, J Zekoll and P Zumbansen (eds), *Beyond Territoriality: Transnational Legal Authority in an Age of Globalization* (Martinus Nijhoff Publishers 2012) 118-20 (referring in particular to social norms governing the behaviour of economic non-state actors).

249 Compare M Koskeniemi, ‘International Law and Hegemony: A Reconfiguration’, (2004) 17 Cambridge Rev Int’l Aff 197, 213-4 (‘By focusing on war and great crises – the great power perspective – international law will continue to be implicated in the marginalisation of problems that touch by far the greatest and the weakest part of the world’s population. It is therefore necessary that its agenda will be enlarged so as to cover questions that have been presently relegated to the unregulated, private network of transnational relations.’).

multilateral agreement regarding global governance challenges may remain elusive, it is posited here that states, acting unilaterally, could fill a void. When so acting, they question the territorial jurisdictional structure of the international system in ways similar to how theorists of non-state governance cast doubt on the continued relevance of territoriality.<sup>250</sup> In fact, advocates of state unilateralism and advocates of transnational private regulation invoke the same extraterritorial jurisdictional model as an alternative to territoriality: the community-based one. But where private regulation theorists advance functionally differentiated communities as jurisdictional centers, theorists of unilateral state jurisdiction refer to the international community as the relevant jurisdictional linchpin, the interests of which are however mediated via the state in the absence of a global government. Pursuant to cosmopolitan unilateralism, indeed, the state could be said not to exercise its own jurisdiction, but rather the jurisdiction of the international community, which the state merely *represents*.<sup>251</sup> Or put differently, the state exercises its sovereignty in the service of the international community.<sup>252</sup> As argued in the previous part, this ‘idealistic’ construction need not be rejected out of hand as a hegemonic ploy.

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250 In fact, G Handl, J Zekoll and P Zumbansen (eds), *Beyond Territoriality: Transnational Legal Authority in an Age of Globalization* (Martinus Nijhoff Publishers 2012), addresses both non-state transnational regulation and extraterritorial jurisdiction exercised by states.

251 The concept of ‘representational’ or ‘vicarious’ jurisdiction is not unknown in legal systems. See J Meyer, ‘The Vicarious Administration of Justice: An Overlooked Basis of Jurisdiction’, (1990) 31 *Har Int’l L J* 108. See notably the *stellvertretende Rechtsprechung* codified in § 7 (2), 2° of the German *Strafgesetzbuch*, which provides that all offences by foreigners committed abroad may be subject to German penal law, if the conduct is punishable under the legislation of the territorial state (or if no state has authority over the place where the conduct has taken place), if the offender is found in Germany, and – although the Extradition Law permits the extradition on the basis of the nature of the offense – he or she is not extradited because an extradition request has not timely been filed, because it has been refused or because the extradition could not be executed.

252 Compare DS Koller, ‘The End of Geography: The Changing Nature of the International System and the Challenge to International Law: A Reply to Daniel Bethlehem’, (2014) 25 *EJIL* 25, 28-9 (adding that territoriality delays the emergence of a global human community with universal jurisdiction ‘holding all individuals accountable independently of any linkages to the state’).





## 4 The actual exercise of unilateral jurisdiction in the common interest

Earlier I described the struggle between realism and idealism/cosmopolitanism. I then went on to provide a brief intellectual history of cosmopolitanism and of international community-based understandings of international law. Subsequently, I considered how such views could impact the law of jurisdiction, in spite of the latter's inherent conservativeness as reflected in its foundational principles of territoriality and sovereignty – in fact, the principles on which the positivist, modern conception of international law is based.

I have cautiously supported cosmopolitan unilateral action in the face of multilateral failures, but it would be intellectually dishonest to dismiss the observation of assorted realists, territorialists, or sovereigntists, that cosmopolitan action is *in reality* not, or hardly taken – unless it is in the state's interest, or when the state has a nexus to the situation subject to regulation. Indeed, in the absence of states' ability and willingness to act as agents of the international community, cosmopolitanism will remain dead letter.<sup>253</sup>

In Section 1 of this part I argue that, while states' jurisdictional assertions may indeed hinge on the presence of a nexus or an interest, this need not have a limiting effect on the exercise of cosmopolitan jurisdiction; on the contrary, it may serve to allocate responsibility and encourage action. Nevertheless, there is no denying that interest-based reasoning has seriously undermined cosmopolitan action (Section 4.2). There is a silver lining, however, on two

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253 R Pierik and W Werner, 'Can Cosmopolitanism Survive Institutionalization?', in R Pierik and W Werner (eds), *Cosmopolitanism in Context: Perspectives from International Law and Political Theory* (CUP 2010) 284.

fronts. For one thing, domestic courts, given their constitutional neutrality, may be more favourably disposed towards such action. For another, where cosmopolitan action could piggyback on the national interest, the odds of unilateral jurisdiction actually being exercised are much higher, as practice indeed demonstrates (Section 4.3).

#### **4.1 Nexus/interest: from free-riding to allocation of responsibility**

Hard-boiled realists would posit that the taking of state action is a function of the maximization of national welfare, thereby all but closing the door to cosmopolitan action. More benign realist types would observe that the likelihood that action is effectively taken in the global interest is higher when a state nexus is present. One would be hard-pressed to take issue with the latter position: the presence of a nexus ordinarily points to the presence of an interest of the state, thereby logically rendering the exercise of jurisdiction more likely. For instance, it is no surprise that states have exercised port state jurisdiction over discharges (which they are allowed to do under Article 218 UNCLOS), as ports (nexus) belong to coastal states whose own environmental interests may be harmed by discharges in coastal waters (interest). Similarly, the EU has wished to regulate emissions from aviation to or from EU aerodromes (nexus) because the EU also suffers from global warming (interest).

But somewhat counter-intuitively perhaps, ‘nexus’ or ‘interest’ does not necessarily serve to *limit* cosmopolitan action. In fact, using such notions may *increase* the prevalence of such action, as they go some way to allocate responsibility: they circumscribe and thus define the circle of actors competent to take action. If, in contrast, one were to promote a version of non-nexus or non-interest based, universal, cosmopolitan jurisdiction, it is likely that no one would take action at all. The irony is apparent. Such jurisdiction has been designed to address multilateral free-rider behaviour, but comes with its own free-rider problems: making everyone responsible to tackle a problem, may in practice be a recipe for doing nothing. Indeed, social

psychologists have experimentally proved that group size has an impact on the likelihood that people help others in a state of emergency.<sup>254</sup>

The prosecution, or rather non-prosecution, of piracy is instructive in this respect. Under international law, *any state* has the right to arrest and prosecute pirates under the universality principle, for such pirates are considered to be *hostes humani generis*; they threaten the community of states at large. In practice, however, universal jurisdiction over piracy is hardly exercised. Even when patrolling vessels, e.g., off the coast of Somalia, come across pirates and arrest them, they are likely not to prosecute them, in particular not if no merchant vessel flying the flag of the intervening state has been attacked or threatened with attack. Even when a national interest is involved, patrolling vessels are likely to either release pirates after catching them, or turn them over to another state – notably Kenya, which operates anti-piracy courts sponsored by the international community – rather than to their own prosecutorial authorities. This may be so for a variety of reasons. Bystander states may not have national laws allowing for piracy prosecution,<sup>255</sup> if they have them, prosecution in the arresting state's own courts may be far too costly, and unsuccessful prosecution may well cause the pirate to seek asylum in the bystander state, which, by virtue of the principle of *non-*

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254 See for early work in social psychology: JM Darley and B Latané, 'Bystander Intervention in Emergencies: Diffusion of Responsibility', (1968) 8 *Journal of Personality and Social Psychology* 377; MR Leary and DR Forsyth 'Attributions of Responsibility for Collective Endeavors', (1987) 8 *Rev Personality & Soc Psychol* 167. See for more recent work: KE Tobin, MA Davey and CA Latkin, 'Calling Emergency Medical Services During Drug Overdose: An Examination of Individual, Social and Setting Correlates', (2005) 100 *Addiction* 397; C Vaillancourt, IG Stiel and GA Wells, 'Understanding and Improving Low Bystander CPR Rates: A Systematic Review of the Literature', (2008) 10 *Journal of the Canadian Association of Emergency Physicians* 51; KH Teigen and W Brun, 'Responsibility Is Divisible by Two, But Not by Three or Four: Judgments of Responsibility in Dyads and Groups', (2011) 29 *Social Cognition* 15.

255 Y Dutton, 'Maritime Piracy and the Impunity Gap: Insufficient National Laws or a Lack of Political Will?', (2011) 86 *Tul L Rev* 1111, 1120.

*refoulement*, may be prevented from sending him back to his home state.<sup>256</sup> Possibly most importantly, states may just reason that it does not increase national welfare – rather on the contrary – to prosecute a foreign pirate who has hijacked a foreign ship with foreign crew.<sup>257</sup>

Kontorovich and Art have succinctly put it as follows: ‘perhaps the most obvious reason for the lack of universal jurisdiction is the fact that it is universal’.<sup>258</sup> Or as Kontorovich argued in another publication: in economic terms, universal jurisdiction transforms claims ‘into a global common resource, preventing several ownership’, which in turn prevents them from being ‘put to their social highest valued use’ – thus ultimately decreasing global welfare.<sup>259</sup> In other words, universal jurisdiction may lead states to shirk their cosmopolitan responsibilities: their reasoning that other states should also bear the enforcement burden, may ultimately yield the outcome that no state takes action. ‘Nexus’, instead, could precisely serve as an incentive for states to assume their responsibility. At the same time, from a positivist international law perspective, ‘nexus’ allows states to err on the safe side of jurisdictional caution: jurisdictional claims that are grounded on a nexus with the state are much more likely to pass the legality test.

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256 E Obuah, ‘Outsourcing the Prosecution of Somali Pirates to Kenya: A Failure of International Law, or a Response to Domestic Politics of States?’, (2012) 21 *Afr Sec Rev* 40, 50.

257 M Sterio, ‘Piracy off the Coast of Somalia: The Argument for Piracy Prosecutions in the National Courts of Kenya, The Seychelles, and Mauritius’, (2012) 4 *Amsterdam L F* 104, 111 (wondering why the United Kingdom should pay for the exercise of universal jurisdiction on behalf of a Liberian vessel owned by a Dutch corporation and employing a Philippine crew).

258 E Kontorovich and SE Art, ‘An Empirical Examination of Universal Jurisdiction for Pirates’, (2010) 104 *AJIL* 436, 453. From these authors’ research it transpires that between 1998 and 2009, 1158 pirate attacks on the high seas were reported. Only 17 prosecutions were brought under the principle of such universal jurisdiction (*i.e.*, only 1,47 pct), even though all those attacks were subject to universality.

259 E Kontorovich, ‘Inefficiency of Universal Jurisdiction’, (2008) *U Ill L Rev* 389, 395, arguing in respect of universal jurisdiction over piracy.

From an enforcement point of view, the law of jurisdiction may have to be geared towards facilitating nexus-based jurisdiction. This may even normatively imply that bystander states – which have no or only a weak nexus to the case – should, if possible, *refrain* from exercising cosmopolitan jurisdiction. Indeed, too readily assuming such jurisdiction may give rise to free-rider behaviour of states that do have a strong connection to the case: the availability of remedies elsewhere may discourage them from assuming their own responsibility and jurisdiction. For instance, in the *Kiobel* litigation under the US Alien Tort Statute before the US Supreme Court, the United Kingdom and the Netherlands argued in their *amicus* brief that the exercise of universal civil jurisdiction by a bystander state would give states with a nexus to the case ‘reason to downplay and even ignore their own international human rights law obligations’ and that ‘[t]hey will also not come under pressure to provide a remedy, and indeed prevent abuses, if plaintiffs have recourse to redress elsewhere’.<sup>260</sup> However, there is little empirical evidence of such a concern. It may be true that the exercise of universal jurisdiction over discrete cases does not necessarily set in motion processes of broader social and legal reform in the territorial state, but it cannot be denied that such cases can expose a wider pattern of misconduct, thereby whipping the territorial state into action. For instance, the ‘Pinochet effect’ in Latin America – the impact of the Spanish indictment, under the universality principle, of the former Chilean dictator on criminal proceedings against torturers in Chile and elsewhere in South America – has been well-documented.<sup>261</sup> Ultimately, the aforementioned *amicus* brief of the UK and the Netherlands appears to be a classic example of states invoking global welfare

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260 Supplemental Brief of the Governments of the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland as *Amici Curiae* in Support of Neither Party, *Kiobel v. Royal Dutch Petroleum Co* 133 S.Ct. 1659 (2013) (No 10-1491), available at <[www.americanbar.org/content/dam/aba/publications/supreme\\_court\\_preview/briefs/10-1491\\_neutralamcunetherlands-uk-greatbritain-andirelandgovs.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/10-1491_neutralamcunetherlands-uk-greatbritain-andirelandgovs.authcheckdam.pdf)> (last visited on 17 March 2015), at 25.

261 N Roht-Arriaza, *The Pinochet Effect: Transnational Justice in the Age of Human Rights* (University of Pennsylvania Press 2006).

arguments, but in fact just promoting their own national interest. Both states obviously wished to shield Shell, an Anglo-Dutch corporation, from liability in US courts, rather than to allocate responsibility among states. US litigation under the universality principle did not diminish the opportunities or incentives for the UK or the Netherlands to assume their own legal responsibility with respect to Shell's activities in Nigeria, as both states arguably never had an interest in doing so in the first place.<sup>262</sup> In any event, the US Supreme Court in *Kiobel*, possibly swayed by the arguments advanced by the United Kingdom and the Netherlands, rejected a broad construction of the Alien Tort Statute and, in essence, dismissed the exercise of universal tort jurisdiction, relying on the presumption that the US Congress did not wish to legislate extraterritorially.<sup>263</sup>

Even if it were true that cosmopolitan assertions of extraterritorial jurisdiction, at least in some instances, yield free-rider behaviour, the question remains whether individual victims of injustice should be victimized again by the absence of remedies in both the territorial *and* bystander state when the latter declines jurisdiction citing free-riding risks on the part of the former. The *Empagran* international antitrust litigation before US courts is instructive in this regard. This case was brought by foreign victims of a worldwide vitamins cartel in respect of foreign harm they had suffered. Before the US Supreme Court (2004), a global justice argument was made by the economists Joseph Stiglitz and Peter Orszag in their *amicus curiae* brief in which they argued that the Court should take into account global deterrence in US antitrust litigation, and thus provide a remedy for

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262 U Kohl, 'Corporate Human Rights Accountability: The Objections of Western Governments to the Alien Tort Statute', (2014) 63 Int'l & Comp L Q 665, 684 ('States that have a connection with the dispute based on the nationality of the parent company (in *Kiobel*, the UK and the Netherlands) also have no real interest in holding the parent accountable for its or its subsidiary's behaviour abroad which injures people to whom they are not politically accountable.')

263 *Kiobel v. Royal Dutch Petroleum Co* 133 S.Ct. 1659 (2013).

antitrust harm suffered in foreign transactions.<sup>264</sup> The Supreme Court, however, rejected this argument, and declined to exercise jurisdiction over separate foreign antitrust harm, on the ground that the non-economic principle of non-intervention in the affairs of foreign states carried more weight.<sup>265</sup> This reasoning left these plaintiffs in the cold, as they could not recover their damages anywhere, their local courts being inaccessible.<sup>266</sup> The Court's decision seemed to be informed by the fear that foreign plaintiffs would flock to US courts if the Court would construe the geographical ambit of US antitrust law too widely. Such a wide construction might arguably result in US courts bearing the international antitrust enforcement burden, with foreign plaintiffs' home states just free-riding on US investigatory and litigation efforts. US reluctance to becoming a 'global antitrust cop' is understandable, but it remains no less true that, from a global justice perspective, the outcome of *Empagran* is not satisfactory: free-riding fears between nations left individual plaintiffs without any remedies.

#### 4.2 Domestic courts as cosmopolitan actors

Underlying the outcomes of the *Kiobel* and *Empagran* litigations, both of which were based on the congressional presumption against extraterritoriality, is ultimately a concern that a more cosmopolitan jurisdictional outlook may diminish, or at least not further the national interest.<sup>267</sup> These cases are concrete instantiations of a more

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264 Brief of *Amici Curiae* Economists JE Stiglitz and PR Orszag in Support of Respondents, *F. Hoffmann-LaRoche v. Empagran S.A.*, 542 US 155 (2004) (No 03-724).

265 *F. Hoffmann-LaRoche Ltd v. Empagran S.A.*, 542 US 155, 159-165 (2004); HL Buxbaum, 'National Jurisdiction and Global Business Networks', (2010) 17 *Ind J Global Legal Stud* 165, 175 ('[T]he court retreated into its "natural" space of engagement. It did not really engage the substance of the plaintiffs' argument regarding global under-deterrence [...]').

266 R Michaels, 'Global Problems in Domestic Courts', in Sam Muller *et al* (eds), *The Law of the Future and the Future of the Law* (Torkel Opsahl Academic EPublisher 2011).

267 U Kohl, 'Corporate Human Rights Accountability: The Objections of Western Governments to the Alien Tort Statute', (2014) 63 *Int'l & Comp L Q* 665, 685 (arguing that 'unconnected States have no obvious economic or political interest in monitoring

general, and rather well-entrenched jurisdictional realism that is distrustful of cosmopolitanism on the ground that rulers of states are beholden to their voters, who may punish them in case they prioritize the interests of others over theirs. State rulers will thus be forced to abandon a cosmopolitan discourse, or when using it, do so strategically to advance their voters' interests. Even when harbouring cosmopolitan sentiments, states may be unwilling to shoulder the cosmopolitan burden alone; exercising unilateral jurisdiction may cause other states to free-ride on the former's efforts, or to protest against jurisdictional overreach, causing them in turn to scale back their efforts – a classic collective action problem.

A perception that the national interest is not at stake,<sup>268</sup> fear of upsetting foreign nations and thus inviting retaliatory action,<sup>269</sup> or concerns over costs and wasting scarce national resources, all militate against cosmopolitan action. Research into the actual exercise of universal criminal jurisdiction, for instance, has shown that such jurisdiction is normally only exercised when the stakes are not very high, *e.g.*, with respect to lower-ranking perpetrators, in which case the risk of upsetting foreign nations is limited.<sup>270</sup> In addition, capacity problems have undoubtedly informed decisions not to

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these obligations towards foreign citizens to whom they are not legally or politically accountable').

268 Note that, rather exceptionally, outside a cosmopolitan context, even when a national interest is at stake and a jurisdictional grant is apparent, courts may for technical jurisdictional reasons not exercise jurisdiction. See, *e.g.*, L Farmer, 'Territorial Jurisdiction and Criminalization', (2013) 63 U To L J 225, 226-7, citing *R v. Serva* (1845), 1 Den 104, 169 ER 169 [*Serva*] and *R v. Keyn* (1876-7), LR 2 Ex D 63, arguing that in these cases 'English courts declined jurisdiction in situations where it might easily have been claimed – and in the face of strong political demands', basing their reasoning 'on the analysis of a highly technical body of law'.

269 It is observed that *not* exercising (extraterritorial) jurisdiction might under certain circumstances also lead to foreign protest. See, *e.g.*, the case of *R v. Bernard*, (1858), 1 F & F 240, in which an English court acquitted a man involved in a plot on the life of Napoleon III for reasons of uncertainty as to whether the man had committed a crime under English law. The acquittal led to French protest. Case cited in L Farmer, 'Territorial Jurisdiction and Criminalization', (2013) 63 U To L J 225.

270 M Langer, 'The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes', (2011) 105 AJIL 1.



prosecute. To give one example, the South African Police Service recently considered itself unable to initiate an investigation into torture committed in Zimbabwe, citing practical problems in particular.<sup>271</sup> The South African Constitutional Court acknowledged practicability as a legitimate limiting principle, averring that '[f]oremost amongst these [practical] considerations are whether the investigation is likely to lead to a prosecution and accordingly whether the alleged perpetrators are likely to be present in South Africa on their own or through an extradition request; the geographical proximity of South Africa to the place of the crime and the likelihood of the suspects being arrested for the purpose of prosecution; the prospects of gathering evidence which is needed to satisfy the elements of a crime; and the nature and the extent of the resources required for an effective investigation'.<sup>272</sup> In the end, prosecutors are unlikely to take action in the global interest when there is not at least a national interest at stake, as also evidenced by a statement of the chief prosecutor of Hamburg, Germany, regarding the prosecution of piracy: '[T]he German judicial system cannot, and should not, act as World Police. Active prosecution measures will only be initiated if the German State has a particular, well-defined interest.'<sup>273</sup>

Also in civil cases have courts often construed broad jurisdictional mandates restrictively, emphasizing territorial or personal links with the state, and ultimately its national interest. The vagaries of the Alien Tort Statute (ATS) illustrate this well. On its face, this US Statute appears to confer universal tort jurisdiction over US federal

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271 Republic of South Africa Constitutional Court, *National Commissioner of The South African Police Service v. Southern African Human Rights Litigation Centre and Another* (CCT 02/14) [2014] ZACC 30; 2015 (1) SA 315 (CC); 2015 (1) SACR 255 (CC) (30 October 2014), para. 15.

272 *ibid.*, para. 64.

273 E Kontorovich and SE Art, 'An Empirical Examination of Universal Jurisdiction for Pirates', (2010) 104 AJIL 436, 451. See also N Krisch, 'The Decay of Consent: International Law in an Age of Global Public Goods', (2014) 108 AJIL 1, 28 ('US courts do not see their role as solving problems of a global nature as such.').

courts in respect of violations of international law. After its 'rediscovery' in 1980, some US courts were indeed willing to offer a remedy to foreign victims in respect of foreign harm committed by foreign perpetrators.<sup>274</sup> As argued above, in *Kiobel* however, the Supreme Court limited the jurisdictional scope of the ATS in a particularly restrictive ruling: even where some national interest would be involved as a result of territorial connection, jurisdiction would not automatically be established. Or as the majority held: '[E]ven where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application'.<sup>275</sup>

However, there is reason to expect that domestic courts harbour more cosmopolitan sentiments than the political branches. The judiciary is an independent branch of government and neutrally adjudicates cases. Accordingly, while not belittling the perceived pressures from other branches of government or public opinion,<sup>276</sup> courts need not directly explain their actions to voters, and thus need not fear punishment when not advancing the national interest. And indeed, in the literature, the 'modern internationalist' role of domestic *courts* as enforcers of international law, dispensers of global justice, and independent arbitrators in transnational disputes,<sup>277</sup> has duly been acknowledged. Notably in international business regulation (antitrust law in particular) and international crimes prosecutions, domestic courts have assumed a prominent

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274 See, e.g., *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980); *Kadic v. Karadzic* 70 F.3d 232 (2nd Cir. 1995).

275 *Kiobel v. Royal Dutch Petroleum Co* 133 S.Ct. 1659 (2013) 1669.

276 MA Pollack, 'Is International Relations Corrosive of International Law? A Reply to Martti Koskeniemi', (2013) 27 *Temp Int'l & Comp. LJ* 339, 373 ('most political scientists would argue that international judicial decisions are likely to reflect [...] also *extra-legal* factors including [...] pressures from state institutions and public institutions') (emphasis in original).

277 AL Parrish, 'Reclaiming International Law from Extraterritoriality', (2009) 93 *Minn L Rev* 815, 829-31, also citing constructivist theory, pursuant to which judges have 'internalized' international norms, and apply them without regard to furthering the interests of 'the state'.

role.<sup>278</sup> It may even be said that domestic courts are the *main* state actors when it comes to unilaterally addressing global governance issues through the law; or as Michaels put it, unilateral adjudication is ‘the predominant legal response to globalization’.<sup>279</sup>

One could raise various objections against this enhanced role of domestic courts as agents of the international community, some of which echo the more general objections against giving *states* a trusteeship role. First, one may *normatively* object that when it comes to cosmopolitan adjudication, *international* courts are better-placed to vindicate global values. This would however be to overlook the accessibility of *domestic courts* for individual plaintiffs, their enforceable judgments,<sup>280</sup> their decisions being directed at individuals and corporations, which are subjects of national, rather than international law<sup>281</sup> and, most obviously, the absence of world courts with jurisdiction over global problems.<sup>282</sup> Thus, just like states acting unilaterally could compensate for the deficiencies of the multilateral system, so can domestic courts compensate for the deficiencies of international courts. Second, one may object that political branches can meddle in judicial decision-making, or that judges apply self-censorship for fear of antagonizing the political branches; accordingly, this enhanced trusteeship role of courts would just be a mirage. Such an objection may to some extent be empirically correct, as indeed, political branches may meddle in judicial decision-

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278 HL Buxbaum, ‘National Jurisdiction and Global Business Networks’, (2010) 17 Ind J Global Legal Stud 165, 166 (referring to the ‘much more pervasive involvement of domestic courts in the regulation of international business’ and the fact that ‘litigants and judges are increasingly conscious of the impact that local litigation has on global regulatory process’).

279 R Michaels, ‘Global Problems in Domestic Courts’, in Sam Muller *et al* (eds), *The Law of the Future and the Future of the Law* (Torkel Opsahl Academic EPublisher 2011).

280 U Kohl, ‘Corporate Human Rights Accountability: The Objections of Western Governments to the Alien Tort Statute’, (2014) 63 Int’l & Comp L Q 665, 682.

281 ME O’Connell, ‘Enforcement and the Success of International Environmental Law’, (1995) 3 Ind J Global Legal Stud 47, 64.

282 R Michaels, ‘Global Problems in Domestic Courts’, in Sam Muller *et al* (eds), *The Law of the Future and the Future of the Law* (Torkel Opsahl Academic EPublisher 2011).

making, even in democratic countries with a strong rule of law tradition.<sup>283</sup> But this reality of political intervention does not mean that courts cannot or should not act with a cosmopolitan outlook. It could be posited that, rather, doctrines should be developed to insulate judges from political interference.<sup>284</sup> Third, one could argue that domestic judges apply and interpret the law in ways that further the national instead of the international interest; thus, they would not fundamentally differ from the political branches in their (non)-cosmopolitan outlook. The application of the presumption against extraterritoriality by US courts may back this argument up.<sup>285</sup> This assumption could be refuted on the basis of empirical evidence, however. For instance, Italian courts did not consider the potential adverse impact on Italian-German diplomatic relations as a relevant factor when deciding not to accord state immunity to Germany in respect of crimes committed during the Second World War,<sup>286</sup> and later refusing to give effect to a contrary decision of the International Court of Justice.<sup>287</sup> And Dutch courts did not consider the impact on the Dutch national economy of establishing jurisdiction over Dutch-incorporated Shell and its Nigerian subsidiary in an oil spills

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283 *E.g.*, the refusal of the Dutch Minister of Justice and Security to execute a judgment against the European Patent Organization, an international organization established in the Netherlands: Directoraat-Generaal Rechtspleging en Rechtshandhaving, Directie Juridische en Operationele Aangelegenheden Aanzegging ex artikel 3a, tweede lid, van de Gerechtsdeurwaarderswet 23 February 2015. In its judgment, the Court of Appeal of The Hague had ruled that restrictions to collective labour action were in violation of international human rights law, and had lifted the organization's immunity from jurisdiction. *Gerechtshof Den Haag*, ECLI:NL:GHDHA:2015:255, 17 February 2015.

284 R Michaels, 'Global Problems in Domestic Courts', in Sam Muller *et al* (eds), *The Law of the Future and the Future of the Law* (Torkel Opsahl Academic EPublisher 2011) (arguing that we need 'doctrines that detach the judicial task from the furthering of domestic political interests').

285 See the discussion regarding the US Supreme Court judgments in *Empagran* and *Kiobel* above.

286 *Ferrini v. Germany*, Appeal decision no 5044/4 ILDC 19 (IT 2004) 11 March 2004.

287 ICJ, *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)* (Merits) [2012] ICJ Rep 99; *Ferrini v. Germany*, Appeal decision no 5044/4; ILDC 19 (IT 2004) 11 March 2004.

case brought by Nigerian farmers and a Dutch NGO.<sup>288</sup> These cases show that domestic courts hearing cases of a transnational character need not, and do not, always further the national interest. Instead, they may increasingly engage in cosmopolitan action as guardians of the international legal order.<sup>289</sup> They may perhaps not have taken such cosmopolitan action *proprio motu*: the cases just cited had been brought before them by private plaintiffs. Nor had the plaintiffs necessarily been inspired by cosmopolitan motives; ultimately they just wanted to see justice done for themselves.<sup>290</sup> But when applying the existing law to the case, courts may be exploring its outer bounds, and construe it in a cosmopolitan manner, without having to fear direct censure by political constituencies. Such courts may ingeniously tap the resources of domestic law to give effect, or even make cosmopolitan law (sometimes unwittingly perhaps).

This is not to say that, from an empirical perspective, domestic courts always, or most of the time, engage in cosmopolitan extra-territorial action. Taking guidance from more narrow-minded political branches and applying various prudential doctrines, their behaviour may well be *nationalistic*. However that may be, while doctrinal research on the effect of international law in domestic courts abounds, there is little empirical research testing various theoretical propositions, such as cosmopolitanism, nationalism, or realism, with respect to the extent to which domestic courts apply

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288 *Akpan v. Royal Dutch Shell PLC*, Arrondissementsrechtbank Den Haag [District Court of The Hague], 30 January 2013, Case No C/09/337050/HA ZA 09-1580 (ECLI:NL:RBDHA:2013:BY9854). An (unofficial) English translation of this and the other four judgments is available at <[www.milieudedefensie.nl/english/shell/oil-leaks/courtcase/press/documents/documents-on-the-shell-legal-case](http://www.milieudedefensie.nl/english/shell/oil-leaks/courtcase/press/documents/documents-on-the-shell-legal-case)> (last visited on 17 April 2015).

289 U Kohl, 'Corporate Human Rights Accountability: The Objections of Western Governments to the Alien Tort Statute', (2014) 63 Int'l & Comp L Q 665, 682 (noting that 'the prevailing wind appears to be changing').

290 D Luban, 'Carl Schmitt and the Critique of Lawfare', (2010) 43 Case W Res JIL 457, 462 ('Anyone who voluntarily has recourse to the institutions of the law has ulterior motives: nobody ever files a lawsuit out of disinterested curiosity in the answer to a legal question.').

international law and cosmopolitanism, and on the variables explaining court attitudes.<sup>291</sup> Tentatively, it is suggested that courts may do so because they have *internalized* international law and cosmopolitan values, or because they *assimilate* themselves to certain actors (*i.e.* the socialization or acculturation hypothesis).<sup>292</sup> As liberal theorists have pointed out, such ‘enlightened’ action is also more likely to emanate from courts with a liberal-democratic tradition that share a commitment to the rule of law, and boast effective institutions and an active civil society.<sup>293</sup> These theories and parameters may surely generate expectations of empirical outcomes in keeping with cosmopolitan premises. Whether these expectations are also borne out in practice is, as already indicated, in need of further social scientific research. But there is at least some anecdotic evidence of domestic courts assuming cosmopolitan responsibilities. This, and the explanatory positivist international relations theories which they have elicited, guarantee that the *normative* point made in this study – that domestic courts may want to act as agents of the international community – is not entirely utopian, but has a foothold in legal practice.

### 4.3 Cosmopolitanism furthering the national interest

The dominant international relations theory explaining the application of international law and cosmopolitan values in the domestic legal order may well be realism, in accordance with its dominance of

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291 L Conant, ‘Whose Agents? The Interpretation of International Law in Domestic Courts’, in JL Dunoff and MA Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (CUP 2012) 413.

292 *ibid* 402-3, citing HH Koh’s transnational legal process approach (which posits that domestic courts’ regular interactions with international law may lead to voluntary obedience to international law) and Goodman and Jinks’s acculturation hypothesis (pursuant to which domestic courts tend to emulate reference groups that subscribe to an international norm or practice). See HH Koh, ‘1998 Frankel Lecture’, (1998) 35 *Hous L Rev* 623; R Goodman and D Jinks, *Socializing States: Promoting Human Rights Through International Law* (OUP 2013).

293 *ibid* 404-6, citing, *inter alia*, AM Slaughter, ‘International Law in a World of Liberal States’, (1995) 6 *EJIL* 503.

international relations in general. As already repeated *ad nauseam*, realists posit that the national interest guides state, including domestic courts' action. Realist approaches limit the space for cosmopolitan action, as such action will not normally further the national interest. However, to the extent that cosmopolitan values are seen as reflecting domestic values, institutions, and interests, the former may actually strengthen the latter, and thus open up a space for cosmopolitan action, even as they strengthen the power of the state. In international relations, this is termed 'second image reversed'.<sup>294</sup> Assuming that strong states have had a strong influence on the making of international law, it may be expected that especially their domestic courts may be willing to apply it.<sup>295</sup> In practice, however, a rational choice cost-benefit analysis may militate against the application of cosmopolitan law by domestic courts, even where courts have no qualms about the *content* of the law: judicial economy, fear of retaliation or emulation, and costs to the political branches or domestic business may give rise to more conservative judicial pronouncements that tie the establishment of jurisdiction to the presence of a 'national interest'.

The aforementioned *Kiobel* decision is a case in point: even the minority, consisting of the liberal Justice Breyer, Ginsburg, Sotomayor, and Kagan, were of the view that the Alien Tort Statute should be interpreted a 'providing jurisdiction only where distinct American interests are at issue'.<sup>296</sup> They then proceeded to identify three instances where the ATS would indeed provide such interest-based jurisdiction, namely where (1) the alleged tort occurs on American soil, (2) the defendant is an American national, or (3) the defendant's conduct substantially and adversely affects an

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294 P Gourevitch, 'The Second Image Reversed', (1978) 32 Int'l Org 881. This theory holds that domestic structures and institutions are the *consequence* of states' positions of relative power in international politics.

295 See L Conant, 'Whose Agents? The Interpretation of International Law in Domestic Courts', in JL Dunoff and MA Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (CUP 2012) 411-2.

296 *Kiobel v. Royal Dutch Petroleum Co* 133 S.Ct. 1659 1674 (2013).

important American national interest and that includes a distinct interest in preventing the United States from becoming a safe harbour (free of civil as well as criminal liability) for a torturer or other common enemy of mankind.<sup>297</sup>

The third scenario cited by these judges demonstrates, however, that one should not reify the national interest as a parochial concept *per se* at loggerheads with cosmopolitan action. As international criminals are unlikely to repeat their crimes on US soil in the absence of a context propitious to their commission, this scenario actually has cosmopolitan overtones: it is arguably in the interest of every state, including the United States, to see to it that justice is done regarding international crimes, as such crimes affect the international community and all its constituent members.<sup>298</sup>

It is this cosmopolitan view which has undergirded assertions of universal jurisdiction over international crimes by a number of states, initially Western European states, but recently also others. In 2014, for instance, the South African Constitutional Court, in the aforementioned Zimbabwe case, ruled that '[g]iven the international and heinous nature of the crime of torture, South Africa has a substantial connection to it', and that hence, '[a]n investigation within the South African territory does not offend against the principle of non-intervention'.<sup>299</sup> This is jurisdictional cosmopolitanism in its purest form: international crimes are considered as having a nexus with every state, and every community interest is

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297 *ibid* (going on to find, however, that the impugned conduct and the parties did not have a sufficient nexus with the US under this test).

298 Compare *Kiobel v. Royal Dutch Petroleum Co* 133 S.Ct. 1659 (2013), 1675 (writing that in the *Filartiga* decision, '[j]urisdiction was deemed proper because the defendant's alleged conduct violated a well-established international law norm, and the suit vindicated our Nation's interest in not providing a safe harbor, free of damages claims, for those defendants who commit such conduct').

299 Republic of South Africa Constitutional Court, *National Commissioner of The South African Police Service v. Southern African Human Rights Litigation Centre and Another* (CCT 02/14) [2014] ZACC 30; 2015 (1) SA 315 (CC); 2015 (1) SACR 255 (CC) (30 October 2014) para. 78.



considered as a national interest. The South African decision is a fine example of how unconnected states, in spite of realist considerations militating *against* jurisdictional cosmopolitanism, *have* assumed their responsibility, especially by exercising universal jurisdiction over gross human rights violations. In the South African case, the Constitutional Court, after confirming the cosmopolitan connection of the case with South Africa, eventually rejected the practical problems cited by the police, held that there *was* a reasonable possibility that the police would gather evidence that may satisfy the elements of the crime of torture,<sup>300</sup> and subsequently ordered the police to investigate the complaint.<sup>301</sup> In so doing, it confirmed that practical difficulties should not be used as an excuse for a failure to act in the global interest.<sup>302</sup> As Kohl has observed, bystander states may act in such a cosmopolitan fashion 'perhaps simply because it is the right thing to do'.<sup>303</sup>

In other situations, this cosmopolitan imperative has merged with national interest-based considerations,<sup>304</sup> notably where states have desired to level the playing field: unilateral action with

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300 *ibid.*

301 *ibid.*

302 Also, it is not excluded that federal courts in the US, hearing ATS claims, give effect to the cosmopolitan construction of Justice Breyer's third scenario in his *Kiobel* opinion when implementing the Supreme Court's 'touch and concern' standard. See PD Mora, 'The Alien Tort Statute after *Kiobel*', 63 (2014) *Int'l & Comp L Q* 704, 705 (citing the 'possibility that the presumption against extraterritoriality will be displaced if such actions were brought against foreign individuals present in the United States at the time when proceedings are initiated'). Elsewhere Mora is less optimistic, however: *ibid* 704 ('US District Courts will not recognize causes of action brought under the ATS for violations of the law of nations where all of the relevant conduct has taken place in the territory of a foreign state, both the claimant and the defendant are foreign nationals, and the defendant is a corporation who is trading shares on a US stock exchange with an office in the United States at the time when the action is brought.').

303 U Kohl, 'Corporate Human Rights Accountability: The Objections of Western Governments to the Alien Tort Statute', (2014) 63 *Int'l & Comp L Q* 665, 685.

304 See also R Pierik and W Werner, 'Can Cosmopolitanism Survive Institutionalization?', in R Pierik and W Werner (eds), *Cosmopolitanism in Context: Perspectives from International Law and Political Theory* (CUP 2010) 286-7 (notions of cosmopolitan

extraterritorial effects could remedy the disadvantage at which domestic economic operators are put as a result of lax foreign regulation. In such ‘hybrid’ cases, the exercise of jurisdiction is much more likely. Port states have exercised jurisdiction over foreign-flagged vessels to ensure that their domestic-flagged vessels, subject to strict regulation, are not outcompeted by flags of convenience, *e.g.*, when it comes to fishing on the high seas. The United States has started to vigorously enforce its Foreign Corrupt Practices Act against foreign corporations arguably in order to safeguard the business opportunities of US corporations in developing countries.<sup>305</sup> The EU has attempted to force foreign airlines to surrender emissions allowances under its Aviation Directive so as to treat foreign operators on the same footing as domestic ones for climate regulation purposes.<sup>306</sup> And the EU Commission has recently proposed to extend the application of a ‘financial transaction tax’ to transactions between participating Member States and non-participating states to combat disruptive global financial speculation. While such regulation surely furthers the interests of national operators and the integrity of domestic regulation – and hence ‘the national interest’ – it remains no less true that a concurrent aim may be cosmopolitan in nature. In our examples, this is the protection of global fish stocks, the marine environment, and the socio-economic interests of individuals in developing countries, as well as the stabilization of the global climate and global capital markets through the prevention of carbon or financial leakage.

Let me develop this financial transaction tax at some length here. This so-called ‘Tobin tax’ is one of the darlings of cosmopolitan advocates of global distributive justice. Named after Nobel laureate in economics

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justice may foster the pursuit of what states perceive to be in their interest, drawing particular attention to the mixture of national security with imperial agendas).

305 *E.g.*, E Willborn, ‘Extraterritorial Enforcement and Prosecutorial Discretion in the FCPA: A Call for International Prosecutorial Factors’, (2013) 22 *Minn J Int’l L* 422.

306 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 [2009] OJ L 8/3.

#### 4 The actual exercise of unilateral jurisdiction in the common interest

James Tobin, it would be imposed on financial transactions so as to prevent the kind of speculation that disrupts global financial and economic stability and has an adverse impact of citizens and governments.<sup>307</sup> Such a tax would thus contribute to the protection of a global public good and to global justice. The obvious problem with such a tax is that it has to be applied internationally for it to be effective. If it is applied only by one state, or a few states, financial ‘leakage’ may occur: financial transactions may move offshore and the purpose of the tax is frustrated. In the absence of a multilateral consensus on the desirability of such a tax, and of a world government with taxation power, a financial transaction tax appears utterly unfeasible. Still, cosmopolitans who have settled for a role, however temporary, of the *state* in realizing global justice have observed that states can put in place such a tax single-handedly, without needing universal cooperation. It would suffice to tax the transaction at the dealing site, making the tax difficult to evade unless financial actors would move their dealing offices entirely abroad.<sup>308</sup> As it happens, the EU, in the wake of the global financial crisis, has taken the initiative to do exactly that. In 2011 and 2013, the Commission published proposals for a Council Directive implementing enhanced cooperation in the area of the Financial Transaction Tax (FTT),<sup>309</sup> the objectives of which were, apart from harmonizing legislation, ‘ensuring that financial institutions make a fair and substantial contribution to covering the costs of the recent crisis and creating a level playing field with other sectors from a taxation point of view’ and ‘creating appropriate disincentives for transactions that do not enhance the efficiency of financial markets thereby complementing regulatory measures to avoid future crises’.<sup>310</sup> Like other EU Directives,

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307 See for the seminal paper: J Tobin, ‘A Proposal for International Monetary Reform’, (1978) 4 *Eastern Econ J* 153.

308 S Caney, *Justice beyond Borders: A Global Political Theory* (OUP 2005) 138.

309 European Commission, Proposal for a Council Directive on a common system of financial transaction tax and amending Directive 2008/7/EC, Brussels, 28 September 2011, COM(2011) 594 final; European Commission, Proposal for a Council Directive implementing enhanced cooperation in the area of financial transaction tax, Brussels, 14 February 2013, COM(2013) 71 final. The 2013 proposal was adopted under the enhanced cooperation procedure between a limited number of EU Member States, after the 2011 proposal failed to garner the support of all Member States.

310 European Commission, Proposal for a Council Directive implementing enhanced cooperation in the area of financial transaction tax, Brussels, 14 February 2013, COM(2013) 71 final, at 2.

such a Directive would be aimed at the EU internal market, preventing regulatory arbitrage between EU Member States. Now, obviously, it would not make sense for the EU to limit the jurisdictional scope of the Directive to the financial institutions of participating Member States. Therefore, a provision with an extraterritorial dimension found its way into the proposed text. Article 4(1)(f) of the proposed Directive provides as follows: ‘For the purposes of this Directive, a financial institution shall be deemed to be established in the territory of a participating Member States [...] if it is party, acting either for its own account or for the account of another person, or is acting in the name of the party to the transaction, to a financial transaction with another financial institution established in that Member State [...] or with a party established in the territory of that Member State and which is not a financial institution.’ This formulation may sound arcane, but the message is rather simple: foreign-based institutions are also subject to the EU FTT, provided that they transact with EU-based institutions. While the proposed Directive does not ‘universalize’ the EU FTT – it could not as the EU does not have taxation powers outside the EU – this provision goes as far as cosmopolitan unilateralism can practically go.

It does not surprise that it was considered to be particularly problematic in view of the territoriality principle under public international law: it allows the EU Member States participating in the FTT to exercise prescriptive jurisdiction over non-resident persons insofar as they interact with a counterparty established or authorized in the EU. Jurisdiction over these non-residents accordingly piggybacks on the uncontested jurisdiction over EU-based financial institutions. The former are ‘deemed’ to be established on the basis of a ‘counterparty principle’, and it is the institution that is actually established in a participating Member States that is liable for payment of the tax.<sup>311</sup> A person liable for payment of the FTT could escape application of the Directive, however, when he ‘proves that there is no link between the economic substance of the transaction and the territory of any participating Member State’.<sup>312</sup>

In a 2013 opinion, the Legal Service of the Council of EU vehemently assailed the extraterritorial aspect of the FTT as violating customary

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311 *ibid* 10.

312 *ibid*, Chapter 2, Article 4(3).

#### 4 The actual exercise of unilateral jurisdiction in the common interest

international law.<sup>313</sup> Yet interestingly, the Service did *prima facie* not as such take issue with the legality of the cosmopolitan ambitions of the FTT: it pointed out that for jurisdiction to be lawfully exercised under customary international law, the sufficient nexus to justify the exercise of jurisdiction is to be determined not only on the basis of a relevant link between the state and the person/situation (arguably a reference to territoriality or personality), but also ‘in the light of the objectives pursued by the proposed legislation’.<sup>314</sup> Thus, in light with cosmopolitan tenets, if the objectives pursue a global interest – in the case the contribution by the financial sector to the costs of the crisis, and discouraging excessively risky activities – the jurisdictional assertion vindicating those objectives might well be lawful. In the Legal Service’s view, however, because the actually envisaged basis for extraterritorial jurisdiction did in fact insufficiently contribute to this global interest, the aforementioned Article 4(1)(f) of the proposed Directive was considered to violate customary international law: arguably, financial institutions and transactions that had no part whatsoever in the crisis would be taxed, and so would activities that were not liable to contribute to systemic risk.<sup>315</sup> In addition, the Legal Service considered the escape clause to be ‘totally unsatisfactory’, as it should not be incumbent on an individual Member State to define the situations falling within this clause.<sup>316</sup>

One may be tempted to conclude that if the scope of the Directive were delimited somewhat more narrowly, and if the escape clause would be made more specific, it would pass muster under international law. But then, the Legal Service affirmed the primordial role of territoriality, referring to the EU (EC)’s own stance *vis-à-vis* the extraterritorial ambitions of the US Helms-Burton Act, *i.e.*, the ‘extraterritorialized’ boycott of Cuba, which also prohibited EU persons from doing business with

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313 Opinion of the Legal Service of the Council of the EU, 6 September 2013, 2013/0045.

314 *ibid.*, para 20.

315 *ibid.*, paras 21-2.

316 *ibid.*, para 25. Scott has regretted that ‘the proposal does not contemplate the “disapplication” of EU law where one counterparty, or indeed the transaction as a whole, has been made subject to a comparable or comparably effective financial transaction tax elsewhere’ and that it ‘does not establish a governance framework to facilitate further clarification and exemplification of the circumstances in which the open-ended criteria laid down by the contextual standard will be deemed to be met’, while nevertheless not rejecting Article 4(3) out of hand (J Scott, ‘The New EU “Extraterritoriality”’, (2014) 51 Common Market L Rev 1343, 1372-3).

Cuba.<sup>317</sup> In the Service's view, 'entities must be subjected to the laws of the country where they are located' and 'exceptions are essentially linked with situations where the activities of the entity are largely directed towards another territory', citing the example of a price-fixing cartel preying on the EU market.<sup>318</sup> The opinion goes to show that only in the case of 'overwhelming necessity' to protect EU interests,<sup>319</sup> extraterritorial jurisdiction would be lawful. Exercising jurisdiction to also protect non-EU interests would be unlawful. This territorial and national-interest-based approach is a clear indictment of cosmopolitan unilateralism.

Relying on similar arguments as those advanced by the Legal Service of the Council of the EU, the United Kingdom – concerned about the impact of the proposed Directive on its financial sector – asked the CJEU to annul the Council decision that authorized a number of Member States to set up the FTT by means of an enhanced cooperation procedure. However, as the EU had not yet taken an implementation decision regarding the FTT, the UK's action was dismissed as premature.<sup>320</sup> A challenge to this implementation decision, once it will have been taken, is obviously to be expected.

Hybridization of global and national-interest-based action could also occur where a state or the EU applies its own regulation to a foreign operator, causing knock-on effects for the latter's global operations. Thus, the EU's application of the right to be forgotten as part of EU data protection regulation, to Google, a foreign 'controller' operating a search engine in the EU, may force Google to apply this right anywhere in the world: it may have to remove the person whose

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317 Opinion of the Legal Service of the Council of the EU, 6 September 2013, 2013/0045, para 24. The comparison is not entirely convincing, as Helms-Burton may not be justified under cosmopolitanism: arguably, it protects the (misguided) security interests of the US rather than the interests of the international community.

318 *ibid* (internal quotation marks omitted); citing *Wood Pulp*, which affirmed the territorial implementation doctrine in EU competition law (*In re Wood Pulp Cartel v. European Commission* [1998] Common Market L Rev 901).

319 The expression is used in *In re Wood Pulp Cartel v. European Commission* [1998] Common Market L Rev 901, para. 23.

320 Case C-209/13, *United Kingdom v. Council*, Judgment of 30 April 2014 [not yet published].

rights the EU protects from search results generated by the Google engine *outside* the EU.<sup>321</sup> Similarly, application of national aviation and maritime safety rules may force foreign aircraft and vessels to upgrade their safety systems in their worldwide operations, as it is not economically profitable to use different aircraft or vessels for different journeys. In this scenario, the primary aim is protecting national or regional interests, *e.g.*, protecting EU citizens' data or the safety of the national territory/territorial sea, but the *consequences* are global, and possibly cosmopolitan, in the sense that they protect the legitimate rights of citizens in other nations (the right to be forgotten, the right to be safe from transport incidents).

#### 4.4 Concluding observations

Concluding this part, it is apparent that cosmopolitan unilateral jurisdiction, whether in design, actual exercise, or consequences, is a reality. Such jurisdiction may be exercised for purely altruistic reasons, insofar as the impugned conduct shocks the conscience of mankind. In line with the doctrine of *erga omnes* obligations set out *supra*, every state could be considered to have a nexus with such conduct, thus grounding a right, or even a moral imperative to exercise (universal) jurisdiction, typically over international crimes, gross human rights violations, or environmental abuses. More often, the more immediate trigger for the exercise of cosmopolitan jurisdiction will be concern over domestic operators' competitiveness or over threats to the integrity of domestic regulation; but even then, such domestic regulation may initially have been adopted with a view to solving, or at least contributing to solving, global problems, *e.g.*, climate change or overfishing. In some cases, cosmopolitanism has not *informed* the exercise of unilateral jurisdiction but may nevertheless be its *consequence*.

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321 Case C-131/12, *Google Spain SL and Google Inc. v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*, Judgment of 13 May 2014 [not yet published].





## 5 Limitations

Richard Ford observed in his magisterial *Law's Territory (A History of Jurisdiction, 1999)*, that jurisdiction appears to be an abstract model that 'tends to present social and political relationships as impersonal'.<sup>322</sup> Mireille Hildebrandt has seconded this view when describing territoriality as conceptually empty, on the ground that it does not focus on actual social relations or the distribution of resources, and in fact has no content.<sup>323</sup> This normative inconsequentiality only applies, however, so long as the opponents of an assertion of unilateral jurisdiction have recourse to the government that created and exercises it.<sup>324</sup> It is precisely the essence of unilateral jurisdiction that it is in principle exercised without the consent of others, for otherwise it would not be unilateral, even if it supposedly furthers the global interest. This unilateralism has undeniable substantive and distributive consequences, as it may shift resources, possibly to the asserting state proper, or at least a group, or good which the asserting state believes is deserving of protection. Such shifts may be justified on scientific or 'uncontested' natural law grounds, obscuring however the *political* character of decision-making by discrete entities bent on entrenching power, discrediting alternative approaches, and marginalizing particular players.<sup>325</sup>

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322 RT Ford, 'Law's Territory (A History of Jurisdiction)', (1999) 97 Mich L Rev 843, 854.

323 M Hildebrandt, 'Extraterritorial Jurisdiction to Enforce in Cyberspace? Bodin, Schmitt, Grotius in Cyberspace', (2013) 63 U To L J 196, 206.

324 RT Ford, 'Law's Territory (A History of Jurisdiction)', (1999) 97 Mich L Rev 843, 866.

325 M Koskeniemi, 'What Use for Sovereignty Today?', (2011) 1 Asian JIL 67 (decrying a managerial decision-making logic that is 'oblivious to the conditions under which it takes place', and highlighting that the resolution of global problems 'is part of everyday political debate and action').

Given that unilateral action allows one state to single-handedly bring about these far-reaching consequences, some pundits have observed that multilateral solutions – for all the ills that afflict their current instantiations, including their own legitimacy deficit – may after all be preferable to bring about a globally efficient and equitable solution, for they allow all those affected to have their voice heard, and to factor in parameters such as a state’s historical contribution to a global public bad, or a state’s ability to pay.<sup>326</sup> But then again, we live in a non-ideal world where such multilateral solutions are not necessarily forthcoming. Faced with this reality, states have exercised, and may want to exercise unilateral jurisdiction in the global interest.

Such action may however surely raise concerns over self-serving behaviour, undue interference in other nations’ internal affairs, and ‘false universalism’. States or regional organizations taking unilateral action in the global interest should be aware of its potential for abuse and imperial imposition. This awareness need however not translate into a wholesale rejection of unilateralism. Rather it calls for jurisdictional or substantive limitation of unilateral action to avert false universalism.<sup>327</sup> There is no reason to believe that such an endeavor is impossible.<sup>328</sup>

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326 See also *contra*: J Meyer, ‘Dual Illegality and Geoambiguous Law: A New Rule for Extraterritorial Application of US Law’, (2010) 95 *Minn L Rev* 110, 158 (submitting, with respect to US territoriality, that ‘without the input of all parties affected there is little reason to suppose that whatever rule US officials choose will be the most globally efficient and optimal solution’). Compare also M Koskenniemi, ‘Constitutionalism, Managerialism and the Ethos of Legal Education’, (2007) 1 *EJIL* 1, 14 (advocating a ‘nuanced attitude to the jurisdictional conflicts and the attendant choices about distributionary effects’).

327 D Bodansky, ‘What’s in a Concept? Global Public Goods, International Law, and Legitimacy’, (2012) 23 *EJIL* 651 (claiming at 668 that ‘[i]nternational governance [is needed] to guard against self-serving behavior by states that, in providing a global public good, give short shrift to the negative externalities that may result’). See also G Shaffer, ‘International Law and Global Public Goods in a Legal Pluralist World’, (2012) 23 *EJIL* 669, highlighting at 677 the role for international institutions in coordinating decisions, and at 692 advocating the need for international constraints on unilateral action).

328 Compare R Howse and R Teitel, ‘Does Humanity-Law Require (or Imply) a Progressive Theory of History? (and Other Questions for Martti Koskenniemi)’, (2013)

The pertinent question thus becomes what limitations should be imposed to render such jurisdiction ‘reasonable’. After introducing the concept of reasonableness (Section 5.1), I go on to suggest such jurisdictional mitigating mechanisms as dual illegality (Section 5.2), democratic participation (Section 5.3), equivalence (Section 5.4), and compensation (Section 5.5). These mechanisms further the legitimacy of unilateral jurisdiction in the global interest, as they take the human-centeredness of cosmopolitanism truly seriously, designed as they are to take the interests of all affected actors into account and thus to limit jurisdictional overreach in violation of cosmopolitan tenets.<sup>329</sup>

### 5.1 Reasonableness

In jurisdictional theory, the question of reasonableness normally only comes up with respect to jurisdictional assertions that are considered as lawful in the first place. Proponents of reasonableness posit that the very fact that such jurisdiction is lawful does not mean that exercising it to the fullest extent allowed under international law is necessarily appropriate as a matter of policy. In this study, I proceed on the basis of a rather agnostic view as to the (il)legality of the exercise of unilateral jurisdiction in the global interest. I acknowledge that such assertions may be in tension with the received principles of jurisdiction, but I also observe that asserting states and organizations, as well as domestic and international courts, may legitimize unilateral action by invoking these principles. Eventually, I consider it a rather fruitless exercise to analyse such

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27 Temple Int’l & Comp L Rev 377, 387 (referring to the ‘self-awareness of humanity-oriented liberal legal internationalism, and its own consciousness of the risk that universalism will be misdirected in a manner that courts with despotism’, and suggesting to weigh the danger of false universalism against the promise of true or benign universalism).

329 Cf *ibid* 388 (citing the ‘awareness of humanity-law’s inner normative logic and its intrinsically self-limiting character’).

action using the crude binary code through which the law operates (lawful/unlawful). Cosmopolitan unilateral action finds itself in a grey legal zone; it does not easily lend itself to legal coding.

That said, it is uncontested that – whether it is legally, politically, morally, or economically justified – unilateralism creates externalities for foreign states, individuals, and operators, which the asserting state may want to internalize. This is where restraining criteria of reasonableness come in. This principle of reasonableness may not *require*, under international law, that states exercise their jurisdiction reasonably, but at least asks them to take into account the interests of affected foreign actors, of a public or private nature, as a matter of good neighbourliness. In an earlier work, I have expounded at length on the principle of jurisdictional reasonableness.<sup>330</sup> Let me highlight here that, from a theoretical perspective, this role of ‘reasonableness’ is a typical late modern praxis of resorting to ‘equity’ or ‘justice’ in order to solve sovereignty problems,<sup>331</sup> a praxis that may be explained by a more general mistrust of the capacity of bright-line rules to yield legitimate solutions.<sup>332</sup> With respect to the law of jurisdiction, it could be submitted that this equity-based approach was in fact necessitated by the seminal *Lotus* judgment, which

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330 C Ryngaert, *Jurisdiction in International Law* (2nd edn, OUP 2015), Chapter 5. In this chapter, I refuted the claim that reasonableness is required as a matter of international law, *inter alia* made by the American Law Institute in its commentary to Section 403 of the Restatement (Third) of US Foreign Relations Law, which codifies the jurisdictional rule of reason. On the basis of an extensive analysis of state practice and *opinio juris*, I came to the conclusion that such a requirement does not currently exist as a matter of positive law. This finding does not mean, however, that reasonableness is not normatively desirable. In this work I went on to praise subsidiarity as a proper criterion of reasonableness.

331 M Koskeniemi, ‘The Politics of International Law’, (1990) 1 EJIL 1, 16 (‘Late modern practice of solving sovereignty disputes pays hardly more than lipservice to the traditional bases of territorial entitlement. Deciding such questions is now thought of in terms of trying to establish the most equitable solution’).

332 *ibid* 20 (‘In the absence of any determinate rules, and being unable to prefer one sovereign over another, legal practice has turned to equity in order to justify the delimitation of the two sovereignties *vis-à-vis* each other. [...] the late modern silence about theoretical justifications and the leap to *ad hoc* compromise’).

affirmed the positive jurisdictional freedom of states, as well as states' right not to be subject to regulation without their consent.<sup>333</sup> These 'liberal' affirmations are in tension with each other, as upholding the former, including in its extraterritorial dimension, necessarily undermines the latter. Eventually, circumscribing, through rather loosely defined interest-balancing tests, states' rights to assert jurisdiction and to be free from outside interference could offer a way out of the conundrum.<sup>334</sup> This is not much unlike the liberal state has balanced the freedoms of its citizens, imposing restrictions on some freedoms so as to protect the freedoms of others, as *e.g.*, reflected in the restrictions which states are allowed to impose on the freedom of speech.<sup>335</sup>

Jurisdictional reasonableness, as it has in the past been pioneered in US antitrust law,<sup>336</sup> has – not surprisingly – come under severe criticism for failing to provide legal certainty.<sup>337</sup> Reasonableness would at best be subjective, and at worst arbitrary.<sup>338</sup> When the reasonableness test is carried out by domestic actors, the risk of

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333 PCIJ, *SS Lotus*, PCIJ Reports, Series A No 10 (1927).

334 M Koskenniemi, 'The Politics of International Law', (1990) 1 EJIL 1, 1 (arguing that 'conflict of their liberties [...] would not seem soluble by simply preferring "liberty" – because we would not know which state's liberty to prefer [and that] [a]t that point, legal practice breaks from the argumentative cycle by recourse to equity – an undifferentiated sense of justice'.

335 See for instance Article 10(2) ECHR which provides that the right to freedom of expression 'may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary'.

336 See for a strong defense: L Kramer, 'Extraterritorial Application of American Law after the *Insurance Antitrust Case*: A Reply to Professors Lowenfeld and Trimble', (1995) 89 AJIL 750, 752.

337 C Ryngaert, *Jurisdiction in International Law* (2<sup>nd</sup> edn, OUP 2015) 172.

338 M Koskenniemi, 'The Politics of International Law', (1990) 1 EJIL 1, 16 ('recourse to the kind of justice involved in such appreciation can only mean, from the perspective of the Rule of Law, capitulation to arbitrariness or undermining the principle of the subjectivity of value, required in the pursuit of a Rule of Law').

parochial applications may be said to be high. The challenge then is to develop more specific criteria that could inform a jurisdictional interest-balancing test, a challenge that has earlier been taken up by US courts<sup>339</sup> and by the Restatement (Third) of US Foreign Relations Law.<sup>340</sup> This selection of more specific criteria is not a neutral one, however, and it cannot escape natural law-based subjectivism. As Koskenniemi pointed out, ‘in justifying its conception of what is equitable, the court will have to assume a theory of justice – a theory, however, which it cannot justify by further reference to the legal concepts themselves’.<sup>341</sup> When exercising unilateral jurisdiction in the perceived global interest, it appears indeed inevitable that states will apply *their* notions of global justice to foreign territories and persons.<sup>342</sup> The subjective character of this state of affairs can however be mitigated where the factors used in the interest-balancing test are in part inter-subjectively shared, e.g., when they reflect a substantive or formal international consensus laid down in a legal instrument, or when input is sought from affected parties.

Nonetheless, absent a globally shared justice conception, a state’s quest for an objective test of justice (which will in turn also be *applied* objectively) may ultimately prove futile. This is simply a limitation that we will have to accept. Indeed, to reject reasonableness means to accept either that jurisdictional problems can be solved via bright-line rules of territoriality or personality or that such problems cannot be solved at all. The first position is increasingly difficult to maintain in light of the accelerating interdependence of the world, notably following the spread of the Internet. The

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339 *Timberlane Lumber Co v. Bank of America* (1976) 549 F.2d 597; *Mannington Mills Inc v. Congoleum Corp* (1979) 595 F.2d 1287.

340 Section 403 of the Restatement (Third). At the time of writing, a fourth Restatement was in preparation.

341 M Koskenniemi, ‘The Politics of International Law’, (1990) 1 EJIL 1, 30.

342 Cf M Koskenniemi, ‘What Use for Sovereignty Today?’, (2011) 1 Asian JIL 66 (assailing the assumption that ‘we have a more or less unproblematic access to what it “really” is that territorial rule ought to achieve’, and that ‘assessments are bound to differ between individuals and social groups’).

second position is outright undesirable, as it negates the ordering role of international law and simply stands for lawlessness in international relations, *i.e.*, the hard-core realist position. Ultimately, giving in to some form of legal subjectivism, as reflected in an interest-balancing test, however defined, is the only realistic option: after all, the law, and international law in particular, is never applied in a politically neutral fashion.<sup>343</sup>

It is wiser to formally factor political or other non-legal considerations into the legal analysis than to deny their operation, or to give up the law altogether. This also follows from the autopoietic theory posited by the systems theorist Niklas Luhmann. Luhmann famously argued that every social system, including the legal system, is a differentiated functional system within society.<sup>344</sup> This legal system reproduces itself (*autopoiesis*) and the overall social system, by being closed and open to its environment at the same time. In a complex environment, the structural stability of the law is ensured through its operative closedness (the law determines what is lawful and what is not, and thus ensures recursivity and reproduction), but to maintain its relevance it should open itself up to adapt to rigid environmental systems.<sup>345</sup> To enable this adaptation of the legal system to its environment, Luhmann suggests, most interestingly,

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343 Cf M Koskenniemi, 'The Politics of International Law', (1990) 1 EJIL 1, 31 ('The late modern turn to equity in the different realms of international law is, in this sense, a healthy admission of something that is anyway there: in the end, legitimizing or criticizing state behaviour is not a matter of applying formally neutral rules but depends on what one regards as politically right, or just.'). *ibid* 31-2 ('The turn away from general principles and formal rules into contextually determined equity may reflect a similar turn in the development of international legal thought and practice. For issues of contextual justice cannot be solved by the application of ready-made rules or principles. Their solution requires venturing into fields such as politics, social and economic casuistry which were formally delimited beyond the point at which legal argument was supposed to stop in order to remain "legal"').

344 See for a summary of Luhmann's work in this respect: A Viskovatoff, 'Foundations of Niklas Luhmann's Theory of Social Systems', (1999) 29 *Phil Soc Sci* 481.

345 N Luhmann, 'Law as a Social System', (1998) 83 *Nw U L Rev* 136, 144 (mentioning technology and capital investment).

‘proportionality’ and ‘balancing interests’.<sup>346</sup> This interest-balancing in turn allows the legal system to loosen its own rigidity and to tailor the applicable law to the needs of the individual case – eventually allowing the entire social system to reproduce itself in this act. The need for international law to be open to the necessities of social life has in fact a long pedigree in international law. Authors propounded a departure from abstract legal formalism and advocated thinking in terms of social necessities as early as the first decades of the 20<sup>th</sup> century.<sup>347</sup> Most notably, the Yale-based policy-oriented school of international law drew attention to context and preferred legal order when trying to resolve issues by law.<sup>348</sup>

All this implies that considerations of social expediency may inform the jurisdictional reasonableness analysis. Particular weight in this respect may be given to a perceived global urgency, *e.g.*, where global public goods risk going undersupplied or where global justice risks not being delivered in the absence of unilateral action. *A la limite*, a jurisdictional assertion could even be considered reasonable on the mere ground that it protects a global interest or a universally shared value. To the extent that this interest or value is recognized in international law, allowing states – rather than aloof multilateral institutions that may be seen as undemocratic – to enforce this law will also strengthen their sense of ownership, and foster implementation.<sup>349</sup> Another reason for not placing the bar of reasonableness

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346 *ibid.*

347 M Koskenniemi, ‘The Politics of International Law’, (1990) 1 *EJIL* 1, 10-1, citing such authors as Politis (N Politis, *Les nouvelles tendances du droit international* (1927), Scelle (G Scelle, *Précis de droit des gens. Principes et systématique I-II* (1932, 1936) and Pound (R Pound, ‘Philosophical Theory and International Law’, (1923) 1 *Bibliotheca Visseiana* 1).

348 MS McDougal, ‘International Law, Power and Policy: A Contemporary Conception’, (1953) 82 *Recueil des Cours de l’Académie de Droit International* 133; MS McDougal and HD Lasswell, ‘Jurisprudence in Policy-Oriented Perspective (with Harold D. Lasswell)’, (1967) 19 *U Fla L Rev* 486.

349 G Shaffer, ‘International Law and Global Public Goods in a Legal Pluralist World’, 23 (2012) *EJIL* 669, 687 (supporting unilateral state application of international law via legal pluralism, holding that ‘international law is more likely to be implemented if it



too high is, as legal pluralists have pointed out, that regulatory innovation and error correction, also in respect of global values, benefits from unilateral action taken by a variety of actors.<sup>350</sup> At first sight, a ‘disorder of orders’, in Walker’s words, may be discerned.<sup>351</sup> But, as Shaffer has pointed out, ‘the one’ may be ‘constituted by the interactions of the many’.<sup>352</sup> This ‘one’ does not mean that one legal system prevails over another, however.<sup>353</sup> Moreover, in legal pluralist understandings, the circle of relevant jurisdictional actors goes beyond the nation-state.<sup>354</sup> Indeed, regulatory innovation, including in respect of global values, also flows from non-state regulation, *e.g.*, private norms developed transnationally. But even if one were not to abandon the nation-state system just yet, there is no denying that non-state actors have impacted on the scope of state jurisdiction, notably by triggering this very jurisdiction on the basis of private complaints, *e.g.*, in transnational human rights and anti-trust litigation.<sup>355</sup> The concerns over this ‘let thousands flowers

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engages and takes account of state perceptions and concerns through pluralist interaction’, also highlighting ‘the potential pathologies of centralized institutions’).

- 350 PS Berman, ‘A Pluralist Approach to International Law’, (2007) 32 *Yale J Int’l L* 301 (citing as benefits that accrue from having multiple overlapping jurisdictional assertions: greater possibility for error correction, a more robust field for norm articulation, and a larger space for creative innovation, drawing on RM Cover, ‘The Uses of Jurisdictional Redundancy: Interest, Ideology and Innovation’, (1981) 22 *William & Mary L Rev* 639). See also JR Reidenberg, ‘Technology and Internet Jurisdiction’, (2005) *U Pa L Rev* 1951, 1974 (‘the multiplicity of states with jurisdiction over Internet activities is likely to stimulate creativity and new Internet services, such as more accurate and selective filtering technologies, stronger security zones and more robust, customized compliance capabilities’).
- 351 N Walker, ‘Beyond Boundary Disputes and Basic Grids: Mapping the Global Disorder of Normative Orders’, (2008) 6 *Int’l J Const L* 373, 376.
- 352 G Shaffer, ‘International Law and Global Public Goods in a Legal Pluralist World’, (2012) *EJIL* 669.
- 353 H Lindahl, ‘A-Legality: Postnationalism and the Question of Legal Boundaries’, (2010) 73 *Modern L Rev* 30, 56 (‘none of these principles succeeds in gaining ascendancy over the others, even though they can display a measure of mutual accommodation’).
- 354 HL Buxbaum, ‘Territory, Territoriality, and the Resolution of Jurisdictional Conflict’, (2009) 57 *Am J Comp L* 631, 673.
- 355 HL Buxbaum, ‘National Jurisdiction and Global Business Networks’, (2010) 17 *Ind J Global Legal Stud* 165, 173 (‘activists, legislative reformers, and plaintiffs seeking

bloom' approach are obvious: normative conflict will purportedly be rife and rulings in various jurisdiction inconsistent.<sup>356</sup> Given the prevailing under-enforcement of global values, however, these concerns are to be taken with a grain of salt.

## 5.2 Dual illegality

A constraint that has traditionally been suggested in the law of jurisdiction is the rule of dual illegality, in the criminal law known as double criminality. Pursuant to this rule, states should only exercise their jurisdiction when the impugned behaviour is illegal or criminal under the law of both the asserting state and the foreign territorial state. Arguably, when thus exercising its jurisdiction extra-territorially, the state is just enforcing foreign regulations and thus exercise some sort of 'vicarious' jurisdiction. The rule of dual illegality would purportedly dispel legitimacy and democracy concerns, preclude tricky determinations as regards the perceived inability or unwillingness to prosecute or offer remedies on the part of the foreign state, and prevent foreign protest.<sup>357</sup> From a cosmopolitan

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recovery for harm suffered, are attempting to create a broader area of engagement for domestic courts through methods that rescale regulatory challenges').

356 AL Parrish, 'Reclaiming International Law from Extraterritoriality', (2009) 93 Minn L Rev 815, 866, inveighing against legal pluralism on the ground that '[t]he expectation is also that with increased extraterritorial application of domestic laws, "clashes" between inconsistent rulings in different countries will become commonplace', and citing 'inconsistent adjudications' as well. See also AL Parrish, 'The Effects Test: Extraterritoriality's Fifth Business', (2008) 61 Vand L Rev 1453, 1490 (repeating the criticism and arguing that 'global problems require international solutions').

357 Cf J Meyer, 'Dual Illegality and Geoambiguous Law: A New Rule for Extraterritorial Application of US Law', (2010) 95 Minn L Rev 110, 119 ('[t]he dual-illegality rule would require that US courts decline to interpret geoambiguous laws to penalize or regulate conduct that occurs in the territory of another state unless the same conduct is also illegal or similarly regulated by the law of the foreign territorial state'; 'purely legal determinations that do not draw judges into making value judgments about this wisdom or need for extraterritorial regulation'). *ibid* 120 (arguing that 'there is far less reason (or, at least, legitimate reason) for the territorial state to complain'). *ibid* 178 (drawing attention to the reduced concerns; about antidemocratic overextension of US law).

perspective, however, the rule of dual illegality may allow recalcitrant states to just drag their feet when it comes to tackling global problems: *not* tackling them via their domestic laws would suffice to escape extraterritorial application by third states. Still, in relation to global justice, the dual illegality rule could seriously bite where global problems have been addressed by international treaty or customary international law. To the extent that states are bound by relevant treaty or customary norms, might their subjects be amenable to the exercise of extraterritorial jurisdiction by third states, as *arguendo* the impugned conduct is illegal under both the law of the third states *and* international law binding on the territorial state. This reasoning opens up a *vista* to enforce international law even where treaty or customary law does not explicitly provide for the exercise of universal jurisdiction: for every state to exercise jurisdiction, it would simply suffice that international law has prohibited a certain conduct, whatever the provisions of domestic law. As international law proscribes the conduct, states arguably have no reason to complain about jurisdictional overreaching.<sup>358</sup> Obviously, this only applies *in theory*. In reality, states *have* protested, citing the principle of non-intervention, as no state likes another state to pass judgment on territorial conduct or conduct in which its own nationals are implicated.<sup>359</sup>

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358 U Kohl, 'Corporate Human Rights Accountability: The Objections of Western Governments to the Alien Tort Statute', (2014) 63 Int'l & Comp L Q 665, 679, discussing the reach of the US Alien Tort Statute (ATS), which on its face provides for universal tort jurisdiction ('human rights are internationally recognized and thus ATS human rights litigation cannot create clashes with foreign law [...]. Here the US does not force its domestic law on other States [e.g., US antitrust law], but simply enforces law which everyone has agreed upon. Western States can hardly object to this aspect of the litigation, and they have not.')

359 See, e.g., Nigeria's protest against the exercise of US jurisdiction under the Alien Tort Statute, Supplemental Brief for Respondents, *Kiobel v. Royal Dutch Petroleum Co* 133 S.Ct. 1659 (2013) (No 10-1491), at 5; and Dutch and UK protest relating to the same case, Supplemental Brief of the Governments of the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland as *Amici Curiae* in Support of Neither Party, *Kiobel v. Royal Dutch Petroleum Co* 133 S.Ct. 1659 (2013) (No 10-1491), available at <[www.americanbar.org/content/dam/aba/](http://www.americanbar.org/content/dam/aba/)

Such an international law-based dual illegality rule appears to be far-reaching, as basically it allows states to unilaterally enforce international law – thereby compensating for generally weak international enforcement mechanisms. But at the same time it is constraining too: when absent a clear international prohibition, states exercise jurisdiction, they would interfere in the affairs of other states,<sup>360</sup> even if such interference would be desirable from a global justice perspective. An example is the so-called ‘social’ genocide, *i.e.*, the intentional extermination of political groups. This instantiation of genocide is not covered by the definition of genocide under international law,<sup>361</sup> although it is not less atrocious than other forms of genocide. Under the dual illegality rule, extraterritorial jurisdiction would only be allowed if ‘social genocide’ is also punishable in the territorial state (which it normally is not). It has even been argued that such interference may also take place when non-internationally accepted domestic legal doctrines are applied alongside international law. An example is the United States applying uniquely federal common law rules of corporate veil-piercing and agency to non-US entities acting outside the United States, in the context of the

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publications/supreme\_court\_preview/briefs/10-1491\_neutralamcunetherlands-uk-greatbritain-andirelandgovs.authcheckdam.pdf> (last visited on 17 March 2015), at 6.

360 AJ Colangelo, ‘Universal Jurisdiction as an International False Conflict Of Laws’, (2008) 30 Mich J Int’l L 881, 903 (‘Divorcing the exercise of universal jurisdiction from the faithful application of the international law against the crime serving as the jurisdictional trigger not only contradicts the underlying legal principle, but also effectively guts any restriction on a State’s ability to project any law, anywhere, to anyone-and in this respect would stamp an open invitation to arbitrary and unchecked interference with the sovereignty of other States.’).

361 *ibid* 905-6 (noting the problematic character of the exercise of universal jurisdiction by the Spanish Audiencia Nacional over former Chilean dictator Augusto Pinochet, who was charged with genocide of political groups, and arguing that Chile ‘would have had a strong legal objection to the exercise of Spain’s jurisdiction since the definition employed was exorbitant against the existing state of customary law’). See for a treaty-based definition of genocide: Convention on the Prevention and Punishment of the Crime of Genocide (adopted on 9 December 1948, entered into force 12 January 1951) 78 UNTS 277 and Rome Statute of the International Criminal Court (adopted on 17 July 1998, entered into force 1 July 2002) ISBN 92-9227-227-6.

application of the Alien Tort Statute, which provides a cause of action for violations of international law.<sup>362</sup>

A dual illegality rule limits jurisdictional overreach, but it may overly restrict the realization of global justice principles. This is so because the rule is grounded in the principle of consent, and as indicated earlier, the principle of consent in international law is precisely the reason why needed global action is *not* undertaken. Under the dual illegality rule, where global justice principles have *not* been enshrined in domestic or international law, unilateral jurisdictional action taken to further global justice will be illegal.

### 5.3 Democratic participation

Hewing too closely to dual illegality may have a stifling effect on unilateral state action in the face of responsibility failures on the part of other states or international institutions. For such unilateral action, other principles of mitigation may be called for. As such action suffers from a democratic deficit, much more than dual illegality-based action, it is suggested that foreign affected parties be involved in the design of the regulation, or be given access to remedies so as to contest the regulation before the courts of the asserting state, even in respect of global values.<sup>363</sup> After all, extraterritorial laws may be considered to be inherently

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362 AJ Colangelo, 'A Unified Approach to Extraterritoriality', (2011) 97 Va L Rev 1019, 1107-8 criticizing *In re S African Apartheid Litig.*, 617 F. Supp. 2d 228, 275 (SDNY 2009) on the ground that a German company operating in South Africa could not have 'any expectation that its conduct there would someday be subject to US federal common-law rules of liability').

363 D Bodansky, 'What's in a Concept? Global Public Goods, International Law, and Legitimacy', (2012) 23 EJIL 651, 667 (arguing that a unilateral decision may be substantively correct, but that the issue is 'whether [the unilaterally acting state] had a right to decide, given that many of those affected by its decision are not represented in its decision-making process and cannot hold it accountable', and suggesting that 'assessment, notice, and consultation [...] help to ensure that the views of those affected by a decision are represented').

undemocratic,<sup>364</sup> as they interfere in individuals' right to self-government in the territory of another state, where the latter's laws may be supplanted by the former's.<sup>365</sup> These foreign individuals may never have democratically consented to extraterritorial legislation,<sup>366</sup> as they are not represented within the political institutions of the extraterritorially acting state,<sup>367</sup> or at least have little influence on that state's political processes.<sup>368</sup> In order to transnationally re-politicize unilateral national decision-making with extraterritorial effects, in keeping with the tenets of global administrative law and eventually political sovereignty and self-government, participation and representation of affected foreign persons,<sup>369</sup> transparency, accountability, and international regulatory cooperation, possibly

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364 AL Parrish, 'The Effects Test: Extraterritoriality's Fifth Business', (2008) 61 Vand L Rev 1453, 1483; AL Parrish, 'Reclaiming International Law from Extraterritoriality', (2009) 93 Minn L Rev 815, 820 ('The rise of extraterritorial domestic law [...] poses a greater threat to democratic sovereignty than traditional sources of international law.').

365 Cf M Koskenniemi, 'What Use for Sovereignty Today?', (2011) 1 Asian JIL 68 (arguing that management of significant social problems 'outside the structures of formal statehood' leaves no room for communities 'to decide on their own preferences', and that such management makes 'human beings appear as objects of "protection" or charity but rarely as masters of their own lives').

366 G Binder, 'Authority to Proscribe and Punish International Crimes', (2013) 63 U To L J 278 (rejecting the extraterritorial application of passive personality jurisdiction on this ground). However, Binder *supports* the exercise of active personality principle over a state's own nationals abroad, as such jurisdiction would be in keeping with democratic theory tenets; after all offending nationals are 'likely to return home eventually' (ibid 296).

367 G Shaffer, 'International Law and Global Public Goods in a Legal Pluralist World', (2012) 23 EJIL 669, 684 ('national institutions' [...] 'make decisions which affect outsiders who are not represented before them'); J Meyer, 'Dual Illegality and Geoambiguous Law: A New Rule for Extraterritorial Application of US Law', (2010) 95 Minn L Rev 110, 157 ('The foreign targets of a US extraterritorial law have little potential democratic redress.').

368 AL Parrish, 'Reclaiming International Law from Extraterritoriality', (2009) 93 Minn L Rev 815, 860.

369 AL Parrish, 'The Effects Test: Extraterritoriality's Fifth Business', (2008) 61 Vand L Rev 1453, 1486 ('if democracy means anything, those whose conduct is to be controlled by a particular law must have some voice (directly, or through some form of representation) in determining the substance of those laws').

via networks,<sup>370</sup> are advisable,<sup>371</sup> at least provided that foreign persons and regulators also *wish* to participate.<sup>372</sup> In a maximalist interpretation of modes of participation and representation, decision-making bodies could, as Schiff Berman has suggested, in the interest of legitimacy and fairness even be entirely ‘hybridized’, in the sense that judges from different states sit on domestic courts deciding extraterritoriality cases.<sup>373</sup> As we write, participation and

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370 R Michaels, ‘Global Problems in Domestic Courts’, in Sam Muller *et al* (eds), *The Law of the Future and the Future of the Law* (Torkel Opsahl Academic EPublisher 2011) (arguing that networks can ‘substitute for true global courts by bringing everyone in’, but noting that ‘networks face high coordination problems once the number of involved courts becomes great’ and that ‘networks fail where different countries differ either in their substantive perspectives or, perhaps even more often, in their desire to be active’). In the antitrust field, such networked cooperation has been rather successful, with Sassen even suggesting that antitrust regulators share more with each other than with colleagues back home (S Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages* (Princeton University Press 2006) 237).

371 G Shaffer, ‘International Law and Global Public Goods in a Legal Pluralist World’, 23 (2012) EJIL 669, 688, citing the following accountability mechanisms proposed by global administrative law (GAL) in the (unilateral) production of global public goods: transparency, access to information, engagement with civil society and national parliaments, reporting, notice and comment procedures, reason-giving, proportionality. See also M Koskeniemi, ‘What Use for Sovereignty Today?’, (2011) 1 Asian JIL 68 (arguing, although not in the context of extraterritoriality, but rather with respect to the informal management of social problems by global expert regimes, that transparency and accountability could ‘contribute to the re-imagining of what international politics could mean today’).

372 Such procedures of foreign actors’ participation in unilateralism are obviously only a second-best option compared to mechanisms of participation in multilateral institutions. See N Krisch, ‘The Decay of Consent: International Law in an Age of Global Public Goods’, (2014) 108 AJIL 1, 33 (‘participation in this mode is far less effective than in classical multilateralism’).

373 PS Berman, ‘Global Legal Pluralism’, (2007) 80 S Cal L Rev 1155, 1218 (giving historical examples). Compare the Extraordinary Chambers in the Courts of Senegal, which have been established within the domestic court system of Senegal to judge former Chad dictator Hissène Habré for international crimes under the universality principle, but which are composed of judges from various African countries. See Statute of the Extraordinary African Chambers within the courts of Senegal created to prosecute international crimes committed in Chad between 7 June 1982 and 1 December 1990 (22 August 2012). Unofficial translation available at <[www.hrw.org/news/2013/09/02/statute-extraordinary-african-chambers](http://www.hrw.org/news/2013/09/02/statute-extraordinary-african-chambers)> (last visited on 17 April 2015).

representation in domestic decision-making processes with respect to unilateral action may not yet rise to the level of an international principle,<sup>374</sup> but they may at least be a legitimate expectation harboured by norm addressees.<sup>375</sup> They soften the edges of global values/public goods consequentialism by reimporting the seminal deontological value of selfhood.<sup>376</sup>

The theoretically most notable contribution to the debate about involving foreign affected persons in domestic decision-making has arguably been made by Eyal Benvenisti in the context of his Global Trust project based at Tel Aviv University.<sup>377</sup> Admittedly, the project does not mention the term 'jurisdiction'. However, it clearly has jurisdictional overtones as it focuses on the question whether states, when setting national policies and thereby routinely affecting foreigners in faraway countries, should not provide them with adequate opportunities to participate in shaping these policies. When states exercise extraterritorial jurisdiction, surely it is their explicit aim to

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374 Cf N Krisch, 'The Decay of Consent: International Law in an Age of Global Public Goods', (2014) 108 AJIL 1, 33 (arguing that representation and consultation of affected actors may replace their consent, but that these mechanisms 'have yet to mature into formal requirements that apply generally to global governance institutions').

375 Thus, as Krisch observed, foreign governments and exporters should have been allowed to comment on US environmental, 'turtle-protecting' legislation that applied extraterritorially to foreign fishermen harvesting shrimp (N Krisch, 'The Decay of Consent: International Law in an Age of Global Public Goods', (2014) 108 AJIL 1, 33). This legislation, which was effectively protecting a global environmental interest, was successfully challenged before the World Trade Organization WTO: *Import Prohibition of Certain Shrimp and Shrimp Products – Report of the Appellate Body* (October 12, 1998) WT/DS58/AB/R). After the WTO Panel and Appellate Body reviewed the US extraterritorial assertions, the US changed its legal procedures to 'better to assure due process review of the situations and concerns of these countries and their traders' (G Shaffer, 'International Law and Global Public Goods in a Legal Pluralist World', (2012) 23 EJIL 669, 688).

376 M Koskeniemi, 'What Use for Sovereignty Today?', (2011) 1 Asian JIL 69 (submitting that 'authority is not simply about outcomes', but 'also about self-hood and relationship to others').

377 See Tel Aviv University, Global Trust: Sovereigns as Trustees of Humanity, available at <<http://globaltrust.tau.ac.il/>> (last visited on 17 April 2015).



affect foreign-based persons. In an influential article in the *American Journal of International Law* (2013), Benvenisti made the (granted, not entirely new) claim that sovereignty entails responsibility and that sovereign states should be considered as trustees of mankind.<sup>378</sup> Pursuant to this (unfortunately historically charged)<sup>379</sup> concept of trustee sovereignty, ‘sovereigns are obligated to provide remedies that can correct, or at least minimize, the loss to individuals of the ability to participate meaningfully in shaping their life opportunities’.<sup>380</sup> Arguing from the perspective of democratic theory and the right to self-determination, Benvenisti went on to suggest the imposition of minimal obligations on states to take others’ interests into account, *e.g.*, by offering reasons and paying due respect.<sup>381</sup> This constitutes a convincing argument that partly draws on global administrative law’s suggestion to apply the principles of accountability, transparency, and participation that have matured in domestic settings to global governance.<sup>382</sup> Indeed, insofar as states extend laws beyond their borders to affect global outcomes, are they taking part in global governance? Those who are affected by such laws, whether there are based in the territory, or outside it, should have a

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378 E Benvenisti, ‘Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders’, (2013) 107 AJIL 295.

379 Benvenisti was criticized for advocating neocolonialism and domination: trusteeship may be traced back to ‘the civilizing mission’ of the European colonial powers, and to the continuation of the colonial system via the ‘trust system’, which required that states responsible for their administration take adequate steps to prepare them for self-government or independence. See Chapter XIII of the UN Charter (all Trust Territories have in the meantime obtained self-government or independence). Benvenisti has countered, however, that the critics did not understand him well: ‘my version of trusteeship of humanity did not support giving *more* powers over foreign stakeholders, but just the opposite, requiring more *burdens* on trustees’ resources and more *constraints* on trustees’ autonomy’. See E Benvenisti, ‘Who Trusts the Trustees? (Answer: No One Should)’, 8 February 2015, available at <<http://globaltrust.tau.ac.il>> (last visited on 17 April 2015).

380 E Benvenisti, ‘Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders’, (2013) 107 AJIL 295, 313.

381 *ibid* 318.

382 B Kingsbury, N Krisch and RB Stewart, ‘The Emergence of Global Administrative Law’, (2005) *Law and Contemporary Problems* 15.

voice in the design of such laws. This is not to say, however, that territory loses all its meaning. True, under a radical conception of global democratic theory, borders collapse, and any person affected by a regulatory decision, wherever on earth (s)he may be found, should be allowed to have a voice in the design of such a decision. But as argued above, this is not the world we live in, and moreover it is normatively questionable whether this is the world we *should* live in: in spite of spatio-temporal changes, individuals may still rather strongly identify with the territorially delimited community they inhabit. Therefore, while citizens of *other* territorial communities may, and should have a voice in the design of foreign laws to the extent that they are affected by them, their voice should possibly not be accorded the same weight as the voice of the asserting state's own citizens. Deciding otherwise, and for instance giving foreign-based persons the right to vote – insofar as this would be practically possible at all – might unduly interfere in the life choices of local communities.<sup>383</sup>

Ultimately, many extraterritorial laws are just extensions of local laws (possibly enacted in the global interest), and extraterritoriality may be needed to strengthen the effectiveness of the latter, *e.g.*, to counter carbon leakage as a result of strict local climate change legislation, to prevent capital flight as a result of strict local financial regulation, to address reflagging of vessels subject to strict local legislation, or to stop foreign cartels from preying on local markets subject to tight antitrust regulation. Allowing foreign-based persons to vote down extraterritorial laws inevitably comes down to allowing them to second-guess local regulatory choices, and thus to violate principles of democracy and self-determination.<sup>384</sup> Such regulatory

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383 E Benvenisti, 'Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders', (2013) 107 AJIL 295, 313 (relying on JS Mill, who draws attention to the need for communities to pursue their own unique preferences).

384 Obviously, this argument has less strength in case the law in question is *only* applied extraterritorially, and not domestically, in which case the asserting state may be seen to unjustifiably intervene in the life choices of others, without making its own sacrifices in the global interest. When such action is given shape by trade restrictions, it may be considered as protectionism that runs afoul of the law of the World Trade Organization.

choices should arguably remain with the territorial community, but then, as argued above, democratic considerations call for the development of mechanisms that factor in (although not necessarily slavishly give effect to) the views of foreign affected persons. How such mechanisms are precisely devised cannot be described here in the abstract, just like the acceptable reach of state jurisdiction cannot be described in the abstract. Parameters to be taken into account include the scope of the regulation, the intensity of foreign stakeholders being affected, and state capacity.<sup>385</sup> What is key is that these mechanisms, while perhaps not enabling the formation of a ‘collective will’, at least facilitate the definition, generation, and implementation of inter-subjectively shared values.

Note that allowing foreign affected persons a voice in domestic deliberative processes is not only desirable from a democratic theory perspective, but also from an implementation point of view. Participation of the extraterritorial regulatory targets may increase the chances of successful implementation of the relevant norms; indeed, norm addressees are more likely to support norms in the design of which they were able to participate, and thus, over which they could claim some ownership.<sup>386</sup>

Participation of foreign stakeholders in the design of extraterritorial regulation is not fanciful. As we write, various institutional arrangements already enable or even require it. In *Shrimp Turtle*, for

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385 E Benvenisti, ‘Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders’, (2013) 107 AJIL 295, 320 ([...] the question of deciding upon particular “minimal” deliberative obligations raises several secondary questions. They include the extent to which states ought to involve foreign stakeholders in their decision-making processes, taking into account the costs that are involved; how to determine the circle of those regarded as stakeholders entitled to a hearing; and how information should be made available to them during hearings or when presenting the *rationale* for the policies chosen. The answers to these and other questions must be sensitive to different areas of regulation, the types of interests that are affected, the relative wealth and capacities of the state, among other considerations.’).

386 N Krisch, ‘The Decay of Consent: International Law in an Age of Global Public Goods’, (2014) 108 AJIL 1, 9 (‘Broad participation may foster implementation.’).

instance, a case concerning the compatibility with the law of the World Trade Organization of a US import ban of shrimp harvested in a turtle-unfriendly manner – a measure aimed at realizing global environmental justice goals – the WTO Appellate Body required the United States to consult foreign operators affected by its import ban,<sup>387</sup> a requirement with which it subsequently complied.<sup>388</sup> Also, the regulatory framework of EU financial regulation allows foreign regulators and entities subject to such ‘extraterritorial’ regulation to influence the interpretation of escape jurisdictional clauses and contextual standards,<sup>389</sup> and has reportedly restricted the extraterritorial impact of the EU’s financial regulation.<sup>390</sup>

Foreign affected persons may possibly even have access to domestic dispute-settlement mechanisms to *ex post* contest the legality of extraterritorial regulation. For instance, the Air Transport Association of America, which represents the principal US airlines, contested the validity of the EU Aviation Directive – which was given cosmopolitan extraterritorial effect to combat climate change – under EU and international law, to no avail however.<sup>391</sup> Not all

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387 WTO, *US: Import Prohibition of Certain Shrimp and Shrimp Products – Report of the Appellate Body* (October 12, 1998) WT/DS58/AB/R, para. 172.

388 *ibid*, Recourse to Article 21.5 of the DSU by Malaysia.

389 J Scott, ‘The New EU “Extraterritoriality”’, (2014) 51 *Common Market L Rev* 1343, reporting that the European Securities and Markets Authority consulted with stakeholders, including foreign ones, regarding draft technical standards, and indicated the changes made to the draft standards on the basis of this input. See Final Report, Draft technical standards under EMIR on contracts with a direct, substantial and foreseeable effect within the Union and non-evasion, 15 November 2013, ESMA/2013/1657, at 6-13.

390 *E.g.*, PWC, ‘FS Regulatory Briefing: EMIR Proposals Narrow Impact Outside EU’ (August 2013), concerning the reach of the European Market Infrastructure Regulation (EMIR) (Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories [2012] OJ L 201/1, cited in J Scott, ‘The New EU “Extraterritoriality”’, (2014) 51 *Common Market L Rev* 1343, 1349).

391 Case C-366/10, *Air Transport Association of America and Others v. Secretary of State for Energy and Climate Change (ATA)*, Judgment of 21 December 2011, OJ C 49/7.

foreign persons affected by extraterritorial EU law, however, have access to remedies, not even if such law adversely affects the enjoyment of their human rights.<sup>392</sup> Oddly, the EU Court of First Instance even invoked the international principle of non-intervention and the prohibition of unilateral action to resist such remedies, although remedies are precisely aimed at *limiting* unilateral, interventionist action affecting outsiders.<sup>393</sup> Such resistance to offering ‘extraterritorial remedies’ can also be witnessed in the field of corporate social responsibility, where legal and political obstacles have stood in the way of overseas victims’ access to remedies in multinational corporations’ home states.<sup>394</sup> It is observed that this sort of remedies should

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392 L Bartels, ‘The EU’s Human Rights Obligations in Relation to Policies with Extraterritorial Effects’, (2014) 25 EJIL 1071, citing *inter alia*, Case T-212/02, *Commune de Champagne and Others v. Council of the European Union and Commission of the European Communities*, [2007] ECR II-2023, paras. 88-9 (‘an act of an institution adopted pursuant to the Treaty, as a unilateral act of the Community, cannot create rights [and obligations] outside the territory’). As in contrast, domestic EU persons do have such access, this discriminatory state of affairs is subject to criticism. See, however, for a wider view of the circle of actors that should have access to EU courts: Case C-347/10, *A. Salemink v. Raad van bestuur van het Uitvoeringsinstituut werknemersverzekeringen*, Opinion of Advocate General Cruz Villalón, 8 September 2011, paras. 54-7 (submitting that ‘for EU purposes, the “territory” of the Member States is the area (not necessarily territorial, in the spatial or geographical sense) of exercise of the competences of the Union’).

393 Case T-212/02, *Commune de Champagne and Others v. Council of the European Union and Commission of the European Communities*, [2007] ECR II-2023, paras. 88-9 (ruling that ‘the principle of sovereign equality enshrined in Article 2(1) of the United Nations Charter means that it is, as a rule, a matter for each State to legislate in its own territory and, accordingly, that generally a State may unilaterally impose binding rules only in its own territory’).

394 Human Rights Council, Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework, UN Doc A/HRC/17/31 (2011); General Principle 26 requires that ‘States should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses, including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy.’ The commentary to General Principle 26 further identifies that one such barrier is lack of jurisdiction the part of the home state ‘where claimants face a denial of justice in a host State and cannot access home State courts regardless of the merits of the claim’.

not be offered to mitigate unilateral cosmopolitan action, but rather to make cosmopolitan action possible in the first place. They force states and regional organizations to account for the creation of global injustices as a result of self-interested action (attributable to them or to persons within their jurisdiction). When it comes to human rights, such remedies may in fact be *required* under international or regional human rights treaties, the jurisdictional scope of which is not necessarily territorially limited.<sup>395</sup>

Participation may increase the quality of regulation, and ultimately global welfare and justice, as foreign affected persons may suggest regulatory solutions and perspectives which the asserting state had not yet imagined.<sup>396</sup> Accordingly, involving foreign stakeholders is desirable from both a moral and a utilitarian point of view.<sup>397</sup> Apart from moral and utilitarian considerations, also strategic reciprocity may serve as a pull mechanism for states to establish consultation and representation mechanisms: a failure to do so may invite other states, and possibly *illiberal* states to turn the tables, to the detriment of the liberal states which normally engage in regulatory unilateralism.<sup>398</sup> Nonetheless, in all fairness, there is no strong evidence of such reciprocity actually working. States ‘victims’ of universal

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395 M Langford *et al* (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social, and Cultural Rights in International Law* (CUP 2012). See on the extraterritorial application of human rights in particular M Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (OUP 2011).

396 E Benvenisti, ‘Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders’, (2013) 107 *AJIL* 295, 300 (arguing that ‘public participation and accountability not only are valuable intrinsically but also contribute to better informed, more efficient, and egalitarian outcomes’ and that ‘through other-regardingness, sovereigns can indirectly promote global welfare as well as global justice’). *ibid* 318-9 (writing that the involvement of foreign stakeholders could ‘potentially facilitat[e] a dialogue on ways to promote common and, indeed, global interests’ so that domestic decision-makers can gauge the consequences, and procedural rights for outsiders could offer additional perspectives and better and fuller information, thereby benefiting domestic decision-makers).

397 *ibid* 303.

398 Cf AL Parrish, ‘The Effects Test: Extraterritoriality’s Fifth Business’, (2008) 61 *Vand L Rev* 1453, 1485.

jurisdiction have not started to exercise universal jurisdiction to keep jurisdictionally assertive states in check. Perhaps the only exceptions are South Africa and Argentina.<sup>399</sup> On the 30<sup>th</sup> of October 2014, the South Africa Constitutional Court held that South African authorities are obligated under the South African Constitution and international law to investigate allegations of crimes against humanity committed by Zimbabwean authorities.<sup>400</sup> Argentina initiated investigations into crimes allegedly committed by the Francoist regime in Spain, after Spain had prosecuted a number of officers for crimes committed in the Argentinean Dirty War.<sup>401</sup> Retaliation, in contrast, may serve as a more potent deterrence mechanism: universality laws in Belgium and Spain were scaled back, not because Belgian and Spanish authorities feared that their officials would be hauled before foreign courts, but rather because they bent to diplomatic pressure and wished to avoid political and economic sanctions imposed by target states.<sup>402</sup> Where states do not have the capacity to take sanctions – because of power asymmetries or economic interdependence – or where private economic operators cannot afford to forfeit opportunities of access to the regulating state's markets, retaliation will obviously not serve its purpose.

Representation and consultation mechanisms may provide a modicum of fairness, but there is no guarantee that the state wishing to

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399 International Justice Resource Center, *Argentina and South Africa Pursue Human Rights Abusers in Spain and Zimbabwe*, 5 November 2014, available at <[www.ijrcenter.org/2014/11/05/argentina-and-south-africa-to-prosecute-human-rights-abuses-in-spain-and-zimbabwe-through-universal-jurisdiction/](http://www.ijrcenter.org/2014/11/05/argentina-and-south-africa-to-prosecute-human-rights-abuses-in-spain-and-zimbabwe-through-universal-jurisdiction/)> (last visited on 17 April 2015).

400 Republic of South Africa Constitutional Court, *National Commissioner of The South African Police Service v. Southern African Human Rights Litigation Centre and Another* (CCT 02/14) [2014] ZACC 30; 2015 (1) SA 315 (CC); 2015 (1) SACR 255 (CC) (30 October 2014).

401 The Guardian, *Argentinian Judge Petitions Spain to Try Civil War Crimes of Franco*, 26 October 2010, available at <[www.theguardian.com/world/2010/oct/26/argentina-spain-general-franco-judge](http://www.theguardian.com/world/2010/oct/26/argentina-spain-general-franco-judge)> (last visited on 17 April 2015).

402 A Cassese, 'Is the Bell Tolling for Universality – A Plea for a Sensible Notion of Universal Jurisdiction', (2003) 1 J Int'l Crim Just 589.

legislate extraterritorially will take comments from potentially affected persons and states into account when reaching its final decision, let alone that the state will seek the latter's consent. A decision taken without having recourse to prior consultation, or without giving due attention to input from foreign actors, may be considered to lack procedural fairness. Such a decision is not necessarily illegitimate, however. Rules of procedural fairness make abstraction of the character of the norm to be projected extraterritorially, and of the substance of the input given. Where the extraterritorial norm protects global goods, norms, and values, procedural rules can be relaxed, as arguably there is a shared consensus on the good/norm/value to be protected, in particular where it has internationally been recognized in legal or political instruments. After all, foreign comments which – in bad faith – cast doubt on the existence of the relevant good/norm/value can be discarded, and need not even be sought when the need for the latter's effective protection is crystal-clear. As Krisch has usefully suggested in this respect, a shift from input (procedural) to output (substantive) legitimacy may be defensible. Citing flexibility in democratic theory, he points out that, in respect of the protection of global public goods through non-consensual action, the effective protection of such goods in the common interest may trump requirements of consent and the principle of sovereign equality.<sup>403</sup>

This reasoning may not apply to *all* global public goods, however. Surely, there may be less concern over unilateral action to suppress piracy, international crimes, and terrorism, as such acts have been clearly outlawed, and even criminalized by international treaties, customary international law, and other mechanisms of international cooperation. In economic terms, they represent 'weakest link' problems caused by international outliers that have to be coerced for the

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403 N Krisch, 'The Decay of Consent: International Law in an Age of Global Public Goods', (2014) 108 AJIL 1, 6.



global public good to be supplied.<sup>404</sup> Such coercion may also be done unilaterally where the territorial state is unable or unwilling to assume its responsibility,<sup>405</sup> and where a competent multilateral institution is lacking (teeth). Where a global public good is rather in the ‘aggregate effort’ category, in contrast, a range of positive acts by an internally differentiated international community should be taken to protect the good, without any one specific act being *per se* illegal. Because action is differentiated, any unilateral determination of how such differentiation should take place necessarily has distributional effects, which affected parties should be able to contest through procedural mechanisms made available by the unilaterally acting state. Thus, for unilateral action in respect of aggregate effort goods, effectiveness may not prevail over consent as strongly as in respect of weakest link goods.

#### 5.4 Equivalence

Another mechanism of restraint consists of the asserting state’s recognition of the equivalence, or at least acceptability of a foreign state’s regulation, even if such regulation is not *identical* to the former state’s regulation. One state’s recognition of another state’s laws as adequate may accommodate concerns over foreign regulatory intervention, and limit transaction costs for operators doing business transnationally. Thus, mechanisms of recognition acknowledge state sovereignty concerns and private actors’ business and legal certainty concerns. They are in essence instantiations of a horizontal subsidiarity principle. In a jurisdictional context, this principle could be defined as a principle requiring that bystander states defer the exercise of their jurisdiction when another state with a stronger nexus to the conduct, or a multilateral institution (if one were available) is able and willing to adequately exercise its jurisdiction.

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404 D Bodansky, ‘What’s in a Concept? Global Public Goods, International Law, and Legitimacy’, (2012) 23 EJIL 651, 667.

405 *ibid* 662.

In international law, the standard of equivalence can be traced to the case-law of the European Court of Human Rights on the responsibility of Member States for the acts of international organizations.<sup>406</sup> Pursuant to this case-law, state action taken in compliance with obligations flowing from the state's membership of an international organization to which it has transferred part of its sovereignty 'is justified as long as the relevant organization is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least *equivalent* to that for which the Convention provides'.<sup>407</sup> In the law of jurisdiction, the standard of equivalent protection can usefully be applied via techniques of unilateral or mutual recognition, or via safe harbour agreements. Pursuant to mutual recognition, asserting states recognize that other states' standards, while not providing for identical protection, could also meet the regulatory goal sought, provided that a number of conditions are met.<sup>408</sup> Joanne Scott, writing in the field of EU financial regulation, has characterized such mutual recognition as a jurisdictional 'safety-valve', which causes the EU to disapply its own legislation when the foreign conduct 'has been satisfactorily regulated by another state or by an international body'.<sup>409</sup> A variation on mutual recognition are safe harbour arrangements between states, typically adopted bilaterally in the field of privacy/data protection.

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406 See notably ECtHR, Case of *Bosphorus v. Ireland*, Application No 45036/98, Judgment of 30 June 2005.

407 *ibid.*, paras. 154-6 (emphasis added) (Court going on to state that '[b]y "equivalent" the Court means "comparable"; any requirement that the organisation's protection be "identical" could run counter to the interest of international cooperation pursued', and that '[i]f such equivalent protection is considered to be provided by the organisation, the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organisation').

408 PS Berman has characterized mutual recognition as a means of managing 'hybridity that the movement across territorial borders inevitably creates' (PS Berman, 'Global Legal Pluralism', (2006) 80 S C L Rev 1155, 1224 fn, 323 ECtHR, Case of *Bosphorus* for a literature overview).

409 J Scott, 'The New EU "Extraterritoriality"', (2014) 51 Common Market L Rev 1343.

The most well-known such arrangement is the ‘Safe Harbor’ framework developed by the US Department of Commerce in consultation with the European Commission; this framework provides a means for US businesses to comply with the ‘adequacy’ requirements of the EU Directive on Data Protection<sup>410</sup> when doing business in the EU.<sup>411</sup>

Mutual recognition and safe harbour arrangements acknowledge that locally adopted norms, possibly inspired by a cosmopolitan outlook, may in fact not be universally shared. Still, they assume that there is at least a convergence on regulatory goals, and thus, an overlapping consensus on values without this consensus consisting of states apply exactly the same norms and procedures. These arrangements require that states defer to another state providing adequate protection, especially when that other state has a stronger nexus to the situation. A failure to defer may amount to a disproportionate and unreasonable exercise of jurisdiction.

### 5.5 Compensation

Offering compensation to targeted states or individuals/operators may constitute a final technique of mitigating the exercise of jurisdiction in the global interest. The exercise of such jurisdiction may indeed come at a considerable financial cost to these actors, who may want to be compensated, at least in part, for their efforts to meet the regulatory standards set by the asserting state. In law, compensation typically takes the form of a liability rule: when one actor takes the entitlement of another actor, the former is liable to pay compensation to the latter. In the law and economics literature, this is termed ‘efficient breach’: an entitlement is taken, but as

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410 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 [1995] OJ L 281.

411 See for the details of the process: Helping US Companies Export, available at <<http://export.gov/safeharbor/>> (last visited on 17 April 2015).

compensation is paid, no one is made worse off. An efficient breach may thus be Pareto efficient and serve the social function of maximizing overall welfare.<sup>412</sup> The efficient breach doctrine has relevance for our research object insofar as some jurisdictional assertions may be considered to violate international law. Applying efficient breach, a violation of accepted principles of jurisdiction can be tolerated if its net cost is lower than the cost of compliance with the law, provided that compensation is offered.<sup>413</sup>

Discussing such a liability rule in a part on 'reasonableness' may at first sight seem to be somewhat off target, as reasonableness normally only comes into play when jurisdiction is lawfully exercised in the first place. But then, as argued above, many cosmopolitan jurisdictional assertions are legally dubious. I considered it more fruitful to address mitigating factors, rather than to identify the precise conditions which render an assertion lawful, *e.g.*, on the basis of the strength of the territorial nexus. Whether or not an assertion of unilateral jurisdiction is lawful, it is in any event likely to affect actors outside the state, and thus to engender opposition. An offer of compensation could go some way to soothe foreign opposition. However that may be, it remains that the efficient breach doctrine, on which I draw here, is premised on a prior violation of international law. For the sake of doctrinal clarity, one could hypothesize

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412 J Pauwelyn, *Optimal Protection of International Law* (CUP 2008) 6; G Calabresi and D Melamed, 'Property Rules, Liability Rules, and Inalienability: One View of the Cathedral', (1972) *Harv L Rev* 1089 (arguing that anyone can take 'liability entitlements' provided that compensation is paid).

413 A liability rule may also serve as a democratic safety-valve: as domestic action may be imbued with more democratic legitimacy than international action, violations of international law may well be tolerated, at least if compensation is offered (J Pauwelyn, *Optimal Protection of International Law* (CUP 2008) 72-4). Such views are particularly prevalent in the United States, where state sovereignty and representative democracy are considered to be higher values than international law. For (some) Americans, a cost/benefit analysis could well yield the result that non-compliance with international law is more efficient. Compare with European absolutism, based on the Kantian ideal that universal values and law prevail over politics, and pursuant to which international entitlements should be inalienable (*ibid* 13, 20, 23).

that at least some assertions of cosmopolitan jurisdiction violate international law. The efficient breach doctrine would then posit that such assertions, in spite of breaching the law, could yet be reasonable, as, provided that compensation is offered, they may increase global welfare. The doctrine could be expanded to include assertions that do not technically breach the law, but at least have injurious consequences or harmful outcomes. Along similar lines, recent scholarship pertaining to the law of international responsibility has advocated a departure from the excessive focus on international wrongful acts when determining responsibility, and emphasized instead the purportedly responsible actor's contribution to a harmful outcome as the relevant inquiry.<sup>414</sup>

Applying the efficient breach doctrine, whether in its restricted or expansive form, to the exercise of unilateral jurisdiction,<sup>415</sup> target states which consider their sovereignty to be violated may claim compensation in the form of transfer payments by the assertive states, allowing these states – especially the poorer ones – to comply, or enable the individuals and legal persons falling within their (primary) jurisdiction to comply with the obligations imposed by the asserting state.<sup>416</sup> The challenge, of course, will be how to

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414 A Nollkaemper and D Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework', (2012) 34 *Mich J Int'l L* 359.

415 Note that under current international law, there are a limited number of efficient breach-based liability rules, none of which relates to the exercise of unilateral jurisdiction however: (1) the law of cross-border environmental damage, which requires that the state causing this damage compensate the injured state, even if the former's act was not unlawful; (2) the law of the World Trade Organization, which allows Member States to refrain from compliance with WTO law, or rulings of the WTO Dispute Settlement Mechanism, if such non-compliance is compensated by the suspension of trade concessions by the injured party; and (3) the law concerning investor protection, which allows states to expropriate (foreign) investors if compensation is paid. See J Pauwelyn, *Optimal Protection of International Law* (CUP 2008) 126.

416 Because these payments may have to be funneled to non-state actors, the recipient state should guarantee that they will indeed trickle down to these actors. This is not given, in which case the state-to-state liability framework for efficient breach will not work. See J Pauwelyn, *Optimal Protection of International Law* (CUP 2008) 99-100.

calculate the exact amount of compensation which the target state is entitled to. Arguably, the principle of common but differentiated responsibilities may be guiding here. Pursuant to this principle, every state has responsibilities to supply global public goods, but developed states may have to do more, as they have better capabilities than developing states.<sup>417</sup> This may imply that the jurisdictionally assertive state may have to compensate poorer nations much more than rich nations such as the United States. Other criteria than capacity to pay could come into play, however, *e.g.*, historical contribution. In a jurisdictional context, this criterion posits that states that have historically contributed more to a global public bad, but subsequently change gear by addressing this bad via extraterritorial jurisdiction, should compensate foreign states for the costs associated with the regulatory burden imposed on them. For instance, when Western states require that only sustainably logged tropical timber be imported, with a view to protecting the world's rainforests and thus combating climate change (*e.g.*, the EU Timber Regulation),<sup>418</sup> these states may have to compensate rainforest states for not logging, or at least for only sustainably logging their rainforests, on the ground that historically Western states have logged their own forests and contributed to global warming. Practically speaking, transfer payments could take place via the UN REDD programme, a United Nations Collaborative Programme on Reducing Emissions from Deforestation and Forest Degradation (REDD) in Developing Countries.<sup>419</sup> Arguments of historical contribution do not mean that (Western) states cannot act unilaterally in the global interest – they can, and possibly they should, to break a multilateral deadlock.

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417 See, *e.g.*, Rio Declaration on Environment and Development adopted on 14 June 1992, UN Doc A/CONF.151/26 (Vol I).

418 Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market [2010] OJ L 295/23 (entered into force on 1 March 2013).

419 See The United Nations Collaborative Programme on Reducing Emissions from Deforestation and Forest Degradation in Developing Countries, available at <[www.un-redd.org](http://www.un-redd.org)> (last visited on 17 April 2015).

Yet, they may have to compensate, via cash or technology transfers, other states to ensure that their economic operators can comply with the Western regulations.

A danger with an efficient breach based liability rule in the context of cosmopolitan unilateralism is that the amount of compensation is set too high, as this may discourage states to act and foster under-enforcement. Even without having to provide compensation, when intervening in the interest of the international community, states acting in a cosmopolitan manner already spend regulatory and enforcement resources that should in fact be borne by international institutions. Having to transfer funds in excess of these expenses may discourage states from acting in the common interest altogether, thereby making everybody worse off. Accordingly, when it comes to efficient breach in the common interest, foreign states and sub-state actors should arguably not be compensated for the entire losses they have suffered as a result of the exercise of unilateral jurisdiction. This is where the incommensurability argument really bites: one cannot compare the losses suffered by a trade partner as a result of breach of an international trade agreement, with the 'losses' suffered by a repressive state and its executioners who are prosecuted by a bystander state for international crimes, where international law does not ambiguously provide for universal jurisdiction over such crimes (let's say a prosecution *in absentia* in respect of violations of international humanitarian law committed in a non-international armed conflict). It would certainly be abominable for the latter state and its sub-state actors to be compensated for an exercise of universal jurisdiction in violation of the principle of non-intervention: in the efficient breach approach, the bystander state would have to pay an executioner to put him behind bars, and in tort proceedings, that state rather than the executioner or the responsible state, would compensate the victims. That said, when it comes to unilateral jurisdiction in respect of global public goods for the realization of which an overall effort of the international community is required, incommensurability does not bite as strongly. Such unilateral

jurisdiction often takes the form of trade-restrictive measures, the cost of which to the target country could more easily be calculated.

## 5.6 Concluding observations

Applying ‘reasonableness’ is inevitably a messy process. It is an inherently vague notion that may fail to confer legal certainty on international relations and transnational transactions. However, even jurisdiction is not a stable category with a fixed meaning, but rather, to recall Berman’s words, ‘the locus for debates about the appropriate definition of community and the articulation of norms’.<sup>420</sup> The implementation of ‘reasonableness’ ultimately depends, as Scott has observed, on a ‘continuing dialogue’ and a dynamic ‘discursive process’, that may lead to ‘ongoing adjustment as new factual scenarios emerge’.<sup>421</sup> What is reasonable cannot be defined in the abstract, but certain techniques, such as dual illegality, democratic participation, and equivalent protection may prove helpful. That being said, where states are willing to act in the global interest, mechanisms of restraint may have a chilling effect on the exercise of jurisdiction, potentially leading to under-enforcement and a decrease in global welfare. Therefore, a flexible application of such mechanisms, which does not set the bar prohibitively high, is called for.

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420 PS Berman, ‘Conflict of Laws, Globalization, and Cosmopolitan Pluralism’, (2005) 51 *Wayne L Rev* 1105, 1126.

421 J Scott, ‘The New EU “Extraterritoriality”’, 51 (2014) *Common Market L Rev* 1365.



## 6 Final concluding thoughts

Returning to my initial observations, there is no denying the abiding role of international law in regulating international affairs. This role is perhaps not the one classic international lawyers envisage: a role based on multilateral consent of states. Rather, drawing on the optimistic Lauterpachtian notion of international law being in need to be progressively developed, I have argued in favour of a Grotian moment. I have propounded a paradigm shift, consisting of relaxing the requirement of consent and of international law authorization for states to act unilaterally to protect global values. Such authorization is needed for the proper enforcement of international law, as well as to tackle pressing global governance challenges.

Given the territorial and consent-based structure of the international legal order, such an authorization is not self-evident. It may be in clear tension with the positivist streak of modern international law. It is observed, however, that natural law and policy-oriented approaches have never entirely disappeared in international legal discourse. Such approaches do not ground the validity of an authorizing norm just on compliance with formal procedures or rules, but also on compliance with substantive (moral) values.<sup>422</sup> Classic, formal constraints such as territoriality, (negative) sovereignty, and state consent may have to give way in the face of global governance challenges of an ethical nature, such as climate change, overfishing,

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422 See even HLA Hart, *The Concept of Law* (OUP 1994) 250 (even as a positivist arguing that 'the rule of recognition may incorporate as criteria of legal validity conformity with moral principles or substantive values'). In international law, this relatively wide rule of recognition has been relied on the ground the supremacy of a number of substantive international community norms over municipal laws. See J Nijman and A Nollkaemper, 'Beyond the Divide', in J Nijman and A Nollkaemper (eds), *New Perspectives on the Divide between National and International Law* (OUP 2007) 345.

and human rights violations. A state's sovereignty is relative: it comes with cosmopolitan responsibilities and objectives.<sup>423</sup> When these objectives are not properly fulfilled, other states or actors may assume their own responsibility by exercising unilateral jurisdiction in the global interest.<sup>424</sup>

Allowing unilateral action in the global interest is not a blank check, however. States should use their power wisely and exercise their jurisdiction reasonably. To prevent self-service or plain abuse of right, when acting in the common interest they should base their jurisdictional assertions on inter-subjectively shared norms, as preferably laid down in international legal or political instruments, or an independent scientific studies evidencing the scale of a global problem and the need to take action. In addition, they should take into account various mitigating factors, thus doing justice to the rights and interests of foreign states as well as foreign individuals or operators. Such a constellation of reasonable extraterritoriality may realize the goals which the international community has set for itself: the realization of justice, equity, and democracy.

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423 That sovereignty entails responsibility on behalf of the sovereign was already highlighted by S Pufendorf in his 1672 treatise 'On the Law of Nature and of Nations', where he held that '[t]he general law for supreme sovereigns is this: "Let the people's welfare be the supreme law"'. Cited by M Koskenniemi, 'What Use for Sovereignty Today?', (2011) 1 Asian JIL 65.

424 R Howse and R Teitel, 'Does Humanity-Law Require (or Imply) a Progressive Theory of History? (and Other Questions for Martti Koskenniemi)', (2013) 27 Temple Int'l & Comp L Rev 377, 383 (writing that 'the relevant concept of cosmopolitan right implies not only the preservation of the state, but the enhancement of its responsibilities. *And where these are not fulfilled, the state risks displacement by other political actors.*') (emphasis added). *Contra*: M Koskenniemi, 'What Use for Sovereignty Today?', (2011) 1 Asian JIL 64 ('Under this view, sovereignty has no intrinsic sense beyond the objectives it is supposed to serve. It may then be set aside as the *de facto* occupant imagines itself as a trustee of the population [...]', and lamenting the exercise of 'cosmopolitan governance' 'by whomsoever is in a position to exercise it').