

Whither territoriality?

The European Union's use of territoriality to set norms with universal effects

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Sovereignty and the exercise of jurisdiction have always been tied up with the concept of territory.¹ Max Huber famously held in the *Island of Palmas* arbitration in 1928 that “[T]erritorial sovereignty ... involves the exclusive right to display the activities of a state”,² or in other words that States can exercise jurisdiction – set and enforce laws – on their territory to the exclusion of other States. Huber’s Westphalian premise has been severely eroded in the last few decades, however. For one thing, States have increasingly transferred competencies to international organizations, such as the European Union (EU). These have become territorial actors in their own right, setting and enforcing laws within the territory of their member States,³ and participating in international relations often on a par with States.⁴ Furthermore, in an interdependent world, territoriality is gradually losing its meaning as the guiding principle of world jurisdictional order, since the increasing number of transnational activities *per se* have territorial links with more than one regulating entity. Multiple States and regional organizations, such as the EU, could thus rely on territoriality to justify jurisdictional assertions which they consider appropriate, thereby creating international tension and subjecting private actors to multiple regulatory burdens and even conflicting demands. Some States and regional organizations may even use the hook of territoriality to export their own values abroad,⁵ by conditioning market access on compliance with stringent territorial law, or by conditioning extradition of suspects to third countries on compliance with human rights law that normally applies only within the State’s territory. In this scenario, territoriality is no

¹ See for a fine discussion: R.T. Ford "Law's Territory (A History of Jurisdiction)" (1999) 97 *Michigan Law Review* 843-930; D. Kritsiotis "Public International Law and Its Territorial Imperative" (2009) 30 *3 Michigan Journal of International Law* 547-566.

² *Island of Palmas* case (Netherlands, USA) (1928) 2 *Reports of International Arbitral Awards* 829-871, 839.

³ See, as regards the setting of law, Consolidated Version of the Treaty on the Functioning of the European Union (2012) *Official Journal of the European Union* C 326/47 e.g., art. 288 TFEU, which provides that "A regulation [...] shall be binding in its entirety and directly applicable in all Member States. A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods." See as to enforcement, art. 105 TFEU, which lays down the role of the Commission in competition matters: "[...] the Commission shall ensure the application of the principles laid down in arts. 101 and 102 [...] the Commission shall investigate cases of suspected infringements of these principles. If it finds that there has been an infringement, it shall propose appropriate measures to bring it to an end. [...] If the infringement is not brought to an end, the Commission shall record such infringement of the principles in a reasoned decision."

⁴ See e.g. Draft revised agreement on the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms. Found in the 7th working meeting on the CDDH informal working group on the accession of the European Union to the European Convention on Human Rights (CDDH-UE) with the European Commission CDDH-UE(2011)10, available at <http://www.coe.int/t/dghl/standardsetting/hrpolicy/accession/Meeting_reports/CDDH-UE_2011_10_RAP_en.pdf> Also, the European Union has been a WTO member since 1 January 1995.

⁵ Joanne Scott has characterized this method as ‘territorial extension of law’. See J. Scott "Extraterritoriality and Territorial Extension in EU Law" (2014) 62 *American Journal of Comparative Law* 87.

longer used as a shield to prevent foreign States' interference in a State's internal affairs, but rather as a sword to spread domestic or regional law at the global level.⁶

The fundamental transformation of territoriality is the subject of this contribution. It specifically focuses on how the EU, and Europe more generally, are using territoriality to regulate partly, or even entirely, extraterritorial situations, particularly with a view to realizing global values and interests, such as environmental protection, privacy, conflict prevention, and human rights. It challenges our preconceived notions of territoriality, and thus contributes to a better understanding of why territoriality clouds rather than illuminates jurisdictional and regulatory questions. Put differently, this contribution seeks to shed light on what is wrong, if anything, with the use of territoriality in contemporary international regulatory practice.

The contribution consists of two sections. The first section discusses how the EU *nominally* relies on territoriality when imposing market access conditions on foreign (non-EU) goods and services,⁷ whereas *de facto* such conditions may have extraterritorial effects. Indeed, market access conditions need not be geared towards protecting EU territorial interests in the strict sense (*e.g.*, health and safety of EU-based persons), but could be used to tackle *globally* unregulated or under-regulated phenomena (*e.g.*, the emission of greenhouse gases, illegal, unregulated, or unsustainable fishing, or human rights violations): where foreign goods and services are not subject to country of origin regulation that is sufficiently stringent to address these global phenomena, their EU importation can be barred by EU law. Such measures, which export EU values, or at least an EU understanding of global values and threats, may force transnational economic operators to change their global production patterns and service provisions just to comply with EU law, often the strictest legislation on the subject-matter, throughout their worldwide business activities, so as not to lose access to the lucrative EU market. This obviously invites the question as to whether territoriality can still serve its purpose as a mechanism of delimiting spheres of competence between States.

The second section discusses the potential of extradition law, to project European values outside European territory by means of a European territorial link, namely the presence of the

⁶ See on the international benchmarking effect of EU standards notably: A. Bradford "The Brussels Effect" (2012) 107 *Northwestern University Law Review* 68.

⁷ See notably, with respect to the extension of EU climate change legislation to foreign aircraft operators: Court of Justice of the European Union, *Air Transport Association of America and Others v. Secretary of State for Energy and Climate Change ('ATA')* Case C-366/10 (judgment of 21 December 2011) O.J. (C49/07 18 February 2012) para. 125 (holding that application of the Emissions Trading Scheme to foreign aircraft operators, on the basis of the EU Aviation Directive – discussed below – infringes neither the principle of territoriality nor the sovereignty of third states, since the scheme is applicable to the operators only when their aircraft is physically in the territory of one of the member states of the EU and is thus subject to the unlimited jurisdiction of the EU). See with respect to EU legislation regulating the harvesting of seals, notably in Canada and Norway: World Trade Organization, Appellate Body report, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R, WT/DS401/AB/R, 22 May 2014, para. 5.59, 5.167 (holding that the Seals Regulation did not impose extraterritorial obligations, as it was designed to address seal hunting activities occurring 'within and outside the Community' and the seal welfare concerns of European citizens).

suspect on European territory.⁸ This presence, and the legal power which a European State can accordingly exercise over the suspect, allows (and even requires) European States to condition extradition to third countries on assurances that human rights standards, as enshrined in the European Convention on Human Rights (ECHR) or the EU Charter on Fundamental Rights, are complied with after extradition. This mechanism of extradition holds the promise for European States to strengthen international human rights protection in the requesting State, or to export European values, depending on the perspective one takes. Again, as with respect to market access regulation, territorial presence (even if just accidental) serves as a trigger to extend European legislation to territories far beyond Europe's shores.

1. Territorial extension of socio-economic and environmental regulation

The EU has not shied away from taking unilateral measures to address global challenges, when multilateral solutions failed. In fact, the EU has adopted a considerable number of legal instruments governing situations which are not wholly territorial (intra-EU), but which have undeniable effects beyond the EU's territorial boundaries. Such unilateral action could lead to intergovernmental tension, apart from catching businesses between a rock and a hard stone by potentially subjecting them to conflicting demands from different regulators. More fundamentally, it demonstrates how a 'territorial hook' is used to address partly, or wholly, extraterritorial situations, or as Joanne Scott aptly described it, how EU territorial law is 'extended' beyond EU borders.⁹ The discussion in these pages is not meant to, and cannot, be exhaustive. Three sets of EU laws will be briefly addressed here: EU data protection/privacy laws, EU climate change legislation, and EU forestry protection. These laws have been selected because they convey strongly held values of the EU, and have given, or may give rise to international tension.

EU climate change legislation is an example of an area of EU legislation where territorial extension has led to particular international tension. An EU Directive includes aviation activities in the EU greenhouse gas emissions trading scheme, as a result of which all airlines –European or not – have to acquire and surrender emission allowances for their flights that depart from and arrive at European airports, even with regard to non-EU air mileage.¹⁰ This unilateral decision, which was triggered by the blocking of negotiations on the issue within the International Civil Aviation Organization (ICAO), was met with strong international

⁸ *Soering v. the United Kingdom*, ECtHR, judgment of 7 July 1989, appl. no. 14038/88, ser. A 161 (stating that art. 1 of the convention 'sets a limit, notably territorial, on the reach of the Convention', and going on to state that while 'it is common ground that the United Kingdom has no power over the practices and arrangements of the Virginia authorities which are the subject of the applicant's complaints', this does not 'absolve the Contracting Parties from responsibility under Article 3 for all and any foreseeable consequences of extradition suffered outside their jurisdiction.'). See also H. Battjes "Soering's Legacy" (2008) 1 *Amsterdam Law Forum* 139, 142 (stating that "the UK remains responsible for acts within its jurisdiction: the act of expulsion. So Article 1 limits, but does not completely rule out responsibility under Article 3: it can be applicable if the adverse effects of removal are suffered outside the state's jurisdiction.").

⁹ Scott, note 5.

¹⁰ 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) O.J. (L8/3).

protest,¹¹ given the financial repercussions of the Directive on international airline companies. Some U.S. airlines even challenged the international legality of the Directive before the Court of Justice of the EU insofar as it included non-EU mileage in the calculation of emission allowances. This challenge was unsuccessful, however: the Court held in 2011 that the application of the Emissions Trading Scheme to foreign aircraft operators infringes neither the international principle of territoriality nor the sovereignty of third states, since the scheme is applicable to the operators only when their aircrafts are physically in the territory of one of the Member States of the EU and are thus subject to the unlimited jurisdiction of the EU.¹² The EU has currently suspended the entry into force of the Directive, awaiting a positive outcome of negotiations at the ICAO. Recent signals from the ICAO have not been very encouraging, as a result of which the EU may yet wish to enforce the Directive. This may cause third States to mount a legal challenge before the WTO, on the ground that the Directive constitutes an unlawful barrier to international trade in goods and services.

The reach of this Directive shows, if anything, how ‘territory’ has been expanded to extend the reach of EU law. An operator’s free decision to depart or arrive at an EU airport is considered as a sufficient territorial nexus to apply EU law to the entire flight stretch, including the part outside EU airspace. This effectively allows the regulating entity to impose universal legislation, as indeed, in economic terms, aviation operators hardly have the choice *not* to arrive or depart from an airport in as important a market as the EU. From the perspective of the operator, this means that it will be subject to the strictest ‘territorial’ legislation. From a sovereignty perspective, it means that the strictest – in the case EU – legislation problematically supplants the legislation of other States, which may have equally strong or even stronger territorial/regulatory connections.

Another example of how territoriality has enabled the extraterritorial application of EU law through the imposition of market access conditions is offered by the so-called EU ‘Timber Regulation’. The Regulation lays down the obligations of all operators who place timber and timber products on the EU market (adopted in 2010, entered into force in 2013)¹³ and is an outcome of the EU’s Forest Law Enforcement, Governance and Trade (FLEGT) Action Plan. It aims to promote sustainable forest management in *third countries*, and aims at excluding non-certified, illegal timber harvested in third countries from reaching the EU market. Again, territoriality is used as a ploy to reach and influence situations far beyond the EU’s shores.

Illegality in the Timber Regulation is admittedly defined by reference to the law of rainforest States, rather than the law of the EU or its member States. Thus, one could submit that the EU is simply vicariously enforcing foreign law, which should limit concerns over jurisdictional overreaching and sovereignty encroachment. But it remains no less true that rainforest States do not necessarily have a strong interest in the enforcement of local laws and thus may not

¹¹ See, e.g. Declaration adopted by the Council of the International Civil Aviation Organization (ICAO) at the Second Meeting of the 194th Session on 2 November 2011, C-DEC 194/2.

¹² ‘ATA’ case, note 7. See for a critical discussion: G. De Baere and C. Ryngaert “Air Transport Association of America and the EU’s Contribution to the Strict Observance and Development of International Law” (2013) 18 *European Foreign Affairs Review* 389-409.

¹³ 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) O.J. (L295) 23–34.

particularly welcome an EU Regulation in this field (moreover, they could simply get rid of their own legislation if they so desire, as a result of which there is nothing to enforce for the EU). In addition, the Timber Regulation burdens businesses with stringent due diligence requirements that may differ from the requirements they incur under the law of other importing nations. Again, concerns over the compatibility of the Regulation with the law of the World Trade Organization have been raised.¹⁴

The reach of EU data protection/privacy laws offers yet another example of how territoriality has allowed the EU to extend the geographical reach of its legislation. Pursuant to Article 25(2) of the EU Data Protection Directive (1995),¹⁵ the European Commission has the authority to prohibit the transfer of data to non-EU countries who fail to provide “an adequate level of protection” for personal data. This effectively enables the EU to set data protection standards for third countries, to the extent that operators in such countries are interested in data originating in the EU. In a world where data has become an extremely important economic asset, third countries and operators based there, may have no other choice than to comply, although not wholeheartedly. Application of the Directive has notably led to a spat with the United States concerning the application of the terrorism financing provisions of the U.S. PATRIOT Act to the EU-based banking routing company SWIFT, which the EU considered to be subject to EU data protection legislation. This conflict was solved only when the U.S. and the EU concluded a temporary SWIFT agreement in 2010, in which the U.S. committed itself to stronger privacy protections so as to fall within the ‘safe harbor’ exceptions of the Directive.¹⁶ The EU Data Protection Directive will soon be superseded by a General Data Protection Regulation. This Regulation, the scope of which will in fact be even more global - it may apply to all iCloud services for instance –¹⁷ may however further flam the flames of conflict with jurisdictions that provide a lower level of data protection/privacy.¹⁸

Other examples in the same vein could be given, such as the EU’s decision to ban the importation of seal products into the EU,¹⁹ the CJEU’s *Kadi* decisions concerning individuals

¹⁴ See D. Geraets and B. Natens "The WTO consistency of the European Union Timber Regulation" (2014) *Journal of World Trade* 433-455.

¹⁵ Parliament and Council Directive 95/46/EC 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) O.J. (L281/40).

¹⁶ D.B. Bulloch "Tracking Terrorist Finances: the ‘SWIFT’ Program and the American Anti-Terrorist Finance Regime" (2011) 3 *Amsterdam Law Forum* 74-101.

¹⁷ European Commission, Proposal for a Regulation of the European Parliament and of the Council on the Protection of Individuals With Regard to the Processing of Personal Data and on the Free Movement of Such Data (General Data Protection Regulation) (25 January 2012), art. 3(2) (applying the Regulation to “processing activities” that are related to “the offering of goods or services” to individuals within the European Union or “the monitoring of their behavior”).

¹⁸ See on the cloud, e.g., P.M. Schwartz "EU Privacy and the Cloud: Consent and Jurisdiction Under the Proposed Regulation" (2013) 12 *PVLR* 718 *Privacy & Security Law Report*. See on the clash over privacy protection between the EU and the U.S.: P.M. Schwartz "The EU-U.S. Privacy Collusion" (2013) 126 *Harvard Law Review* 1966, 1976.

¹⁹ Regulation 1007/2009 of the Council and Parliament on Trade in Seal Products (2009) O.J. (L286/36). A WTO panel held that such a trade-restrictive measure could in principle be justified under a public morality exception, but that the measure was not applied in an even-handed manner. See Panel Reports, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/R / WT/DS401/R and add.1, circulated to WTO Members 25 November 2013 [appeal in progress].

and entities placed on a terrorism blacklist of the United Nations,²⁰ possible initiatives to stem the flow of conflict minerals, or transparency/disclosure rules governing the activities of EU-based companies extracting natural resources overseas ('publish what you pay').²¹

What unites all these examples is that the EU is using a *territorial link* to regulate situations that are partly, or sometimes even wholly *extraterritorial* in nature. This link may consist of a perceived effect of a situation on persons territorially based in the EU (data protection),²² the presence of assets in the EU (anti-terrorism sanctions), or the use of a territorial entry point in the EU to import third country goods or services (trade measures relating to aviation, forestry, seal products, labor conditions). Especially in the latter case, it appears that the EU is 'using territory' to, in fact, effect *extraterritorial change*.

One may wonder then whether it still makes sense to employ territoriality as an adequate legal basis to exercise jurisdiction in these cases. It appears that a substantial portion of the aforementioned measures is in fact informed by a desire to improve international standards so as to protect global public goods. Such measures could thus be seen as an honest attempt to reconcile different values dear to the EU, also in the external domain: on the one hand the market-based freedom of movement and information, and on the other hand the pursuit of legitimate non-commercial and arguably *global* policy objectives that are insufficiently protected by the market or by multilateral regulation, such as privacy, climate change mitigation, and rainforest protection. An economic operator's EU territorial presence or market access desire then just serves as a useful territorial hook to realize those objectives, which are ultimately not bound to a particular territory, or at least not just to the EU's territory.

Regulation of matters that are not bound to the EU's territory, but subject to shared sovereignty, is however likely to cause conflict between sovereigns which each claim the strongest territorial connection to the matter, and to cause headaches for businesses that have to negotiate different regulatory demands. At times, businesses may even be compelled by one sovereign to do something which another sovereign precisely prohibits. It is of note that regulators do not necessarily take into account such 'foreign sovereign compulsion'. For instance, the EU Article 29 [Data Privacy Directive] Working Party's stated, with respect to

²⁰ CJEU, joined cases C-584/10 P, C-593/10 P and C-595/10 P, *Commission and others v Kadi* (judgment of the Grand Chamber of 18 July 2013).

²¹ See for U.S. regulation aimed at stemming the flow of 'conflict minerals', the extraction and sale of which fuels protracted conflicts in Central Africa, s. 1502 of the Dodd-Frank Act, § 1502(b)(1)(A) & (E) of the Dodd-Frank Wall Street Reform and Consumer Protection Act 2010 (public law no. 111-203), at 124 Stat 2213-18; codified at 15 USC 78m note, which obliges issuers to annually disclose whether minerals "necessary to the functionality or production of a product [they] manufacture[...]" originated in the Democratic Republic of the Congo (DRC) or one of the nine adjoining countries; and, if so, submit a report to the Securities and Exchange Commission (SEC) – the U.S. financial regulator – and make it available to the public.

²² Admittedly, one could also make the argument that, insofar as EU law follows the *transfer* of data of EU persons abroad, the protection offered by EU law is based on the passive personality principle, which allows states to protect the interests of their own citizens abroad. It is noted, however, that a transfer from the EU to another state presupposes an initial EU territorial presence of data; EU law does not as such protect the foreign data of EU persons. In respect of data that are transferred, e.g., 'browsing data' (cookies, web services, profiling), the EU territorial hook may be less ambiguous, as EU law applies to the extent that providers (domestic or foreign) offer services to persons based in the EU's territory.

whistleblower protection under the U.S. Sarbanes-Oxley Act, that "an obligation imposed by a foreign legal statute of regulation ... may not qualify as a legal obligation by virtue of which data processing in the EU would be made legitimate."²³ Similarly, one could imagine a situation of European extractive industry companies being required by EU law to disclose payments made to foreign governments, and foreign law precisely prohibiting the disclosure of such information on confidentiality grounds.

Such conflicts may have to be solved by softening the sharp edges of the liberal invocation of territoriality discussed above. Different ways could be conceived of: (1) one of the regulators backs down, possibly on grounds of comity or just because of sheer power differences; (2) regulators mutually recognize each other's regulatory schemes as providing equivalent protection (e.g., the 'safe havens' under the Data Protection Directive); (3) regulatory convergence, possibly as a result of the benchmarking effect of one regulator's assertiveness; (4) international (minimum) harmonization through conventions or other international legal instruments.

2. Extradition and human rights

The EU and its member States do not only spread values through economic regulation, as discussed in Section 1. They may also do so via international assistance arrangements in penal matters, notably through rules governing extradition to third countries. Under ECHR and EU law, EU member States cannot extradite, surrender or deport a person if the extradition might foreseeably imply the risk of human rights violations.²⁴ This allows the EU and member States to protect human rights as a core value of the EU²⁵ also *outside European territory*, effectively enabling European States to steer third country criminal justice and human rights practices in third States into a more desirable direction, via the – possibly entirely incidental – territorial link constituted by the territorial presence and detention of a presumed offender sought by a third State. The 'steering power' of European States is based on the assumption that the latter States are normally intent on actually prosecuting the person whose extradition they request, and are thus willing to push through legal reforms, or forgo certain punishments to accommodate the requested European State.

The principle that ECHR States are prohibited from extraditing persons to third States where they are exposed to certain human rights violations,²⁶ has its roots in the famous *Soering* decision (1989) of the European Court of Human Rights (ECtHR),²⁷ which paid short shrift to the classic non-inquiry rule in extradition proceedings. Pursuant to *Soering*, Contracting

²³ Art. 29 Working Party, opinion 1/2006 on the Application of EU Data Protection Rules to Internal Whistleblowing Schemes in the Fields of Accounting, Internal Accounting Controls. The relevant U.S. provision can be found in the *Sarbanes-Oxley Act 2002*, 15 U.S.C. §§78(j)-(l), 301(m)(4) 2002.

²⁴ See as regards the prohibition of the death penalty, torture and inhuman and degrading treatment: *Soering v. United Kingdom*, note 8; art. 19(2) of the (since the Lisbon Treaty binding) Charter of Fundamental Rights of the European Union (2000) O.J. (C364/01).

²⁵ Art. 2 of the Treaty on European Union (TEU) (2010) O.J. (C83/01).

²⁶ Below it will be argued which human rights violations (should) qualify.

²⁷ *Soering v. United Kingdom*, note 8.

Parties to the ECHR must ensure that the individual who is extradited to another (requesting) State, even a State that is not a Contracting Party, will not be subjected to torture or inhuman or degrading treatment in that State.²⁸ If the requested State extradites the individual without complying with this obligation, it runs the risk of being complicit in the violation committed by the requesting State. At any rate, by thus extraditing, the requested State directly violates the ECHR, regardless of whether the requesting State also violates international human rights. Accordingly, the violation is construed *territorially*: at the end of the day, the administrative or judicial decision to extradite despite the risk, is taken on EU territory. At the same time, however, it is undeniable that the physical violation, if it were to take place, would occur *extraterritorially*. One cannot escape the impression that territorial jurisdiction is used as a hook to impact on how third States protect human rights, even if the prohibition of extradition is at first sight only aimed at the protection of those specific individuals whose rights may be at risk in the third State as a result of a discrete extradition case.

The *Soering* principle impacts on the interpretation of existing extradition treaties featuring a clause on conditional extradition, including, via Art. 19.2 of the Charter on Fundamental Rights of the EU (CFREU), those to which the EU is a Contracting Party itself, such as the Agreement on Extradition between the EU and the United States (2003). The latter agreement provides that an extradition decision can depend on the requesting State satisfying certain conditions ('conditional extradition'),²⁹ and that extradition can be denied if it would run counter to 'the constitutional principles of the requested State',³⁰ but it does not contain an unambiguous human rights clause. However, since *Soering*, the ECHR, as interpreted by the ECtHR and the CFREU, is seen implicitly to contain such a clause. Accordingly, all EU legal instruments should be interpreted in light of it. Logically, this should mean that EU member States are prevented from extraditing an individual to the U.S. without securing the non-imposition of the death penalty.

While it can hardly be contested that *Soering* and Article 19(2) CFREU inform EU member States' extradition practice, a considerable number of questions remain unanswered. They go to the very essence of the extent to which European core values can be 'exported' outside the European territory.

For one thing, it is not fully clear whether, and to what extent, the principle also extends to cooperation in criminal matters outside extradition. Taking again the example of EU-U.S. cooperation, the Agreement on Mutual Legal Assistance between the EU and the United States (2003),³¹ just like the Extradition Agreement, does not contain an explicit human rights clause, although it provides that the parties can refuse mutual assistance on the basis of their

²⁸ Note that before 1989, European states *could*, but *were not required* to refuse extradition "[I]f the offence for which extradition is requested is punishable by death under the law of the requesting Party, and if in respect of such offence the death-penalty is not provided for by the law of the requested Party or is not normally carried out, extradition may be refused unless the requesting Party gives such assurance as the requested Party considers sufficient that the death-penalty will not be carried out" (art. 11 European Convention on Extradition 1957 CETS no. 024).

²⁹ Art. 13 of the Agreement on Extradition between the EU and the United States (2003) O.J. (L181/27).

³⁰ *Ibid.*, art. 17(2).

³¹ Agreement on mutual legal assistance between the European Union and the United States of America (2003) O.J. (L181/34).

'legal principles'. Does this mean that the EU is not allowed to transfer materials to the U.S. if such materials are used as evidence in legal proceedings that may result in the imposition of the death penalty? Should it matter how much weight the court eventually attaches to this evidence? And, from the perspective of judicial review, one of the core EU values, to what extent can the Court of Justice of the EU check member States' decisions to provide mutual assistance to third States in light of fundamental rights?³² Another contested issue concerns the substantive scope of the human rights clause in extradition proceedings. Article 19(2) CFREU mentions only the death penalty, torture, and inhuman/degrading treatment.³³ This may lead us to believe that the prohibition of the death penalty and the prohibition of torture and other inhuman or degrading treatment, are 'core' core values of the EU that cannot be compromised to any extent in 'extraterritorial' situations where the EU or its member States cooperate with third States. Other human rights are also core values of the EU, which, as part of the EU's constitutional *acquis*, must be protected to the fullest extent within the EU's territory (also when the EU implements UN sanctions on its territory, see the *Kadi* litigation).³⁴ However, when the EU or its member States cooperate with third States, a 'lighter touch' approach may arguably be called for if Article 19(2) CFREU is anything to go by. This approach also accords with the ECtHR's recent case-law, pursuant to which the responsibility of the requested State under the ECHR is engaged only in case the requesting States commits a *flagrant* violation of human rights other than the prohibition of torture and inhuman/degrading treatment.³⁵ This higher bar is defensible and prevents the EU from exporting its far-reaching human rights protections lock-stock-and-barrel to third States without any consideration of local understandings of human rights law that may be accommodated by international human rights treaties, such as the International Covenant on Civil and Political Rights.

The challenge then is to identify which human rights violations are so flagrant as to impinge on the 'core' core European values. Beltran and Nieto have characterized the approach taken so far as being based on an 'I know it when I see it' rationale.³⁶ There is some truth to this characterization, but it should be noted that the determination of a 'flagrant' violation is not arbitrary. In *Ahorugeze*, a case concerning the restrictions to extraditions posed by Article 6 ECHR, the ECtHR held that 'flagrant denial of justice' means a trial that is manifestly contrary to the provisions or the principles embodied in Article 6; a breach of the principles of fair trial so fundamental as to amount to a nullification, or destruction of the very essence of the right to fair trial.³⁷ The fact that the ECtHR found a violation of Article 6 ECHR in extradition proceedings only as late as 2012 substantiates the claim that this is a particularly

³² Cf. M. Beltran de Felipe and A.N. Martin "Post 9/11 Trends/ in International Judicial Cooperation: Human Rights as a Constraint on Extradition in Death Penalty Cases" (2012) 10 *Journal of International Criminal Justice* 581, 601.

³³ Compare art. 3 (f) of the United Nations Model Treaty on Extradition, which prohibits extradition "[I]f the person whose extradition is requested [...] has not received or would not receive the minimum guarantees in criminal proceedings", as contained in art. 14 of the ICCPR.

³⁴ See for the latest judgment in the *Kadi* litigation saga, note 20.

³⁵ *Ahorugeze v. Sweden*, ECtHR, judgment of 27 October 2011, appl. no. 37075/09, para. 115; *Othman (Abu Qatada) v. United Kingdom*, ECtHR, judgment of 21 January 2012, appl. no. 8139/09, para. 285.

³⁶ Felipe and Martin, note 32 at 592.

³⁷ E.g., *Ahorugeze v. Sweden*, note 35 at para. 115.

high bar, 23 years after *Soering*, and in relation to a case concerning an individual's (Abu Qatada) removal to Jordan where evidence obtained by torture could be admitted at his retrial.³⁸ It may be submitted that the ECtHR employs a presumption that the requesting State does offer a fair trial, a presumption that can be rebutted only when it is demonstrated that there is a real risk that torture-contaminated evidence might be used in proceedings in the requesting State. This would mean that a flagrant violation of Article 6 ECHR can be established only if linked with a violation of the prohibition of torture, explicitly mentioned in Article 19(2) CFREU. Whether the requested State would flagrantly violate Article 6 ECHR if it extradites a person to a State where he will be tried by a tribunal consisting of military rather than civilian judges, or where his conviction would not be read in open court, is far less certain.³⁹ As Nico Keijzer argued, reasonableness should be the leading principle here.⁴⁰ Obviously, reasonableness is always in the eye of the beholder. It is key, however, that an extensive interpretation of human rights beyond the EU's territory should not undermine the imperative to fight international crime, or the principles of mutual confidence and respect between nations on which the international legal order is based. These are also core values to which the EU has committed itself.⁴¹ Courts and decision-makers should duly take them into account when territorially extending the reach of European law through extradition restrictions. It remains no less true, however, that the persons for whose benefit these restrictions are applied, are undeniably within the extraditing State's jurisdiction at the moment the extradition decision is taken and executed.

Accordingly, there appears to be an awareness that an interpretation of territoriality in extradition law and practice that allows for a largely unhindered projection of territorial human rights protection abroad to the fullest extent, is 'wrong'. Arguably, while the territorial link constituted by the presumed offender's presence allows, and even obliges, the territorial State to protect the individual from being exposed to a potential human rights violation post-extradition, the very fact that the actual violation potentially takes place *outside* the territorial State, and that the requested and requesting States are bound by extradition treaties premised on their jointly felt need to tackle crime, militates in favor of restricting the protective scope of territorial law. It cannot be denied, however, that human rights-based extradition limitations are a potent tool in the hands of requested States to promote legal reform in requesting States.⁴²

³⁸ *Othman (Abu Qatada) v. United Kingdom*, note 35 at para. 285.

³⁹ Note that after Abu Qatada objected to one of his three judges being a military one, this judge was replaced by a civilian. See BBCNews "Abu Qatada defiant in Jordan terrorism trial" 25 December 2013. At the time of writing (2 July 2014), Abu Qatada had been acquitted of conspiracy to carry out terrorist acts, but remained charged with another plot. See BBCNews "Abu Qatada found not guilty by Jordan court of terror plot" 26 June 2014.

⁴⁰ N. Keijzer "The European Arrest Warrant and Human Rights" (2005) available at www.asser.nl > eurowarrant.nl > capita selecta > human rights commentaries.

⁴¹ See art. 3(5) TEU.

⁴² The successive legal reforms which Rwanda has pushed through so as to obtain the extradition-like transfer of detainees held by the International Criminal Tribunal for Rwanda (ICTR) provide a fine example of this reform potential. See rule 11bis (C) of the ICTR Rules of Procedure and Evidence, which, with respect to the referral of an indictment to another court, provide that the "Trial Chamber shall satisfy itself that the accused will receive a fair trial in the courts of the State concerned and that the death penalty will not be imposed or carried out". See for a discussion of how ICTR practice as to rule 11bis has influenced legal reform in Rwanda: C. Ryngaert

4. Concluding observations

This contribution has set out to demonstrate that territoriality has lost its moorings. Formal reliance on territorial jurisdiction cannot hide that a person's territorial presence may be used as nothing more than a useful nexus to influence that person's global or foreign activity, or more incisively, and possibly invidiously, to limit third countries' regulatory freedom. EU regulation of transnational economic operators and ECHR/EU conditional extradition practice are cases in point.

In this scenario, territoriality serves as a mere trigger to effectively exercise quasi-universal jurisdiction. This begs the question as to whether territoriality, as the jurisdictional manifestation of the principle of non-intervention and the sovereign equality of States, can still be a legitimate principle of world public order. Or, to put it in this volume's terminology, is there nothing fundamentally wrong with how States and regional organizations conceive of territoriality? Perhaps so. But there is a silver lining, as territoriality does not necessarily translate in the application of idiosyncratic territorial law: as the European practice discussed above demonstrates, European legislation could be viewed as enforcing international law, or international values at the sub-global level, in the absence of adequate multilateral norm-setting and enforcement. Viewed from this angle, such unilateralism dovetails well with the classic decentralized enforcement paradigm of international law,⁴³ Moreover, when enforcing international law or values, Europe tends to take into account the protection which third countries already offer, by deferring to foreign legislation that provides equivalent protection, at times by even directly applying third country definitions of illegality (see, e.g., the EU Timber Regulation), and by respecting the regulatory learning curve which third countries are experiencing (e.g., by limiting the human rights extradition exception to certain violations).

Such decoupling of territorial (enforcement) jurisdiction and territorial law is well-known in private international law, where rules on applicable law do not necessarily coincide with rules on jurisdiction. To regulatory and criminal law, which is more heavily impregnated with notions of territorial sovereignty, application of, or reference to foreign law has traditionally been anathema, however. This tenet currently appears to be undergoing change which should nuance potential alarmism about States and the EU trampling on foreign sovereignty – and even international law proper – through their artificial reliance on territoriality. A territorial nexus may be artificial at times. But are individual States and the EU, through what only *appears* to be 'unilateral' action, not just exercising vicarious jurisdiction to protect global public goods on behalf of the international community? Or to put it more crudely, should we not be grateful that most global problems at least have a territorial nexus, however weak,

"State Cooperation with the International Criminal Tribunal for Rwanda" (2013) 13 *International Criminal Law Review* 125-146.

⁴³ Note that EU unilateralism in the environmental field may be based on multilateral enforcement failures. The Aviation Directive, in any event, is based on the stalling of negotiations within the ICAO regarding emissions reduction for the aviation sector (see above), although states had generally agreed to cut emissions when adopting the Kyoto Protocol in 1997. Other forms of unilateralism may not be based on the enforcement of international norms *stricto sensu*, but rather on the protection of global public goods which tend to be undersupplied as a result of consensual international law. See on the latter N. Krisch "The Decay of Consent: International Law in an Age of Global Public Goods" (2014) 108 *American Journal of International Law* 1-40.

which, in the face of apparent multilateral governance failures, enables a State or a regional entity to assume its responsibility to act in the global public interest, while paying lip-service to the classic territoriality paradigm?