

ORIGINAL ARTICLE

INTERNATIONAL LEGAL THEORY

Post-jurisdiction (The erosion of jurisdiction doctrine)

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Abstract

There is a consensus in international lawyers' analyses on jurisdiction, that jurisdiction doctrine is unworkable. Extraterritorial jurisdiction is no longer exceptional; at the same time, it is almost impossible to distinguish between territorial and extraterritorial jurisdiction. Legal experts have had three reactions to this crisis of extra/territorial jurisdiction. Some of them continue to pretend that nothing is wrong, and territorial jurisdiction is well and alive: this can be called 'zombie territoriality'. Others acquiesce to the end of territoriality by affirming a type of limitless jurisdiction based on 'genuine connections', 'substantial links', or the like. Thirdly, some lawyers have set different limits for different sub-domains of international law, thereby fragmenting the law of jurisdiction and creating different meanings of 'territoriality' for international criminal law, international financial law, antitrust law, human rights law, etc. In this explosion of jurisdictional sub-domains, territoriality is strict in human rights law and refugee law, but remarkably flexible in criminal law and antitrust law. Is there any way out of this crisis of jurisdiction? Limitless jurisdiction seems to be winning out, but some scholars have tried to reformulate non-intervention or self-determination as substantive bulwarks against extraterritoriality. Developing multilateral institutions would also prevent jurisdictional overreach. In truth, though, all the proposed ways out of the crisis of jurisdiction mean the end of jurisdiction doctrine. It may be time to accept that we now live in a post-jurisdictional system of international law.

Keywords: crisis of jurisdiction; crisis of territoriality; extraterritorial jurisdiction; history of jurisdiction in international law; post-jurisdiction

1. Arriving at the crisis of jurisdiction

The doctrine of jurisdiction in international law is in crisis. It can no longer fulfil its original and intended role in the system of international law: to make sure that states only create and enforce laws over matters which have a close enough connection to the state itself, thereby protecting other states' domestic affairs, independence and sovereignty.¹ The origin of this crisis is the radical expansion of extraterritorial jurisdiction, *and* its melding with territorial jurisdiction, such that we

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¹C. Ryngaert, *Selfless Intervention: Exercising Jurisdiction in the Common Interest* (2020), 19; D. J. B. Svantesson, *Solving the Internet Jurisdiction Puzzle* (2017), at 29–53; N. Krisch, 'Jurisdiction Unbound: (Extra)territorial Regulation as Global Governance', (2022) 33 EJIL 481.

can no longer separate the two.² As Nico Krisch has warned, '[u]nilateral global governance, resting on wide jurisdictional claims, is bound to carry imperial overtones and raise serious problems from a perspective of democracy or self-determination. Its legitimacy deficit will not be remedied even if it produces beneficial "outputs" . . .'³ The crisis of jurisdiction is thereby the most prominent indicator of the failure of the international law to *define* – not even to enforce – economic sovereignty and non-violent non-intervention.

This has become common knowledge among international legal scholars during the last decade and a half. Austen Parrish was perhaps the first to note the 'tremendous expansion in countries using extraterritorial laws',⁴ and also noted that 'as extraterritorial laws are more frequently applied worldwide, the very purpose of legislative jurisdiction – to avoid conflict between countries and the harms that conflicts inevitably cause – is threatened'.⁵ Around the same time, Marko Milanović noted that extraterritorial jurisdiction 'can hardly be said to be exceptional . . . these days'.⁶ A collective of Canadian scholars tried to distinguish territoriality from extraterritoriality by using the intermediate term 'extended territoriality' (also used at the same time by Joanne Scott⁷), but they conceded that there are no hard and fast borders that separate territoriality from extraterritoriality.⁸ By 2019, Matthias Lehmann contended that 'extraterritoriality is the new normal . . . far from being a suspicious exception, extraterritoriality has become ubiquitous and is often legitimate'.⁹ In 2022, Nico Krisch could confidently state that 'practice has largely "unbound" territoriality from its constraining aspects, opening the door to . . . a normalization of regulation with few traditional territorial links'.¹⁰ Perhaps Cedric Ryngaert's pithy summary is the best characterization of the state of jurisdiction doctrine: 'If one wishes to hit a dog, one will always find a stick – territoriality'.¹¹

The crisis has been exacerbated by two factors. The first one is the realization that economic and financial globalization has created global informational networks, without which international trade and finance is impossible: the Internet, and based on the Internet, the Society for Worldwide Interbank Financial Telecommunication (SWIFT) as the only viable network for clearing international payments.¹² Both the Internet and the dollar-based international financial system has its network hubs physically in the United States, which allows that one state to impose financial and trading sanctions on other states that are both territorial and extraterritorial.¹³ Secondly, claims of national security reasons have been used with increasing frequency to justify (extra)territorial jurisdiction. This makes territoriality, as such, irrelevant,

²P. D. Szigeti, 'In the Middle of Nowhere: The Futile Quest to Distinguish Territoriality from Extraterritoriality', in D. S. Margolies et al. (eds.), *The Extraterritoriality of Law: History, Theory, Politics* (2019), 30. Hereon in, I will refer to this melding of territorial and extraterritorial jurisdiction as 'extra/territorial jurisdiction'.

³See Krisch, *supra* note 1, at 513. See also H. Farrell and A. Newman, *Underground Empire: How America Weaponized the World Economy* (2023).

⁴A. Parrish, 'The Effects Test: Extraterritoriality's Fifth Business', (2008) 61 *Vanderbilt Law Review* 1455, at 1456.

⁵*Ibid.*, 1459–60.

⁶M. Milanović, 'From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties', (2008) 8 *Human Rights Law Review* 411, at 421.

⁷J. Scott, 'Extraterritoriality and Territorial Extension in EU Law', (2014) 62 *AJCL* 87.

⁸S. Coughlan et al., *Law Beyond Borders: Extraterritorial Jurisdiction in an Age of Globalization* (2014), at 82–5.

⁹M. Lehmann, 'New Challenges of Extraterritoriality: Superposing Laws', in F. Ferrari and D. P. Fernández Arroyo (eds.), *Private International Law: Contemporary Challenges and Continuing Relevance* (2019), 258 at 259.

¹⁰See Krisch, *supra* note 1, at 482.

¹¹C. Ryngaert, 'An Urgent Suggestion to Pour Old Wine into New Bottles: Comment on "A New Jurisprudential Framework for Jurisdiction"', (2015) 109 *AJIL Unbound* 81, at 83. See also C. Ryngaert, 'International Jurisdiction Law', in A. Parrish and C. Ryngaert (eds.), *Research Handbook on Extraterritoriality in International Law* (2023), 13, at 15: 'If even a *de minimis* territorial impact is sufficient, territorial bases of jurisdiction can swallow all other forms. Territoriality then becomes a vessel for extraterritoriality.'

¹²See Farrell and Newman, *supra* note 3.

¹³T. Ruys and C. Ryngaert, 'Secondary Sanctions: A Weapon Out of Control? The International Legality of, and European Responses to, Secondary Sanctions', (2020) 90 *BYIL* 1, at 11–15.

because national security measures can always be justified under the principle of protective jurisdiction, and protective jurisdiction is independent of territoriality.¹⁴

Nevertheless, jurisdictional doctrine still exists, and it still relies mostly on territoriality. Courts regularly preface their judgments with jurisdictional deliberations, and scholarly summaries and discussions of jurisdiction are flourishing.¹⁵ This article attempts to provide three contributions. Firstly, it provides a historical overview to situate the creation of jurisdiction doctrine and the transformations of the doctrine of non-intervention. The historical overview aims to show that jurisdiction doctrine is a modern invention that was unnecessary for most of the history of international law: instead, territoriality was an independent rule that made jurisdiction unnecessary.¹⁶ If jurisdiction was unnecessary for such a long span of time, perhaps it is also unnecessary today. It is better to jettison a non-functioning doctrine than to get bogged down in endless and fruitless discussions about a doctrine that *cannot* function.

Secondly, the article maps and analyses three strategies or avenues of argumentation that judges and scholars have taken in response to the realization that it is no longer possible to differentiate between territoriality and extraterritoriality. The three strategies have been, firstly, ignoring the problem, and insisting on what I call ‘zombie territoriality’; secondly, creating a doctrine of limitless jurisdiction; and finally, further dissecting territoriality to create separate doctrines of territoriality and extraterritoriality in each sub-area of international law (international criminal law, international financial law, international human rights law, refugee law, etc.), which I call the fragmentation of jurisdiction. The three approaches operate in tandem, but in the end they all support the abolition of jurisdiction doctrine. Limitless jurisdiction as an approach has arguably already done so, making jurisdictional inquiries impossibly vague.

The third aim of this article is to consider possibilities for reforming the law of jurisdiction, aside from overtly or covertly abandoning it. I consider two approaches: one of them is to take the concepts that jurisdictional rules are supposed to protect (non-intervention, the prohibition of coercion, or self-determination), and turn the relationship around: define jurisdiction using these concepts, instead of using territorial jurisdiction to define non-intervention. The second approach would be to create and strengthen multilateral regimes that solve the dilemmas of sharing authority over international affairs. Unfortunately, this is unlikely to happen in the foreseeable future.

1.1. International law without jurisdiction

James Crawford has remarked that ‘the question [of jurisdiction] emerged as a distinct one only after about 1870’.¹⁷ For the longest time, jurisdiction doctrine simply did not exist in international law. Ancient empires certainly had no doctrine of jurisdiction: they claimed universal jurisdiction – the right and the obligation to serve justice to all, without geographical bounds.¹⁸ ‘Jurisdiction’ as a concept was an early medieval Papal invention, which at the beginning focused on imposing requirements for judging religious matters.¹⁹

¹⁴The protective principle ‘allows states to prohibit and prosecute certain acts committed outside their territories by persons who are not their nationals. These acts must be against certain interests of the state, but need not have their criminal results in its territory.’ K. S. Gallant, *International Criminal Jurisdiction: Whose Law Must We Obey?* (2022), at 409.

¹⁵E.g., D. S. Margolies et al., *supra* note 2; S. Allen et al. (eds.), *The Oxford Handbook of Jurisdiction in International Law* (2019); A. Mills, ‘Rethinking Jurisdiction in International Law’, (2014) 84 BYIL 187; Parrish and Ryngaert, *supra* note 11; M. Ó Floinn et al. (eds.), *Transformations in Criminal Jurisdiction: Extraterritoriality and Enforcement* (2023); Gallant, *supra* note 14.

¹⁶In the sense that ‘the entire point of having a law of jurisdiction is precisely to regulate the *exceptions* from territoriality.’ See Milanović, *supra* note 6, at 419 (emphasis in the original).

¹⁷J. Crawford, *Brownlie’s Principles of Public International Law* (2019), at 441.

¹⁸K. Tuori, ‘The Beginnings of State Jurisdiction in International Law Until 1648’, in Allen et al., *supra* note 15, at 25, 28–9.

¹⁹U. Müßig, ‘Jurisdiction, Political Authority and Territory’, in H. Pihlajamäki, M. D. Dubber, and M. Godfrey (eds.), *The Oxford Handbook of European Legal History* (2018), 678 at 678–80.

Jurisdictional *practices* certainly had to exist wherever two societies with materially different norms lived together, or in close proximity: Lauren Benton has written extensively about jurisdictional fluidity in Spanish–Moorish relations during the fifteenth century, and between colonizers and Indigenous nations in the Spanish and British Atlantic empires.²⁰ Philip Stern has described the varied jurisdictional practices of the East India Company in what eventually became British India.²¹ Hannah Muller Weiss explored the uncertainties of who counted as a British subject in the eighteenth century, in the fast-growing British Empire.²² Yet all of these varied practices never made it ‘back’ into international legal doctrine. Curiously, during the age of European conquests and the colonization of large portions of the Earth, while European states and companies were subduing Indigenous peoples and negotiating divisions of authority with various Asian cities, empires and powers, the recognition and negotiation of jurisdictional conflicts was basically completely absent from doctrinal discussions of international law.

Hugo Grotius did use the word *jurisdictio*, but its meaning in *The Rights of War and Peace* is closer to ‘power’, ‘sovereignty’ or ‘legislative competence’ in the most general sense: it applies over places, things, persons or concepts, depending on the context.²³ Jurisdictional *conflict*, to the extent that the concept even arises for Grotius, is a constitutional question that can only arise between a ruler and his subjects, but not between two sovereigns.²⁴

Justice Coke called the jurisdiction that England had over visiting foreigners, ‘local allegiance’²⁵ – in other words, the power of the English Crown over foreigners in England was conceptualized as a sort of temporary personal jurisdiction, the submission of travelers to the (personal, feudal) authority of the Crown, without any mention of territoriality.²⁶

Ulrich Huber’s *De Conflictu Legum*, published as part of a commentary on Justinian’s Digest in 1689,²⁷ seems to be the first work that proposed territoriality as the master principle for deciding jurisdictional conflicts.²⁸ But Huber’s influence on contemporary public international law seems to be limited at best.²⁹ Whatever its origins, the classical eighteenth century authors of natural law-based public international law did have a clear conception of (territorial) jurisdiction as the power of a sovereign state to create and enforce its laws³⁰ – but without using the term and without seeing

²⁰L. Benton, *Law and Colonial Cultures: Legal Regimes in World History 1400–1900* (2002), at 31–80 (on ‘jurisdictional fluidity’ and the accompanying lack of legal certainty regarding jurisdiction); L. Benton and L. Ford, *Rage for Order: The British Empire and the Origins of International Law, 1800–1850* (2016); L. Benton and J. Burbank, ‘Rights and Empires: Relations of Authority’, in D. Edelstein and J. Pitts (eds.), *The Cambridge History of Rights, Volume IV: The Eighteenth and Nineteenth Centuries* (2025), 437.

²¹P. J. Stern, *The Company-State: Corporate Sovereignty and the Early Modern Foundations of the British Empire in India* (2011).

²²H. Muller Weiss, *Subject and Sovereign: Bonds of Belonging in the Eighteenth-Century British Empire* (2017).

²³Cf. H. Grotius, *The Rights of War and Peace* (R. Tuck ed., 2005), Ch. III, sec. IV: ‘Possession is Double, Jurisdiction and Property; The Distinction Explained’; Ch. III, sec. XIII: ‘That there may be Jurisdiction over Part of the Sea, and how’; Ch. VI, sec. VII: ‘The Jurisdiction over a Place may be transferred’; Ch. XXVI, sec. I: ‘Who are they, who may be said to be under another’s Jurisdiction’; etc.

²⁴‘But suppose they [i.e., the People] had a Design to divide the Government with the King . . . there ought to be Bounds assigned to the Power of each Party, according to the Difference of Places, Persons, or Affairs, that the Extent of their respective Jurisdictions might be easily discerned.’ *Ibid.*, at 276 (Ch. III, sec. IX).

²⁵*Calvin v. Smith*, [1608] 77 ER 377, 383–4.

²⁶See also *Inglis v. Trustees of the Sailor’s Snug Harbor*, 28 U.S. (3 Pet.) 99, 164 (1830); and Muller Weiss, *supra* note 22, at 28–40 on the inability of *Calvin v. Smith* to provide answers as to the rights and obligations of English colonial subjects in the eighteenth century.

²⁷U. Huberus, *Praelectionum Juris Romani et Hodierni Pars II* (1689), Appendix to Book I, Title 3. English translations and overviews are available in E. G. Lorenzen, ‘Huber’s *De Conflictu Legum*’, (1918) 13 *Illinois Law Review* 375, at 376–7; N. E. Hatzimihail, *Preclassical Conflict of Laws* (2021), at 357–79.

²⁸See Hatzimihail, *supra* note 27, at 464–72.

²⁹[T]here appears to be little evidence of Huber’s influence on the European Continent . . .’ *Ibid.*, at 354.

³⁰Cf. arguments that the rise of the ‘Westphalian order’ took places significantly later than the Peace of Westphalia: S. Beaulac, ‘The Westphalian Legal Orthodoxy – Myth or Reality?’, (2000) 2 *Journal of the History of International Law* 148.

it as a topic for international legal conflict or commentary. Neither Vattel, nor Martens discuss jurisdiction as a separate topic; instead, they write about *territoriality*. Vattel's *Law of Nations* has no chapter on jurisdiction, and jurisdiction is equated with territoriality throughout:

The sovereignty united to the domain establishes the jurisdiction of the nation in her territories, or the country that belongs to her. It is her province, or that of her sovereign, to exercise justice in all the places under her jurisdiction, to take cognizance of the crimes committed . . .³¹

Although states may, in exceptional cases, complain about the treatment of their subjects or citizens in other states' territories, 'where justice is refused, or palpable and evident injustice done, or rules and forms openly violated, or, finally, an odious distinction made to the prejudice of [their] subjects . . .'³² – this is clearly an exception. In general, '[t]he prince . . . ought not to interfere in the causes of his subjects in foreign countries, and grant them his protection.'³³ Nationality-based jurisdiction as a general principle does not exist in Vattel's work.

Georg-Friedrich von Martens is even stricter regarding the equation of jurisdiction with territoriality: 'One of the most essential rights in the hands of the sovereign is the judiciary power. It extends indiscriminately to all who are in the territory, and the sovereign only is the source of it.'³⁴ For Martens, 'a sovereign is not only incapable of exercising any act of sovereignty on a foreign territory, but even those he exercises at home produce no effect in foreign countries.'³⁵ Extraterritorial jurisdiction was an oxymoron. And if jurisdiction is only and always territorial, then it certainly does not make sense to talk about jurisdiction as a separate concept from territoriality.

Absolute territorial jurisdiction thus *produced* sovereign equality. Vattel's famous adage that 'A dwarf is as much a man as a giant; a small republic is no less a sovereign state than the most powerful kingdom'³⁶ can make sense only in a world where domestic jurisdiction is strictly separated from international affairs and from the desires of more powerful states.³⁷ This link is still preserved in modern doctrinal works,³⁸ but it is lacking more and more in practice.

The birth of jurisdictional doctrine (as something separate from territoriality *tout court*) began with conflicts on and around ships, where territorial analogies were hard to apply.³⁹ Some of the earliest cases which explicitly raise and discuss jurisdictional issues are *The Anna* (1805),⁴⁰ *The Appollon* (1824),⁴¹ *U.S. v. Davis* (1837),⁴² *R. v. Serva* (1845)⁴³ and

³¹E. de Vattel, *The Law of Nations* (B. Kapossy & R. Whatmore eds., 2008), at 303–4 (book II, Ch. VII, §84.).

³²*Ibid.*, at 304.

³³*Ibid.*

³⁴G.-F. von Martens, *A Compendium of the Law of Nations, Founded on the Treaties and Customs of the Modern Nations of Europe* (William Corbett trans., 1802), at 103 (book III, Ch. III, sec. 13).

³⁵*Ibid.*, 83–4 (book III, Ch. III, sec. 1).

³⁶See Vattel, *supra* note 31, at 75 (Prelim., §18).

³⁷On the history of jurisdiction and its identity with territoriality before 1870, see P. D. Szigeti, 'Sovereignty, Territory, Jurisdiction', in M. Več and P. Starski (eds.), *The Cambridge History of International Law, Vol. VII: Western International Law, 1776-c. 1870* (forthcoming 2026).

³⁸E.g., '[T]he legislature of a State has the primary right to set the laws that apply to everyone within the borders of the territory of that State. [This] is an aspect of territorial sovereignty, and of the right of self-determination [according to which] States and peoples have the right to pursue their own economic, social, and cultural development, freely choosing the legal structures that support them.' V. Lowe, *International Law: A Very Short Introduction* (2015), at 86–7.

³⁹Although it was agreed in these cases that 'a ship is a sort of floating island' (*R. V. James Anderson*, [1868] 11 Cox. Crim. C. 198 (C.C.A.)), this analogy cannot decide which 'floating island' prevails when two ships collide.

⁴⁰(1805) 165 Eng. Rep. 809.

⁴¹22 U.S. (9 Wheat.) 362 (1824).

⁴²Summ. 482 (D. Mass. 1837).

⁴³(1845), 1 Den. 104. Further see L. Farmer, 'Territorial Jurisdiction and Criminalization', (2013) 63 *University of Toronto Law Journal* 225.

R. v. Keyn (1876)⁴⁴ – all of them about ships on the high seas or in foreign ports, just like the *Lotus* (1927).⁴⁵ None of these cases discuss jurisdiction beyond the principle of territoriality, though they do manipulate it in interesting ways.⁴⁶ While ‘extraterritoriality’ and ‘extraterritorial jurisdiction’ began to be applied, as a term, in the late nineteenth century, it referred mostly to consular jurisdiction⁴⁷ (a treaty-based practice that did not dispute customary strict territorial jurisdiction), jurisdiction on the high seas,⁴⁸ or sometimes even private international law.⁴⁹ Although extraterritorial exercises of jurisdiction did take place from time to time in the nineteenth century, they were roundly condemned for violating the principle of territoriality.

The creation of jurisdiction as a separate doctrine is properly a twentieth century story.⁵⁰ The PCIJ in the *Lotus* judgment stated that jurisdiction is a matter for each state’s sovereign authority, as long as it does not contravene settled principles of international law (such as the ban on extraterritorial enforcement).⁵¹ This first rupture between territoriality and jurisdiction was solidified by the Harvard Draft,⁵² which set out the four basic categories of jurisdiction – territorial, nationality-based, protective, and universal – that we have been using ever since. The *Alcoa* judgment then added effect-based jurisdiction,⁵³ sometimes envisaged as a form of territoriality and sometimes described as a separate ground for jurisdiction.⁵⁴

1.2. Non-intervention as territorial jurisdiction

If a single sentence about territoriality was enough to regulate jurisdiction in eighteenth- and nineteenth-century international law, then what role was there for a doctrine of non-intervention? In Vattel’s work, prohibited intervention refers to speech-acts that have negative effects on a foreign sovereign’s policies. For example, Vattel cautions against commenting on foreign states’ constitutional changes, or foreign disputes on constitutional interpretation, for ‘[i]f any intrude into the domestic concerns of another nation, and attempt to put a constraint on its *deliberations*, they do it an injury.’⁵⁵ Vattel is shocked at the rights of the Pope to appoint Catholic bishops, even in accordance with national recommendations on who to appoint, because ‘a nation ought not to suffer foreigners to dictate laws to her, to interfere in her concerns, or deprive her of her natural advantages’, not to mention ‘tamely suffer[ing] a foreigner to dispose of posts and employments of the highest importance’, and of course for Vattel, the Pope is first and foremost a foreigner.⁵⁶

⁴⁴(1876) 2 Ex. D. 63. Also see A. W. B. Simpson, ‘The Ideal of the Rule of Law: *Regina v. Keyn* (1876)’, in A. W. B. Simpson, *Leading Cases in the Common Law* (1995), 227 at 231–6.

⁴⁵*SS Lotus case (France v. Turkey)*, PCIJ Rep Series A No 10.

⁴⁶See Szigeti, *supra* note 2; P. D. Szigeti, ‘The Illusion of Territorial Jurisdiction’, (2017) 52 *Texas Journal of International Law* 369, at 376–8.

⁴⁷E.g., French and Richardson, *United States Consular Relations: A Practical Guide for Consular Officers* (1868), at 35–42 (‘Chapter II: Extraterritorial and Other Privileges of Consuls’); G. Ohlinger, ‘Extra-Territorial Jurisdiction in China’, (1906) 4 *Michigan Law Review* 339.

⁴⁸E.g., W. Forsyth, *Cases and Opinions on Constitutional Law and Various Points of English Jurisprudence* (1869), at 217–38.

⁴⁹E.g., E. Stocquart, ‘Spanish Laws on Marriage and Their Extraterritorial Effect’, (1891) 25 *American Law Review* 82.

⁵⁰See Svantesson, *supra* note 1; K. Raustiala, *Does the Constitution Follow the Flag? The Evolution of Territoriality in American Law* (2009), at 93–125.

⁵¹See *Lotus case*, *supra* note 45, at 18–19.

⁵²‘Draft Convention on Jurisdiction with Respect to Crime’ (E. D. Dickinson, Reporter), (1935) 29(S1) AJIL 436.

⁵³*U.S. v. Aluminum Co. of America (Alcoa)*, 148 F.2d 416 (2d Cir. 1945)

⁵⁴Cf. *ibid.* and C. Ryngaert, *Jurisdiction in International Law* (2015), at 76–7 (holding effects-based jurisdiction to be a form of territorial jurisdiction: ‘passive territoriality’); compared to W. S. Dodge, ‘Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism’, (1998) 39 HILJ 101, 121–7 and Parrish, *supra* note 4, at 1474–6 (holding effects-based jurisdiction to be a form of extraterritorial jurisdiction). See also Scott, *supra* note 7 (creating and applying the category of ‘territorial extension’, halfway between extraterritoriality and territoriality proper).

⁵⁵See Vattel, *supra* note 31, at 96 (Book I, Ch. III, § 37).

⁵⁶*Ibid.*, 173 (Book I, Ch. XII, § 147).

Even commenting on foreign states' oppressive domestic policies, if they fall short of 'tyranny becoming insupportable',⁵⁷ is advised against:

[i]f [the prince] loads his subjects with taxes, and . . . treats them with severity, the nation alone is concerned in the business . . . It is the part of prudence to point out the occasions when officious and amicable representations may be made to him.⁵⁸

Vattel's definition of non-intervention is, therefore, both extremely strict, and is focused on 'verbal acts'⁵⁹ that cannot be caught by the rule of exclusive territorial jurisdiction, but which *may have* adverse political effects for the government in question. It is quite close in fact to the current-day Chinese position which views sanctions for human rights violations⁶⁰ and political commentary by foreigners,⁶¹ and even the possible jurisdiction of the Holy See on matters of faith and religious organization,⁶² as unlawful interventions. It is very far from the modern liberal understanding of intervention, according to which 'mere persuasion, i.e., an attempt by one State to convince another that a particular course of action is for some reason optimal, which does not involve any threat of harm by the former'⁶³ cannot form prohibited intervention. Nor can

[s]imple diplomatic engagement with another State, even if it regards matters that clearly fall within that State's reserved domain, such as its choice of a political system or its choice as to what kind of 5G infrastructure it wants to build.⁶⁴

The meaning of (non-)intervention was entirely transformed by the Holy Alliance after the 1815 Congress of Vienna. Post-1815, it meant and still means, approximately, armed violations of the territorial sovereignty of a foreign state for purposes that are less than conquest or colonization.⁶⁵ Non-intervention (and its purported exceptions, such as humanitarian interventions,⁶⁶ pro-democratic intervention,⁶⁷ or interventions authorized by the United Nations Security Council⁶⁸) thereby passed from debates about the basic framework of international law (sovereign equality, exclusive jurisdiction, etc.) to debates about the use of force. Ever since, debate on what non-intervention is and how to strengthen it has focused almost exclusively on violent intervention and exceptions to the prohibition of the use of force.

⁵⁷*Ibid.*, 290 (Book II, Ch. IV, § 56).

⁵⁸*Ibid.*, (Book II, Ch. IV, § 55).

⁵⁹On verbal acts, see J. L. Austin, *How to Do Things with Words* (1962).

⁶⁰C. Cai, 'China's Position and Practice Concerning Unilateral Sanctions', in C. Beaucillon (ed.), *Research Handbook on Unilateral and Extraterritorial Sanctions* (2021), 70 at 76–7.

⁶¹E.g., R. Perper, 'China and the NBA Are Coming to Blows Over a Pro-Hong Kong Tweet. Here's Why.', *Business Insider*, 22 October 2019, available at www.businessinsider.com/nba-china-feud-timeline-daryl-morey-tweet-hong-kong-protests-2019-10; S. Deb, 'N.B.A. Commissioner: China Asked Us to Fire Daryl Morey', *The New York Times*, 17 October 2023, available at www.nytimes.com/2019/10/17/sports/basketball/nba-china-adam-silver.html.

⁶²M. Masláková and A. Satorová, 'The Catholic Church in Contemporary China: How Does the New Regulation on Religious Affairs Influence the Catholic Church?', (2019) 10 *Religions* 446.

⁶³M. Milanović, 'Revisiting Coercion as an Element of Prohibited Intervention in International Law', (2023) 117 *AJIL* 601, at 613.

⁶⁴*Ibid.*

⁶⁵G. J. Jones, *The United Nations and the Domestic Jurisdiction of States: Interpretations and Applications of the Non-Intervention Principle* (1979), at 1–6; G. Abi-Saab, 'Some Thoughts on the Principle of Non-Intervention', in K. Wellens (ed.), *International Law: Theory and Practice – Essays in Honour of Eric Suy* (1998), 225 at 225–6.

⁶⁶S. Kroll, 'The Legal Justification of International Intervention: Theories of Community and Admissibility', in F. Klose (ed.), *The Emergence of Humanitarian Intervention: Ideas and Practice from the Nineteenth Century to the Present* (2016), 73.

⁶⁷E.g., M. Byers and S. Chesterman, '"You, the People": Pro-Democratic Intervention in International Law', in G. H. Fox and B. R. Roth (eds.), *Democratic Governance and International Law* (2000), 259.

⁶⁸1945 Charter of the United Nations, Arts. 39–49.

The 1960s and 1970s saw some attempts in the UN General Assembly to expand the concept of non-violent non-intervention, and to give it back its Vattelian meaning. The UN Declaration on the Inadmissibility of Intervention⁶⁹ and the UN Declaration on Friendly Relations⁷⁰ still focused on the use of force, but both affirmed that non-intervention goes beyond armed or physical violations of territorial integrity. They used identical language in this regard:

No State may use or encourage *the use of economic, political or any other type of measures* to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights or *to secure from it advantages of any kind*.

Such wide-ranging language of course begs the question of what is *not* intervention and what sort of international diplomacy would be allowed.⁷¹

Also in the 1970s, the emergence of human rights monitoring as a domain of international politics, and the acknowledgement of internal political developments as possible threats to the peace, has meant that the internal/external distinction broke down.⁷² Vattel's notion of intervention, that includes legal or policy critique by another state, has become decidedly authoritarian. Non-violent non-intervention continues to be a marginal, almost non-existent category. Debates about the meaning of intervention, in both its Vattelian and modern versions, have therefore reinforced territoriality and the primacy of territorial jurisdiction for defining what 'pure' sovereignty, without foreign intervention, means.

1.3. Reasons for the erosion of jurisdiction: A critique of territoriality

Territorial jurisdiction has always been unstable, and absolute and exclusive territoriality has always been more of a dogma than a straightforward rule. There are three conceptual reasons for the instability of territorial jurisdiction: (i) no straightforward rules on jurisdiction over cross-border events; (ii) the impossibility of assigning simple locations to complex immaterial objects (events, mental states, data, etc.); and (iii) the manipulability of territorial boundaries themselves. A further material development is (iv) the creation of a few transnational networks with hubs and chokepoints within the United States – 'the complicated wiring and plumbing arrangements of the global economy'⁷³ – that concentrate power in the hands of whoever has legal control over the hubs, thereby transforming territorial jurisdiction into universal jurisdiction. These transnational networks are the Internet, the SWIFT interbank payment system, and the semiconductor supply chain.⁷⁴

To briefly unpack these reasons: territoriality as a baseline has been compelling for eighteenth- and nineteenth-century international lawyers because of the unstated background assumption that a person, object or event must be in one place at any one time.⁷⁵ But this is not necessarily true: cross-border events are a distinct reality. Judges have been pondering the problem of jurisdiction over a murderer killing their victim by firing a gun across an international boundary

⁶⁹Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, UN GA Res. 2131 (XX) (21 December 1965), Art 2. (emphasis added).

⁷⁰Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, UN GA Res. 2625 (XXV) (24 October 1970).

⁷¹Cf. A. Tzanakopoulos, 'The Right to be Free from Economic Coercion', 4 (2015) CJIL 616.

⁷²M. S. Rajan, 'The Question of Defining 'Domestic Jurisdiction'', (1959) 1 *International Studies* 248, at 251–4.

⁷³See Farrell and Newman, *supra* note 3, at 7.

⁷⁴H. Farrell and A. Newman, 'Weaponized Interdependence: How Global Economic Networks Shape State Coercion', (2019) 44 *International Security* 42, at 47–65.

⁷⁵See Szigeti, *supra* note 46, at 373.

for quite some time, without reaching any consensus on *where* such an event took place. The answer may be ‘both places’,⁷⁶ ‘neither place’,⁷⁷ ‘the location of impact’,⁷⁸ or the ‘location of the attempt/planning/origin’,⁷⁹ for very different but similarly compelling (or unconvincing) reasons.⁸⁰

Transborder shootings pose problems *despite* their simplicity: we can know at every moment where the victim is, where the perpetrator is, and where the bullets are, in relation to the boundary. An international cartel or a criminal conspiracy,⁸¹ by comparison, does not even offer the comfort of physically locating the elements of the violation – *where* is a price fixing? In every place where the fixed-price goods are being sold? Or only at the offices and boardrooms of the directors who colluded to fix prices? Just like the transborder shooting question, it is a metaphysical question, and therefore analytically undecidable.⁸² At times, such as when courts look for the location of an intangible asset,⁸³ the metaphysical unreality of the question slips into open discourse.⁸⁴

The conceptual instability is immediately visible by looking at effects-based jurisdiction. Effects-based jurisdiction was widely seen as illegitimate and fundamentally different from territorial jurisdiction, especially by British and European publicists – a form of extraterritorial jurisdiction that was hard to justify – until the 1980s.⁸⁵ However, in 1988 the European Court of Justice asserted its jurisdiction in the ‘Wood Pulp’ cases concerning export cartels outside of the (then) European Community.⁸⁶ Although the ECJ used the language of territoriality (sanctioning the foreign companies not for ‘effects’ on but active ‘implementation’ within the European Community), its judgment was nevertheless functionally indistinguishable from the US Supreme Court’s case-law on international antitrust issues. As effects-based jurisdiction gained acceptance on both sides of the Atlantic, it became a standard element of territorial, or ‘extended territorial’ jurisdiction in economic regulation: antitrust/competition law, financial regulation, intellectual property law and elements of criminal law have all extended territorial jurisdiction until it became indistinguishable from extraterritoriality.

Arguably, a further revolution took place after 2010: territorial jurisdiction turned into *de facto* universal jurisdiction. US prosecutors and regulators started taking advantage of network effects created by the geography of the Internet and fundamental financial networks that were built in part onto the infrastructure of the Internet. The common structure of US criminal and regulatory

⁷⁶See Crawford, *supra* note 17, at 443 (‘... whenever the constituent elements of a crime occur across an interstate boundary both states have jurisdiction.’).

⁷⁷See *Keyn* case, *supra* note 44, at 233 (‘[A person] may be wounded in England; he may die in Scotland. In which is the offence committed? ... I answer, in neither ...’).

⁷⁸*Hernandez v. Mesa*, 589 U.S. ___, at 15–16 (2020) (stating that the trial of a US Border Patrol officer who shot a Mexican teenager across the US-Mexico border is an exercise of *extraterritorial* jurisdiction). See also *Libman v. The Queen*, [1985] 2 S.C.R. 178, Paras. 23–5 (applying the ‘completion of the offense’ test).

⁷⁹See *Libman v. The Queen*, *ibid.*, Para. 68 (‘As early as 1883 ... [English courts] also took jurisdiction in cases where the victim and hence the impact was abroad.’).

⁸⁰See *Keyn*, *supra* note 44, at 105 (‘a manslaughter committed by firing a gun from a fort in Barbadoes, and unlawfully, though not intentionally, killing a person on board a ship two miles off at sea, was not triable in any court of common law, but ... in the Admiralty Court at Barbadoes’).

⁸¹Cf. J. D. A. Blackmore, ‘The Jurisdictional Problem of the Extraterritorial Conspiracy’, (2006) 17 *Criminal Law Forum* 71.

⁸²See Szigeti, *supra* note 2, at 31–2. Note further that we have not even mentioned jurisdiction over digital data, the Internet, or online actions, which may or may not be qualitatively different from ‘real-life’ events: cf. J. Daskal, ‘Borders and Bits’, (2018) 71 *Vanderbilt Law Review* 179, at 221–6.

⁸³‘The *situs* of intangible property is about as intangible a concept as is known to the law.’ *Tabacalera Severiano Jorge, S. A. v. Standard Cigar Co.*, 392 F.2d 706, 714–16 (5th Cir. 1968).

⁸⁴A. D. Simowitz, ‘Siting Intangibles’, (2015) 48 *N.Y.U. Journal of International Law and Politics* 259.

⁸⁵E.g., J. B. Sandage, ‘Forum Non Conveniens and the Extraterritorial Application of United States Antitrust Law’, (1985) 94 *Y.L.J.* 1693, at 1698 (describing the effects test as ‘Yankee “jurisdictional jingoism” [that] created wide-spread resentment’); also see P. C. F. Pettit and C. J. D. Styles, ‘The International Response to the Extraterritorial Application of United States Antitrust Laws’, (1982) 37 *Business Lawyer* 697, at 707–14.

⁸⁶*Joined Cases 89/85 et al. Ahlström Osakeyhtiö and Others v. Commission*, [1988] ECR 5193, 5243.

actions, particularly in the spheres of financial regulation, trade embargoes and sovereign debt legislation, was to threaten to ban US dollar clearing by both domestic and international banks, if the banks in question have done business in a way that contravenes US banking regulations, or trade restrictions, anywhere on the globe.⁸⁷ Because the banks that clear international transactions in US dollars are all US institutions located in New York City,⁸⁸ the threat to ban certain banks from using this system is undoubtedly territorial.⁸⁹ However, because international finance (and consequently, international trade that is made possible by international finance) is transacted by a handful of Global Systematically Important Banks⁹⁰ (which rely on US dollar clearing mechanisms for most of their non-US business as well), the threats to remove US dollar clearing privileges result in *de facto* global enforcement.⁹¹ The mere risk of potentially being threatened with restrictions regarding business with sanctioned entities, has convinced banks to stop all business with other banks and entities co-operating with the sanctioned ones, and even with those only *at risk* of being sanctioned. This withdrawal in the face of *possible* legal risk has been dubbed ‘de-risking’ and ‘overcompliance’.⁹² ‘Such a phenomenon has resulted in many countries finding themselves largely “unbanked”, which goes hand-in-hand with a broad and devastating range of negative humanitarian consequences.’⁹³ Similar restrictions have been enacted in the production and export of complex semiconductors, the programs necessary to design them, and the ‘fabs’ (machines) used to create them, due to the near-monopolistic centralization of the market in the hands of a very small number of producers in the United States, Taiwan, and the Netherlands.⁹⁴ These types of actions have been described by Henry Farrell and Abraham Newman as ‘weaponized interdependence’.⁹⁵ In international legal terms, it is the use of territorial jurisdiction over chokepoints in fundamental transnational networks, in order to create *de facto* universal jurisdiction.

Finally, because territoriality is a legal construct to begin with, it is susceptible to ‘redefinition’ by courts and legislatures. Particularly in the realm of migration law, borders are increasingly redefined to ‘extraterritorialize’ persons or events that would otherwise create a responsibility to protect on behalf of the territorial state.⁹⁶ Migrants can therefore be physically present in a country, but at the same time ‘treated as if stopped at the border’,⁹⁷ denying them rights through

⁸⁷See esp. P.-H. Verdier, *Global Banks on Trial: U.S. Prosecutions and the Remaking of International Finance* (2020), for an accessible summary of jurisdictional expansion through US financial regulations.

⁸⁸*Ibid.*, at 26–33.

⁸⁹See Ruys and Ryngaert, *supra* note 13, at 15: ‘... the important point is that enforcement works through the denial of economic privileges and, consequently, falls within states’ sovereign prerogatives.’

⁹⁰Globally Systematically Important Banks (G-SIBs) are banks whose ‘whose disorderly failure, because of their size, complexity and systemic interconnectedness, would cause significant disruption to the wider financial system and economic activity’, as defined, listed, and catalogued by the G20 Financial Stability Board. See Verdier, *supra* note 87, at 5; also *ibid.*, at 6, 10–14.

⁹¹*Ibid.*, at 28–33.

⁹²See, e.g., the reactions to the Joint Comprehensive Plan of Action with Iran in 2015: ‘When Obama administration officials urged European banks to lend to Iran and businesses to invest there, they found that no one wanted to listen. Banks and businesses worried that U.S. authorities would change their mind again, using the vagueness of OFAC rulings and regulations to determine that they were sanction breakers, and would punish them harshly.’ See Farrell and Newman, *supra* note 3, at 64. On overcompliance, see E. Breen, ‘Corporations and US Economic Sanctions: The Dangers of Overcompliance’, in Beaucillon, *supra* note 60, 256; I. Znotić and P. Iljenkovs, ‘Using Extraterritorial Sanctions in the Fight Against Financial Crime in Latvia: From Silver Lining to Overcompliance’, in Beaucillon, *supra* note 60, 288.

⁹³E. Moret, ‘Unilateral and Extraterritorial Sanctions in Crisis: Implications of Their Rising Use and Misuse in Contemporary World Politics’, in Beaucillon, *supra* note 60, 19 at 30.

⁹⁴See Farrell and Newman, *supra* note 3, at 83–7, 128–36; C. Miller, *Chip War: The Fight for the World’s Most Critical Technology* (2022); A. Nguyen, ‘The Discomfort of Extraterritoriality: U.S. Semiconductor Export Controls and Why Their Chokehold on Dutch Photolithography Machines Matters’, *EJIL:Talk!*, 1 December 2023, available at www.ejiltalk.org/the-discomfort-of-extraterritoriality-us-semiconductor-export-controls-and-why-their-chokehold-on-dutch-photolithography-machines-matters/.

⁹⁵D. W. Drezner, H. Farrell, and A. Newman (eds.), *The Uses and Abuses of Weaponized Interdependence* (2021).

⁹⁶A. Shachar et al., *The Shifting Border: Legal Cartographies of Migration and Mobility: Ayelet Shachar in Dialogue* (2020).

⁹⁷*Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 215 (1953).

the denial of territorial jurisdiction as such. France's attempts to create extraterritorial zones within its airports⁹⁸ was eventually curtailed by the European Court of Human Rights.⁹⁹ Australia, by contrast, has gone so far as to 'excise' its entire territory from its Migration Act: anybody who arrives in Australia for immigration purposes without a valid visa is legally not even in Australia.¹⁰⁰

As Nico Krisch has noted, the overall structure of international law did not change in tandem with these changes to international jurisdiction.¹⁰¹ The law of jurisdiction is still introduced as the practical application of sovereign equality, non-intervention, and self-determination,¹⁰² whereas current jurisdictional practice pushes hard against these values.

2. Reactions to the contemporary crisis: Zombie territoriality, limitless jurisdiction, and fragmentation

The reactions of courts and scholars to the crisis of jurisdiction have been threefold. First of all, there has been a clinging on to territoriality that one could call zombie territoriality – this is still the starting point for all analyses and rulings on jurisdiction. The second reaction has been the emergence and proliferation of flexible contacts-based tests, under different names that include 'genuine connections',¹⁰³ 'real and substantial links',¹⁰⁴ and 'substantial connections and legitimate interests'.¹⁰⁵ I will call these approaches collectively 'limitless jurisdiction', because they eschew the bright-line limits, embodied in physical–geographical international boundaries, that traditional territorial jurisdiction set for states. Thirdly, there has been a partial fragmentation of extra/territorial jurisdiction by subject matter. The result of fragmentation is that territoriality means different things for different sub-fields of (international) law: there is a separate 'territorial' jurisdiction in criminal law, in human rights law, in business regulation, in environmental law, and so forth. Incoherence and all too frequently, manifest injustice are the price we pay for sustaining territoriality through these partial means. The three reactions often take place within the same dispute; sometimes, within the same case.

2.1. Zombie territoriality

Zombie territoriality refers to post-critique territorial jurisdiction: even though we know that it does not and cannot work in its system-affirming, non-intervention-supporting way, it gets referred to and used all the time. As Nico Krisch has remarked,

We would thus expect significant pressure for change in the law of jurisdiction – an expansion of jurisdictional boundaries in order to come to terms with the difficulty of localizing acts . . . Yet at first glance, surprisingly little change is apparent in the international legal discourse around jurisdiction . . .¹⁰⁶

This paralytic grasping on to conceptual frameworks that are no longer valid is sadly similar to John Quiggin's critique of outdated theories in Economics:

⁹⁸P. Mailet, *Nowhere Countries: Exclusion of Non-Citizens from Rights through Extra-Territoriality at Home* (2020).

⁹⁹*Amuur v. France*, Judgment of 25 June 1996, [1996] ECHR, Sec. 52.

¹⁰⁰Migration Amendment (Excision from Migration Zone) Act 2001 (Australia).

¹⁰¹See Krisch, *supra* note 1.

¹⁰²E.g., Crawford, *supra* note 17, at 440–1; see Lowe, *supra* note 38, at 99–100.

¹⁰³Restatement (Fourth) of the Foreign Relations Law of the United States (2018), § 407.

¹⁰⁴See *Libman v. The Queen*, *supra* note 78, at 74.

¹⁰⁵See Svantesson, *supra* note 1, at 59–70.

¹⁰⁶See Krisch, *supra* note 1, at 5. Also see Mills, *supra* note 15, at 196–200.

[E]ven when they have proved themselves wrong and dangerous, ideas are very hard to kill. Even after the evidence seems to have killed them, they keep on coming back. These ideas are neither alive nor dead; rather, as Paul Krugman has said, they are undead, or zombie, ideas.¹⁰⁷

Such bad faith legal reasoning is unfortunately particularly stable, as Duncan Kennedy has described it:

Bad faith, here and in the case of legal reasoning, means simultaneously affirming and denying to oneself the presupposed rationality of the discourse, and of the particular demand cast in its terms. It means being conscious of the critique of the whole enterprise, sensing the shiftiness of the sand beneath one's feet, but plowing on "as if" everything were fine. Bad faith can be a stable condition . . .¹⁰⁸

Despite the wave of critiques mentioned in the introduction,¹⁰⁹ territorial jurisdiction remains the point of departure not only for courts, but even scholarly works that then deny the relevance of territoriality.¹¹⁰

Territorial jurisdiction and its offshoots, such as the US constitutional doctrine of the presumption against extraterritoriality,¹¹¹ lives on for three reasons. Firstly, territoriality is the traditional starting point and has tremendously weighty historical authorities backing it up.¹¹² Secondly, even critics of territoriality (like myself) have to concede that some affairs just *are* territorial in a very straightforward way.¹¹³ Real estate, as well as persons and physical objects which do not cross international boundaries, are clearly immune to the critiques enumerated above.¹¹⁴ Because the enforcement of laws usually depends on bailiffs, policemen, soldiers or other state officials being physically present at the site of enforcement, it is common and easy to say that '[n]o State may exercise its enforcement jurisdiction in the territory of another State without that State's permission'.¹¹⁵ The rule against extraterritorial enforcement is not nearly so straightforward when relating to digital data or international banking, where enforcement or execution can take place remotely and locations are inherently questionable. This is why fragmentation has been another prime reaction to the (partial) death of territoriality.¹¹⁶

¹⁰⁷J. Quiggin, *Zombie Economics: How Dead Ideas Still Walk Among Us* (2010), at 1. Also see D. Herzog, *Sovereignty, RIP* (2020), at 291.

¹⁰⁸D. Kennedy, 'The Critique of Rights in Critical Legal Studies', in J. Halley and W. Brown (eds.), *Left Legalism/Left Critique* (2002), 178, at 190.

¹⁰⁹See notes 2–11, *supra*.

¹¹⁰E.g., C. E. Blattner, *Protecting Animals Within and Across Borders: Extraterritorial Jurisdiction and the Challenges of Globalization* (2022), at 24, where a comprehensive critique of territoriality is given ('The traditional image of states as bodies with prescriptive authority limited to their territories cannot capture the complex realities of modern life or serve the plethora of interests that states and the international community at large have. Events that occur nowhere (cyberspace) and everywhere (global markets) have caused jurisdictional gaps and overlaps that recompose jurisdictional space.') and two pages later, at 26, where territoriality becomes the foundation of jurisdiction regardless ('Yet, if we look closer, all [jurisdictional principles] hinge on a territorial base. . . . [N]ationality is valid only because a territorially defined state has granted it . . . The effects principle is based on the territorial effects of an extraterritorial measure. The protective principle is based on the desire of each state to ensure its territorial security . . .').

¹¹¹*Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010); *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013); J. H. Knox, 'A Presumption Against Extrajurisdictionality', (2010) 104 AJIL 351.

¹¹²See Ryngaert, *supra* note 54, at 49–100; see notes 31–46 and accompanying text, *supra*.

¹¹³See Szigeti, *supra* note 46, at 397.

¹¹⁴*Ibid.*; also notes 73–100 and accompanying text, *supra*.

¹¹⁵V. Lowe, *International Law* (2007), at 184.

¹¹⁶See notes 140–55 and accompanying text, *infra*.

Finally, territoriality is *inherently limited*, and therefore inherently compatible with a world of multiple independent sovereigns, as Vattel and Martens already recognized.¹¹⁷ Nationality-based jurisdiction, by contrast, could never resolve conflicts as the sole principle of jurisdiction, unless some nationalities trumped others, or mixed courts and/or mixed juries were the general rule.¹¹⁸ Universal jurisdiction and protective jurisdiction also, clearly, have no limiting functions: they were designed to counter and supplement territorial jurisdiction.

2.2. Limitless jurisdiction

The second contemporary trend is to emphasize ‘genuine connections’, which include territoriality, nationality and effects, in all their varieties and strengths.¹¹⁹ These approaches are literally limitless. Paul Schiff Berman, perhaps the scholar whose reinterpretation of jurisdiction has the widest scope, has argued for community-based jurisdiction, which can include religious communities, business communities or emotional communities.¹²⁰ Dan Svantesson argues that even protective jurisdiction and universal jurisdiction can be interpreted as legitimate interests of states.¹²¹ If, as per Svantesson, universal jurisdiction can be *included* as a type of substantial connection, then there is definitely no *limit* to how far connections can stretch geographically; to what makes a link substantial enough; or an interest legitimate enough.

Theoretically, this connection-based jurisdiction is not universal jurisdiction for all.¹²² The limits included within the formulations (the genuineness of the connections, the substantiveness of the links, and so on) are nevertheless too nebulous to be of much use. The Third Restatement of the Foreign Relations Law of the United States had a long list of criteria for courts to consider, whether their ‘exercise of jurisdiction over a person or activity is reasonable’.¹²³ The criteria included ‘the link of the activity to the territory of the regulating state’,¹²⁴ ‘the character of the activity to be regulated’,¹²⁵ ‘the existence of justified expectations’,¹²⁶ and a host of other considerations, but no metric to evaluate these considerations compared to each other, and no guidance for what counts as reasonable within each of these. The more recent Fourth Restatement has abandoned the list of considerations, and replaced them with the single, permissive injunction that ‘As a matter of prescriptive comity, courts in the United States *may* interpret federal statutory provisions to include other limitations on their applicability’.¹²⁷

Limits to the exercise of (extra)territorial jurisdiction are therefore permissive, not mandatory; the permission is based on a balancing exercise by each court; and they are based on the international legal concept of comity, which is ‘not legally binding’, but instead ‘based on courtesy, tradition, goodwill, or utility’.¹²⁸ Limits to international jurisdiction have been replaced by interest-balancing, which is basically an open invitation to shrink weaker states’ radius of action,

¹¹⁷R. T. Ford, ‘Law’s Territory (A History of Jurisdiction)’, (1999) 97 *Michigan Law Review* 843, at 852–4; and notes 31–8, *supra*.

¹¹⁸Cf. M. Constable: *The Law of the Other: The Mixed Jury and Changing Conceptions of Citizenship, Law and Knowledge* (1994).

¹¹⁹E.g., Restatement (Fourth), *supra* note 103, §§ 407–13.

¹²⁰P. S. Berman, ‘The Globalization of Jurisdiction’, (2002) 151 *UPLR* 311, at 435–7.

¹²¹See Svantesson, *supra* note 1, at 60.

¹²²With the possible exception of Berman, *supra* note 120.

¹²³Restatement (Third) of the Foreign Relations Law of the United States (1987), § 403 (2).

¹²⁴*Ibid.*, (a).

¹²⁵*Ibid.*, (c).

¹²⁶*Ibid.*, (d).

¹²⁷See Restatement (Fourth), *supra* note 103, at § 405 (emphasis added).

¹²⁸J. A. Kämmerer, ‘Comity’, in A. Peters and R. Wolfram (eds.), *Max Planck Encyclopedia of Public International Law*, available at opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e691?rskey=B8nhgb&result=1&prd=MPIL. The US understanding of comity seems to be somewhat more binding, though not entirely, either: “Comity,” in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will,

if the circumstances call for it. Limitless jurisdiction, based on (minimal) genuine connections and moderated by balancing exercises, goes against 'the very regulating purpose of the international law of jurisdiction: *delimiting* States' spheres of action and thus reducing conflicts between States'.¹²⁹

2.3. *Zombie territoriality and limitless jurisdiction in action: The example of the Microsoft Ireland dispute*

There is no way nor any reason for courts or legislatures to judiciously choose between zombie territoriality and limitless jurisdiction: they are free to choose either or both, often in the very same cases. For example, the dispute between Microsoft and the United States government between 2013 and 2018 revolved around the transmission of an email stored on a server in Ireland to US federal prosecutors, as part of the investigation into a drug trafficking case.¹³⁰ The magistrate judge brought up a number of reasons why Microsoft should be compelled to produce the data: partly because warrants under the US Stored Communications Act (hereinafter: SCA)¹³¹ have no territorial limits and function more like subpoenas, which act *ad personam*,¹³² partly because 'location' was deemed to refer to the location of the Internet Service Provider (Microsoft, in this case, which has its corporate headquarters in the United States), and not the location of the data storage unit,¹³³ partly because any alternative conclusion would have created possible data havens abroad for US criminals.¹³⁴

On appeal, the Second Circuit reversed the decision, and found that the location of the server is controlling after all. It did so by starting out from the presumption against extraterritoriality, and denying that the SCA warrant functions independently of territoriality.¹³⁵ Secondly, the appeals court found that the 'focus' or main objective of the SCA is to protect user privacy, so that the location of the data is more important than the location of the person holding the data, the location of the person being investigated, or the location of the crime for which the email in question may hold evidence.¹³⁶ Quite simply, '[b]ecause the content subject to the Warrant is located in, and would be seized from, the Dublin datacenter, the conduct that falls within the focus of the SCA would occur outside the United States, regardless of the customer's location and regardless of Microsoft's home in the United States'.¹³⁷

Finally, in 2018, while an appeal to the Supreme Court was pending,¹³⁸ the US Congress modified the SCA, so that now a warrant-holder is entitled to any digital information 'regardless of whether such communication, record, or other information is located within or outside of the United States'.¹³⁹

Clearly, the two judgments and the new statutory text are in some contradiction with each other. It is also clear that only some of the arguments and reasoning involved in the judgments are

upon the other'. *Hilton v. Guyot*, 159 U.S. 113, 163 (1895). See also W. S. Dodge, 'International Comity in American Law', (2015) 115 CLR 2071.

¹²⁹See Ryngaert, *supra* note 54, at 29 (emphasis added).

¹³⁰*In re Warrant to Search a Certain Email Account Controlled & Maintained by Microsoft Corp.*, 15 F. Supp. 3d 466 (S.D.N.Y. 2014); *In re Warrant to Search a Certain Email Account Controlled & Maintained by Microsoft Corp.*, Note, (2015) 128 HLR 1019, at 1020.

¹³¹Stored Communications Act of 1986, 18 U.S.C. §§ 2701–12.

¹³²See *In re Warrant*, *supra* note 130, at 471–2.

¹³³*Ibid.*, 473–4.

¹³⁴*Ibid.*, 474–5.

¹³⁵*Microsoft Corp. v. United States (In re Warrant to Search a Certain E-Mail Account Controlled and Maintained by Microsoft Corp.)*, 829 F.3d 197, 210–16 (2d Cir. 2016).

¹³⁶*Ibid.*, at 217–20.

¹³⁷*Ibid.*, at 220. For a summary and cogent critique, see Daskal, *supra* note 82, at 187–91.

¹³⁸*United States v. Microsoft Corp.*, 584 U.S. ___, 138 S. Ct. 1186 (2018).

¹³⁹Clarifying Lawful Overseas Use of Data (CLOUD) Act, Pub. L. 115-41, modifying 18 U.S.C. § 2703.

directed towards determining the location of actions, objects or persons (even though territorial jurisdiction is taken for granted, and the importance of the territorial/extraterritorial divide permeates the discourse). The magistrate judge used both policy-based and authority-based arguments to minimize territoriality and focus on personal jurisdiction. The appeals court did the opposite, and it focused on both establishing territorial limits (via the presumption against extraterritoriality), and the ‘correct location’ of the dispute, which it did so by equating the location of the object of the dispute (the emails stored on the server in Ireland) over the location of the parties. The Congress took a third tack by ignoring all jurisdictional limitations whatsoever.

2.4. The fragmentation of territoriality

If one tries to resurrect territoriality – make an honest and hard-working attempt to reconfigure the boundaries, instead of regurgitating the zombified formulas and authorities of territorial jurisdiction – the result will be fragmentation. Fragmentation within jurisdictional law is related to, but not identical to the general fragmentation of international law, which has been defined as the separation of international law into ‘functionally delineated specialised regimes’ without an overarching ‘process of treaty interpretation and conflict adjudication’.¹⁴⁰ Jurisdictional fragmentation refers instead to the process of separation that traditional doctrinal consolidation practices (quoting and following favourable cases, distinguishing unfavourable cases, contextualizing, considering policy arguments, etc.)¹⁴¹ produce in each sub-area of international law. In other words, consolidation and doctrinal review takes place separately in international and transnational criminal law,¹⁴² and in antitrust/competition law only,¹⁴³ or in jurisdiction over data.¹⁴⁴ Numerous contemporary studies of jurisdiction as a field are organized as edited volumes, where authors contribute a chapter to a single sub-field, and there is no space for an overall picture of jurisdiction except for the introductory chapter.¹⁴⁵ The introductory chapter, in turn, can only become a restatement of zombie territoriality, or a statement on contextual limitless jurisdiction.

This certainly produces converging customary international standards about the location of data, of transnational crimes, of international business transactions, and so on. The problem is that the clarified standards in each sub-area do not converge with each other, even though all of them claim to be instances of *territorial* jurisdiction. In other words, ‘territoriality’ now means different standards in international criminal law, human rights law, antitrust law, and so on. Fragmentation is not so much an alternative to zombie territoriality and limitless jurisdiction, but the result of both of these strategies being deployed in different areas to different extents. In the end, it is just as destructive of the coherence of jurisdiction doctrine as the former two strategies. If territoriality means different things in different situations, then it has lost its physical-cartographical meaning for good. Fragmented territoriality is just as incapable of drawing limits to states’ juridical powers, as limitless jurisdiction is.

¹⁴⁰M.-C. Petersmann, *When Environmental Protection and Human Rights Collide: The Politics of Conflict Management by Regional Courts* (2022), 3–4. On fragmentation in international law generally, see, e.g., E. de Wet and J. Vidmar, ‘Conflicts between International Paradigms: Hierarchy versus Systemic Integration’, (2013) 2 *Global Constitutionalism* 196; J. Pauwelyn and R. Michaels, ‘Conflict of Norms or Conflict of Laws? Different Techniques in the Fragmentation of Public International Law’, (2012) 22 *Duke Journal of International and Comparative Law* 349; M. A. Young, *Trading Fish, Saving Fish: The Interaction between Regimes in International Law* (2011).

¹⁴¹P. Schlag and A. J. Griffin, *How to Do Things with Legal Doctrine* (2020), at 72–99.

¹⁴²E.g., A. Chehtman, *The Philosophical Foundations of Extraterritorial Punishment* (2010); R. O’Keefe, ‘Universal Jurisdiction: Clarifying the Basic Concept’, (2004) 2 *Journal of International Criminal Justice* 735; see Gallant, *supra* note 14.

¹⁴³E.g., C. Ryngaert, *Jurisdiction Over Antitrust Violations in International Law* (2008); see Pettit and Styles, *supra* note 85; R. Y. Jennings, ‘Extraterritorial Jurisdiction and the United States Antitrust Laws’, (1957) 33 *BYIL* 146.

¹⁴⁴See Daskal, *supra* note 82; J. Daskal, ‘The Un-Territoriality of Data’, (2015) 125 *YLIJ* 326.

¹⁴⁵E.g., Parrish and Ryngaert, *supra* note 11; F. Casolari and M. Gatti (eds.), *The Application of EU Law beyond Its Borders*, *CLEER Papers* 2022/3. But see Ryngaert, *supra* note 54.

Fragmentation transforms jurisdiction from being founded on the geographical location of its underlying facts, to being founded on the principal subject matter of a case. In other words, fragmentation transforms territorial jurisdiction into subject matter-based jurisdiction. This is perhaps best illustrated by another US Supreme Court case, *Morrison v. National Australia Bank Ltd.*¹⁴⁶ The case concerned a possibly fraudulent US mortgage lending company, HomeSide Lending Inc., which was purchased by the respondent Australian bank. In 2001, HomeSide (and thereby National Australia Bank) unexpectedly suffered losses of more than USD 2.2 billion, allegedly because of manipulated income models created by HomeSide's corporate leadership.¹⁴⁷ Australian investors thereafter sued the Australian bank in US courts, regarding the loss of value of stocks listed and sold in Australia, but due to events taking place in the United States. Where did the facts of the case take place – Australia or the United States?

Although the Court ruled that the Securities Exchange Act does not apply extraterritorially,¹⁴⁸ the plaintiffs also argued that all the relevant facts happened in the United States, so extraterritoriality need not apply in any case.

Petitioners argue that the conclusion that §10(b) [of the Securities Exchange Act] does not apply extraterritorially does not resolve this case. They contend that they seek no more than domestic application anyway, since Florida is where HomeSide and its senior executives engaged in the deceptive conduct of manipulating HomeSide's financial models . . .¹⁴⁹

Justice Scalia recognized that 'it is a rare case of prohibited extraterritorial application that lacks *all* contact with the territory of the United States'.¹⁵⁰ His reply was to look for the (subject matter-based) *focus* of the law in question: 'we think that the focus of the Exchange Act is not upon the place where the deception originated, but upon purchases and sales of securities in the United States'.¹⁵¹ As commentators have noted, there is no agreed way to determine the focus of statutes and disputes: 'Morrison rests, ultimately, on a standardless concept – "focus"'.¹⁵² Focus seems to depend on the principal subject matter of the laws in question, so where a case involves several rules, some of these can have a domestic focus and others a foreign focus.¹⁵³ Scalia therefore turned the location of the 'facts' into the location of the 'focus' of the laws in question. As a case about fraud, *Morrison* may well be 'foreign' or transnational; as a securities law case, it has to be 'domestic' to be justiciable. Geography has been turned into a debate on subject matter.

We can see this in the Microsoft Ireland dispute as well: the location of the email in question could be Ireland (as the server where the email was stored was there), but it could also be seen as the United States (because Microsoft and its employees were located in Washington state, and Microsoft had continuous access to the email).

[I]t is not at all clear that the privacy intrusion occurs in Ireland as opposed to the United States. The United States government is not accessing the data in Ireland; Microsoft is.

¹⁴⁶See *Morrison v. National Australia Bank Ltd.*, *supra* note 111.

¹⁴⁷*Ibid.*, 247–50.

¹⁴⁸*Ibid.*, 252–63.

¹⁴⁹*Ibid.*, at 264.

¹⁵⁰*Ibid.* (emphasis in the original).

¹⁵¹*Ibid.*

¹⁵²L. Brilmayer, 'The New Extraterritoriality: *Morrison v. National Australia Bank*, Legislative Supremacy, and the Presumption against Extraterritorial Application of American Law', (2011) 40 *Southwestern Law Review* 655, at 660.

¹⁵³Brilmayer brings the example of *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264–75 (1990), where the question before the court was whether a warrantless search in Mexico results in evidence that should be excluded from the trial in the United States. As Brilmayer describes the case, it depends on whether the main norm that regulates the trial is the Fourth Amendment (whereby the focus of the case is the warrantless search in Mexico) or the Fifth Amendment (whereby the focus of the case is the fairness of the trial in the U.S.). *Ibid.*, at 681–2.

But Microsoft already has access to the data as its caretaker and in fact moves it around without notice to or control by the user.¹⁵⁴

As the Second Circuit reasoned in the case, if the focus of the dispute is a criminal investigation, then everything takes place in the United States. If the focus of the case is privacy protection, then it takes place in Ireland.¹⁵⁵

Cases involving Internet search engines and cloud-based email service providers have no alternative, but to become a topic subject to completely limitless jurisdiction. *Equustek v. Google* concerned a small Canadian firm specializing in computer network hardware for industrial uses, names Equustek Solutions Inc., whose products were copied and passed off by one of its retailers, Datalink. When Datalink was ordered to stop by Canadian courts, its owner disappeared from Canada and set up shop in an unknown location, but continued to sell its stolen products online, on websites that were listed by and searchable through Google. Equustek then sued Google to have sites featuring Datalink's offerings delisted, not just from Canadian IP addresses or through google.ca, but globally. In ruling against Google's protests against jurisdictional overreach, the Canadian Supreme Court openly stated that,

The problem in this case is occurring online and globally. The Internet has no borders – its natural habitat is global. The only way to ensure that the interlocutory injunction attained its objective was to have it apply where Google operates – globally.¹⁵⁶

The US Congress, as we have seen in the CLOUD Act, agreed.¹⁵⁷ And so did Belgian courts in cases against Yahoo! and Skype, very similar in its facts to the Microsoft Ireland dispute, where courts held that the territorial jurisdiction of Belgium is established over 'any operator or service provider that actively directs his economic activity to consumers in Belgium'.¹⁵⁸ Despite the fears of commentators that the Equustek judgment clears the way for global restrictions of free speech on the Internet, courts (and the US Congress) had no issues about 'legislating for the entire world'.¹⁵⁹

2.5. Fragmentation and the marginalization of human rights

The fragmentation of jurisdiction also results in the differential and often unjust treatment of similar geographical-territorial dispersions. In transnational criminal law as well as in transnational business and financial regulation, any type of link with the forum states results in territorial jurisdiction. '[A]ll States in which a constituent element of the offence could be located may exercise jurisdiction over that offence, [which is] is also denoted as the "theory of ubiquity"'.¹⁶⁰ Therefore, in the FIFA bribery cases, where the bribes were exchanged in

¹⁵⁴See Daskal, *supra* note 82, at 188.

¹⁵⁵See *Microsoft Corp. v. United States*, *supra* note 135, at 216–19.

¹⁵⁶*Google Inc. v. Equustek Solutions Inc.*, 2017 SCC 34, Para. 41.

¹⁵⁷See CLOUD Act, *supra* note 139.

¹⁵⁸Hof van Cassatie [Court of Cassation], Dec. 1, 2015, Nr. P.13.2082.N (Belg.), translated in (2016) 13 *Digital Evidence and Electronic Signature Law Review* 156, available at perma.cc/A2ZM-KVZC. See also *Procureur-Général v. Skype*, Correctionnele Rechtbanken [Criminal Tribunal] Antwerp, Division Mechelen, Oct. 27, 2016, No. ME20.4.1 105151–12 (Belg.).

¹⁵⁹E. Volokh, 'Canadian Court Orders Google to Remove Search Results Globally', *Washington Post*, 29 June 2017, available at www.washingtonpost.com/news/volokh-conspiracy/wp/2017/06/29/canadian-court-orders-google-to-remove-search-results-globally/; D. Keller, 'Ominous: Canadian Court Orders Google to Remove Search Results Globally', *Stanford Center for Internet and Society*, 28 June 2017, available at cyberlaw.stanford.edu/blog/2017/06/ominous-canadian-court-orders-google-remove-search-results-globally.

¹⁶⁰C. Rynjaert, 'Territorial Jurisdiction Over Cross-frontier Offences: Revisiting a Classic Problem of International Criminal Law', (2009) 9 *International Criminal Law Review* 187, at 189. See further Code pénal, Art. 113-2 (Fr.); StGB, § 9(i) (Germ.).

Switzerland, the persons accepting the bribes were mostly nationals of South American states, and the persons offering the bribes were also non-US nationals, the United States could nevertheless assert *territorial* jurisdiction based on the defendants having

met in the United States in furtherance of the charged conspiracies, maintained bank accounts [and] maintained businesses in the United States that were used to further the charged conspiracies, and used the United States' financial system to clear U.S. dollar transactions involved in the charged conspiracies.¹⁶¹

A similar approach rules transnational financial law:

Companies trading shares on the New York Stock Exchange as well as banks offering products in the U.S. are regarded as domestic and consequently subject to U.S. law. ... [B]anks whose subsidiaries are active on the U.S. market must demonstrate to the Federal Reserve Bank that their *global* operations are sufficiently capitalised. And as soon as (foreign) banks conduct transactions via U.S. accounts – which is difficult to avoid given the central position of the U.S. dollar – they often expose themselves to the full application of U.S. law ... The European Union also requires, for example, that foreign hedge funds wishing to offer products within the Union comply with European rules on liquidity, capitalisation, conflicts of interest and risk management.¹⁶²

So far, so good. We may conclude that territorial jurisdiction is by its nature overlapping, and a broad interpretation of territoriality is necessary to ensure international justice.¹⁶³ However, by contrast, when courts have to decide human rights cases (that is, criminal law cases where the defendants are state officials charged with violating human rights law or constitutional rights, or civil cases for violations of the same rights), the interpretation of territoriality is strikingly different. I have mentioned above the age-old question of jurisdiction regarding a shooting across an international border¹⁶⁴ – it is no accident that the cases which hold that the criminal act takes place in both are ordinary criminal cases,¹⁶⁵ and the cases which hold that the criminal act only place at the termination (result) of the criminal act are mostly human rights cases.

In *Banković v. Belgium*, the European Court of Human Rights (ECtHR) found that the bombing of a TV station in Belgrade by NATO forces in 1999 was outside of the territorial scope of the European Convention on Human Rights (ECvHR), even though the airstrike was planned in ECvHR member states, and the military airplanes executing the airstrike took off and landed in ECvHR member states.¹⁶⁶ The ECtHR has since developed its own jurisprudence on 'extended territoriality' in cases such as *Al-Skeini v. United Kingdom*,¹⁶⁷ *Jaloud v. Netherlands*¹⁶⁸ or *Hirsi Jamaa v. Italy*,¹⁶⁹ but this remains a uniquely European development. In *Kiobel v. Royal Dutch Petroleum Co.*,¹⁷⁰ the US Supreme Court interpreted the Alien Tort Statute to be limited by the presumption against extraterritoriality, and thereby inapplicable to the human rights violations

¹⁶¹*United States v. Napout et al.*, 332 F.3d 533, 553 (2018); see also Krisch, *supra* note 1, at 10; J. E. Struebing, 'Federal Criminal Law and International Corruption: An Appraisal of the FIFA Prosecution', (2018) 21 *New Criminal Law Review* 1.

¹⁶²See Krisch, *supra* note 1, at 11–12 (emphasis in the original). Also see Verdier, *supra* note 87.

¹⁶³E.g., Gallant, *supra* note 14, at 30–3.

¹⁶⁴See notes 75–80 and accompanying text, *supra*; also see Ryngaert, *supra* note 160.

¹⁶⁵E.g., see *Libman v. The Queen*, *supra* note 78; see Ryngaert, *supra* note 160, at 193–207 and cases cited therein.

¹⁶⁶*Banković and Others v. Belgium and Others*, Decision as to the Admissibility of 12 December 2001, [2001] ECHR. Serbia (or, the Federal Republic of Yugoslavia, as the state was named at the time) was not a member state to the ECHR until 2003.

¹⁶⁷*Al-Skeini and Others v. United Kingdom*, Judgment of 7 July 2011, [2011] ECHR.

¹⁶⁸*Jaloud v. Netherlands*, Judgment of 20 November 2014, [2014] ECHR.

¹⁶⁹*Hirsi Jamaa and Others v. Italy*, Judgment of 23 February 2012, [2012] ECHR.

¹⁷⁰569 U.S. 108 (2013).

suffered by the plaintiffs in Nigeria, at the instigation of Royal Dutch Petroleum/Shell and its local subsidiary.¹⁷¹ The plaintiffs were all on the US soil and refugees under the protection of the United States during the proceedings, so it is arguable that the human rights violations *also* took place on the US territory, since the plaintiffs who suffered torture and the murder of their relatives all lived on the US territory.¹⁷² Nevertheless, none of the judges took note of extended territorial jurisdiction, the theory of ubiquity, effects jurisdiction, the doctrine of continuing acts, or any of the available fancy doctrines to state that extraterritoriality need not apply in the first place, since the ‘focus’ of the Alien Tort Claims Act is to repair human rights harms occurring to plaintiffs on the US soil.¹⁷³ Generally, having a bank account in a state or having done business within a state is enough territorial presence for valid *criminal* jurisdiction over that person; it is, inexplicably, not enough to ground jurisdiction for human rights law or refugee law.¹⁷⁴

3. Reforming jurisdiction doctrine: Three uncertain possibilities

The critique of jurisdiction presented so far is arguably nothing new: there have certainly been numerous proposals to amend the four basic principles of jurisdiction.¹⁷⁵ Reform proposals have been strongly formal affairs, proposing simple meta-jurisdictional principles that would have established a hierarchy between the existing principles. Robert Jennings in the 1950s wrote that ‘the local law must be preferred’, that is to say that ‘extraterritorial jurisdiction may not be exercised in such a way as to contradict the local law at the place where the alleged offence was committed’.¹⁷⁶ In other words, territoriality is king; the other principles can only be relied on in the absence of territorial laws. This has been affirmed by certain courts,¹⁷⁷ although it has also been denied by courts.¹⁷⁸ A ‘first in time, first in right’ principle – meaning that whichever state started to adjudge or regulate a matter first, has precedence – has also been suggested, though there is no state practice or judicial affirmation of such a rule.¹⁷⁹

Such formal and general approaches, I propose, should be laid to rest. These approaches are too simple and too divorced from substantive law to be able to function as all-purpose metaprinciples. They have also been effectively rebuffed by state practice.¹⁸⁰ Finally, a hierarchy of principles is useless when all the claims are based on (some form of) territorial jurisdiction – which has been a large part of the problem from the beginning.¹⁸¹

¹⁷¹*Ibid.*, 108–9.

¹⁷²On the doctrine of continuing acts, see *United States v. Morales*, 11 F.3d 915, 921 (9th Cir. 1999); see Szigeti, *supra* note 46, at 375; M. Akehurst, ‘Jurisdiction in International Law’, (1973) 46 BYIL 145, at 153.

¹⁷³Cf. ‘A state or nation has a legitimate interest in the orderly resolution of disputes among those within its borders, and where the *lex loci delicti commissi* is applied, it is an expression of comity to give effect to the laws of the state where the wrong occurred.’ *Filártiga v. Peña-Irala*, 630 F.2d 876, 885 (2d Cir. 1980).

¹⁷⁴Cf. *United States v. Napout et al.*, *supra* note 161 and *Abdul Wahab Khan v. United Kingdom*, Admissibility Decision of 28 January 2014, [2014] ECHR, Paras. 24–8, contra *M.N. and Others v. Belgium*, Decision of 5 March 2020, [2020] ECHR, Paras. 96–125.

¹⁷⁵That is, territoriality, nationality, universality, and the protective principle, see ‘Draft Convention on Jurisdiction with Respect to Crime’, *supra* note 52.

¹⁷⁶See Jennings, *supra* note 143, at 151; echoed in H. Lauterpacht, *Oppenheim’s International Law* (1955), at 296; F. A. Mann, ‘The Doctrine of Jurisdiction in International Law’, (1964/I) 111 RCADI 1, at 90.

¹⁷⁷See *Banković and Others v. Belgium and Others*, *supra* note 166, Para. 60: ‘a State’s competence to exercise jurisdiction over its own nationals abroad is subordinate to that State’s and other States’ territorial competence.’; *Laker Airways Ltd. v. Sabena*, 731 F.2d 909, 936 (DC Cir. 1984): ‘Territoriality, not nationality, is the customary and preferred base of jurisdiction.’

¹⁷⁸See *Laker Airways Ltd. v. Sabena*, *ibid.*, at 935 (‘no rule of international law or national law precludes an exercise of jurisdiction solely because another state has jurisdiction’) and 952 (‘There is no principle of international law which abolishes concurrent jurisdiction.’).

¹⁷⁹See Ryngaert, *supra* note 54, at 143.

¹⁸⁰See Krisch, *supra* note 1, at 22: ‘Today, however, most observers find that state practice offers little indication of [jurisdictional “conflict rules”] to resolve conflicts, instead treating different grounds of jurisdiction on an equal footing.’

¹⁸¹See Ryngaert, *supra* note 54, at 144.

Existing substantive reform proposals can be sorted into three groups, but arguably, they all lead to the same place. Firstly, most leading scholars acquiesce to limitless jurisdiction, thereby also following state practice. This seems to be the easiest path to take: the one that is closest to realism and the one that requires the least amount of juridical creativity. Dan Svantesson has argued clearly against territoriality, and has supported limitless jurisdiction, moderated by interest-balancing, in a quite straightforward way.¹⁸² Cedric Ryngaert has been more circumspect and hesitant in endorsing limitless jurisdiction, but he has ultimately supported jurisdiction by the most powerful actors in favour of the common good, while acknowledging the dangers of neo-imperialism.¹⁸³ Nico Krisch, as we have seen, is overall pessimistic about limitless jurisdiction.¹⁸⁴ At the same time, he is equivocal about alternatives, especially alternatives that do not, in the end, deliver the same outcomes.

If jurisdiction is limitless, of course, then there is effectively no law of jurisdiction. If Ryngaert is essentially correct that one can always find a territorial connection¹⁸⁵ (and that there are no criteria for deciding what is the ‘focus’ of a statute for determining what are the relevant territorial connections¹⁸⁶), then jurisdictional inquiry becomes an ‘abortive ritual’, to use the words of Michel-Rolph Trouillot.¹⁸⁷ Abortive rituals are collective actions that ‘are meant not to succeed... because the very condition of their emergence deny the possibility of a transformation’.¹⁸⁸ In other words, jurisdictional enquiry becomes a fake enquiry: anything is (or if the court thinks otherwise, nothing is) territorial, because there are no limits to jurisdictional extension. We are back to the medieval and early modern world of having no law of jurisdiction.¹⁸⁹

A second approach is the circuitous rebel route: strengthening the adjacent values of independence, non-intervention, self-determination, etc., so as to get around the hopelessness of jurisdiction. Marco Milanović and Mohammed Helal have explicated the concept of coercion in international law, partly so as to include types of coercion that are not related to the use or threat of military force.¹⁹⁰ Arguably, if coercion and intervention can be defined without reference to territoriality, then lawful and *ultra vires* exercises of jurisdiction can also be defined by reference to what is coercive and interventional, without having to refer to extra/territoriality. Evan Criddle has expanded on the concept of self-determination to argue that extraterritorial jurisdiction is, in most cases, unlawful.¹⁹¹ He has argued that because extraterritorial jurisdiction applies the law of one country in the territory of another country, it is essentially a bypassing or overriding of the law of the second, territorial state.¹⁹² Extraterritoriality is therefore always imperialist and antidemocratic in its nature, because it disregards the law (and in democratic states, the legislative will of the people) that should apply territorially.¹⁹³

These approaches are ambitious, but they present serious challenges. As explained above, all of these concepts have so far relied on territoriality, therefore expounding or elaborating them

¹⁸²See Svantesson, *supra* note 1, at 59–84; D. J. B. Svantesson, ‘A New Jurisprudential Framework for Jurisdiction: Beyond the Harvard Draft’, (2015) 109 *AJIL Unbound* 69.

¹⁸³See Ryngaert, *supra* note 54, at 189–230; see Ryngaert, *supra* note 1.

¹⁸⁴See Krisch, *supra* note 1, at 33.

¹⁸⁵See Ryngaert, *supra* note 11.

¹⁸⁶See notes 50–5 and accompanying text, *supra*.

¹⁸⁷M.-R. Trouillot, ‘Abortive Rituals: Historical Apologies in the Global Era’, (2012) 2 *Interventions: International Journal of Postcolonial Studies* 171, at 185 (emphasis added).

¹⁸⁸*Ibid.*

¹⁸⁹See Tuori, *supra* note 18.

¹⁹⁰See Milanović, *supra* note 63; M. S. Helal, ‘On Coercion in International Law’, (2019) 52 *NYU Journal of International Law and Politics* 1.

¹⁹¹E. J. Criddle, ‘Extraterritoriality’s Empire: How Self-Determination Limits Extraterritorial Lawmaking’, (2024) 118 *AJIL* 607.

¹⁹²*Ibid.*, at 608–11.

¹⁹³*Ibid.*, at 618–21.

without addressing the failures of territorial jurisdiction will not square the circle. All three of these recent approaches merit a slightly more detailed analysis.

Milanović presents a sophisticated understanding of the types of behaviour that constitute coercion, but he has to specify that coercive behaviour that does not imply the threat or use of armed force is only illegal if it impinges on the *domaine réservé* or ‘internal and external affairs’ of a state.¹⁹⁴ How does one define the *domaine réservé*? The concept,

should not be understood as referring to those matters . . . that are entirely unregulated by international law. Today there are hardly any such matters. Rather, internal and external affairs belong to the reserved domain if a state *has any measure of discretion* within the bounds of international law regarding such issues.¹⁹⁵

One could argue that that is a rather unclear measure: discretion is hard to quantify in a yes-or-no fashion. But it is also hard to miss that every example of protected internal and external affairs that Milanović brings up are either territorial (e.g., Qatar’s right to host and support Al-Jazeera), or relate to classic elements of sovereignty even if they are abstract and non-territorial (e.g., membership in international organizations, or the conduct of domestic elections).¹⁹⁶

Mohamed Helal is openly equivocal about defining the *domaine réservé*, stating that ‘[i]dentifying th[e] specific areas of internal affairs and external relations [that are] within the *domaine réservé* is . . . an elusive endeavor’¹⁹⁷ and that the ‘breadth [of the *domaine réservé*] is ever-changing depending on the extent of the international legal obligations of a state, the growth of international law, and the intrusiveness of international regulatory and adjudicatory bodies’.¹⁹⁸ Helal does not even attempt to define the *domaine réservé* in general way: such a definition would be impossible, and the *domaine réservé* has to be reconstructed by looking at *all* the international obligations that a specific state has at a specific time. This also seems like a tall order, although it does not covertly resort to resurrecting a previously abandoned territoriality.

Evan Criddle, in his attempt to wield self-determination as the shield against extraterritorial jurisdiction, is openly territorialist.¹⁹⁹ His affirmations of territoriality, however, are at times self-contradictory;²⁰⁰ and they do not answer the question whether an act that is clearly territorial (e.g., the United States limiting access to US dollars) can also be *de facto* imperialist or extraterritorial by having extraterritorial, or even global, effects.²⁰¹ These attempts are admirable, but it is not clear that they have overcome the centrality of territoriality in defining non-intervention, the *domaine réservé*, self-determination, and the other concepts that signal and create independence in international law.

The third approach, the one most consistent with the liberal internationalist spirit of much of post-1945 international law, would be to strengthen and (re)create multilateral regimes with their

¹⁹⁴See Milanović, *supra* note 63, at 609–11.

¹⁹⁵*Ibid.*, at 610.

¹⁹⁶*Ibid.*, at 609, note 48, and 611.

¹⁹⁷See Helal, *supra* note 190, at 66.

¹⁹⁸*Ibid.*, at 66–7.

¹⁹⁹See Criddle, *supra* note 191, at 632–3.

²⁰⁰On page 633, Criddle asserts that ‘American lawmakers . . . exercise extraterritorial jurisdiction when they seek to regulate how foreign companies handle the personal data of U.S. nationals on servers overseas,’ presumably as an example of states ‘exploit[ing] incidental or insubstantial territorial contacts as a pretext for regulating unilaterally . . .’ (with reference to the Microsoft affair, notes 130–9 and accompanying text, *supra*). At the same time, on page 635, he asserts that it is no violation of self-determination if ‘a state extends its national law to its expatriate nationals’. It is then hard to see why extending national law to the *data* of not even expatriate nationals would be overstepping the limits of ‘territorial’ jurisdiction.

²⁰¹See N. Tzouvala, ‘TWAAIL and Dollar Hegemony: An Agenda for Research (and Change)’, in S. Yee and X. Ma (eds.), *Developing Countries and International Law: Beijing Forum Essays* (2024), Vol. 1, 205 at 209–14 (on file with the author); also A. Bradford, *The Brussels Effect: How the European Union Rules the World* (2020) (on the calculated extraterritorial effects of EU regulations that leverage access to the EU’s internal market as ways to influence foreign legal and policy practices).

own standards and forums. This approach recognizes that subduing domestic jurisdiction in different sub-fields of international law effectively creates ‘shared regimes of jurisdiction’. The curse of territoriality, as discussed above, is that many types of events happen in multiple places, and neither concurrent jurisdiction over the event, nor one-state-above-the-other approaches seem to yield justice reliably. Particularly in the case of network effects such as dollar hegemony in international trade and finance, neither treating it as an internal US affair, nor demanding that the entire world have unconditional access to US dollars, seems correct. Ideally, networks like the Internet and the global financial system would be treated as the infrastructure of humanity – a modern form of global commons, and a shared network between nations. This would certainly be keeping in the spirit of international law, which has mandated the freedom of the seas – the one indispensable commons for international trade – for centuries.²⁰² It would also be consistent with basic principles of property law, which has treated the sea, seashores, harbours, and the banks of navigable rivers as *res communis*, belonging to everyone without the possibility to private appropriation, under the law of nature and nations.²⁰³ The international regulation of SWIFT, the Internet, advanced microchip manufacturing capacities, and other ‘chokepoint-based’ networks that benefit most, perhaps all states, could be conducted somewhat like world trade under the WTO, guided by the most favoured nation principle and a compulsory international dispute settlement mechanism. Then again, we are currently seeing global trade wars and the incapacitation of the WTO’s dispute settlement mechanism, so recommending its extension to other domains seems less than prudent.

Multilateral regimes also come with their own more general problems, which have been well studied in international law.²⁰⁴ They may not even be so different from hegemonic practices, where a few great powers dictate international rules based on their own interests. In Cedric Ryngaert’s description of WTO negotiations, ‘[i]n informal “green room” consultations, the industrialized “Quad-countries” [USA, EU, Canada, Japan] often manage to build a consensus which they present as a “take it or leave it” package to the other Member States’.²⁰⁵ These informal negotiations are designed to work around the formal conference rules, which provide for the equal treatment of all states.²⁰⁶

Considering these three avenues for reform, it is perhaps time to abolish jurisdiction doctrine entirely. We could go back, or perhaps we already *have* gone back, to the seventeenth century, when the ability to execute judgments was synonymous with the power to create law. The fragmentation of territoriality means that the complete, formalized death of jurisdiction doctrine is unlikely: there will be areas such as human rights or transnational criminal law, where the physical presence of actions and actors makes just enough sense for considerations of territoriality vs. extraterritoriality to continue. Fragmentation also means that in other domains, such as international data protection, discussions of territoriality can only continue in a completely zombified manner, and doctrines of limitless jurisdiction in fact already make discussions on jurisdiction pointless. Nevertheless, such a state of affairs would be clearly unsatisfactory. If for no other purpose than to aid students in studying other, more worthwhile areas of international law, the entire domain of territorial and extraterritorial jurisdiction should just be left out of future textbooks.

²⁰²H. Grotius, *The Freedom of the Seas* (R. Van Deman Magoffin trans., 1916); 1982 United Nations Convention on the Law of the Sea, 1833 UNTS 3, Art. 87.

²⁰³Justinian, *Institutes* (533), Bk II, Tit I, S. 1.–5.

²⁰⁴E.g., N. Krisch, ‘The Decay of Consent: International Law in an Age of Global Public Goods’, (2014) 108 AJIL 1.

²⁰⁵See Ryngaert, *supra* note 54, at 205.

²⁰⁶*Ibid.*

4. Conclusion

Weaponized interdependence, viewed in conjunction with some classic horror movies, provides a sobering realization here as well. It is a common, but nonetheless always shocking trope in zombie films, to have a beloved family member succumb to death and zombification in front of the protagonists' eyes.²⁰⁷ The parent, child, spouse, or romantic partner of one of the protagonists has been bitten by zombies and is succumbing to the infection. The family member dies, and is immediately reanimated and attacks the surviving protagonist. The protagonist must then 'kill' their undead child, spouse, or parent to preserve their own lives, and live with guilt and horror in addition to the grief and shock of having witnessed the death of their loved one. Zombified territoriality works in a surprisingly similar way. 'Living' territoriality was a tool for ensuring independence, sovereignty and the equality of states.²⁰⁸ Zombified territoriality – because it can be found almost everywhere – is more often used to deny sovereign equality and independence, especially when the territorial elements in finance or trade are used to deny resources and connections through unilateral economic sanctions. Territoriality was conceived of as the perfect protector of sovereign equality – 'good fences make good neighbours',²⁰⁹ as Robert Frost wrote and international relations scholars have been quoting ever since – but once zombified, it turns against its conceptual parent and protégé.

The result is jurisdictional chaos. In this moment, territoriality is still used as a catchphrase, but its meanings are radically different even within the same case. Some judges try to restore territoriality to its previous meanings; other judges (and most scholars) reinterpret it to mean a flexible system of jurisdictional extensions; yet others eschew the language entirely, and propose a flexible, limitless, 'unbound' jurisdiction restrained only by vague precepts of comity. In this (non-) system of 'zombie territoriality', there are slowly emerging consensuses on what counts as 'territorial', but they are different in every sub-discipline of international law. This fragmented territoriality extends the reach of powerful states but keeps the strictures of traditional territoriality for migration law and human rights claims. The concurrent fragmentation and limitlessness of jurisdiction discourse means that it is by now all but useless for separating jurisdictional claims between states. The true goal for international lawyers is not to reinterpret territoriality in increasingly convoluted ways again and again, but to make a stand for non-intervention, whenever and wherever extended jurisdictional claims truly threaten the independence of particular states, and the deeper values of freedom at a national scale. Undoubtedly, this is extraordinarily difficult, because fundamental concepts of the entire liberal structure of international law, such as sovereignty and non-intervention, have themselves been defined by relying on territoriality.²¹⁰ Nevertheless, the values of independence and collective freedom are cognizable, and must be given institutional force, despite the shortcomings of territoriality.

²⁰⁷E.g., G. Romero, *Night of the Living Dead*, 1968, at 1:24:00–1:26:00; E. Wright, *Shaun of the Dead*, 2004, at 51:00–56:00; F. Darabont, *The Walking Dead S1:E1, 'Days Gone By'*, 2010.

²⁰⁸See notes 1, at 30–8 and accompanying text, *supra*.

²⁰⁹R. Frost, *North of Boston* (1915), at 3.

²¹⁰P. D. Szigeti, 'Beyond Place: Network Effects Versus Jurisdiction and Sovereignty', (2025) 140 PSQ (forthcoming).