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International Law and Limitations on the Exercise of Extraterritorial Jurisdiction in U.S. Domestic Law

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I. Introduction

In 1804, in a case entitled *Murray v. The Schooner Charming Betsy*, Chief Justice John Marshall held that "an act of [C]ongress ought never be construed to violate the law of nations, if any other possible construction remains."[1] Almost a century later, writing for a majority of the Court in *The Paquete Habana* case, Justice Gray held that "[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination."[2] Such decisions would seem to carve out a defined place for international law in United States jurisprudence. Yet today, another century beyond the holding of *The Paquete Habana,* trenchant questions are posed regarding the appropriate role of international law in the domestic legal order.[3] Both

1. 6. U.S. (2 Cranch) 64, 118 (1804).
2. 175 U.S. 677, 700 (1900).
3. *See* Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers:*

commentators and judicial opinions give cause to wonder if the language of these past opinions retains resonance or if they are now merely the antique echoes of more idealistic age, rendered devoid of meaning in modern times.[4]

This Article explores the role of international law in U.S. domestic law vis-à-vis the exercise of extraterritorial jurisdiction – an area of law that marks the intersection between domestic law and international affairs. The analysis which follows demonstrates the continued force of international law in the body of U.S. domestic law which governs this realm and highlights both the advantages and dangers attendant to the reliance upon international law by courts engaged in this complex yet increasingly salient area of the law. Moreover, a review of U.S. jurisprudence relating to the extraterritorial application of U.S. law reveals a sharp dichotomy between the rules articulated for regulatory crime and those prescribed for other sorts of transnational criminal activity. This dichotomy in U.S. jurisprudence with regard to laws that impact commercial markets and criminal matters that do not have such market-impacting qualities is both a logical and supportable rationale due to the different nature of such laws and their respective purposes.

The role of international law in each analysis will also differ, depending on the nature of the matter under consideration. For instance, in regulatory matters, U.S. courts will base limitations on extraterritorial jurisdiction on notions of comity while, for transnational criminal matters, courts will apply limitations mostly commonly associated with the Due Process Clause of the U.S. Constitution, but suffused with international legal considerations. An analysis of each varied approach in U.S. jurisprudence illuminates key areas where international law and U.S. domestic law converge, specifically with regard to the manner in which each empowers or limits the extraterritorial reach of U.S. law.

II. International Law in the Domestic Legal Order

Commentators note that the relationship between international law and domestic national law can be aptly "characterized in terms of coordination between formally autonomous, but in practice

Rethinking the Interpretive Role of International Law, 86 GEO. L.J. 479, 526 (1998).

4. *Id.*

highly interdependent, legal orders."[5] With the dramatic rise in the frequency and scope of transnational criminal activity and the modern phenomenon of globalization, the interrelationship of these two legal orders has come into sharper focus. From issues relating to international terrorism to more banal matters with distinct international dimensions, national courts in the modern era find themselves deciding cases with significant international elements and which have the potential to impact relations between sovereigns on the international plane. One area which is implicated across a broad range of legal topics and which has a natural propensity to affect international relations is the assertion of extraterritorial jurisdiction.[6] This is due to the inherently conflict-generative nature of extraterritoriality. As one author notes:

> [E]xtraterritorial punishment has also been considered inconsistent with, or at least problematic under, the light of the principle of state sovereignty. The world is divided into political entities with an exclusive right to regulate the conduct of individuals within their territorial borders. A crucial normative difficulty with extraterritorial jurisdiction is, then, that it is not claimed exclusively on the high seas, or Antarctica for that matter, but rather on the territory of another sovereign state.[7]

Moreover, as Nollkaemper notes, "[t]he rule of law at the national level does not provide an adequate framework for the control of public power as it relates to such transnational issues as . . . protection of fundamental rights, health, and security."[8] When confronted with such matters, national courts are thus left with the Herculean task of addressing transnational legal issues, which national legal systems cannot alone regulate, and under certain circumstances which can provide fertile ground for conflict.[9]

5. ANDRE NOLLKAEMPER, NATIONAL COURTS AND THE INTERNATIONAL RULE OF LAW 13 (2011).

6. Rep. of the Int'l Law Comm'n, 58th Sess., May 1-June 9, July 3-Aug. 11, 2006, U.N. GAOR, 61st Sess., Supp. No. 10, U.N. Doc. A/61/10 (2006), Annex E, Extraterritorial Jurisdiction, ¶ 6 ("The notion of extraterritoriality may be understood in relation to a State as encompassing the area beyond its territory, including its land, internal waters, territorial sea as well as the adjacent airspace.") [hereinafter Extraterritorial Jurisdiction], *available at* http://www.tjsl.edu/slomansonb/5.1_UNExtra.pdf.

7. ALEJANDRO CHEHTMAN, THE PHILOSOPHICAL FOUNDATIONS OF EXTRA-TERRITORIAL PUNISHMENT 20 (2010).

8. *See* NOLLKAEMPER, *supra* note 5, at 2.

9. *See* Extraterritorial Jurisdiction, *supra* note 6, ¶ 2 ("The assertion of

In such instances, a court may find it more appropriate to demure – to refuse to enter into the fray by finding a limitation on its ability to extend its jurisdictional reach to the matter under consideration. Such demurrals serve to decrease the potential for international conflict but at the cost of sovereign power.

In grappling with this need to address transnational issues in the context of a national legal system, domestic courts have increasingly looked to international legal principles, resulting in a level of "penetration of international law in the national legal order[.]"[10] This Article explores the degree to which international law has permeated U.S. jurisprudence governing the exercise of extraterritorial jurisdiction over transnational criminal activity and the degree to which international law has been used by U.S. courts to limit or empower extraterritorial jurisdiction. Specific focus is given to the interrelationship between the limits imposed by international law, such as the "rule of reasonableness," and due process limitations imposed by U.S. courts.

In reviewing a broad spectrum of U.S. judicial decisions, this Article demonstrates that the justifications for and against the exercise of extraterritorial jurisdiction in U.S jurisprudence are multifarious, revealing distinct analytical strata that are dependent upon the nature of the law being applied extraterritorially and the conduct regulated. For instance, regulatory laws impacting commercial markets have been made the subject of an analysis that is distinct from analysis applied to other forms of transnational criminal activity.[11] Moreover, due to a split in U.S. jurisprudence, the analysis applied to that latter group of transnational crimes (those that do not impact international commercial markets), will further depend upon the judicial district. In that regard, analysis of lower courts roughly falls into one of two categories: (1) districts which require a nexus between the defendant and the United States in order to exercise extraterritorial jurisdiction, and (2) districts

extraterritorial jurisdiction by a State is an attempt to regulate by means of national legislation, adjudication or enforcement the conduct of persons, property or acts beyond its borders which affect the interests of the State in the absence of such regulation under international law. The exercise of extraterritorial jurisdiction by a State tends to be more common with respect to particular fields of national law in view of the persons, property or acts outside its territory which are more likely to affect its interests, notably criminal law and commercial law.").

10. *See* NOLLKAEMPER, *supra* note 5, at 9.

11. *See, e.g.*, Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993).

which only require that the exercise of jurisdiction not be arbitrary or unfair. The particular role of international law in each of these analyses varies along with the sorts of limitations imposed upon the extraterritorial exercise of jurisdiction.

III. Jurisdiction and the International Legal Order

Jurisdiction, defined as "the right to prescribe and enforce rules against others,"[12] is a core element of state power. The ability to wield authority over a certain class of individuals, described by one commentator as "the quintessence of sovereignty,"[13] is fundamental to the idea of a governing authority that is capable of exercising power over its territory.[14] The exercise of jurisdiction by a state is typically conceived of taking one of three forms: jurisdiction to prescribe (to enact law), jurisdiction to adjudicate (to subject persons or entities to its law), and jurisdiction to enforce (to compel compliance with its law).[15] The focus of this Article is prescriptive and adjudicative jurisdiction in the context of criminal law – the enactment of laws creating a criminal offense and the concomitant adjudication of the offenders made the subject of those laws.

It is the primal aspect of jurisdiction – its close association with sovereign authority – which also infuses it with such conflict-generative potential. A cursory search of contemporary headlines provides ample evidence of how the exercise of jurisdiction can dramatically impact foreign affairs and give rise to potential conflict. A notable example is the case of Yunus Rahmatullah, a citizen of Pakistan who was captured in Iraq by British forces in 2004 before being transferred to the United States and then moved from Iraq to Bagram in Afghanistan.[16] Rahmatullah, though imprisoned in Afghanistan, brought his case before domestic courts in the United Kingdom and eventually appealed to the Court of Appeal (Civil Division) in the United Kingdom for a writ of *habeas corpus*. The

12. VAUGHAN LOWE, INTERNATIONAL LAW 171 (2007).

13. ANTONIO CASSESE, INTERNATIONAL LAW 49 (2d ed. 2005).

14. H.L.A. HART, THE CONCEPT OF LAW 50 (2d ed. 1997) ("This vertical structure composed of sovereign and subjects is, according to the theory, as essential a part of a society which possesses law, as a backbone is of a man.").

15. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 401 (1987) [hereinafter RESTATEMENT].

16. Ramhmatullah v. Sec'y of State for Foreign & Commonwealth Affairs, [2011] EWCA (Civ) 1540, [3].

U.K. court, after considering the issue, held that a Pakistani man who was captured by British forces but held by the U.S. military in Afghanistan may pursue a *habeas corpus* petition against the U.K. Secretary of State for Defence and for Foreign and Commonwealth Affairs.[17] In so holding, the U.K. Court of Appeal ordered the executive branch of the United Kingdom to secure the release of Rahmatullah who was held by the United States. This, in turn, placed the government of the United Kingdom in the odd position of having to approach the United States to ask for the release of this prisoner so that it could comply with a judicial decision by U.K. domestic court. As such, one sovereign was compelled to oppose the obvious desire of another – even though the facts of the case suggest that foreign policy considerations (at least at one point) compelled the United Kingdom to support the individual's detention by the United States.

Similarly, in 2005, a Spanish judge issued an international arrest order for three U.S. soldiers based upon their involvement in the death of a Spanish journalist in Iraq who was killed when an American tank fired at his hotel in Baghdad in 2003.[18] U.S. officials denied that the soldiers acted improperly and, to the contrary, expressly found that they were justified in firing at the hotel because they had reason to believe it was an enemy position. A Spanish Judge, nonetheless, believed that certain evidence suggested the soldiers might have committed murder and a "crime against the international community" by firing at the hotel.[19] The Spanish judge eventually indicted the U.S. soldiers, but the U.S. government refused to hand them over to Spain.[20] Accordingly, a Spanish judge's exercise of jurisdiction over a transnational criminal issue placed two sovereigns in antagonistic positions.

As these examples indicate, a domestic court's decision to exercise jurisdiction is capable of having a profound impact on international affairs and relations between sovereigns.[21]

17. *Id.* at [33]-[34].

18. Renwick McLean, *3 U.S. soldiers face arrest in Spain*, N.Y. TIMES (Oct. 20, 2005), http://www.nytimes.com/2005/10/19/world/europe/19iht-spain.html.

19. *Id.*

20. Victoria Burnett, *Spanish judge indicts 3 U.S. soldiers in connection with journalist's death*, N.Y. TIMES (Apr. 27, 2007), http://www.nytimes.com/2007/04/27/world/europe/27iht-spain.4.5474901.html.

21. *See generally* Eric Talbot Jensen & Chris Jenks, *All Human Rights Are Equal, But Some Are More Equal Than Others: The Extraordinary Rendition of a Terror Suspect*

International affairs, in turn, are regulated by international law – the legal order that serves as the framework for cooperation between nation states.[22] It is therefore unsurprising to see domestic courts look to international law when making decisions that implicate international affairs and incorporate relevant international legal principles into their decisionmaking.

IV. International Law and the Recognized Bases of Jurisdiction

While the normal ambit of prescriptive jurisdiction is "the territory over which a State is sovereign,"[23] states may also, in certain circumstances, enact legislation that criminalizes conduct occurring outside of their territory.[24] As noted, such assertions of extraterritorial prescriptive jurisdiction are inevitably a more precarious venture as they generally involve both the interests of another sovereign and a projection of state power of particular significance.[25] Accordingly, as a matter of international law, extraterritorial prescriptive jurisdiction is only considered to be a legitimate exercise of state power when exercised in conformance with one or more internationally recognized bases for the assertion of jurisdiction. On that score, while domestic legal systems typically have developed systems and rules demarcating the authorities and limits of a court's jurisdiction, international law has not yet developed a framework relating to the exercise of jurisdiction or the apportionment of such national power between sovereigns.[26] Customary international law, however, has developed to an extent that the exercise of jurisdiction in certain forms can be identified as

in Italy, the NATO SOFA, and Human Rights, 1 HARV. NAT'L SEC. J. 171 (2010) (explaining that an Italian court found a group of Italian military intelligence agents, operatives from the Central Intelligence Agency and a U.S. Air Force (USAF) officer guilty of the 2003 kidnapping of terror suspect Abu Omar).

22. *See* LOWE, *supra* note 12, at 1.

23. *See* CASSESE, *supra* note 13, at 49.

24. *See, e.g.*, Christopher L. Blakesley & Dan E. Stigall, *Wings for Talons: The Case for the Extraterritorial Jurisdiction Over Sexual Exploitation of Children through Cyberspace*, 50 WAYNE L. REV. 109 (2004); Christopher L. Blakesley & Dan E. Stigall, *The Myopia of U.S. v. Martinelli: Extraterritorial Jurisdiction in the 21st Century*, 39 GEO. WASH. INT'L L. REV. 1 (2007).

25. ROBERT CRYER ET AL., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 22 (2010) (noting, "[t]he assertion of criminal jurisdiction over a person is amongst the most coercive activities any society can undertake.").

26. LINDA CARTER ET AL., GLOBAL ISSUES IN CRIMINAL LAW 7 (2007).

permissible or otherwise.

The basic framework for the international law of jurisdiction begins with the *S.S. Lotus* case, which was decided in 1927 by the Permanent Court of International Justice (the League of Nations forerunner to the current International Court of Justice).[27] In that decision, the Permanent Court of International Justice articulated the fundamental rule that prescriptive jurisdiction – the ability of a government to prescribe law relating to certain activity[28] – is permissive in international law and, unless a prohibition to prescriptive jurisdiction is proved, a state may properly claim jurisdiction.[29]

> International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.[30]

The International Court of Justice has reaffirmed the enduring force of this rule as recently as 2010, noting that the rule articulated in *Lotus* remains a cornerstone of the international law of jurisdiction. [31] As such, the starting point for any jurisdictional analysis is a presumption of permissibility – a presumption that is only overcome by demonstrating that the action is otherwise prohibited by treaty or customary international law.[32]

It is generally accepted that there are five recognized bases of

27. S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7).

28. CEDRIC RYNGAERT, JURISDICTION IN INTERNATIONAL LAW 9 (2008).

29. *See S.S. Lotus*, ¶ 44.

30. *Id.*

31. *See, e.g.*, Written Contribution of the Republic of Kosovo Concerning Request of United Nations General Assembly for Advisory Opinion on Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo, Kosovo Advisory Opinion, 2010 I.C.J. (Apr. 17, 2009), *available at* http://www.icj-cij.org/docket/files/141/15678.pdf.

32. *Id.* at 138 (noting "[f]rom the *Lotus* case to the present, the Court's jurisprudence indicates that when assessing the international legality of a contested action, the starting point is a presumption of permissibility, overcome only if it can be shown that the action is prohibited by treaty or customary international law.").

jurisdiction over transnational crime.[33] These are the territorial principle, the protective principle, nationality, passive personality, and universal jurisdiction.[34] The first of these, the territorial principle, is the least controversial basis of jurisdiction.[35] The territorial principle is a theory of jurisdiction based upon a nexus with the territory of the sovereign and grounded in a sovereign's "right to legislate for all persons within its territory."[36] Such jurisdictional power aligns with the basic framework of the international order, in which territorial units comprise the basis for organization.[37] A state, accordingly, may exercise jurisdiction based on a theory of subjective territoriality (an exercise of jurisdiction over a crime which occurs in its territory), or a state may exercise jurisdiction based on objective territoriality (an exercise of jurisdiction over a crime that "originates abroad or is completed elsewhere, so long as at least one of the elements of the offense occurs in its territory").[38] Although it is, in many ways, "[t]he most obvious basis upon which a state exercises its jurisdiction,"[39] it also has its limitations.

> Despite the resistance to excessive jurisdictional claims, there is a general recognition that territorial jurisdiction is an inadequate basis for regulating problems of the modern world such as international crime, terrorism, cartelization, and pollution.[40]

Jurisdiction based on territory, accordingly, is a basic concept in the law of international jurisdiction but, like states themselves, is an inadequate tool for addressing contemporary issues of global significance.[41]

Another accepted basis for jurisdiction under customary international law is the nationality principle. Sometimes called "active nationality," this theory of jurisdiction permits states to

33. CARTER ET AL., *supra* note 26, at 7.

34. *Id.*

35. CRYER ET AL., *supra* note 25, at 46.

36. *See* LOWE, *supra* note 12, at 172.

37. *Id.* at 9.

38. CRYER ET AL., *supra* note 25, at 46.

39. *See* LOWE, *supra* note 12, at 172.

40. *Id.* at 180.

41. *See* DOUGLAS HURD, THE SEARCH FOR PEACE 6 (1997) ("[N]ation states are … incompetent. Not one of them, even the United States as the single remaining super power, can adequately provide for the needs that its citizens now articulate.").

exercise jurisdiction over their nationals who commit crimes abroad.[42] This generally accepted principle of jurisdiction is based on numerous considerations, such as a state's need to prevent its nationals from engaging in criminal activity, to prevent its nationals "from enjoying scandalous impunity,"[43] difficulty locating the place where an offense was committed, and the need of a state to protect its international reputation.[44] Jurisdiction based on nationality also has deep historico-legal roots, reaching far back to ancient times when law had an ethnic quality and, in what is termed the "personality of laws," each person was judged according to the law of his or her ethnic group.[45]

The passive personality principle, in turn, is a theory of jurisdiction under which states assert jurisdiction over a crime committed against one of their nationals abroad.[46] This basis of jurisdiction has been historically considered somewhat controversial and criticized as an exorbitant jurisdictional claim.[47] Cedric Ryngaert, a lecturer in public international law at the University of Utrecht in The Netherlands and the author of an authoritative text on international jurisdiction, notes that "[i]t is unclear whether the nationality of the victim, which certainly constitutes a legitimate interest of the State, also constitutes a sufficient jurisdictional link under international law."[48] Nonetheless, commentators note that recent state practice indicates a growing acceptance of this practice "at least for certain crimes, often linked to international terrorism."[49] This trend is discernible in the 1963 Convention on Offenses and Certain Acts Committed on Board Aircraft which allows states whose nationals have been harmed to exercise criminal jurisdiction over the offenders. Similarly, the 2000 Transnational Organized Crime Convention, in the context of transnational crimes which are the subject of that multilateral instrument, allows states to exercise jurisdiction over individuals who harm their nationals.[50]

42. CRYER ET AL., *supra* note 25, at 47.

43. RYNGAERT, *supra* note 28, at 90.

44. *Id.*

45. *See* JEAN-MARIE CARBASSE, MANUEL D'INTRODUCTION HISTORIQUE AU DROIT 94-96 (2002).

46. CRYER ET AL., *supra* note 25, at 49.

47. *See* RYNGAERT, *supra* note 28, at 94.

48. *Id.* at 92.

49. *Id.* at 94.

50. JEFFREY L. DUNOFF, STEVEN R. RATNER & DAVID WIPPMAN, INTERNATIONAL

The protective principle is a basis for jurisdiction under which a state exercises jurisdiction over extraterritorial conduct that threatens state security "such as the selling of State secrets, spying or the counterfeiting of its currency or official seal."[51] Under this principle, a state may assert jurisdiction over "acts perpetrated abroad which jeopardize its sovereignty or its right to political independence."[52]

Finally, universal jurisdiction, noted as being among the most controversial bases of extraterritorial jurisdiction, is a theory of jurisdiction that allows the exercise of jurisdiction over an offense without regard to any nexus with the territory or national interests of the sovereign – it is an exercise of jurisdiction over a crime "without reference to the place of perpetration, the nationality of the suspect or victim or any other recognized linking point between the crime and the prosecuting State."[53] This principle of jurisdiction, described as both important and controversial,[54] is increasingly legitimated through state practice and is noted as a key tool in seeking redress and providing justice for victims of gross human rights violations.[55]

These traditionally recognized bases for the exercise of prescriptive jurisdiction under international law, which are also listed in Section 402 of the Restatement,[56] are frequently referenced in U.S. jurisprudence and relied upon by courts seeking to assert a proper basis of jurisdiction. Their increasingly common appearance in U.S. jurisprudence elucidates the deepening interrelationship between domestic and international legal orders.

V. Limitations on Extraterritorial Jurisdiction in International Law

Although the bulk of the international law of jurisdiction focuses on what bases of extraterritorial jurisdiction are permissible, another focus of courts and commentators has been the bases for limiting the exercise of extraterritorial jurisdiction – even when that

LAW NORMS, ACTORS, PROCESS: A PROBLEM-ORIENTED APPROACH 379 (2006).

51. CRYER ET AL., *supra* note 25, at 50.

52. RYNGAERT, *supra* note 28, at 96.

53. CRYER ET AL., *supra* note 25, at 50–51.

54. LUC REYDAMS, UNIVERSAL JURISDCTION 1 (2003).

55. *Id*.

56. RESTATEMENT § 402.

jurisdiction is otherwise permitted by one of the bases outlined above. The two most prominent of such limitations are the ancient principle of "comity" and the relatively recent "rule of reasonableness."

A. Comity

One way in which extraterritorial jurisdiction is limited is through the doctrine of judicial restraint known as comity. The notion of comity has been an idea in flux from a legal perspective. It began in nineteenth-century U.S. jurisprudence "as an assertion of the primacy of the forum's own law" but evolved in its juridical understanding into "an obligation to apply foreign law."[57] Thereafter, in Cold War era jurisprudence, the idea of comity became understood as "a justification for limiting domestic jurisdiction to prescribe, adjudicate, or enforce."[58] It is frequently characterized today as

> a traditional diplomatic and international law concept used by States in their dealings with each other. Short of legal obligation, States respect each other's policy choices and interests in a given case without inquiring into the substance of each other's laws. Comity is widely believed to occupy a place between custom and customary international law.[59]

The U.S. Supreme Court has noted that the notion of deferring to a state to respect its choices is based on a degree of recognition for the laws and status of another nation.[60] As one commentator notes, "[r]oughly speaking, courts, according to this doctrine, should apply foreign law or limit domestic jurisdiction out of respect for foreign sovereignty."[61] Sovereignty, in turn, is a foundational principle of the international order. Its legal corollary, the principle of nonintervention, serves as a buttress of this foundational principle by prohibiting actions that undermine sovereignty.[62] The ideas are irrevocably intertwined as the latter implies the inviolability of the

57. Joel R. Paul, *The Transformation of International Comity*, 71 L. & CONTEMP. PROBS. 19, 38 (2008).

58. *Id*.

59. RYNGAERT, *supra* note 28, at 136–37.

60. *See* Hilton v. Guyot, 159 U.S. 113, 163-64 (1895).

61. Paul, *supra* note 57, at 19.

62. JOSEPH S. NYE, JR., UNDERSTANDING INTERNATIONAL CONFLICTS: AN INTRODUCTION TO THEORY AND HISTORY 166 (7th ed. 2009).

former. As Max Huber, arbiter in the *Island of Palmas* case wrote, "[s]overeignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State."[63] The system of organization of states upon which international relations are based depends upon these basic tenets to ensure stability in world affairs.

This is also reflected in the U.N. General Assembly's Declaration on Principles of International Law Concerning Friendly Relations and Cooperation states that "[n]o state or Group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other state[.]"[64] The practice of declining jurisdiction based upon the interests of another sovereign is, therefore, based in the undergirding legal principles that serve as the framework for the international legal order.[65] A defining feature of comity, however, is that it is a discretionary concept rather than a legal obligation.[66] In this netherworld between custom and customary international law,[67] it is considered "neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other."[68] Its place in the legal universe is, at once, ill-defined and entrenched.

B. The Rule of Reasonableness

A similar but separate concept which ostensibly serves as a limit on assertions of extraterritorial jurisdiction is what is known as the "rule of reasonableness." Literature and certain judicial decisions have recently begun to discuss how international law may place limitations on jurisdiction – even when otherwise permissible– based upon notions of reasonableness. According to the Restatement, even when one of the permissible bases for jurisdiction

63. Island of Palmas Arbitration (Neth. v. U.S.), 2 R.I.A.A. 829, 838 (Huber, J., 1928).

64. Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625(XXV), U.N. GAOR, 25th Sess., U.N. Doc A/8082, at 121 (Oct. 24, 1970).

65. Paul, *supra* note 57, at 38 ("Comity was conceived originally as mutual respect between sovereigns.").

66. RYNGAERT, *supra* note 28, at 136.

67. *Id*. at 136–37.

68. *Guyot*, 159 U.S. at 163–64.

is present, "a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable."[69] To determine whether or not the exercise of jurisdiction is unreasonable, the Restatement counsels that courts should review a number of factors, including (a) the link of the activity to the territory of the regulating state, (b) the connections between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect, (c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted, (d) the existence of justified expectations that might be protected or hurt by the regulation, (e) the importance of the regulation to the international political, legal, or economic system; (f) the extent to which the regulation is consistent with the traditions of the international system, (g) the extent to which another state may have an interest in regulating the activity, and (h) the likelihood of conflict with regulation by another state.[70]

Under the framework posited by the Restatement, when reasonable assertions of jurisdiction conflict, each state must "evaluate its own as well as the other state's interest in exercising jurisdiction," and "a state should defer to the other state if that state's interest is clearly greater."[71] Ryngaert succinctly notes the implications of the rule reflected in Section 403 in writing that such a rule would require that when states exercise prescriptive jurisdiction pursuant to an internationally recognized basis, they must also go on to conduct an additional "reasonableness analysis" to determine whether or not the exercise of jurisdiction is permissible.[72]

In support of this assertion, the comments to the Restatement assert that "[t]he principle that an exercise of jurisdiction on one of the bases indicated in Section 402 is nonetheless unlawful if it is unreasonable is established in United States law, and has emerged

69. RESTATEMENT § 403(1).

70. *Id*. § 403(2).

71. *Id*. § 403(3).

72. RYNGAERT, *supra* note 28, at 142.

as a principle of international law as well."[73] The Reporters' Notes elaborate upon that position vis-à-vis U.S. domestic law:

> The courts of the United States have used different formulations in approaching challenges to the reach of United States jurisdiction to prescribe. Some courts have addressed the issue from the point of view of "comity," but seen as a matter of obligation among states. Other courts have spoken of "due recognition of our self-regarding respect for the relevant interests of foreign nations." Courts have invoked the presumption that Congress does not intend to violate international law, and have interpreted general words in United States statutes in the light of "the limitations customarily observed by nations upon the exercise of their powers." Taken together, these formulations and variations on them support the principle of reasonableness as well as the factors set forth in Subsection (2). Congress will not, in Learned Hand's phrase, be presumed to intend to "punish all whom [our] courts can catch."[74]

Commentators however dispute such assertions and whether a jurisdictional rule of reasonableness is actually a part of customary international law.[75] An analysis of U.S. jurisprudence on that subject reveals that even when courts reference such a rule, they are markedly disinclined to limit jurisdiction in transnational criminal matters on such grounds. As such, it may fairly be said that no such rule applies in U.S. law vis-à-vis transnational crime. Even in regulatory matters, where the rule is more frequently cited in U.S. jurisprudence, it is couched in terms of comity rather than a prohibitive rule in international law based on reasonableness.

VI. Extraterritoriality and the U.S. Legal Framework

The U.S. Supreme Court has long held that it interprets U.S. legislation with the assumption that "Congress generally legislates with domestic concerns in mind."[76] This undergirds "the legal presumption that Congress ordinarily intends its statutes to have

73. RESTATEMENT § 403, cmt. a.

74. *Id.* § 403.

75. RYNGAERT, *supra* note 28, at 178 ("When States exercise jurisdiction reasonably, they appear to do so as a matter of discretion, not out of legal obligation. Reasonableness, if any could be discerned, appears to be 'soft law' that need not guide future State behavior as a matter of law.").

76. Smith v. United States, 507 U.S. 197, 204 n.5 (1993).

domestic, not extraterritorial, application."[77] As this author and numerous others have noted, however, this general rule is not without significant exceptions.[78]

A. The Acceptance of Implied Extraterritoriality

In 1922, the Supreme Court faced the issue of asserting jurisdiction over conduct that occurred outside the territorial United States. In *United States v. Bowman*, the Court considered the case of a steam boat engineer (Bowman) who conspired to defraud the U.S. Shipping Board Emergency Fleet Corporation under Section 35 of the U.S. Criminal Code.[79] According to the indictment, the plot to defraud the United States was hatched by Bowman and his confederates while on board a steamer journeying to Rio de Janeiro. The overt act that consummated the crime was a wireless telegram sent from the vessel to certain agents while it was still on the high seas.[80]

The sole objection made by the defense in *Bowman* was that because the crime was committed on the high seas – closer to Brazil than the United States – the United States lacked jurisdiction to prosecute the crime.[81] The Supreme Court, however, found that, for a certain class of crimes, the old rule of presuming a statute had territorial limitations was inapplicable:

> But the same rule of interpretation should not be applied to criminal statutes which are, as a class, not logically dependent on their locality for the government's jurisdiction, but are enacted because of the right of the government to defend itself against obstruction, or fraud wherever perpetrated, especially if committed by its own citizens, officers, or agents. Some such offenses can only be committed within the territorial jurisdiction of the government because of the local acts required to constitute them. Others are such that to limit their locus to the strictly territorial jurisdiction would be greatly to curtail the scope and usefulness of the statute and leave open a large immunity for frauds as easily committed by citizens on the high seas and in foreign countries as at home. In such cases, Congress has not thought it necessary to make specific provision in the law that the

77. Small v. United States, 544 U.S. 385, 388–89 (2005).

78. *See* Blakesley & Stigall, *supra* note 24, at 3.

79. United States v. Bowman, 260 U.S. 94, 95 (1922).

80. *Id.* at 96.

81. *Id.* at 96–97.

> locus shall include the high seas and foreign countries, but allows it to be inferred from the nature of the offense.[82]

Accordingly, the Supreme Court has held that the territorial presumption does not govern the interpretation of criminal statutes or statutory schemes which, by their nature, would be greatly curtailed if limited to domestic application.

Notably, however, the *Bowman* court obliquely addressed the issue of a potential conflict with other sovereigns in noting that that it would be "no offense to the dignity or right of sovereignty of Brazil to hold [the defendants] for this crime against the government to which the owe allegiance."[83] Similarly, with regard to the defendant who was a subject of Great Britain, the Court noted that he had not yet been apprehended and that "it will be time enough to consider what, if any, jurisdiction the District Court has to punish him when he was brought to trial."[84] The Court, therefore, recognized in some small way the issue of a potential limitation on jurisdiction based on "the dignity or right of sovereignty" of a foreign government. As demonstrated below, the question that the Court then deferred has since been the subject of numerous and divergent opinions in lower courts. These divergent opinions form a legal Tower of Babel, all articulating different (sometimes conflicting) views of the role of international law and limitations on extraterritorial jurisdiction in U.S. domestic law.

B. Structural and Due Process Limitations

Commentators note that the U.S. Constitution imposes both structural and due process limits on the ability of the U.S. to extend its laws to assert jurisdiction over extraterritorial conduct.[85] Structural limitations refer to the authority of Congress to enact legislation that has extraterritorial application. Inquiries into structural limitations focus on the source of authority for the jurisdictional assertion, such as powers granted in the Offences Clause, the Foreign Commerce Clause, and the Necessary and

82. *Id.* at 98.

83. *Id.* at 102.

84. *Id.*

85. Anthony J. Colangelo, *Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law*, 48 HARV. INT'L L.J. 121, 122 (2007).

Proper Clause.[86] In contrast, due process limitations are not rooted in Congress's general authority to create laws with extraterritorial effect, but instead act "to shield the individual accused from the application of an otherwise constitutional enactment."[87] As the former of these two categories relates primarily to the organic authority of the government to enact law, there is little room for discussion of how international law may permeate its analysis. It is, therefore, this latter category of limitation that shall be the focus of this Article.

While no decision of the U.S. Supreme Court has directly addressed the issue of whether the Due Process Clause limits the extraterritorial extension of U.S. criminal law,[88] lower courts have articulated a number of theories relating to this issue.

C. Prescriptive Comity and U.S. Antitrust Cases

Although the U.S. Supreme Court has delved into the subject of limitations on the reach of U.S. extraterritorial jurisdiction, it has largely been in the context of the limitations imposed by the exercise of international comity, which is defined as "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws."[89] Roberto Iraola notes that international comity is manifested in two ways: prescriptive comity and "comity of courts." Under prescriptive comity, courts will construe ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations.[90] Under the related notion of "comity of courts," judges may decline to exercise jurisdiction over matters more appropriately adjudged elsewhere.[91]

From almost the very moment when U.S. courts began to recognize that U.S. antitrust law could apply to conduct occurring

86. *Id.* at 124.

87. *Id.* at 136.

88. A. Mark Weisburd, *Due Process Limits on Federal Extraterritorial Legislation?*, 35 COLUM. J. TRANSNAT'L L. 379, 380 (1997).

89. *Guyot*, 159 U.S. at 164.

90. Roberto Iraola, *Jurisdiction, Treaties, and Due Process*, 59 BUFF. L. REV. 693, 702 n.41 (2011).

91. *Id.*

outside of U.S. territory, there was also a recognition of concomitant restraints on such jurisdictional reaching based on the interests of a foreign sovereign.[92] In the seminal case of *United States v. ALCOA*, which found that jurisdiction could be properly exercised over an agreement based outside of the United States but which had effects inside the United States, Judge Learned Hand noted that when the exercise of jurisdiction would give rise to "international complications," then "it is safe to assume that Congress certainly did not intend the Act to cover them."[93] Such language forms the protean origin of the rule of reasonableness in U.S. domestic law. Interestingly, however, such a rule seems to be almost exclusively a creature of U.S. antitrust jurisprudence. In fact, Ryngaert has traced the juridical origins of this rule to U.S. antitrust cases and limitations imposed by U.S. courts on the extraterritorial exercise of U.S. antitrust legislation.[94]

> U.S. antitrust courts soon qualified the effects doctrine by requiring direct, substantial, and reasonably foreseeable effects. In spite of this jurisdictional restraint, conflict potential did not appear to subside. Therefore, toward the end of the 1970s, courts superimposed another test of jurisdictional restraint. This test required antitrust courts to inquire 'whether the interests and the links to the United States – including the magnitude of the effect on American foreign commerce – are sufficiently strong vis-à-vis those of other nations, to justify an assertion of extraterritorial authority."[95]

A review of key U.S. Supreme Court decisions addressing the extraterritorial reach of U.S. antitrust law demonstrates the development of a jurisprudential rule of restraint focused on alleviating conflicts in commercial affairs.

1. Timberlane: A Lower Court Sets the Stage

In the 1976 case of *Timberlane Lumber Co. v. Bank of America*, the Ninth Circuit considered the matter of a U.S. partnership (Timberlane) that imported lumber into the United States from Central America and sought to expand its operations into

92. *See* United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945).

93. *Id.* at 443.

94. RYNGAERT, *supra* note 29, at 154.

95. *Id.*

Honduras.[96] When Bank of America, which financed much of the Honduran lumber industry, conspired with Honduran lumber companies to put Timberlane out of business, Timberlane sued Bank of America alleging violations of sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1-2) and the Wilson Tariff Act (15 U.S.C. § 8). Among the many issues that the Ninth Circuit was called upon to address in that matter was the extraterritorial reach of the Sherman Act. In entering into this analysis, the Ninth Circuit stressed the potential for international discord in applying U.S. law extraterritorially.

> That American law covers some conduct beyond this nation's borders does not mean that it embraces all, however. Extraterritorial application is understandably a matter of concern for the other countries involved. Those nations have sometimes resented and protested, as excessive intrusions into their own spheres, broad assertions of authority by American courts.[97]

Based on such concerns, the court found that even though jurisdiction could be obtained in cases where there was an effect on U.S. commerce, the interests of other nations could serve to limit an otherwise proper extraterritorial extension of U.S. criminal law. In so holding, the Ninth Circuit found that, beyond the question of whether the exercise of jurisdiction was cognizable, an additional analysis "which is unique to the international setting" must be undertaken in order to determine whether the interests of the United States in the matter "are sufficiently strong, vis-à-vis those of other nations, to justify an assertion of extraterritorial authority."[98] The Court concluded that the problem should be addressed using a three-prong analysis: (1) Does the alleged restraint affect, or was it intended to affect, U.S. foreign commerce? (2) Is the restraint of a type and magnitude that it would be a cognizable violation of the Sherman Act? And (3) As a matter of international comity and fairness, should extraterritorial jurisdiction be asserted over the matter? [99]

Because there was no indication in the record of any conflict "with the law or policy of the Honduran government, nor any comprehensive analysis of the relative connections and interests of

96. 549 F.2d 597, 603 (9th Cir. 1976).

97. *Id*. at 608.

98. *Id.* at 613.

99. *Id.* at 615.

Honduras and the United States," the Ninth Circuit found that the dismissal by the district court cannot be sustained on jurisdictional grounds.[100]

Commentators have noted the impact of this decision as it "introduced a 'comity' analysis to mitigate the impacts of a growing effects test" and required "that comity considerations be joined with a finding of direct, substantial and foreseeable effect on foreign commerce."[101] This analysis and its impact, however, would be curtailed in the subsequent case of *Hartford Fire Insurance v. California*.

2. Hartford Fire: Comity and a "True Conflict"

Over a decade later, in *Hartford Fire Ins. Co. v. California*, the Supreme Court addressed the extraterritorial reach of U.S. antitrust law in a case in which numerous plaintiffs sued London reinsurers, alleging that they conspired to coerce primary insurers in the U.S. to offer insurance coverage only if certain changes were made in insurance forms.[102] The defendants argued that, although the Sherman Act permitted the exercise of jurisdiction over foreign conduct that produced substantial effects in the U.S., the exercise of jurisdiction should be declined under the principle of international comity.[103] In a 5-4 decision, the Court rejected that argument and held that international comity would not require a declination of jurisdiction absent "a true conflict between domestic and foreign law."[104] As there was no indication that U.K. law prohibited the defendants from acting in the way required by U.S. law, there was no conflict and, accordingly, no prohibition on the extraterritorial reach of the Sherman Act.[105] The majority, therefore, adopted a

100. *Id.*

101. S.W. O'Donnell, *Antitrust Subject Matter Jurisdiction Over State Owned Enterprises and the End of Prudential Prophylactic Judicial Doctrines*, 26 SUFFOLK TRANSNAT'L L. REV. 247, 264 (2003).

102. 509 U.S. 764.

103. *Id.* at 769.

104. *Id.* at 798 (citing Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Ct. for S. Dist. of Iowa, 482 U.S. 522, 555 (1987)).

105. *Id.* at 799 ("Since the London reinsurers do not argue that British law requires them to act in some fashion prohibited by the law of the United States, or claim that their compliance with the laws of both countries is otherwise impossible, we see no conflict with British law. We have no need in this litigation to address other considerations that might inform a decision to refrain from the exercise of jurisdiction on grounds of international comity.").

rather strict view of international conflict balancing for jurisdictional purposes – though one which conceived of a potential judicial moment in which it would be appropriate to decline to exercise jurisdiction based on the interests of another state.

Justice Scalia, however, in a powerfully worded dissent, urged that the extension of jurisdiction in such circumstances as presented in *Hartford Fire* should be limited by "prescriptive comity," which he defined as "the respect sovereign nations afford each other by limiting the reach of their laws."[106] Citing to Section 403 of the Restatement, Justice Scalia noted, "the practice of using international law to limit the extraterritorial reach of statutes is firmly established in our jurisprudence."[107] Proceeding from that analysis, Justice Scalia argued that the assertion of jurisdiction under the facts of *Hartford Fire* should have been considered unreasonable.[108] This was because, in his view, such expansive jurisdictional assertions "will bring the Sherman Act and other laws into sharp and unnecessary conflict with the legitimate interests of other countries – particularly our closest trading partners."[109] As noted, however, Justice Scalia's view was a dissenting one and was not adopted.

3. F. Hoffman-La Roche, Ltd. v. Empagran S.A.*: Comity and Conduct Too Attenuated*

Another decade later, in *F. Hoffman-La Roche, Ltd v. Empagran S.A*, the Supreme Court found the judicial moment it anticipated in *Hartford Fire*. In *F. Hoffman-La Roche*, the Supreme Court considered a class action suit brought by foreign and domestic purchasers of vitamins alleging that certain vitamin manufacturers and distributors had engaged in a price-fixing conspiracy that resulted in the rise in the price of vitamin products in the United States and elsewhere.[110] The defendants moved to dismiss the suit as to the foreign purchasers who had, while located abroad, purchased vitamins outside the United States.[111] Finding that the adverse foreign effect at issue was independent of the adverse domestic effect, the Court declined to extend the Sherman Act so that it

106. *Id.* at 817.
107. *Id.* at 818.
108. *Id.* at 820.
109. *Id.*
110. 542 U.S. 155, 160 (2004).
111. *Id.* at 159–60.

applied to the foreign purchasers. In so holding, the Court noted that it "ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations" and that such a rule of construction reflected principles of customary international law.[112]

> This rule of statutory construction cautions courts to assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws. It thereby helps the potentially conflicting laws of different nations work together in harmony – a harmony particularly needed in today's highly interdependent commercial world.[113]

The Court, accordingly, found that while U.S. courts have long held that application of U.S. antitrust laws to foreign anticompetitive conduct was reasonable and consistent with principles of "prescriptive comity" when seeking to redress domestic antitrust injuries, it was unreasonable to apply U.S. antitrust law to conduct "that is significantly foreign insofar as that conduct causes independent harm and that foreign harm alone gives rise to [a] plaintiff's claim[.]"[114] Accordingly, the Supreme Court declined to extend the Sherman Act to a claim by a foreign plaintiff based wholly on foreign harm.

The holding in *F. Hoffman-La Roche* is notable for the Court's emphasis on the unique ability of antitrust laws to impact markets in foreign countries, stating that "[n]o one denies that America's antitrust laws, when applied to foreign conduct, can interfere with a foreign nation's ability independently to regulate its own commercial affairs."[115] And, in fact, a key reason for the limitations articulated in that case was an "insubstantial" justification for such foreign interference.[116] To support this jurisdictional limitation, the Court cited to Section 403(2) of the Restatement to support its finding that the exercise of extraterritorial jurisdiction must be reasonable based on "such factors as connections with [the] regulating nation, harm to that nation's interests, [the] extent to which other nations regulate, and the potential for conflict."[117]

112. *Id.* at 164.
113. *Id*. at 164-65.
114. *Id*. at 166.
115. *Id*. at 165.
116. *Id.*
117. *Id*.

What is key in the Court's analysis in *F. Hoffman-La Roche* and in each of the cases described above is the focus on commercial nature of the legislation at issue and the regulation of anticompetitive conduct. Throughout the analysis in each case, reference is made to other antitrust cases and one can discern a limitation in the rule of restraint being articulated and adopted. Moreover, a defining feature of each of these cases is that they are civil in nature, requiring the court to define rules relating to jurisdictional assertions based on actions brought by private parties. In sharp contradistinction, a review of jurisprudence relating to the extraterritorial application of criminal law reveals an entirely different analysis.

VII. Transnational Crime

Professor Anthony J. Colangelo has noted, "the idea that the Fifth Amendment Due Process Clause attaches to the extraterritorial application of federal jurisdiction is of relatively recent vintage."[118] While no decision of the U.S. Supreme Court has directly addressed the issue of whether the Due Process Clause limits the extraterritorial extension of U.S. criminal law,[119] lower courts have articulated a number of theories relating this issue when determining whether an extraterritorial extension of U.S. criminal law was proper. As one District Court judge has noted, however, whether the test for due process requires a sufficient nexus to the United States, or if it suffices that the prosecution be neither arbitrary nor capricious is a question that has split the circuits.[120]

A. Nexus-based Limitations

1. Ninth Circuit

The Ninth Circuit first ruled that the extraterritorial application of U.S. criminal law requires a nexus to the United States in a case entitled *United States v. Peterson*.[121] In that case, which involved defendants convicted of possession of a controlled substance in U.S. customs waters with the intent to distribute and of conspiracy to destroy goods to prevent seizure, the Ninth Circuit did not expound

118. Colangelo, *supra* note 85, at 159.

119. Weisburd, *supra* note 88, at 380.

120. United States v. Campbell, 798 F. Supp. 2d 293, 306 (D.D.C. 2011).

121. 812 F.2d 486, 493 (9th Cir. 1987).

upon the topic but succinctly addressed – and rejected – the argument that the relevant charges constituted an improper and unconstitutional exercise of extraterritorial jurisdiction.[122] The court found that "there was more than a sufficient nexus with the United States to allow the exercise of jurisdiction" because of the evidence indicating that the drugs were bound for the United States.[123] In addition, the court held that "drug trafficking may be prevented under the protective principle of jurisdiction, without any showing of an actual effect on the United States" because the protective principle allows for jurisdiction "if the activity threatens the security or governmental functions of the United States."[124] Finding that narcotrafficking posed the sort of threat necessary to warrant application of the protective principle, the court concluded that the exercise of jurisdiction in that case was proper.[125]

The issue would receive more extensive treatment only three years later in the case of *United States v. Davis*.[126] On June 15, 1987, a Coast Guard cutter encountered a U.K. vessel called the *Myth of Ecurie* sailing in waters southwest of California, and heading in the direction of San Francisco. The Coast Guard suspected the *Myth* of smuggling contraband as the *Myth* was on a list of vessels suspected of drug smuggling, was sailing in an area in which sailing vessels were infrequently found, and appeared to be carrying cargo.[127] The Coast Guard then requested permission from the United Kingdom to board the *Myth* after informing the British officials of the circumstances which led the Coast Guard to believe the *Myth* contained contraband material. The United Kingdom thereafter gave the Coast Guard permission to board the *Myth*, which, by that time, had sailed to a location approximately 100 miles west of the California coast.[128] A subsequent search of the vessel revealed over 7,000 pounds of marijuana.[129] Davis, the captain of the vessel, was charged and convicted of possession of, and conspiracy to possess, marijuana on a vessel subject to the jurisdiction of the United States

122. *Id.*
123. *Id.* at 493–94.
124. *Id.*
125. *Id.*
126. 905 F.2d 245 (9th Cir. 1990).
127. *Id.* at 247.
128. *Id.*
129. *Id.*

with intent to distribute in violation of the Maritime Drug Law Enforcement Act.[130]

On appeal, Davis argued that the provisions of the statute under which he was convicted, the Maritime Drug Law Enforcement Act (46 U.S.C. §§ 1903(a)-(j)), did not apply to persons on foreign vessels outside the territory of the United States.[131] To address this contention, the court used a tripartite analytical framework to determine: (1) whether Congress had constitutional authority to give extraterritorial effect to the Maritime Drug Law Enforcement Act, (2) whether the Constitution prohibited the United States from punishing Davis's conduct in this instance, and (3) whether the Maritime Drug Law Enforcement Act applied to the conduct at issue.[132]

The first part of this analysis was addressed quickly by the court, which found that the Constitution authorized Congress to give extraterritorial effect to the Act because the Constitution gives Congress the power to "define and punish piracies and felonies on the high seas[.]"[133] The court then turned its attention to what limitations exist on U.S. power to exercise that authority.[134]

On that second part of the analysis, the court noted that "as a matter of constitutional law, we require that application of the statute to the acts in question not violate the due process clause of the fifth amendment,"[135] and that "[i]n order to apply extraterritorially a federal criminal statute to a defendant consistently with due process, there must be a sufficient nexus between the defendant and the United States, so that such application would not be arbitrary or fundamentally unfair."[136]

The Ninth Circuit found that a sufficient nexus existed in that case so that the exercise of jurisdiction over Davis's extraterritorial conduct did not violate the Due Process Clause. This was because the court found that the attempted transaction was designed to ultimately facilitate criminal conduct in the United States (as Davis

130. *Id.*
131. *Id.*
132. *Id.* at 248.
133. *Id.* (citing U.S. Const. art. I, § 8, cl. 10).
134. *Id.*
135. *Id.* at 247.
136. *Id.* at 248–49.

intended to smuggle contraband into U.S. territory).[137]

Interestingly, the Ninth Circuit did not engage in a lengthy analysis of international law, but noted that prior decisions did discuss international law jurisdictional principles simultaneously with the constitutionality of Congress' exercise of jurisdiction. That practice was eschewed in *Davis*:

> International law principles may be useful as a rough guide of whether a sufficient nexus exists between the defendant and the United States so that application of the statute in question would not violate due process. However, danger exists that emphasis on international law principles will cause us to lose sight of the ultimate question: would application of the statute to the defendant be arbitrary or fundamentally unfair?

The Ninth Circuit again addressed the nexus requirement in *United States v. Caicedo*. On November 15, 1993, the U.S. Coast Guard apprehended six foreign nationals on a power boat floating in the water approximately 200 miles off the coast of Nicaragua and 2,000 miles from San Diego, California.[138] The boat was "stateless," as it had not registered to any nation, and was not flying any nation's flag.[139] Before being boarded by the Coast Guard, the defendants jettisoned 2,567 pounds of cocaine, which was recovered by the Coast Guard, into the ocean. There was no evidence that the vessel, its cargo or its crew were destined for the United States, or that any part of the criminal venture occurred in the United States.[140] The defendants were charged and convicted of possession of cocaine with intent to distribute and conspiracy.[141]

At trial, the district judge dismissed the complaint, finding that the government failed to demonstrate a sufficient nexus with the United States and, accordingly, prosecution was "arbitrary and fundamentally unfair under the Fifth Amendment.[142] The appellate court, however disagreed with this decision and found that *Davis* and its progeny were distinguishable as those cases all involved defendants apprehended on foreign flagged vessels. Per the Ninth Circuit, "[t]he radically different treatment afforded to stateless

137. *Id.* at 249.
138. United States v. Caicedo, 47 F.3d 370, 371 (9th Cir. 1995).
139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.*

vessels as a matter of international law convinces us that there is nothing arbitrary or fundamentally unfair about prosecuting the defendants in the United States."[143] The court therefore refused to extend the holding in *Davis* to cases involving stateless vessel on the high seas.[144]

With regard to a jurisdictional rule of reasonableness, in the 1994 case of *United States v. Vasquez-Velasco*, the Ninth Circuit considered the case of certain defendants who were accused of murdering an American citizen named John Walker, who was living in Guadalajara, Mexico, while writing a novel, along with his friend Alberto Radelat, a legal resident of the United States who had travelled to Guadalajara to visit Walker.[145] In addressing the challenge made to the extraterritorial application of U.S. law in that case, the court noted that, although an assertion of jurisdiction could be otherwise proper under international law, an exercise of jurisdiction "still violates international principles if it is 'unreasonable.'"[146]

In support of the statement that an exercise of jurisdiction on one of the permissible bases may still be curtailed if it is unreasonable, the court cited to Restatement Section 403's comment a, which states that "the principle that an exercise of jurisdiction on one of the bases indicated . . . is nonetheless unlawful if it is unreasonable . . . has emerged as a principle of international law."[147]

This, to the court, posed no obstacle "[b]ecause drug smuggling is a serious and universally condemned offense, no conflict is likely to be created by extraterritorial regulation of drug traffickers."[148] Accordingly, a "universally condemned" offense did not occasion the sort of conflict that "reasonableness" was designed to mitigate. Even so, although the Ninth Circuit rejected the defendant's argument and allowed for the extension of jurisdiction in that case, the decision is notable in that the court did articulate the "reasonableness" test as being a part of the broader extra-territoriality analysis.

Over a decade later, in *United States v. Clark*, the Ninth Circuit

143. *Id.* at 372.
144. *Id.*
145. 15 F.3d 833, 838 (9th Cir. 1994).
146. *Id.* at 840.
147. *Id.*
148. *Id.* at 841.

considered the case of a defendant who sought to evade criminal liability by arguing that extraterritorial application of the relevant statute was unreasonable under Section 403 of the Restatement.[149] Noting that the defendant "cites no precedent in which extraterritorial application was found unreasonable in a similar situation," and that "Cambodia consented to the United States taking jurisdiction and nothing suggests that Cambodia objected in any way to Clark's extradition and trial under U.S. law," the Ninth Circuit rejected this argument and found that the exercise of jurisdiction over the defendant was reasonable.[150] The court did not, however, expound upon the rule of reasonableness or how it factors in to an extraterritoriality analysis.

Ultimately, the role of Section 403 of the Restatement in Ninth Circuit jurisprudence remains vague and inconstant. Although it is given a prominent position in the analysis in *Vasquez-Velasco*, in key cases such as *Davis* and *Caicedo*, it does not appear as a factor in the analysis at all. It appears in *Clark*, but without great discussion and in the context of a failed argument. It is, therefore, extremely difficult to discern what force the rule of reasonableness may have in the Ninth Circuit's extraterritoriality analysis in cases of transnational crime. What is clear from the holding in *Clark* is that, even if applicable, there is no history of it serving as a successful defense in such cases.

2. Second Circuit

The Second Circuit first addressed the issue of whether due process required a nexus to the United States in the case of *United States v. Yousef*, a titan judicial opinion which, within its hundred or so pages, manages to touch upon almost every key legal issue relevant to transnational crime.[151] The appeal in *Yousef* concerned two different trials – one concerning a conspiracy to bomb U.S. airliners in Southeast Asia and the other concerning the 1993 bombing of the World Trade Center in New York.[152]

On appeal, some of Yousef's arguments were that the crime of which he was convicted could not be applied to conduct outside of the United States, that his prosecution violated customary

149. 435 F.3d 1100, 1101 (9th Cir. 2006).

150. *Id.*

151. 327 F.3d 56 (2003).

152. *Id.* at 77.

international law limiting a nation's ability to criminalize conduct outside its borders, and that such an application of the law violated the Due Process Clause of the Fifth Amendment.[153]

Yousef claimed that numerous counts of which he was charged, which included a plot to bomb a U.S.-flagged aircraft and a count related to the bombing of a Philippine aircraft traveling outside the U.S. with no U.S. citizens on board, should be dismissed because customary international law provided no basis for the exercise of such jurisdiction. The Second Circuit, however, noted that U.S. law may apply extraterritorially where Congress has indicated its intent to give the statute extraterritorial effect[154] or where the statute belongs to that class of statutes that do not logically depend on locality for their jurisdiction.[155] In addition, while finding that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains,"[156] the court also noted that Congress can legislate in excess of the limits of international law if it so desires.[157]

The court then, in an expansive analysis, went on to find that each statute in question applied extraterritorially under U.S. law and that, in addition, each had a permissible jurisdictional basis under international law for extraterritorial application. International law permitted extraterritorial jurisdiction for those charges relating to a plot to bomb a U.S.-flagged aircraft as they fell within three bases: the "passive personality" principle (because the plot involved U.S. aircraft and persons destined for the United States), the "objective territoriality" principle (because the purpose of the attack was to influence U.S. foreign policy and the attack was intended to have an effect within the United States), and the "protective principle" (because the planned attacks were intended to affect U.S. foreign policy).[158] Moreover, with respect to the charge relating to the Philippine airliner outside the United States, the court found that jurisdiction was permissible under international law as a result of U.S. obligations under the Montreal Convention as well as

153. *Id.* at 85.

154. *Id.* at 86 (citing United States v. Pinto-Mejia, 720 F.2d 248, 259 (2d Cir. 1983)).

155. *Id*. (citing *Bowman*, 260 U.S. at 98).

156. *Id.* (citing McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 21 (1963)).

157. *Id.* (citing *Pinto-Mejia*, 720 F.2d at 259).

158. *Id*. at 97.

the protective principle because the bombing of the Philippine aircraft was done as a test-run in furtherance of a plot to attack U.S. aircraft and influence U.S. foreign policy.[159]

With regard to the issue of due process and the requirement of a nexus to the United States, the court looked to the holding of the Ninth Circuit in *Davis* which maintained that in order to apply a federal criminal statute extraterritorially, the Due Process Clause requires "a sufficient nexus between the defendant and the United States, so that such application would not be arbitrary or fundamentally unfair."[160] Because the facts of the case demonstrated that the defendants conspired to attack a U.S.-flagged aircraft "in an effort to inflict injury on this country and its people and influence American foreign policy," the court found that there was a "substantial intended effect" on the United States and, accordingly, a sufficient nexus with the United States so that the extraterritorial application of U.S. law comported with the requirements of due process.[161]

The extraterritoriality analysis detailed by the Second Circuit in *Yousef* consists of four-part analytical framework. This framework is first textual, then contextual, then international, and finally constitutional. First, the court evaluates the statute in question to determine if there is an express textual basis for its extraterritorial application under U.S. law. If there is not, then the court must undergo a second phase of analysis to determine whether – either through express language or via "implied extraterritoriality" as permitted by *Bowman* and its progeny – the extraterritorial application of the statute can be inferred. If the statute in question requires this second phase of analysis, then the court determines whether there is a legitimate basis under international law for the extraterritorial application of the statute.[162] This third phase is required where there is no express language authorizing extraterritorial application because the court is, at that point, required to make an interpretive decision as to whether extraterritoriality can be "implied" and, in such circumstances,

159. *Id.* at 97–98.

160. *Id.* at 111.

161. *Id.* at 112.

162. *Id.* at 92 n.26 (noting that the "interpretive canon established by *Charming Betsy* does not impinge upon our analysis . . . *because such exercise of jurisdiction is consistent with principles of customary international law*." (emphasis added)).

"where legislation is susceptible to multiple interpretations, the interpretation that does not conflict with 'the law of nations' is preferred."[163]

For the Second Circuit, resort to customary international law is, thus, only appropriate to the limited extent that there is no treaty, no controlling executive or legislative act, and no controlling judicial decision.[164] In the absence of positive law, and when required to make judicial inferences, reference to customary international law is appropriate. In every case, the court must look to determine whether a sufficient nexus with the United States exists so that the statute's extraterritorial application comports with due process.[165]

This approach by the Second Circuit has remained constant, requiring a nexus between the defendant and the United States in order for the assertion of jurisdiction to satisfy due process.[166] As a result of this analytical framework, the question of whether or not an exercise of jurisdiction comports with international law is disjoined from the question of whether or not a sufficient nexus exists to make the exercise of jurisdiction constitutionally permissible. Accordingly, as assertion of jurisdiction could potentially comport with international law but still fail to satisfy constitutional due process or vice versa.

With regard to a jurisdictional rule of reasonableness, the Second Circuit was clear in *Yousef* that, although prior cases had indicated that "Congress may be constrained by a 'reasonableness' standard in enacting legislation that asserts jurisdiction over extraterritorial criminal conduct,"[167] such cases could be not be read in such a way as to pose a limitation on the ability of Congress to extend the jurisdiction of a statute extraterritorially.[168] Although a subsequent decision has mentioned the Restatement in the context

163. *Id.* at 92.

164. *Id.*

165. United States v. Al-Kassar, 660 F.3d 108, 118 (2011).

166. *Id.* ("When Congress so intends, we apply a statute extraterritorially as long as doing so does not violate due process. In order to apply extraterritorially a federal criminal statute to a defendant consistently with due process, there must be a sufficient nexus between the defendant and the United States, so that such application would not be arbitrary or fundamentally unfair. For non-citizens acting abroad, a jurisdictional nexus exists when the aim of that activity is to cause harm inside the United States or to U.S. citizens or interests.").

167. *Yousef*, 317 F.3d at 109 n.44.

168. *Id.*

of transnational crime, the circumstances of that case did not require a deep analysis of its role.[169] Subsequent decisions have not even mentioned the Restatement or a rule of reasonableness.[170] Accordingly, neither the Restatement nor a corresponding rule of reasonableness has been a factor in the Second Circuit's extraterritoriality analysis *vis-à-vis* transnational crime.

3. Fourth Circuit

The key Fourth Circuit case on the issue of extraterritorial jurisdiction and the requirements of due process is *United States v. Mohammad-Omar*.[171] There, the Fourth Circuit considered the case of a defendant convicted of conspiracy to import heroin and conspiracy to possess heroin.[172] The defendant was found guilty of drug trafficking activity in Afghanistan, Dubai, and Ghana, which had as its intended goal to transport heroin into the United States.[173] On appeal, the defendant challenged the jurisdiction of the district court over his case, arguing that prosecution for conduct that occurred entirely in foreign countries violated the Due Process Clause.[174]

In its analysis, the Fourth Circuit found that the statutes under which the defendant was charged applied extraterritorially due to express language within the statutes prohibiting drug importation.[175] Finding extraterritorial application of the statutes proper in that regard, the court went on to analyze whether or not such extraterritorial jurisdiction was constitutional. In this analysis, the Fourth Circuit looked to the jurisprudence of the Second Circuit in *Yousef* and Ninth Circuit in *Davis*.[176]

The Second and Ninth Circuits have held that, while Congress

169. United States v. Weingarten, 632 F.3d 60, 67 (2d Cir. 2011) ("Moreover, although the Restatement indicates that a nation's exercise of jurisdiction must be 'reasonable,' see Restatement (Third) at § 403 (listing factors to be considered), Weingarten does not argue that construing § 2423(b) to reach American citizens and lawful permanent resident aliens acting abroad would be unreasonable under customary international law.").

170. *Al-Kassar*, 660 F.3d at 108.

171. 323 Fed. Appx. 259 (2009).

172. *Id.* at 260.

173. *Id.* at 262.

174. *Id.* at 260.

175. *Id.* at 261.

176. *Id.*

> may clearly express its intent to reach extraterritorial conduct, a due process analysis must be undertaken to ensure the reach of Congress does not exceed its constitutional grasp. To apply a federal criminal statute to a criminal extraterritorially without violating due process, there must be a sufficient nexus between the defendant and the United States so that such application would not be arbitrary.[177]

The court noted that the nexus requirement serves the same purpose as the minimum contacts test for personal jurisdiction as it ensures that a U.S. court will assert jurisdiction only over persons who should reasonably anticipate being haled into a court in the United States.[178] And in this case, because the evidence demonstrated that the defendant knew that the illicit drugs he was trafficking were bound for the United States, a sufficient nexus existed with the United States to render the exercise of jurisdiction proper.[179]

District courts within the Fourth Circuit have maintained this approach and have elaborated upon its contours and limitations. For instance, in *United States v. Brehm*, the U.S. District Court for the Eastern District of Virginia considered the case of a U.S. prosecution of a South African contractor who, while working for a German shipping company, stabbed a citizen of the United Kingdom on a military base in Afghanistan.[180] Jurisdiction in this case was premised on the Military Extraterritorial Jurisdiction Act (MEJA), which extends criminal jurisdiction to persons who commit certain crimes "while employed by or accompanying the Armed Forces outside the United States."[181] On appeal, the defendant asserted that the extension of MEJA to the relevant conduct in this matter was an unconstitutional grasp at foreign conduct. In rejecting this assertion, the court noted that the Fourth Circuit and other judicial circuits have required a "sufficient nexus between the defendant and the United States, such that the application of the statute would not be arbitrary or fundamentally unfair."[182]

In an attempt to escape the court's jurisdictional grasp, the

177. *Id.* (quotations and citations omitted).
178. *Id.*
179. *Id.* at 261–62.
180. 2011 U.S. Dist. LEXIS 33903 (2011).
181. 18 U.S.C. § 3261(a).
182. 2011 U.S. Dist. LEXIS 33903 at *12.

defendant argued that the court should apply the "minimum contacts" test used in civil matters and its requirement that the claims against a defendant "arise out of or relate to" his contacts with the United States.[183] The court, however, while noting that the "minimum contacts" rule in civil cases served the same purpose as the "sufficient nexus" rule in criminal matters, refused to conflate them. Instead, the court enumerated a variety of factors that can be determinative of a sufficient nexus for due process concerns in criminal matters:

> Courts that have applied this nexus test have considered a wide range of factors including (1) the defendant's actual contacts with the United States, including his citizenship or residency; (2) the location of the acts allegedly giving rise to the alleged offense; (3) the intended effect a defendant's conduct has on or within the United States; and (4) the impact on significant United States interests.[184]

Notably, the court neither cited the Restatement nor referenced a "rule of reasonableness" in its analysis; in fact, no court in the Fourth Circuit has done either of these things in a case centering on a transnational crime. Instead, the factors and analysis used by the court were derived from an examination of jurisprudence articulating what did or did not constitute a sufficient nexus for due process purposes.[185]

In this case, the court found that there was a sufficient nexus with the United States due to defendant's employment, which provided certain benefits from the United States including access to the military base; the fact that defendant's conduct impacted U.S. interests and resources because it disrupted the operations on the military base; and the fact that the defendant had signed an employment contract that acknowledged he could be subjected to U.S. criminal law under MEJA.

With regard to the role of international law, the court in *Brehm* followed a line of reasoning similar to the Second Circuit and, citing to *Yousef*, found that, because of the explicit Congressional language authorizing extraterritorial jurisdiction through MEJA, it was not necessary to consider whether such an exercise of jurisdiction was

183. *Id.* at *13.

184. *Id.* at *14.

185. *Id.* at *14–15.

consistent with customary international law.[186] The court nonetheless noted that the exercise of jurisdiction under the facts of that case was consistent with customary international law, specifically finding that jurisdiction was appropriate under the "protective principle."[187]

B. Fairness-based Limitations

1. First Circuit

The First Circuit does not interpret the Due Process Clause of the Fifth Amendment to require a nexus between a defendant and the United States in order for the United States to exercise extraterritorial jurisdiction over a defendant. Rather, for the First Circuit, the extraterritorial application of a U.S. criminal statute will not violate due process so long as the exercise of jurisdiction is not arbitrary or fundamentally unfair. Interestingly, in order to determine whether or not the extraterritorial application of a statute is arbitrary or fundamentally unfair, the First Circuit has held that the exercise of jurisdiction must comply with the principles of international law that govern the exercise of extraterritorial jurisdiction.[188] Under such an analysis, due process and compliance with the international law of jurisdiction are coequal.

The First Circuit considered the case of three defendants who were prosecuted for violations of the MDLEA after their vessel, a "go fast" boat called the Corsica that was flagged as a Venezuelan vessel, was intercepted by the Coast Guard in waters roughly 150 miles south of Puerto Rico.[189] The Coast Guard, having obtained consent from the Venezuela government, boarded and searched the Corsica.[190] Although they initially found nothing on board, a second search discovered material that enabled them to link the vessel to numerous bales of marijuana that had been thrown overboard. Thereafter, the Venezuelan government confirmed that the vessel was of Venezuela registry and authorized the arrest and application of U.S. law to the defendants.[191] Defendants were thereafter convicted of aiding and abetting each other in the possession of

186. *Id.* at *20 n.9.
187. *Id.*
188. United States v. Cardales, 168 F.3d 548, 553 (1999).
189. *Id.* at 551–52.
190. *Id.*
191. *Id.* at 552.

marijuana on board a vessel subject to the jurisdiction of the United States.[192]

On appeal, the defendants argued that the Due Process Clause of the Fifth Amendment required the government to prove a nexus between their criminal conduct and the United States. The First Circuit, however, disagreed and held that "due process does not require the government to prove a nexus between a defendant's criminal conduct and the United States under the MDLEA when the flag nation has consented to the application of United States law to the defendants."[193] Instead, rather than requiring a nexus to the United States, the First Circuit held that "[t]o satisfy due process, our application of the MDLEA must not be arbitrary or fundamentally unfair."[194]

In order to determine whether or not the extraterritorial application of this U.S. criminal statute was "arbitrary or fundamentally unfair," however, the court found that it must look to principles of international law relating to extraterritorial jurisdiction.[195] On that score, the court found that the territorial principle of international law applied when a state agreed to allow the law of another state to apply within its territory and that the protective principle applied to illegal drug trafficking.[196] Both of these positions are questionable under established principles of international law. Nonetheless, finding that either the territorial or protective principles permitted the exercise of jurisdiction under the facts *sub judice*, the court found that due process was satisfied. The analysis expressed in the holding is a dense tangle of constitutional law and international law:

> We, therefore, hold that when individuals engage in drug trafficking aboard a vessel, due process is satisfied when the foreign nation in which the vessel is registered authorizes the application of United States law to the persons on board the vessel. When the foreign flag nation consents to the application of United States law, jurisdiction attaches under the statutory requirements of the MDLEA without violation of due process or the principles of international law because the flag nation's

192. *Id.*
193. *Id.* at 553.
194. *Id.*
195. *Id.*
196. *Id.*

> consent eliminates any concern that the application of United States law may be arbitrarily or fundamentally unfair.[197]

The First Circuit, therefore, has taken the position that extraterritorial application of this U.S. criminal statute will not violate due process so long as the exercise of jurisdiction is not arbitrary or fundamentally unfair. Furthermore, such exercise is not arbitrary or fundamentally unfair so long as it complies with the principles of international law that govern the exercise of extraterritorial jurisdiction.[198]

It is important to emphasize that compliance with international law does not merely form a separate step in such an analysis. To the contrary, according to this rationale, an exercise of jurisdiction is considered fair and predictable under the U.S. Constitution precisely because international law permits it. Rather than serving as a cynosure, international law takes on a legitimating role that makes an assertion of jurisdiction constitutionally permissible. The fairness of the exercise of jurisdiction and the lack of arbitrariness flow from the compliance with international law. As such, due process and compliance with the international law of jurisdiction are deemed practically coequal in that compliance with international law equates to constitutionality. To comport with international law is to comport with due process.

Roughly a decade later, in an illuminative dissent, Circuit Judge Torruella questioned the basis of the First Circuit's longstanding position, arguing that the First Circuit "erred in *Cardales* and subsequent precedent, by assuming due process was satisfied if international law was satisfied.[199] In Judge Torruella's analysis, "compliance with international law is necessary but not sufficient."[200] Looking to U.S. jurisprudence governing the constitutionally permissible exercise of personal jurisdiction, Judge Torruella urged that due process should serve to limit the exercise of criminal jurisdiction over foreign nationals "absent a nexus

197. *Id.*

198. *Id.*

199. United States v. Angulo-Hernandez, 576 F.3d 59, 61 (2009) (Torruella, J., dissenting from denial of rehearing en banc). Judge Torruella also notes that the Cardales opinion's conclusions regarding the protective principle and territorial principle of jurisdiction are suspect.

200. *Id.* at 62.

between the seizing State and the seized individual."[201] In his dissenting view, to comport with international law is necessary, but is not determinative of whether the defendant would have a reasonable expectation that he or she might be hauled into a U.S. court and made the subject of a U.S. criminal proceeding. In that regard, Judge Torruella argued, "consent of the flag nation, while relevant to establishing statutory jurisdiction, should not automatically establish that due process is satisfied."[202] Torruella's view, accordingly, is that compliance with international law is a necessary but not altogether dispositive step in the analysis. This dissenting view, however, has not held sway in the First Circuit.

With regard to the rule of reasonableness, Judge Torruella did cite to Section 403 of the Restatement in arguing that a nexus should be required in order for the United States to exercise jurisdiction over extraterritorial crime.[203] But there has been no role for either that section of the Restatement or the rule of reasonableness in the analysis articulated by majority opinions of the First Circuit.

2. Eleventh Circuit

The Eleventh Circuit's analysis aligns with that of the First Circuit in that it does not require a nexus but only that the extraterritorial extension of jurisdiction be neither arbitrary nor fundamentally unfair. This is made apparent in decisions such as *United States v. Ibaruen-Mosquera*, wherein the Eleventh Circuit considered the case of several defendants who were found in a "semi-submersible vessel" in international waters in the Eastern Pacific Ocean.[204] After being observed for some time by a Maritime Patrol Aircraft, a Coast Guard ship reached the semi-submersible vessel and took custody of the defendants, though not before one of them managed to sabotage the semi-submersible vessel and sink it in the ocean.[205] The defendants were thereafter charged with a violation of 18 U.S.C. § 2285, which prohibits

> Operat[ing] . . . or embarking in any submersible vessel or semi-submersible vessel that is without nationality and that is navigating or has navigated into, through, or from waters beyond

201. *Id.*
202. *Id.*
203. *Id.*
204. 634 F.3d 1370, 1376 (11th Cir. 2011).
205. *Id.* at 1377.

> the outer limit of the territorial sea of a single country or a lateral limit of that country's territorial sea with an adjacent country, with the intent to evade detection . . . .

The defendants, on appeal, challenged the constitutionality of the statute by arguing, among other things, that it exceeded congressional power to criminalize this conduct. In rejecting this argument, the court stated that, in order to give a law extraterritorial effect, in must not only have a statutory basis for its extraterritorial application, but must also comport with the Due Process Clause of the Fifth Amendment.[206] To that end, the court – citing to the First Circuit decision in *Cardales* – found that "application of the law must not be arbitrary or fundamentally unfair."[207] And, in order to determine whether or not such a law is arbitrary or fundamentally unfair, the court looked to the bases of jurisdiction under international law. "In determining whether an extraterritorial law comports with due process, appellate courts often consult international law principles such as the objective principle, the protective principle, or the territorial principle."[208] In that regard, the court found that because the semi-submersible vessel was stateless, international law permitted any nation to subject it to its jurisdiction and, accordingly, as the assertion of jurisdiction complied with international law, the extraterritorial application of the statute did not offend due process.[209] As with the First Circuit, compliance with international law translated into constitutionality.

With regard to a jurisdictional rule of reasonableness, the Eleventh Circuit has referenced Section 403 of the Restatement but has only done so in one case in which it was treated only with brief attention and in which the court did not elaborate on the extent, if any, of its legal force. In *United States v. MacAllister*,[210] it considered a case of a defendant who asserted that extraterritorial application of a statute was unreasonable based on the principles set forth in the Restatement. In rejecting such an argument, the court merely found that "[d]rug smuggling is a serious and universally condemned offense, and therefore, no conflict is likely to be created by

206. *Id.* at 1378.
207. *Id.*
208. *Id.* at 1378–79.
209. *Id.* at 1379.
210. 160 F.3d 1304, 1304 (11th Cir. 1998).

extraterritorial regulation of drug traffickers."[211] Given the absence of any reliance upon Section 403 of the Restatement or the rule of reasonableness in any of the subsequent decisions on extraterritoriality,[212] it is fair to state that neither the Restatement nor the rule of reasonableness factor largely in the Eleventh Circuit's extraterritoriality analysis relating to transnational crime.

3. Third Circuit

Third Circuit jurisprudence echoes the rationale of the First Circuit, though the rule articulated by the Third Circuit is not as clear and seems to revolve around slightly different core considerations. The Third Circuit's jurisprudence, which ultimately adheres to the principle that due process is satisfied so long as the exercise of jurisdiction is not "arbitrary or fundamentally unfair," maintains that a nexus could be required under certain circumstances, but that no nexus is required in cases relating to extraterritorial jurisdiction over crimes which are universally condemned. This rationale seems to equate state conflict with arbitrariness and/or fundamental unfairness.

In *United States v. Martinez-Hidalgo*, the Third Circuit considered the case of a Columbian national who was arrested in international waters after the U.S. Coast Guard boarded the vessel and found eight burlap bags of cocaine.[213] A U.S. naval vessel was in the course of patrolling the area on the lookout for a drug drop when it encountered the defendant's vessel – without a flag nor identifying numbers or name – approximately 80 miles south of Puerto Rico.[214] The Coast Guard asked the flagless vessel's crew what their nationality was, where they were going, and if they had documentation.[215] After the crew responded by saying that they were Columbian nationals looking for another boat in distress, the Coast Guard contacted the Columbian government and obtained a statement of no objection, boarded the vessel, and found the cocaine.[216] The defendant, a member of the crew, was subsequently

211. *Id.* at 1308.

212. *See, e.g.*, United States v. Ibarguen-Mosquera, 634 F.3d 1370, 1376 (11th Cir. 2011).

213. 993 F.2d 1052, 1053 (3d Cir. 1993).

214. *Id.*

215. *Id.* at 1054.

216. *Id.*

prosecuted and convicted for possession of cocaine on the high seas with intent to distribute and conspiracy on the high seas to distribute cocaine in violation of the MDLEA.[217]

On appeal, the defendant argued that the prosecution failed to show that he intended that the drugs eventually reach the United States and, therefore, failed to show a sufficient nexus to the United States to permit the exercise of jurisdiction over his crime.[218] The court, however, in spite of its prior ruling in *Wright-Barker*, found that no nexus to the United States was needed to exercise jurisdiction because 46 U.S.C. § 1903(d) of the MDLEA "expresses the necessary congressional intent to override international law to the extent that international law might require a nexus to the United States[.]"[219] In so holding, the court specifically declined to follow the Ninth Circuit's *Davis* opinion, noting, "we see nothing fundamentally unfair in applying section 1903 exactly as Congress intended – extraterritorially without regard for a nexus between a defendant's conduct and the United States."[220]

The critical element that removed the taint of fundamental unfairness for the Third Circuit was their finding that narcotrafficking is universally condemned. The court left open the possibility, however, for a limitation on jurisdiction for crimes that were not universally condemned:

> We, of course, are not suggesting that there is no limitation on Congress's power to declare that conduct on the high seas is criminal and is thus subject to prosecution under United States law. To the contrary, we acknowledge that there might be a due process problem if Congress provided for the extraterritorial application of United States law to conduct on the high seas without regard for domestic nexus if that conduct were generally lawful throughout the world. But that is not the situation here.[221]

This indicates that, for the Third Circuit, jurisdiction may be considered improper if there was no nexus and the conduct at issue was not universally condemned. The addition of universal condemnation into the analysis, however, overcomes the lack of a nexus and renders the exercise of jurisdiction proper. The holding

217. *Id.* at 1053.
218. *Id.* at 1054–55.
219. *Id.* at 1056.
220. *Id.*
221. *Id.*

clearly envisions that a nexus could be required under certain circumstances, but that, in the absence of a nexus, other factors (in this case, the "universal" condemnation of the offense at issue) could make a detached exercise of jurisdiction acceptable.

Although the court did not elaborate upon why the exercise of jurisdiction over a defendant for a universally condemned crime – even absent a nexus to the prosecuting state – is not considered unfair, there are two ways to interpret the holding. The first is that the exercise of jurisdiction in such circumstances is proper because the perpetrators of such crimes should anticipate that their engagement in such activity exposes them to the risk of being brought before a foreign court due to the universal condemnation of their activity.[222] The second interpretation is that because the lack of state conflict in a case involving the prosecution of a universally condemned crime obviates concerns about competing interests from other states, because all nations abhor the conduct being pursued, and, therefore, makes the exercise of jurisdiction neither arbitrary nor unfair. Neither of these options seems to withstand scrutiny.

As to the first of these potential interpretations, universal condemnation does not give rise to an assumption of universal prosecution. Simply because a person commits a crime which is generally condemned – and many are – this does not necessarily mean that individual anticipated being prosecuted in a forum with which he or she has no significant connection. For instance, theft is widely condemned, yet a thief who steals a purse in the Czech Republic hardly anticipates being prosecuted for his crime in Swaziland. Unmoored from the nexus requirement and the necessity of some connection between the crime and the prosecuting state, the lone fact that a crime is universally condemned simply does not provide a logical basis for asserting that an exercise of jurisdiction lacks arbitrariness.

As to the second of these possible interpretations, it is an obvious error to equate a lack of intergovernmental conflict with a lack of arbitrariness or fundamental unfairness. The two are separate concerns. While the lack of conflict between states in a given case may be a basis for finding that there is no reason to decline jurisdiction based on reasons of comity, it does not mean that an exercise of jurisdiction is necessarily fair or even foreseeable.

222. *Martinez-Hidalgo*, 993 F.2d at 1056.

Moreover, such logic would mean that due process hinged on state protest or consent, so that that citizens of a failed state like Somalia, which has a very limited presence on the world stage and thus a limited capacity to protest another government's action, could be prosecuted for crimes that might be considered to violate due process were the defendant from a more engaged state. Constitutional limitations on government action should be rooted in more constant and egalitarian principles.

Some light was cast on the obscurity of the Third Circuit's rationale in a 2002 opinion entitled *United States v. Perez-Oviedo*, which dealt with the extraterritorial application of the MDLEA. In that case, the Third Circuit reaffirmed the holding in *Martinez-Hidalgo* and found that due process did not prohibit the exercise of extraterritorial jurisdiction over the captain of a Panamanian vessel found in waters north of Trinidad and Tobago laden with cocaine.[223] In finding that due process did not prohibit the exercise of jurisdiction in such a manner, the court again noted that, since drug trafficking is "condemned universally by law-abiding nations," the exercise of jurisdiction over a narcotrafficker apprehended on the high seas is not fundamentally unfair. [224] While the court offered nothing illuminative to assist in understanding why this is so, it did–in addition to the weight given to the general condemnation of the offense – give emphasis to the fact that the Panamanian government consented to the search of the vessel.[225] According to the Court's rationale, "[s]uch consent from the flag nation eliminates a concern that the application of the MDLEA may be arbitrarily or fundamentally unfair."[226] This strongly indicates that the Third Circuit's rationale equates competing state claims with arbitrariness and/or fundamental unfairness. In spite of any concerns as to the propriety of such an analysis, it is the prevailing law of that judicial circuit.[227]

223. United States v. Perez-Oviedo, 281 F.3d 400, 401 (3d Cir. 2002).

224. *Id.*

225. *Id.* at 403.

226. *Id.*

227. It is also worth noting that the Third Circuit has not cited the Restatement or referenced a "rule of reasonableness" in its extraterritoriality analysis dealing with transnational crime.

4. Fifth Circuit

In *United States v. Alvarez-Mena*,[228] the Fifth Circuit considered a case involving the seizure of a stateless vessel on the high seas, and the arrest and subsequent prosecution of her alien crew, for violation of 21 U.S.C. § 955(a), a predecessor to the MDLEA.[229] Alvarez-Mena, the defendant, was one of the crew members and was neither a citizen nor resident of the United States. Alvarez-Mena moved to dismiss the charges against him for lack of subject matter jurisdiction. Specifically, he argued that, even if jurisdiction was properly exercised over the vessel in rem by virtue of its stateless status, it was nonetheless improper to assert jurisdiction over the conduct of the members of her crew who were not U.S. citizens and not stateless persons.[230]

The Fifth Circuit, however, rejected this claim by focusing on the language of subsection (a) of Section 955(a), which extends criminal culpability to "any person . . . on board a vessel subject to the jurisdiction of the United States on the high seas."[231] In reading that expansive language, the Fifth Circuit found that "Congress anticipated that the act would reach as far as international law would countenance."[232] In that regard, the court found that the objective territorial principle of international law provided the proper basis for the assertion of jurisdiction in this case.[233]

> Here the legislative history and the wording of the statute clearly demonstrate Congress's intent to proscribe the specified conduct of "any person" on a stateless vessel on the high seas without any U.S. nexus or personal citizenship requirement, as well as Congress's awareness of the well established rule of international law that stateless vessels on the high seas may be subjected to the jurisdiction of any nation. In this situation, in order for us to find that Congress, out of deference to international law, nevertheless did intend for there to be some such requirement for a U.S. nexus or personal citizenship as to persons on stateless vessels on the high seas, there would have to be a broadly established and well recognized principle of international law clearly specifying that

228. 765 F.2d 1259 (5th Cir. 1985).
229. *Id.* at 1261.
230. *Id.* at 1265–66.
231. *Id.* at 1266.
232. *Id.*
233. *Id.* at 1267 n.11.

> the right of nations to subject stateless vessels on the high seas to their jurisdiction is exclusive of the right to exercise jurisdiction over the conduct of those aboard such vessels and that jurisdiction over the conduct of such persons extends no farther than it would if they were on foreign flag vessels. However, there is no such principle.[234]

Accordingly, although the court found no limitation and no nexus requirement, its analysis of international law was central to its conclusion. The court went on to note that there may be potential limits to jurisdictional reach under different facts.[235] The influence of international law in the court's analysis is, however, apparent. The analysis clearly indicates that the jurisdictional reach the court is willing to countenance is that which is coextensive with what international law allows.[236] While it is true that the decision identified "the relevance of international law to the problem at hand is as a reflection of congressional intent rather than as a limitation on the power of Congress,"[237] a canon of construction that finds Congressional intent will align with international law unless otherwise stated is, *a contrario sensu*, a canon of construction thatgives international law the force of Congressional mandate unless there is some legislative language to the contrary.

The court then notes that "a broadly established and well recognized limitation" on jurisdiction would have served as a limitation had the defendant been capable of demonstrating one – which he could not.[238] The penetration of international law in the jurisdictional analysis of the Fifth Circuit in *Alvarez-Mena* is, accordingly, significant enough that international legal principles were determinative of the outcome.

Over a decade later, in *United States v. Suerte*, the Fifth Circuit

234. *Id.* at 1266–67.

235. *Id*. at 1267 n.11 ("Nevertheless, we observe that we are not faced with a situation where the interests of the United States are not even arguably potentially implicated. The present case is not remotely comparable to, for example, the case of an unregistered small ship owned and manned by Tanzanians sailing from that nation to Kenya on which a crew member carries a pound of marihuana to give a relative for his personal consumption in the latter country. It might be inferred that Congress did not intend to reach so far in section 955a(a) as to cover such a hypothetical case. The validity of such an inference, however, is by no means entirely clear.").

236. *Id.* at 1266.

237. *Id.*

238. *Id.* at 1266–67.

was confronted with the case of a Philippine national who was the captain of a freighter registered in Malta and owned by a Columbian/Venezualan drug trafficking organization.[239] The United States received permission from Malta to board and search the vessel and, although an initial search did not reveal cocaine, once Malta waived objection to the enforcement of U.S. law over the vessel and it was towed to the United States, a subsequent search revealed evidence of a conspiracy to distribute cocaine (a telex containing coordinates and a briefcase full of money).[240] At trial, the defendant moved to dismiss the indictment for lack of jurisdiction, arguing that there was an insufficient nexus to the United States to allow for the exercise of jurisdiction over his conduct.[241] The district court agreed and, finding no nexus existed, dismissed the indictment.[242]

The Fifth Circuit approached the constitutional question head-on in its analysis and found that its jurisprudence indicated that the only constitutional constraint on the exercise of jurisdiction pursuant to the MDLEA was found in Article III rather than the Due Process Clause.[243] Exploring caselaw and historic records that addressed the treatment of the exercise of power under the Piracies and Felonies Clause of the Constitution, the Fifth Circuit found that the Fifth Amendment did not impose a nexus requirement on the reach of statutes criminalizing felonies committed on the high seas.[244]

The Fifth Circuit then went on to note, *arguendo*, that even if reference to international law principles was required, international law in this circumstance did not require a nexus to the United States because "[a] flag nation's consent to a seizure on the high seas constitutes a waiver of that nation's rights under international law."[245]

> Enforcement of the MDLEA in these circumstances is neither arbitrary nor fundamentally unfair (the due process standard agreed upon by *Suerte* and the Government). Those subject to

239. 291 F.3d 366, 367 (5th Cir. 2002).
240. *Id.* at 368.
241. *Id.*
242. *Id.*
243. *Id.* at 369.
244. *Id.* at 373.
245. *Id.* at 375.

> its reach are on notice. In addition to finding "that trafficking in controlled substances aboard vessels presents a specific threat to the security and societal well-being of the United States," Congress has also found that such activity "is a serious international problem and is universally condemned." Along this line, the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, to which Malta and the United States are signatories, provides as its purpose: "to promote cooperation among the Parties so that they may address more effectively the various aspects of illicit traffic in narcotic drugs and psychotropic substances having an international dimension."

Like the Third Circuit, the Fifth Circuit adopted an analysis that seems to conflate a lack of conflicts on the international plane with fundamental fairness. As noted, while such reasons may be reasons for a court to decline abstaining as a matter of comity, they have little to do with fundamental fairness or arbitrariness.

It is important to note that the Fifth Circuit expressly stated that it was not deciding whether the Due Process Clause imposed no constraints at all upon the extraterritorial application of the MDLEA– only that it did not impose a nexus requirement.[246] The court failed, however, to elaborate on what the Due Process Clause might require. Also notable in the Fifth Circuit's analysis is any mention of Section 403 of the Restatement and/or the "rule of reasonableness."

A review of U.S. jurisprudence relating to the extraterritorial application of U.S. law, therefore, reveals that courts are disinclined to limit the extension of extraterritorial jurisdiction in transnational criminal matters and look principally the Due Process Clause of the U.S. Constitution – rather than prescriptive comity or a jurisdictional rule of reasonableness – to determine whether any such limitations exist. Moreover, within that subset of cases dealing with transnational crime, the role of international law differs from jurisdiction to jurisdiction. Even so, international law is a pervasive presence in almost all such opinions and consistently serves as a fulcrum in the analysis by which U.S. courts arrive at a conclusion.

246. *Id.*

VIII. The Penetration of International Law into the U.S. Domestic Law of Extraterritorial

A. Jurisdiction

As noted, the role of international law in U.S. jurisprudence addressing extraterritorial jurisdiction differs depending on the nature of the law in question. In regulatory matters, the United States will base limitations on extraterritorial jurisdiction on notions of comity while, for transnational criminal matters, courts will apply limitations mostly commonly associated with the Due Process Clause of the U.S. Constitution, though suffused with international legal considerations. An analysis of each varied approach in U.S. jurisprudence illuminates key areas where international law and U.S. domestic law converge, specifically with regard to the manner in which each empowers or limits the extraterritorial reach of U.S. law.

1. Civil Antitrust Cases and Comity

The defining feature of the extraterritorial analysis used by the U.S. Supreme Court in the series of civil antitrust cases it has addressed is its emphasis on the use of comity as a means to limit the extraterritorial application of U.S. law. In a series of holdings, the U.S. Supreme Court has instructed subordinate courts on when it is appropriate to refuse to exercise jurisdiction based on a matter of international comity and the competing interests of another sovereign. Although the Court indicated in *Hartford Fire* that international comity would not require a declination of jurisdiction absent "a true conflict between domestic and foreign law,"[247] it has also held in *F. Hoffman-La Roche* that it was unreasonable to apply U.S. antitrust law to conduct "that is significantly foreign insofar as that conduct causes independent harm and that foreign harm alone gives rise to [a] plaintiff's claim[.]"[248] Again, the basis for such a demurral was the desire to avoid infringing on the interests of other sovereigns. On that score, in its most recent pronouncement on the topic, the Court stated that it "ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations" and that such a rule of construction

247. *Hartford Fire*, 509 U.S. at 765 (quoting *Societe Nationale*, 482 U.S. at 555).

248. *F. Hoffman-La Roche*, 542 U.S. at 166.

reflected principles of customary international law.[249] Similarly, the Supreme Court is routinely reliant on Section 403 of the Restatement and concerns of "reasonableness" in formulating its basis for demurring where U.S. interests are too attenuated[250]—demonstrating in clear terms the way in which international law has permeated judicial reasoning in such matters.

B. Transnational Crime: The Nexus Requirement versus the Focus on Fairness

With regard to crimes that do not focus on market-regulating activity, a notable difference is the comparatively scant weight allotted by lower courts to considerations of "reasonableness" and/or in Section 403 of the Restatement. A review of U.S. jurisprudence relating to transnational crime finds few mentions of this rule at all – and what few mentions are found are typically in the context of a failed argument by a defendant over whom the court is finding a basis for jurisdiction. Limitations on extraterritorial jurisdiction in transnational criminal matters are mostly commonly rooted in the Due Process Clause of the U.S. Constitution. In that regard, U.S. law relating to the extraterritorial application of criminal statutes typically falls within one of two categories: (a) those districts which require a sufficient nexus between the defendant and the United States so that due process is not violated; and (b) those districts which require only that the assertion of jurisdiction be neither arbitrary nor fundamentally unfair.

1. International Law and Nexus-Based Limitations

The discussion above illustrates that, in those cases where Congress has expressly stated that a statute should apply extraterritorially, courts maintaining nexus-based limitations based on due process have used the customary international law of jurisdiction as a measuring stick for the sufficiency of a nexus. Where, however, extraterritoriality must be implied, such courts have held that compliance with the customary international law of jurisdiction is required.

As a general matter, in the analysis used by courts maintaining

249. *Id.*

250. *Id.*

nexus-based limitations on extraterritoriality, the role of international law has been notably secondary. While the Ninth Circuit in *Davis* noted that international law principles can serve as a rough guide to determining the sufficiency of a jurisdictional nexus, it cautioned against overemphasizing international law principles at the risk of neglecting "the ultimate question" of whether the application of the statute to the defendant would be be arbitrary or fundamentally unfair.[251] The Second Circuit in *Yousef* was equally emphatic that "United States law is not subordinate to customary international law or necessarily subordinate to treaty-based international law and, in fact, may conflict with both."[252]

Yet, as has been illustrated, courts adhering to this view still maintain that the customary international law of jurisdiction plays a central role in situations where the extraterritorial application of a statute is to be inferred. In such circumstances, courts must still ensure that the exercise of jurisdiction comports with a recognized basis under international law because "where legislation is susceptible to multiple interpretations, the interpretation that does not conflict with "the law of nations" is preferred."[253] As such, international law has been expressly incorporated in the analysis used by courts maintaining the need for nexus-based limitations on extraterritorial jurisdiction, guided national courts in making determinations on the constitutionality of a jurisdictional claim of legislation that expressly applies extraterritorially, and served as a hard limitation where extraterritoriality must be implied.

2. International Law and Fairness-Based Limitations

For other courts, the extraterritorial application of this U.S. criminal statute does not require a nexus between the defendant and the United States. According to this view, a statute will not violate due process so long as the exercise of jurisdiction is not arbitrary or fundamentally unfair. But, for those courts adopting a fairness-based analysis, international law has played a larger role than in the "nexus" analysis. For instance, the First Circuit has held that, in order to determine whether a statute is arbitrary or fundamentally unfair (the central query in the analysis of its constitutionality), it will look to the principles of international law which govern the

251. 905 F.2d at 248–49.

252. *Yousef*, 327 F.3d at 91.

253. *Id.* at 92 n.26.

exercise of extraterritorial jurisdiction[254] – positing a rule that suggests that due process and compliance with the international law of jurisdiction are practically coequal in that compliance with an internationally recognized basis of jurisdiction equates to a constitutionally permissible exercise of state authority. Similarly, the Eleventh Circuit has expressly looked to international law principles in determining whether an extraterritorial application of U.S. law comports with due process.[255]

One may debate the question of whether or not these courts intended to impart to international law such primacy or whether international law merely served as a convenient tool to attain a desired result in otherwise difficult cases – providing a convenient rationale to justify the exercise of criminal jurisdiction over extraterritorial conduct. If this line of reasoning merely represents an exercise in legal instrumentalism to attain a desired result, then its logic will likely prove to be ephemeral and its underlying principles will yield should its implications become inconvenient or uncomfortable. If, however, the language of these opinions proves durable, then the result is the placement of international law in a position of great consequence within the U.S. domestic legal order.

The Third Circuit, which departs from other courts of this school in important regards, has found that due process will not limit the extraterritorial application of U.S. criminal law – even absent a nexus to the United States – in situations where the criminalized conduct is "generally lawful throughout the world,"[256] thus arguably allowing for universal jurisdiction to create the basis for an appropriate exercise of jurisdiction under U.S. law. The Fifth Circuit has adopted a rationale which seems to echo this line of reasoning, though both judicial circuits have used language indicating that due process may limit extraterritorial jurisdiction under the right circumstances and when the link between the United States and the relevant conduct is sufficiently attenuated.

254. *Cardales*, 168 F.3d at 553.

255. *Ibarguen-Mosquera,* 634 F.3d at 1378–79.

256. *Martinez-Hidalgo*, 993 F.2d at 1056.

IX. Conclusion

International law and domestic national law are autonomous, but interdependent, legal orders.[257] As domestic national law does not provide an adequate framework for the regulation of transnational issues,[258] and as the exercise of extraterritorial jurisdiction can be conflict generative, U.S. domestic courts have developed rules to avoid inappropriate extensions of jurisdiction. As this Article has demonstrated, the nature of the demurral mechanism used to avoid excessive jurisdictional claims will depend on the nature of the case before the court and the judicial district in which the case is tried. An analysis of each varied approach in U.S. jurisprudence illuminates key areas where international law and U.S. domestic law converge, specifically with regard to the manner in which each empowers or limits the extraterritorial reach of U.S. law.

A. Different (and Inapposite) Rationales

The most marked dichotomy in U.S. jurisprudence with regard to limitations on the exercise of extraterritorial jurisdiction is that which exists between cases dealing with regulatory legal regimes and those dealing with transnational crime. The cases in which the Court has counseled and exercised limitations based on the sovereign interests of other nations have been exclusively antitrust cases arising in the context of civil litigation and were unwaveringly focused on a desire to keep "the potentially conflicting laws of different nations work together in harmony"[259] in commercial matters. Such limitations, however, have not been articulated in the context of other sorts of legal regimes that do not focus on market-regulating activity, nor have subordinate U.S. courts adhered to such an analysis. In U.S. jurisprudence, transnational crime has been treated differently.

Although the rationale for this disparate analytical treatment has not been expounded upon by the Supreme Court, the analysis

257. NOLLKAEMPER, *supra* note 6, at 13.

258. *Id.* at 2.

259. *F. Hoffman-La Roche*, 542 U.S. at 164–65 (noting that legal harmony is "particularly needed in today's highly interdependent commercial world.").

above demonstrates its existence and further reflection upon the differences in the sorts of legislation subject to regulation allows observers to discern its rationale – a rationale which can be justifiably grounded in the very obvious differences between civil actions involving U.S. antitrust law and criminal statutes that take on a transnational focus.

1. The Civil-Criminal Divide

At the outset, there is a significant difference between civil and criminal law in both purpose and effect. Civil law, as a general matter, is concerned with "civil or private rights and remedies, as contrasted with criminal laws."[260] Criminal law, in turn "is an institution by which the state prohibits certain types of conduct and punishes persons who violate those prohibitions."[261] The former concerns private litigants seeking to use the law to bring each other into conformance with a preferred course of conduct dictated, at least in part, by private interests while the latter concerns the state using its sovereign authority to punish a transgressor. While both can involve sanctions of a type, as one commentator succinctly noted, "Criminal liability is *different* – importantly dissimilar from other kinds of legal sanctions"[262] due to the resonating stigma of a criminal conviction versus a civil fine or injunction. U.S. jurisprudence has recognized this distinction and, accordingly, cautioned against using the extraterritoriality analysis of civil and criminal cases interchangeably.[263]

The disparate analyses for disparate laws is highlighted in the recent Supreme Court case of *Morrison v. Nat'l Australia Bank, Ltd.*,

260. BLACK'S LAW DICTIONARY 246 ("civil law").

261. A.P. Simester & Stephen Shute, *On the General Part in Criminal Law in* CRIMINAL LAW THEORY: DOCTRINES OF THE GENERAL PART 4 (Shute & A.P. Simester eds., 2002).

262. Douglas N. Husak, *Limitations on Criminalization and the General Part of Criminal Law*, *in* CRIMINAL LAW THEORY: DOCTRINES OF THE GENERAL PART 23 (Stephen Shute & A.P. Simester eds., 2002).

263. *See, e.g.*, United States v. Delgado-Garcia, 374 F.3d 1337, 1348 (D.C. Cir. 2004) ("Nothing in Sale and Arabian Oil Co. compels the conclusion that [a statute] applies only domestically. Those decisions involved very different statutes."); United States v. Campbell, 798 F. Supp. 2d 293, 303 (D.D.C. 2011) (distinguishing the recent case of Morrison v. Nat'l Australia Bank, Ltd., 130 S. Ct. 2869 (2010), which limits the extraterritorial reach of the Securities Exchange Act of 1934 from the proper extraterritoriality analysis in criminal matters, noting that "recent Supreme Court jurisprudence has developed with nary a mention of *Bowman* and has predominately involved civil statutes.").

which limits the extraterritorial reach of the Securities Exchange Act of 1934. The *Morrison* opinion unwaveringly focuses on the overseas applicability of specific civil legislation,[264] and, in discussing the extraterritorial applicability of that statute, makes absolutely no mention of its prior decision in *Bowman* and the extensive progeny of that criminal case in the lower courts. Such cases, which address extraterritorial application of criminal statutes, are not part of the Court's analysis as that criminal law analysis has become so separate as to be inapposite to civil litigation. Lending additional force to this restrictive view of *Morrison* is that the analysis in the decision focuses on the Restatement, which specifically sets forth the bases for jurisdiction to regulate "activities related to securities" rather than Section 402. This case, accordingly, serves to emphasize the civil-criminal divide.

Given this distinction, there is a certain fundamental logic to showing greater caution in extending the reach of U.S. law for a matter involving a private litigant in a civil matter who wishes to use U.S. law in a way that may result in some abrasion between sovereigns. This is because such actions are, in a sense, uncontrolled and dependent entirely upon private parties pursuing private interests. By contrast, a criminal action in the United States is one being brought by the government (at some level) in order to punish an individual for a transgression so severe that a legislative body has seen fit to enact law making it a crime. The multiplicity of U.S. jurisdictions notwithstanding, the inherently governmental aspect of a criminal prosecution makes extraterritorial extensions of U.S. law more controlled and ensures that any international discord occasioned by such action has been, at the very least, occasioned by a purposive government actor rather than a private participant who has drug the government into an international conflict unwittingly.

2. The Mala In Se–Mala Prohibita *Continuum*

Another difference between regulatory legal regimes and transnational criminal law lies in the particular point on which regulatory law – such as antitrust legislation – is located on the ideological continuum between *mala prohibita* and *mala in se* offenses.[265] Antitrust cases are more likely to be classified as *mala*

264. *Morrison*, 130 S. Ct. at 2869.

265. A.P. Simester & Stephen Shute, *On the General Part in Criminal Law in* CRIMINAL LAW THEORY: DOCTRINES OF THE GENERAL PART 10-11 (Stephen Shute &

prohibita as, even when appearing in the criminal context, they are essentially regulatory[266] in nature and address conduct which is not "pre-legally wrong" – as opposed to other offenses such as terrorism and narcotrafficking which are more closely aligned with that category of inherently wrongful conduct. This is because, at the core, antitrust law exists to encourage competition and prohibit anti-competitive behavior and unfair business practices in the commercial marketplace.[267] Engaging in anticompetitive business practices – even if labeled a criminal offense – is a qualitatively different sort of offense from, for instance, an act of international terrorism in that international terrorism poses more danger to the sovereign and its citizenry. As such, a sovereign's need to pursue an offense such as an act of terrorism will more likely outweigh any potential conflict with another sovereign that the extraterritorial application of U.S. law might occasion. Otherwise stated, *mala in se* crimes can logically be afforded greater extraterritorial reach than *mala prohibita* crimes as the state's need to pursue the former category is naturally greater. On that score, a number of serious crimes such as narcotrafficking,[268] terrorism,[269] money laundering,[270] and corruption[271] are the subject of various multilateral conventions

A.P. Simester eds., 2002).

266. *See* STUART P. GREEN, LYING CHEATING, AND STEALING: A MORAL THEORY OF WHITE-COLLAR CRIME 249 (2006) ("As the term is generally used, 'regulatory crime' refers to a collection of penal statutes applying to a wide array of matters within the purview of federal, state, and local administrative agencies, including the environment, product and workplace safety, labor, banking, securities, antitrust, transportation, trade, taxation, immigration, customs, agriculture, education, health care, and housing.").

267. *See generally* KEITH N. HYLTON, ANTITRUST LAW: ECONOMIC THEORY AND COMMON LAW EVOLUTION (2003).

268. *See, e.g.*, United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Dec. 19, 1988, art. 17, 28 I.L.M. 493, 520; Convention for the Suppression of the Illicit Traffic in Dangerous Drugs, June 26, 1936, 198 L.N.T.S. 299.

269. *See, e.g.*, International Convention for the Suppression of Terrorist Bombings, Jan. 12, 1998, S. Treaty Doc. No.106-6, 2149 U.N.T.S. 256; International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, S. Treaty Doc. No. 106-49, 39 I.L.M. 268; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted Dec. 14, 1973, 28 U.S.T. 1975, 1035 U.N.T.S. 167; International Convention for the Suppression of Acts of Nuclear Terrorism, open for signature Sept. 14, 2005, 44 I.L.M. 815.

270. *See, e.g.*, The Council of Europe Convention on Laundering, Search, Seizure, and Confiscation of the Proceeds from Crime ETS No. 141 (entered into force 1993).

271. *See, e.g.*, Convention Against Corruption, U.N. GAOR 57th Sess., U.N. Doc.

which require all states to criminalize and suppress such conduct and, therefore, would logically not be appropriately limited by a court for the sake of avoiding international discord. There is, therefore, a logical and supportable rationale for the dichotomy in U.S. jurisprudence with regard to laws that impact commercial markets and criminal matters that do not have such market-impacting qualities.

B. Preferred Approach for Transnational Crime?

There a degree of conceptual overlap among the competing rationales the lower courts have adopted in exploring limitations on extraterritorial jurisdiction over transnational crime. There is, to be sure, a consonance in the rationales of those courts requiring a nexus to the United States in order for jurisdiction to be appropriate and those courts which, while not requiring a nexus, demand that the exercise of jurisdiction be fundamentally fair, lack arbitrariness, and which look to the customary international law of jurisdiction to gauge whether that standard has been met. This is because, in most cases, the customary international law of jurisdiction presupposes a nexus.

> The permissive principles of jurisdiction are entwined in that they all put forward a link between the situation they govern and the competence of the State. This link is not necessarily the territory. It can as well be one of the two other constituent elements of the definition of a State, namely its population or its sovereign authority.[272]

The international law of jurisdiction, therefore, typically envisions some linkage between the prosecuting state and the person being prosecuted – even if it is an abstract linkage – in order for jurisdiction to be permissible. As such, in most cases where extraterritorial jurisdiction is exercised pursuant to one of the recognized bases under international law, a nexus between the criminal and the prosecuting state exists. As a result, an analysis which eschews a nexus requirement – yet looks to customary international law to determine whether an exercise of jurisdiction is fair – is still achieving connectivity by looking to a body of law which envisions the existence of a link between the prosecuting state and the criminal or his/her activity. The analysis merely finds its

A/58/422 (Dec. 14, 2005).

272. RYNGAERT, *supra* note 29, at 31.

nexus through international legal principles. For this reason, conflating "fundamental fairness" with customary international law typically produces the same result as requiring a nexus as a part of the due process analysis. The inherent nexus in international law provides an adequate link in most circumstances to make an exercise of jurisdiction fundamentally fair.

The rationale, however, grows hoarse and true differences in the approaches become emphasized when courts base the "fairness" of a jurisdictional claim on universal jurisdiction – a theory of jurisdiction which allows a court to be seized of a matter "without reference to the place of perpetration, the nationality of the suspect or victim or any other recognized linking point between the crime and the prosecuting State."[273] Under such circumstances, there is not necessarily a link of any sort between the prosecuting state and the criminal and his/her activity and the inherent link normally achieved by looking to customary international law dissipates. With that dissipation, the adequacy of international law as a basis for satisfying constitutional requirements of due process becomes more questionable. If due process should serve to provide a defendant with a reasonable expectation that he or she might be haled into a U.S. court and made the subject of a U.S. criminal proceeding, it seems an error to conflate those ideas associated with fundamental fairness and the lack of arbitrariness with a jurisdictional basis unmoored from any link to any specific place or government. This danger is only exacerbated when courts broaden the scope of universal jurisdiction so that it applies not only to *jus cogens* crimes but also to conduct that is generally condemned throughout the world.[274] The reliance on international law in such a way raises the concerns expressed by Judge Torruella in *United States v. Angulo-Hernandez*: "[C]ompliance with international law is necessary but not sufficient."[275]

C. Final Remarks

The subject of extraterritorial jurisdiction is a vortex on the legal plane in which domestic law and international law swirl alongside delicate policy considerations related to international affairs. The

273. CRYER ET AL., *supra* note 25, at 50–51.

274. *Martinez-Hidalgo*, 993 F.2d at 1056.

275. *Angulo-Hernandez*, 576 F.3d at 62 (Torruella, J., dissenting from denial of rehearing en banc).

analysis above demonstrates the textured and complex nature of this area of the law. From the ancient doctrine of comity, particularly as applied in civil regulatory matters, to reliance upon customary international law in transnational criminal matters, it remains true that that international law plays a critical role in the U.S. of extraterritorial jurisdiction and that, just as much as when the words were penned at the dawn of the last century, "[i]nternational law is part of our law[.]"[276] Whatever the facts, though distinct differences in analysis prevail, international law factors as a critical element in U.S. judicial decisionmaking vis-à-vis extraterritorial jurisdiction.

In addition, the analysis demonstrates the variety of approaches adopted in U.S. jurisprudence in limiting the extraterritorial reach of U.S. domestic law and, thereby, assuaging potential conflicts that can be occasioned by such juridical projections of power. In exploring the varying approaches, it is evident that the jurisprudence surrounding limitations on extraterritorial jurisdiction is something of a juridical Tower of Babel. Some of that difference is due to differences in the nature of the laws under consideration, and the natural lack of legal interoperability resulting from a necessary variance in approach with regard to, for instance, civil antitrust matters. Some of the confusion – especially with regard to those decisions dealing with transnational crime – is, however, simply the result of a lack of uniformity in approach among the lower courts and a lack of a clarifying voice from the Supreme Court.

With so many courts speaking a different legal language and espousing so many conflicting views, U.S. domestic law regarding limits on extraterritorial jurisdiction is fractured. Nonetheless, some hope for resolution may be found as the analysis also illuminates a number of similarities in these seemingly different approaches. By understanding the role international law plays in each of these analyses, the similarities of the undergirding rationales, as well as the differences and potential dangers, policymakers and legal actors can work to clarify this discordant and fractured legal landscape and articulate a unified view of international law and limitations on the exercise of extraterritorial jurisdiction in U.S. domestic law.

276. The Paquete Habana, 175 U.S. 677.