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Customary International Law Limits to
Bases of International Civil Court Jurisdiction

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Chapter 1

Introduction

‘[...] It is not to be forgotten that there are many countries in the world which exercise, what are in the eyes of international law, an exorbitant jurisdiction; indeed, in some cases, the jurisdiction exercised by the courts of this country can be so regarded. [...]’¹

(Lord Goff, 1988)

1. Revisiting International Civil Court Jurisdiction

Across the world, state courts exercise civil jurisdiction on various grounds. Except for regional initiatives, states have neither agreed to nor converged to one set of common rules.² This is true for grounds of jurisdiction in domestic and international disputes.³ Whether a court is competent to decide a particular civil case with an international element is mostly discussed under the banner of private international law.⁴ Courts determine the issue under the domestic private international law rules of their respective state, applicable treaty law or applicable supranational norms. State-to-state comparison of rules regularly does not play any significant

¹ *Deutsche Schachtbau-Und Tiefbohrgesellschaft Mbh and Others v. Shell International Petroleum Company Limited* [1988] 27 I.L.M. 1032, 1051 (Lord Goff).

² For two regional examples see: Código de Derecho Internacional Privado (signed on 20 February 1928, in force since November 1928) 86 LNTS 120 (Código de Bustamante) and Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) [2012] OJL 351/1, amended through [2015] OJL 54/1 (Brussels I bis Regulation). Furthermore, the (Hague Conference on Private International Law) *Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters* sets forth commonly accepted conditions for recognition and enforcement of judgments and as such regulates bases of international civil jurisdiction indirectly. The convention has so far been ratified mostly by EU member states. Russia and the U.S. have signed, but not ratified the convention, see <<https://www.hcch.net/en/instruments/conventions/status-table/?cid=137>>, accessed on 31 January 2025. See on this 2019 convention also Chapter 5 Section 5.

³ What qualifies as a domestic and what as an international dispute varies across legal systems. Here the distinction merely reflects the fact that several legal systems have different rules for domestic and international disputes (according to their own definitions of the terms).

⁴ The term private international law here includes rules of international civil jurisdiction (see also James Crawford, *Brownlie’s Principles of Public International Law* (Oxford University Press 2019) 458). Conversely, at least in Austria and Germany private international law or Internationales Privatrecht is traditionally concerned only with the conflict of substantive laws (For Austria see the Bundesgesetz vom 15. Juni 1978 über das internationale Privatrecht (IPR-Gesetz) StF: BGBl. Nr. 304/1978; for Germany see the Einführungsgesetz zum Bürgerlichen Gesetzbuche in der Fassung der Bekanntmachung vom 21. September 1994 (BGBl. I S. 2494; 1997 I S. 1061) Chapter 2; see, however, for the Swiss Federation the Bundesgesetz über das Internationale Privatrecht (IPRG) vom 18. Dezember 1987, BBl 1988 I 5, which addresses international civil court jurisdiction as well.

role in this analysis.⁵ The evaluation of various rules, their relative merits and demerits, is mostly deferred to the political level and comes to the fore especially when negotiating jurisdiction treaties and in academic discussion.

While most grounds of international civil jurisdiction are acceptable to most stakeholders, certain rules have been met with recurring criticism and have been labelled ‘exorbitant’ (see Lord Goff’s quote above), derived from the Latin term *exorbitare*, which means to depart (from the right path).⁶ In the context of international civil jurisdiction ‘exorbitant’ has been described as ‘condemn[ing] [a basis of jurisdiction] as inappropriate from an international standpoint’⁷ or simply as ‘impermissible’.⁸ Two prominent examples are (i) Art 14 of the French Code Civil,⁹ which has been interpreted by the French Cour de cassation to allow any French national to sue in France, irrespective of the nationality or domicile of the defendant, regarding any obligation wherever entered into, and (ii) ‘tag-jurisdiction’ under U.S. law, which grants jurisdiction over any defendant served with process in U.S. territory. Another less prominent example from the perspective of Western literature is Art 265 Civil Procedure Code of the People’s Republic of China, which establishes civil court jurisdiction at the place of arrestable property and any representative office of the defendant.¹⁰

⁵ This may differ at the enforcement stage, see Chapter 2 Section 1.2 and Chapter 6 Section 1.

⁶ See Kurt H Nadelmann, ‘Jurisdictionally Improper Fora’ in Kurt H. Nadelmann, Arthur T. von Mehren and John N. Hazard (eds), *XXth Century Comparative and Conflicts Law: Legal Essays in Honor of Hessel E Yntema* (1961) 321; Louis I De Winter, ‘Excessive jurisdiction in private international law’ (1968) 17 *International & Comparative Law Quarterly* 706; Kevin M Clermont and John RB Palmer, ‘Exorbitant jurisdiction’ (2006) 58 *Maine Law Review* 474, 476.

⁷ Clermont and Palmer, ‘Exorbitant jurisdiction’ (n 6).

⁸ Oscar Schachter, ‘International Law in Theory and Practice: General Course in Public International Law’ (1982) 178 *Recueil Des Cours* 9, 246 for ‘prescriptive jurisdiction’.

⁹ ‘A foreigner, although not resident in France, may be cited before the French courts to enforce the execution of engagements contracted by him in France with a Frenchman; he may be summoned before the tribunals of France, on account of engagements entered into by him with Frenchmen in a foreign country’, translated by Law Bookseller William Benning (ed) *The Code Napoleon; or The French Civil Code; literally translated from the original and official edition, published at Paris, in 1804, by a barrister of the Inner Temple* (William Benning, Law Bookseller 1827) 4; the original French wording is: ‘L’étranger, même non résidant en France, pourra être cité devant les tribunaux français, pour l’exécution des obligations par lui contractées en France avec un Français; il pourra être traduit devant les tribunaux de France, pour les obligations par lui contractées en pays étranger envers des Français’; see also Nadelmann (n 6).

¹⁰ Guangjian Tu, *Private international law in China* (Springer 2016) 124. Tu provides the following English translation: ‘Where an action is instituted against a defendant that has no domicile within the territory of the People’s Republic of China for a contract dispute or any other property right or interest dispute, if the contract is signed or performed within the territory of the People’s Republic of China, or the subject matter of action is located within the territory of the People’s Republic of China, or the defendant has any arrestable property within the territory of the People’s Republic of China, or the defendant has any representative office within the territory of the People’s Republic of China, the people’s court at the place where the contract is signed or performed, where the subject matter of action is located, where the arrestable property is located, where the tort occurs or where the domicile of the representative office is located may have jurisdiction over the action’.

In essence, the charge of exorbitance seeks to express that a particular ground of civil court jurisdiction may be unfair to the defendant for several reasons: the defendant must (potentially) defend itself in an unfamiliar forum and an unfamiliar language, bear higher costs than in proceedings at home and might be confronted with prejudice against foreigners. The defendant's assets will only be secure if they are in a state that does not enforce judgments based on exorbitant grounds of civil court jurisdiction. Even then, the defendant may face repercussions if it enters this state's territory.¹¹

The English case of *Buchanan v. Rucker* (1808)¹² serves as one of the oldest documented illustrations of a judge grappling with a potentially exorbitant ground of jurisdiction. A plaintiff had obtained a default judgment on the Island of Tobago (today part of Trinidad and Tobago) against a defendant, who had not been present on the island during the proceedings. Process had been served on the defendant by nailing of a copy of the notice document on the courthouse door. In the proceedings in England proof was provided that such procedure was indeed in accordance with the law of the Island of Tobago in cases in which the defendant was absent. Lord Ellenborough, however, would not have it. He held that any such law must be construed as limited to cases where the defendant was 'present and within the jurisdiction, to have been subject to the process of the Court'. He strengthened this conclusion by pointing out that the alternative would be absurd. Famously, he asked three rhetorical questions: 'how could that be obligatory upon the subjects of foreign countries? Can the Island of *Tobago* pass a law to bind the rights of the whole world? Would the world submit to such an assumed jurisdiction?'¹³ **Chapter 6 Section 2** will return to this case.

While this is where most general accounts of exorbitant jurisdiction end, the description is incomplete. Theorizing exorbitant jurisdiction exclusively as a political facet of private international law misses an important critique. The charge of exorbitance has a further dimension, which is rarely articulated today: certain rules of civil court jurisdiction may not only be unfair and undesirable internationally, but they may violate customary international law ('CIL'), specifically CIL rules on jurisdiction (see **Section 2**). This thought, today overshadowed by the private international law perspective, has a long and rich history. Rarely has the matter been addressed with the rigour it deserves – those who did often arrived at

¹¹ See Nadelmann (n 6); De Winter (n 6); see also Clermont and Palmer, 'Exorbitant jurisdiction' (n 6) 476 et seqq.

¹² *Buchanan v. Rucker* [1808] 9 East. 192.

¹³ Ibid.

opposite conclusions. For methodological and substantive reasons discussed below, the matter merits reconsideration.

2. CIL Rules on Adjudicatory Jurisdiction

CIL rules on jurisdiction concern the legal authority of states to regulate and enforce conduct¹⁴ and have been referred to as the ‘law on laws’.¹⁵ They delimitate spheres of power among sovereigns and are therefore central to public international law. Without power-delimiting rules, a system of peaceful co-existence and cooperation would be unthinkable.¹⁶

While not universally applied,¹⁷ the distinction between prescriptive, adjudicative and enforcement jurisdiction has proved useful. Prescriptive jurisdiction refers to the authority to enact rules and thereby regulate conduct.¹⁸ Prescriptive jurisdiction is not limited to the legislature but encompasses enactments of rules by other bodies. Even courts exercise prescriptive jurisdiction when they develop the law.¹⁹ Enforcement jurisdiction is the authority to ensure compliance with the norms of prescriptive and adjudicative jurisdiction through official action.²⁰ Enforcement concerns actualization of the law in particular instances.²¹ In other words, while prescriptive jurisdiction is concerned with the law in general, enforcement jurisdiction is concerned with official action upon the law in specific instances.²²

¹⁴ See e.g. Joseph Henry Beale, ‘The Jurisdiction of a Sovereign State’ (1923) 36 Harvard Law Review 241; see also D. W. Bowett, ‘Jurisdiction: Changing Patterns of Authority over Activities and Resources’ (1983) 53 British Yearbook of International Law 1982 1.

¹⁵ Cedric Ryngaert, *Jurisdiction in International Law* (OUP Oxford 2015) General Editor’s Preface. Strictly speaking, this is only true for the power to regulate, i.e. prescriptive jurisdiction and the prescriptive part of adjudicative jurisdiction.

¹⁶ First and foremost, this is true of enforcement jurisdiction, which for peaceful co-existence must be limited to the state’s own territory, see *The Case of the S.S. “Lotus” (France v Turkey)* PCIJ Rep Series A, No 10, 18.

¹⁷ Anthea Roberts, *Is international law international?* (Oxford University Press 2017) Preface xix.

¹⁸ Ryngaert, *Jurisdiction in International Law* (n 15) 9.

¹⁹ Frederick Alexander Mann, ‘The Doctrine of Jurisdiction in International Law’ (1964) 111 *Recueil des Cours* 1, 13; August Reinisch, *US-Exportkontrollrecht in Österreich: ein Beitrag zur völkerrechtlichen und kollisionsrechtlichen Problematik der extraterritorialen Anwendung ausländischen Wirtschaftsrechts* (Manz 1991) 31; Ryngaert, *Jurisdiction in International Law* (n 15) 10.

²⁰ Ryngaert, *Jurisdiction in International Law* (n 15) 9.

²¹ Joachim Bertele, *Souveränität und Verfahrensrecht: eine Untersuchung der aus dem Völkerrecht ableitbaren Grenzen staatlicher extraterritorialer Jurisdiktion im Verfahrensrecht* (Mohr Siebeck 1998) 101. On a narrower view, only the act that compels compliance comes under enforcement jurisdiction (e.g. William S Dodge, ‘Jurisdiction in the Fourth Restatement of Foreign Relations Law’ (2016/2017) 18 *Yearbook of Private International Law* 143, 146).

²² It has, however, been pointed out that enforcement jurisdiction may in certain circumstances overlap with prescriptive and adjudicative jurisdiction (Bertele (n 21) 101).

Adjudicative jurisdiction concerns the authority to subject persons or things to the process of the courts and tribunals.²³ However, scholars do not always accord it a separate category.²⁴ Some view it as part of prescriptive jurisdiction,²⁵ others view it as part of enforcement jurisdiction.²⁶ The jurisdiction of courts covers a range of issues. Arguably, each can be categorised as either prescriptive or enforcing.

The rules/bases of court jurisdiction themselves (be they developed through statute or case law) are arguably prescriptive as they regulate conduct in general terms. This is the only aspect of adjudicative jurisdiction that will be addressed in this doctoral thesis and references to ‘adjudicative jurisdiction’ are to be thus understood. The restrictions applicable in this regard will be analysed in this doctoral thesis.

As mentioned above, courts also develop the law in general terms. As such courts exercise prescriptive jurisdiction and must not violate the CIL rules on prescriptive jurisdiction for the respective field of substantive law (e.g. antitrust law, commercial contract law, criminal law etc.).²⁷

Finally, courts also act upon their jurisdiction in particular instances, they apply the law to the facts, issue orders and render judgments. These official acts arguably form part of enforcement jurisdiction as defined above and by virtue of the CIL on enforcement jurisdiction must not be carried out outside the state’s territory.

Ultimately, the categories of prescriptive, adjudicative and enforcement jurisdiction are useful theoretical classifications. However, they by themselves cannot answer the question which restrictions CIL imposes on a specific kind of state conduct. Just because a theorist – rightly or wrongly – considers a specific kind of adjudicative jurisdiction to be part of prescriptive jurisdiction, this does not allow any conclusion as to the CIL rules applicable to

²³ Ryngaert, *Jurisdiction in International Law* (n 15) 9 et seq.

²⁴ Roberts (n 17) 207; Dodge (n 21) 146; IBA Legal Practice Division, Report of the Task Force on Extraterritorial Jurisdiction (2008) 8; see also the comments respectively by Yoram Dinstein, Louis Henkin, Karl Zemanek, Walter Rudolf, M. Ch. Dominicé in Institut de Droit International, 19th Committee, ‘The Extraterritorial Jurisdiction of States’ (Rapporteur: Maarten Bos), 65 *Annuaire IDI*, Vol I (1993) 60, 63, 69, 85, 94 as well as IDI, 65 *Annuaire IDI*, Vol II (1993) 142 et seqq.

²⁵ See Satya T Mouland, ‘Rethinking adjudicative jurisdiction in international law’ (2019) 29 *Wash Int’l LJ* 173, 177.

²⁶ See Schachter (n 8) 246.

²⁷ Mann, ‘The Doctrine of Jurisdiction in International Law’ (n 19) 149 et seqq.

this specific kind of adjudicative jurisdiction. Only an inductive analysis into state practice and *opinio juris* can answer this question (see **Chapter 2**). Nevertheless, these classifications are useful labels that facilitate discussion, because they provide clarity on what meaning the author attributes to them in a given instance.

On the other hand, the territorial-extraterritorial dichotomy is not a useful classification as it confuses more than it enlightens.²⁸ Scholars who employ this dichotomy in discussion are bound to misunderstand each other due to the inherent ambiguity.²⁹ The term can refer to laws regulating conduct outside the territory (extra-territorial).³⁰ However, it can also mean laws in conflict with the relevant norm of CIL.³¹ Therefore, the labels of territorial vs extraterritorial will not appear in this doctoral thesis.

Having a separate category of adjudicative jurisdiction, as defined above as a subsection of prescriptive jurisdiction, is useful since different rules may apply to different areas of prescriptive jurisdiction and thus also to adjudicative jurisdiction. There is no axiom that they must all follow the same rule. The same applies to different areas of adjudicative jurisdiction, such as criminal and civil adjudicative jurisdiction.³² There is therefore merit in defining the category even narrower: CIL on civil adjudicative jurisdiction. Does this area of the law provide limits to bases of civil court jurisdiction?

²⁸ See Péter D Szigeti, 'The illusion of territorial jurisdiction' (2017) 52 *Tex Int'l LJ* 369.

²⁹ Institut de Droit International, 19th Committee, 'The Extraterritorial Jurisdiction of States' (Rapporteur: M. François Rigaux), 68 *Annuaire IDI*, Vol I (1999) 509, 560 : 'une perte de confiance dans le caractère opérationnel des concepts mêmes de territorialité et d'extraterritorialité', 'les notions de territorialité et d'extraterritorialité et, par conséquent, le concept même de la compétence extraterritoriale des Etats doivent être éliminés.'

³⁰ Institut de Droit International, 19th Committee, 'The Extraterritorial Jurisdiction of States' (Rapporteur: Maarten Bos), 65 *Annuaire IDI*, Vol I (1993) 16 et seqq.

³¹ In this sense e.g. Harold G Maier, 'Jurisdictional Rules in Customary International Law' in Karl M Meessen (ed), *Extraterritorial Jurisdiction in Theory and Practice* (1996) 64.

³² Dodge (n 21) 147; Christopher Staker, 'Jurisdiction' in Malcolm D Evans (ed), *International Law* (Oxford University Press 2024) 309 who speaks of a possible fragmentation of the law on jurisdiction; see also Alan V Lowe, 'The problems of extraterritorial jurisdiction: Economic sovereignty and the search for a solution' (1985) 34 *International & Comparative Law Quarterly* 724, 734: 'It should not be assumed that all laws must fit into the same jurisdictional framework' and Nico Krisch, 'Jurisdiction unbound: global governance through extraterritorial business regulation' (2020) PATHS Working Paper 21: 'We might expect that the picture will differ significantly from one issue areas to another and that we would need a more fine-grained, context-dependent re-specification in order to do justice to the multiplicity of jurisdictional practices'.

3. The Rich Doctrinal History on CIL Limits to Bases of Civil Court Jurisdiction

During the eighteenth to mid-twentieth century, several scholars in Europe and the U.S. shared the view that CIL limited civil court jurisdiction.³³ They agreed that civil court jurisdiction was territorial (by which they arguably meant slightly different things). Emer de Vattel limited civil jurisdiction to ‘differences that arise in the country’ and invoked the mandatory character of the ‘*forum rei*’, which was established at the ‘place where that defendant has his settled abode, or [...] the place where the defendant is, when any sudden difficulty arises [except for disputes regarding land]’.³⁴ Other scholars required that the defendant had to be within the state’s territory. Thus, the German scholar Georg Friedrich von Martens wrote that civil court jurisdiction ‘extends indiscriminately to all who are in the territory’.³⁵ U.S. scholar and Supreme Court Justice Joseph Story³⁶ as well as other prominent U.S.³⁷ and English scholars³⁸ and at least one Spanish author³⁹ followed a territorial conception of civil court jurisdiction as well. Other scholars of the nineteenth to early twentieth century stood opposed to territorial limits to civil court jurisdiction.⁴⁰

³³ See John R Stevenson, ‘The Relationship of Private International Law to Public International Law’ (1952) 52 Colum L Rev 561, 564-567; Gary B Born, ‘Reflections on Judicial Jurisdiction in International Cases’ (1987) 17 Ga J Int’l & Comp L 1, 17 FN 78.

³⁴ Emmerich de Vattel, *The Law of Nations: Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns* (Cambridge University Press 2011) Book II §§ 84, 103 (the French original is Emer de Vattel, *Le droit des gens ou principes de la loi naturelle* (1758)).

³⁵ Georg Friedrich von Martens, *The Law of Nations: Being the Science of National Law, Covenants, Power, &c* (W. Cobbett tr, 4 edn, W. Cobbett 1829) 101; see also the comments by the German scholar Carl Ludwig von Bar, *Theorie und Praxis des Internationalen Privatrechts*, vol 2 (Hahn 1889) cited in Arthur Taylor Von Mehren and Eckart Gottschalk, *Adjudicatory Authority in Private International Law : A Comparative Study* (Brill 2007) 119 et seqq.

³⁶ Joseph Story, *Commentaries on the Conflict of Laws* (Hilliard, Gray, and Company 1834) § 539, § 546 ‘[...] there is no pretence to say that such modes of proceeding can confer any legitimate jurisdiction over foreigners, who are non-residents, and do not appear, whether they have notice of the suit or not; ibid § 556 ‘[...] no nation can rightfully claim to exercise it [jurisdiction], except as to persons and property within its own domains [...]’.

³⁷ Henry Wheaton, *Elements of International Law* (8 edn, Sampson Low Son & C. 1866) § 77 in conjunction with § 112 (cited together with Story by the U.S. Supreme Court in *Pennoyer v. Neff*, 95 U.S. 714 (1878) 722); Henry Wager Halleck, *Halleck’s International Law, Or, Rules Regulating the Intercourse of States in Peace and War*, vol 1 (C. Kegan Paul & Co. 1878) 169; Francis Wharton, *A Treatise on the Conflict of Laws: Or, Private International Law* (2 edn, Kay and Brother 1881) § 649; Beale, ‘The Jurisdiction of a Sovereign State’ (n 14) 243.

³⁸ Robert Phillimore, *Commentaries upon International Law*, vol 1 (T. & J. W. Johnson 1854) 162, 355, 359; George Bowyer, *Commentaries on Universal Public Law* (V. & R. Stevens and GS Norton 1854) 173.

³⁹ Antonio Riquelme, *Elementos de derecho público internacional: con explicacion de todas las reglas que, segun los tratados, estipulaciones, leyes vigentes y costumbres, constituyen el derecho internacional español* (Pedro Vives 1875) 305, 359.

⁴⁰ See authors cited in Stevenson (n 33) 564-567 and Mann, ‘The Doctrine of Jurisdiction in International Law’ (n 19) 39; other scholars did not invoke public international law, but nevertheless heavily criticised provisions of exorbitant jurisdiction. E.g. Franz von Zeiller referred to Art 14 Code Civil as an unnecessary and unnatural restriction on civil liberties (‘unnöthige und unnatürliche Beschränkung der bürgerlichen Freiheit’, Franz von Zeiller, *Der Ur-Entwurf und die Berathungs-Protokolle des Österreichischen Allgemeinen bürgerlichen Gesetzbuches* (Julius Ofner, Verlag Auvermann 1976) 479).

The second half of the twentieth century gave rise to Friedrich Alexander Mann's seminal work 'The Doctrine of Jurisdiction in International Law'.⁴¹ Since Joseph Story's era, scholars have occasionally considered the issue of CIL limits to bases of civil court jurisdiction.⁴² Mann, however, was the first to properly re-engage with the topic.

He was a proponent of CIL limits to civil court jurisdiction.⁴³ In his view, CIL required a sufficiently close connection to a state's territory (and in some instances to other aspects of the state).⁴⁴ On *opinio juris*, Mann cited English decisions on the recognition of foreign judgments, which required the judgment court to have jurisdiction under international principles.⁴⁵ However, this hardly was evidence of widespread *opinio juris* since it focused on English decisions only and neglected the practices of many other states.⁴⁶ Austria, for instance, as a general rule does not recognise foreign judgments even if rendered based on internationally unobjectionable grounds of civil jurisdiction. Austria does not even recognise foreign judgments if civil jurisdiction is based on a ground that Austria itself exercises.⁴⁷ Mann offered little further evidence of *opinio juris*.

Furthermore, Mann sought to demonstrate that virtually all state practice in this matter accords to a rule of sufficiently close connection. He pointed out that civil court jurisdiction is often based on a link between the defendant and the territory of the state exercising jurisdiction. In civil law systems this link is established through the requirement of residence or domicile; in common law countries, it is through service.⁴⁸ While he thought that jurisdiction based on

⁴¹ Mann, 'The Doctrine of Jurisdiction in International Law' (n 19). This was followed up by the no less impressive work: Frederick Alexander Mann, 'The Doctrine of International Jurisdiction Revisited after Twenty Years' (1984) 186 *Recueil des Cours* 9.

⁴² See e.g. Stevenson (n 33) 576; Max Rheinstein, 'The Constitutional Bases of Jurisdiction' (1955) 22 *The University of Chicago Law Review* 775, 799: '[...] nor would any rule, it seems, stand in the way of some other enterprising country rendering its courts available for the issuance of default money judgments against anyone in the whole world'; Sir Gerald Fitzmaurice, 'The General Principles Of International Law Considered from the Standpoint Of the Rule of Law' [Brill | Nijhoff] (1957) 92 *Recueil des cours de l'Académie de La Haye en ligne* 220: 'international law is not concerned to delimit the respective spheres of each State's action and jurisdiction, but is on the contrary content to leave any resulting conflicts to be resolved or determined by each State for itself, through its own conflict rules'. See further examples in Mann, 'The Doctrine of Jurisdiction in International Law' (n 19) 73 FN 81, 82 and Michael Akehurst, 'Jurisdiction in International Law' (1972-1973) 46 *Brit YB Int'l L* 145, 170 FN 1.

⁴³ Mann, 'The Doctrine of Jurisdiction in International Law' (n 19) 73.

⁴⁴ *Ibid* 73 et seqq.

⁴⁵ *Ibid* 75; see also Andreas F. Lowenfeld, 'International Litigation and the Quest for Reasonableness: General Course on Private International Law' (1995) 245 *Recueil des Cours* 9, 83.

⁴⁶ See Akehurst (n 42) 175, FN 1.

⁴⁷ § 406 österreichische Exekutionsordnung. However, there are exceptions to this, especially where a treaty provides thus.

⁴⁸ Mann, 'The Doctrine of Jurisdiction in International Law' (n 19) 76.

mere presence (tag-jurisdiction) – see **Section 1** above – might violate CIL,⁴⁹ the doctrine of *forum non conveniens*, which is the discretionary power of the courts to refrain from exercising jurisdiction in favour of another forum under certain circumstances, would avoid such a result at least under English law.⁵⁰ In other instances, Mann pointed out that state practice is based on an equally unobjectionable link between the subject matter of the claim and the territory of the state exercising jurisdiction (e.g. in tort and contract claims).⁵¹ He did not object to Article 15 Code Civil, which vests French courts with civil jurisdiction over French nationals, as states are allowed to base jurisdiction on nationality ties under CIL.⁵² However, Mann proposed that Article 14 Code Civil violates CIL, which vests French courts with jurisdiction over foreign defendants if the plaintiff is a French national (see **Section 1** above).⁵³ Finally, he regarded jurisdiction based on the location of assets in a state as rightful only to the extent of such assets, but not beyond.⁵⁴

20 years later, in 1986, Mann emphasised the importance of the 1968 Brussels Convention, a double convention on the jurisdiction of courts and the recognition and enforcement of judgments originally concluded between six European states, which has been replaced by the Brussels Regulation (in its most recent form: the Brussels 1 bis Regulation) (see **Chapter 5 Section 5.2**).⁵⁵ According to Mann, the grounds of civil court jurisdiction it endorses are likely in line with CIL. The grounds it bans but allows vis-à-vis third states, need not necessarily violate CIL, although they might.⁵⁶ Mann contrasted the rules of the Brussels Convention with U.S. law. In this regard, he criticised the U.S. ‘doing business’ doctrine,⁵⁷ which since then has been eliminated in the context of general jurisdiction,⁵⁸ and at least much alleviated in the context of specific jurisdiction⁵⁹ (see for this the section on U.S. practice in **The Annex**).

Since Mann few have picked up the torch and engaged in elaborate analysis. The first scholar who did, fundamentally disagreed with Mann. In 1973, Michael Akehurst maintained

⁴⁹ Ibid 77; see also Mann, ‘The Doctrine of International Jurisdiction Revisited after Twenty Years’ (n 41) 32.

⁵⁰ Mann, ‘The Doctrine of Jurisdiction in International Law’ (n 19) 77.

⁵¹ Ibid 78.

⁵² Ibid 79.

⁵³ Ibid 80, pointing out the irony that it was France who argued that the principle of passive personality in criminal law violated CIL in the *Lotus* case. At the same time, they have their own civil law version of passive personality, which is Article 14 Code Civil.

⁵⁴ Ibid 81; see also Mann, ‘The Doctrine of International Jurisdiction Revisited after Twenty Years’ (n 41) 32, 69.

⁵⁵ Mann, ‘The Doctrine of International Jurisdiction Revisited after Twenty Years’ (n 41) 69.

⁵⁶ Ibid.

⁵⁷ Ibid 71 et seq.

⁵⁸ *Goodyear Dunlop Tires Operations, S. A., et al. v. Brown*, 564 U.S. 915 (2011).

⁵⁹ *Asahi Metal Indus. v. Superior Court*, 480 U.S. 102 (1987).

that '[s]tates claim jurisdiction over all sorts of cases and parties having no real connection with them and that this practice has seldom if ever given rise to diplomatic protests'.⁶⁰ On this basis Akehurst concluded that '(apart from the well-known rules of immunity for foreign States, diplomats, international organizations, etc.) customary international law imposes no limits to the jurisdiction of municipal courts in civil trials'.⁶¹

Akehurst's first claim that states exercise civil court jurisdiction over cases 'having no real connection with them'⁶² does not entirely convince. Akehurst cited the extreme examples of tag-jurisdiction⁶³ (alleviated through the doctrine of *forum non conveniens*),⁶⁴ asset-based jurisdiction⁶⁵ and plaintiff jurisdiction,⁶⁶ but ignored the bulk of internationally uncontroversial grounds of civil court jurisdiction. Furthermore, arguably even the exorbitant grounds cited are based on some connection with the state exercising jurisdiction (either territory or nationality). On *opinio juris*, Akehurst pointed out that the exorbitant grounds of civil court jurisdiction had not elicited many protests throughout the preceding decades. However, even if this is the case, a lack of protests does not disprove the existence of CIL. It may mean that the discussed grounds of exorbitant grounds of civil court jurisdiction remain within the limits of what CIL permits.⁶⁷ Jochen Schröder therefore provocatively remarked that the CIL limits lie somewhere in the mist of practical uselessness.⁶⁸

Pierre Mayer, arguably the most influential French author on this issue,⁶⁹ in 1979 came to a similar conclusion albeit through different reasoning. He maintained that no state court is ever bound by CIL to decline civil jurisdiction (apart from immunities). For if the decision is enforced on the same state's territory, CIL on enforcement jurisdiction will not be violated. If

⁶⁰ Akehurst (n 42) 170.

⁶¹ Ibid 177.

⁶² Ibid 170.

⁶³ Ibid.

⁶⁴ Ibid 171.

⁶⁵ Ibid.

⁶⁶ Ibid 172.

⁶⁷ Ralf Michaels, 'Is Adjudicatory Jurisdiction a Category of Public International Law?' (*Opiniojuris*, 20 September 2018) <<http://opiniojuris.org/2018/09/20/is-adjudicatory-jurisdiction-a-category-of-public-international-law/>> accessed on 31 January 2025.

⁶⁸ Jochen Schröder, *Internationale Zuständigkeit: Entwurf eines Systems von Zuständigkeitsinteressen im zwischenstaatlichen Privatverfahrensrecht aufgrund rechtshistorischer, rechtsvergleichender und rechtspolitischer Betrachtungen* (Westdt. Verlag 1971) 766.

⁶⁹ Pierre Mayer's course *Le phénomène de la coordination des ordres juridiques étatiques en droit privé* is the third most cited – public or private course – by other Hague courses since the establishment of the courses (88 citations). Mann's *The doctrine of jurisdiction in international law* has 67 citations (Damien Charlotin and Michael Waibel, 'Between Eurocentrism and universality: computational insights from the Hague Academy's first century' *forthcoming*).

the decision is enforced in another state, this state through its law will decide whether to make it legally effective in its territory or not. Enforcement jurisdiction will again not be violated.⁷⁰ Mayer, however, does not properly consider the repercussions a foreign national may incur through the very exercise of civil court jurisdiction (see **Section 1** above) and the interests of the national's state to protect it. There is also no detailed analysis of state practice and *opinio juris*.

In 1987, the debate took another decisive turn. The Restatement Third of U.S. Foreign Relations Law (**'Restatement (Third)'**)⁷¹ agreed with Mann that CIL limits to civil court jurisdiction exist. The U.S. Restatements on the law are influential publications by the American Law Institute. While the Restatement Second of U.S. Foreign Relations Law (**'Restatement (Second)'**)⁷² had explicitly only addressed prescriptive and enforcement jurisdiction,⁷³ the Restatement (Third) added the category of adjudicative jurisdiction, covering

⁷⁰ Pierre Mayer, 'Droit international privé et droit international public sous l'angle de la compétence' (1979) *Revue Critique de Droit International Privé* 1, 349, 537, 552; similarly Paul David Mora, 'Universal Civil Jurisdiction and Forum Necessitatis: The Confusion of Public and Private International Law in *Naït-Liman v. Switzerland*' (2018) 65 *Netherlands International Law Review* 155, 163. In French doctrine, Pascal de Vareilles-Sommières took up the torch from Pierre Mayer and in 1997 came to a slightly different conclusion. According to him, CIL does not limit states in their choice of bases of civil jurisdiction as such. But no state must call into question the sovereignty and independence of another state by systematically intervening in all or part of its internal private law relations (Pascal de Vareilles-Sommières, *La compétence internationale de l'état en matière de droit privé: droit international public et droit international privé* (LGDJ 1997) 224, 283).

⁷¹ ALI, *Restatement of the Law, Third, The Foreign Relations Law of the United States* (American Law Institute Publishers 1987).

⁷² ALI, *Restatement of the Law, Second, Foreign Relations Law of the United States* (American Law Institute Publishers 1965). There is no 'first' U.S. Restatement on Foreign Relations Law. The Restatement on Foreign Relations Law (Second) derives its name from the fact that it was part of the second series of restatement efforts by the American Law Institute (Harold G Maier and others, 'The Restatement of Foreign Relations Law of the United States, Revised: How Were the Controversies Resolved? (Remarks by Harold G. Maier)' (1987) *Proceedings of the Annual Meeting* (American Society of International Law) 180).

⁷³ A possible interpretation is that the Restatement (Second) had nothing to say on adjudicative jurisdiction (William S. Dodge, Anthea Roberts and Stephan Paul, 'Jurisdiction to Adjudicate Under Customary International Law' (11 September 2018) <<http://opiniojuris.org/2018/09/11/33646/>>, accessed on 31 January 2025). A different interpretation is that the co-reporters of the Restatement (Second) conceptualized adjudicative jurisdiction as part of prescriptive or enforcement jurisdiction (Austen Parrish, 'Personal Jurisdiction: The Transnational Difference' (2019) 59 *Va J Int'l L* 97, 129; Austen Parrish, 'Adjudicatory Jurisdiction and Public International Law: The Fourth Restatement's New Approach' (2019) *The Restatement and Beyond: The Past, Present, and Future of the Foreign Relations Law of the United States* (31st Sokol Colloquium) 4). On a third – but contextually unconvincing – account, the Restatement (Second) implicitly contained a rule on adjudicative jurisdiction (Arthur Lenhoff, 'International Law and Rules on International Jurisdiction' 50 *Cornell LQ* 5, 7). § 19 (1) provides: 'Subject to the limitation of Subsection (2), a state has jurisdiction to prescribe a rule as to choice of the law governing the substantive adjudication or other determination of a claim asserted in its territory against a person, or with respect to a thing, located there, or another interest localized there, even though the state does not otherwise have a basis of jurisdiction to the conduct giving rise to the claim' (ALI, *Restatement of the Law, Second, Foreign Relations Law of the United States* (n 72) § 19, 57). What seems to be a rule of prescriptive jurisdiction for conflict of laws norms, is followed by commentary according to which 'a state may provide a forum for the settlement of claims even though they arise out of conduct not otherwise within its jurisdiction' (ibid) and '[t]here are at present no rules of international law specifically governing the jurisdiction of a state to prescribe rules for the adjudication or other determination of claims of private nature' (ibid 58). This has been viewed as evidence for the position of

both criminal and civil court jurisdiction.⁷⁴ The Restatement (Third) contended that CIL requires a reasonable basis for adjudicative jurisdiction as opposed to an exorbitant basis, and exhaustively listed the bases considered reasonable.⁷⁵ Notably, tag-jurisdiction, which U.S. courts still exercise today, is not listed among the reasonable bases⁷⁶ (nor are asset-based jurisdiction and plaintiff jurisdiction). These conclusions are based largely on the expertise of Oscar Schachter, who served as an adviser to the American Law Institute at the time.⁷⁷ In 1991, Andreas F. Lowenfeld, one of the co-reporters, confirmed and expanded on the Restatement (Third)'s position, however, adopting a less stringent conception of public international law as 'a set of standards to which States adhere or ought to adhere'.⁷⁸ Neither Schachter, the Restatement (Third) or Lowenfeld provided much evidence of *opinio juris*.

In 1993, rapporteur Maarten Bos of the Nineteenth Commission of the Institut de Droit International, working on extraterritoriality, concluded in his final report that adjudicative jurisdiction (not distinguishing between criminal and civil matters) is subject to international law. In his view 'jurisdiction extraterritorially to adjudicate exists whenever there is jurisdiction extraterritorially to prescribe, provided any requirements international law may impose upon the exercise of jurisdiction extraterritorially to adjudicate are being met'.⁷⁹ This is not an unreasonable position. However, it entirely leaves open the central issue. This is because the latter part of the sentence was a reference to the work of the Third Commission,⁸⁰ which never reached any conclusion on this point. The Institut de Droit International did not adopt Bos' report. In 1994, his successor rapporteur M. François Rigaux merely remarked that it cannot be

freedom of adjudicative jurisdiction in the Restatement (Second) (Lenhoff 7). Against the backdrop of provision § 19, which deals exclusively with choice of law, this view is questionable. To make contextual sense, the 'rules of international law specifically governing the jurisdiction of a state to prescribe rules for the adjudication or other determination of claims of private nature' must rather refer to questions of procedure and merits, presupposing the court's jurisdiction. To the contrary, § 19 might even be viewed to limit adjudicative jurisdiction by providing that the claim must be 'asserted in its territory against a person, or with respect to a thing, located there, or another interest localized there'. This might, however, also only restate U.S. domestic limitations at the time. This view is reinforced in ALI, *Restatement of the Law, Third, The Foreign Relations Law of the United States* (n 71) § 421, Reporters' Notes 11: 'The previous Restatement did not address jurisdiction to adjudicate'.

⁷⁴ ALI, *Restatement of the Law, Third, The Foreign Relations Law of the United States* (n 71) § 421.

⁷⁵ Ibid.

⁷⁶ Ibid § 421, Comment e.

⁷⁷ Louis Henkin, 'In Memory of Oscar Schachter' (2004) 104 Colum L Rev 554 FN 3; Schachter (n 8) 246 where he also voiced opposition against jurisdiction based on transitory presence and the location of assets (ibid 248).

⁷⁸ Lowenfeld (n 45) 81, 122.

⁷⁹ Institut de Droit International, 19th Committee, 'The Extraterritorial Jurisdiction of States' (Maarten Bos), 65 *Annuaire IDI*, Vol I (1993) 175; see on the work of the 19th Committee: August Reinisch, 'Extraterritorial Jurisdiction' in M. Kohen and I. van der Heijden (eds), *150 Years of Contributing to the Development of International Law – Justitia et Pace* (A. Pedone 2023) 509.

⁸⁰ Institut de Droit International, 19th Committee, 'The Extraterritorial Jurisdiction of States' (Maarten Bos), 65 *Annuaire IDI*, Vol I (1993) 181.

excluded that CIL limits private international law including civil court jurisdiction. Still, according to him state practice hardly reveals any cases in which states mutually accuse each other of violating international law in this area.⁸¹ While the latter is true (see **Chapter 2 Section 1.2** and **Chapter 6 Section 1**), this does not substitute a proper analysis of state practice and *opinio juris*.

In 1998, Joachim Bertele provided one of the most comprehensive treatments of the subject to date. In his view finding the correct answer for civil court jurisdiction, requires, even more than for other areas, an inquiry into the foundation of the law of jurisdiction.⁸² For Bertele, this foundation is the concept of sovereignty. On a structural level, he equates sovereignty with the factual freedom of states vis-à-vis each other ('strukturelle Souveränität'). According to Bertele, states limited this freedom by creating binding rules of public international law. However, where no such rules exist, states retain their factual freedom.⁸³ Some rules thus created concern the division of factual and legal power among states. Bertele refers to these rules as the rules of substantive sovereignty ('materielle Souveränität'), in particular the rules of jurisdiction.⁸⁴ He seeks to describe a general concept of substantive sovereignty, not just one for civil court jurisdiction. In doing so, Bertele rejects the strict territorial notion of sovereignty (that states may only regulate persons and activities on their territory) as not conforming to practice.⁸⁵ For the same reason he rejects a rule of strict personality (a state's sovereignty over its people wherever they are).⁸⁶ Bertele dismisses most past doctrines of jurisdiction as natural law arguments in disguise.⁸⁷ He finds that only the requirement of a close or genuine connection and the universality principle for certain crimes are consistent with state practice.⁸⁸ This general concept of substantive sovereignty is then applied to civil court jurisdiction. In addition, Bertele analyses the practice of Germany, the U.K., and the U.S. in terms of civil court jurisdiction specifically. He concludes that the genuine link requirement of general CIL renders certain

⁸¹ Institut de Droit International, 19th Committee, 'The Extraterritorial Jurisdiction of States' (Rapporteur: M. François Rigaux), 68 Annuaire IDI, Vol I (1999) 377: 'Une conclusion paraît claire : il ne paraît pas exclu que le droit international puisse limiter l'exercice des compétences étatiques dans les domaines classiques du droit international privé. Toutefois, la pratique étatique ne révèle guère d'hypothèse dans laquelle les Etats s'accusent mutuellement de violation du droit international en ces domaines'. On similar efforts by the International Law Association (ILA) see Omri Sander and Michael Wood, 'Extraterritorial jurisdiction and the limits of customary international law' in Austen Parrish and Cedric Ryngaert (eds), *Research Handbook on Extraterritoriality in International Law* (Edward Elgar Publishing 2023) 31, 36.

⁸² Bertele (n 21) 2.

⁸³ Ibid 61.

⁸⁴ Ibid 63.

⁸⁵ Ibid 66.

⁸⁶ Ibid 77.

⁸⁷ Ibid 142.

⁸⁸ Ibid 183, 192.

grounds of civil court jurisdiction (although not entirely the same as Mann had stated) potential violations of CIL. Still, at the same time, according to him, states do not protest these instances, which precludes their unlawfulness.⁸⁹ There are two main issues with this otherwise very thoughtful analysis: The first is the lack of geographical breadth regarding the analysed material. The second is the top-down application of alleged general rules of jurisdiction to civil court jurisdiction instead of separately establishing rules for the subject area through inductive analysis.

In 2006, the American Law Institute and UNIDROIT published the Principles of Transnational Civil Procedure which, as a matter of state practice, require that civil court jurisdiction is based on either consent of the parties or a substantial connection.⁹⁰ In 2008, the IBA Taskforce on Extraterritorial Jurisdiction analysed extraterritorial tort jurisdiction and concluded that ‘international law imposes certain limits on adjudicative jurisdiction in civil cases’.⁹¹ However, the taskforce could not reach consensus on the scope of these limits.⁹²

In 2014, Alex Mills pointed out that states are increasingly under the obligation to exercise jurisdiction and that in certain contexts CIL may grant jurisdictional rights directly to the individual.⁹³ In investment arbitrations investors can themselves invoke breaches of investment protections before arbitral tribunals, such as denial of justice.⁹⁴ Moreover, under international human rights law, access to justice may not be owed only to other states ‘in respect of individuals’, but also ‘to individuals’.⁹⁵ Mills suggests that this has consequences for CIL rules on civil court jurisdiction as well, e.g. in the context of jurisdiction agreements.⁹⁶

⁸⁹ Ibid 325.

⁹⁰ ALI / UNIDROIT Principles of Transnational Civil Procedure (2006) Principle 2.1.2. states that ‘[a] substantial connection exists when a significant part of the transaction or occurrence occurred in the forum state, when an individual defendant is a habitual resident of the forum state or a jurat entity has received its charter of organization or has its principal place of business therein, or when property to which the dispute relates is located in the forum state’. The 2006 ALI / UNIDROIT Principles of Transnational Civil Procedure are non-binding, but make it clear that the ‘standard of “substantial connection” has been generally accepted for international legal disputes’ (ibid, Comment P-2B) and is thus based on state practice.

⁹¹ IBA Legal Practice Division, Report of the Task Force on Extraterritorial Jurisdiction (2008) 124.

⁹² Ibid 127 et seqq.

⁹³ Alex Mills, ‘Rethinking Jurisdiction in International Law’ (2014) 84 British Yearbook of International Law 187, 209 et seqq; see also Alex Mills, ‘Conceptualising Party Autonomy in Private International Law’ (2019) 2 *Revue critique de droit international privé* 417.

⁹⁴ Mills, ‘Rethinking Jurisdiction in International Law’ (n 93) 217.

⁹⁵ Ibid 220.

⁹⁶ Ibid 230 et seqq; see also Mills, ‘Conceptualising Party Autonomy in Private International Law’ (n 93).

Overall, most scholars have taken the view that CIL restricts bases of civil court jurisdiction, however, without any extensive engagement with state practice and *opinio juris*.⁹⁷

⁹⁷ See e.g. Bowett (n 14) 4; Alfred Verdross and Bruno Simma, *Universelles Völkerrecht* (3 edn, Duncker & Humblot 1984) § 1186; Helmut Damian, *Staatenimmunität und Gerichtszwang: Grundlagen und Grenzen der völkerrechtlichen Freiheit fremder Staaten von inländischer Gerichtsbarkeit in Verfahren der Zwangsvollstreckung oder Anspruchssicherung* (Springer 1985) 63; Ena-Marlies Bajons, 'Zur Nationalität internationaler Schiedssachen' in *FS Kralik* (Manz 1986) 3, 11; Born (n 33) 18; Peter Gottwald, 'Grenzen Zivilgerichtlicher Maßnahmen mit Auslandswirkung' in *FS Habscheid* (Verlag Ernst und Werner Gieseking 1987) 119, 130; Delbrück Jost and Wolfrum Rüdiger, *Die Grundlagen. Die Völkerrechtssubjekte*, vol 12 (De Gruyter 1988) 323; Reinisch (n 19) 34; Russell J Weintraub, 'An Objective Basis for Rejecting Transient Jurisdiction' (1990) 22 Rutgers LJ 611, 615; Reinhold Geimer, 'Verfassung, Völkerrecht und Internationales Zivilverfahrensrecht' (1992) 5 ZfRV 321, 333; Oliver Remien, *Rechtsverwirklichung durch Zwangsgeld: Vergleich, Vereinheitlichung, Kollisionsrecht*, vol 54 (Mohr Siebeck 1992) 304; Campbell McLachlan, 'The Influence of International Law on Civil Jurisdiction' (1993) Hague YB Int'l L 125, 140: 'This does not mean that it is right to conclude, as Akehurst did, that "[apart from the well-known rules of immunity for foreign states ... , etc.] customary international law imposes no limits on the jurisdiction of municipal courts in civil trials." A claim to judicial jurisdiction is still, on one level, an exercise in state power.' (references omitted); Bertele (n 21) 325; Catherine Kessedjian, Preliminary Document No 7 of April 1997 for the attention of the Special Commission of June 1997 on the question of jurisdiction, and recognition and enforcement of foreign judgments in civil and commercial matters, p. 21, <<https://assets.hcch.net/docs/76852ce3-a967-42e4-94f5-24be4289d1e5.pdf>>, accessed on 31 January 2025; Vareilles-Sommières (n 70) 224, 283 does not agree that CIL limits states in their choice of bases of civil law jurisdiction as such, but, according to him, no state must call into question the sovereignty and independence of another state by systematically intervening in all or part of its internal private law relations; Markus Rau, 'Minimum Contacts' (2000) RIW 761, 772; Wendy Perdue, 'Aliens, the Internet, and Purposeful Availment: A Reassessment of Fifth Amendment Limits on Personal Jurisdiction' (2003) 98 Nw UL Rev 455 (in favour of lenient limits); Sabine Kofmel Ehrenzeller, *Der vorläufige Rechtsschutz im internationalen Verhältnis: Grundlagen*, vol 39 (Mohr Siebeck 2005) 315; Rolf A. Schütze, *Deutsches Internationales Zivilprozessrecht unter Einschluss des Europäischen Zivilprozessrechts* (2 edn, De Gruyter 2005) mn 113; Vaughan Lowe, 'Expert Opinion on International Law Issues, Professor Alan Vaughan Lowe, in re: Yukos Oil Company, Case No. 04-47742-H3-11' 2 Transnational Dispute Management (TDM) 11) – on the case see Giuditta Cordero Moss, 'Between private and public international law: exorbitant jurisdiction as illustrated by the Yukos case' (2007) 32 Review of Central and East European Law 1; at least for human rights claims and regulatory (antitrust) litigation Cedric Ryngaert, 'Universal tort jurisdiction over gross human rights violations' (2007) 38 Netherlands Yearbook of International Law 3; Alfred Escher and Götz Reichert, 'Die subsidiäre Zuständigkeit des Kammergerichts Berlin nach § 1062 Abs. 2 a.E. ZPO: Globale Allzuständigkeit oder minimaler Inlandsbezug?', in Jörg Risse, Guenter Pickrahn, et al. (eds), *SchiedsVZ | German Arbitration Journal* 5/2 (2007) 73; Michael Weber, *Europäisches Zivilprozessrecht und Demokratieprinzip: internationale Zuständigkeit und gegenseitige Anerkennung im Gerichtssystem der Europäischen Union und der USA*, vol 61 (Mohr Siebeck 2009) 55; tentatively Bruno Simma and Andreas Th. Müller, 'Exercise and Limits of Jurisdiction' in James Crawford and Martti Koskeniemi (eds), *The Cambridge Companion to International Law* (Cambridge University Press 2012) 149; Mills, 'Rethinking Jurisdiction in International Law' (n 93) 201; August Reinisch, 'Jurisdiction: Grenzen der Staatsgewalt und Verfahrensgerechtigkeit bei internationalen Prozessen' in *Vienna Law Inauguration Lectures – Antrittsvorlesungen an der Rechtswissenschaftlichen Fakultät der Universität Wien*, vol 3 (Manz 2014) 97, 115; in principle supportive, yet highly critical of any meaningful limits: Reinhold Geimer, *Internationales Zivilprozessrecht*, vol 7 (Verlag Dr. Otto Schmidt KG 2015) mn 127-128b, 377-378a; Ryngaert, *Jurisdiction in International Law* (n 15) 10; Gary Born and Peter Rutledge, *International Civil Litigation in United States Courts* (Wolters Kluwer Law & Business 2018) 97; Duncan French and Veronica Ruiz Abou-Nigm, 'Jurisdiction: betwixt unilateralism and global coordination' in Kasey McCall-Smith, Veronica Ruiz Abou-Nigm and Duncan French (eds), *Linkages and Boundaries in Private and Public International Law* (2018) 75; Alex Mills, 'Connecting Public and Private International Law' in Kasey McCall-Smith, Veronica Ruiz Abou-Nigm and Duncan French (eds), *Linkages and Boundaries in Private and Public International Law* (2018) 13, 21; Parrish, 'Personal Jurisdiction: The Transnational Difference' (n 73); Parrish, 'Adjudicatory Jurisdiction and Public International Law: The Fourth Restatement's New Approach' (n 73); Alex Mills, 'Private Interests and Private Law Regulation in Public International Law Jurisdiction' in Stephen Allen and others (eds), *The Oxford Handbook of Jurisdiction in International Law* (Oxford University Press 2019) 330 FN 29; Michaels (n 67); Lucas Roorda and Cedric Ryngaert, 'Public International Law Constraints on the Exercise of Adjudicatory Jurisdiction in Civil Matters' in Serena Forlati and Pietro Franzina (eds), *Universal Civil Jurisdiction* (Brill Nijhoff 2020) 74, 81 et seqq; Reinhard Patzina, '§ 12 ZPO: Internationale Zuständigkeit' in Wolfgang Krüger and Thomas Rauscher (eds), *Münchener*

However, scholars also have recently reached the opposite conclusion. This view has been held in particular by scholars focusing on private international law, but public international law scholars have also adopted this view.⁹⁸ In the most recent Restatement of the Law, Fourth, the Foreign Relations Law of the United States (**'Restatement (Fourth)'**), the co-reporters Anthea Robers, William S. Dodge and Paul B. Stephan contend – in unmistakable homage to Akehurst – that '[w]ith the significant exception of various forms of immunity, however, modern customary international law generally does not impose limits to jurisdiction to adjudicate'.⁹⁹ This in turn has reignited the debate.¹⁰⁰

Kommentar zur ZPO (6 edn, 2020) mn 57; August Reinisch and others, 'IV. Abschnitt: Die Völkerrechtssubjekte 1. Kapitel: Die Staaten' in August Reinisch (ed), *Österreichisches Handbuch des Völkerrechts Band I - Textteil* (6 edn, Manz Wien 2021) mn 718; Cedric Ryngaert, 'The Restatement and the Law of Jurisdiction: A Commentary' (2021) 32 *European Journal of International Law* 1455, 1466 et seqq; Alex Mills, 'Exorbitant Jurisdiction and the Common Law' in Jonathan Harris and Campbell McLachlan (eds), *Essays in International Litigation for Lord Collins* (Oxford University Press 2022) 243, 262; Alexander Orakhelashvili, *Akehurst's Modern Introduction to International Law* (Oxford University Press 2022) 231; Cedric Ryngaert, 'International jurisdictional law' in Austen Parrish and Cedric Ryngaert (eds), *Research Handbook on Extraterritoriality in International Law* (Edward Elgar Publishing 2023) 13, 29.

⁹⁸ See Arthur Lenhoff's article of 1964, in which he concluded, based on his (mis)reading of the first draft of the Restatement (Second), that there 'no rules of international law specifically governing the jurisdiction of a state to prescribe rules for the adjudication or other determination of claims of a private nature' (Lenhoff (n 73) 7); at least sceptical Robert Yewdall Jennings, 'General Course on Principles of International Law' (1967) 121 *Recueil des Cours* 324, 515: 'Questions of jurisdiction arise in all kinds of cases, both civil and criminal; but the kind of case where questions of public international law, in contrast to private international law, usually arise, is the kind that involves either criminal law, or some offence, not perhaps technically criminal but where the essence of the offence is a breach of general public law, and not only, though it may also be, a delict giving rise to claims to reparation between private persons. The essence of the matter is an attempted enforcement through municipal courts of a State's peculiar standards or requirements of public order, which contains the elements of a conflict with another State's standards or requirements of public order.'; Franz Matscher, 'Zur Funktion und Tragweite der Bestimmung des § 28 JN' in *Festschrift Schwind* (Manz 1978) 185, 186; Robert Seber, 'Der Umfang der österreichischen inländischen Gerichtsbarkeit für Klagen im gewerblichen Rechtsschutz und Urheberrecht' (1983) 24 *ZfRV* 270, 271; Walter H Rechberger, 'Gibt es eine „internationale Zuständigkeit“ der österreichischen Gerichte?' in *FS Nagel* (Aschendorff 1987) 295, 312; Franz Matscher, 'Die Indikationentheorie an der Schwelle der Integration des österreichischen in das europäische Zivilprozeßrecht' (1996) *JB* 277, 279; Haimo Schack, 'Internationale Zuständigkeit und Inlandsbezug' in *FS Nakamura* (De Gruyter 1996) 492, 506; for Kevin M. Clermont and John Palmer exorbitant civil jurisdiction meant condemning a particular basis of ICA-Jurisdiction as internationally inappropriate. However, they did not consider it a matter of public international law (Clermont and Palmer, 'Exorbitant jurisdiction' (n 6) 475); Moss (n 97) 9; Franz Matscher, 'Vor Art IX EGJN: Allgemeines zur (inländischen) Gerichtsbarkeit' in Fasching/Konecny (ed), *Kommentar zu den Zivilprozessgesetzen* (3 edn, Manz 2013) mn 5; sceptical of meaningful limits Donald Earl Childress III, 'Jurisdiction, Limits Under International Law' in Jürgen Basedow and others (eds), *Encyclopedia of private international law* (Edward Elgar Publishing 2017); see also Schröder (n 68) 766, who remarked that CIL limits lie somewhere in the mist of practical uselessness.

⁹⁹ ALI, *Restatement of the Law, Fourth, the Foreign Relations Law of the United States: Selected Topics in Treaties, Jurisdiction, and Sovereign Immunity* : §§ 301-313; 401-464; 481-490, *Tables and Index* (American Law Institute Publishers 2018) § 422, Reporter's Notes 1; see also Dodge (n 21) 143, 158; William S Dodge and Scott Dodson, 'Personal Jurisdiction and Aliens' 116 *Mich L Rev* 1205, 1234.

¹⁰⁰ William S. Dodge, 'United States v. Microsoft: Why the Government Should Win the Statutory Interpretation Argument' (*justsecurity*, 19 February 2018) <<https://www.justsecurity.org/52681/united-states-v-microsoft-government-win-statutory-interpretation-argument-2/>> , accessed on 31 January 2025; Austen Parrish, 'U.S. v. Microsoft (Microsoft-Ireland): Implications for International Lawmaking' (*opiniojuris*, 26 February 2018) <<http://opiniojuris.org/2018/02/26/u-s-v-microsoft-microsoft-ireland-implications-for-international-lawmaking/>> , accessed on 31 January 2025; William S. Dodge, 'The Customary International Law of Jurisdiction in the Restatement (Fourth) of Foreign Relations Law' (8 March 2018) <<https://opiniojuris.org/2018/03/08/the->

Perhaps due to this stalemate scholars at least since Mann have sought to derive answers from concepts of public international law by way of deduction. One strand of reasoning conceives civil court jurisdiction as just another emanation of the state's power to prescribe and concludes that it should the same or similar rules should thus govern it.¹⁰¹

The view is perhaps best summarised in Mann's reaffirmation of his 1964 position. Based on a review of the developments of the previous 20 years, he concludes that '[t]he international jurisdiction to adjudicate is, as has been pointed out, not a separate type of jurisdiction, but merely an emanation of the international jurisdiction to legislate: a State's right of regulation is

customary-international-law-of-jurisdiction-in-the-restatement-fourth-of-foreign-relations-law/> , accessed on 31 January 2025; Austen Parrish, 'Remaking International Law? Personal Jurisdiction and the Fourth Restatement of the Foreign Relations Law' (*opiniojuris*, 6 September 2018) <<http://opiniojuris.org/2018/09/06/remaking-international-law-personal-jurisdiction-and-the-fourth-restatement-of-the-foreign-relations-law/>> , accessed on 31 January 2025; Dodge, Roberts and Paul (n 73); Parrish, 'Personal Jurisdiction: The Transnational Difference' (n 73); Parrish, 'Adjudicatory Jurisdiction and Public International Law: The Fourth Restatement's New Approach' (n 73); Mills, 'Private Interests and Private Law Regulation in Public International Law Jurisdiction' (n 97); Michaels (n 67); Roorda and Ryngaert (n 97); Fabrizio Marongiu Buonaiuti, 'Limitations to the Exercise of Civil Jurisdiction in Areas Other Than Reparation for International Crimes' in Serena Forlati and Pietro Franzina (eds), *Universal Civil Jurisdiction* (Brill Nijhoff 2020) 120; Ryngaert, 'The Restatement and the Law of Jurisdiction: A Commentary' (n 97) 1466 et seqq; Sophie Ryan, 'Fundamental Legal Conceptions and the International Law of (Civil) Jurisdiction' (2024) 42 *The Australian Year Book of International Law Online* 130.

¹⁰¹ In 1964, Mann wrote: 'The jurisdiction of the courts in civil matters is an aspect of the activity of States, which is more effectively determined and circumscribed by international rules of jurisdiction than many observers recognise or admit. A judgment, viz. a command conveyed through the courts, is not essentially different from a command expressed by legislative or administrative action. It cannot claim international validity except if and in so far as it keeps within the limits which public international law imposes' (Mann, 'The Doctrine of Jurisdiction in International Law' (n 19) 73). For the 1984 reaffirmation see Mann, 'The Doctrine of International Jurisdiction Revisited after Twenty Years' (n 41) 67; see also Bowett (n 14) 4; Sir Ian Brownlie states in the 2nd edition of his textbook on public international law that 'there is in principle no great difference between the problems created by assertion of civil and criminal jurisdiction over aliens' (Ian Brownlie, *Brownlie's Principles of Public International Law* (2nd edn, Oxford University Press 1973) 262. In the 9th edition James Crawford juxtaposes this view with the competing view that there are no CIL limitations on civil court jurisdiction (Crawford, *Brownlie's Principles of Public International Law* (n 4) 455); Similarly, Orakhelashvili 231: 'There is no feasible difference, in terms of general public international law, in terms of the assentation by States of civil and criminal jurisdiction; where a State has criminal jurisdiction over a particular act, it has civil jurisdiction over it as well; whether it is being exercised in practice does not prejudice the issue of whether it exists and could be exercised'; Alex Mills writes that 'there is little in practice or policy to support the idea that an assertion of jurisdiction or governing law in civil proceedings is anything other than an exercise of state regulatory power which falls to be restricted by public international rules on jurisdiction. The application of private law, no less than public law, constrains and compels individual behaviour in pursuit of national policy interests, and is ultimately backed up by the coercive power of the state.' (Mills, 'Rethinking Jurisdiction in International Law' (n 93) 201; see also Mills, 'Connecting Public and Private International Law' (n 97) 13, 21); Ralf Michaels argues that the distinction between adjudicative and prescriptive jurisdiction is questionable and that the 'question of categorization matters for the proper assessment of state practice' (Michaels (n 67)); see also Parrish, 'Remaking International Law? Personal Jurisdiction and the Fourth Restatement of the Foreign Relations Law' (n 73); Parrish, 'Personal Jurisdiction: The Transnational Difference' (n 73) 132; Roorda and Ryngaert (n 97) 74, 82 argue that civil court jurisdiction is just another emanation of state authority, just like criminal law jurisdiction (82). However, in practice the rules of civil court jurisdiction remain within these rules of public international law (95).

exercised by legislative jurisdiction which includes adjudication'.¹⁰² In 1983, Derek Bowett while siding with Mann, introduced a novel distinction. CIL would limit civil court jurisdiction pursuant to the same rules as criminal law where it is 'an instrument of State policy, used as a means of exercising control over activities or resources in the interests of the State'.¹⁰³ Akehurst opposed these conclusions as in his opinion 'limitations in criminal cases cannot be cited as authority for the existence of like limitations in civil cases'.¹⁰⁴ He saw nothing that could justify transferring rules from one area of public international law to another quite distinct area. Akehurst was right to oppose these views. As has been pointed out in **Section 2** above, there is no reason why even just two areas of prescriptive jurisdiction must follow the same rules.

A second strand of reasoning seeks to derive answers from first principles of public international law. Derek Bowett analysed the relevance of the principles of equality of states, non-intervention and territorial integrity for establishing CIL limits to civil court jurisdiction.¹⁰⁵ He highlighted non-intervention as the most fundamental principle in this context. Still, he cautioned that the 'very breadth and vagueness of the principle means that its application to a specific problem will require a good deal of judgment and subjective interpretation'.¹⁰⁶ Similarly, Andrew L. Strauss contended that the 'personal jurisdictional realm of states is [...] conceptually synonymous [*sic*] with defining the state and its corresponding powers'.¹⁰⁷ Strauss concluded that if one accepts that the state is defined by public international law, one must also accept that public international law governs the state's personal jurisdiction, including civil court jurisdiction, leaving open, however, what these rules are.¹⁰⁸ Rudolf Dolzer argued that it follows from the rules of territoriality, equality of states and non-intervention that extraterritorial conduct violates CIL unless it can be generalized for all states without creating the kind of conflict that those rules seek to avoid.¹⁰⁹ In case of doubt, extraterritorial rules are

¹⁰² Mann, 'The Doctrine of International Jurisdiction Revisited after Twenty Years' (n 41) 67; see also Mills, 'Rethinking Jurisdiction in International Law' (n 93) 201; Mills, 'Connecting Public and Private International Law' (n 97) 21; Roorda and Ryngaert (n 97) 74, 82.

¹⁰³ Bowett (n 14) 4: 'The argument made here, which is believed to be consistent with Mann's approach, is that where the civil jurisdiction of the State is an instrument of State policy, used as a means of exercising control over activities or resources in the interests of the State, then in principle such jurisdiction ought to be subject to the same governing rules of international law. This would not affect areas of civil jurisdiction concerned solely with the enforcement of private rights. These areas would remain very much within the discretion of the State asserting jurisdiction, largely free of the control of rules of public international law and without protest from foreign States'.

¹⁰⁴ Akehurst (n 42) 170.

¹⁰⁵ Bowett (n 14) 15.

¹⁰⁶ Ibid 17.

¹⁰⁷ Andrew L. Strauss, 'Beyond National Law: The Neglected Role of the International Law of Personal Jurisdiction in Domestic Courts' (1995) 36 Harv Int'l LJ 373, 405.

¹⁰⁸ Ibid 405.

¹⁰⁹ Rudolf Dolzer, 'Extraterritoriale Anwendung von nationalem Recht aus der Sicht des Völkerrechts' (2003) Bitburger Gespräche Jahrbuch 71, 82.

therefore to be interpreted restrictively. If a state exceeds the jurisdictional boundaries which the community of states has accepted in the past, discernible approval by the majority of states is necessary for that practice to become legal.¹¹⁰ He concluded that exorbitant grounds of civil court jurisdiction violate CIL since the majority of states has not approved them.¹¹¹ Gary Born and Peter Rutledge argue that the concept of sovereignty itself provides the answer. They contend that ‘detailed evidence of state practice’ is not necessary given that ‘the long-established jurisdictional limits rest on fundamental principles of national sovereignty’.¹¹² This aligns with Mills¹¹³ and Austen Parrish,¹¹⁴ who consider that the Restatement (Fourth) operates on the outdated assumption that exercising jurisdiction is permitted unless a specific prohibitive rule can be identified. They consider that exercising civil court jurisdiction must rest on accepted permissive rules, rather than be based on the outdated *Lotus* principle. Based on this they conclude that absent any specific permissive rule, CIL must prohibit the exercise of civil court jurisdiction.

Two points need to be distinguished. First, Akehurst was right to be sceptical of derivations from first-order concepts such as sovereignty as they can vary significantly depending on the stance taken.¹¹⁵ Still, deduction can serve as a vital aid in the analysis of jurisdictional rules (see **Chapter 2 Section 2** and **Chapter 7**). Second, and distinctly, there is the methodological question whether CIL must grant jurisdiction or whether the absence of a prohibited rule is sufficient (see further **Chapter 3 Section 6** and **Chapter 7**).

¹¹⁰ Ibid 84.

¹¹¹ Ibid 85.

¹¹² Born and Rutledge (n 97) 101.

¹¹³ Mills, ‘Private Interests and Private Law Regulation in Public International Law Jurisdiction’ (n 97) 330, FN 29.

¹¹⁴ Parrish, ‘Remaking International Law? Personal Jurisdiction and the Fourth Restatement of the Foreign Relations Law’ (n 73); Parrish, ‘Personal Jurisdiction: The Transnational Difference’ (n 73) 134.

¹¹⁵ Akehurst (n 42) 176.

4. Motivations, Research Question, Limitations and Outlook

Motivations:

Three aspects are striking when considering the collection of Western scholarly opinion on the subject. First, virtually all examples of state practice are from the U.S. and Europe, predominantly from Germany and the U.K. There is no truly representative empirical study. Second, the proponents of CIL limits offer little (or no) analysis of concrete examples of *opinio juris*. Third, they do not define the proper role for deductive arguments. Revisiting the research question whether CIL restricts states in their choice of bases of international civil court jurisdiction with an emphasis on the three aspects mentioned, this thesis intends to contribute to clarifying an area of the law too important to be left ambiguous.

Against this backdrop, this dissertation will address the following research question:

‘Does CIL restrict states in their choice of bases of international civil court jurisdiction (specifically ICA-Jurisdiction – see Limitation 1) and, if so, what are these limits?’

Limitation 1

CIL rules on civil adjudicative jurisdiction may restrict states in their choice of bases of civil court jurisdiction in various types of proceedings. This doctoral thesis is interested in only a subset of these that concern plain-vanilla private law matters. It is intentional that these matters have no apparent linkages to areas of public interest, as this is meant to bring clarity to an area of the law that is mostly considered the sole domain of private international law. The selection also eschews specialized legal regimes as different rules may apply there. The following matters are therefore excluded: family law, the law of succession, status matters, trusts, maritime and naval carriage law, IP law, securities law, consumer protection and labour law, insurance protection law, antitrust law, (art) restitution proceedings, proceedings against the state, non-contentious proceedings, provisional measures, arbitration-related proceedings, enforcement, bankruptcy law and civil proceedings based on a criminal offense including anti-terrorism and anti-money-laundering laws, military jurisdiction and other specialised jurisdictional regimes as they may exist. Due to the focus on positive bases of jurisdiction, the

issues of *lis pendens* and *res judicata* and whether a court must decline its jurisdiction due to an exclusive jurisdiction agreement in favour of a foreign court are not covered.

The analysis is limited to rules on civil court jurisdiction in international proceedings, hereinafter defined as proceedings against non-national defendants as this arguably is ‘the best indicator that jurisdictional interests might exist beyond those of the state asserting jurisdiction and those of its citizens’.¹¹⁶ Proceedings against nationals (also if domiciled outside the state in question) are excluded as these instances regularly do not pose a concern for public international law.¹¹⁷ Nationality will be regulated by the respective domestic laws of the forum state (bar instances in which public international law might dictate otherwise) and here refers to both natural and juridical persons.

Traditionally, the common law distinguishes between jurisdiction over persons (natural or juridical), referred to as jurisdiction *in personam*, and jurisdiction over things, which is referred to as jurisdiction *in rem*. This distinction is unknown to most if not all civil law jurisdictions. Depending on the type of jurisdiction the effects of the resulting judgment will differ: ‘A judgment *in personam* imposes a personal liability or obligation on one person in favor of another. A judgment *in rem* affects the interests of all persons in designated property.’¹¹⁸ This doctoral thesis only concerns proceedings against natural or juridical persons as defendants, regardless of whose interests are affected and who is bound by the resulting judicial decision.

The private international law rules of each state thus defined, whether they are created through legislation or judicial decisions, will be referred to as the rules of **ICA-Jurisdiction** (international civil adjudicative jurisdiction).

Limitation 2

This doctoral thesis explores inter-state obligations under CIL. A potential ‘sovereignty of the individual’ in the context of civil court jurisdiction, an intriguing possibility, is therefore beyond its scope.

¹¹⁶ Strauss (n 107) 374 FN 6.

¹¹⁷ Ibid.

¹¹⁸ *Hanson v. Denckla*, 357 U.S. 235 (1958) 246, FN 12; Von Mehren and Gottschalk (n 35) 22; Schröder (n 68) 362.

Outlook

This doctoral thesis comes to the following conclusion:

The exorbitant bases of ICA-Jurisdiction as they exist today do not violate CIL. There is no prohibitive rule against them, instead they conform to a permissive rule. A sample of 75 legal systems shows that exorbitant bases of ICA-Jurisdiction are pervasive in state practice. Moreover, there is no evidence of opposing *opinio juris*. Nevertheless, CIL foresees limits to ICA-Jurisdiction. The extant exorbitant bases remain within these limits. All ICA-Jurisdiction must be exercised based on a rule of a sufficiently close connection, i.e. one that is non-arbitrary and otherwise in good faith, between the parties and/or the subject matter of the lawsuit on the one side and at least one constitutive element of the state exercising ICA-Jurisdiction (population, territory, government) on the other side.

The next Chapter will address the methodology.

Chapter 2

Methodology

‘There are a number of examples of authors and municipal courts using a priori arguments to support alleged limitations on a State’s jurisdiction in civil cases-limitations which are contradicted by the actual practice of States.’¹¹⁹

(Michael Akehurst, 1973)

1. An Inductive Analysis of State Practice and *Opinio Juris*

Article 38 (1) (b) of the ICJ Statute lists ‘international custom, as evidence of a general practice accepted as law’ as one of the ICJ’s sources of law. Already the PCIJ Statute contained an identical provision,¹²⁰ which was modelled after the practice of arbitral tribunals applying public international law.¹²¹ It is generally accepted that Article 38 (1) (b) reflects not only a source of law for the ICJ, but a source of public international law generally.¹²²

The research question will be addressed through analysis of ‘empirical evidence of a general practice and its acceptance as law’,¹²³ following the methodology identified in the 2018 ILC Draft Conclusions on the Identification of Customary International Law (**‘ILC Draft Conclusions on CIL’**), henceforth referred to as the inductive approach.¹²⁴ The inductive

¹¹⁹ Akehurst (n 42).

¹²⁰ The entirety of Article 38 is identical, but for the addition ‘whose function is to decide in accordance with international law such disputes as are submitted to it’. This addition is meant to emphasize that, by applying the sources of law in sub-paragraphs (a) to (d), the ICJ applies public international law (Anthea Roberts and Sandesh Sivakumaran, ‘The Theory and Reality of the Sources of International Law’ in Malcolm D. Evans (ed), *International Law* (5 edn, Oxford University Press 2018) 94.

¹²¹ Crawford, *Brownlie’s Principles of Public International Law* (n 4) 20.

¹²² Ibid.

¹²³ ILC, ‘Draft conclusions on identification of customary international law, with commentaries’ (30 April–1 June and 2 July–10 August 2018) UN Doc A/73/10, 121, 126.

¹²⁴ ILC Draft Conclusions on CIL; on the inductive-deductive debate see Section 2 below and in particular Peter Tomka, ‘Custom and the International Court of Justice’ (2013) 12 *The Law & Practice of International Courts and Tribunals* 195, 215; Stefan Talmon, ‘Determining Customary International Law: the ICJ’s Methodology Between Induction, Deduction and Assertion’ (2015) 26 *European Journal of International Law* 417; Stefan Talmon, ‘Determining Customary International Law: The ICJ’s Methodology between Induction, Deduction and Assertion’ (*EJIL:Talk!*, 27 November 2015) <<https://www.ejiltalk.org/determining-customary-international-law-the-icjs-methodology-between-induction-deduction-and-assertion/>> , accessed on 31 January 2025; Omri Sander and Michael Wood, ‘The International Court of Justice and Customary International Law: A Reply to Stefan Talmon’ (*EJIL:Talk!*, 30 November 2015) <<https://www.ejiltalk.org/the-international-court-of-justice-and-customary-international-law-a-reply-to-stefan-talmon/>> , accessed on 31 January 2025; Harlan G. Cohen, ‘Methodology and Misdirection: Custom and the ICJ’ (*EJIL:Talk!*, 1 December 2015) <<https://www.ejiltalk.org/methodology-and-misdirection-custom-and-the-icj/>> .

approach is strongly rooted in the tradition of Georg Schwarzenberger¹²⁵ and others: ‘[O]ne must look at what States actually do and seek to determine whether they recognize an obligation or a right to act in that way’ as this ‘serves to ensure that the exercise of identifying rules of customary international law results in determining only such rules as actually exist’.¹²⁶ The ILC adopted the ILC Draft Conclusions on CIL and the General Assembly of the United Nations acknowledged them in Resolution 73/203 of 20 December 2018.¹²⁷ These actions taken together with the thoroughness and inclusiveness of the process of the ILC make the ILC Draft Conclusions on CIL arguably the most authoritative statement on the subject to date.¹²⁸ However, not everybody agrees with the ILC’s conclusions¹²⁹ and debate on CIL continues.¹³⁰

misdirection-a-response-to-stefan-talmon-on-custom-and-the-icj/>, accessed on 31 January 2025; Fernando Lusa Bordin, ‘Induction, Assertion and the Limits of the Existing Methodologies to Identify Customary International Law’ (*EJIL:Talk!*, 2 December 2015) <<https://www.ejiltalk.org/induction-assertion-and-the-limits-of-the-existing-methodologies-to-identify-customary-international-law/>>, accessed on 31 January 2025; Stefan Talmon, ‘Determining Customary International Law: The ICJ’s Methodology and the Idyllic World of the ILC’ (*EJIL:Talk!*, 3 December 2015) <<https://www.ejiltalk.org/determining-customary-international-law-the-icjs-methodology-and-the-idyllic-world-of-the-ilc/>>, accessed on 31 January 2025.

¹²⁵ Georg Schwarzenberger, *The inductive approach to international law* (Stevens 1965).

¹²⁶ ILC Draft Conclusions on CIL 125.

¹²⁷ See for the overview of the procedure: <https://legal.un.org/ilc/guide/1_13.shtml>, accessed on 31 January 2025.

¹²⁸ On the authoritativeness of ILC texts and instruments see the statement by the former president of the ICJ Peter Tomka that ‘[...] the codifications produced by the International Law Commission have proven most valuable, primarily due to the thoroughness of the procedures utilized by the ILC. Its texts and instruments are produced at a pedantic pace, entailing numerous reports of one or more (successive) Special Rapporteurs, discussions among ILC members in plenary session, debates over precise wording in the drafting committee, as well as dialogue with States in the Sixth Committee and the submission of States’ written comments and observations prior to the final adoption of a text. [...] Throughout this process, the topics under consideration also attract the attention of scholars and practitioners, who also voice their opinions. Such procedures provide for a much more comprehensive examination of a rule of customary law than is possible by the Court in the context of a judicial proceeding.’ (references omitted) (Tomka (n 124) 202); see also Ian Sinclair, *The International Law Commission* (Grotius Publications 1987); Danae Azaria, ‘Codification by Interpretation’: The International Law Commission as an Interpreter of International Law’ (2020) 31 *European Journal of International Law* 171; Omri Sender, *International Law-Making by the International Court of Justice and International Law Commission: Partnership for Purpose in a Decentralized Legal Order* (Cambridge University Press 2024).

¹²⁹ E.g., Jean d’Aspremont, *International Law as a Belief System* (Cambridge University Press 2018) 87 et seqq; Jean d’Aspremont, ‘The Four Lives of Customary International Law’ (2019) 21 *International Community Law Review* 229; Jörg Kammerhofer, ‘Between Pragmatism and Disenchantment: The Theory of Customary International Law after the ILC Project’ in Panos Merkouris, Jörg Kammerhofer and Noora Arajärvi (eds), *The Theory, Practice and Interpretation of Customary International Law* (Cambridge University Press 2022) 1.

¹³⁰ E.g. Kammerhofer (n 129) 1; Jean d’Aspremont, ‘The Custom-Making Moment in Customary International Law’ in Panos Merkouris, Jörg Kammerhofer and Noora Arajärvi (eds), *The Theory, Practice and Interpretation of Customary International Law* (Cambridge University Press 2022) 29; Noora Arajärvi, ‘Misinterpreting Customary International Law’ in *ibid* 40; Anna Irene Baka, ‘The Logic of Absence in Customary International Law’ in *ibid* 62; Markus P Beham, ‘Schrödinger’s Custom’ in *ibid* 87; Panos Merkouris, ‘Interpreting Customary International Law’ in *ibid* 347; Kostiantyn Gorobets, ‘Practical Reasoning and Interpretation of Customary International Law’ in *ibid* 370; Marina Fortuna, ‘Different Strings of the Same Harp’ in *ibid* 393; Riccardo Di Marco, ‘Customary International Law - Identification versus Interpretation’ in *ibid* 414; John R. Morss and Emily Forbes, ‘“And in the Darkness Bind Them” Hand-Waving, Bootstrapping, and the Interpretation of Customary International Law after Chagos’ in *ibid* 432; Cedric Ryngaert, ‘Customary International Law Interpretation - The Role of Domestic Courts’ in *ibid* 481.

1.1. State Practice

Public international law requires state practice to be general, ‘meaning that it must be sufficiently widespread and representative, as well as consistent’.¹³¹

The Annex to this doctoral thesis lists the internationally accepted, semi-exorbitant and exorbitant rules on ICA-Jurisdiction in 75 legal systems. This is further explained in **Chapter 5**. The information on the domestic rules on ICA-Jurisdiction is sourced from three different encyclopaedias, the *Encyclopedia of Private International Law*,¹³² the *International Encyclopaedia for Civil Procedure Law*¹³³ and the *Encyclopaedia of International Commercial Litigation*,¹³⁴ as well as legislative texts and further academic literature where available. The general cut-off date is March 2023, unless otherwise indicated.

For this purpose, it was necessary to carefully extract the required information from the encyclopaedic entries (which are not limited to exorbitant bases of ICA-Jurisdiction but discuss them alongside other bases of civil court jurisdiction and other private international law matters), cross-check the information for accuracy (as far as possible) and compile the information in tabular form. This procedure allowed to make transparent information otherwise buried within the encyclopaedias, namely the surprising extent to which exorbitant bases of ICA-Jurisdiction are accepted across the world. To the best of the author’s knowledge this is the most comprehensive and up-to-date table on exorbitant bases of ICA-Jurisdiction yet.

The existence of exorbitant bases of ICA-Jurisdiction as such is inconclusive as to their use in practice. However, there is evidence of such use in several cases, which is documented in **Chapter 5 Section 3**.

¹³¹ ILC Draft Conclusions on CIL Conclusion 8.

¹³² Jürgen Basedow and others, *Encyclopedia of Private International Law* (Edward Elgar Publishing 2017).

¹³³ Piet Taelman (ed) *International Encyclopaedia of Laws: Civil Procedure* (Wolters Kluwer) (each entry with individual dates).

¹³⁴ Anthony Colman and Simon Bryan (eds), *Encyclopaedia of International Commercial Litigation* (Wolters Kluwer) (each entry with individual dates).

In the Annex the different types of ICA-Jurisdiction are accorded the following labels:

Exorbitant bases of ICA-Jurisdiction

AL: 'Applicable Law' – The law governing the cause of action is sufficient to confer ICA-Jurisdiction to the courts of the corresponding state;

TP: 'Transitory Presence' – The transitory presence of the defendant at a defined time (most commonly the time of service) is sufficient to confer ICA-Jurisdiction on the courts of the corresponding state for any claim;

P: 'Plaintiff Jurisdiction' – The domicile/habitual residence/nationality of the plaintiff is sufficient to confer ICA-Jurisdiction on the courts of the corresponding state for any claim;

A: 'Assets' – The location of assets (mobile or immobile) of the defendant is sufficient to confer ICA-Jurisdiction on the courts of the corresponding state for any claim;

DB: 'Doing Business' – That the defendant is doing business in a state without being established there (formally or factually) is sufficient to confer ICA-Jurisdiction on the courts of the corresponding state for any claim. This includes a branch office, subsidiary and the mere selling of products;

Semi-Exorbitant bases of ICA-Jurisdiction

R: 'Reciprocity' – That the state of the defendant's nationality/domicile/habitual residence assumes ICA-Jurisdiction under these circumstances confers ICA-Jurisdiction;

N: 'Necessity' – That the defendant cannot access any other court or cannot be expected to do so is sufficient to confer ICA-Jurisdiction (with slight variations);

TP+: 'Transitory Presence' plus an additional connecting factor not of the 'Common'-type, e.g. nationality of the plaintiff, is sufficient to confer ICA-Jurisdiction for any claim;

P+: 'Plaintiff Jurisdiction' plus an additional connecting factor not of the 'Common'-type, e.g. reciprocity, is sufficient to confer ICA-Jurisdiction for any claim.

A+: 'Asset Jurisdiction' or arrest of the defendant plus an additional connecting factor not of the 'Common'-type, e.g. nationality of the plaintiff, is sufficient to confer ICA-Jurisdiction for any claim;

Common bases of ICA-Jurisdiction

D: domicile or habitual residence or formal or factual establishment of a juridical person;

C & P: the cause of action (or parts of it) arose in the state or the obligation is to be performed in the state;

C: connectedness of claims (personal connectedness, ancillary connectedness and counter-claims – and for one of the claims there exists ICA-Jurisdiction based on another ‘Common’-type basis);

LBA: the location of a branch office or agency for claims pertaining to their activities;

L: the location of assets (mobile and immobile) for claims pertaining only to them, the place of formal or factual establishment of a company for claims pertaining to their registries and the validity of company decisions;

Abstaining from exercising jurisdiction: under certain circumstances the respective state court has discretion to or is mandated to abstain from exercising jurisdiction that would otherwise exist. The most prominent example is the common law doctrine of *forum non conveniens*.

The entry for the People’s Republic of China illustrates the approach of this doctoral thesis:

People’s Republic of China:¹³⁵

Exorbitant:

AL	TP	P	A	DB
			x	x

Semi-exorbitant:

R	N	TP+	P+	A+
			x	

¹³⁵ The information is based on the English translation of Civil Procedure Code, available at <<http://cicc.court.gov.cn/html/1/219/199/200/644.html>>, accessed on 4 March 2023; Tu (n 10) 124; and the following country reports: Weizuo Chen, ‘National Reports: China’ in Basedow and others (eds), *Encyclopedia of Private International law* (Edward Elgar Publishing 2017); Shizhou Wang, ‘China’ in Piet Taelman (ed), *International Encyclopaedia of Laws: Civil Procedure* (Wolters Kluwer 2016) 67; Jingzhou Tao, ‘China’ in Anthony Colman and Simon Bryan (eds), *Encyclopaedia of International Commercial Litigation* (Wolters Kluwer 2019) 8.

Common:

C & S	D	C & P	C	LBA	L
x	x	x	x		x

Possibility of Abstention

1.2. *Opinio Juris*

Commonly, ‘[t]he acid test of the limits of jurisdiction in international law is the presence or absence of diplomatic protests’.¹³⁶ Yet, states hardly ever protest each other’s exercise of ICA-Jurisdiction.¹³⁷ Akehurst found this to be compelling proof for the proposition that no *opinio juris* exists.¹³⁸ Others have offered a different explanation. They have pointed to the possibility that the bulk of existing rules may align with CIL.¹³⁹ In other words, exorbitant grounds of jurisdiction may be undesirable, but – at least most – not in violation of CIL. Therefore, the insignificant number of protests, true as it may be, does not resolve the question. Equally, one might not consider exercises of exorbitant bases of ICA-Jurisdiction to be

¹³⁶ Akehurst (n 42) 176.

¹³⁷ Rheinstein (n 42) 798: ‘No country has ever protested against the practice of Italy, Germany and other nations of proceeding against a foreign resident in exactly that way which was declared to be inadmissible by the Supreme Court of the United States when it had been applied by Oregon against a resident of California. No protest has been lodged either, against the English and American claims of jurisdiction over a mere transient on whom the sheriff succeeds in serving a summons while he happens to change ships or planes in an American port’; Nadelmann (n 6) 321 is commonly cited as source referencing state protests against exorbitant bases of ICA-Jurisdiction. However, the author does not cite any. He refers to unfriendly measures that were taken in reaction to the introduction of Art 14 Code Civil (reciprocity statutes) and explains that judicial decisions based on provisions like Art 14 Code Civil (and other exorbitant grounds) are not recognized and enforced in most jurisdictions. This falls short of any actual protest; see also ALI, *Restatement of the Law, Third, The Foreign Relations Law of the United States* (n 71) Chapter 2, Jurisdiction to Adjudicate, Introductory Note: ‘increasingly they [states] object to the improper exercise of jurisdiction as itself a violation of international principles’. Yet, the Restatement (Third) does not provide any examples. Based on the review of *opinio juris* in Chapter 6, it is likely that the reporters referred to instances outside the purview of ICA-Jurisdiction (e.g. antitrust). In 1994, rapporteur M. François Rigaux remarked that state practice rarely reveals any cases in which states mutually accuse each other of violating international law in this area (Institut de Droit International, 19th Committee, ‘The Extraterritorial Jurisdiction of States’ (Rapporteur: M. François Rigaux) 68 Annuaire IDI, Vol I (1999) 377; John Dugard, *International Law: A South African Perspective* (2011) 147 notes that exercise of jurisdiction over persons and property in another state has seldom elicited international protest. Dugard cites protests against the U.S. Alien Tort Statute as an exception. This, however, rests on a misunderstanding as far as ICA-Jurisdiction is concerned (see Chapter 4 Section 3.2); see also Matscher, ‘Vor Art IX EGJN: Allgemeines zur (inländischen) Gerichtsbarkeit’ (n 98); Roorda and Ryngaert (n 97) 83.

¹³⁸ Akehurst (n 42) 176, 177.

¹³⁹ Roorda and Ryngaert (n 97) 83; Michaels (n 67); see also Judge Altamira’s dissent in *Lotus*, where he maintained that a virtual lack of protests may also be explained by the ‘infrequency of the occasions on which encroachments upon jurisdiction have actually occurred’, or even the fact that many governments ‘have shown themselves insensible to the injury sustained by their subjects as a result of occurrences abroad’ (*Lotus* (n 16) (Dissenting Opinion Altamira)); on the last point see also ILC, ‘Draft conclusions on identification of customary international law, with commentaries’ (30 April–1 June and 2 July–10 August 2018) UN Doc A/73/10, 121, 142.

accompanied by a legal claim that it is lawful under CIL since there are no corresponding explicit references. It has been argued that without a legal claim no protest is required.¹⁴⁰

Nor is it sufficient to look, as Mann did, at the recognition and enforcement practice of states. Some states are more accommodating of foreign judicial decisions than others. Indeed, states rarely recognise and enforce judicial decisions of courts in other states based on exorbitant bases of ICA-Jurisdiction.¹⁴¹ However, this is no proof of any reproach towards the exercise of ICA-Jurisdiction itself. States such as Austria do not recognise and enforce any judicial decisions of other states at all under their domestic law (barring exceptions).¹⁴² However, it has never been argued that Austria opposes all ICA-Jurisdiction by other states generally. Such instances are therefore not evidence of *opinio juris* in themselves. The decisions denying enforcement may of course contain statements of *opinio juris*, which is a different matter.¹⁴³

Certainly, states have at times reacted adversely to the exorbitant provisions of other states, resulting in reciprocal conduct and denial of recognition and enforcement based on violation of public policy.¹⁴⁴ However, domestic public policy concerns the core values of the respective state's legal system. It allows no conclusion as to the state's *opinio juris* in the international legal system. Plaintiff jurisdiction, for instance, may be alien to certain legal systems. Some states may even refuse recognition and enforcement based on domestic public policy concerns. But at the same time a state may not wish to formulate any international *opinio juris* against plaintiff jurisdiction, since it exercises a basis of jurisdiction itself, which many other states consider exorbitant. If a state reciprocates in kind, this may be done first and foremost to protect its nationals and interests on its territory but does not have to be an expression of *opinio juris*.

Criticism has also been directed at the EU for making judicial decisions against non-EU defendants, which were rendered based on exorbitant grounds, enforceable in all other EU states.¹⁴⁵ However, this only shows that states are – again – concerned about widespread

¹⁴⁰ Danae Azaria, 'State Silence as Acceptance: A Presumption and an Exception' 2024 British Yearbook of International Law 13.

¹⁴¹ Nadelmann (n 6) 321.

¹⁴² See e.g. Section 406 of the Austrian Enforcement Code; see also Akehurst (n 42) 175 FN 1.

¹⁴³ Many such decisions – especially throughout the 19th century – do contain valuable material in this regard. See Chapter 6.

¹⁴⁴ Nadelmann (n 6) 327.

¹⁴⁵ Kurt H Nadelmann, 'Jurisdictionally Improper Fora in Treaties on Recognition of Judgments: The Common Market Draft' (1967) 67 Colum L Rev 995, 1001.

recognition and enforcement of these decisions and the discrimination against non-EU defendants. This is no evidence of their condemnation of the originating state's exercise of ICA-Jurisdiction either.

Finally, it is not enough to look at *opinio juris* concerning other areas of prescriptive jurisdiction and assume that these statements also cover civil adjudicative jurisdiction. One must in particular steer clear of the temptation of accepting protests against other areas of prescriptive jurisdiction (e.g. the jurisdictional provisions of the U.S. Alien Torts Statute Act) as evidence of protests against exercises of ICA-Jurisdiction. They do not constitute such evidence (see in detail **Chapter 4 Section 3.2**). To transfer *opinio juris* concerning other areas of prescriptive jurisdiction runs into two issues: First and foremost, states may not seek to include civil adjudicative jurisdiction when making statements on prescriptive jurisdiction. The intended inclusion of civil adjudicative jurisdiction remains an untested assumption by those who claim so. Second, even if this assumption were correct, it is unclear what the result would be. The territorial principle shall serve as an example. For substantive areas of prescriptive jurisdiction, the requirement is satisfied if the law's application is restricted to the state's territory (see **Chapter 3 Section 7**). Yet, would this requirement already be satisfied if judges – as they virtually always do – exercise their jurisdiction from within the state's territory? Indeed, some eminent scholars have argued thus.¹⁴⁶ Truthfully, this would result in a meaningless standard and miss the point why scholars contest exorbitant bases of ICA-Jurisdiction.

An approach is therefore required, which focuses on the available expressions of *opinio juris* specifically regarding bases of ICA-Jurisdiction. **Chapter 6** examines such expressions canvassed from a wide array of source materials spanning over two centuries. Besides findings from legal literature, materials from eight states have been studied systematically to uncover expressions of *opinio juris*. Seven of the selected states employ exorbitant bases of ICA-Jurisdiction. Their economic, political or historical significance makes it likely for most of these states that protests or other expressions of *opinio juris* by them or against their practice would have been recorded. Austria was added as an eighth example. These states are in alphabetical order: Australia, Austria, China (PRC), Germany, Japan, South Africa, the U.K. and the U.S. For Australia, Austria, Germany and the U.K. digests on national practices in public

¹⁴⁶ See Mayer (n 70) 349, 537, 552 and Geimer, *Internationales Zivilprozessrecht* (n 97) mn 377 with reference to other authors.

international law have been consulted. For Austria these are the respective chapters in ZÖVR 1990-1995 and ARIEL 1996-2022 (published in July 2024). In addition, the Austrian judicial database RIS-JUSTIZ has been searched for relevant keywords. For Germany the respective chapters in ZaöRV 1990-2024 (issue 3) and Stefan Talmon's *German Practice in International Law* (2019 and 2020) have been consulted. For the U.K. the respective chapters in the British Yearbook of International Law 1996-2017 (vol. 66-87) plus advance articles until 15 November 2024 have been studied. For Australia the respective chapters in the Australian Yearbook of International Law 2000-2024 have been investigated. For South Africa any relevant chapters from the South African Yearbook of International Law 2011-2024 have been analysed. For China (PRC) and Japan the law firms DaHui Lawyers in Beijing and Sonderhoff & Einsel in Tokyo have been tasked with providing potentially relevant original language literature from their jurisdictions but without any analysis. The material provided was then translated using Google Translator and Deepl. For the U.S., *amicus curiae* briefs (or the lack thereof) in the recent U.S. Supreme Court cases regarding ICA-Jurisdiction and the U.S. Alien Tort Statute have been analysed via Westlaw. Lastly, it must be noted that unpublished diplomatic protests may exist but could not be taken account of. The result of this research is recorded in **Chapter 6**.

2. Deduction – An Aid to be Employed with Caution

While the permissible use-cases remain contested,¹⁴⁷ deductive reasoning in establishing CIL remains part of the methodological discourse.¹⁴⁸ Former president of the ICJ, Peter Tomka, stated that the ICJ has employed the deductive method as part of a 'pragmatic approach to determining the existence and content of international custom, considering whether a rule has been convincingly identified before moving on to consider the primary evidence of State practice and *opinio juris*'.¹⁴⁹ The ILC Draft Conclusions on CIL accept that deduction can serve as an 'aid, to be employed with caution [...] in particular when considering possible rules of

¹⁴⁷ Schwarzenberger (n 125) 5 and 33: 'The present state of the source material of international law is ample justification for the wider application of the inductive method. A plea for such a change in emphasis is a call away from the dreamland of deductive speculation to the reality of hard work on raw material waiting for the workman'.

¹⁴⁸ On a theoretical level, Wilfred Jenks and other scholars have argued for a role of deductive reasoning in the methodical canon (see *ibid* for a discussion). On the empirical level, Stefan Talmon has pointed out that the ICJ does not restrict itself to inductive reasoning but establishes CIL also deductively and by assertion (Talmon, 'Determining Customary International Law: the ICJ's Methodology Between Induction, Deduction and Assertion' (n 124)). As a paradigm case for the inductive method Talmon cites the *Jurisdictional Immunities of the State* case in which the ICJ examined in particular judgments of national courts to establish the extent and scope of state immunity in CIL (*ibid* 418). For assertion and deduction, Talmon refers *inter alia* to the *Arrest Warrant* case. After asserting that foreign ministers enjoy immunity under CIL, the ICJ deduced the extent of this immunity in a functional analysis: Since the institute of immunity serves the effective performance of the minister's official function, it must apply throughout the duration of his or her official function to any and all actions (*ibid* 425).

¹⁴⁹ Tomka (n 124) 215.

customary international law that operate against the backdrop of rules framed in more general terms that themselves derive from and reflect a general practice accepted as law [...] or when concluding that possible rules of international law form part of an “indivisible regime”, referencing *Pulp Mills on the River Uruguay (Argentina v. Uruguay)* and *Territorial and Maritime Dispute (Nicaragua v. Colombia)*.¹⁵⁰ **Chapter 7** will re-examine whether deduction from first-order CIL rules such as sovereignty and the equality of states can corroborate the inductive findings. It will use deduction ‘[a]s an aid, to be employed with caution’.

3. In Case of Finding No Applicable Rule of CIL or a *Non Lique*: A Presumption of Unlimited ICA-Jurisdiction?

A preliminary question is what happens if no applicable rule of CIL regarding bases of ICA-Jurisdiction can be identified. Does a residual rule or presumption exist? Enter *The Case of the S.S. “Lotus” (France v Turkey)* (*‘Lotus’*).¹⁵¹ In a sense, there are two *Lotus* judgments: one that decided a case on criminal law jurisdiction and a second one that purportedly expounded the widely cited *Lotus* principle.¹⁵² Both readings are relevant. The first reading will be addressed in the **Chapter 3** as part of the historical review of state jurisdiction under public international law. The second reading is of interest in this Section.

Commentary on *Lotus* is characterized mainly by two antagonistic viewpoints. On the first view, the *Lotus* judgment expressed the *Lotus* principle that ‘whatever is not explicitly prohibited by international law is permitted’,¹⁵³ which received extensive criticism.¹⁵⁴ On the

¹⁵⁰ ILC Draft Conclusions on CIL 126.

¹⁵¹ *Lotus* (n 16).

¹⁵² Douglas Guilfoyle, ‘SS Lotus (France v Turkey) (1927)’ in Eirik Bjorge and Cameron Miles (eds), *Landmark Cases in Public International Law* (Bloomsbury Publishing 2017) 89; see also James Crawford, ‘Chance, Order, Change: The Course of International Law, General Course on Public International Law’ (2014) 365 *Recueil des Cours* 1, 66.

¹⁵³ Prosper Weil, ‘The Court Cannot Conclude Definitively... Non Lique Revisited’ (1998) 36 *Colum J Transnat’l L* 109, 112; see also Brad R Roth, ‘The Enduring Significance of State Sovereignty’ (2004) 56 *Fla L Rev* 1017, 129.

¹⁵⁴ To name two prominent critics: James L. Brierly remarked that the ‘highly contentious metaphysical proposition of the extreme positivist school that the law emanates from the free will of sovereign independent States’ (James L Brierly, ‘The Lotus Case’ (1928) 44 *LQ REV* 133, 155). If restrictions on independent states cannot be presumed, neither can the absence of restrictions, as sovereignty and independence do not allow deductions for the ‘law applicable to a specific state of facts’ (ibid 155). Furthermore, he referred to the analysis of the majority as historically unsound, as ‘[i]nternational law did not start as the law of a society of States each of omnicompetent jurisdiction, but of States possessing a personal jurisdiction over their own nationals and later acquiring a territorial jurisdiction over resident non-nationals’ (ibid 156). However, on the facts of the case Brierly agreed with the outcome of the majority decision (ibid 156); Mann notes: ‘These sentences seem to propagate the idea of the delimitation of jurisdiction by the State itself rather than international law or, in the words of Sir Hersch Lauterpacht, they proclaim the principle of presumptive freedom of State action, and may, therefore, have to be

second view, the first view rests on a misreading of the majority decision.¹⁵⁵ I side with the second view.

The *Lotus* principle has often been framed as a rebuttable presumption, putting the burden of proof on the party invoking restrictions to the state's freedom.¹⁵⁶ This view can claim for itself that the majority used the term 'to prove'.¹⁵⁷ Furthermore, the Israeli Supreme Court reinforced the view in the Eichmann proceedings. After discussing the implications of *Lotus*, the Court concluded

It follows that in the absence of general agreement as to the existence of the rule of international law, upon which Counsel for the Appellant relied, there is no escape from the conclusion that it cannot be deemed to be embodied in Israel municipal law, and therefore on that ground, too, his second contention fails.¹⁵⁸

According to this view, without proof of general agreement of a rule of CIL, there is a presumption of state freedom.

However, it is doubtful that this is what the majority in *Lotus* meant. Immediately after the unfortunate reference to the term 'to prove', the majority referred to 'the necessity of ascertaining **whether or not** under international law there is a principle which would have prohibited Turkey, in the circumstances of the case before the Court, from prosecuting Lieutenant Demons'.¹⁵⁹ The majority was therefore concerned with establishing either that such a prohibition existed or did not exist. It was not concerned with the case that it remained unclear whether a prohibition existed, which could then trigger a presumption. Despite the ambiguous

read as countenancing a most unfortunate and retrograde theory' (Mann, 'The Doctrine of Jurisdiction in International Law' (n 19) 35).

¹⁵⁵ E.g. An Hertogen, 'Letting Lotus Bloom' 26 *European Journal of International Law* 901; Ole Spiermann, *International legal argument in the permanent Court of International Justice: the rise of the international judiciary*, vol 34 (Cambridge University Press 2005).

¹⁵⁶ Akehurst (n 42) 167, however, contends that the principle had relevance only 'in specialized or unusual situations where the authorities are few and/or contradictory'; see also Hugh Handeyside, 'The Lotus principle in ICJ jurisprudence: Was the ship ever afloat' 29 *Mich J Int'l L* 71, 79; Guilfoyle (n 152) 100 who seems to ascribe this position to Spiermann (n 155) 254 - however, Spiermann clearly speaks of the case that there are no otherwise applicable rules; for a discussion see also Schachter (n 8) 241.

¹⁵⁷ *Lotus* (n 16) 21: 'Now, in order to establish the first of these points, one must, as has just been seen, prove the existence of a principle of international law restricting the discretion of States as regards criminal legislation.' Ibid 26: 'In the Court's opinion, the existence of such a rule has not been conclusively proved.'; see also Akehurst (n 42) 167.

¹⁵⁸ *Attorney-General of the Government of Israel v. Eichmann* (1968) I.L.R., vol. 36, 277, 286 (English translation).

¹⁵⁹ *Lotus* (n 16) 21

wording, the majority did ascertain that no such rule existed: ‘But **no such rule** of international law exists.’¹⁶⁰ ‘[T]here is **no rule** of international law in regard to collision cases to the effect that criminal proceedings are exclusively within the jurisdiction of the State whose flag is flown.’¹⁶¹ This enabled the majority to rely on the objective territoriality principle and rule in Turkey’s favour (see **Chapter 3 Section 6**).

The alternative, more convincing reading of *Lotus* is therefore that the majority did not express a presumption of state freedom. ‘Restrictions upon the independence of States cannot therefore be presumed’¹⁶² is not the same as a presumption in favour of states’ freedom; or as Ole Spiermann puts it: ‘the *Lotus* statement did not give expression to a presumption of freedom: it rejected a presumption against freedom.’¹⁶³ Accordingly, Spiermann distinguishes between a *Lotus* residual rule, which the majority opinion does express, and a *Lotus* presumption, which the majority opinion does not express.¹⁶⁴ According to him, ‘a residual principle differed from a presumption in that it rested on a legal analysis which had determined **that there were no rules**. In contrast, a presumption, though rebuttable by legal analysis, provided a method of determining that there were no rules.’¹⁶⁵

On the one hand, such a residual rule could be understood as extra-legal. If legal analysis does not yield applicable rules, there is extra-legal freedom.¹⁶⁶ In *Nationality Decrees Issued in Tunis and Morocco* (1921) the PCIJ observed that a matter may not be ‘in principle, regulated by international law [...]’.¹⁶⁷ The residual principle could, however, also be understood as part of public international law. The judgment leaves room for both interpretations. The majority held: ‘It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and **in which it cannot rely on some permissive rule of international law**’.¹⁶⁸ At face value this seems to indicate that the residual rule is extra-legal, as otherwise it would

¹⁶⁰ Ibid 23.

¹⁶¹ Ibid 30.

¹⁶² Ibid 18.

¹⁶³ Spiermann (n 155) 254; see also Hertogen (n 155) 908; Guilfoyle (n 152) 100.

¹⁶⁴ Spiermann (n 155) 254.

¹⁶⁵ Ibid (emphasis added).

¹⁶⁶ For this view see Martti Koskeniemi, *From Apology to Utopia: the Structure of International Legal Argument* (Cambridge University Press 2006) 256; Armin Von Bogdandy and Markus Rau, ‘The Lotus’ (2006) Max Planck Encyclopedia of Public International Law; Mills, ‘Rethinking Jurisdiction in International Law’ (n 93) 192.

¹⁶⁷ *Nationality Decrees Issued in Tunis and Morocco on Nov. 8th, 1921* (Advisory Opinion) PCIJ Rep Series B, No 4, 8, [24].

¹⁶⁸ *Lotus* (n 16) 19 (emphasis added).

qualify as a ‘permissive rule of international law’.¹⁶⁹ Perhaps the majority intended to state ‘on some [*other*] permissive rule of international law’. This would make more sense as the majority also held that ‘all that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction ; within these limits, its title to exercise jurisdiction rests in its sovereignty.’¹⁷⁰ A ‘title’ seems to indicate a legal rather than a factual ground.¹⁷¹ It has also been suggested that the majority navigated between two different concepts of sovereignty – factual and legal.¹⁷²

Today, sovereignty and jurisdiction are both widely considered a matter of legal right (or even obligation), not fact.¹⁷³ While theoretically, the difference is profound, practically, the two approaches do not differ if the residual rule is unfettered freedom. However, if the residual rule is legal, it might have a different content. In a thoughtful analysis of the judgment, An Hertogen concludes that ‘[i]n the *Lotus* case, the residual rule is that territorial sovereignty needs to be exercised so as to ensure co-existence and cooperation between independent states whose sovereignty is defined by their territorial borders.’¹⁷⁴ This interpretation may have an ‘air of revisionism’ about it.¹⁷⁵ Instead, the majority may have taken the view – in line with the later dictum in *Island of Palmas* – that there is an ‘exclusive competence of the State in regard to its own territory’ and that this **at the time** ensured co-existence and cooperation between independent states. The aspiration towards co-existence and cooperation would thus have not been the applicable legal standard, but (at the time) the coincidental with the applicable standard. The majority decision itself does not easily lend itself to a definite choice between the two interpretations.

Under the second reading of *Lotus*, quoted above, the majority decision expounded a residual rule, which applies if no other rules exist. A complete legal system necessarily requires such a residual rule, which *qua* being a complete legal system is itself legal.¹⁷⁶ This doctoral thesis proceeds on the assumption that public international law indeed is a complete legal

¹⁶⁹ See also Mills, ‘Rethinking Jurisdiction in International Law’ (n 93) 192.

¹⁷⁰ *Lotus* (n 16) 19.

¹⁷¹ *Lotus* (n 16) 18.

¹⁷² Guilfoyle (n 152) 103.

¹⁷³ Mills, ‘Rethinking Jurisdiction in International Law’ (n 93).

¹⁷⁴ Hertogen (n 155) 917.

¹⁷⁵ Alex Mills levelled this criticism against Mann’s interpretation of *Lotus* (Mills, ‘Rethinking Jurisdiction in International Law’ (n 93) 190). However, by comparison Mann’s interpretation is more conservative than that of An Hertogen, as he merely pointed out that the majority sought to express that there are a range of grounds of extraterritorial jurisdiction (Mann, ‘The Doctrine of Jurisdiction in International Law’ (n 19) 35).

¹⁷⁶ Hertogen (n 155); Ryan (n 100) 157 et seq.

system. In that way the long-lasting criticism of the majority decision in *Lotus* is misguided. However, the criticism is potentially correct in that the residual rule may have been different at the time or changed compared to this ‘high water mark of laissez-faire in international relations’.¹⁷⁷ In addition, different areas of the law of jurisdiction may also have different residual rules.¹⁷⁸ Finally, since they are themselves part of public international law, they must find expression in the actions and statements of states, i.e. they must be CIL.

According to this reading of the majority decision, *Lotus* does not pronounce on whether there can be a *non liquet* in public international law: if no applicable rule can be established, it follows that states are free to act as they please. The decision does not provide guidance on potential scenarios where neither ‘no rule’ nor ‘a rule’ (and be that a residual rule) can be established with certainty. *Non liquet* is a highly complex and thorny issue,¹⁷⁹ which thankfully need not be resolved in this doctoral thesis.

To summarise this understanding of *Lotus*:

- (i) Under the assumption that public international law is a complete legal system, it must have a residual legal rule;
- (ii) the residual rule applies if no other rules apply;
- (iii) this rule may differ for different areas of the law;
- (iv) since the residual rule(s) is/are part of public international law, it/they must be CIL.

The crucial question, which will be addressed in **Chapter 7**, then becomes whether the residual rule requires a permissive rule of CIL or merely the absence of a prohibitive rule for the exercise of ICA-Jurisdiction.

¹⁷⁷ *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* [2002] (Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal) ICJ Rep 3, 78; Mills, ‘Rethinking Jurisdiction in International Law’ (n 93) 193.

¹⁷⁸ See Staker (n 32) 309 who speaks of a possible fragmentation of the law on jurisdiction.

¹⁷⁹ Hersch Lauterpacht, *The function of law in the international community* (OUP Oxford 2011) 59 et seqq; Weil (n 153); Stephen C Neff, ‘Chapter Three. In Search Of Clarity: Non Liqueur And International Law’ in *International Law and Power: Perspectives on Legal Order and Justice* (Brill Nijhoff 2009) 63; Julius Stone, ‘Non Liqueur and the Function of Law in the International Community 1’ in Martti Koskeniemi (ed), *Sources of International Law* (Routledge 2017) 124; see also Valentin Joutner, *Irresolvable norm conflicts in international law: the concept of a legal dilemma* (Oxford University Press 2017) 85 et seqq.

4. A Historical Understanding of the Rules

CIL limits to ICA-Jurisdiction have been discussed for over 200 years. A thorough methodology therefore also requires a historical analysis. Historical accounts cannot answer the question whether a rule of CIL presently has a certain content. However, they provide an additional – and important – layer to the analysis. CIL forms and changes over time. Since CIL is a process in time, its present state cannot be fully understood without its past. References to historical practices or statements must be considered in their contexts. The interests and concerns behind certain rules are often only uncovered when tracing them back to their origins. Protests against certain practices must be assessed over time. **Chapter 3** therefore continues with two histories of jurisdiction – that of state jurisdiction under CIL and that of the provisions of ICA-Jurisdiction. The evolution of *opinio juris* on ICA-Jurisdiction is reserved for **Chapter 6**.

Chapter 3

Two Histories of Jurisdiction

‘The highest rule of forum, often repeated, is this: that the plaintiff must follow the forum of the defendant. [...] The reason is not to favour the defendant over the plaintiff, although this is certainly true. [...] The reason is that it is necessary to summon the defendant and enforce upon him the law and this is possible only if one can proceed before a superior, and the superior is not alien, but the proper ruler (of the defendant).’

(Ulrik Huber, 1687)¹⁸⁰

1. Introduction

Two histories presented below inform the understanding of today’s law of jurisdiction and are directly relevant to the research question. One history concerns the CIL of prescriptive jurisdiction (hereinafter ‘**prescriptive jurisdiction**’). This history is well-examined. The following expositions will therefore focus only on the events most relevant to the research question and explore these in greater detail. This history touches upon the CIL of adjudicative jurisdiction where appropriate, but references to historical sources on CIL restrictions to bases of ICA-Jurisdiction feature in **Chapter 6** on *opinio juris*.

The second history concerns selected practices of ICA-Jurisdiction. It weaves together seminal, but fragmentary, contributions on this topic (to the best of the author’s knowledge no comprehensive monograph exists) in order to trace the two grand strands of ICA-Jurisdiction: civil law and common law. Sometimes interwoven with customary and religious law, these two strands permeate the landscape of ICA-Jurisdiction today. ICA-Jurisdiction as a concept is a recent creation and reflects a modern understanding of institutions. As such, the concept cannot simply be applied to historical practices. To recall, ‘international’ in ICA-Jurisdiction has been

¹⁸⁰ This is the author’s own translation from the Latin original in Ulrik Huber, *Praelectiones Iuris Civilis: Secundum Institutiones et Digesta Justiniani*, vol 2 (Franequae : Apud Henricum Amama & Zachariam Taedama 1687) book 5, title 1, number 38 (De Foro Competente): ‘Summa decantata regula Fori est haec: Quod Actor sequitur Forum Rei [...] Cujus Ratio non tam est, quod Reus sit actore favorabilior, etsi verissima, [...] sed quod necessitas vocandi & cogendi alium ad jus aequum, non nisi a superiore proficisci queat, superior autem cujusque non est alienus, sed proprius Rector’.

defined in **Chapter 1** as jurisdiction over nationals of other states. However, both the state and the national are modern concepts. In this Chapter, therefore, the term ‘foreigner’ does not refer to non-nationals, but to people who were not considered part of the socio-politically dominant group in a certain area. In the discussion of time periods before the emergence of the states, reference will be made to these groups as societies. Examined are then not only practices that conform to ICA-Jurisdiction according to the definition in **Chapter 1** but also practices that are precursors of contemporary practice.

The two histories will not be presented consecutively, but chronologically. Thus, Sections on the two histories will alternate in an interwoven manner with some overlap as to the time periods covered.

2. The Origins of Prescriptive Jurisdiction

Public international law – in the sense of ‘a set of substantive principles applying uniquely to states as such’ – was first conceptualised in 17th century Europe.¹⁸¹ The origins of prescriptive jurisdiction, however, lie in much older rules that today would be categorized as rules of private international law and international criminal law – domestic rules applying to conduct with a foreign element.¹⁸²

Personality, that is jurisdiction based on personal ties, was the basic jurisdictional principle in continental Europe.¹⁸³ The law’s substantive reach and the competence of judges were in large parts attached to personal characteristics, *e.g.* membership to a tribe.¹⁸⁴ The shift to territoriality – understood as jurisdiction based on territorial connecting factors – occurred only gradually. In England jurisdiction became territorial early,¹⁸⁵ namely after the Norman conquest of 1066.¹⁸⁶

¹⁸¹ Stephen C Neff, ‘A Short History of International Law’ in Malcolm D Evans (ed), *International Law* (Oxford University Press 2024) 4.

¹⁸² Mann, ‘The Doctrine of Jurisdiction in International Law’ (n 19) 24 et seqq; Alex Mills, ‘The Private History of International Law’ (2006) 55 *International & Comparative Law Quarterly* 1; Ryngaert, *Jurisdiction in International Law* (n 15) 49 et seqq; see also Rheinstein (n 42) 802 et seqq.

¹⁸³ Ryngaert, *Jurisdiction in International Law* (n 15) 49; Stéphane Beaulac, ‘The Lotus Case in Context’ in Stephen Allen and others (eds), *The Oxford Handbook of Jurisdiction in International Law* (Oxford University Press 2019) 40, 44; see also Brierly (n 154) 156

¹⁸⁴ Ryngaert, *Jurisdiction in International Law* (n 15) 50; Kaius Tuori, ‘The Beginnings of State Jurisdiction in International Law until 1648’ in Stephen Allen and others (eds), *The Oxford Handbook of Jurisdiction in International Law* (Oxford University Press 2019) 25.

¹⁸⁵ Ryngaert, *Jurisdiction in International Law* (n 15) 62.

¹⁸⁶ Theodore Plucknett, *A Concise History of the Common Law* (1956) 11.

With the rise of the nation state in the 17th century, territoriality became the bedrock principle of the nascent public international law of jurisdiction.¹⁸⁷ Expositions by Hugo Grotius' in *De iure belli ac pacis* (1625) have been interpreted to demand territorial connecting factors for criminal law jurisdiction.¹⁸⁸ The connection between private law jurisdiction and the sovereignty of the state was likely first articulated in 17th century Holland.¹⁸⁹ Paulus Voet wrote in *De Statutis eorumque Concursu* (1661) that 'no statute according to the civil law [...] extends beyond the territory of the legislator'¹⁹⁰. It was, however, the short tract by Ulrik Huber *De Conflictu Legum Diversarum In Diversis Imperiis* as part of his *Praelectiones Juris Romani et Hodierni* (1689) which proved particularly influential.¹⁹¹ Huber formulated the following three maxims based (loosely) on sections of Justinian's digest of the 'jus Civile':

'(1) The laws of every sovereign authority have force within the boundaries of its state, and bind all subject to it, but not beyond. (D. 2, 1, 20.)¹⁹²

¹⁸⁷ Ryngaert, *Jurisdiction in International Law* (n 15) 54; Brierly (n 154) 156.

¹⁸⁸ For this interpretation see Ryngaert, *Jurisdiction in International Law* (n 15) 59; Hugo Grotius, *The Rights of War and Peace* (AC Campbell tr, 1901) book 3 chapter XXI n 3: 'But since established governments were formed, it has been a settled rule, to leave the offences of individuals, which affect their own community, to those states themselves, or to their rulers, to punish or pardon them at their discretion. But they have not the same plenary authority, or discretion, respecting offences, which affect society at large, and which other independent states or their rulers have a right to punish, in the same manner, as in every country popular actions are allowed for certain misdemeanors. Much less is any state at liberty to pass over in any of its subjects crimes affecting other independent states or sovereigns. On which account any sovereign state or prince has a right to require another power to punish any of its subjects offending in the above named respect: a right essential to the dignity and security of all governments'; the Latin original is Hugonis Grotii, *De Jure Belli ac Pacis, libri tres, In quibus ius naturae & Gentium: item iuris publici praecipuae explicantur*, (Pariis: Apud Nicolaum Buon, 1625). However, for violations of natural law and the law of nations, Grotius accepted that every sovereign may exercise jurisdiction (ibid book 3 chapter XL n 40); see also Emer de Vattel who referred to the prerogative of the sovereign 'to exercise justice in all the places under her jurisdiction, to take cognizance of the crimes committed, and the differences that arise in the country' (Vattel (n 34) 165).

¹⁸⁹ Ryngaert, *Jurisdiction in International Law* (n 15) 60.

¹⁹⁰ The English translation is adopted from Hessel E Yntema, 'The comity doctrine' (1966) 65 Mich L Rev 9, 22.

¹⁹¹ DJ Davies, 'The Influence of Huber's *De Conflictu Legum* on English Private International Law' (1937) 18 Brit YB Int'l L 49, 53; In *De Conflictu Legum Diversarum In Diversis Imperiis* Huber contended that even though the Roman Empire had not known rules of private international law due to its all-encompassing sovereignty, the fundamental rules of the subject should still be taken from the Roman 'jus Civile'. He conceded, however, that the subject matter pertained more to the 'jus Gentium' as it concerned the rules that the states should observe among themselves. It should be noted, however, that Huber's references to *jus gentium* are ambiguous. It seems that Huber referred to Roman law concept of *jus gentium* meaning universal or natural law, not the law of nations. On the other hand, Huber did make sovereignty the bedrock of his analysis (*De Conflictu Legum Diversarum In Diversis Imperiis*, reprinted in DJ Davies 65 with an English translation); on this see also Mann, 'The Doctrine of Jurisdiction in International Law' (n 19) 26; Akehurst (n 42) 214; Mills, 'The Private History of International Law' (n 182) 26.

¹⁹² The wording in Justinian's digest (D 2, 1, 20) is: '*Extra territorium jus dicenti impune non paretur. Idem est et si supra jurisdictionem suam velit jus dicere*' which translates to 'One who administers justice beyond the limits of his territory may be disobeyed with impunity. The same applies where he purports to administer justice in a case exceeding the amount established for his jurisdiction' (Alan Watson, *The Digest of Justinian Volume I* (Philadelphia: University of Pennsylvania Press 1998) 42).

(2) Those are held to be subject to a sovereign authority who are found within its boundaries, whether they be there permanently or temporarily. (D. 48, 22, 7, § 10, i.f.)¹⁹³

(3) Those who exercise sovereign authority so act from comity that the laws of each nation having been applied within its own boundaries should retain their effect everywhere so far as they do not prejudice the power or rights of another state or its subjects.¹⁹⁴

From these maxims Huber developed rules of (what we today would call) private international law, but the maxims themselves concern nothing less than ‘[t]he laws of every sovereign authority’ – be those private or public laws.¹⁹⁵

Over time Huber became known for the proposition that under public international law the laws of a state are territorially limited, i.e. they do not apply to facts outside the state’s border.¹⁹⁶ This interpretation of Huber’s work would go on to shape the doctrine of prescriptive jurisdiction in a decisive way (see **Section 5**). However, it is more than doubtful that this is what Huber had meant at the time since he was concerned with the application of foreign laws and judicial decisions, not the territorial reach of laws.¹⁹⁷

¹⁹³ The wording in Justinian’s digest (D 48, 22, 7, § 10) is: ‘Interdicere autem quis ea provincia potest quam regit, alia non potest: et ita divi fratres rescripserunt. unde eveniebat, ut, qui relegatus esset ab ea provincia, in qua domicilium habuit, morari apud originem suam posset. sed imperator noster cum divo patre suo huic rei providerunt. maecio enim probo praesidi provinciae hispaniae rescripserunt etiam ea provincia interdicti, unde quis oriundus est, ab eo qui regit eam provinciam, ubi quis domicilium habet. sed et eos, qui, cum incolae non essent, in ea provincia quid admiserint, aequum est ad rescripti auctoritatem pertinere’, which translates to ‘The governor can bar someone from the province which he himself rules, but not from another; and the deified brothers wrote in a rescript to this effect. The consequence of this was that a person who had been relegated from the province in which he had his domicile could remain in the place from which he originated. However, our emperor and his deified father have provided for this. For they wrote in a rescript to Maecius Probus, governor of the province of Spain, that a person could also be barred from the province from which he originated by the governor of the province where he had his domicile. It is also proper that persons who, though not residents of a province, commit an offense there, should come under the force of [this] rescript’ (Alan Watson, *The Digest of Justinian Volume IV* (Philadelphia: University of Pennsylvania Press 1998) 374).

¹⁹⁴ Davies (n 191) 65.

¹⁹⁵ Ibid 65.

¹⁹⁶ Mann, ‘The Doctrine of Jurisdiction in International Law’ (n 19) 27 linked Huber’s maxims to Joseph Story who did make this claim.

¹⁹⁷ Huber states that, in principle, each state applies its own laws and that no state is bound by the laws of another state. The laws apply to everyone within the territory, but not in the sense that they cannot cover acts outside the territory. Huber only meant to express that whenever an individual crosses a state’s border the state may apply all of its laws. The state should, however, act with comity and uphold acts done validly elsewhere, unless this prejudices the power and rights of itself or its subjects. See Mills, ‘The Private History of International Law’ (n 182) 25 and FN 154; Akehurst (n 42) 182 and FN 4 rightly draws a distinction between Joseph Story’s contention

Having established the early origins of prescriptive jurisdiction, the next two Sections will outline the development of ICA-Jurisdiction.

3. ICA-Jurisdiction: The Civil Law Tradition

In antiquity, foreigners were often subject to a separate judicial process, if not exempt from any judicial protection altogether.¹⁹⁸ The latter was a compromise between the host societies' self-perception of particularity and even superiority that ruled out opening the same legal processes to foreigners and a certain degree of hospitality – often in the interest of commerce.¹⁹⁹ The Book of Odes, which is the oldest collection of Chinese poetry, states that '[u]nder the whole heaven, there is no land that is not the Emperor's, and within the sea-boundaries of the land, there is none who is not a subject of the Emperor.'²⁰⁰ Nevertheless, in fact the Chinese seem to have exercised a *laissez-faire* policy towards the 'barbarians', peoples who did not match the Chinese cultural achievement, but were subjects of the Emperor nonetheless. Hsü gives an English account of the writings of the great Han scholar Ho Hsiu (A.D. 129-182): 'The Emperor does not govern the barbarians. Those who come will not be rejected, and those who leave will not be pursued'.²⁰¹ This seems to contrast with societies in ancient India, which are reported to have had special processes for foreigners. Bandyopadhyay reports that 'jurisdiction exercised by members of the "family of nations" in ancient India was ample and all-absorbing' and that 'they maintained absolute control over aliens within their jurisdiction'.²⁰² This is confirmed by Viswanatha, who in addition points to the recollections of the Greek diplomat, historian and geographer Megasthenes (350-290 B.C.) according to whom the government of

that legislation on persons and objects outside the territory infringe other states' sovereignty and Huber's expositions on conflict of laws. This is likely also the sense in which Karl Friedrich von Savigny endorsed Huber's principles (Friedrich Carl Von Savigny, *System des heutigen römischen Rechts*, vol 8 (Veit 1841) 24: 'Manche haben versucht, diese Fragen lediglich durch den Grundsatz der unabhängigen Staatsgewalt (Souveränität) zu entscheiden, indem sie folgende zwei Regeln an die Spitze stellen. 1. Jeder Staat kann fordern, daß innerhalb seiner Grenzen lediglich sein Gesetz gelte. 2. Kein Staat kann die Geltung seines Gesetzes außer seinen Grenzen fordern (a). Ich will nicht nur die Wahrheit dieser Sätze einräumen, sondern selbst ihre Ausdehnung bis zu den äußersten denkbaren Grenzen anerkennen, glaube aber, daß sie für die Lösung unsrer Aufgabe wenig Hülfe gewähren.').

¹⁹⁸ Shih Shun Liu, *Extraterritoriality: Its Rise and Its Decline* (Columbia University 1925) 26.

¹⁹⁹ David J Bederman, *International Law in Antiquity* (Cambridge University Press 2001) 120; see also Philippon Coleman, *The International Law and Custom of Ancient Greece and Rome* (Londres, Macmillan 1911) 125.

²⁰⁰ Book of Odes, translated in Immanuel CY Hsü, *China's Entrance Into the Family of Nations: The Diplomatic Phase, 1858–1880* (Harvard University Press 2013) 6; see on this Tieya Wang, 'International law in China: Historical and Contemporary Perspectives' (1990) 221 *Recueil des Cours* 195, 214.

²⁰¹ Hsü (n 200) 9.

²⁰² Pramathanath Bandyopadhyay, *International Law and Custom in Ancient India* (Calcutta University Press 1920) 52.

Chandragupta had a special department concerned with the treatment of foreigners.²⁰³ Chatterjee adds that foreign visitors and travellers were under the jurisdiction of the respective state and that ‘their cases were to be dealt with by [special] officials [...]’.²⁰⁴ While these accounts remain vague and speculative, there are more detailed accounts for ancient Greece.

The relationship between the early Greek *poleis* and foreigners was antagonistic in the beginning.²⁰⁵ There was a ‘spirit of exclusiveness’ to Greek citizenship – as Coleman Philipson puts it.²⁰⁶ In later times, the Greek *poleis* introduced relaxations and numerous contemporaneous sources speak of Greek hospitality towards foreigners, especially in commercial relations.²⁰⁷ Transitory foreigners or – for the most part – even permanently resident foreigners were not subject to the ordinary judicial process.²⁰⁸ As with other societies in antiquity,²⁰⁹ ancient Greece had special magistrates which dealt with cases involving foreigners.²¹⁰ These magistrates did, however, not always have full judicial function, but in certain cases only investigated the issue and then transferred the case to the ordinary magistrates for the final decision.²¹¹ The Greek *poleis* concluded conventions regulating the status of foreign individuals. Among other things, these treaties provided for the jurisdiction of tribunals in proceedings between individuals of the societies concerned and between a society and an individual. Usually, the tribunal of the defendant’s society had jurisdiction. In some instances, these treaties provided for arbitration through a third *polis*.²¹² In commercial matters, the jurisdiction of the defendant’s domicile ascended to a general principle of jurisdiction – thus applying also where no treaty applied – sometimes displaced by the jurisdiction of the place where the contract was concluded.²¹³ As commercial relations increased – in particular over larger distances – the forum of contract conclusion was frequently applied.²¹⁴

²⁰³ Sekharipuram Vaidyanatha Viswanatha, *International Law in Ancient India* (Longmans, Green and Company, London 1925) 42, 53 referring to the impressions of Megasthenes translated in John Watson McCrindle, *Ancient India as Described by Megasthenes and Arrian* (Thacker, Spink 1877) 87.

²⁰⁴ Hiralal Chatterjee, *International Law and Inter-State Relations in Ancient India* (Mukhopadhyay 1958) 40.

²⁰⁵ Coleman (n 199) 122; Shalom Kassan, ‘Extraterritorial Jurisdiction in the Ancient World’ (1935) 29 *Am J Int’l L* 237, 244.

²⁰⁶ Coleman (n 199) 122-125.

²⁰⁷ *Ibid* 125.

²⁰⁸ *Ibid* 192.

²⁰⁹ In particular Egypt had such an arrangement for Greek citizens, see *ibid* 195; Liu (n 198) 24; Kurt Siehr, ‘History of Private International Law’ in Jürgen Basedow and others (eds), *Encyclopedia of Private International Law* (Edward Elgar Publishing 2017).

²¹⁰ Coleman (n 199) 193; Liu (n 198) 25; see also Bederman (n 199) 128.

²¹¹ Coleman (n 199) 194.

²¹² *Ibid* 140.

²¹³ *Ibid* 200.

²¹⁴ *Ibid*.

Unlike the Greek *poleis*, ancient Rome had an all-encompassing conception of empire. Therefore, Rome did not divide jurisdiction between societies, but within the empire.²¹⁵ The Roman civil law (*jus civile*) applied exclusively to Roman citizens. *Peregrini* were subjects and free inhabitants of the Roman Empire, but not citizens.²¹⁶ As such, they were governed by a complex interplay of the *jus gentium*, a ‘collection of rules, principles of customs of the various Italian tribes’ which were considered to be binding on all people,²¹⁷ and the *jus originis* – the personal law of the *peregrinus*.²¹⁸ Similar to the Greek *poleis* and other ancient societies, ancient Rome had a separate judicial institution for disputes between and with foreigners – initially the *recuperator*, later the *praetor peregrinus*.²¹⁹ Foreigners outside of the *peregrini*, whose societies did not have treaty relations with Rome, did not enjoy legal protection.²²⁰

From Rome’s inception, the principal *actor sequitur forum rei* was an established jurisdictional principle. The plaintiff had to sue at the domicile of the defendant.²²¹ The place of *origio*, the defendant’s hometown, established jurisdiction as well.²²² Constitutions of Justinian later declared that actions against property may be brought at the location of the property²²³ and that a delict may be pursued where the unlawful act was committed – at least for certain actions.²²⁴ Certain passages of the *Corpus Iuris Civilis* suggest that contractual

²¹⁵ Joseph Henry Beale, ‘The Jurisdiction of Courts over Foreigners. I. European Law’ (1913) 26 Harvard Law Review 193, 195. The office of the *praetor peregrinus* disappeared when in A.D. 212 Emperor Caracalla extended Roman citizenship to all provincials of the Empire, see Liu (n 198) 26.

²¹⁶ Liu (n 198) 26.

²¹⁷ Kassan (n 205) 246; Coleman (n 199) 267.

²¹⁸ Coleman (n 199) 280.

²¹⁹ Theodor Mommsen, *Römisches Staatsrecht. Zweiter Band* (Hirzel 1877) 187, 211; Coleman (n 199) 267; Hélène Gaudemet-Tallon, *Recherches sur les origines de l'article 14 du code civil* (Presses Universitaires de France 1964) 14; Liu (n 198) 25.

²²⁰ Gaudemet-Tallon (n 219) 9; Liu (n 198) 26.

²²¹ The Code of Justinian C. 3.13.2: ‘Imperatores Diocletianus, Maximianus. Iuris ordinem converti postulas, ut non actor rei forum, sed reus actoris sequatur: nam ubi domicilium habet reus vel tempore contractus habuit, licet hoc postea transtulerit, ibi tantum eum conveniri oportet.’ The English translation provided by Samuel P Scott, *The Civil Law, XII; The Enactments of Justinian* (Cincinnati 1932) Code 3.13.2 states: ‘You ask that the order prescribed by law shall be transposed, and that the plaintiff shall not follow the residence of the defendant, but the defendant that of the plaintiff; for wherever the defendant has his domicile, or had it at the time when the contract was made, there alone he must be sued, even though he afterwards may have changed it.’ See also Lord Thomas Mackenzie, *Studies in Roman Law, with Comparative Views of the Laws of France, England, and Scotland* (William Blackwood and Sons 1862) 293; Schröder (n 68) 118.

²²² Von Savigny (n 197) 72; Schröder (n 68) 196.

²²³ The Code of Justinian, C. 3.19.3: ‘Actor rei forum, sive in rem sive in personam sit actio, sequitur. Sed et in locis, in quibus res propter quas contenditur constitutae sunt, iubemus in rem actionem adversus possidentem moveri.’ The English translation provided by Scott (n 221) Code 3.19.3 states: ‘The plaintiff follows the residence of the defendant, whether the action be a real or a personal one, but We order that the real action shall be brought against the possessor in the place in which the property in dispute is situated.’ See also Mackenzie (n 221) 294; Beale, ‘The Jurisdiction of Courts over Foreigners. I. European Law’ (n 215) 195; Schröder (n 68) 353.

²²⁴ Nov. 69, c. I: ‘ut unusquisque in qua provincia delinquit aut in qua pecuniarum aut criminum reus fit, sive de terra et de terminis sive de proprietate sive de possessione aut hypotheca vel de qualibet alia occasione, illic etiam iuri subiaceat (hoc enim apud praecedentes legislatores varie quidem, tamen dictum est, licet non pure et sicut nos

claims could be brought at the place where the contract was concluded²²⁵ or was to be performed.²²⁶ Furthermore, Roman law recognised jurisdiction for counter-claims at the forum of the main claim, after an initial period where no such special jurisdiction had existed.²²⁷ Justinian required that the matters are connected;²²⁸ subsequently even the requirement of connectedness was removed.²²⁹ Finally, the parties could also establish jurisdiction through agreement and the defendant could submit to the jurisdiction of the court.²³⁰

After the fall of the Western Roman Empire in A.D. 476, Germanic kingdoms ruled much of continental Europe. One of them was the Kingdom of the Franks, also called Francia. In Francia, the general place of jurisdiction was at the place of domicile of the defendant or its real property.²³¹ These two factors also constituted ‘Dingpflicht’, the obligation to participate in

illud consideravimus), et ultra terminos litigare non quaerat.’ The English translation provided by Scott (n 221) Nov. 69, c. I states: ‘to see that each person is tried in the province where he has committed a crime, or is a defendant in a civil or criminal action having reference to the boundaries or the ownership of land, the possession or hypothecation of property, or any other matter whatsoever (for provisions have been made in an inconsistent and irregular manner on this subject by preceding legislators, which We have already taken into consideration) in order that no one may attempt to conduct litigation outside of his province.’ See also Mackenzie (n 221) 294; Beale, ‘The Jurisdiction of Courts over Foreigners. I. European Law’ (n 215) 195; Schröder (n 68) 241, who refers to Nov. 69 as atrocious (‘miserabel’), points out that it is doubtful that there had been a general *forum delicti commissi* before the *novellae*.

²²⁵ This may be inferred from D. 5,1,65, D. 5,1,19,2 and D. 5,1,2,4; in favour e.g. Beale, ‘The Jurisdiction of Courts over Foreigners. I. European Law’ (n 215) 195; for inconclusiveness Eva Quick, *Forum Contractus: Eine Untersuchung zur Gerichtsstandslehre im Usus Modernus* (Kovač 2011) 35; see also Schröder (n 68) 284.

²²⁶ This may be inferred from D. 42,5,1-3, D. 44,7,21 and D. 5,1,19,4 and D. 13,4,1; in favour again e.g. Beale, ‘The Jurisdiction of Courts over Foreigners. I. European Law’ (n 215) 195; for inconclusiveness again Quick 35; see also Schröder (n 68) 284.

²²⁷ Schröder (n 68) 582.

²²⁸ The Code of Justinian C. 7.45.14: ‘Cum Papinianus summi ingenii vir in quaestionibus suis rite disposuit non solum iudicem de absolutione rei iudicare, sed ipsum actorem, si e contrario obnoxius fuerit inventus, condemnare, huiusmodi sententiam non solum roborandam, sed etiam augendam esse sancimus, ut liceat iudici vel contra actorem ferre sententiam et aliquid eum daturum vel facturum pronuntiare, nulla ei opponenda exceptione, quod non competens iudex agentis esse cognoscitur. Cuius enim in agendo observavit arbitrium, eum habere et contra se iudicem in eodem negotio non dedignetur.’ The English translation provided by Scott (n 221) C. 7.45.14 states: ‘As that distinguished man, Papinian, very properly stated in his book of Questions, that a judge could not only discharge the defendant from liability, but could render a decision against the plaintiff himself, if, on the other hand, he should find that he was indebted to the defendant, We also order this rule to be extended so that the judge may be permitted to render a decision against the plaintiff, and require him to either pay or do something without allowing any exception to be pleaded against him on the ground that he is not a competent judge of the plaintiff, for he should not object to have the same judge whom he had accepted in the beginning of the case decide against him at the end’.

²²⁹ Nov 96 II 1: ‘Sancimus igitur, si quis obnoxium arbitratur habere eum. qui contra se conventionem exposuit, non apud alium iudicem, sed apud eum mox a principio convenire, et eundem esse iudicem in utroque negotio.’ The English translation provided by Scott (n 221) Nov 96 II 1: ‘Therefore We decree that if anyone should think that another who has sued him is indebted to him, he shall not, in his turn, bring an action against him before another judge, but must bring it before the same one who already has cognizance of the case, who shall dispose of both transactions’; Schröder (n 68) 583.

²³⁰ Schröder (n 68) 405.

²³¹ Rudolf Sohm, *Die fränkische Reichs- und Gerichtsverfassung*, vol 1 (Duncker & Humblot 1911) 299, 307, 338; Schröder (n 68) 130, 353; see also Gaudemet-Tallon (n 219) 17 discussing whether the principle of *actor sequitur forum rei* applied in Francia.

regular sessions of the local court.²³² However, similar to the system in antiquity, many rules of medieval societies applied along personal lines, rather than territorial ones.²³³ As Liu puts it: ‘the Goths, the Franks, the Burgundians, each submitted to their own laws while resident in the same country’.²³⁴ Instances are known in which this also extended to the jurisdiction of the courts. The laws of the Visigoths, as translated by Liu, provided: ‘when foreign merchants have disputes with one another, none of our judges shall take cognizance, but they shall be decided by officers of their nation and according to their laws.’²³⁵ The Ostrogoths and the Lombards had similar arrangements.²³⁶ On the other hand, Gaudemet-Tallon finds it likely that foreigners without such privileges were simply subject to the jurisdiction of their current stay, if not falling outside judicial protection at all.²³⁷

It is likely the discovery of the Digest²³⁸ in Northern Italy in the eleventh century that marks the point of re-emergence of Roman law in continental Europe. This discovery sparked intense scholarly engagement with Roman law. The University of Bologna started to teach Roman law and others followed. The students who returned to their home countries to exercise important worldly or clerical functions sealed the triumph of Roman law in most of continental Europe.²³⁹

In canon law, the *Decretum Gratiani* of 1140, the first part of the *Corpus Juris Canonici*, recognized the *forum domicilii* of the defendant as well as the *forum delicti commissi* following the Roman tradition.²⁴⁰ In a process of reception and acculturation, the *Corpus Juris Civilis* and the canonical law evolved into the common law of (most of) continental Europe – the *ius commune*. The *ius commune* applied where local laws did not supersede it.²⁴¹

The *forum domicilii* of the defendant remained the basic principle of jurisdiction, in the *ius commune* and in the local laws.²⁴² It was regarded as a natural and necessary corollary of the

²³² Schröder (n 68) 130.

²³³ George W Keeton, ‘Extraterritoriality in International and Comparative Law’ (1948) 72 *Recueil des cours* 284, 290; Gaudemet-Tallon (n 219) 15 discussing also the possibility of territorial application of laws.

²³⁴ Liu (n 198) 28; see also Keeton (n 233) 290.

²³⁵ Liu (n 198).

²³⁶ *Ibid* 28, 29.

²³⁷ Gaudemet-Tallon (n 219) 19.

²³⁸ The Digest is the largest part of the *Corpus Juris Civilis* compiled in the sixth century.

²³⁹ Joseph W Planck, ‘The Survival of Roman Law’ (1965) *American Bar Association Journal* 259, 260; see also Beale, ‘The Jurisdiction of Courts over Foreigners. I. European Law’ (n 215) 195.

²⁴⁰ Erwin Jacobi, *Der Prozeß im Decretum Gratiani und bei den ältesten Dekretisten* (Hof-Buchdruckerei 1913) 239.

²⁴¹ James Gordley, *The Jurists: A Critical History* (Oxford University Press 2013) 28.

²⁴² Schröder (n 68) 119.

establishment of domicile, which meant submission to the local law and authority of the local judge.²⁴³ In 1615, the Parlement de Paris, a local court, decided that a foreigner not domiciled in France did in principle not come under its jurisdiction.²⁴⁴ The Tribunal de Cassation seconded this view shortly before the Code Civil was enacted.²⁴⁵

However, the maxim *actor sequitur forum rei* (in the form of an exclusive domicile and/or habitual residence jurisdiction) did not remain unchallenged. Gaudemet-Tallon reports that French courts (before the enactment of the Code Civil) in certain instances accepted jurisdiction in suits brought by French nationals against foreigners not domiciled in France.²⁴⁶ Furthermore, medieval sources mention a *forum contractus*.²⁴⁷ Certain accentuations of this principle emerged in particular out of the jurisdiction over merchants at merchant fairs.²⁴⁸ Charles IX of France specified in a declaration of 1565 that foreigners may litigate among themselves before the French courts in commercial matters based on the following grounds of jurisdiction: the place of the conclusion of the contract, the place of delivery and the place of payment.²⁴⁹ These grounds of jurisdiction were then extended to disputes in commercial matters between French nationals and foreigners.²⁵⁰ The Roman jurisdictional principle of the place of the unlawful action was only hesitantly adopted.²⁵¹ The *forum rei sitae* was well-established, in some places – as formerly in Francia – even as a general place of jurisdiction.²⁵² Jurisdiction for counter-claims was acknowledged. However, some local laws required a connection between the main and the counter-claim to establish jurisdiction.²⁵³ As regards jurisdiction agreements, the Roman liberal tradition clashed with Germanic tradition of localized ‘Dingpflicht’. There were prohibitions against jurisdiction agreements and acceptance emerged very gradually.²⁵⁴ Even then, the *jus commune* allowed judges to disregard unreasonable prorogations of forum.²⁵⁵

²⁴³ Ibid.

²⁴⁴ Gaudemet-Tallon (n 219) 34.

²⁴⁵ Ibid 36; Schröder (n 68) 174.

²⁴⁶ Schröder (n 68) 174.

²⁴⁷ Ibid 296.

²⁴⁸ Gaudemet-Tallon (n 219) 65; Schröder (n 68) 175.

²⁴⁹ Gaudemet-Tallon (n 219) 67; Schröder (n 68) 175.

²⁵⁰ Gaudemet-Tallon (n 219) 68.

²⁵¹ Schröder (n 68) 246.

²⁵² Ibid 130, 353.

²⁵³ Ibid 584.

²⁵⁴ Ibid 406.

²⁵⁵ Ibid 491.

However, beginning with Denmark (1683) and Sweden (1734),²⁵⁶ codifications began to replace the *ius commune* throughout continental Europe. The most famous codification, which also addressed ICA-Jurisdiction, is without doubt the French *Code Civil* of 1804. Article 14 Code Civil introduced plaintiff jurisdiction for French citizens (see already in **Chapter 1**) and Article 15 Code Civil introduced the possibility to sue a French citizen in France regardless of other connecting factors. Noticeably, the initial negotiations on the new Code Civil did not feature the far-reaching plaintiff jurisdiction of Article 14. The committee discussed whether French courts should have jurisdiction if the obligation had been entered into in France, if the defendant habitually resided in France or if the defendant was simply found in France.²⁵⁷ It remains unknown to this day how these discussions transformed into what is now known as Article 14 Code Civil. Gaudemet-Tallon believes it was an editorial error with far reaching consequences.²⁵⁸ However, the result may also have to do with the fact that at the time France was at war with most of Europe. The drafters were concerned that French nationals would not receive fair treatment in foreign courts.²⁵⁹

Another prominent example is the German Civil Procedure Code of 1877. Section 24 of the Code (today Section 23) established jurisdiction against non-residents for pecuniary claims on the basis of assets of the defendant within the jurisdiction.²⁶⁰ Already in 1877, the wording of the provision (i) did not require any connection between the claim and the asset or (ii) arrest of the asset and (iii) the claim was not limited to the value of the asset (iii).²⁶¹ Prior to the enactment of the Code in 1877, Prussian law had known asset-based jurisdiction, first requiring attachment of the assets, then without, but always limited to the value of the assets.²⁶² When the new Civil Procedure Code was drafted, it was proposed that Section 24 should contain the mentioned restrictions. The motion failed.²⁶³

Many other codes emerged as well. While each contained particularities of their own, the influence of Roman law persists to this day. The civil law tradition of ICA-Jurisdiction largely

²⁵⁶ George Mousourakis, *Roman Law and the Origins of the Civil Law Tradition* (Springer 2015) 287.

²⁵⁷ Gaudemet-Tallon (n 219) 80; Schröder (n 68) 175.

²⁵⁸ Gaudemet-Tallon (n 219) 81; Schröder (n 68) 176; Kevin M Clermont and John RB Palmer, 'French Article 14 Jurisdiction, Viewed from the United States' (2004) Cornell Law Faculty Publications Paper 13, 10; see also Nadelmann (n 6) 321.

²⁵⁹ Clermont and Palmer, 'French Article 14 Jurisdiction, Viewed from the United States' (n 258) 9.

²⁶⁰ Civilprozessordnung vom 30.1.1877 (RGBl. S. 83).

²⁶¹ Ibid.

²⁶² Schröder (n 68) 388 et seq; Nadelmann (n 6) 329.

²⁶³ Schröder (n 68) 390; Nadelmann (n 6) 329.

is this Roman law heritage moulded by the demands of subsequent periods. Originating in continental Europe, the tradition now covers many states in other regions. For instance, 19th century Russia borrowed from the European codes in its civil procedure reforms.²⁶⁴ Today's most prominent representatives of the civil law tradition of ICA-Jurisdiction are the Brussels I bis Regulation and the Lugano Convention, which **Chapter 5** will discuss.

4. ICA-Jurisdiction: The Common Law Tradition

After the Norman conquest of 1066 England gradually advanced to a highly ordered dominion.²⁶⁵ These achievements served as the foundation for the later growth of the common law,²⁶⁶ which eventually extended over the entire territory of what was then England.²⁶⁷ It is therefore not surprising that territoriality became important in England earlier than in continental Europe.²⁶⁸ Maine writes that the 'superiority of the Norman monarchs [...] was distinctly a territorial sovereignty' and that '[e]very subsequent dominion which was established or consolidated was formed on the later model'.²⁶⁹

Originally, the defendant or its attorney had to be present before the court to establish jurisdiction. Service of summons did not suffice. If the defendant did not appear after service of summons, it was considered to be in contempt of court, which could lead to the attachment of its property or personal arrest.²⁷⁰ Subsequently, the requirement of appearance was substituted by the requirement of proper service and the general rule of personal jurisdiction

²⁶⁴ Don W Chenoweth, 'Soviet Civil Procedure: History and Analysis' (1977) 67 Transactions of the American Philosophical Society 1, 3; see also on the influence of French and German law: Nadelmann (n 6) 323, 330; Clermont and Palmer, 'French Article 14 Jurisdiction, Viewed from the United States' (n 258) 3.

²⁶⁵ Plucknett (n 186) 11; Alexander N. Sack, 'Conflicts of Laws in the History of the English Law' in A. Reppy (ed), *Law, a Century of Progress, 1835-1935*, vol III (New York University Press 1937) 342, 343.

²⁶⁶ Plucknett (n 186) 13; George Burton Adams, 'The Origin of the Common Law' (1924) 34 The Yale Law Journal 115.

²⁶⁷ Joseph Henry Beale, 'The Jurisdiction of Courts over Foreigners. II. Personal Jurisdiction at Common Law' (1913) 26 Harvard Law Review 283, 284; Richard T Ford, 'Law's Territory (A History of Jurisdiction)' (1999) 97 Michigan Law Review 843, 880.

²⁶⁸ Beale, 'The Jurisdiction of Courts over Foreigners. II. Personal Jurisdiction at Common Law' (n 267).

²⁶⁹ Henry Sumner Maine, *Ancient Law: Its Connection with the Early History of Society and its Relation to Modern Ideas* (John Murray 1920); see also Ford (n 267) 873.

²⁷⁰ Alexander Martin, *Civil Procedure at Common Law* (Boston Book Company 1899) 11; Joseph J Kalo, 'Jurisdiction as an Evolutionary Process: The Development of Quasi In Rem and In Personam Principles' (1978) Duke LJ 1147, 1157.

became that where a person was present on the territory of a sovereign – if only temporarily – he or she may upon proper service there be subjected to the jurisdiction of that sovereign.²⁷¹

ICA-Jurisdiction over the temporarily present – often regarded as exorbitant by civil lawyers – can be viewed as a natural consequence of full territoriality. Sir Edward Coke states in *Calvin's Case* of 1608:

‘and that is when an alien that is in amity cometh into England, because as long as he is within England, he is within the King’s protection; therefore so long as he is here, he oweth unto the King a local obedience or ligeance, for that the one (as it hath been said) draweth the other.’²⁷²

Schröder succinctly paraphrases: protection and submission imply each other.²⁷³ He suggests that jurisdiction over the temporarily present was so inconspicuous to the English legal thought that it seems to have come under attack in legal proceedings for the very first time in 1966 – unsuccessfully that is.²⁷⁴

Territorial civil court jurisdiction did not mean that all claims could be adjudicated in the English courts. In early English practice this was not the case for foreign causes of action. One reason was that the courts relied on juries drawn from the vicinity for the facts. As juries were not summoned from abroad, it was impossible to collect evidence of these places.²⁷⁵ Joseph Beale reports of a case of 1282, in which an Italian merchant domiciled in England sought compensation for the destruction of his house in Florence by rival guilds. The court declined the request because ‘it is not the custom of England that anyone should answer in the Kingdom of England for any trespass committed abroad in time of war or otherwise.’²⁷⁶ A similar, second challenge arose with regard to suits by foreign corporations because there was no way of

²⁷¹ Beale, ‘The Jurisdiction of Courts over Foreigners. II. Personal Jurisdiction at Common Law’ (n 267) 285; sceptical Albert A Ehrenzweig, ‘The Transient Rule of Personal Jurisdiction: The Power Myth and Forum Conveniens’ (1955) 65 Yale LJ 289.

²⁷² *Calvin's Case* [1608] 7 Co. Rep. 1a, 77 ER 377.

²⁷³ Schröder (n 68) 167.

²⁷⁴ *Colt Industries Inc. v. Sarlie*, [1966] 1 All E.R. 673; see also Schröder (n 68) 165; for the U.S. see *Burnham v. Superior Court*, 495 U.S. 604 (1990) 613: ‘Although research has not revealed a case deciding the issue in every State’s courts, that appears to be because the issue was so well settled that it went unlitigated.’; Ehrenzweig, however, was sceptical that English precedents were quite so clear-cut (Ehrenzweig (n 271)).

²⁷⁵ Beale, ‘The Jurisdiction of Courts over Foreigners. II. Personal Jurisdiction at Common Law’ (n 267) 289; see also Ryngaert, *Jurisdiction in International Law* (n 15) 62.

²⁷⁶ Beale, ‘The Jurisdiction of Courts over Foreigners. II. Personal Jurisdiction at Common Law’ (n 267) 289.

proving their valid incorporation. These obstacles were overcome once juries could rely on witnesses and documentary evidence.²⁷⁷ A third challenge was the character of personal jurisdiction, which originally was considered to lie in a breach of the king's peace and by implication had to occur within the king's territory.²⁷⁸ The solution was recourse to a fictitious venue in England, which the other party was not allowed to dispute.²⁷⁹ According to Beale, it was not an English court, but the General Court of the Colony of Massachusetts in 1648 that was the first to allow a suit based on a foreign cause of action.²⁸⁰ Subsequently, also the English courts accepted the notion. Thus, Albert Dicey wrote in 1896: 'When the defendant in an action *in personam* is, at the time for the service of the writ, in England, the Court has jurisdiction in respect of any cause of action, in whatever country such cause of action arises'.²⁸¹ However, certain exceptions remained.²⁸²

Beyond the general jurisdiction over defendants present in the territory, special grounds of jurisdiction developed that allowed to serve defendants outside of England.²⁸³ In 1896, Dicey listed eight such exceptions.²⁸⁴ The details have changed, but the law of England and Wales still distinguishes service in and out of the jurisdiction.²⁸⁵

²⁷⁷ Ibid.

²⁷⁸ Ibid; see also Ryngaert, *Jurisdiction in International Law* (n 15) 63.

²⁷⁹ Beale, 'The Jurisdiction of Courts over Foreigners. II. Personal Jurisdiction at Common Law' (n 267) 290.

²⁸⁰ Ibid 290.

²⁸¹ Albert Venn Dicey, *A Digest of the Law of England with Reference to the Conflict of Laws* (Stevens and Sons, Limited 1896) 233 (references omitted).

²⁸² Beale, 'The Jurisdiction of Courts over Foreigners. II. Personal Jurisdiction at Common Law' (n 267) 291, 294.

²⁸³ The Common Law Procedure Act 1852 first allowed the summoning of defendants residing out of the jurisdiction, see Lawrence Collins, 'Some Aspects of Service out of the Jurisdiction in English Law' (1972) 21 *International & Comparative Law Quarterly* 656, 656; see also Mills, 'Exorbitant Jurisdiction and the Common Law' (n 97) 246.

²⁸⁴ These were cases in which (i) 'the whole subject matter of the action is land situated in England' (Dicey (n 281) 240) (ii) 'any act, deed [will], contract, obligation, or liability affecting land or hereditaments situate in England is sought to be construed, rectified, set aside, or enforced in the action' (ibid 241 (references omitted)), (iii) 'any relief is sought against any person domiciled or ordinarily resident in England' (ibid 243) (iv) 'the action is for the execution (as to property situate in England) of the trusts of any written instrument of which the person to be served with a writ (defendant) is a trustee, which ought to be executed according to the law of England' (ibid 247), (v) 'the action is founded on any breach, or alleged breach, in England, of any contract, wherever made, which, according to the terms thereof, ought to be performed in England, unless the defendant is domiciled or ordinarily resident in Scotland or Ireland' (ibid 248), (vi) 'any injunction is sought as to anything to be done in England, or any nuisance in England is sought to be prevented or removed, whether damages are or are not sought in respect thereof' (ibid 248), (vii) 'whenever any person out of England is a necessary or proper party to an action properly brought against some other person duly served with a writ in England, the Court has jurisdiction to entertain an action against such first mentioned person as a co-defendant in the action' (ibid 254), (viii) 'any two or more persons being liable as co-partners, and carrying on business in England, when sued in the name of the firm (if any) of which such persons were co-partners at the time of the accruing of the cause of action' (ibid 257).

²⁸⁵ Civil Procedure Rules & Practice Directions Part 6, III and IV, available at <<https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part06>>, accessed on 31 January 2025.

One noteworthy basis of ICA-Jurisdiction today found in Section 3.1 (6) (c) of Practice Directive 6B to the Civil Procedure Rules of England and Wales concerns claims made in respect of a contract where the law of England and Wales governs the contract.²⁸⁶ Dicey did not mention the rule in 1896. It was added only in 1921 to overcome the decision *Johnson v. Taylor Bros. & Company, Limited*, in which leave for service out of the jurisdiction was denied even though the contractual claim was apparently governed by English law.²⁸⁷ In 1965, the rule was incorporated into the Rules of the Supreme Court.²⁸⁸

Pursuant to the law of England and Wales, the decision whether the case should proceed, and in service out cases whether jurisdiction exists at all, does not follow hard and fast rules, but is essentially a discretionary one pursuant to the well-known doctrine of *forum non conveniens*. Scottish decisions in the 17th century are credited with its origin.²⁸⁹ English courts at first resisted the doctrine's adoption but then gradually incorporated it.²⁹⁰ Lord Goff defined the modern test in the House of Lords decision in *Spiliada Maritime Corp. v. Cansulex Ltd* in 1986:

'The basic principle is that a stay will only be granted on the ground of forum non conveniens where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for trial of the action, i.e., in which the case may be tried more suitably for the interests of all the parties and the ends of justice.'²⁹¹

This is a two-prong analysis. The first part is concerned with the appropriate forum, the second part with requirements of justice.²⁹² The principle applies in service in and service out cases, but there are important differences, e.g. regarding the burden of proof.²⁹³

²⁸⁶ Practice Direction 6B – Service Out of the Jurisdiction – Civil Procedure Rules, <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part06/pd_part06b#3.1>, accessed on 31 January 2025; see on this also Mills, 'Exorbitant Jurisdiction and the Common Law' (n 97) 257.

²⁸⁷ *James Finlay and Company, Limited v. N. V. Kwik Hoo Tong Handel Maatschappij* [1928] 2 K.B. 604, which refers to *Johnson v. Taylor Bros. & Company, Limited* [1920] A.C. 144.

²⁸⁸ Schröder (n 68) 548.

²⁸⁹ Ronald A Brand and Scott R Jablonski, *Forum Non Conveniens: History, Global Practice, and Future under the Hague Convention on Choice of Court Agreements*, vol 3 (Oxford University Press 2007) 7.

²⁹⁰ Ibid 11.

²⁹¹ *Spiliada Maritime Corp. v. Cansulex Ltd* [1987] A.C. 460, 476 (H.L.).

²⁹² Brand and Jablonski (n 289) 3.

²⁹³ Ibid 22.

The Kingdom of England, since 1707 the Kingdom of Great Britain, since 1801 the United Kingdom of Great Britain and Ireland and since 1922 United Kingdom of Great Britain and Northern Ireland exported the common law to the colonies of its Empire. The rules on ICA-Jurisdiction (including those on *forum non conveniens*)²⁹⁴ developed distinct features in each state, but the basic common law structure remained. The example of the U.S. is illustrative.

The American colonies adopted the English common law and retained it after their independence where it did not contradict their own laws.²⁹⁵ Louisiana is an exception as the state's law is in important parts of civil law origin.²⁹⁶ Before the enactment of the Fourteenth Amendment of the U.S. Constitution, which contains the Due Process Clause, ICA-Jurisdiction was based on common law principles akin to the English understanding. If the defendant did not consent to the jurisdiction of the court or make a general appearance, the defendant had to be brought bodily before the court, in subsequent years be served with a writ within the respective state of the court.²⁹⁷ Early U.S. judges had a highly territorial conception of ICA-Jurisdiction. *Pearse* gives an illuminating account for why this might have been the case:

‘Early American judges, imbued perhaps with the prevailing isolationist ethos of their era, with its aversion to Old World entanglements and its anxiety about projections of feudal power contaminating their country’s ostensibly unblemished Lockean landscape, were historically wed to the notion that jurisdiction, along with politics, stopped at the water’s edge.’²⁹⁸

This definitely changed in 1945, when the U.S. Supreme Court in the case of *International Shoe Co. v. Washington* articulated the ‘minimum contacts’ test which did not require service of the defendant within the state of the court, but relied on contacts of the defendant with the state.²⁹⁹ The decision has been viewed as being part of a larger shift to a social welfare society that was determined to provide a shield against adverse effects.³⁰⁰ Subsequent decisions have

²⁹⁴ See for Australia, Canada and the U.S. *ibid* chapters 3-6.

²⁹⁵ Richard C Dale, ‘The Adoption of the Common Law by the American Colonies’ (1882) 30 *The American Law Register* (1852-1891) 553.

²⁹⁶ Robert A Pascal, ‘Louisiana Civil Law and Its Study’ (1999) 60 *La L Rev* 1.

²⁹⁷ Kalo (n 270) 1148, 1157; Brian Pearce, ‘The Comity Doctrine as a Barrier to Judicial Jurisdiction: A US-EU Comparison’ (1994) 30 *Stan J Int’l L* 525, 530.

²⁹⁸ Pearce (n 297).

²⁹⁹ 326 U.S. 310 (1945); Pearce (n 297) 531.

³⁰⁰ Kalo (n 270) 1182.

fleshed out the details of this test, which remains the relevant test under U.S. constitutional law to this day.³⁰¹

Importantly, already the Common Law Procedure Act 1852 allowed service out of the jurisdiction if – according to Dicey – ‘any two or more persons being liable as co-partners, and carrying on business in England, when sued in the name of the firm (if any) of which such persons were co-partners at the time of the accruing of the cause of action’.³⁰² U.S. decisions before *International Shoe Co. v. Washington* generally relied either on actual or implied consent of the company doing business to the court’s jurisdiction (many states required companies to consent to the jurisdiction of the state’s courts in order to do business).³⁰³ After *International Shoe Co. v. Washington*, doing business within the state was considered sufficient to comply with the constitutional restraint of ‘minimum contacts’.³⁰⁴ However, recently the U.S. Supreme Court drastically reframed and limited this ground of ICA-Jurisdiction and brought it more in line with international practice.³⁰⁵

³⁰¹ Austen Parrish, ‘Sovereignty, Not Due Process: Personal Jurisdiction over Nonresident Alien Defendants’ (2006) 41 Wake Forest L Rev 1, 8; Dodge and Dodson (n 99); Born (n 33); Kate Bonacorsi, ‘Not at Home with at-Home Jurisdiction’ (2013) 37 Fordham Int’l LJ 1821; Kyle Voils, ‘Making Sense of Sovereignty: A Historical Understanding of Personal Jurisdiction from Pennoyer to Nicaastro’ (2015) 110 Nw UL Rev 679.

³⁰² Dicey (n 281) 257; see also Von Mehren and Gottschalk (n 35) 175.

³⁰³ Friedrich K Juenger, ‘The American Law of General Jurisdiction’ (2001) U Chi Legal F 141 et seqq.

³⁰⁴ Ibid 155 et seqq.

³⁰⁵ *Goodyear Dunlop Tires Operations, S. A., et al. v. Brown*, 564 U.S. 915 (2011).

5. Ulrik Huber's legacy

Staying with the U.S., but returning to the development of prescriptive jurisdiction, it was in fact Huber's *De Conflictu Legum* (see **Section 2**) which exerted great influence there.³⁰⁶ U.S. Supreme Court Justice and scholar Joseph Story reinterpreted Huber's first and second maxims to be about the territorial reach of legislation in his famous *Commentaries on the Conflict of Laws* (1834).³⁰⁷

‘Another maxim, or proposition, is that no state or nation can, by its laws, directly affect, or bind property out of its own territory, or persons not resident therein, whether they are natural born subjects, or others. This is a natural consequence of the first proposition; for it would be wholly incompatible with the equality and exclusiveness of the sovereignty of any nation, that other nations should be at liberty to regulate either persons or things within its territories.’³⁰⁸

Story accepted as an exception to this rule that nationals of the prescribing state could be bound by the state's law also beyond its borders (of course not excluding being bound also by the territorial law).³⁰⁹ Perhaps most clearly this was set out by Story himself as Justice of the U.S. Supreme Court in the *The Appollon* (1824), where he held:

‘The laws of no nation can justly extend beyond its own territories except so far as regards its own citizens. They can have no force to control the sovereignty or rights of any other nation within its own jurisdiction. And however general and comprehensive the phrases used in our municipal laws may be, they must always be restricted in construction to places and persons, upon whom the legislature has authority and jurisdiction.’³¹⁰

Another example is the *Cutting Case* (1886). The case concerned Mexico's assertion of jurisdiction over a U.S. citizen, Mr. Cutting, based on the passive personality principle, that is

³⁰⁶ Davies (n 191) 54; the doctrine subsequently influenced many other U.S. scholars, see for a prominent example Beale, ‘The Jurisdiction of a Sovereign State’ (n 14) 241.

³⁰⁷ Story (n 36) 19-37; see Geoffrey C Hazard Jr, ‘A General Theory of State-Court Jurisdiction’ (1965) *The Supreme Court Review* 241, 258 et seqq on Story's reinterpretation of Huber's maxims.

³⁰⁸ Story (n 36) 21.

³⁰⁹ *Ibid* 22.

³¹⁰ *The Appollon* 22 U.S. 9 Wheat. 362, 370 (1824).

because the victim was Mexican.³¹¹ Mr. Cutting had published an article in a Texas newspaper criticising a Mexican citizen.³¹² When the Mexican authorities arrested him in Paso del Norte and charged him with criminal libel, the U.S. protested and invoked a violation of territorial jurisdiction.³¹³ In his report, John Moore, then Third U.S. Assistant Secretary of State, later Judge to the PCIJ (including in *Lotus*), wrote: '[f]or a nation to hold its penal laws to be binding on all persons within the territory of another state, is to assert a right of sovereignty over the latter, and impairs its independence.'³¹⁴ The conflict concluded without a decision on the permissibility of Mexican jurisdiction as the Mexican authorities released Mr. Cutting.³¹⁵

As has been pointed out above (**Section 4**), the U.S. as a newly independent state at the beginning of the 19th century was wary of foreign interference. It had less to gain from extraterritorial application of its laws than what it could lose by inviting the application of foreign laws to conduct in the U.S.³¹⁶

While throughout the 19th and early 20th century claims for territorially limited prescriptive jurisdiction occurred elsewhere as well,³¹⁷ this notion of prescriptive jurisdiction was certainly not universal. The most prominent dissent came from The Hague. In *Lotus* the majority took a different approach.

³¹¹ John Bassett Moore, *Report on Extraterritorial Crime and the Cutting Case* (US Government Printing Office 1887); John G McCarthy, 'The Passive Personality Principle and Its Use in Combatting International Terrorism' (1989) 13 *Fordam Int'l LJ* 298, 302.

³¹² Moore (n 311) 3; McCarthy (n 311) 302.

³¹³ Moore (n 311) 6.

³¹⁴ *Ibid* 125.

³¹⁵ McCarthy (n 311) 303.

³¹⁶ Ryngaert, *Jurisdiction in International Law* (n 15) 67; see also *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909) and for a discussion Jeffrey L Dunoff and others, *International Law: Norms, Actors, Process* (5 edn, Wolters Kluwer Law & Business 2020) mn 281. Accordingly, when power relations shifted in favour of the U.S. after World War II, views in the U.S. also became more expansive; see e.g. the famous *Alcoa Case* (1945). In this antitrust case, the U.S. Court of Appeals for the Second Circuit held that the U.S. had jurisdiction to restrict cartel and cartel-related activities 'if they were intended to affect imports and did affect them' (*United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945)); for a discussion see also Schachter (n 8) 255.

³¹⁷ The French Cour de Cassation, confronted with the allegation of criminal acts committed outside of France, held in 1873 that 'the right to punish emanates from the right of sovereignty, which does not extend beyond the limits of the territory' and accordingly annulled the conviction of the lower instance court (Translation in Moore (n 311) 56; for the original text see *ibid* 130 (Exhibit B)); see also *Der Zollverein* [1856], 66 E.R. 1038, 1040; British courts followed this approach in several other cases as well, see Akehurst (n 42) 183-185; see also the arbitration *The North Atlantic Coast Fisheries Case (Great Britain, United States)* (7 September 1910) RIAA XI 167, 180, 183.

6. *Lotus* and the *Island of Palmas* Arbitration

Lotus remains the only judgment in which either the PCIJ or the ICJ ‘addressed the question of jurisdiction head-on’.³¹⁸ The PCIJ had observed already in 1923 that ‘[t]he question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends upon the development of international relations’.³¹⁹ Only in *Lotus* the PCIJ offered a comprehensive analysis of jurisdiction. It was a split decision with the president Max Huber casting the deciding vote (Judge Moore agreed with the *dispositif* but voted against the decision for different reasons).

The PCIJ established the following facts in *Lotus*: On 2 August 1926, just before midnight the French mail steamer *Lotus* and the Turkish collier *Boz-Kourt* collided on the high seas. The *Boz-Kourt* was cut in two, sank, and eight Turkish nationals on board died.³²⁰ The Turkish authorities arrested the captain of the *Lotus*, Lieutenant Demons, a French citizen, charged him with manslaughter and sentenced him to eighty days’ imprisonment and a fine of twenty-two pounds. The captain of the *Boz-Kourt* was sentenced to a slightly more severe penalty.³²¹ By special agreement France and Turkey asked the PCIJ whether Turkey, by instituting criminal proceedings against Lieutenant Demons, had acted in violation of public international law.³²²

After having established that the Convention of Lausanne of 4 July 1923, which was applicable between the parties, referred to the CIL of jurisdiction, the PCIJ was confronted with two diverging approaches for establishing the content of CIL in this matter. France advocated that Turkey ‘should be able to point to some title to jurisdiction recognized by international law in favour of Turkey’.³²³ Turkey, on the other hand, contended that the law ‘allows Turkey jurisdiction whenever such jurisdiction does not come into conflict with a principle of international law’.³²⁴ This was not an academic exercise, but went to the heart of Turkish interests. Only three years prior to the collision, Turkey abolished a highly resented capitulatory

³¹⁸ Ryngaert, *Jurisdiction in International Law* (n 15) 4.

³¹⁹ *Nationality Decrees Issued in Tunis and Morocco on Nov. 8th, 1921* (Advisory Opinion) PCIJ Rep Series B, No 4, 24; see Daniel Costelloe, ‘Conception of State Jurisdiction in the Jurisprudence of the International Court of Justice and the Permanent Court of International Justice’ in Stephen Allen and others (eds), *The Oxford Handbook of Jurisdiction in International Law* (Oxford University Press 2019) 455, 463.

³²⁰ *Lotus* (n 16) 10.

³²¹ *Ibid* 11.

³²² *Ibid* 5.

³²³ *Ibid* 18.

³²⁴ *Ibid* 18.

regime, which had divested the Ottoman Empire from jurisdiction over people of certain nationalities on its territory.³²⁵ Agent for Turkey, Mahmut Esat, forcefully made the point that the abandonment of this oppressive regime had been a matter of honour and national existence for his new independent country and that Turkey was not prepared to cede jurisdiction to France on unjustified grounds again.³²⁶

The PCIJ famously held:

‘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.’³²⁷

The PCIJ accepted as the first and foremost ‘restriction imposed by international law upon a State’ that it ‘may not exercise its power in any form in the territory of another State’ and that ‘[i]n this sense jurisdiction is certainly territorial’.³²⁸ Here, the PCIJ referred to what modern parlance calls enforcement jurisdiction. For other types of jurisdiction the PCIJ remarked:

‘It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law.’³²⁹

The contrary view could only hold, pursuant to the PCIJ, if ‘international law contained a general prohibition to States to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, and if, as an exception to this general prohibition, it allowed States to do so in certain specific cases.’ However, the PCIJ concluded

³²⁵ Umut Ozsu, ‘De-territorializing and Re-territorializing’ (2009) 22 LJIL 29, 42.

³²⁶ ‘Discours prononcé par Mahmout Essat Bey’, in ‘The ‘Lotus’ Case: Documents Relating to Judgment No. 9 (1927) 102, 107: ‘Le bon sens et la logique prouvent que la nouvelle Turquie, pour qui l’abolition des Capitulations était une question d’honneur et d’existence nationale, n’aurait pas demandé et obtenu cette abolition pour accepter qu’on y substituât une situation pire’.

³²⁷ *Lotus* (n 16) 18.

³²⁸ *Ibid* (n 16) 18.

³²⁹ *Ibid* (n 16) 19.

that ‘this is certainly not the case under international law as it stands at present’:³³⁰ ‘all that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty.’³³¹

This section of the *Lotus* judgment is most remarkable, not least because the majority of Judges opted for a different notion of territorial sovereignty than the one expounded by the U.S. Supreme Court in *The Appolon* in 1824 and also later in other cases. It defies Story’s notion of territorially limited prescriptive jurisdiction.³³² Pursuant to the PCIJ, a state has jurisdiction, at least *prima facie*, ‘in its own territory, in respect of any case which relates to acts which have taken place abroad’.³³³ At first glance, it is therefore surprising that even the Judge for the U.S., Judge Moore, supported the operative part of the majority’s decision (his dissent concerned a point left open by the majority). However, Judge Moore did take a decidedly U.S. American approach, relying on Story’s notion of territorial jurisdiction and only concurred because he agreed with the majority that the act of manslaughter took place on Boz Kourt, which he equated with Turkish territory (see below).

After the general expositions on jurisdiction, the PCIJ went on to analyse whether a different principle governed criminal jurisdiction. The PCIJ concluded that ‘[t]he territoriality of criminal law, therefore, is not an absolute principle of international law and by no means coincides with territorial sovereignty.’³³⁴ Reserving judgment on whether Turkey could base its jurisdiction solely on the nationality of the victims, the PCIJ accepted that public international law does not contain a rule precluding Turkey to prosecute a crime the effects of which occurred ‘in a place assimilated to Turkish territory’ (the Boz-Kourt).³³⁵ The PCIJ added that ‘[a] corollary of the principle of the freedom of the seas is that a ship on the high seas is assimilated to the territory of the State the flag of which it flies, for, just as in its own territory, that State exercises its authority upon it, and no other State may do so’ and that therefore ‘what occurs on board a vessel on the high seas must be regarded as if it occurred on the territory of the State whose flag the ship flies.’³³⁶

³³⁰ Ibid 19.

³³¹ Ibid 19.

³³² Mann, ‘The Doctrine of Jurisdiction in International Law’ (n 19) 33.

³³³ *Lotus* (n 16) 19.

³³⁴ Ibid 20.

³³⁵ Ibid 23.

³³⁶ Ibid, 25; Guilfoyle (n 152) 102.

Not often mentioned, this was the point of law decided in *Lotus* (without reliance on the fundamental points expounded earlier in the judgment).³³⁷ The state to which a vessel belongs has criminal jurisdiction over a collision caused by another vessel on the high seas since the collision is deemed to take place on board the vessel and by extension on the territory of the state.³³⁸ Consequently, states departed from this rule.³³⁹ Today, Art 97 of UNCLOS states that in the event of a collision or any other incident of navigation concerning a ship on the high seas, involving the penal or disciplinary responsibility of the master or any other person in the service of the ship, no penal or disciplinary proceedings may be instituted against such person except before the judicial or administrative authorities either of the flag State or of the State of which such person is a national. Were *Lotus* decided today, France would have exclusive jurisdiction pursuant to the exclusive jurisdiction of the flag state.

Six PCIJ Judges dissented from the majority opinion. However, Judge Moore actually agreed on the question decided. His dissent concerned the question whether Turkey could base its jurisdiction on the Turkish nationality of the victims.³⁴⁰

³³⁷ Costelloe (n 319) 473.

³³⁸ The possibility of this result was discussed already before the judgment by W Eric Beckett, 'Criminal Jurisdiction Over Foreigners' (1927) 8 Brit YB Int'l L 108.

³³⁹ Article 1 of the International Convention for the Unification of Certain Rules relating to Penal Jurisdiction in Matters of Collision and Other Incidents of Navigation, 10 May 1952, 439 UNTS 233; Article 11(1) of the Convention on the High Seas, 29 April 1958, 450 UNTS 11; Article 97 of the UN Convention on the Law of the Sea, 10 December 1982, 1833 UNTS 397.

³⁴⁰ *Lotus* (n 16) (Dissenting Opinion Moore); Guilfoyle (n 152) 103. At the outset, Judge Moore clarified that his dissent did not concern the question decided by the majority, but the question whether Article 6 of the Turkish Penal Code, which reflected the passive personality principle, violated public international law. He actually agreed with the operative part of the majority's decision, making it 'a definitely ascertained majority of seven to five' (*Lotus* (n 16) (Dissenting Opinion Moore) 65). However, he was not in wholesale agreement with the reasoning. With reference to U.S. Supreme Court judgment in *Schooner Exchange v. McFaddon*, Judge Moore posited that '[i]t is an admitted principle of international law that a nation possesses and exercises within its own territory an absolute and exclusive jurisdiction, and that any exception to this right must be traced to the consent of the nation, either express or implied [...]' (ibid 68). Following the legal tradition in the U.S., Judge Moore agreed that a state could apply its penal law to acts done on its territory and to acts of its citizens abroad (ibid 91). He contended that 'a ship on the high seas is, for jurisdictional purposes, to be considered as a part of the territory of the country to which it belongs' (ibid 69). In his view, it sufficed that the act took place on the prosecuting state's territory, with no need for the acting person to be corporeally present there (ibid). Judge Moore considered this the case for an act of involuntary manslaughter originating on board of one ship but taking effect on another ship. Turkey thus acted in accordance with international law. Judge Moore then considered Article 6 of the Turkish Penal Code, which established that Turkey had jurisdiction for offences committed by foreigners abroad to the prejudice of 'Turkish subject', subject to some qualifications (ibid 90). This reflects the passive personality principle of jurisdiction. In a comparatively brief section of his Opinion, Judge Moore concludes that the criminal proceedings in Turkey, 'so far as they rested on Article 6 of the Turkish Penal Code, were in conflict with [...] principles of international law' (ibid 94).

Judges Finlay,³⁴¹ Loder³⁴², Nyholm³⁴³ and Weiss³⁴⁴ considered that under public international law the penal law of a state must not apply to acts outside its territory (following a decidedly Storyan conception), barring certain exceptions, which they did not consider applicable to the case at hand. The Judges did not consider it permissible to conclude that the offense had taken place in Turkish territory. Judge Loder's summary of the majority decision may have nourished the extreme interpretation of the judgment that became known as the *Lotus* principle (see the discussion in **Chapter 2**). He attributed to the majority the view that 'under international law, every door is open unless it is closed by treaty or by established custom'.³⁴⁵ Judge Altamira followed an idiosyncratic approach, denying Turkish jurisdiction as well.³⁴⁶

³⁴¹ Judge Finlay observed:

'The practice with regard to crimes committed at sea has been that the accused should be tried by the courts of the country to which his ship belongs, with the possible alternative of the courts of the country to which the offender personally belongs, if his nationality is different from that of the ship.'
(*Lotus* (n 16) (Dissenting Opinion Finlay) 50).

Judge Finlay accepted piracy as the only exception to this rule (*ibid*). He refused to equate the Turkish ship, *Boz Kourt*, with Turkish territory (*ibid* 53). On the issue of the passive personality principle, Judge Finlay stated that international law does not recognize jurisdiction 'for the "protection" of the national' (*ibid* 55).

³⁴² Opposing the majority's view, Judge Loder argued that the '[t]he fundamental consequence of their [the states'] independence and sovereignty is that no municipal law, in the particular case under consideration no criminal law, can apply or have binding effect outside the national territory' (*Lotus* (n 16) (Dissenting Opinion Loder) 34). He considered this a 'logical principle of law', and 'a postulate upon which the mutual independence of States rests' (*ibid* 35). He accepted the existence of an exception where the offense committed by the foreigner is directed against the state or 'its security or credit' but found that this exception did not apply to the facts in *Lotus* (*ibid* 36). Judge Loder considered the principle of objective territoriality, i.e. jurisdiction at the place where the effects of the crime occur, 'in every case a legal fiction', except 'where the act and its effect are indistinguishable', such as intentional inflictions of injury across borders (*ibid* 37). Thus, he did not accord the principle any relevance.

³⁴³ To Judge Nyholm two principles of public international law were essential: 'the principle of sovereignty and the territorial principle, according to which each nation has dominion over its territory and-on the other hand-has no authority to interfere in any way in matters taking place on the territories of other nations' (*Lotus* (n 16) (Dissenting Opinion Nyholm) 59). In his view, Turkey's exercise of jurisdiction constituted a transgression of these principles (*ibid* 60). Judge Nyholm disposed of Turkey's argument that the effects of the offense had occurred on the *Boz-Kourt* and thus on Turkish territory by pointing out that Turkey had not advanced any evidence in this regard (*ibid* 61). According to Judge Nyholm, Turkey had not established any applicable exception to the territorial principle, albeit in his view there was a 'tendency towards a relaxation in the strict application of this principle' (*ibid* 63).

³⁴⁴ Judge Weiss endorsed a state's jurisdiction to 'punish the perpetrators of offences committed within its territory' (*Lotus* (n 16) (Dissenting Opinion Weiss) 40, 44). However, he added that 'outside the territory, the frontier having once been traversed, the right of States to exercise police duties and jurisdiction ceases to exist' (*ibid*). He was skeptical of exceptions to this rule based on nationality or the protective principle (*ibid* 45). As regards the high seas, Judge Weiss viewed the vessels and crews 'answerable only to the law of the flag' (*ibid*). Finally, Judge Weiss dismissed Turkey's argument to localise the offence on the *Boz Kourt* and thus on Turkish territory as 'the place where the punishable act has been committed and where the person responsible for that act was at the time when it was committed; it is there that the offence has really taken place' (*ibid* 47).

³⁴⁵ *Lotus* (n 16) (Dissenting Opinion Loder) 34.

³⁴⁶ Judge Altamira started from the proposition that 'amongst the most widely recognized principles of international law are the principles that the jurisdiction of a State is territorial in character and that in respect of its nationals a State has preferential, if not sole jurisdiction' (*Lotus* (n 16) (Dissenting Opinion Altamira) 95). He found great difficulty in accepting that Turkey could 'exercise jurisdiction over a foreigner, who resided on board a vessel flying the flag of his own country and did not land with the intention of remaining ashore, and that for an alleged offence committed outside the territory of the country which claimed to exercise jurisdiction over him.' He conceded the existence of certain exceptions to this rule 'in extreme cases where it has been absolutely necessary or inevitable' (*ibid*). However, referred to several cases and municipal rules of criminal jurisdiction, he argued that the majority of states did not recognize an exception which would cover the facts of the case (*ibid* 97-98).

The *Island of Palmas* arbitration decided in the immediate aftermath of *Lotus*, as far as it concerns sovereignty and jurisdiction, bears great resemblance with the majority decision in *Lotus*. Departures from the theory expounded one year prior are not discernible. This can come as no surprise as the sole arbitrator was Max Huber, the former president of the PCIJ who cast the deciding vote in *Lotus*. The dispute arose between the U.S. and the Netherlands over the question of who the territorial sovereign of the Island of Palmas (today part of Indonesia) was. Huber decided in favour of the Netherlands. On sovereignty, Huber confirmed the residual rule formulated in *Lotus*:

‘Sovereignty 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. The development of the national organisation of States during the last few centuries and, as a corollary, the development of international law, have established this principle of the **exclusive competence of the State in regard to its own territory** in such a way as to make it the point of departure in settling most questions that concern international relations.’³⁴⁷

However, major developments in the law of prescriptive jurisdiction throughout the following decades cast serious doubts on the expositions in *Lotus* and *Island of Palmas* –if they ever were correct as a matter of CIL, that is. In the words of Judge Guillaume, ‘[t]he situation is different today, it seems to me - totally different’.³⁴⁸ The work of the Nineteenth Commission of the Institut de Droit International demonstrates the transition well. In an early draft, rapporteur Maarten Bos suggested that ‘extraterritorial jurisdiction to prescribe and to adjudicate may [...] be exercised in all cases in which the absence of a significant link has not

102). Judge Altamira argued that even ‘[i]n the case of competing claims to jurisdiction such as those in question (according to those who recognize the existence of such competition), this freedom is conditioned by the existence of the express or tacit consent of other States and particularly of the foreign State directly interested. As soon as these States protest, the above-mentioned freedom ceases to exist’ (ibid 103). Consequently, Judge Altamira accorded great weight to the protest of France as evidence of France’s dissent (ibid). Finally, Judge Altamira invoked ‘respect for the rights of the individual’ as taking ‘precedence over everything else’ (ibid). He concluded that Turkey’s assertion of jurisdiction violated Lieutenant Demons’ rights (ibid 106).

³⁴⁷ *Island of Palmas Case (Netherlands v United States of America)* (4 April 1928) RIAA II, 829, 838 (emphasis added).

³⁴⁸ *Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* (Separate Opinion of President Guillaume) [2002] ICJ Rep 43.

been proved by an opposing State’.³⁴⁹ In his final report he instead required the asserting state to justify its jurisdiction by reference to certain heads of jurisdiction.³⁵⁰ The succeeding rapporteur M. François Rigaux was similarly doubtful of the validity of *Lotus* on this point.³⁵¹ James Crawford wrote: ‘[...] there are hints that *Lotus* has been reversed: if a state wishes to project its prescriptive jurisdiction extraterritorially, it must find a recognized basis in international law for doing so.’³⁵² Even more generally, Mills wrote: ‘The rules of international jurisdiction authorise an exercise of regulatory authority in limited and defined circumstances – an authorisation which can only be necessary because a regulatory act would be prohibited in its absence’.³⁵³ The first important catalyst in this direction occurred in 1935.

7. The 1935 Harvard Research Draft Convention on Jurisdiction with Respect to Crime: A Consensus on Prescriptive Criminal Law Jurisdiction Emerges

While many questions regarding prescriptive jurisdiction remain unsettled, there is broad consensus on certain CIL bases of jurisdiction for criminal law (see **Chapter 4 Section 2**).³⁵⁴ In this area of the law, plenary jurisdiction with only a few exceptions is no longer an accurate account (if it ever was). Instead, jurisdiction is in conformity with CIL only if it is based on specific principles. The principles apply concurrently. Different states may prosecute and punish based on the same or different heads of jurisdiction.³⁵⁵

The 1935 Harvard Research Draft Convention on Jurisdiction with Respect to Crime (‘**1935 Draft Convention on Crime**’), was highly influential in this regard, although states never adopted it as a treaty. Much of the prior state practice corresponded to these principles, which after all was the source material for the drafters. However, the drafters brought these principles to the fore and shaped the way the international community viewed criminal law jurisdiction.³⁵⁶

³⁴⁹ Institut de Droit International, 19th Committee, ‘The Extraterritorial Jurisdiction of States’ (Rapporteur: Maarten Bos), 65 Annuaire IDI, Vol I (1993) 131.

³⁵⁰ Ibid 175.

³⁵¹ Institut de Droit International, 19th Committee, ‘The Extraterritorial Jurisdiction of States’ (Rapporteur: M. François Rigaux), 68 Annuaire IDI, Vol I (1999) 380.

³⁵² Crawford, *Brownlie's Principles of Public International Law* (n 4) 442 (footnotes omitted); see also Schachter (n 8) 242; see also Ryngaert, *Jurisdiction in International Law* (n 15) 29.

³⁵³ Mills, ‘Rethinking Jurisdiction in International Law’ (n 93) 193.

³⁵⁴ See e.g. Crawford, *Brownlie's Principles of Public International Law* (n 4) 441-455.

³⁵⁵ *Laker Airways Limited v. Sabena, Belgian World Airlines*, 731 F.2d 909 (D.C. Cir. 1984): ‘There is no principle of international law which abolishes concurrent jurisdiction’; Ryngaert, *Jurisdiction in International Law* (n 15) 143.

³⁵⁶ ‘Draft Convention on Jurisdiction with Respect to Crime’ [American Society of International Law] 29 The American Journal of International Law 439; see also Ryngaert, *Jurisdiction in International Law* (n 15) 35.

Even beyond criminal law jurisdiction, the principles have left their mark. For instance, the Council of Europe incorporated them in its classification of state jurisdiction.³⁵⁷ The 1935 Draft Convention on Crime established the following principles:

‘Article 3. Territorial Jurisdiction

A State has jurisdiction with respect to any crime committed in whole or in part within its territory. [...]

‘Article 4. Ships and Aircraft

A State has jurisdiction with respect to any crime committed in whole or in part upon a public or private ship or aircraft which has its national character. [...]
(emphasis added)

Under the territoriality principle, a state may prosecute and punish an offense if it is committed (subjective territoriality) or completed (objective territoriality) within the state’s territory.³⁵⁸

‘Article 5. Jurisdiction over Nationals

[...]

Article 6. Persons Assimilated to Nationals

[...]’ (emphasis added)

Pursuant to the active personality principle, the forum state may prosecute the nationals of the forum state regardless of territorial nexus.³⁵⁹ The 1935 Draft Convention on Crime does not mention the controversial passive personality principle, according to which the nationality of the victim would establish jurisdiction.

‘Article 7. Protection–Security of the State

A State has jurisdiction with respect to any crime committed outside its territory by an alien against the security, territorial integrity or political independence of that State, provided that the act or omission which constitutes the crime was not

³⁵⁷ Council of Europe Res (97) 11 (12 June 1997).

³⁵⁸ Ryngaert, *Jurisdiction in International Law* (n 15) 35; see also Akehurst (n 42) 152. On objective territoriality Akehurst argues that only the state in which the primary effect of the offense occurs should have jurisdiction (ibid 155).

³⁵⁹ Ryngaert, *Jurisdiction in International Law* (n 15) 104; see also Akehurst (n 42) 156.

committed in exercise of a liberty guaranteed the alien by the law of the place where it was committed.

Article 8. Protection–Counterfeiting

[...]’ (emphasis added)

The protective principle ‘protects the State from acts perpetrated abroad which jeopardize its sovereignty or its right to political independence’.³⁶⁰ This principle is frequently invoked for acts which are not condoned by the state in which they take place either, such as the counterfeiting of foreign currency. In such instances, the protective principle does not give rise to much controversy.³⁶¹

‘Article 9. **Universality**–Piracy

A State has jurisdiction with respect to any crime committed outside its territory by an alien which constitutes piracy by international law.

Article 10. Universality–Other Crimes

[...]’ (emphasis added)

While the principles of territory, personality and protection exhibit a connection to the constitutive elements of a state, which are territory, people and sovereign authority, the universality principle is not predicated on such a nexus.³⁶² Universal jurisdiction is based solely on the nature of the offense.³⁶³ While today the universality principle is discussed mainly in the context of abhorrent crimes with the dominant justification being a shared sense of moral reprehensibility,³⁶⁴ the rationale behind the archetypical³⁶⁵ example of piracy is different. Universal jurisdiction over piracy emerged as on the high seas it was easy to evade the jurisdiction of any one state.³⁶⁶ It was in the common interest that pirates were dealt with by any state that happened to make contact with them.³⁶⁷

³⁶⁰ Ryngaert, *Jurisdiction in International Law* (n 15) 114; see also Akehurst (n 42) 157.

³⁶¹ Ryngaert, *Jurisdiction in International Law* (n 15) 116; see also Schachter (n 8) 245.

³⁶² Ryngaert, *Jurisdiction in International Law* (n 15) 38, 120.

³⁶³ Ibid 120.

³⁶⁴ Ibid 127.

³⁶⁵ Ibid 63; see also Akehurst (n 42) 160; Bowett (n 14) 11.

³⁶⁶ Gleider Hernández, *International Law* (Oxford University Press 2022) 225; Staker (n 32) 320.

³⁶⁷ Staker (n 32) 302.

8. 1945 Onwards: Prescriptive Jurisdiction in the Case Law of the ICJ

Although after *Lotus* neither the PCIJ nor the ICJ addressed the issue of jurisdiction ‘head-on’³⁶⁸, three ICJ cases contain material that is relevant to the discussion. The often-mentioned starting point is the second judgment of 1955 in the case of *Nottebohm (Liechtenstein v Guatemala)*³⁶⁹ (‘*Nottebohm*’), which concerned the question whether Liechtenstein could exercise diplomatic protection on behalf of Mr Nottebohm. The ICJ confirmed that Liechtenstein had the competence under public international law to grant Mr Nottebohm citizenship.³⁷⁰ However, for the purpose of diplomatic protection the ICJ required there to be a genuine connection between the individual and the state granting citizenship.³⁷¹ The ICJ denied such a genuine connection existed in the case of Mr Nottebohm.³⁷² Although this case is regularly invoked in the context of the standard of close/genuine/substantial connection,³⁷³ which is proposed to limit prescriptive and adjudicative jurisdiction (see **Chapter 4 Section 2**) *Nottebohm* plainly concerns the right to exercise diplomatic protection, not prescriptive jurisdiction.³⁷⁴ However, what should not be underestimated is that since *Nottebohm* the aforementioned standard carries the imprimatur of the ICJ (albeit in a different context).

Remarks much more tailored to the topic at hand occurred in the *Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* (merits phase,

³⁶⁸ Ryngaert, *Jurisdiction in International Law* (n 15) 4.

³⁶⁹ *Nottebohm Case (Liechtenstein v Guatemala) (second phase)*, Judgment of April 6th, 1955, I.C. J. Reports 1955, 4.

³⁷⁰ Ibid 20: ‘It is for Liechtenstein, as it is for every sovereign State, to settle by its own legislation the rules relating to the acquisition of its nationality, and to confer that nationality by naturalization granted by its own organs in accordance with that legislation. It is not necessary to determine whether international law imposes any limitations on its freedom of decision in this domain. Furthermore, nationality has its most immediate, its most far-reaching and, for most people, its only effects within the legal system of the State conferring it. Nationality serves above all to determine that the person upon whom it is conferred enjoys the rights and is bound by the obligations which the law of the State in question grants to or imposes on its nationals. This is implied in the wider concept that nationality is within the domestic jurisdiction of the State’.

³⁷¹ Ibid 23.

³⁷² Ibid 26: ‘Naturalization was asked for not so much for the purpose of obtaining a legal recognition of Nottebohm’s membership in fact in the population of Liechtenstein, as it was to enable him to substitute for his status as a national of a belligerent State that of a national of a neutral State, with the sole aim of thus coming within the protection of Liechtenstein but not of becoming wedded to its traditions, its interests, its way of life or of assuming the obligations-other than fiscal obligations-and exercising the rights pertaining to the status thus acquired’.

³⁷³ E.g. Crawford, *Brownlie’s Principles of Public International Law* (n 4) 441 FN 4.

³⁷⁴ Staker (n 32) 318; Judges Klaestad and Read disagreed with the majority on this point. In their opinion, Liechtenstein’s prescriptive jurisdiction implied that it could also exercise diplomatic protection absent fraud or abuse of rights (*Nottebohm* (Dissenting Opinion Klaestad) 28, (Dissenting Opinion Read) 34). Also (ad hoc) Judge Guggenheim opined that the issue of prescriptive jurisdiction should not be separated from the issue of diplomatic protection (*Nottebohm* (Dissenting Opinion Guggenheim) 50, 62).

1970)³⁷⁵ (**‘Barcelona Traction’**). The majority of Judges held that Belgium could not exercise diplomatic protection, as the company was not its ‘national’. While agreeing on this point, Judge Fitzmaurice, in his separate opinion, stated that ‘the declaration of bankruptcy made in respect of the Barcelona Company did involve an excess of legitimate, or at least normal, Spanish jurisdiction-internationally’.³⁷⁶ On jurisdiction, Judge Fitzmaurice elaborated thus:

‘It is true that, under present conditions, international law does not impose hard and fast rules on States delimiting spheres of national jurisdiction in such matters (and there are of course others-for instance in the fields of shipping, “anti-trust” legislation, etc.), but leaves to States a wide discretion in the matter. It does however (a) postulate the existence of limits-though in any given case it may be for the tribunal to indicate what these are for the purposes of that case; and (b) involve for every State an obligation to exercise moderation and restraint as to the extent of the jurisdiction assumed by its courts in cases having a foreign element, and to avoid undue encroachment on a jurisdiction more properly appertaining to, or more appropriately exercisable by, another State.’³⁷⁷

Judge Fitzmaurice thus went a step further than the PCIJ in *Lotus*. Whereas *Lotus* posited the possibility of prohibitive rules of jurisdiction, Fitzmaurice affirmed the existence of these rules – albeit with the *proviso* that their content may vary significantly. He discussed jurisdiction in the context of bankruptcy proceedings specifically, but the broad language suggests his views pertained to other areas as well, including ICA-Jurisdiction.

Finally, in the *Case concerning the Arrest Warrant of 11. April 2000 (Democratic Republic of Congo v Belgium)* (2002)³⁷⁸ (**‘Arrest Warrant’**) the issue of prescriptive and adjudicative jurisdiction was addressed by three of the Judges in a joint separate opinion. While the majority decided the case based on immunity from criminal jurisdiction,³⁷⁹ Judges Higgins, Kooijmans and Buergenthal discussed whether Belgium had criminal law jurisdiction (apart from the issue of immunity) to issue the warrant. Since the warrant targeted conduct outside of Belgium by a

³⁷⁵ *Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)*, Judgment, I.C.J. Reports 1970, 3.

³⁷⁶ *Barcelona Traction* (Separate Opinion of Judge Fitzmaurice) 64, 104.

³⁷⁷ *Barcelona Traction* (Separate Opinion of Judge Fitzmaurice) 64, 105.

³⁷⁸ *Case concerning the Arrest Warrant of 11. April 2000 (Democratic Republic of Congo v Belgium)*, Judgment, I.C.J. Reports 2002, 3.

³⁷⁹ *Arrest Warrant* 33.

non-Belgian national against non-Belgian victims, the Judges concluded that it could only be justified under universal jurisdiction.³⁸⁰ According to them, ‘dispassionate analysis of State practice and Court decisions suggests that no such jurisdiction is presently being exercised the right under public international law to universal criminal jurisdiction’.³⁸¹ However, they viewed this lack of practice as a neutral sign, as states may have chosen not to exhaust their possibilities under public international law.³⁸² The Judges acknowledged – citing Oppenheim’s International Law – that

“[w]hile no general rule of positive international law can as yet be asserted which gives to states the right to punish foreign nationals for crimes against humanity in the same way as they are, for instance, entitled to punish acts of piracy, there are clear indications pointing to the gradual evolution of a significant principle of international law to that effect”³⁸³

They also briefly remarked that ‘[i]n civil matters we already see the beginnings of a very broad form of extraterritorial jurisdiction.’³⁸⁴ With reference to the U.S. Alien Tort Claims Act (see **Chapter 4 Section 3.2**), they stated that ‘[w]hile this unilateral exercise of the function of guardian of international values has been much commented on, it has not attracted the approbation of States generally.’³⁸⁵ The language suggests that the Judges were more sceptical of universal civil jurisdiction than of universal criminal law jurisdiction.

9. Consular Jurisdiction

As commerce increased in Western Europe in the Middle Ages, so did legal disagreements between merchants of different origins.³⁸⁶ While special institutions for resolving disputes between and with foreigners had already existed in antiquity, the 11th to 13th centuries saw the

³⁸⁰ *Arrest Warrant* (Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal) 64. Several other Judges discussed on the availability of universal jurisdiction as well: *Arrest Warrant* (Dissenting Opinion of Judge Oda 46, 51; Declaration Judge Ranjeva 54, 55; Separate Opinion Judge Koroma 59, 61; Separate Opinion Judge Rezek 91, 92; Separate Opinion Judge Bula-Bula 100, 126; Dissenting Opinion Judge Van Den Wyngaert 137, 163.

³⁸¹ *Arrest Warrant* (Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal) 75.

³⁸² *Ibid* 76.

³⁸³ *Ibid* 79.

³⁸⁴ *Ibid* 77.

³⁸⁵ *Ibid*.

³⁸⁶ Liu (n 198) 32; Mariya Tait Slys, *Exporting Legality: The Rise and Fall of Extraterritorial Jurisdiction in the Ottoman Empire and China*, vol 23 (Graduate Institute Publications 2014) ch 1 mn 15.

creation of courts with special jurisdiction over resident foreign merchants in French, Italian and Spanish cities. The merchants were subject to the jurisdiction of special magistrates appointed by the local sovereign or the merchants themselves – the origin of the mercantile consul.³⁸⁷ Hanseatic cities made similar arrangements.³⁸⁸ In England, merchant courts existed as well.³⁸⁹ The fair courts of St. Ives are particularly well documented.³⁹⁰ The English lords who owned the fair created and staffed these courts, which served as courts of general jurisdiction for the fair's duration.³⁹¹

During the Crusades (1096 and 1271) consular jurisdiction existed in certain places under Christian sovereignty.³⁹² Later, as commerce between Western European states and societies in Asia and Africa increased, the institution of consular jurisdiction was further exported east- and southwards. In early practice, the local sovereigns unilaterally and voluntarily granted the jurisdictional privileges – as had been the case in Western Europe.³⁹³

Such arrangements were not alien to the Arab rulers. In the ninth and tenth centuries A.D., Arab traders enjoyed similar privileges in China.³⁹⁴ More importantly, already at the times of the prophet Muhammed, Christians and Jews due to the perception that they too were accorded a special status and protection (*dhimma*) in Islam as possessors of the revealed scripture and adherents to one God.³⁹⁵

³⁸⁷ Emily Kadens, 'The Medieval Law Merchant: The Tyranny of a Construct' 7 *Journal of Legal Analysis* 251, 261; Keeton (n 233) 292. As has been noted above, the *forum contractus* was one of the jurisdictional principles employed, see Schröder (n 68) 175; Gaudemet-Tallon (n 219) 65.

³⁸⁸ Liu (n 198) 32.

³⁸⁹ Thomas E Scrutton, 'The work of the commercial courts' (1921) 1 *Cambridge LJ* 6, 10.

³⁹⁰ Stephen E Sachs, 'From St. Ives to Cyberspace: The Modern Distortion of the Medieval Law Merchant' (2005) 21 *Am U Int'l L Rev* 685, 691.

³⁹¹ *Ibid* 694, 764; Kadens (n 387) 261; see, however, Liu (n 198) 35, who points out that 'King Edward IV granted to the merchants of Hansa the right to be judged by their own magistrates according to their own laws'. The English kings also accorded to English merchants the power to adjudicate their own affairs in foreign societies (*ibid* 36).

³⁹² Liu (n 198) 54.

³⁹³ Keeton (n 233) 295; Paweł Czubik and Piotr Szewdo, 'Consular Jurisdiction' in *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2013).

³⁹⁴ Keeton (n 233) 296.

³⁹⁵ Uriel I Simonsohn, *A Common Justice: The Legal Allegiances of Christians and Jews under Early Islam* (University of Pennsylvania Press 2011) 4; H Patrick Glenn, *Legal Traditions of the World* (Oxford University Press, USA 2000) 200; Raja Sakrani, 'The *Dhimmi* as the Other of Multiple Convivencias in al-Andalus: Protection, Tolerance and Domination in Islamic Law' (2018) *Rechtsgeschichte-Legal History* 95, 110; Liu (n 198) 48.

Other religions were later assimilated in status to Christians and Jews.³⁹⁶ The *dhimmi* system accorded a substantial degree of autonomy to these communities to regulate their own affairs. While the details are disputed, in general, *dhimmis* could adjudicate their disputes in their own courts according to their own laws.³⁹⁷ However, this required consent by both parties. If consent was not obtained, *dhimmis* had to litigate in Islamic courts.³⁹⁸ As Al-Qattan's analysis for the Ottoman Empire shows, *dhimmis* (under the *millet* system as it was called then)³⁹⁹ indeed made regular voluntary appearances in Muslim courts as this accorded them certain advantages.⁴⁰⁰

In the Near and Middle East, the nature of the privileges accorded to foreign nationals gradually evolved.⁴⁰¹ The grant of consular jurisdiction by the Ottoman emperor Suleiman the Magnificent to Francis I of France in 1535 is one of the first examples of capitulatory privileges conceded directly to another sovereign.⁴⁰² The grant was still based on the understanding of consular jurisdiction as voluntary and unilateral.⁴⁰³ The treaty between the Ottoman Empire and France of 1740 was already part of a shift to bilateral agreements brokered by the Western European powers. However, the treaty of 1740 still provided consular jurisdiction only in case of a dispute between French citizens, whereas mixed cases were to be dealt with by the local authorities. Regarding dispute between foreigners of different origins, the Ottoman Empire in principle did not interfere.⁴⁰⁴

Over time a decisive shift occurred. In the Ottoman Empire and elsewhere, the European powers pursued a regime of unequal treaties that benefited their own nationals, often against the will of the host state.⁴⁰⁵ The Ottoman Empire, for instance, was concerned about the multiplicity of consular courts operating within the territory, as it was not unusual for several systems of consular jurisdiction to exist in parallel within one country.⁴⁰⁶ Furthermore, it was

³⁹⁶ Glenn (n 395) 200; Cl Cahen, 'Dhimma' in P. Bearman and others (eds), *Encyclopaedia of Islam* (2 edn, Brill 2012).

³⁹⁷ Cahen (n 396).

³⁹⁸ Simonsohn (n 395) 5.

³⁹⁹ Slys (n 386) Chapter 3 mn 4.

⁴⁰⁰ Najwa Al-Qattan, 'Dhimmis in the Muslim court: Legal autonomy and religious discrimination' (1999) 31 *International Journal of Middle East Studies* 429.

⁴⁰¹ On consular jurisdiction in the Middle East see Andreas T Müller, 'Friedrich F. Martens on 'The Office of Consul and Consular Jurisdiction in the East'' (2014) 25 *European Journal of International Law* 871.

⁴⁰² Slys (n 386) Chapter 3 mn 5; Keeton (n 233) 298; Liu (n 198) 62.

⁴⁰³ Keeton (n 233) 296; Slys (n 386) Chapter 3 mn 6.

⁴⁰⁴ Slys (n 386) Chapter 3 mn 8.

⁴⁰⁵ Ryngaert, *Jurisdiction in International Law* (n 15) 61; Slys (n 386) Chapter 3 mn 16.

⁴⁰⁶ Keeton (n 233) 322; Slys (n 386) Chapter 3 mn 16.

concerned about the expansive exercise of jurisdiction by the consular courts, which not only adjudicated cases between foreigners, but also mixed cases.⁴⁰⁷

Another state, among many others,⁴⁰⁸ confronted with European demands for separate jurisdiction was China. Western European traders first arrived in China under the flags of several East India Companies.⁴⁰⁹ After China's defeat in the Opium War, it agreed to the treaty of Nanjing with the U.K. which provided for consular jurisdiction in 1842. Similar treaties with the U.S. and with France followed in 1844 and many others in due course. Cases involving foreigners of the same nationality were to be adjudicated by the consuls, and later special courts.⁴¹⁰ Cases between foreigners of different nationalities were to be adjudicated according to the agreements between the respective states without the interference of China.⁴¹¹ Even mixed cases between a Chinese plaintiff and a foreign defendant were subject to consular jurisdiction. Only where the defendant was Chinese – or did not enjoy consular protection – did the Chinese courts have jurisdiction.⁴¹²

At a time when the Western European countries had long ended the jurisdictional privileges accorded to merchants on their own territory,⁴¹³ the same states resisted several attempts at ending the unequal regime in the East and South.⁴¹⁴ It was not until the late 19th and early 20th century that the system of unequal treaties eventually ceased by consensual termination, often preceded by substantial legal reform in line with 'European principles' in the host states.⁴¹⁵

10. Conclusion

This Chapter has attempted to shed some light on the origins of the civil and common law traditions of ICA-Jurisdiction and the development of the law of prescriptive jurisdiction. When reading of a French and a Turkish ship colliding on the high sea in 1926 in the *Lotus* case, the reader is in the position to understand the Turkish pleadings in their historic context – that of a

⁴⁰⁷ Slys (n 386) Chapter 3 mn 17.

⁴⁰⁸ Liu (n 198) 65, 91 lists the Ottoman Empire, Algiers, Morocco, Tripoli/ Tunis, Persia, Muscat, Zanzibar, Senna (in Arabia), Egypt, Congo, Ethiopia, and Madagascar in the Levant and Africa and Japan, Corea, Siam, Borneo, Tonga and Samoa in the Far East.

⁴⁰⁹ Slys (n 386) Chapter 4 mn 8.

⁴¹⁰ Ibid Chapter mn 23.

⁴¹¹ Liu (n 198) 99.

⁴¹² Keeton (n 233) 312; Wang (n 200) 255.

⁴¹³ Keeton (n 233) 293.

⁴¹⁴ Ibid 330; Slys (n 386) Chapter 3 mn 20, Chapter 4 mn 34.

⁴¹⁵ For the Ottoman Empire see Slys (n 386) Chapter 3 mn 26, Chapter 4 mn 43, Chapter 5 and Ozsu (n 325) 42.

nation that had only three years prior rid itself of a resented capitulary regime and was now again confronted with demands for ceding jurisdiction.⁴¹⁶ When reading of Justice Story's contention in *The Appollon* in 1824 that '[t]he laws of no nation can justly extend beyond its own territories except so far as regards its own citizens',⁴¹⁷ the reader can understand that at the time the self-perception of the U.S. was very different from today's. Historical accounts cannot answer the question whether a rule of CIL presently has a certain content. However, they provide an additional – and important – layer to the analysis. CIL forms and changes over time. Since CIL is a process in time, its present state cannot be properly understood without its past. References to historical practices or statements have to be considered in their contexts. The interests and concerns behind certain rules are often only uncovered when tracing them back to their origins. The researcher comes to appreciate that some of the most controversial principles of ICA-Jurisdiction are deeply rooted in historical practice. At the same time, historical practices reflect certain shared interests and concerns that the rules of ICA-Jurisdiction have been seeking to address.

The civil law tradition has brought forth *actor sequitur forum rei* as its foundational principle of jurisdiction: the plaintiff must follow the defendant's forum. The Greeks applied it; the Romans applied it; the Franks applied it as well as many other medieval societies; canon law adopted it; the *ius commune* – the common law of continental Europe – adopted it; and finally, the continental European states adopted it in their codifications and spread it throughout the world. The principle has deeply pragmatic roots. Historically, it was about the ability to enforce summons and eventually the judgment upon the defendant. This was possible primarily at the place of his or her domicile.⁴¹⁸ Despite a plausible interest in exercising jurisdiction over foreigners, early societies recognized that without the prospect of enforcement, a basis for jurisdiction would prove to be vain. Only subsequently, *actor sequitur forum rei* was disconnected from its original pragmatic purpose and became the jurisdictional mantra of continental Europe, notwithstanding many other jurisdictional principles that developed alongside.

The common law tradition is even more explicitly rooted in enforceable interests. The Kings and Queens of England subjected everyone to the jurisdiction of their courts who came under

⁴¹⁶ Ozsu (n 325) 42 and 45; Guilfoyle (n 152) 91.

⁴¹⁷ *The Appollon* 22 U.S. 9 Wheat. 362, 370 (1824).

⁴¹⁸ Huber (n 180) book 5, title 1, number 38 (De Foro Competente); Schröder (n 68) 230.

their protection, i.e. those who entered their territory – including the temporarily present. Originally, the defendant (or his or her lawyer) had to appear before the court to establish jurisdiction. Only in later times, proper service of writ sufficed. This goes to show how deeply entrenched jurisdiction based on service within the state's territory is among common law jurisdictions. However, commentators writing in the 20th century considered tag-jurisdiction, a subset of service-based jurisdiction, to be exorbitant.⁴¹⁹

Similarly, other bases of exorbitant jurisdiction have a long-lasting tradition as well. Jurisdiction based on the applicable law dates to at least 1921, jurisdiction based on doing business to at least 1852. Both dates refer to their respective introduction into English law, although the latter became much more virulent under U.S. law. Jurisdiction based on the plaintiff's nationality was introduced in 1804, perhaps originally as a drafting error, but subsequently again and again defended by the Cour de Cassation. Asset-based jurisdiction in its exorbitant form stems from 1877.

A proper account of CIL limits to bases of ICA-Jurisdiction in today's world should be mindful of these origins. The researcher should be hesitant to dismiss an exorbitant basis of ICA-Jurisdiction from another legal system as wholly unreasonable just because it seems alien to one own's understanding of what is reasonable, which is likely influenced by one's upbringing in a specific legal system. However, the history of exorbitant bases of ICA-Jurisdiction also puts a spotlight on a much-telling fact: These bases of ICA-Jurisdiction were all introduced by three European empires – the U.K., France and Germany – at times when they were powerful entities, who could get away with subjecting foreigners to their judicial process in order to protect their people.⁴²⁰ There is thus a connection between exorbitant bases of ICA-Jurisdiction and power that cannot easily be overlooked.

Harmonization efforts have attempted to get rid of the exorbitant bases of ICA-Jurisdiction. However, only few states have managed to overcome these provisions in their dealings with each other. In the other legal systems, they persist. Their thrust may even have increased through the mutual recognition and enforcement of decisions in the EU and EFTA states (see **Chapter 5 Section 5**).

⁴¹⁹ E.g. Mann, 'The Doctrine of Jurisdiction in International Law' (n 19) 77; Mann, 'The Doctrine of International Jurisdiction Revisited after Twenty Years' (n 41) 32; ALI, *Restatement of the Law, Third, The Foreign Relations Law of the United States* (n 71) § 421 Comment e.

⁴²⁰ See Clermont and Palmer, 'Exorbitant jurisdiction' (n 6).

Chapter 4

Civil Adjudicative Jurisdiction in Context

'In civil matters we already see the beginnings of a very broad form of extraterritorial jurisdiction. Under the Alien Tort Claims Act, the United States, basing itself on a law of 1789, has asserted a jurisdiction both over human rights violations and over major violations of international law, perpetrated by non-nationals overseas. [...] While this unilateral exercise of the function of guardian of international values has been much commented on, it has not attracted the approbation of States generally.'

(Higgins, Kooijmans and Buergenthal, 2002)⁴²¹

1. Introduction

Building on the historical overview provided in Chapter 3, this Chapter seeks to situate the law on civil adjudicative jurisdiction in the broader contemporary CIL of jurisdiction. Considering the discussions that took place within the Institut de Droit International (IDI) from 1993 to the early 2000s the conclusion seems inevitable that the CIL on jurisdiction is contentious in every aspect imaginable.⁴²² The difference of opinion adopted by the respective rapporteurs Marteen Bos and François Rigaux is striking. This, however, must not obfuscate that certain points of consensus have emerged. **Section 2 of this Chapter** thus purposefully omits most of the complexity of opinion expressed in journal articles and monographs in favour of textbooks on public international law to identify these areas of consensus. The textbooks consulted are not a comprehensive list, but a selection from Brazil, China, Europe, Russia, South Africa and the U.S. The complexity re-emerges more fully in chapters 5 and 6, in which

⁴²¹ *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* [2002] (Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal) ICJ Rep 3, 77.

⁴²² Institut de Droit International, 19th Committee, 'The Extraterritorial Jurisdiction of States' (Maarten Bos), 65 *Annuaire IDI*, Vol I (1993) 13 ; Institut de Droit International, 19th Committee, 'The Extraterritorial Jurisdiction of States' (Maarten Bos), 65 *Annuaire IDI*, Vol II (1993) 133; Institut de Droit International, 19th Committee, 'The Extraterritorial Jurisdiction of States' (Rapporteur: M. François Rigaux), 68 *Annuaire IDI*, Vol I (1999) 371 and Institut de Droit International, 19th Committee, 'The Extraterritorial Jurisdiction of States' (Rapporteur: M. François Rigaux), 69 *Annuaire IDI*, Vol I (2000/2001) 87; see also Reinisch, 'Extraterritorial Jurisdiction' (n 79) 509.

the doctoral thesis focuses on the state practice and *opinio juris* regarding CIL on bases of ICA-Jurisdiction specifically. **Section 3** switches from the macro-overview of the law of jurisdiction to aspects of human rights law and the law on the treatment of foreigners relevant to the research question. These concern access to justice, denial of justice and universal civil jurisdiction. Civil adjudicative jurisdiction should not⁴²³ prohibit what the afore-mentioned rules require. A particular focus will be put on a set of rules, often attributed to civil adjudicative jurisdiction, namely the U.S. Alien Tort Statute. **Section 4** will conclude.

2. International Doctrine on the CIL of Jurisdiction

As Anthea Robert's pioneering work on the lack of universality of public international law in practice suggests,⁴²⁴ doctrinal treatment of the CIL of jurisdiction differs across states and blocks of states. However, the consulted selection of works shows that these differences pertain more to classification and structure than substance.⁴²⁵ Thus, as Roberts observes, traditionally European textbooks have focused on prescriptive jurisdiction to enact public laws, especially criminal laws, whereas U.S. doctrine has questioned the private-public law divide.⁴²⁶ It is noteworthy that extensive treatments of the subject exist outside European and U.S. literature.⁴²⁷ The selection shows that different views exist across regions, but the same is true within a given region. Regional differences do not dominate intra-regional differences.

Across the board, firm consensus exists on the core restriction on enforcement jurisdiction. No state shall exercise enforcement jurisdiction on the territory of another state without the

⁴²³ Although due to fragmentation this may be possible.

⁴²⁴ Roberts (n 17); while the substantive differences will be discussed in this Section, Christopher Staker provides a more formal example: He rightly notes that continental European textbooks often discuss jurisdiction in the chapter on states, while U.K. textbooks commonly dedicate a separate chapter to jurisdiction (Staker (n 32) 309). This is also true for the Brazilian and the U.S. textbooks consulted.

⁴²⁵ This author primarily relied on English, French and German language publications. However, for some countries such language versions were not (readily) available. Where language skills did not suffice, this author is indebted to Google's OCR scan and translation application, which delivered remarkable results.

⁴²⁶ Roberts (n 17) 207; See also for the practice of the U.S.: ALI, *Restatement of the Law, Fourth, the Foreign Relations Law of the United States: Selected Topics in Treaties, Jurisdiction, and Sovereign Immunity* : §§ 301-313; 401-464; 481-490, *Tables and Index* (n 99) §§ 402 Comment d.

⁴²⁷ See e.g. Li Guangmin and Ou Bin, *International Law* (国际法) (Tsinghua University Press 2006) 41.

latter's consent.⁴²⁸ Yet, as Mann convincingly pointed out, beyond this basic understanding many issues remain unsettled.⁴²⁹

As for prescriptive and adjudicative jurisdiction, commendable efforts have been made to establish a rule that would resolve conflicts between competing claims to jurisdiction, most notably the rule of reasonableness. Prominent proponents include Gerald Fitzmaurice⁴³⁰ and Andreas Lowenfeld.⁴³¹ However, according to Cedric Ryngaert, state practice and *opinio juris* do not (yet) reflect such a mediating rule.⁴³² Prescriptive and adjudicative jurisdiction remain concurrent.⁴³³ In a given scenario, more than one state may have a legitimate claim to exercise jurisdiction under public international law.

Major continental European and U.K. publications present criminal law prescriptive and adjudicative jurisdiction (which are the same)⁴³⁴ pursuant to certain bases of jurisdiction. The 1935 Draft Convention on Crime sets out that states may base criminal law jurisdiction on territoriality, personality,⁴³⁵ protection and universality.⁴³⁶ However, even with regard to the least controversial principle – territory – uncertainty may arise over whether an offense took

⁴²⁸ *Lotus* (n 16) 18; Akehurst (n 42) 146; *Cassese's International Law* (Paola Gaeta, Jorge E. Viñuales and Salvatore Zappalà eds, Oxford University Press 2020) 49, 96; Crawford, *Brownlie's Principles of Public International Law* (n 4) 462; Patrick Daillier and others, *Droit international public* (9 edn, LGDJ, Lextenso 2022) 722, 725; Dugard (n 137) 146; Guangmin and Bin (n 427) 42; Hernández (n 366) 213; V.I. Kuznetsov and B.R. Tuzmukhamedov, *International Law - A Russian Introduction* (Eleven International Publishing 2009) 583; Orakhelashvili (n 97) 229; Francisco Rezek, *Direito Internacional Público* (Saraiva Educação SA 2018) Section 89; Malcolm N Shaw, *International Law* (9 edn, Cambridge University Press 2021) 556; Staker (n 32) 330.

⁴²⁹ Mann, 'The Doctrine of Jurisdiction in International Law' (n 19) 127; see also Akehurst (n 42) 146.

⁴³⁰ *Barcelona Traction* (Separate Opinion of Judge Fitzmaurice) 64, 105: 'It [public international law] does however [...] involve for every State an obligation to exercise moderation and restraint as to the extent of the jurisdiction assumed by its courts in cases having a foreign element, and to avoid undue encroachment on a jurisdiction more properly appertaining to, or more appropriately exercisable by, another State'.

⁴³¹ Lowenfeld (n 45) 292; see also ALI, *Restatement of the Law, Third, The Foreign Relations Law of the United States* (n 71) Part IV Jurisdiction and Judgments, for which Lowenfeld was one of the reporters.

⁴³² Ryngaert, *Jurisdiction in International Law* (n 15) 180.

⁴³³ *Laker Airways Limited v. Sabena, Belgian World Airlines*, 731 F.2d 909: 'There is no principle of international law which abolishes concurrent jurisdiction'; Mann, 'The Doctrine of Jurisdiction in International Law' (n 19) 10; Akehurst (n 42) 168; Schachter (n 8) 249, 254; Mills, 'Rethinking Jurisdiction in International Law' (n 93) 199; Ryngaert, *Jurisdiction in International Law* (n 15) 143.

⁴³⁴ Akehurst (n 42) 179. That is because the substantive reach of criminal offences is directly linked to jurisdiction over these offenses in virtually all states. In other words, judges do not apply foreign law to define criminal offences.

⁴³⁵ Jurisdiction may also be linked to personal ties other than nationality, e.g. residence status (ibid 157).

⁴³⁶ Ibid 152; Crawford, *Brownlie's Principles of Public International Law* (n 4) 442 et seqq; Hernández (n 366) 199 et seqq; Jennings (n 98) 515; Jan Klabbbers, *International law* (Cambridge University Press 2024) 99 et seqq; Lassa Oppenheim, *Oppenheim's International Law*, vol Volume 1: Peace (9 edn, Longman 1996) 458 et seqq; Orakhelashvili (n 97) 233 et seqq; Reinisch and others (n 97) mn 704 et seqq; Simma and Müller (n 97) 137 et seqq; Shaw (n 428) 561 et seqq; Staker (n 32) 314 et seqq; however, sceptical of today's usefulness of these principles: Dan Jerker B Svantesson, 'A new jurisprudential framework for jurisdiction: Beyond the Harvard draft' 109 *American Journal of International Law* 69.

place on the territory of one state or the other⁴³⁷ (especially when committed online).⁴³⁸ Furthermore, the question of effects jurisdiction, i.e. jurisdiction based on detrimental effects in the state, which are not the constitutive element of an offense, remains unresolved.⁴³⁹ So does the question of passive personality, relevant *e.g.* in *Lotus* and the *Cutting Case* (encountered in **Chapter 3 Sections 5 and 6**).⁴⁴⁰ While the protective principle traditionally encompasses counterfeiting of money or state-issue documents as well as espionage,⁴⁴¹ more recent additions like the violation of a state's immigration laws are disputed.⁴⁴² Universal jurisdiction is in principle accepted,⁴⁴³ but the contours are also disputed.⁴⁴⁴ In particular, it is unclear whether a state may exercise universal jurisdiction without even a minimal connection to the offense.⁴⁴⁵

As regards other areas of prescriptive and adjudicative jurisdiction, the main continental European and U.K. publications take three distinct approaches. The Storyan conception of jurisdiction based exclusively on territoriality and active personality (encountered in **Chapter 3 Section 5**) is no longer considered adequate for today's integrated world.⁴⁴⁶ Instead, the proposed approaches (also depending on the area of law) are: (i) application of the principles of criminal law (ii)⁴⁴⁷, close/genuine/substantial connection⁴⁴⁸ and (iii) state freedom for certain

⁴³⁷ Mann, 'The Doctrine of Jurisdiction in International Law' (n 19) 36; Simma and Müller (n 97) 140; Staker (n 32) 315.

⁴³⁸ Mills, 'Rethinking Jurisdiction in International Law' (n 93) 197.

⁴³⁹ Akehurst (n 42) 153; Crawford, *Brownlie's Principles of Public International Law* (n 4) 447; Daillier and others (n 428) 724; Effects-based jurisdiction is mostly discussed in the context of U.S. antitrust law: Bowett (n 14) 7; Jennings (n 98) 520; Hernández (n 366) 217; Oppenheim (n 436) 460, 472; Orakhelashvili (n 97) 236; Simma and Müller (n 97) 141; Staker (n 32) 315.

⁴⁴⁰ Akehurst (n 42) 164; Crawford, *Brownlie's Principles of Public International Law* (n 4) 444; Hernández (n 366) 223; Klabbers (n 436) 99; Oppenheim (n 436) 472; Orakhelashvili (n 97) 235; Mills, 'Rethinking Jurisdiction in International Law' (n 93) 199; Simma and Müller (n 97) 142; Shaw (n 428) 571; Staker (n 32) 322; see, however, *Arrest Warrant* (Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal) 77: '[p]assive personality jurisdiction, for so long regarded as controversial, is now reflected not only in the legislation of various countries (the United States, Ch. 113A, 1986 Omnibus Diplomatic and Antiterrorism Act; France, Art. 689, Code of Criminal Procedure, 1975), and today meets with relatively little opposition, at least so far as a particular category of offences is concerned'.

⁴⁴¹ Oppenheim (n 436) 466.

⁴⁴² Simma and Müller (n 97) 144; see also Bowett (n 14) 11.

⁴⁴³ Oppenheim (n 436) 469; Orakhelashvili (n 97) 237.

⁴⁴⁴ Akehurst (n 42) 160; Bowett (n 14) 12; Hernández (n 366) 227; Simma and Müller (n 97) 146; Staker (n 32) 320; David Wallach, 'The Irrationality of Universal Civil Jurisdiction' (2014) 46 *Geo J Int'l L* 803, 818.

⁴⁴⁵ Hernández (n 366) 227.

⁴⁴⁶ Mann, 'The Doctrine of Jurisdiction in International Law' (n 19) 36, 126; Akehurst reports that in '*Amsterdam v. Minister of Finance* (1952), I.L.R., vol. 19, pp. 229, 232-4, 243' the Supreme Court of Israel stated that 'Story's theory was a rule of Anglo-American private international law, not of public international law' (Akehurst (n 42) FN 4).

⁴⁴⁷ *E.g.* Klabbers (n 436) 101; for jurisdiction to adjudicate see Schachter (n 8) 247 noting that 'the bases of jurisdiction parallel those applicable to jurisdiction to prescribe'.

⁴⁴⁸ Mann, 'The Doctrine of Jurisdiction in International Law' (n 19) 49; Mann, 'The Doctrine of International Jurisdiction Revisited after Twenty Years' (n 41) 28; Crawford, *Brownlie's Principles of Public International Law* (n 4) 441; Hernández (n 366) 212; Reinisch and others (n 97) mn 702, 709; Simma and Müller (n 97) 137; Von Bogdandy and Rau (n 166); for taxation see Akehurst (n 42) 179.

domains⁴⁴⁹. Category (i) rests on similarities between criminal law and other types of law (or aspects thereof). It is therefore particularly often invoked with regard to laws which exhibit penal elements, such as antitrust,⁴⁵⁰ sanctions laws⁴⁵¹ and other economic laws.⁴⁵² However, its normative appeal goes beyond that of analogies. Territory, personality and protection correspond to the constitutive elements of the state: territory, population and government.⁴⁵³ Category (ii) (genuine link) encompasses the former,⁴⁵⁴ but is potentially even broader in scope. Category (iii) (freedom) concludes the spectrum.

Among continental European scholarship, French doctrine has developed a unique classification. With no particular focus on criminal law jurisdiction, one of the leading French textbooks posits that exercise of prescriptive and adjudicative jurisdiction is in accordance with CIL if it is exercised (i) territorially, (ii) upon nationals of the state, or (iii) related to a public service of the state (which the authors link to the protective principle).⁴⁵⁵ The authors are, furthermore, sceptical of passive personality jurisdiction in criminal cases, but seem to accept universal jurisdiction with respect to certain international crimes.⁴⁵⁶

On prescriptive jurisdiction (not limited to criminal law), Dunoff, Hakimi, Ratner and Wippman's popular U.S. casebook on international law, although relying predominantly on U.S. case law, discusses the subject matter pursuant to the familiar heads of jurisdiction as well: territoriality, personality, protection and universality.⁴⁵⁷ A distinct feature is that the treatment does not distinguish between criminal law jurisdiction and other forms of prescriptive jurisdiction. §§ 402 and 408-413 of the recent Restatement (Fourth) reflect this understanding,⁴⁵⁸ while on adjudicative jurisdiction, the Restatement (Fourth) propagates state

⁴⁴⁹ Akehurst (n 42) 177 for ICA-Jurisdiction and ibid 187 for private law legislation.

⁴⁵⁰ For a discussion of antitrust jurisdiction see e.g. Cedric Ryngaert, *Jurisdiction over Antitrust Violations in International Law* (Intersentia 2008); Ryngaert, *Jurisdiction in International Law* (n 15) 82; Akehurst (n 42) 191.

⁴⁵¹ For a discussion of sanctions jurisdiction see Tom Ruys, Cedric Ryngaert and Felipe Rodríguez Silvestre, *The Cambridge Handbook of Secondary Sanctions and International Law* (Cambridge University Press 2024); see also Ryngaert, *Jurisdiction in International Law* (n 15) 106, 117; Susan Emmenegger, 'Extraterritorial Economic Sanctions and Their Foundation in International Law' (2016) 33 *Ariz J Int'l & Comp L* 631; Jeffrey A Meyer, 'Second thoughts on secondary sanctions' (2008) 30 *U Pa J Int'l L* 905.

⁴⁵² For a discussion of U.S. export control jurisdiction see Reinisch (n 19); see also Staker (n 32) 326 criticising the U.S. notion of 'nationality of technology'.

⁴⁵³ Simma and Müller (n 97) 144; Klabbers (n 436) 99.

⁴⁵⁴ Oppenheim (n 436) 457.

⁴⁵⁵ Daillier and others (n 428) 717, 723.

⁴⁵⁶ Ibid 729 et seq.

⁴⁵⁷ Dunoff and others (n 316) 273; also Schachter (n 8) 245, 262.

⁴⁵⁸ ALI, *Restatement of the Law, Fourth, the Foreign Relations Law of the United States: Selected Topics in Treaties, Jurisdiction, and Sovereign Immunity* : §§ 301-313; 401-464; 481-490, *Tables and Index* (n 99) §§ 402 and 408-413.

freedom.⁴⁵⁹ Like their European counterparts, U.S. authors also discuss the intricacies of the bases of jurisdiction, such as effects jurisdiction in antitrust cases.⁴⁶⁰

Guangmin (李广民) and Bin (欧斌) in their Chinese textbook on public international law, 国际法, view the law of jurisdiction as the most direct manifestation of state sovereignty, limited by the law of non-intervention.⁴⁶¹ The authors posit that state has jurisdiction over all persons (except those enjoying immunity) as well as over all objects and incidents in its domain. In addition, the state enjoys jurisdiction over certain persons, objects and incidents abroad. This is the case in instances of active personality (based on nationality), protection of vital state interests, and international crimes that endanger international peace and security and the interests of all humanity (universality).⁴⁶²

For the Russian Federation, Kuznetsov and Tuzmukhamedov name territoriality and personality as the generally applicable principles of prescriptive jurisdiction.⁴⁶³ As regards criminal law, the authors reiterate the well-known principles of territoriality, personality, protection and universality.⁴⁶⁴ Abaschidse and others also note that jurisdiction is commonly based on these principles. The authors add that the passive personality principle and the effects doctrine are contested.⁴⁶⁵

For South Africa, John Dugard focuses on criminal law jurisdiction, which he discusses under the familiar heads of prescriptive jurisdiction: territoriality, nationality, protection and universality.⁴⁶⁶ In particular, he discusses the controversies surrounding jurisdiction based on effects, jurisdiction based on the nationality of the victim and universal jurisdiction.⁴⁶⁷

For Brazil, Accioly, Silva and Casella explicate in their *Manual de Direito Internacional Público* that the state has jurisdiction over its territory and its permanent population (also for

⁴⁵⁹ ALI, *Restatement of the Law, Fourth, the Foreign Relations Law of the United States: Selected Topics in Treaties, Jurisdiction, and Sovereign Immunity* : §§ 301-313; 401-464; 481-490, *Tables and Index*) (n 99) § 422, Reporter's Notes 1. ALI of course makes an exception for immunities.

⁴⁶⁰ See e.g. Lowenfeld (n 45) 59.

⁴⁶¹ Guangmin and Bin (n 427) 41.

⁴⁶² Ibid 42.

⁴⁶³ Kuznetsov and Tuzmukhamedov (n 428) 403.

⁴⁶⁴ Ibid 583.

⁴⁶⁵ A. X. Abaschidse and others, *International Law* (Litres 2018) Chapter 9 § 2.

⁴⁶⁶ Dugard (n 137) 148 et seqq.

⁴⁶⁷ Ibid 150, 153, 154.

conduct abroad).⁴⁶⁸ However, the authors also discuss universal criminal jurisdiction in the context of the most egregious crimes.⁴⁶⁹

3. Access to Justice, Denial of Justice and the U.S. Alien Tort Statute

While the previous Section provided an overview of areas of agreement and disagreement on the CIL of jurisdiction, this Section delves into the question whether other areas of the law either require or at least allow states to exercise ICA-Jurisdiction.

Jurisdiction has been traditionally conceptualised as a right, albeit a limited one. However, especially Mills has drawn attention to the fact that jurisdiction must increasingly be conceptualised as a matter of obligation as well. Treaty provisions and CIL may oblige states to exercise jurisdiction.⁴⁷⁰ Access to justice is a human rights obligation under CIL as well as under human rights treaties, such as the ECHR.⁴⁷¹ Denial of justice constitutes a breach of the protections afforded to foreigners under CIL and treaties, most prominently investment treaties.⁴⁷² Discussions culminate in a potential obligation to exercise jurisdiction over certain (criminal) conduct, regardless of any connecting factors (universal jurisdiction as an obligation). Focusing on CIL, there is an immediate connection to the research question. CIL cannot or at least should not prohibit what it at the same time requires. Therefore, **Section 3.1** will address whether access to justice, denial to justice or universal jurisdiction may oblige states to exercise ICA-Jurisdiction. Even if there is no obligation to exercise universal jurisdiction, states may – in line with the traditional understanding of jurisdiction – have a right to do so (universal jurisdiction as a right). The U.S. Alien Tort Statute may be one such example regarding the civil realm. This will be analysed in **Section 3.2**.

⁴⁶⁸ Hildebrando Accioly, Geraldo Eulálio do Nascimento Silva and Paulo Borba Casella, *Manual de Direito Internacional Público* (24 edn, Saraiva 2019) Chapter 3.6.6.

⁴⁶⁹ Ibid Chapter 3.6.7; see on Brazilian public international law textbooks also Luíza Leão Soares Pereira and Fabio Costa Morosini, ‘Textbooks as Markers and Makers of International Law: A Brazilian Case Study’ (2024) 35 *European Journal of International Law* 25.

⁴⁷⁰ Mills, ‘Rethinking Jurisdiction in International Law’ (n 93) 209; Orakhelashvili (n 97) 231; see also Pietro Franzina, ‘The Changing Face of Adjudicatory Jurisdiction’ in Serena Forlati and Pietro Franzina (eds), *Universal Civil Jurisdiction* (Brill Nijhoff 2020) 170.

⁴⁷¹ Mills, ‘Rethinking Jurisdiction in International Law’ (n 93) 214.

⁴⁷² Ibid 219.

3.1. An Obligation to Exercise ICA-Jurisdiction Under CIL?

The concepts of access to justice and denial of justice are intertwined. While the latter refers to the law on the treatment of foreigners and the former to human rights, at its very core justice will be denied if there is no access to it.⁴⁷³ Also, access to justice under human rights law evolved out of the earlier law on the protection of foreigners, i.e. the minimum standard on the treatment of aliens.⁴⁷⁴ The question then is the following: Does CIL (be it under human rights law or the law on the treatment of foreigners) demand that states provide for ICA-Jurisdiction even when the necessary territorial or personal connecting factors under their respective laws are not met, but certain circumstances require thus.

Under the CIL on the treatment of foreigners, states are not barred in principle from treating foreigners differently than their own nationals regarding access to their courts, unless of course a treaty or an investment contract provides otherwise. They must, however, treat the foreign person in accordance with the standard of civilised nations regarding civil and commercial matters, which in essence means that they must not deny access to their courts by arbitrarily discriminating against the foreign person.⁴⁷⁵ This will be a fact-specific inquiry and a high threshold to cross for any complainant. It is highly doubtful that any of the 75 legal systems analysed (see **The Annex**) violates this standard as each legal system offers a multitude of bases of ICA-Jurisdiction.

Under human rights law, the focus is on crimes of the most egregious sort, for which their victims seek compensation. Is there an obligation under human rights law to grant ICA-Jurisdiction under certain circumstances? In 2015, the Institut de Droit International answered this question in the affirmative. It passed a resolution titled ‘Universal Civil Jurisdiction with regard to Reparation for International Crimes’.⁴⁷⁶ Pursuant to its Article 2 ‘[a] court should exercise jurisdiction over claims for reparation by victims provided that: a) no other State has stronger connections with the claim, taking into account the connection with the victims and the defendants and the relevant facts and circumstances; or b) even though one or more other

⁴⁷³ Carlo Focarelli, ‘Denial of Justice’ (2020) Max Planck Encyclopedia of Public International Law mn 14.

⁴⁷⁴ Francesco Francioni, ‘The Rights of Access to Justice under Customary International Law’ in Francesco Francioni (ed), *Access to Justice as a Human Right* (Oxford Academic, Oxford University Press 2007) 1.

⁴⁷⁵ Geimer, *Internationales Zivilprozessrecht* (n 97) mn 129 et seqq.

⁴⁷⁶ Resolution adopted by the Institut de Droit International (IDI) on 30 August 2015, entitled ‘Universal Civil Jurisdiction with regard to Reparation for International Crimes’.

States have such stronger connections, such victims do not have available remedies in the courts of any such other State.’⁴⁷⁷

However, the highest authority so far in this regard comes from the Grand Chamber of the European Court of Human Rights (‘ECtHR’). In *Naït-Liman v. Switzerland* the ECtHR dealt with the question whether Art 6 ECHR or any other rule of public international law grants the right to access a member state’s courts for a civil remedy against a violation of *jus cogens* if no connection to that state exists (universal jurisdiction).⁴⁷⁸ The Swiss Federal Court had confirmed that the Swiss courts did not have ICA-Jurisdiction in the underlying case.⁴⁷⁹ Swiss domestic law does not provide for universal jurisdiction in civil matters. It only provides for *forum necessitatis* jurisdiction under certain circumstances, an exceptional forum meant for cases in which no redress can be obtained abroad (see on this **Chapter 5** and **The Annex**).⁴⁸⁰ However, according to the Swiss Federal Court this did not apply in the underlying case. The Chamber of the ECtHR did not find a violation of Art 6 ECHR or any other norm of public international law (neither in CIL nor in the Convention against Torture). It noted that ‘the acceptance of universal jurisdiction could give rise to undesirable interference by one country in the domestic affairs of another’.⁴⁸¹ It explicitly stated that CIL does not require universal civil jurisdiction even in instances of *jus cogens* violations.⁴⁸² As for *forum necessitatis*, the Chamber found the application of domestic law by the Swiss Federal Tribunal to be neither ‘arbitrary or manifestly unreasonable’.⁴⁸³

In 2018, the Grand Chamber confirmed the decision. It reiterated that ‘as a subsidiary consideration, the Grand Chamber accepts that a State cannot ignore the potential diplomatic difficulties entailed by recognition of civil jurisdiction in the conditions proposed by the

⁴⁷⁷ Ibid.

⁴⁷⁸ Andrea Saccucci, ‘The Case of Naït-Liman before the European Court of Human Rights’ in Serena Forlati and Pietro Franzina (eds), *Universal Civil Jurisdiction* (Brill Nijhoff 2020) 3.

⁴⁷⁹ *Naït-Liman v Switzerland* App no 51357/07 (ECtHR, 21 June 2016) mn 22.

⁴⁸⁰ Ibid mn 24.

⁴⁸¹ Ibid mn 107; this was criticized by Serena Forlati, ‘The Role of the European Court of Human Rights in the Development of Rules on Universal Civil Jurisdiction’ in Serena Forlati and Pietro Franzina (eds), *Universal Civil Jurisdiction* (Brill Nijhoff 2020) 51 as ‘at odds with the premise on which the whole international system of protection of human rights is presently based: namely, that inducing other States to comply with the relevant obligations (including the obligation to ensure reparation in case of serious violations) is not per se undesirable, nor incompatible with the customary international law principle of non-intervention in domestic affairs – all the more so in the relations between countries which are both parties to the UN Convention against Torture’.

⁴⁸² *Naït-Liman v Switzerland* App no 51357/07 (ECtHR, 21 June 2016) mn 120.

⁴⁸³ Ibid 109-114.

applicant.⁴⁸⁴ As the Chamber, it found no obligation under CIL, the Convention against Torture, or the ECHR to provide for universal jurisdiction or a forum of necessity.

The decision has been criticised for failing to protect the victims of human rights violations.⁴⁸⁵ Some authors, however, have interpreted the decision to at least implicitly uphold the lawfulness of universal civil jurisdiction⁴⁸⁶ as well as jurisdiction based on *forum necessitatis*⁴⁸⁷ under CIL. Yet, even such availability of universal civil jurisdiction under CIL is highly controversial.⁴⁸⁸ Several commentators have argued that the U.S. Alien Tort Statute ('ATS') constitutes the prime example of such universal civil jurisdiction.⁴⁸⁹ This will be addressed in the next Section.

3.2. A Right to Exercise Universal Civil Jurisdiction? The U.S. Alien Tort Statute

The ATS is a provision of U.S. federal law, first introduced by Judiciary Act of 1789, codified in 1948 in 28 U.S. Code § 1350, which provides U.S. district courts with 'original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States'.⁴⁹⁰ Thus, non-U.S. entities can sue in a U.S. district court for a civil wrong done in violation of CIL or a treaty to which the U.S. is a party.⁴⁹¹ It is widely believed to have been introduced as a response to an attack on foreign diplomats in the U.S.,⁴⁹² but only very few cases were pleaded under this provision until 1980.⁴⁹³ The U.S. Court of Appeals for the Second Circuit decision in *Filartiga v. Peña-Irala* (1980)⁴⁹⁴ sparked renewed

⁴⁸⁴ *Naït-Liman v Switzerland* App no 51357/07 (ECtHR, GC, 15 March 2018) mn 127.

⁴⁸⁵ E.g. Mora (n 70); Saccucci (n 478).

⁴⁸⁶ Saccucci (n 478) 15; Forlati (n 481) 40; Beatrice I. Bonafè, 'Universal Civil Jurisdiction and Reparation for International Crimes' in Serena Forlati and Pietro Franzina (eds), *Universal Civil Jurisdiction* (Brill Nijhoff 2020) 106; C. Heri, 'The Grand Chamber, Universal Civil Jurisdiction for Torture and *Naït-Liman v Switzerland*', Strasbourg Observers, 28 March 2018, available at <<https://strasbourgobservers.com/2018/03/28/the-grand-chamber-universal-civil-jurisdiction-for-torture-and-naït-liman-v-switzerland/>>, accessed on 31 January 2025.

⁴⁸⁷ Saccucci (n 478) 23 FN 60.

⁴⁸⁸ IBA Legal Practice Division, Report of the Task Force on Extraterritorial Jurisdiction (2008) 128 et seqq; Serena Forlati and Pietro Franzina (eds), *Universal Civil Jurisdiction* (Brill 2020).

⁴⁸⁹ Ryngaert, 'Universal tort jurisdiction over gross human rights violations' (n 97); Georg Nolte, 'Universal Jurisdiction in the Area of Private Law-the Alien Tort Claims Act' in Christian Tomuschat and Jean-Marc Thouvenin (eds), *The Fundamental Rules of the International Legal Order* (Brill Nijhoff 2006) 373; Donald Francis Donovan and Anthea Roberts, 'The emerging recognition of universal civil jurisdiction' (2006) 100 *American Journal of International Law* 142; IBA Legal Practice Division, Report of the Task Force on Extraterritorial Jurisdiction (2008) 112; Abhimanyu George Jain, 'Universal civil jurisdiction in international law' (2015) 55 *Indian Journal of International Law* 209, 211;

⁴⁹⁰ 28 U.S. Code § 1350.

⁴⁹¹ Congressional Research Service, 'The Alien Tort Statute (ATS): A Primer' 1, 2.

⁴⁹² *Ibid* 4.

⁴⁹³ *Ibid* 6.

⁴⁹⁴ *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

interest, as the court held that claims for the violation of international human rights could be brought under the ATS.⁴⁹⁵ From this point onwards plaintiffs brought several cases against foreign corporations and individuals under the ATS in U.S. courts for conduct occurring outside the U.S.⁴⁹⁶ This in turn sparked a series of protests by states and other stakeholders against this – in their view – overreaching exercise of jurisdiction (see below).

In recent years, the U.S. Supreme Court has limited the reach of the ATS considerably. In *Sosa v. Alvarez-Machain* (2004)⁴⁹⁷ it held that the ATS is purely jurisdictional and does not create a cause of action.⁴⁹⁸ Courts must therefore determine whether the claim is based on violation of an international law norm that is ‘specific, universal, and obligatory’.⁴⁹⁹ In *Kiobel v. Royal Dutch Petroleum Co.* (2013)⁵⁰⁰, the U.S. Supreme Court excluded cases not concerning the U.S. Claims under the ATS must touch and concern the territory of the U.S. and they must do so with sufficient force.⁵⁰¹ In *Jesner v. Arab Bank, PLC* (2018),⁵⁰² the U.S. Supreme Court held that under the ATS no claims can be brought against non-U.S. corporations, which was again affirmed in *Nestlé USA, Inc. v. Doe et al* (2021), which additionally postulated that the conduct had to occur within the U.S.⁵⁰³

Upon closer inspection, the claim that the ATS concerns universal civil jurisdiction is true only in a very specific sense. From the perspective of public international law, these cases are about universal prescriptive jurisdiction, not adjudicative jurisdiction as defined in **Chapter 1**. At the heart of the issue lies the question whether U.S. law can provide for civil sanctions for conduct wholly unrelated (or only insignificantly related) to the U.S. In other words, the question is ‘whether there is any conduct that, by its nature, justifies a State in disregarding the substantive law of the States connected to the conduct and applying its own law, regardless of its lack of any such connections’ and ‘whether U.S. courts would apply federal law to events having no connection to the United States, based solely on the nature of alleged conduct’.⁵⁰⁴

⁴⁹⁵ Congressional Research Service (n 491) 7; Donovan and Roberts (n 489) 146.

⁴⁹⁶ Congressional Research Service (n 491) 7.

⁴⁹⁷ *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

⁴⁹⁸ Congressional Research Service (n 491) 10.

⁴⁹⁹ *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

⁵⁰⁰ *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013).

⁵⁰¹ *Ibid.*

⁵⁰² *Jesner v. Arab Bank, PLC*, 584 U.S. ____ (2018).

⁵⁰³ *Nestlé USA, Inc. v. Doe*, 593 U.S. ____ (2021).

⁵⁰⁴ Wallach (n 444) 805, 824. Not clear on the distinction: Nolte (n 489); IBA Legal Practice Division, Report of the Task Force on Extraterritorial Jurisdiction (2008) 15, 112. However, Donovan and Roberts recognize this (Donovan and Roberts (n 489) 144 FN 12): ‘As a form of prescriptive jurisdiction, universal jurisdiction would displace ordinary choice-of-law rules, permitting the forum, state to apply its own substantive laws (including

The confusion arises because U.S. courts treat the matter as one of court jurisdiction under their domestic law. Crucially, however, also under U.S. law, it is not an issue of personal jurisdiction (the U.S. terminology for ICA-Jurisdiction and equivalents), but as one of subject-matter jurisdiction.⁵⁰⁵ U.S. federal courts can only act upon certain subject-matters (that is if they have ‘subject-matter jurisdiction’).⁵⁰⁶ The ATS provides such subject-matter jurisdiction for U.S. federal courts. It grants them the power to issue a civil sanction. As a result, the pertinent public international law question in this context relates to the limits of this civil sanction, in particular whether it applies to conduct having taken place wholly outside the U.S.⁵⁰⁷

The case of *Kiobel v. Royal Dutch Petroleum Co.* (2013)⁵⁰⁸ illustrates this. The majority opinion, after recalling that the ATS ‘allows federal courts to recognize certain causes of action based on sufficiently definite norms of international law’, held that the presumption against extraterritoriality ‘constrain[s] courts considering causes of action that may be brought under the ATS’.⁵⁰⁹ The presumption against extraterritoriality is a U.S. canon of interpretation which assumes that in case of doubt Congress did not intend to regulate extraterritorially.⁵¹⁰ Since all relevant conduct took place outside the U.S., the majority held that the petitioner’s case was barred. The majority went on to add: ‘And even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application’.⁵¹¹ However, as Mills notes, ‘[t]his is not a presumption against *any* extraterritoriality, but only a presumption against *total* extraterritoriality’.⁵¹²

Justice Breyer concurring, joined by Justice Ginsberg, Justice Sotomayor and Justice Kagan, adopted an approach ‘guided in part by principles and practices of foreign relations

those derived from international law) to the conduct instead of the laws of the jurisdiction where, for example, the criminal act or tort took place’.

⁵⁰⁵ John N Drobak, ‘The Alien Tort Statute from the perspective of federal court procedure’ (2014) 13 Wash U Global Stud L Rev 421, 431, 435; Lucas Roorda and Cedric Ryngaert, ‘Business and human rights litigation in Europe and Canada: the promises of forum of necessity jurisdiction’ (2016) *Rabels Zeitschrift für ausländisches und internationales Privatrecht/The Rabel Journal of Comparative and International Private Law* 783, 800.

⁵⁰⁶ Wallach (n 444) 807.

⁵⁰⁷ *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013) (Concurrence Breyer).

⁵⁰⁸ *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013).

⁵⁰⁹ *Ibid.*

⁵¹⁰ Congressional Research Service (n 491) 12 et seq; *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013).

⁵¹¹ *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013).

⁵¹² Alex Mills, ‘Kiobel Insta-Symposium: A Tale of Two Presumptions’ (2013), available at <<https://opiniojuris.org/2013/04/18/kiobel-insta-symposium-a-tale-of-two-presumptions/>>, accessed on 31 January 2025.

law’.⁵¹³ The concurring opinion, inspired by public international law rules of prescriptive jurisdiction,⁵¹⁴ held that the ATS

‘provides jurisdiction where (1) the alleged tort occurs on American soil, (2) the defendant is an American national, or (3) the defendant’s conduct substantially and adversely affects an important American national interest, and that includes a distinct interest in preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind.’⁵¹⁵

Justice Breyer was not – as the majority – concerned with subject matter jurisdiction under U.S. law, but with the substantive reach of the civil sanction itself. However, due to the lack of significant contacts to the U.S., his concurring opinion arrived at the same conclusion as the majority. Indeed, Justice Breyer also alluded to a lack of ICA-Jurisdiction, as the only contact of the defendant with the U.S. was an office in New York.⁵¹⁶ However, the defendant had abandoned this line of defence and therefore the U.S. Supreme Court could not address it.⁵¹⁷ The issue of ICA-Jurisdiction was therefore not before the Supreme Court in *Kiobel v. Royal Dutch Petroleum Co.* (2013), neither were any CIL limits thereof.⁵¹⁸ This is true also for the other ATS cases. ICA-Jurisdiction (or in U.S. terminology: personal jurisdiction) is a separate matter. There can be a lack of ICA-Jurisdiction when there is subject matter jurisdiction under the ATS and vice versa. These are separate categories both under U.S. domestic law and public international law.⁵¹⁹ Public international law may allow an ATS suit to proceed if the defendant is served in the U.S. (adjudicative jurisdiction) but not allow that the U.S. applies a civil sanction to a party with no material connections to the U.S. for conduct having taken place wholly outside the U.S. (prescriptive jurisdiction).⁵²⁰

⁵¹³ *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013) (Concurrence Breyer).

⁵¹⁴ *Ibid.*

⁵¹⁵ *Ibid.*

⁵¹⁶ *Ibid.*

⁵¹⁷ Ishai Mooreville, ‘*Kiobel* Insta-Symposium: Questions of Personal Jurisdiction Lurk Beneath the Surface’, available at <<http://opiniojuris.org/2013/04/19/kiobel-insta-symposium-questions-of-personal-jurisdiction-lurk-beneath-the-surface/>>, accessed on 31 January 2025.

⁵¹⁸ Zachary D Clopton, ‘*Kiobel* and the Law of Nations’ (2013) 107 AJIL Unbound 1; see also Roorda and Ryngaert (n 97) 83.

⁵¹⁹ See Donovan and Roberts (n 489) 144: ‘Although universal jurisdiction may permit courts to adjudicate cases with which the state has no connection, many states will still require an independent basis for personal jurisdiction as a matter of national law, such as the presence of the accused for criminal prosecutions, or the existence of reasonable minimum contacts for civil action’.

⁵²⁰ Again, this is also recognized by *ibid* FN 12: ‘As a form of prescriptive jurisdiction, universal jurisdiction would displace ordinary choice-of-law rules, permitting the forum state to apply its own substantive laws (including

Protests in ATS cases have been cited as evidence of *opinio juris* against overreaching exercises of adjudicative jurisdiction.⁵²¹ Regarding adjudicative jurisdiction as defined in **Chapter 1 Section 2** this is, however, again based on a misunderstanding.⁵²² The *amicus curiae* briefs criticize the ATS in terms of prescriptive jurisdiction.⁵²³ Only very few *amicus curiae* briefs additionally express a view on ICA-Jurisdiction, which will be discussed in **Chapter 6 Section 4**. Equally few are ambiguous as to whether they address ICA-Jurisdiction as well. These will be discussed below.

The following briefs express in clear language that they concern prescriptive jurisdiction only: the European Commission's submission⁵²⁴ as well as the joint submission by Australia, U.K. and Switzerland⁵²⁵ in *Sosa v. Alvarez* (2004); the PRC's statement in *Doe v. Qi* (2004)⁵²⁶; the U.K.'s submission⁵²⁷ and the joint submissions of Germany and the U.K.⁵²⁸ in *In Re*

those derived from international law) to the conduct instead of the laws of the jurisdiction where, for example, the criminal act or tort took place. As a form of adjudicatory jurisdiction, universal jurisdiction would permit the court to hear a case with which the state had no connection but would not dictate the governing substantive law'.

⁵²¹ E.g. Nolte (n 489) 377 seems to argue this for the *amicus curiae* briefs by Australia, Switzerland and the U.K. and for the *amicus curiae* brief by the European Commission in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004); see also Jain (n 489).

⁵²² Jain in his meticulous study of the protests in ATS cases up until 2015 too maintains that it would be false to conclude from these protests that they concern ICA-Jurisdiction in any way. However, his reasoning is different. He draws the dividing line between 'expansive extraterritorial civil jurisdiction over civil offences' and 'the exercise of expansive extraterritorial civil jurisdiction over criminal offences' (Jain (n 489) 231). Yet, this explanation of the protests does not square well with their insistence on prescriptive jurisdiction and the fact that the ATS does not concern personal jurisdiction, i.e. ICA-Jurisdiction at all. The more convincing explanation is thus, as explained that the protesters are concerned about the substantive reach of civil penalty itself.

⁵²³ The relevant protests have been summarized in *ibid* and Office of the High Commissioner United Nations Human Rights, *Business and Human Rights: Enhancing Accountability and Access to Remedy - Project 2: Roles and Responsibilities of Interested States - OHCHR Working Paper #2 - State positions on the use of extraterritorial jurisdiction in cases of allegations of business involvement in severe human rights abuses: a survey of amicus curiae briefs filed by States and State agencies in ATS cases (2000-2015)* (2015); see also Uta Kohl, 'Corporate human rights accountability: The objections of western governments to the Alien Tort Statute' (2014) 63 *International & Comparative Law Quarterly* 665. ATS cases subsequent to 2015 have been checked via Westlaw for *amicus curiae* briefs.

⁵²⁴ Brief of Amicus Curiae the European Commission in Support of Neither Party of 23 January 2004, in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

⁵²⁵ Brief of the Governments of the Commonwealth of Australia, the Swiss Confederation and the United Kingdom of Great Britain and Northern Ireland as Amici Curiae Supporting Petitioner of 23 January 2004, in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (Nos 03-339, 03-485) (USA).

⁵²⁶ Statement by the Chinese Government on Anonymous Persons v Liu Qi Case, in *Doe v. Qi*, 349 F. Supp. 2d 1258 (2004) (Nos C 02-0672, C 02-0695) (USA).

⁵²⁷ Letter from Dominick Chilcott, Embassy of the United Kingdom, to Condoleezza Rice, Secretary of State, US Department of State of 30 January 2008, regarding Khulumani et al v Barclay National Bank et al and Ntsebeza et al v Daimler Chrysler Corp et al (*In Re Apartheid*), filed in Brief for the United States of America as Amicus Curiae Supporting Petitioners at Appendix B, in, *American Isuzu Motors, Inc v Ntsebeza*, 553 US (2008) 1028 (No 07-919) (USA).

⁵²⁸ Diplomatic Note No 126/2007 from the Embassy of the United Kingdom and the Embassy of the Federal Republic of Germany, to the US Department of State of 13 December 2007 and Note Verbale 168/07 from the Embassy of the Federal Republic of Germany and Embassy of the United Kingdom, to the US Department of State

Apartheid (2007); the joint submissions of Australia and the U.K. in and following *Rio Tinto II* (2011),⁵²⁹ El Salvador's submission in *Chavez v. Carranza* (2009),⁵³⁰ Germany's submission in *Kiobel v. Royal Dutch Petroleum Co.* (2013)⁵³¹ (see, however, on the broad introductory comments **Chapter 6 Section 4**) and Jordan's submission in *Jesner v. Arab Bank, PLC* (2018).⁵³²

The distinction between prescriptive jurisdiction and adjudicative jurisdiction is most apparent in the joint submission by the Netherlands and the U.K. in *Kiobel v. Royal Dutch Petroleum Co.* (2013).⁵³³ While the Netherlands and the U.K. express their opposition to any expansive exercise of prescriptive jurisdiction under the ATS, they commend the U.S. for adhering to the CIL limits for adjudicative jurisdiction⁵³⁴ (see in more detail **Chapter 6 Section 4**).

The wording in Canada's brief in *Presbyterian Church of Sudan v. Talisman Energy, Inc* (2005)⁵³⁵ is more ambiguous. It states that Canada is 'opposed, in principle, to broad assertions of extraterritorial jurisdiction over Canadian individuals or entities arising out of activities that take place entirely outside of the place asserting jurisdiction'.⁵³⁶ However, it is easily clarified that Canada did not mean ICA-Jurisdiction. If Canada was in fact opposed to subjecting foreigners to the Canadian judicial process regarding activities that take place entirely outside Canada, it would certainly not apply tag-jurisdiction as a basis of ICA-Jurisdiction in

13 December 2007, both regarding *Khulumani et al v Barclay National Bank et al* and *Ntsebeza et al v Daimler Chrysler Corp et al* (In Re *Apartheid*), filed in Brief for the United States of America as Amicus Curiae Supporting Petitioners at Appendix D and E, in, *American Isuzu Motors, Inc v Ntsebeza*, 553 US (2008) 1028 (No 07-919) (USA).

⁵²⁹ Brief of the Governments of the United Kingdom of Great Britain and Northern Ireland and the Commonwealth of Australia as Amici Curiae Supporting Defendants-Appellees/Cross-Appellants of 16 December 2009, in, *Sarei v Rio Tinto PLC* F 3d (2011) WL 5041927 (9th Cir 2011) (Nos. 02-56256, 02-56390, 09-56381) (USA) and Motion for Leave to File Brief and Brief of the Governments of Australia and the United Kingdom of Great Britain and Northern Ireland as Amici Curiae Supporting Petitioners on Certain Questions in Their Petition for a Writ of Certiorari, in, *Rio Tinto PLC v Sarei*, No 11-649 (USA).

⁵³⁰ Brief of the Republic of El Salvador as Amicus Curiae Supporting Appellant, in, *Chavez v Carranza*, 559 F 3d (6th Cir 2009) 1258 (No 06-6234) (USA).

⁵³¹ Brief of the Federal Republic of Germany as Amicus Curiae in Support of Respondents of 2 February 2012, in *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013).

⁵³² Brief for the Hashemite Kingdom of Jordan as Amicus Curiae Supporting Respondent of 28 August 2016, in *Jesner v. Arab Bank, PLC*, 584 U.S. ____ (2018).

⁵³³ Brief of the Governments of the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland as Amici Curiae in Support of Neither Party of 13 June 2012, in *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013).

⁵³⁴ *Ibid* 17.

⁵³⁵ Diplomatic Note UNGR0023 Embassy of Canada to US Department of State of 14 January 2005, in *Presbyterian Church of Sudan v. Talisman Energy, Inc* (2005) WL 2082846 (USA).

⁵³⁶ *Ibid* 2.

international cases, which it does at least for natural persons (see **The Annex**). Service of the defendant in the jurisdiction cannot be said to amount to any relevant ‘activity’ by the defendant. It is thus evident that Canada is opposed to the extraterritorial extension of civil sanctions by the U.S.

The same is true for Switzerland’s submission in *In Re Apartheid* (2007).⁵³⁷ It states that ‘[...] a broad assertion of jurisdiction to provide civil remedies for violations perpetrated by foreign corporations against aliens in foreign places is inconsistent with international law and may indeed undermine efforts to promote human rights and their protection. International law does not recognize the principle of universal civil jurisdiction over the foreign conduct of foreign defendants not affecting the forum State, unless the States involved have expressly consented to it’.⁵³⁸ In the context of ICA-Jurisdiction it is the consent of the parties, not the respective States, that suffices to establish jurisdiction (in most instances). Switzerland thus did not refer to adjudicative jurisdiction.

The European Commission’s submission in *Kiobel v. Royal Dutch Petroleum Co.* (2013),⁵³⁹ however, contains ambiguous language that cannot be resolved so easily. According to the European Commission, universal civil jurisdiction may be exercised if – and only if – universal criminal jurisdiction can be established. Otherwise, the principles of either territoriality, nationality or protection must be adhered to.⁵⁴⁰ In any event, however, it does not constitute a protest since it states that U.S. past practice under the ATS remained within the limits of international law.⁵⁴¹

⁵³⁷ Aide Memoire from the Government of Switzerland, to the US Department of State of December 2007, regarding *Khulumani et al v Barclay National Bank et al* and *Ntsebeza et al v Daimler Chrysler Corp et al* (*In Re Apartheid*), filed in Brief for the United States of America as Amicus Curiae Supporting Petitioners at Appendix C, in, *American Isuzu Motors, Inc v Ntsebeza*, 553 US 1028 (2008) (No 07-919) (USA).

⁵³⁸ Ibid.

⁵³⁹ Brief of the European Commission on Behalf of the European Union as Amicus Curiae in Support of Neither Party of 13 June 2012, in *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013).

⁵⁴⁰ Ibid.

⁵⁴¹ Ibid 4 et seq: The United States’ exercise of universal jurisdiction under the ATS is consistent with international law in accordance with these well- established constraints’.

4. Conclusion

This Chapter has examined the research question in four different contexts, namely that of the law of jurisdiction generally, that of the law on the treatment of foreigners, that of human rights law and finally that of the ATS. Under CIL, violations of the law on the treatment of foreigners due to a lack of necessary bases of ICA-Jurisdiction to bring one's claim will occur only in extreme scenarios. Considering the 75 sample states it is only imaginable in cases of misapplication, not application, of the rules. As for human rights law, the ECtHR has denied any obligation under CIL to exercise universal ICA-Jurisdiction but left open the question of whether it is at least lawful. Often hailed as one such example, the ATS, is in fact about prescriptive and not adjudicative jurisdiction. The protests against the ATS predominantly regarded prescriptive jurisdiction, with some obiter remarks on adjudicative jurisdiction, which will be evaluated in **Chapter 6**. Before that, the next chapter, **Chapter 5**, will examine the practice of ICA-Jurisdiction.

Chapter 5

State Practice

‘[I]t is in order to remedy the difficulties resulting from such variety that efforts have been made for many years past, both in Europe and America, to prepare conventions the effect of which would be precisely to limit the discretion at present left to States in this respect by international law, thus making good the existing lacunae in respect of jurisdiction or removing the conflicting jurisdictions arising from the diversity of the principles adopted by the various States.’
(PCIJ in *Lotus*, 1927)⁵⁴²

1. Introduction

While doctrine and practice in different jurisdictions have developed different categorisations for ICA-Jurisdiction and have focused on different aspects,⁵⁴³ most theoretical accounts have moved away from state-focused explanations in terms of sovereignty, power and allegiance.⁵⁴⁴ Instead, especially scholars from common law jurisdictions have turned to theories of fairness and reasonableness, which focus on the position of the individual.⁵⁴⁵ Scholars have also pointed to the diverse party interests involved. All else being equal, each party usually prefers to litigate in its ‘home’ state due to a variety of factors including cost, familiarity with the legal system and the language.⁵⁴⁶ In addition, each party will seek to litigate in the state whose procedural and substantive laws will work in its favour.⁵⁴⁷ The plaintiff has an interest in litigating in a state where it can prove its claim through readily available witnesses

⁵⁴² *Lotus* (n 16) 19.

⁵⁴³ Von Mehren and Gottschalk (n 35) 21.

⁵⁴⁴ Ralf Michaels, ‘Jurisdiction, Foundations’ in Jürgen Basedow and others (eds), *Encyclopedia of Private International Law* (Edward Elgar Publishing 2017), available at <<https://www.e-elgar.com/shop/gbp/encyclopedia-of-private-international-law-9781782547228.html>>, accessed on 31 January 2025.

⁵⁴⁵ *Ibid*; see also Von Mehren and Gottschalk (n 35) 51 who identified ‘ease of administration and predictability, on the one hand’ and ‘litigational fairness, on the other as the controlling and often competing policies in international litigation’ as guiding principles.

⁵⁴⁶ Michaels, ‘Jurisdiction, Foundations’ (n 544); see also Von Mehren and Gottschalk (n 35) 166; De Winter (n 6) 716.

⁵⁴⁷ Von Mehren and Gottschalk (n 35) 166; De Winter (n 6) 716.

etc.⁵⁴⁸ and the defendant has assets sufficient to satisfy its claim.⁵⁴⁹ At the very least, the judicial decision should be able to be recognized and enforced in the state where the assets are located. However, as a matter of fact, the state has relevant interests as well. On the one hand, the state has an interest in a manageable caseload for its courts, on the other hand, it may also seek to attract certain types of litigation for the purposes of increased fees and prestige.⁵⁵⁰ The state may also have an interest in the enforcement of certain regulations through its courts⁵⁵¹ or protection of certain parties by its courts.⁵⁵² Yet, states may also be keen not to encroach on the sovereignty of other states.⁵⁵³

This brief outline from the vast corpus of private international law literature on this issue⁵⁵⁴ merely serves as an introduction to the focus of this Chapter, which is the presentation of the empirical evidence, upon which these theories are built. The purpose of this Chapter is to work out and depict the practice of ICA-Jurisdiction in different legal systems (**Section 2 and 3**) alongside the most important treaties and EU-regulations on the subject matter (**Section 4**). **The Annex** contains a list of bases of ICA-Jurisdiction from 75 sample legal systems.

This data-focused Chapter demonstrates the pervasiveness of exorbitant bases of ICA-Jurisdiction among 75 sample legal systems. This contrasts sharply with the narrative that such bases of ICA-Jurisdiction are the exception to a rule. This Chapter also highlights that the decades-long efforts to outlaw exorbitant bases of ICA-Jurisdiction on an international level have not been successful.

⁵⁴⁸ De Winter (n 6) 716.

⁵⁴⁹ Michaels, 'Jurisdiction, Foundations' (n 544).

⁵⁵⁰ Ibid.

⁵⁵¹ Ibid.

⁵⁵² Clermont and Palmer, 'Exorbitant jurisdiction' (n 6) 501 et seq.

⁵⁵³ *Daimler AG v. Bauman*, 571 U.S. 117 (2014).

⁵⁵⁴ See e.g. Schröder (n 68); Paul Schiff Berman, 'The Globalization of Jurisdiction, 151 U' (2002) 311 Pa L Rev 476; Ralf Michaels, 'Two paradigms of jurisdiction' (2005) 27 Mich J Int'l L 1003.

2. The Different Bases of ICA-Jurisdiction

The Sub-sections that follow present the bases of ICA-Jurisdiction pursuant to their three traditional categories: consent (**Section 2.1**), proximity (**Section 2.2**) and – most importantly for the purpose of this doctoral thesis – exorbitance (**Section 2.3**).⁵⁵⁵ However, at the outset two clarifications are in order.

First, Arthur von Mehren and Donald Trautmann introduced an influential distinction between general and specific jurisdiction.⁵⁵⁶ General jurisdiction refers to ‘a legal order’s power to adjudicate essentially any kind of controversy involving that person regardless whether the matters in issue derive from, or are related to, the circumstances relied upon to establish adjudicatory authority’.⁵⁵⁷ On the other hand, specific jurisdiction exists where ‘the adjudicatory authority claimed extends only to controversies deriving from, or closely related to, the very circumstances relied upon to justify the forum’s claim of adjudicatory authority’.⁵⁵⁸ This distinction must not be confused with the distinction in many civil law codes between general (‘Allgemeiner Gerichtsstand’) and specific (‘Besonderer Gerichtsstand’) bases of jurisdiction.⁵⁵⁹ As an example, Section 99 Austrian Jurisdiktionsnorm, which grants ICA-Jurisdiction based on the location of the defendant’s property regardless of the connectedness of the claim is a special basis of jurisdiction under Austrian law (‘Besonderer Gerichtsstand’), but also an example of general jurisdiction as per von Mehren and Trautmann’s definition.

Second, in particular common law jurisdictions grant courts discretion to decline jurisdiction or to stay proceedings on the basis of different rationales. The best-known example is the doctrine *forum non conveniens*, according to which the court may stay proceedings if another forum is available, in which the case may be tried (i) more suitably for the interests of all the parties and (ii) the ends of justice.⁵⁶⁰ On the other hand, civil law jurisdictions in principle do not grant their courts such discretion. There, ICA-Jurisdiction is mostly binary.⁵⁶¹ However,

⁵⁵⁵ See also Michaels, ‘Jurisdiction, Foundations’ (n 544).

⁵⁵⁶ Von Mehren and Gottschalk (n 35) 25 and 24 FN 32.

⁵⁵⁷ Ibid 25.

⁵⁵⁸ Ibid.

⁵⁵⁹ E.g. Artt 65 et seqq Austrian Jurisdiktionsnorm (‘Allgemeiner Gerichtsstand’) and Artt 76 et seqq Austrian Jurisdiktionsnorm (‘Besondere Gerichtsstände’).

⁵⁶⁰ As per its classic formulation in *Spiliada Maritime Corporation v. Consulex Ltd.* [1987] A.C. 460; see also Von Mehren and Gottschalk (n 35) 267, 269.

⁵⁶¹ Ibid 269.

exceptions like the Swedish jurisdictional system do exist.⁵⁶² **The Annex** records this as ‘Possibility of Abstention’.

2.1. Consent

Most states allow private parties to agree on the jurisdiction of a specific court to resolve their dispute.⁵⁶³ However, it is not unheard of that states do not accept party-conferred jurisdiction. For instance in India, it has been held that it is a ‘well-settled principle that by agreement the parties cannot confer jurisdiction, where none exists, on a court to which CPC [Civil Procedure Code] applies’.⁵⁶⁴ Moreover, non-designated courts may accept jurisdiction as well, at least for certain disputes (e.g. immovable property situated within the court’s jurisdiction) or for the protection of certain groups of litigants (e.g. consumers).⁵⁶⁵ Another issue may arise with regard to the question of valid consent. Consent may have been coerced or produced through fraud, consent may not cover the particular controversy, or a company may deny being bound by an agreement reached by a third party, such as its subsidiary etc. Submission to the court is usually subsumed under the heading of consent. As such, the defendant’s consent may be established through submission during the proceedings, either explicitly or implicitly by pleading the merits of the case. The challenge of the court’s jurisdiction is usually not considered a submission.⁵⁶⁶

In **The Annex** the bases of ICA-Jurisdiction consent and submission are recorded under the heading ‘Common bases of ICA-Jurisdiction’ as ‘C & S: choice of forum and submission to the court’s jurisdiction’.

2.2. Proximity

Proximity is an umbrella term for different connections that exist between a litigant or the dispute and the forum where the action is brought.⁵⁶⁷ The most widespread territorial factor is

⁵⁶² Alexander Foerster and Azadeh Razani, ‘Sweden’ in Anthony Colman and Simon Bryan (eds), *Encyclopaedia of International Commercial Litigation* (Wolters Kluwer 2023) 6; Bengt Lindell, ‘Sweden’ in Piet Taelman (ed), *International Encyclopaedia of Laws: Civil Procedure* (Wolters Kluwer 2021) 77 FN 271.

⁵⁶³ Michaels, ‘Jurisdiction, Foundations’ (n 544).

⁵⁶⁴ *Modi Entertainment Network and Another v WSG Cricket PTE [Ltd 2003 (1) SCR 480]*; see also Tushar Kumar Biswas, ‘National Reports: India’ in Basedow and others.

⁵⁶⁵ Art 25 (4) Brussels I bis Regulation.

⁵⁶⁶ Michaels, ‘Jurisdiction, Foundations’ (n 544).

⁵⁶⁷ *Ibid.*

the defendant's domicile or habitual residence. The definitions vary from state to state, but have in common a certain sense of permanence, which is why this basis of ICA-Jurisdiction is sometimes referred to as the defendant's home jurisdiction.⁵⁶⁸ For juridical entities, this is typically their statutory seat, their place of central administration or their principal place of business.⁵⁶⁹ Virtually all states share this basis of ICA-Jurisdiction,⁵⁷⁰ which harks back to Roman times, where it was the principle basis of civil jurisdiction (*actor sequitur forum rei* – see **Chapter 3 Section 3**). Other territorial factors include – provided that the claim pertains to these elements – the place where the contract was concluded or performed, the wrongful act was committed or took effect, or generally where the cause of action arose or the obligation is to be performed and the location of immovable or (less commonly) movable property for claims pertaining to such property.⁵⁷¹ The principal personal factor is that of nationality. The nationality of the plaintiff without further qualifications is usually considered an exorbitant connecting factor (see **Section 2.3**).⁵⁷² Outside the scope of this doctoral thesis, in the context of family law, nationality is more readily accepted as a connecting factor.⁵⁷³

In **The Annex** these bases are recorded under the heading 'Common bases of ICA-Jurisdiction' as

D: domicile or habitual residence or formal or factual establishment of a juridical person;
 C & P: the cause of action (or parts of it) arose in the state or the obligation is to be performed in the state;
 C: connectedness of claims (personal connectedness, ancillary connectedness and counter-claims – and for one of the claims there exists ICA-Jurisdiction based on another 'Common'-type basis);
 LBA: the location of a branch office or agency for claims pertaining to their activities;
 L: the location of assets (mobile and immobile) for claims pertaining only to them, the place of formal or factual establishment of a company for claims pertaining to their registries and the validity of company decisions.

⁵⁶⁸ Ibid.

⁵⁶⁹ Art 63 (1) Brussels I bis Regulation.

⁵⁷⁰ See The Annex below.

⁵⁷¹ Ibid.

⁵⁷² Michaels, 'Jurisdiction, Foundations' (n 544). He also mentions jurisdiction based on the nationality of the defendant (Art 15 Code Civil). However, such a base of jurisdiction does not pose an issue from the perspective of public international law (Strauss (n 107) 374 FN 6).

⁵⁷³ Michaels, 'Jurisdiction, Foundations' (n 544).

2.3. Exorbitance

As stated in **Chapter 1**, certain rules of ICA-Jurisdiction have been internationally criticised for being exorbitant (*exorbitare*: to depart from the right path).⁵⁷⁴ These bases have been condemned as ‘inappropriate from an international standpoint’⁵⁷⁵ or simply as ‘impermissible’⁵⁷⁶ as they go beyond consent and the more accepted forms of proximity.⁵⁷⁷ Thus, states have sought to outlaw them. However, worldwide treaties have not yet attracted a substantial following (see **Section 4**). It has been held that exorbitant bases of ICA-Jurisdiction are unfair to the defendant for several reasons: the defendant must (potentially) defend itself in an unfamiliar forum and an unfamiliar language, bear higher costs than in proceedings at home and might be confronted with prejudice against foreigners. The defendant’s assets will only be secure if they are located in a state that does not enforce judgments based on exorbitant grounds of civil court jurisdiction. Even then, the defendant may face repercussions if it enters this state’s territory.⁵⁷⁸

Private and public international law doctrine largely agree on a specific set of bases of ICA-Jurisdiction as exorbitant for the reasons given above.⁵⁷⁹ These will therefore also be adopted for this doctoral thesis and are recorded in **The Annex** under the heading ‘Exorbitant bases of ICA-Jurisdiction’. ICA-Jurisdiction where the defendant has no domicile or residence anywhere in the world is not recorded as exorbitant or semi-exorbitant as this base of ICA-Jurisdiction is in fact quite common and has – to the best of the author’s knowledge – not given rise to objections in literature or practice.

⁵⁷⁴ See Nadelmann (n 6); De Winter (n 6); Clermont and Palmer, ‘Exorbitant jurisdiction’ (n 6) 476; Clermont and Palmer, ‘French Article 14 Jurisdiction, Viewed from the United States’ (n 258); Michaels, ‘Jurisdiction, Foundations’ (n 544); Childress III (n 98).

⁵⁷⁵ Clermont and Palmer, ‘Exorbitant jurisdiction’ (n 6).

⁵⁷⁶ Schachter (n 8) 246 for ‘prescriptive jurisdiction’.

⁵⁷⁷ Michaels, ‘Jurisdiction, Foundations’ (n 544); some have gone further, see “International jurisdiction and foreign judgments in civil and commercial matters” (Prel. Doc. No 7 of April 1997, revised translation of October 1997): ‘We venture to suggest here one possible definition of exorbitant jurisdiction: jurisdiction is exorbitant when the court seised does not possess a sufficient connection with the parties to the case, the circumstances of the case, the cause or subject of the action, or fails to take account of the principle of the proper administration of justice. An exorbitant form of jurisdiction is one which is solely intended to promote political interests, without taking into consideration the interests of the parties to the dispute’.

⁵⁷⁸ See Nadelmann (n 6); De Winter (n 6); Clermont and Palmer, ‘Exorbitant jurisdiction’ (n 6) 476.

⁵⁷⁹ Generally see Nadelmann (n 6); Mann, ‘The Doctrine of Jurisdiction in International Law’ (n 19) 76 et seqq; De Winter (n 6); Clermont and Palmer, ‘Exorbitant jurisdiction’ (n 6); Clermont and Palmer, ‘French Article 14 Jurisdiction, Viewed from the United States’ (n 258); Michaels, ‘Jurisdiction, Foundations’ (n 544); Childress III (n 98); in addition for a criticism of ICA-Jurisdiction based on the applicable law see Mann, ‘The Doctrine of Jurisdiction in International Law’ (n 19) 78; De Winter (n 6) 713; Mills, ‘Exorbitant Jurisdiction and the Common Law’ (n 97) 257.

AL: ‘Applicable Law’ – The law governing the cause of action is sufficient to confer ICA-Jurisdiction to the courts of the corresponding state;

TP: ‘Transitory Presence’ – The transitory presence of the defendant at a defined time (most commonly the time of service) is sufficient to confer ICA-Jurisdiction on the courts of the corresponding state for any claim;

P: ‘Plaintiff Jurisdiction’ – The domicile/habitual residence/nationality of the plaintiff is sufficient to confer ICA-Jurisdiction on the courts of the corresponding state for any claim;

A: ‘Assets’ – The location of assets (mobile or immobile) of the defendant is sufficient to confer ICA-Jurisdiction on the courts of the corresponding state for any claim;

DB: ‘Doing Business’ – That the defendant is doing business in a state without being established there (formally or factually) is sufficient to confer ICA-Jurisdiction on the courts of the corresponding state for any claim. This includes a branch office, subsidiary and the mere selling of products.

Another (self-defined) subgroup concerns bases of ICA-Jurisdiction, which, while not common, are less controversial than their exorbitant counterparts. Often these bases do involve exorbitant factors, but also require at least one additional connecting factor, making them more balanced. The most prominent example of this subgroup is ICA-Jurisdiction based on necessity, or *forum necessitatis*,⁵⁸⁰ where courts have jurisdiction if e.g. a plaintiff cannot bring the claim in any other state, a judgment from another state would not be enforced, or justice would not be delivered in another state.⁵⁸¹

⁵⁸⁰ Michaels, ‘Jurisdiction, Foundations’ (n 544).

⁵⁸¹ Ibid; see e.g. § 28 Abs 1 Z 2 of the Austrian Jurisdiktionsnorm: ‘Sind für eine bürgerliche Rechtssache die Voraussetzungen für die örtliche Zuständigkeit eines inländischen Gerichts im Sinne dieses Gesetzes oder einer anderen Rechtsvorschrift nicht gegeben oder nicht zu ermitteln, so hat der Oberste Gerichtshof aus den sachlich zuständigen Gerichten eines zu bestimmen, welches für die fragliche Rechtssache als örtlich zuständig zu gelten hat, wenn [...] der Kläger österreichischer Staatsbürger ist oder seinen Wohnsitz, gewöhnlichen Aufenthalt oder Sitz im Inland hat und im Einzelfall die Rechtsverfolgung im Ausland nicht möglich oder unzumutbar wäre’. Translated this means: ‘If the requirements for the local jurisdiction of a domestic court within the meaning of this Act or another legal provision are not met or cannot be determined for a civil case, the Supreme Court shall determine one of the courts with subject-matter jurisdiction which shall be deemed to have local jurisdiction for the case in question if [...] the plaintiff is an Austrian national or has his domicile, habitual residence or registered office in Austria and in the individual case legal proceedings abroad would not be possible or unreasonable’.

These are recorded in **The Annex** under the heading ‘Semi-exorbitant bases of ICA-Jurisdiction’:

R: ‘Reciprocity’ – That the state of the defendant’s nationality/domicile/habitual residence assumes ICA-Jurisdiction under these circumstances confers ICA-Jurisdiction;

N: ‘Necessity’ – That the defendant cannot access any other court or cannot be expected to do so is sufficient to confer ICA-Jurisdiction (with slight variations);

TP+: ‘Transitory Presence’ plus an additional connecting factor not of the ‘Common’-type, e.g. nationality of the plaintiff, is sufficient to confer ICA-Jurisdiction for any claim;

P+: ‘Plaintiff Jurisdiction’ plus an additional connecting factor not of the ‘Common’-type, e.g. reciprocity, is sufficient to confer ICA-Jurisdiction for any claim.

A+: ‘Asset Jurisdiction’ or arrest of the defendant plus an additional connecting factor not of the ‘Common’-type, e.g. nationality of the plaintiff, is sufficient to confer ICA-Jurisdiction for any claim.

3. The Data

75 sample legal systems have been analysed and the results are recorded in **The Annex**. These are as follows:

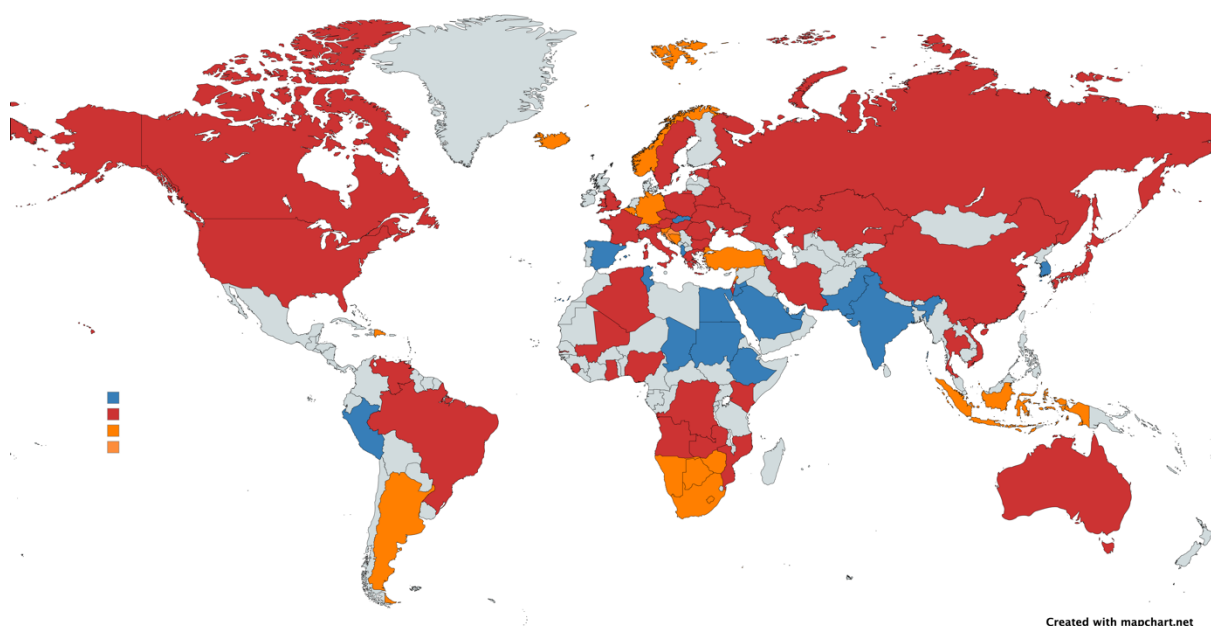
Albania, Algeria, Angola, Argentina, Austria, Australia, Belarus, Belgium, Bermuda, Bosnia and Herzegovina, Botswana, Brazil, Bulgaria, Canada, Cayman Islands, Chad, China, Democratic Republic of Congo, Croatia, Czech Republic, Dominican Republic, Estonia, Egypt, Ethiopia, France, Gambia, Germany, Ghana, Greece, Hungary, Iceland, India, Indonesia, Iran, Israel, Italy, Japan, Jersey, Jordan, Kazakhstan, Kenya, Korea, Lebanon, Lesotho, Macau, Mali, Mozambique, Namibia, Nigeria, Norway, Pakistan, Peru, Poland, Qatar, Romania, Russia, Saudi Arabia, Sierra Leone, Slovakia, Slovenia, South Africa, Spain, Sudan, Sweden, Thailand, Tunisia, Turkey, United Arab Emirates, Ukraine, England and Wales, USA, Venezuela, Vietnam, Zambia, Zimbabwe.

The information is up to date according to the date of the sources cited. Changes may have occurred since. However, the field of ICA-Jurisdiction is not particularly fast-moving. The general cut-off date is March 2023, unless otherwise indicated. In ambiguous cases, bases of ICA-Jurisdiction are not labelled as exorbitant or semi-exorbitant.

‘Common bases of ICA-Jurisdiction’ are recorded only for some states as they are not the focus of this doctoral thesis. However, as the name indicates virtually all states have these bases of ICA-Jurisdiction, in one way or another.

The following map depicts

- in red states/legal systems which employ at least one exorbitant basis,
- in orange states/legal systems which employ no exorbitant basis, but at least one semi-exorbitant basis, and
- in blue states/legal systems which employ neither of the above, but only ‘Common bases of ICA-Jurisdiction’,
- non-analysed states/legal systems in grey.



Of the 75 sample legal systems, 42 exhibit at least one exorbitant basis of ICA-Jurisdiction. Additional 17 legal systems exhibit one or more semi-exorbitant bases of ICA-Jurisdiction. Merely 16 legal systems exhibit neither exorbitant nor semi-exorbitant bases of ICA-Jurisdiction. 22 legal systems know a discretionary or mandatory abstention from exercising ICA-Jurisdiction.

The distribution of exorbitant bases of ICA-Jurisdiction is as follows:

AL	TP	P	A	DB
14	11	9	16	15

Truly universal ICA-Jurisdiction has not been encountered.⁵⁸²

The Annex contains a detailed list of the legal systems analysed.

4. Exorbitant bases of ICA-Jurisdiction in Practice

The preceding Section demonstrated that many of the legal systems analysed contain legislation authorizing exorbitant ICA-Jurisdiction. However, the fact that exorbitant provisions of ICA-Jurisdiction are abundant does not necessarily mean that they are exercised in practice. To this there are two answers. First, their very existence is likely to impact in-court and out-of-court settlements, as the (prospective) defendant may be more willing to make concessions in order to avoid having to litigate in that particular forum with all the potential downsides mentioned in **Section 2.3** above.⁵⁸³ Courts may also be willing to be more lenient with the application of other (non-exorbitant) provisions to establish ICA-Jurisdiction knowing that the exorbitant provision exists as back-up.⁵⁸⁴ The threat of exorbitant ICA-Jurisdiction on its own thereby likely affects foreign defendants as well. Second, even a brief survey of some notorious provisions shows that these are in fact exercised. There is every reason to believe that in other states these provisions are employed in practice as well.

Clermont and Palmer confirm that Art 14 of the French Code Civil is invoked against foreign defendants in practice.⁵⁸⁵ A search in Legifrance⁵⁸⁶ under judicial decisions for the term “l’article 14 du code civil” revealed 269 entries since the 1960s (as of 10 July 2024). As an example, ICA-Jurisdiction was recently established on this basis in the case *Court of Cassation*,

⁵⁸² See also Cedric Ryngaert, *Selfless intervention: the exercise of jurisdiction in the common interest* (Oxford University Press, USA 2020) 183.

⁵⁸³ Clermont and Palmer, ‘French Article 14 Jurisdiction, Viewed from the United States’ (n 258) 18 et seq.

⁵⁸⁴ Ibid 19.

⁵⁸⁵ Ibid 18.

⁵⁸⁶ <<https://www.legifrance.gouv.fr/>>.

Civil, Civil Chamber I, June 29, 2022, 21-11.085, Unpublished, against a South African defendant. For ICA-Jurisdiction based on service within the jurisdiction against foreign defendants see the e.g. the U.S. cases *Ridgway v. Phillips* (2019),⁵⁸⁷ *Martinez v. Aero Caribbean* (2014)⁵⁸⁸ and *Topnotch Tennis Tours, LLC v. Global Tennis Connections Ltd.* (2014)⁵⁸⁹. As for a case against a foreign defendant on the basis of the applicable law being English law see e.g. the English case *Alliance Bank JSC v. Aquanta Corporation & Ors* (2011).⁵⁹⁰ Before the U.S. Supreme Court outlawed general jurisdiction on the basis of ‘doing business’,⁵⁹¹ U.S. courts exercised such jurisdiction against foreign defendants, see e.g. *Altmann v. Republic of Austria* (2002).⁵⁹² A search in ris.bka.gv.at under case law for the term “§ 99 JN” (asset-based ICA-Jurisdiction) revealed 150 cases (as of 10 July 2024). While there are many *en passant* references, there is also a lot of substantive engagement with this provision.⁵⁹³ A recent case confirmed ICA-Jurisdiction based on Section 99 JN against a defendant with its seat in New York.⁵⁹⁴

Still there is another important aspect of state practice (and potentially *opinio juris*). States have for decades attempted to outlaw exorbitant bases of ICA-Jurisdiction through international treaties and supranational regulation. This will be considered in the next Section.

5. Treaties and Supranational Regulation

The following sub-sections provide an overview of relevant treaties in the context of ICA-Jurisdiction with a focus on exorbitant bases of ICA-Jurisdiction. These include the conventions under the auspices of the Hague Conference on Private International Law (‘HCCH’) (**Sub-section 5.1**), the EU and EFTA rules (**Sub-section 5.2**) and the Codice Bustamante (**Sub-section 5.3**). Mention is also made of the European Convention on State Immunity, which in an addendum contains a list of exorbitant bases of ICA-Jurisdiction (**Sub-section 5.4**).

⁵⁸⁷ *Ridgway v. Phillips*, Case No. 18-cv-07822-HSG (N.D. Cal. Mar. 18, 2020).

⁵⁸⁸ *Martinez v. Aero Caribbean*, 764 F.3d 1062 (9th Cir. 2014).

⁵⁸⁹ *Topnotch Tennis Tours, LLC v. Global Tennis Connections Ltd.*, 13-CV-4844 (SLT)(VMS) (E.D.N.Y. Nov. 10, 2014).

⁵⁹⁰ *Alliance Bank JSC v. Aquanta Corporation & Ors* [2011] EWHC 3281 (Comm). Service out of the jurisdiction was, however, eventually set aside due to application of the *forum non conveniens* doctrine, see *Alliance Bank JSC v. Aquanta Corporation & Ors* [2012] 2 CLC 1027.

⁵⁹¹ *Goodyear Dunlop Tires Operations, S. A., et al. v. Brown*, 564 U.S. 915 (2011).

⁵⁹² *Altmann v. Republic of Austria*, 317 F.3d 954 (9th Cir. 2002).

⁵⁹³ See in particular RIS-Justiz RS0046752, RS0046756, RS0046805.

⁵⁹⁴ OGH 5 Ob 72/16y.

5.1. HCCH Conventions

The work of the HCCH with its 90 state parties⁵⁹⁵ offers a unique insight into the perspective of states on matters of ICA-Jurisdiction. Prior to the 1990s, the HCCH had produced some treaties with relevance for ICA-Jurisdiction, however, with limited success.⁵⁹⁶ The 1971 Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters and its Supplementary Protocol of the same year counts only five state parties.⁵⁹⁷ The Supplementary Protocol states that member states shall not recognize and enforce judgments based on the enumerated exorbitant bases of ICA-Jurisdiction, which essentially are asset-based ICA-Jurisdiction, plaintiff-ICA-Jurisdiction, ICA-Jurisdiction based on doing business and ICA-Jurisdiction based on transitory presence.⁵⁹⁸

In 1992, the Permanent Bureau of the HCCH discussed three potential paths forward: First, states could join the Lugano Convention. However, that would have required approval of each state by the parties to that convention. Additionally, there were concerns about the mandatory recognition and enforcement of judgments from other convention parties based on exorbitant bases of ICA-Jurisdiction (see **Section 5.2**). Second, states could join the 1971 HCCH convention. Third, a new convention could be created. One of the declared objectives was to eliminate exorbitant grounds of ICA-Jurisdiction. It was, however, not yet clear whether the convention should provide directly for the applicable bases of ICA-Jurisdiction as the Lugano Convention did (*Traité double*), whether it should regulate the permissible bases indirectly through restrictions on recognition and enforcement as the 1971 HCCH convention did (*Traité simple*), or whether it should adopt an intermediary solution.⁵⁹⁹ A working group of experts in the field of judicial jurisdiction was set up composed of experts from Argentina, Venezuela,

⁵⁹⁵ <<https://www.hcch.net/en/states/hcch-members>>, accessed on 31 January 2025.

⁵⁹⁶ Convention on the jurisdiction of the selected forum in the case of international sales of goods (signed on 15 April 1958, not in force): only Austria, Belgium, Germany and Greece are signatories (<https://www.hcch.net/en/instruments/conventions/status-table/?cid=34>); Convention on the Choice of Court (25 November 1965, not in force): only Israel is a signatory (<https://www.hcch.net/en/instruments/conventions/full-text/?cid=77>).

⁵⁹⁷ Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters and Supplementary Protocol to the Convention (1 February 1971, in force since 20 August 1979): the parties are Albania, Cyprus, Kuwait, the Netherlands and Portugal, <<https://www.hcch.net/en/instruments/conventions/status-table/?cid=78>>.

⁵⁹⁸ Supplementary Protocol to the Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, <<https://www.hcch.net/en/instruments/conventions/full-text/?cid=79>>.

⁵⁹⁹ “Some reflections of the Permanent Bureau on a general convention on enforcement of judgments” (Prel. Doc. No 17 of May 1992 in Proceedings of the Seventeenth Session (1993), Vol. I, 231.

China, Egypt, Finland, France, Hungary, the U.K. and the U.S.⁶⁰⁰ The working group proposed an intermediate type convention, under which certain bases of ICA-Jurisdiction would belong to the white list. Courts would be required to assume ICA-Jurisdiction based on those grounds and the resulting judgments had to be recognized and enforced. If contained in the black list, courts were not allowed to assume ICA-Jurisdiction on this basis and were not allowed to recognize and enforce judgments based thereupon. The grey list provided for a non-exhaustive list of bases of ICA-Jurisdiction which allowed courts to assume ICA-Jurisdiction and to recognise and enforce judgments based on these grounds.⁶⁰¹

The resulting draft convention provided for a ban of any basis of ICA-Jurisdiction without a sufficiently close link with the parties, the circumstances of the case, the cause or object of the action. The non-exhaustive examples provided were asset-based ICA-Jurisdiction, plaintiff-ICA-Jurisdiction, ICA-Jurisdiction based on doing business and ICA-Jurisdiction based on transitory presence.⁶⁰² However, no convention was concluded, mainly due to resistance from the U.S. The Special Committee noted in 2000 that ‘a consistent view had emerged that there would be difficulty in accepting the text of the preliminary draft Convention in the United States’ and that ‘some American lawyers were not yet ready to accept the proposed list of prohibited bases of jurisdiction’.⁶⁰³

Work was eventually shifted to a convention that would regulate ICA-Jurisdiction if the parties had concluded a jurisdiction agreement and the recognition and enforcement of the resulting judgments. These efforts resulted in the 2005 Choice of Court Convention, which naturally had nothing to say on exorbitant bases of ICA-Jurisdiction.⁶⁰⁴

This changed only in 2019. The Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (**HCCH 2019 Judgments**

⁶⁰⁰ Conclusions of the Special Commission of June 1992 on general affairs and policy of the Conference (Prel. Doc. No 18 of August 1992 in Proceedings of the Seventeenth Session (1993), Vol. I, 245, 253.

⁶⁰¹ “Conclusions of the Working Group meeting on enforcement of judgments” (Prel. Doc. No 19 of November 1992 in Proceedings of the Seventeenth Session (1993), Vol. I, 257, 261; see also “Annotated checklist of issues to be discussed at the meeting of the Special Commission of June 1994” (Prel. Doc. No 1 of May 1994) 18; “Conclusions of the Special Commission of June 1994 on the question of the recognition and enforcement of foreign judgments in civil and commercial matters” (Prel. Doc. No 2 of December 1995) 20.

⁶⁰² “Preliminary draft out line to assist in the preparation of a convention on international jurisdiction and the effects of foreign judgments in civil and commercial matters” (Info. Doc. No 2 of September 1998) 22.

⁶⁰³ “Conclusions of the Special Commission of May 2000” (Prel. Doc. No 10 of June 2000) 11.

⁶⁰⁴ The Hague Convention on Choice of Court Agreements of 30 June 2005 on Choice of Court Agreements (entered into force 1 October 2015), <<https://www.hcch.net/de/instruments/conventions/full-text/?cid=98>>.

Convention)⁶⁰⁵ is the HCCH's latest achievement in the field of ICA-Jurisdiction, at least indirectly. Signatories to the HCCH 2019 Judgments Convention include among others the EU and its member states as well as the U.S.⁶⁰⁶ While the convention entered into force for the EU and its member states on 1 September 2023, the U.S. has yet to ratify the convention.⁶⁰⁷ The HCCH 2019 Judgments Convention is not a double convention as it does not prescribe the permissible bases of ICA-Jurisdiction directly. Instead, its Art 5 enumerates certain bases of ICA-Jurisdiction. It stipulates that if a judgment is based on any of them, it must be recognized and enforced – provided that certain other conditions are met. Notably, the exorbitant bases, as defined above, are not among the bases recorded in Art 5. However, Art 23 (4) provides that nothing in the HCCH 2019 Judgments Convention affects the application of the rules of the Brussels 1 bis Convention, which includes the obligation to recognize and enforce EU court judgments based on exorbitant bases of ICA-Jurisdiction (see **Section 5.2**). Regarding future EU rules, Art 23 (4) (b) contains a counter-exception. It provides that future EU rules 'adopted after this Convention was concluded' shall not 'affect the obligations under Article 6 towards Contracting States that are not Member States of the Regional Economic Integration Organisation'.

5.2. EU and EFTA Rules

In 1968, Belgium, Germany, France, Italy, Luxembourg and the Netherlands signed the Brussels Convention.⁶⁰⁸ It entered into force in 1973⁶⁰⁹ and several other EU states (including formerly the U.K.) acceded to it subsequently.⁶¹⁰ The Brussels Convention provides for directly applicable rules of ICA-Jurisdiction and the recognition and enforcement of judgments between the contracting states. Article 3 contains a list of bases of ICA-Jurisdiction considered to be exorbitant, which cannot be invoked against defendants with a domicile in a contracting state.⁶¹¹

⁶⁰⁵ Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (in force since 1 September 2023), <<https://www.hcch.net/en/instruments/conventions/full-text/?cid=137>>.

⁶⁰⁶ Status table of the HCCH 2019 Judgments Convention, <<https://www.hcch.net/en/instruments/conventions/status-table/?cid=137>>, accessed on 31 January 2025.

⁶⁰⁷ Ibid.

⁶⁰⁸ Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, OJ L 299, 31.12.1972, p. 32–42.

⁶⁰⁹ Ibid FN 1.

⁶¹⁰ These are Austria, Denmark, Finland, the Hellenic Republic, Ireland, Portugal, Spain, Sweden and the U.K. Due to Brexit, the Brussels Convention no longer applies to the U.K.

⁶¹¹ Joseph Halpern, 'Exorbitant Jurisdiction and the Brussels Convention: Toward a theory of restraint' (1982) 9 Yale J World Pub Ord 369, 379 writes that 'these grounds for jurisdiction are insufficient because they give inadequate weight to the interests of the defendant, whose connection to the forum is merely procedural, temporary, incidental, or nonexistent'.

Among these are Art 14 of the French Code Civil and the German Section 23 dZPO. Essentially, these provisions again concern the well-known exorbitant bases of ICA-Jurisdiction (although this author considers Section 23 dZPO to be only semi-exorbitant due to the jurisprudence of the German Supreme Court). The list is symbolic since in any event Article 3 forbids the exercise of ICA-Jurisdiction on any ground not contained in the Brussels Convention. The two Lugano Conventions,⁶¹² which extended the ‘Brussels’ rules to Iceland, Norway and Switzerland, as well as the original Brussels I Regulation, which is the successor to the Brussels Convention in the form of a directly binding EU Regulation,⁶¹³ contain a symbolic list of exorbitant grounds of jurisdiction as well.⁶¹⁴ Only the updated Brussels I bis Regulation does not contain such a list. Since the introduction of the Brussels and Lugano Conventions exorbitant bases of ICA-Jurisdiction cannot be invoked against an EU/EFTA defendant before a member state court.

However, states are not only allowed to exercise their national exorbitant bases of ICA-Jurisdiction vis-à-vis defendants domiciled in third states (with exceptions), but are also under the obligation to recognize and enforce the resulting judgments from other contracting/member states regardless of the exorbitant nature of the jurisdiction invoked.⁶¹⁵

5.3. The *Codigo Bustamante*

The *Codigo Bustamante*, which was concluded as an Annex to the Treaty of Havana in 1928 between several states of Central and Latin America and among other things regulates ICA-

⁶¹² Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, OJ L 319, 25.11.1988, p. 9–48. It has been replaced by the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 339, 21.12.2007, p. 3–41.

⁶¹³ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 12, 16.1.2001, p. 1–23. It has been replaced by the Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).

⁶¹⁴ Lugano Convention (1988) Article 3; Lugano Convention (2007) Annex 1; Brussels Regulation (2001) Annex 1.

⁶¹⁵ See e.g. Articles 6 (1), 36 (1), 39 (1) of the Brussels I bis Regulation; for extensive criticism of this approach see Nadelmann, ‘Jurisdictionally Improper Fora in Treaties on Recognition of Judgments: The Common Market Draft’ (n 145); see, however, also Art 72 of the Brussels I bis Regulation: ‘This Regulation shall not affect agreements by which Member States, prior to the entry into force of Regulation (EC) No 44/2001, undertook pursuant to Article 59 of the 1968 Brussels Convention not to recognise judgments given, in particular in other Contracting States to that Convention, against defendants domiciled or habitually resident in a third State where, in cases provided for in Article 4 of that Convention, the judgment could only be founded on a ground of jurisdiction specified in the second paragraph of Article 3 of that Convention’.

Jurisdiction, does not foresee that ICA-Jurisdiction can be based on any of the exorbitant bases discussed.⁶¹⁶

5.4. The European Convention on State Immunity

An annex to the European Convention on State Immunity⁶¹⁷ contains a list of bases of ICA-Jurisdiction, among others asset-based ICA-Jurisdiction, plaintiff-ICA-Jurisdiction and ICA-Jurisdiction based on doing business. These are relevant in various contexts at the enforcement stage.⁶¹⁸ Most importantly ‘a Contracting State is not obliged to give effect to the judgment: a) if the courts of the State of the forum would not have been entitled to assume jurisdiction had they applied, *mutatis mutandis*, the rules of jurisdiction (other than those mentioned in the annex to the present Convention) which operate in the State against which judgment is given’, unless the state is obliged to give effect to the judgment owing to a separate convention between the states.⁶¹⁹

6. Conclusion

This data-focused Chapter demonstrated the pervasiveness of exorbitant bases of ICA-Jurisdiction among 75 sample legal systems, with a detailed list contained in the **The Annex**. This contrasts sharply with the narrative that such bases of ICA-Jurisdiction are the exception to a rule. This Chapter also highlighted the decades-long efforts to outlaw exorbitant bases of ICA-Jurisdiction on an international level, which so far has not been successful. It is telling that the recent HCCH 2019 Judgments Convention operates exclusively on the level of the recognition and enforcement of judicial decisions. It appears that states are not prepared to relinquish their respective exorbitant bases of ICA-Jurisdiction and have put their efforts to come to a global agreement on this issue on hold. To deduct *opinio juris* from the existing treaties and rules is a delicate matter. A treaty provision, such as the ban of certain bases of ICA-Jurisdiction, may reflect a common belief among the treaty parties of the provision’s status as CIL. Conversely, the provision may have been included precisely because it has no CIL

⁶¹⁶ Artt 318-339 of the Código de Derecho Internacional Privado (signed on 20 February 1928, in force since November 1928) 86 LNTS 120 (Código de Bustamante).

⁶¹⁷ European Convention on State Immunity (signed on 16 May 1972, entered into force on 11 June 1976) Europ. T.S. No. 74, reprinted in 11 I.L.M. 470: in force between Belgium, Germany, Luxembourg, Netherlands, Austria, Switzerland, the U.K. and Cyprus; Addendum to the European Convention on State Immunity, <<https://rm.coe.int/168007311a>>.

⁶¹⁸ Artt 20, 24, 25 of the European Convention on State Immunity.

⁶¹⁹ Art 20 of the European Convention on State Immunity.

status. The repeated, but failed attempts to ban exorbitant bases of ICA-Jurisdiction beyond successful regional initiatives, clearly points to the latter. Furthermore, the U.S. still has not ratified the HCCH 2019 Judgments Convention, even though it only indirectly concerns ICA-Jurisdiction. A strong case has been made by the co-reporters of the Restatement (Fourth) that the EU rules were never intended to outlaw exorbitant bases of ICA-Jurisdiction completely, but instead are evidence that the respective states considered these grounds to be in line with CIL.⁶²⁰ As mentioned, states are not only allowed to exercise their national exorbitant bases of ICA-Jurisdiction vis-à-vis defendants domiciled in third states (with exceptions), but are also under the obligation to recognize and enforce the resulting judgments from other contracting/member states regardless of the exorbitant nature of the jurisdiction invoked.⁶²¹ It is hard to imagine that for decades such an obligation would exist among EU and EFTA member states if they believed that they thereby sanctioned breaches of public international law.⁶²²

Regardless, *opinio juris* may still be found outside of treaties and supranational rules. This is examined in the next Chapter.

⁶²⁰ Dodge, Roberts and Paul (n 73).

⁶²¹ See e.g. Articles 6 (1), 36 (1), 39 (1) of the Brussels 1 bis Regulation; for extensive criticism of this approach see Nadelmann, 'Jurisdictionally Improper Fora in Treaties on Recognition of Judgments: The Common Market Draft' (n 145); see, however, also Art 72 of the Brussels 1 bis Regulation: 'This Regulation shall not affect agreements by which Member States, prior to the entry into force of Regulation (EC) No 44/2001, undertook pursuant to Article 59 of the 1968 Brussels Convention not to recognise judgments given, in particular in other Contracting States to that Convention, against defendants domiciled or habitually resident in a third State where, in cases provided for in Article 4 of that Convention, the judgment could only be founded on a ground of jurisdiction specified in the second paragraph of Article 3 of that Convention'.

⁶²² ALI, *Restatement of the Law, Fourth, the Foreign Relations Law of the United States: Selected Topics in Treaties, Jurisdiction, and Sovereign Immunity* : §§ 301-313; 401-464; 481-490, *Tables and Index* (n 99) § 422, Reporter's Notes 1; Dodge (n 21), Roberts and Paul (n 73); see also Gottwald (n 97) 130.

Chapter 6

ICA-Jurisdiction: *Opinio Juris*

‘Can the Island of Tobago pass a law to bind the rights of the whole world? Would the world submit to such an assumed jurisdiction?’

(Lord Ellenborough, 1808)⁶²³

1. Introduction

A priori there is no reason why CIL should not address ICA-Jurisdiction. After all, it may negatively affect nationals of other states.⁶²⁴ However, to answer the question, expressions of *opinio juris* have to be analysed. There is no shortcut. To recall from **Chapter 2 Section 1.2** (including references):

- considering the number of legal systems exhibiting exorbitant bases of ICA-Jurisdiction (see **Chapter 5**), one would expect states to protest in significant numbers. After all, ‘[t]he acid test of the limits of jurisdiction in international law is the presence or absence of diplomatic protests’;⁶²⁵ yet, states hardly ever protest each other’s exercise of ICA-Jurisdiction. This could point to a lack of *opinio juris*. However, it has also been pointed out that the bulk of existing rules may be in line with CIL, which would explain the insignificant number of protests;
- alternatively, exercises of exorbitant bases of ICA-Jurisdiction may lack a legal claim that they are lawful under CIL since there are no corresponding explicit references to that effect. It has been argued that without a legal claim no protest is required;
- it is not sufficient to look at the recognition and enforcement practice of states. Some states are more accommodating of foreign judicial decisions than others. Therein lies no proof of any reproach towards the exercise of ICA-Jurisdiction itself;

⁶²³ *Buchanan v. Rucker* [1808] 9 East. 192, 194.

⁶²⁴ See Chapter 5 Section 2.3 and Chapter 7.

⁶²⁵ Akehurst (n 42) 176.

- states have at times reacted adversely to the exorbitant provisions of other states, resulting in reciprocal conduct and denial of recognition and enforcement based on violation of public policy. However, domestic public policy concerns the core values of the respective state's legal system. It allows no conclusion as to the state's *opinio juris* in the international legal system. Plaintiff jurisdiction, for instance, may be alien to certain legal systems. Some states may even refuse recognition and enforcement based on domestic public policy concerns. But at the same time a state may not wish to formulate any international *opinio juris* against plaintiff jurisdiction, since it exercises a basis of jurisdiction itself, which many other states consider exorbitant. If states reciprocate in kind, this may be done first and foremost to protect their nationals and their interests on their territory, but does not have to be an expression of *opinio juris*;
- criticism has also been directed at the EU for making judicial decisions against non-EU defendants, which were rendered based on exorbitant grounds, enforceable in all other EU states. However, this only shows that states are – again – concerned about widespread recognition and enforcement of these decisions and (additionally) discrimination against non-EU defendants. This is no evidence of their condemnation of the originating state's exercise of ICA-Jurisdiction either.
- finally, it is not enough to look at *opinio juris* concerning other areas of prescriptive jurisdiction and assume that these statements also cover civil adjudicative jurisdiction. One must in particular steer clear of the temptation of accepting protests against other areas of prescriptive jurisdiction (e.g. the jurisdictional provisions of the U.S. Alien Torts Statute Act) as evidence of protests against exercises of ICA-Jurisdiction. They do not constitute such evidence (see in detail **Chapter 4 Section 3.2**). States may not seek to include civil adjudicative jurisdiction when making statements on prescriptive jurisdiction. The intended inclusion of civil adjudicative jurisdiction remains an untested assumption by those who claim so.

What is required therefore is the analysis of expressions of *opinio juris* pertaining specifically to ICA-Jurisdiction. This Chapter will review expressions of *opinio juris* canvassed from a wide array of source material, spanning more than two centuries, to answer the question whether the state practice analysed in **Chapter 5** amounts to more than an amalgam of facts – namely a reflection of *opinio juris*.

Section 2 reviews early examples of *opinio juris* on ICA-Jurisdiction, which come predominantly from England (and later the U.K.) and the U.S. These expressions of *opinio juris* view ICA-Jurisdiction as territorial, i.e. only binding defendants within the state's territory. Comparable statements from other states during this early period are much rarer.⁶²⁶

English case law of this period points to a constructive role of CIL when it comes to ICA-Jurisdiction. Where a court exercises ICA-Jurisdiction on a basis not recognized by the 'law of nations', it lacks jurisdiction in the international sense. The decision is a 'nullity'. Other states are therefore not obliged to recognise and enforce this decision. However, legislation of the state exercising ICA-Jurisdiction may still recognise that basis of ICA-Jurisdiction as valid and foresee enforcement of the resulting decision within that state. There is no discernible admonition, let alone negative *opinio juris*, towards the exercise of such a basis of ICA-Jurisdiction itself. The focus is on whether the defendant is bound by the decision in English recognition and enforcement proceedings. This is best illustrated in the decision of the U.K. Privy Council in *Sirdar Gurdyal Singh v. The Rajah of Faridkote* (1894) and accords well with the fact that since 1852 U.K. law itself foresaw that ICA-Jurisdiction could be established through service of process on foreign defendants outside the U.K. under certain circumstances.⁶²⁷ It is difficult to square this conduct with any *opinio juris* forbidding the exercise of ICA-Jurisdiction against a defendant outside the territory.

Early U.S. case law also held that there is no jurisdiction in the international sense if the basis of ICA-Jurisdiction is unknown to the 'law of nations'. However, at least since *D'Arcy v. Ketchum* (1850) U.S. case law contained the suggestion that an exercise of ICA-Jurisdiction not recognized by the 'law of nations' not only releases other states from their obligation to recognize and enforce the decision but that it is also a violation of the 'law of nations'. These developments culminated in the decisions of the U.S. Supreme Court in *Galpin v. Page* (1873) and *Pennoyer v. Neff* (1878), in which the U.S. Supreme Court formulated direct and enforceable jurisdictional restraints on courts based on principles of public international law. In these cases, the U.S. Supreme Court invoked rules of public international law to limit

⁶²⁶ E.g. in 1883, the Naples Court of Appeal refused recognition of a French judgment since that court's jurisdiction was based solely on Article 14 Code Civil (a French national may always sue in France). The court held that Article 14 Code Civil was contrary to the law of nations. (*Girard c. Tramontano*, Cour d'appel de Naples, 30 déc. 1883, in (1885) *Journal de Droit International* 464, 465; see Akehurst (n 42) 173 FN 10).

⁶²⁷ The Common Law Procedure Act 1852 first allowed the summoning of defendants residing out of the jurisdiction (Collins (n 283) 656; see also Dicey (n 281) 240).

domestic personal jurisdiction (and only by implication ICA-Jurisdiction since the rules do not differ). Hence, public international law was invoked by analogy, but the U.S. Supreme Court left no doubt that it referred to these rules as CIL. As long as the statements of *opinio juris* are clear, the context does not matter.⁶²⁸

Nevertheless, it is unlikely that these U.S. views represented CIL at the time. The PCIJ's decision in *Lotus* (1927) is illuminating in this regard (**Section 3**).

Post-*Lotus* the most noteworthy explicit expressions of *opinio juris* on the matter come from Australia, Germany, the Netherlands and the U.K (**Section 4**). These statements of *opinio juris* require 'a substantial and bona fide connection between the subject matter of a dispute and the source of jurisdiction',⁶²⁹ a 'sufficient connection to [the state]'⁶³⁰ and 'a sufficiently close nexus to the forum State'.⁶³¹ Most other states have not voiced their views on the matter. Conspicuously, the U.S. – once so vocal on the matter – has abandoned the diction of public international law. Especially since 1945 the U.S. Supreme Court has eschewed to mention public international law at all in the context of domestic personal or ICA-Jurisdiction.

Section 5 concludes.

2. Early Examples of *Opinio Juris*

Relevant references can already be found in English – and subsequently also U.S. – cases from the 18th and 19th century.⁶³² These proceedings were not instituted against natural or juridical persons as defendants but directed towards pieces of property (in the common law: proceedings *in rem*)⁶³³, primarily vessels and goods connected to these vessels. The resulting decisions came before the English and U.S. courts for their recognition and enforcement.⁶³⁴ The definition of ICA-Jurisdiction is limited to proceedings against natural or juridical persons (see **Chapter 1 Section 4**). Nevertheless, these early statements are relevant as their scope is not

⁶²⁸ No context requirement is found in the ILC Draft Conclusions on CIL.

⁶²⁹ *Dow Jones & Company Inc. v Gutnick*, 42 ILM 41 (2003) para 57.

⁶³⁰ Judgment of 2.7.1991 (XI ZR 206/90), BGHZ 115, 90 (ZaöRV 53 [1993], 372).

⁶³¹ Brief of the Governments of the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland as Amici Curiae in Support of Neither Party of 13 June 2012, in *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013) 12

⁶³² See cases discussed in *Rose v. Himely*, U.S. 241 (1808) 270-272.

⁶³³ *Hanson v. Denckla*, 357 U.S. 235 (1958) 246, FN 12; see also Von Mehren and Gottschalk (n 35) 22; Schröder (n 68) 362.

⁶³⁴ See e.g. *Rose v. Himely*, U.S. 241 (1808).

limited to proceedings *in rem*. The 1808 U.S. Supreme Court decision in *Rose v. Himely*⁶³⁵ is an illustrative example of the role of public international law in these early cases.

In *Rose v. Himely*, the question was whether to recognize a foreign court's decision on the condemnation of an American vessel. The U.S. Supreme Court refused recognition, holding that the foreign court lacked jurisdiction pursuant to the 'law of nations'.⁶³⁶

The tribunal of first instance at Santo Domingo (today the capital of the Dominican Republic, then under French colonial rule) had condemned the American schooner *The Sarah* although it had never been carried within the jurisdiction of the tribunal. Instead, it had been seized outside territorial waters, brought into a Cuban port and sold there under the authority of an agent of Santo Domingo.⁶³⁷

Chief Justice Marshall, delivering the majority opinion, considered:

'Of its own jurisdiction, so far as depends on municipal tiles, the court of a foreign nation must judge, and its decision must be respected. But if it exercises a **jurisdiction which, according to the law of nations, its sovereign could not confer**, however available its sentences may be within the dominions of the prince from whom the authority is derived they are not-regarded by foreign courts. This distinction is taken upon this principle, that the law of nations is the law of all tribunals, in the society of nations, and is supposed to be equally understood by all'.⁶³⁸

Pursuant to Chief Justice Marshall, it would contradict 'every idea of a proceeding *in rem*, to act against a thing which is not in the power of the sovereign under whose authority the court proceeds'.⁶³⁹ As the laws of every state and the enforcement thereof are only valid within its territory, the seizure of the vessel outside French dominion was held to be invalid and

⁶³⁵ *Rose v. Himely*, U.S. 241 (1808).

⁶³⁶ *Ibid*; see also Born and Rutledge (n 97) 82.

⁶³⁷ *Rose v. Himely*, U.S. 241 (1808) 241, 276.

⁶³⁸ *Ibid* 276 (emphasis added).

⁶³⁹ *Ibid* 277.

accordingly never within the power of the French sovereign. This in turn meant that the tribunal at Santo Domingo lacked jurisdiction and the U.S. was entitled to disregard the decision.⁶⁴⁰

Also in 1808, but in the U.K., Lord Ellenborough applied similar considerations to jurisdiction against a natural person as the defendant (in common law parlance: *in personam* jurisdiction).⁶⁴¹ In the case of *Buchanan v. Rucker* (1808)⁶⁴² a default judgment had been obtained on the Island of Tobago (today part of Trinidad and Tobago) against a defendant, who had not been present on the island. The facts of the decision have been outlined in **Chapter 1 Section 1**. Lord Ellenborough asked three rhetorical questions about the effects of the decision: ‘how could that be obligatory upon the subjects of foreign countries? Can the Island of *Tobago* pass a law to bind the rights of the whole world? Would the world submit to such an assumed jurisdiction?’⁶⁴³ However, Lord Ellenborough made no explicit reference to public international law.

The observations of Justice Johnson of the U.S. Supreme Court in his Dissent in *Mills v. Durye* (1813)⁶⁴⁴ are similar. The case concerned the question of recognition and enforcement of a sister state judgment under the ‘Full Faith and Credit Clause’ of the U.S. Constitution (proceedings in the District of Columbia for a judgment rendered in New York).⁶⁴⁵ Justice Johnson expressed the view that even under the obligation to give ‘Full Faith and Credit’, there must be the possibility to review the principles on which the judgment court founded its jurisdiction. He appealed to principles of justice that must not be violated:

‘[o]ne of those [principles] is that jurisdiction cannot be justly exercised by a state over property not within the reach of its process **or over persons not owing them**

⁶⁴⁰ Ibid 279. Subsequently, *Rose v. Himely* was expressly overruled on the point that a sovereign could not bring a vessel under its power outside its territory and thereby establish the jurisdiction of its courts. However, the role of public international law was not questioned (*Hudson v. Guestier*, 10 U.S. (6 Cranch) 281 (1810)).

⁶⁴¹ *Hanson v. Denckla*, 357 U.S. 235 (1958) 246, FN 12; See also Von Mehren and Gottschalk (n 35) 22; Schröder (n 68) 362. From the perspective of *in personam* jurisdiction the defendant may just as well be a juridical person.

⁶⁴² *Buchanan v. Rucker* [1808] 9 East. 192.

⁶⁴³ Ibid 194; Martin H Redish, ‘Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation’ (1980) 75 Nw UL Rev 1112, 1126 speaks of ‘concerns of international comity’.

⁶⁴⁴ *Mills v. Durye* 11 U.S. (7 Cranch) 481 (1813) (Dissent Justice Johnson). On the case see Patrick J Borchers, ‘The Death of the Constitutional Law of Personal Jurisdiction: From Pennoyer to Burnham and Back Again’ (1990) 24 UC Davis L Rev 19, 26; Born and Rutledge (n 97) 82.

⁶⁴⁵ U.S. Const. art IV, § 1: ‘Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof’.

allegiance or not subjected to their jurisdiction by being found within their limits’.⁶⁴⁶

However, as in *Buchanan v. Rucker*, it is unclear whether Justice Johnson considered this principle of justice to be mandated by public international law.⁶⁴⁷

After the publication of Joseph Story’s highly influential Commentaries on the Conflict of Laws in 1834 (see **Chapter 3 Section 5**), the relationship between public international law and ICA-Jurisdiction crystallized in U.S. case law. The case of *D’Arcy v. Ketchum* (1850) again concerned recognition and enforcement of a sister state’s judgment under the ‘Full Faith and Credit Clause’ (just as in *Mills v. Durye*).⁶⁴⁸ Justice Catron observed that an exception existed to the general obligation under this clause. U.S. courts had found judgments from other states void where service had not been effected within these states. Accordingly, courts had resisted the enforcement of these judgments. Justice Catron opined that such practice was in conformity with public international law.⁶⁴⁹ In particular, he observed that

‘the international law as it existed among the states in 1790 was that a judgment rendered in one state, assuming to **bind the person of a citizen of another, was void within the foreign state, when the defendant had not been served with process or voluntarily made defense, because neither the legislative jurisdiction, nor that of courts of justice, had binding force’.**⁶⁵⁰

Justice Catron did not clarify whether – under such circumstances – the exercise of jurisdiction itself was a violation of public international law. Surely, the decision contains indications that this was indeed his opinion as he referred to these exercises of jurisdiction as ‘illegitimate assumption of power’ and ‘abuse’.⁶⁵¹

⁶⁴⁶ *Mills v. Durye* 11 U.S. (7 Cranch) 481, 486 (1813) (Dissent Justice Johnson).

⁶⁴⁷ Roger H Trangsrud, ‘Federal Common Law of Personal Jurisdiction’ (1988) 57 Geo Wash L Rev 849, 858 puts forward that at the time U.S. courts and scholars considered this to be mandated by the ‘law of nations’.

⁶⁴⁸ *D’Arcy v. Ketchum*, 52 U.S. 165 (1850); see Borchers (n 644) 28; Born and Rutledge (n 97) 82; Redish (n 643) 1123.

⁶⁴⁹ *D’Arcy v. Ketchum*, 52 U.S. 165 (1850) 174.

⁶⁵⁰ Ibid 176.

⁶⁵¹ Ibid 174; see also Trangsrud (n 647) 858.

In *Schisby v. Westenholz* (1870),⁶⁵² a case before the Queen's Bench Division of the High Court of Justice in London, the facts were the following: A Danish national, resident in France, had sued before a French tribunal other Danish nationals resident in London, carrying out business there. The French tribunal had assumed jurisdiction based on Art 14 Code Civil, which had been held to apply also to foreigners resident in France, and had given judgment against the defendants for default of appearance.⁶⁵³ The question was whether to enforce the judgment in the U.K. Recounting Lord Ellenborough's statements in *Buchanan v. Rucker*, Blackburn J. delivered the opinion of the Court:

'Can the empire of France pass a law to bind the whole world? We admit, with perfect candour, that in the supposed case of a judgment, obtained in this country against a foreigner under the provisions of the common Law Procedure Act, being sued on in a court of the United States, the question for the court of the United States would be, Can the Island of Great Britain pass a law to bind the whole world? We think in each case the answer should be, No, but every country can pass laws to bind a great many persons; and therefore the further question has to be determined, whether the defendant in the particular suit was such a person as to be bound by the judgment which it is sought to enforce'.⁶⁵⁴

Blackburn J. concluded that no factors existed that could make the French judgment binding on the Danish defendants. Enforcement was therefore refused. As in *Buchanan v. Rucker*, no reference was made to public international law. The decision has been interpreted as to find no violation of CIL in the exercise of ICA-Jurisdiction by the French courts.⁶⁵⁵ This is supported by Blackburn J.'s statement that 'if the principle on which foreign judgments were enforced was that which is loosely called "comity," we could hardly decline to enforce a foreign judgment given in France against a resident in Great Britain under circumstances hardly, if at all, distinguishable from those under which we, *mutatis mutandis*, might give judgment against a resident in France', which suggests that he did not condemn Art 14 Code Civil.⁶⁵⁶ However, the decision can also be read to leave this point open.

⁶⁵² *Schisby v. Westenholz* [1870] L. R. 6 Q.B. 155.

⁶⁵³ *Ibid* 156.

⁶⁵⁴ *Ibid* 160.

⁶⁵⁵ Elliott E Cheatham, 'Sources of rules for conflict of laws' 89 *University of Pennsylvania Law Review and American Law Register* 430, 435.

⁶⁵⁶ *Schisby v. Westenholz* [1870] L. R. 6 Q.B. 155, 159.

Whereas *Mills v. Durye* and *D'Arcy v. Ketchum* were U.S. inter-state recognition and enforcement cases, *Galpin v. Page* (1873) concerned the intra-state recognition of a judgment.⁶⁵⁷ A California state court had issued a decree over the absent out-of-state infant defendant. Service of process had been made only by publication in a newspaper, which the Californian laws in principle allowed.⁶⁵⁸ Proceedings were then brought before a federal court within the same state, California, to attack the decree for lack of jurisdiction.⁶⁵⁹ Justice Field delivered the opinion of the U.S. Supreme Court. He stated that '[t]he tribunals of one state have no jurisdiction over the persons of other states unless found within their territorial limits.'⁶⁶⁰ Justice Field approvingly cited Justice (Joseph) Story's remarks in *Picquet v Swan* and the Pennsylvania Supreme Court decision in *Steel v. Smith* to underscore that this limitation derived from public international law.⁶⁶¹ *Galpin v. Page* therefore clarified that – in the view of the U.S. Supreme Court – CIL limits applied to bases of ICA-Jurisdiction at the stage of the original action.

However, under U.S. domestic law, Justice Field could not simply apply cases like *Mills v. Durye* and *D'Arcy v. Ketchum* and declare the decree void for violation of these principles. These were inter-state cases, *Galpin v. Page* an intra-state case.⁶⁶² Justice Field instead required that state rules of jurisdiction which were not in line with the principles of international law and the common law, as the ones of California in the case, had to be pursued strictly.⁶⁶³ He held that these rules had not been strictly applied and that accordingly, the decree could not be recognised.⁶⁶⁴

In 1878, ten years after the U.S. states had ratified the Fourteenth Amendment containing the 'Due Process' Clause,⁶⁶⁵ according to which no state shall 'deprive any person of life, liberty, or property, without due process of law',⁶⁶⁶ the U.S. Supreme Court delivered its

⁶⁵⁷ Borchers (n 644) 31.

⁶⁵⁸ *Galpin v. Page*, 85 U.S. 350 (1873) 353 et seq.

⁶⁵⁹ Ibid 355, 356; Borchers (n 644) 31.

⁶⁶⁰ *Galpin v. Page*, 85 U.S. 350 (1873) 367.

⁶⁶¹ Ibid 367 et seq.

⁶⁶² Borchers (n 644) 31.

⁶⁶³ *Galpin v. Page*, 85 U.S. 350 (1873) 372.

⁶⁶⁴ Ibid 373.

⁶⁶⁵ Borchers (n 644) 37, FN 117.

⁶⁶⁶ U.S. Const. amend. XIV, § 1.

landmark decision in *Pennoyer v. Neff*, Justice Field again writing the opinion.⁶⁶⁷ Like *Galpin v. Page*, *Pennoyer v. Neff* was an intra-state case.⁶⁶⁸

Pennoyer v. Neff concerned the prior proceeding *Mitchell v. Neff* that concluded in 1866.⁶⁶⁹ In *Mitchell v. Neff*, an Oregon court rendered a default judgment against the absent defendant, Mr Neff, for the recovery of attorney fees.⁶⁷⁰ However, neither when the proceeding commenced nor when the judgment was rendered, was Mr. Neff a resident of the state of Oregon.⁶⁷¹ Based on the judgment, Mr Neff's tract of land, which was located in Oregon, was subsequently sold and transferred to Mr Mitchell in enforcement proceedings and three days later assigned by him to Mr. Pennoyer, a *bona fide* buyer.⁶⁷² It was Mr Neff's claim for recovery of the property against Mr. Pennoyer that reached the U.S. Supreme Court.⁶⁷³ The question was whether the Oregon court had overstepped its jurisdiction by rendering the judgment against Mr Neff in the first place. Just as in *Galpin v. Page*, Justice Field relied on public international law⁶⁷⁴ to address the jurisdictional boundaries of the U.S. states. He held that 'every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory', 'no State can exercise direct jurisdiction and authority over persons or property without its territory' and 'no tribunal established by it [the law] can extend its process beyond that territory so as to subject either persons or property to its decisions'.⁶⁷⁵ Field explicitly relied on Story's treatise on Conflict of Laws and Wheaton's treatise on international law.⁶⁷⁶

Mr. Neff's property in the state of Oregon had not been attached in the suit.⁶⁷⁷ Pursuant to the U.S. Supreme Court, only such attachment would have made possible *in rem* jurisdiction.⁶⁷⁸ Since Mr Neff was neither served in Oregon nor appeared before the court, *in personam*

⁶⁶⁷ *Pennoyer v. Neff*, 95 U.S. 714 (1878) (expressly overruled in part in *Shaffer v. Heitner*, 433 U.S. 186 (1977) 206); see Hazard Jr (n 307) 246.

⁶⁶⁸ Borchers (n 644) 37.

⁶⁶⁹ For an illuminating account of the case see Wendy Perdue, 'Sin, Scandal, and Substantive Due Process: Personal Jurisdiction and Pennoyer Reconsidered' (1987) 62 Wash L Rev 479; see also Parrish, 'Sovereignty, Not Due Process: Personal Jurisdiction over Nonresident Alien Defendants' (n 301) 10.

⁶⁷⁰ *Pennoyer v. Neff*, 95 U.S. 714 (1878) 720.

⁶⁷¹ *Ibid* 719.

⁶⁷² Perdue, 'Sin, Scandal, and Substantive Due Process: Personal Jurisdiction and Pennoyer Reconsidered' (n 669) 486.

⁶⁷³ *Pennoyer v. Neff*, 95 U.S. 714 (1878).

⁶⁷⁴ This is despite the fact that the U.S. Supreme Court referred to 'public law', not public international law, see e.g. Born and Rutledge (n 97) 95; Born (n 33) 2; Akehurst (n 42) 172; Perdue, 'Sin, Scandal, and Substantive Due Process: Personal Jurisdiction and Pennoyer Reconsidered' (n 669) 506; Redish (n 643) 1116.

⁶⁷⁵ *Pennoyer v. Neff*, 95 U.S. 714 (1878) 722.

⁶⁷⁶ *Ibid*; for Story's influence on Justice Field see Hazard Jr (n 307) 262.

⁶⁷⁷ *Ibid* 720

⁶⁷⁸ *Ibid* 728; Borchers (n 644) 35.

jurisdiction did not exist either.⁶⁷⁹ The U.S. Supreme Court found that the judgment in *Mitchell v. Pennoyer* was invalid and that enforcement could be resisted.⁶⁸⁰

Pennoyer v. Neff has been widely interpreted, including by the U.S. Supreme Court itself, as expounding direct and enforceable jurisdictional restraints on courts based on principles of international law, meaning that the judgments in violation of these principles were invalid even in the state of origin.⁶⁸¹ Justice Field understood that the previous case law did not directly support this position. Courts had merely refused recognition and enforcement of such judgments in other states, i.e. in inter-state cases (e.g. *D'Arcy v. Ketchum*). Within the same state, courts were only required to abide strictly by their own rules (*Galpin v. Page*, which Justice Field conspicuously did not cite in *Pennoyer v. Neff*). Nevertheless, Justice Field concluded that a federal court situated within the state of the judgment's origin may refuse recognition and enforcement just as a court in the inter-state context would.⁶⁸²

The above account is reasonable based on the text of the decision. However, the deviation from *Galpin v. Page*, which Justice Field had decided just a few years prior, but under a different rationale, is startling (and perhaps this was the reason why Justice Field did not refer to *Galpin v. Page* even once in *Pennoyer v. Neff*).⁶⁸³ A different interpretation of *Pennoyer v. Neff* therefore attempts to reconcile the decisions.⁶⁸⁴ According to this view, Justice Field interpreted the jurisdiction rules of the state of Oregon to reflect the territorial restrictions of international law and merely sought to enforce these state rules. As in *Galpin v. Page*, Justice Field would have required merely that state courts abide by their own rules and did not impose independent rules. Decisions immediately subsequent to *Pennoyer v. Neff* bolster this view.⁶⁸⁵ However, eventually the U.S. Supreme Court endorsed the broader interpretation of

⁶⁷⁹ *Pennoyer v. Neff*, 95 U.S. 714 (1878) 733, 734.

⁶⁸⁰ *Ibid*.

⁶⁸¹ Perdue, 'Sin, Scandal, and Substantive Due Process: Personal Jurisdiction and Pennoyer Reconsidered' (n 669) 500; Borchers (n 644) 38 et seqq.

⁶⁸² *Pennoyer v. Neff*, 95 U.S. 714 (1878) 733, 734; It is unclear whether the 'Due Process Clause' of the Fourteenth Amendment formed an integral part of Justice Field's reasoning (Borchers (n 644) 38). If this was his intention, there may be a timing issue. The Fourteenth Amendment had not existed at the time of the underlying proceedings *Mitchell v. Neff* (*ibid* 37; Perdue, 'Sin, Scandal, and Substantive Due Process: Personal Jurisdiction and Pennoyer Reconsidered' (n 669) FN 142), which suggests that Justice Field intended the reference as mere dictum for future challenges within the original state proceedings (Borchers (n 644) 37; Trangsrud (n 647) 875). Yet, Justice Field may also have been 'lulled by the fact that the collateral proceeding [the proceeding that reached the U.S. Supreme Court] was not initiated until 1874, six years after ratification, and simply overlooked the timing problem' (Borchers (n 644) 38). Finally, Justice Field may have thought of the clause as not prescribing the requirements of jurisdiction, but as a mere enforcement mechanism (*ibid*).

⁶⁸³ Borchers (n 644).

⁶⁸⁴ *Ibid* 40.

⁶⁸⁵ *Ibid* 43, 47.

Pennoyer,⁶⁸⁶ which is also more in line with the text of Field's opinion. Regardless of the interpretation, *Pennoyer*, just as *Galpin v. Page*, upholds CIL limits applicable to bases of ICA-Jurisdiction at the stage of the original action.

In 1894, the U.K. Privy Council confirmed what was merely hinted at (if at all) in *Buchanan v. Rucker* and *Schisby v. Westenholz*, namely the relevance of public international law for ICA-Jurisdiction. In *Sirdar Gurdyal Singh v. The Rajah of Faridkote* (1894)⁶⁸⁷ the facts were the following: The Rajah of Faridkote, India, had obtained two judgments against the Appellant (in the proceedings before U.K. Privy Council) from a court in Faridkote. The Appellant had been in the service of the Rajah. When he had left the Rajah's service, he had ceased to reside within the state's jurisdiction and had then been resident in the state of Jhind, of which he was a national and where he had his domicile, and had never returned to Faridkote. He had eventually been served in Jhind with process of the Faridkote court. The U.K. Privy Council had to assess whether the Faridkote court had jurisdiction over the Appellant. Relying on Phillimore and Story, the U.K. Privy Council held (which merits quoting in full) that

'[...] there was, in their Lordships' opinion nothing to take this case out of the general rule, that the Plaintiff must sue in the Court to which the Defendant is subject at the time of the suit ("*Actor sequitur forum rei*")'; which is rightly stated by Sir Robert Phillimore (*International Law*, Vol. 4, sec 891) to "lie at the root of all international, and of most domestic, jurisprudence on this matter." All jurisdiction is properly territorial, and "*extra territorium jus dicenti, impune non paretur*." Territorial jurisdiction attaches (with special exceptions) upon all persons either permanently or temporarily resident within the territory, while they are within it; but it does not follow them after they have withdrawn from it, and when they are living in another independent country. It exists always as to land within the territory, and may be exercised over movables within the territory; and in questions of *status* or succession governed by domicile, it may exist as to persons domiciled, or who when living were domiciled, within the territory. As between different provinces under one sovereignty (e.g., under the Roman Empire) the legislation of the

⁶⁸⁶ Ibid 38.

⁶⁸⁷ *Sirdar Gurdyal Singh v The Rajah of Faridkote* (Punjab) [1894] UKPC 44, 46 (28 July 1894); affirmed also in the frequently cited case *Emanuel v. Symon*, [1908] 1 K.B. 302 (C.A.); see also *Morguard Investments Ltd. v. De Savoye* [1990] 3 S.C.R. 1077, where the Supreme Court of Canada discusses the role of these cases for the development of the common law in this area.

sovereign may distribute and regulate jurisdiction; but no territorial legislation can give jurisdiction, which any foreign court ought to recognize, against foreigners, who owe no allegiance or obedience to the Power which so legislates. In a personal action, to which none of these causes of jurisdiction apply, a decree pronounced *in absentem* by a foreign court, to the jurisdiction of which the Defendant has not in any way submitted himself, **is by international law an absolute nullity**. He is under no obligation of any kind, to obey it; and it must be regarded as a mere nullity, by the courts of every nation, except (when authorized by special local legislation) in the country of the *forum* by which it was pronounced'.⁶⁸⁸

There is a subtle, but important difference to *Galpin v. Page* and *Pennoyer*. It does not follow from the text of the decision that the U.K. Privy Council considered the exercise of jurisdiction itself a violation of public international law.⁶⁸⁹ The converse is more likely since – already at the time – U.K. law had rules on service out of the jurisdiction, thus U.K. courts could serve process on foreign defendants outside the U.K. and thereby establish ICA-Jurisdiction.⁶⁹⁰ *Sirdar Gurdyal Singh v. The Rajah of Faridkote* merely lays down the rule that public international law does not require another state to recognise and enforce a decision under such circumstances. Yet, other English judges during the 19th century were indeed concerned that service out of the jurisdiction might breach 'international comity' or the 'comity of nations' and thus argued in favour of jurisdictional restraint.⁶⁹¹ Whether by 'comity' they meant rules of public international law remains unclear.⁶⁹²

Besides judicial decisions, expressions of *opinio juris* of that time can be found in diplomatic exchanges and correspondence between U.S. officials, which addressed territorial

⁶⁸⁸ *Sirdar Gurdyal Singh v The Rajah of Faridkote* (Punjab) [1894] UKPC 44 (28 July 1894) (emphasis added).

⁶⁸⁹ Similarly sceptical of the meaning of the early British (but also U.S. cases) Akehurst (n 42) 175 FN 2; for the view that early British decisions did accept public international law limits to bases of ICA-Jurisdiction see Born (n 33) 17 FN 79 and Mann, 'The Doctrine of Jurisdiction in International Law' (n 19) 74.

⁶⁹⁰ The Common Law Procedure Act 1852 first allowed the summoning of defendants residing out of the jurisdiction (Collins (n 283) 656; see also Dicey (n 281) 240); see also Blackburn J.'s statement that 'if the principle on which foreign judgments were enforced was that which is loosely called "comity," we could hardly decline to enforce a foreign judgment given in France against a resident in Great Britain under circumstances hardly, if at all, distinguishable from those under which we, mutatis mutandis, might give judgment against a resident in France' (*Schisby v. Westenholz* [1870] L. R. 6 Q.B. 155, 159).

⁶⁹¹ See cases cited in Collins (n 283) 658 and Mann, 'The Doctrine of Jurisdiction in International Law' (n 19) 79.

⁶⁹² See also Akehurst (n 42) 175 FN 2. Akehurst mentions a British protest against an exercise of ICA-Jurisdiction by a Portuguese court in a case of 1879 against British subjects concerning a collision off the Portuguese coast, but he points out that the protest really regarded the implication that the Portuguese territorial sea extended 10 miles from its coast and that it was dropped as soon as it became apparent that the Portuguese court had a separate basis for assuming jurisdiction unrelated to question of territory (ibid 176).

restrictions on jurisdiction (including ICA-Jurisdiction). In *Lund v. Ogden*, the U.S. Secretary of War was advised on an intervention.⁶⁹³ During the war between the U.S. and Mexico (1846-1848), Major Ogden of the U.S. had allegedly disturbed Mr Lund in operating a ferry across the Rio Grande, for which Mr Lund claimed damages before a Texas court. At the time of the lawsuit, Major Ogden did not reside in Texas, nor had he ever before. He was served not personally, but by publication in a local newspaper. None of his property was seized in Texas. He did not make an appearance or file a writ. Nevertheless, the Texas court rendered judgment against him in default.⁶⁹⁴ In a letter to the U.S. Secretary of War, Attorney General Cushing expressed the view that

‘[a]ll proceedings of this kind, by which one State undertakes to exercise constructive jurisdiction over the absent citizen of another state, are acts in violation of international comity, and a usurpation of general sovereignty, in derogation of the rights of co-equal States and of their residents or subjects [...]’.⁶⁹⁵

The Attorney General indicated that he understood this to be a case in which the Secretary of War sought to intervene.⁶⁹⁶

In 1884, U.S. Secretary of State Frelinghuysen relied on principles of international law in an exchange with Mr. Morgan, U.S. ambassador in Mexico.⁶⁹⁷ A Mexican gunboat had attacked the U.S. Schooner *Daylight*.⁶⁹⁸ The Mexican government insisted that the dispute should be tried before Mexican courts.⁶⁹⁹ Relying on the work of U.S. and English scholars, Secretary of State Frelinghuysen wrote that

⁶⁹³ C.C. Andrews (ed) *Official Opinions of the Attorneys General of the United States*, vol VI (Farnham, Robert 1856) 75; Born (n 33) FN 80 and Born and Rutledge (n 97) 84, FN 48 mention one further advice on an U.S. intervention. However, the instance mentioned does not concern exorbitant grounds of ICA-Jurisdiction. Instead, the U.S. protest against British practice regarding U.S. sailors concerned consular jurisdiction. The U.S. disagreed with the practice of British courts to assume jurisdiction in civil disputes between sailors on board of U.S. vessels on the high seas because the U.S. and other states provided for consular jurisdiction in such instances. The U.S. argued that such disputes had to be resolved by the respective consuls (Letters between Secretary of State Fish and General Schenck dated Nov. 8, 1873 and 12 March 1875 and 19 April 1875, reprinted in *Foreign Relations to the United States* (1874) 490 and *ibid* (1875) 592, 633).

⁶⁹⁴ Andrews (n 693) 75.

⁶⁹⁵ *Ibid* 76.

⁶⁹⁶ *Ibid* 78.

⁶⁹⁷ Secretary of State Frelinghuysen to Mr. Morgan, dated 17 May 1884, reprinted in *Foreign Relations of the United States* (1884) 358.

⁶⁹⁸ *Ibid*.

⁶⁹⁹ *Ibid*.

‘[...] no sovereignty can extend its process beyond its own territorial limits so as to subject either persons or property to its judicial decisions, and every exertion of authority of its sort beyond its limits is a mere nullity and incapable of binding such persons or property in any other tribunals’.⁷⁰⁰

Frelinghuysen added that he was ‘not aware that it [this doctrine] has ever been questioned’.⁷⁰¹ However, he was convinced that the doctrine was not applicable to the case and that it would be a ‘practical denial of justice’ if the owners of the U.S. schooner had to sue in Mexico.⁷⁰²

3. The U.S. View Refuted? The *Lotus* Case

There are two possible explanations for the scarcity of non-U.S. expressions of *opinio juris*. Either such statements exist, but are not well reported, or other states just did not express *opinio juris* on this matter. The latter view is corroborated by the judgment in the *Lotus Case*, which, while not being a statement of *opinio juris* itself, is the most authoritative account of *opinio juris* of that period.

The majority of Judges deciding *Lotus*, eminent jurists from Brazil,⁷⁰³ Cuba,⁷⁰⁴ Italy⁷⁰⁵, Japan,⁷⁰⁶ Switzerland,⁷⁰⁷ and Turkey⁷⁰⁸ all ruled in favour of discretion in the law of jurisdiction, which to them ‘explain[ed] the great variety of rules’, and found a lack of ‘objections or complaints on the part of other States’.⁷⁰⁹ The Judges highlighted rules on criminal law jurisdiction as a special and potentially separate case, which shows that these general comments pertain in particular to civil law, including ICA-Jurisdiction (‘jurisdiction of their courts to persons’⁷¹⁰). The relevant passages discussed in **Chapter 3** do not rule out CIL limits to bases of ICA-Jurisdiction, but the majority does make a twofold statement. First, the

⁷⁰⁰ Ibid 359.

⁷⁰¹ Ibid.

⁷⁰² Ibid 360.

⁷⁰³ Eptácio Lindolfo da Silva Pessoa.

⁷⁰⁴ Antonio Sánchez de Bustamante y Sirven.

⁷⁰⁵ Dionisio Anzilotti.

⁷⁰⁶ Yorozu Oda.

⁷⁰⁷ Max Huber.

⁷⁰⁸ Mr Feizi-Daïm Bey.

⁷⁰⁹ *Lotus* (n 16) 19.

⁷¹⁰ Ibid.

Judges considered that most rules of ICA-Jurisdiction at that time were in line with CIL. Second, they did not accept the narrow U.S. position on CIL.

Unsurprisingly, the U.S. Judge John Basset Moore defended the territorial U.S. view on CIL limits, which he had already relied upon in a different capacity in the *Cutting Case* (see **Chapter 3 Section 5**). However, he still agreed with the majority's eventual conclusion since he equated the Turkish vessel *Boz Kourt*, where the damage occurred, with Turkish territory.⁷¹¹ Of the dissenting Judges, in particular the Judges from Denmark⁷¹², France⁷¹³ and the Netherlands⁷¹⁴ appealed to similar territorial principles.⁷¹⁵

Overall, *Lotus* illustrates well that the U.S. perspective on CIL limits to grounds of ICA-Jurisdiction was far from being universally accepted. Indeed, in light of contrary state practice at the time,⁷¹⁶ the more plausible conclusion is that such limits were not accepted with the degree of uniformity required for establishing CIL.

4. Expressions of *Opinio Juris* between 1927 and the Present

The time period following 1927 depicts a less concentrated picture. Several states have expressed *opinio juris* on the issue, which will be discussed in turn.

a) Australia

*Dow Jones & Company Inc. v Gutnick*⁷¹⁷ was a defamation case decided by the Australian High Court in 2002. The plaintiff, Australian resident Mr. Gutnick, argued that an article which had been published in the online magazine *Barron's Online* in 2000 had defamed him.⁷¹⁸ The defendant applied for an order that service of the writ and statement of claim be set aside, alternatively an order that further proceedings in the matter be permanently stayed because

⁷¹¹ See Chapter 3 Section 6.

⁷¹² Didrik Nyholm.

⁷¹³ André Weiss.

⁷¹⁴ Bernard Cornelis Johannes Loder.

⁷¹⁵ See Chapter 3 Section 6.

⁷¹⁶ E.g. for the U.K. see Dicey (n 281) 240, albeit that the doctrine of *forum non conveniens* provided for moderation; for France see Art 14 Code Civil; for the Austrian Empire, see § 45 Gesetz über den Wirkungskreis und die Zuständigkeit in bürgerlichen Rechtssachen, RGBI 1850/237, available at <<https://alex.onb.ac.at/cgi-content/alex?aid=rgb&datum=1850&page=1074&size=45>>, accessed on 31 January 2025.

⁷¹⁷ *Dow Jones & Company Inc. v Gutnick*, 42 ILM 41 (2003).

⁷¹⁸ Ibid para 42.

Australia was not the appropriate forum.⁷¹⁹ The matter ultimately reached the High Court of Australia, which held that there was ‘no reason to conclude that the primary judge erred in the exercise of his discretion to refuse to stay the proceeding’⁷²⁰ and accordingly – unanimously – dismissed the appeal.⁷²¹

In this case, Kirby J remarked

‘It might be complained that “long-arm” rules such as that in r 7.01(1)(j), providing jurisdiction based upon the mere happening of damage within a jurisdiction, conflicts with the **ordinary principle of public international law obliging a substantial and bona fide connection between the subject matter of a dispute and the source of jurisdiction of a national court over its resolution**. The validity of the relevant rule has not been challenged in the present proceedings. The rule in question in this case has overseas equivalents. The law in the United States itself contains many provisions for long-arm jurisdiction’.⁷²²

Kirby J made comparable remarks in *Blunden v Commonwealth of Australia* (2003).⁷²³

b) Austria

In 1994, the Austrian Supreme Court held that particularly relevant links between the subject matter or the parties to a lawsuit and Austria are required for domestic jurisdiction and this is so not only for cost and administrative reasons, but for safeguarding the acceptance of foreign states with regard to their affected nationals and in order to avoid possible retorsions that would affect Austrian nationals.⁷²⁴ This was, however, at a time when the ‘Indikationentheorie’ was still applied, according to which bases of domestic jurisdiction do not automatically grant ICA-Jurisdiction. Since 1998 this is no longer the case.⁷²⁵ In 1999, the Austrian Supreme Court considered there to be no rule of CIL requiring that a state may only exercise adjudicative jurisdiction if it has a sufficient link to said state. There may be a rule

⁷¹⁹ Ibid.

⁷²⁰ Ibid para 50.

⁷²¹ Ibid para 51.

⁷²² Ibid para 57.

⁷²³ *Blunden v Commonwealth of Australia* [2003] HCA 73.

⁷²⁴ OGH 6 Ob 557/94.

⁷²⁵ See Section 27a (1) Austrian Jurisdiktionsnorm. However, Section 27a (2) Austrian Jurisdiktionsnorm contains an exception for the requirements of public international law.

according to which a case must not lack any link to the adjudicating state. Still, the Court found that the case at hand exhibited relevant links to Austria since the plaintiff had its seat in Austria and the defendant had a representative office there. This pronouncement was made in defence of asset-based jurisdiction pursuant to Section 99 Austrian Jurisdiktionsnorm, which the defendant had challenged as exorbitant.⁷²⁶

In *Altmann v Austria*, the District Court for the Central District of California⁷²⁷ and the Ninth Circuit Court of Appeals⁷²⁸ ruled that U.S. courts had personal jurisdiction over the defendant, the Republic of Austria. Reinisch records that the *Altmann Case* led to protests by Austria.⁷²⁹ However, it is not clear whether the protest targeted the expansive exercise of ‘doing business’ jurisdiction or the dismissal of Austria’s sovereign immunity objection.⁷³⁰ In any case, Austria – as the defendant – had a manifest interest in not being subjected to the U.S. courts’ jurisdiction and any protest must be considered in this light.⁷³¹ Ultimately, the dispute was resolved through arbitration.⁷³²

c) Belgium

In *Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (Belgium v Switzerland)* the Kingdom of Belgium requested the ICJ to find that the Swiss Confederation had violated the Lugano Convention and general public international law since its courts had refused to recognise a future judgment of a Belgian court and stay the Swiss proceedings on the subject of the same dispute accordingly.⁷³³ This was the first time that the ICJ was requested to decide whether the exercise of ICA-Jurisdiction violated public international law.⁷³⁴ In its application for instituting proceedings the Kingdom of Belgium referred to ‘rules of general

⁷²⁶ OGH 8 Ob 105/99w.

⁷²⁷ *Altmann v. Republic of Austria*, 142 F. Supp. 2d 1187 (US District Court for the Central District of California 2001).

⁷²⁸ *Altmann v. Republic of Austria*, 317 F.3d 954 (9th Cir. 2002).

⁷²⁹ Reinisch, ‘Jurisdiction: Grenzen der Staatsgewalt und Verfahrensgerechtigkeit bei internationalen Prozessen’ (n 97) 113.

⁷³⁰ The U.S. Supreme Court was not concerned with the question of personal jurisdiction, but with the question whether Austria’s sovereign immunity objection barred the action, which it held that it did not (*Republic of Austria v. Altman*, 541 U.S. 677 (2004)).

⁷³¹ See also Akehurst (n 42) 176, who argues that certain protests against exorbitant exercise of ICA-Jurisdiction were really protests against other aspects of the courts’ reasoning.

⁷³² Reinisch, ‘Jurisdiction: Grenzen der Staatsgewalt und Verfahrensgerechtigkeit bei internationalen Prozessen’ (n 97) 113.

⁷³³ *Enforcement of Judgments in Civil and Commercial Matters (Belgium v Switzerland)* (Application Instituting Proceedings) General List No 145 [2010] ICJ 1, 3.

⁷³⁴ Roorda and Ryngaert (n 97) 82 FN 35; see also French and Ruiz Abou-Nigm (n 97) 75, 100.

international law governing the exercise by States of their authority, in particular in judicial matters, according to which State authority of any kind must be exercised reasonably'.⁷³⁵ This may reflect *opinio juris* for a rule of reasonableness in judicial matters including civil cases. However, the fact that the statement was little more than a side-note to Belgium's main argument militates against according to much weight to it. Eventually, the case was discontinued.

d) Germany

The facts of BGHZ 115, 90 (1991)⁷³⁶ were the following: A shareholder of a Cypriot company brought an action against a Turkish bank with a branch office and assets in Germany. The proceedings concerned the liability of the defendant in connection with a failed construction project in Libya. ICA-Jurisdiction was argued on the basis of Section 23 dZPO, which establishes ICA-Jurisdiction at the place of the defendant's assets.

The German Supreme Court ('**BGH**') concluded that not only the *telos* of Section 23 dZPO, but also public international law required interpreting Section 23 dZPO restrictively.⁷³⁷ Only cases with a sufficient connection to Germany – a notion that goes beyond the mere existence of assets – could come under Section 23 dZPO.⁷³⁸ The BGH reasoned that by assuming jurisdiction in Germany a foreign defendant is deprived of his home state's jurisdiction, has to defend the case before a court that may apply unfamiliar laws and unfamiliar customs in an unfamiliar language and has to engage unfamiliar lawyers. Pursuant to the BGH, this consideration mandated limiting asset-based ICA-Jurisdiction – a basis of jurisdiction, which had been outlawed or restricted already through several treaties (to which Turkey was not a

⁷³⁵ Enforcement of Judgments in Civil and Commercial Matters, General List No 145 [2010] ICJ 1, 13.

⁷³⁶ Judgment of 2.7.1991 (XI ZR 206/90), BGHZ 115, 90 (ZaöRV 53 [1993], 372).

⁷³⁷ Bertele and other authors consider the BGH's comments on this point obscure (Bertele (n 21) 232). While, admittedly, the decision is not a beacon of clarity, the BGH unmistakably states 'Nur eine auf den hinreichenden Inlandsbezug abstellende Auslegung des § 23 ZPO begrenzt in sachbezogener und völkerrechtskonformer Weise die mit dem Vermögensgerichtsstand verbundene Beeinträchtigung der Verteidigungsmöglichkeiten des ausländischen Beklagten, [...]'. For a comity interpretation of the decision see Peter Schlosser, *Jurisdiction and international judicial and administrative co-operation* (Martinus Nijhoff 2000) 55; see Bertele (n 21) 230 FN 43 on the subsequent decision by the OLG München (IPrax 1993, 237) which posits the requirement of a genuine link under public international law; for German decisions from the 1950s and 1960s, which are partly ambiguous and partly dismissive of the role of CIL, see Deutsche Rechtsprechung in völkerrechtlichen Fragen 1958-1965. Teil A: Allgemeines Friedensvölkerrecht, ZaöRV 28 (1968) 96.

⁷³⁸ BGHZ 115, 90.

party).⁷³⁹ The BGH left open whether a domicile of the plaintiff in Germany would have sufficed, as such domicile could not be proved.⁷⁴⁰

In 1993, the Federal German Government also responded to criticism of Section 23 dZPO. It first pointed out that Germany was not the only state which provided for asset-based ICA-Jurisdiction. Furthermore, the provision did not affect foreigners any more than nationals in so far as every plaintiff could rely on Section 23 dZPO irrespective of nationality. The provision was not only directed against foreign defendants, but also against Germans living abroad. The Federal German Government thus saw no reason to abandon the provision.⁷⁴¹

In *Kiobel v. Royal Dutch Petroleum Co.* (2013)⁷⁴², discussed in **Chapter 4 Section 3.2**, Germany participated as *amicus curiae*. While Germany's *amicus curiae* brief⁷⁴³ stressed that the question is one of subject matter jurisdiction, which relates to CIL limits to prescriptive jurisdiction (see **Chapter 4 Section 3.2**), the introductory comments seem to address CIL limits to ICA-Jurisdiction as well. The *amicus curiae* brief thus states:

‘The Federal Republic of Germany has consistently **maintained its opposition to overly broad assertions of extraterritorial civil jurisdiction arising out of aliens’ claims against foreign defendants for alleged foreign activities that caused injury on foreign soil**. This position is not one that has been lightly adopted by The Federal Republic of Germany. The Federal Republic of Germany believes that overbroad exercises of jurisdiction are **contrary to international law** and create a substantial risk of jurisdictional conflicts with other countries.

The Federal Republic of Germany is concerned that the failure by some United States courts to take into account limitations on the exercise of their jurisdiction when construing the Alien Tort Statute, 28 U.S.C. § 1350 (“ATS”), has resulted in the assertion of subject

⁷³⁹ Ibid.

⁷⁴⁰ Ibid.

⁷⁴¹ ZaöRV 53 (1993) 981.

⁷⁴² *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013).

⁷⁴³ Brief of the Federal Republic of Germany as Amicus Curiae in Support of Respondents of 2 February 2012, in *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013); in opposition to this view see Supplemental brief amicus curiae of members of parliament Volker Beck and Christoph Strässer of 11 June 2012, in *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013); see also the answers of the Federal German Government in the Bundestag to the questions of members of parliament Volker Beck, Marieluise Beck, Agnes Brugger and others as well as the ‘Fraktion BÜNDNIS 90/DIE GRÜNEN’, available at <<https://dserver.bundestag.de/btd/17/098/1709867.pdf>>, accessed on 31 January 2025.

matter jurisdiction over suits by foreign plaintiffs against foreign corporate defendants for conduct that took place entirely within the territory of a foreign sovereign and **lack sufficient nexus** to the United States. Such assertions of jurisdiction are likely to interfere with foreign sovereign interests in governing their own territories and subjects and in applying their own laws in cases which have a closer nexus to those countries'.⁷⁴⁴

e) Italy

In *Ferrini v Germany* (2004), a civil case, the Italian Supreme Court – after it had dismissed Germany's claim to state immunity – upheld the jurisdiction of the Italian courts on the basis that (i) the pertinent facts had partly taken place in Italy and that (ii) Italy had universal jurisdiction under public international law in an action concerning international crimes.⁷⁴⁵

f) Japan

The lawyers of the Tokyo office of the law firm Sonderhoff & Einsel kindly provided Japanese court cases, relevant legal treatises and articles and discussion materials at the governmental review committee for international jurisdiction, but none of these documents contains any discussion, let alone *opinio juris*, on the matter.

g) Netherlands and the U.K.

In *Societe Eram Shipping Company Limited v. Hong Kong and Shanghai Banking Corporation Limited* (2003), Lord Millet opined – quite out of touch with the practice of the time – that '[t]he near universal rule of international law' to be 'that sovereignty, both legislative and adjudicative, is territorial, that is to say it may be exercised only in relation to persons and things within the territory of the state concerned or in respect of its own nationals'.⁷⁴⁶

In *Jones v Saudi Arabia* (2006), the U.K. House of Lords dismissed the proposition that an obligation to exercise universal civil jurisdiction 'over claims arising from alleged breaches of

⁷⁴⁴ Brief amicus curiae of the Federal Republic of Germany 1.

⁷⁴⁵ Corte di Cassazione, Sezioni unite, sentenza del 11/03/2004, Luigi Ferrini / Repubblica federale di Germania; see, however, Lord Goff in *Jones v. Ministry of Interior for the Kingdom of Saudi Arabia & Ors* [2006] UKHL 26 (14 June 2006) para 22: 'The *Ferrini* decision cannot in my opinion be treated as an accurate statement of international law as generally understood; and one swallow does not make a rule of international law'.

⁷⁴⁶ Lord Millet in *Societe Eram Shipping Company Limited v Hong Kong and Shanghai Banking Corporation Limited* [2003] 3 All ER 465, 492, para 80.

peremptory norms of international law’ arose either from the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment or from CIL.⁷⁴⁷ The case left open whether CIL allowed universal civil jurisdiction.

The second *amicus curiae* brief submitted jointly by the Netherlands and the U.K. in *Kiobel v. Royal Dutch Petroleum Co.* (2013)⁷⁴⁸ mentions CIL limits on bases of ICA-Jurisdiction. It states in general terms that ‘the basis for jurisdiction is always grounded in a sufficiently close nexus to the forum State’, the only exception being universal criminal jurisdiction.⁷⁴⁹ It addresses ICA-Jurisdiction head-on when discussing the Due Process clause of the 14th Amendment to the U.S. Constitution, noting that the U.S. Supreme Court’s decisions ‘are entirely consistent with international law; and thus, there is no basis for a nation to exercise general jurisdiction over a foreign corporation for activities having no close connection with the forum without its consent’.⁷⁵⁰

h) People’s Republic of China⁷⁵¹

In a thoughtful and elaborate analysis that distinguishes between the areas of private law and public law, Xiao Song concludes that CIL does not restrict the bases of ICA-Jurisdiction.⁷⁵² Conversely, Tao Du holds that CIL requires a reasonably close connection between the state exercising ICA-Jurisdiction and the issue in dispute.⁷⁵³ He notes that on the surface exorbitant rules of ICA-Jurisdiction do not violate CIL, although the resulting judgments may not be recognized and enforced elsewhere.⁷⁵⁴ Holding a more restrictive view, Han Wang notes that the criteria for ICA-Jurisdiction must conform with the rules of public international law⁷⁵⁵ and

⁷⁴⁷ Lord Goff in *Jones v. Ministry of Interior for the Kingdom of Saudi Arabia & Ors* [2006] UKHL 26 (14 June 2006) paras 25 and 27.

⁷⁴⁸ *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013).

⁷⁴⁹ Brief of the Governments of the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland as Amici Curiae in Support of Neither Party of 13 June 2012, in *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013) 12.

⁷⁵⁰ Ibid 17.

⁷⁵¹ The cited journal articles in the Chinese language were kindly provided by DaHui Lawyers in Beijing.

⁷⁵² Xiao Song, ‘The System and Structure of Extraterritorial Jurisdiction: the Boundary Between Legislative and Judicial Jurisdiction (域外管辖的体系构造 - 立法管辖与司法管辖之界分)’ (2021) 43 Chinese Journal of Law 171, 185.

⁷⁵³ Tao Du, ‘Exorbitant Jurisdiction in International Civil Procedure (论国际民事诉讼中的过度管辖权)’ (2017) 1 Wuhan University International Law Review 18, 19.

⁷⁵⁴ Ibid 21.

⁷⁵⁵ Han Wang, ‘Determination of Jurisdiction of International Civil Proceedings and How to Resolve Conflicts (国际民事诉讼管辖权的确定及其冲突解决析论)’ (2014) 35 Law Journal 4.

that excessive bases of jurisdiction will lead to jurisdictional disputes between states as they infringe on other states' sovereignty.⁷⁵⁶ Xianbo Li holds that states must comply with basic rules of CIL without elaborating further on the content of these rules.⁷⁵⁷

The authors do not refer to any Chinese *opinio juris* on the matter.

i) South Africa

Cassim and Kelbrick write:

'South African interpretations of the principles of public international law are conservative, and it is accepted that the State can only enforce its authority within its own territorial area. The only principle of public international law which South African courts recognize for the exercise of civil jurisdiction is that of territoriality, in accordance with which the courts will exercise jurisdiction over persons, property, and causes of action if they have some connection with the territorial area'.⁷⁵⁸

However, it is unclear whether these are statements of *opinio juris* by the South African courts.

j) USA

aa) Introduction

The analysis of U.S. *opinio juris* post-*Lotus* presents a puzzle. The once unequivocal articulations of *opinio juris* by the U.S. Supreme Court have subsided. The language of the court opinions has changed. The reasoning is anchored no longer in CIL, but in the U.S. Constitution. For decades, U.S. courts invoked *Pennoyer v. Neff* (1878) to establish or decline jurisdiction, while also creating exceptions to the strict rule expressed therein.⁷⁵⁹ In

⁷⁵⁶ Ibid 7.

⁷⁵⁷ Xianbo Li, 'Coordination of International Civil Jurisdiction (国际民事管辖权的协调)' (2000) 22 Legal Studies 114, 121.

⁷⁵⁸ Fawzia Cassim and Roshana Kelbrick, 'South Africa' in Piet Taelman (ed), *International Encyclopaedia of Laws: Civil Procedure* (Wolters Kluwer 2021) 50.

⁷⁵⁹ Patrick J Borchers, 'Comparing Personal Jurisdiction in the United States and the European Community: Lessons for American Reform' (1992) 40 The American Journal of Comparative Law 121 125; Voils (n 301) 685.

International Shoe v. the State of Washington (1945) the U.S. Supreme Court once and for all broke with *Pennoyer*'s strict rule of territoriality.⁷⁶⁰ Whether *International Shoe v. the State of Washington* and its legacy also abandoned *opinio juris* with respect to ICA-Jurisdiction is controversial.⁷⁶¹ Certainly, the U.S. Supreme Court did not rely on CIL in *International Shoe v. the State of Washington*. Subsequent decisions contain – if at all – ambiguous allusions to international interests, comity and sovereignty.⁷⁶² Does this warrant the conclusion that U.S. *opinio juris* has vanished during the 20th century? Some scholars answer this question in the affirmative,⁷⁶³ while others disagree.⁷⁶⁴ This warrants a closer look at the U.S. Supreme Court case law and diplomatic practice after *Pennoyer v. Neff* to see if references to sovereignty⁷⁶⁵ and the 'territorial limitations on the power of the respective States'⁷⁶⁶ are indeed expressions of *opinio juris*. The focus is not on the evolution of the U.S. rules on ICA-Jurisdiction (**The Annex** contains an overview) but on whether the material exhibits statements of *opinio juris*. This brief survey concludes that the material does not contain such statements. Nevertheless, the U.S. may still have *opinio juris* on the matter. The result remains inconclusive.

bb) The Demise of U.S. *Opinio Juris*?

During the late 19th century and early 20th century, cases adopted a gradual shift away from rigid territoriality by carving out certain exceptions.⁷⁶⁷ *McDonald v. Mabee* (1917) and *Milliken v. Meyer* (1940) illustrate this.

In *McDonald v. Mabee*, the defendant and his family were domiciled in Texas when the proceeding in Texas commenced. However, the defendant had already left Texas to find a domicile in another state. After a brief return to Texas, he finally departed to establish his

⁷⁶⁰ *International Shoe v. State of Washington*, 326 U.S. 310 (1945) 316; Parrish, 'Personal Jurisdiction: The Transnational Difference' (n 73) 113.

⁷⁶¹ Dodge, Roberts and Paul (n 73); Parrish, 'Personal Jurisdiction: The Transnational Difference' (n 73) 129; see also American Law Institute, *Restatement of the Law, Third, The Foreign Relations Law of the United States* (n 71) Chapter 2 Introductory Note: 'In the United States, and perhaps elsewhere, it is not always clear whether the principles governing jurisdiction to adjudicate are applied as requirements of public international law or as principles of national law'.

⁷⁶² *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873 (2011) (Plurality Opinion Justices Kennedy, Roberts, Scalia and Thomas); *Daimler AG v. Bauman*, 571 U.S. 117 (2014).

⁷⁶³ Dodge, Roberts and Paul (n 73).

⁷⁶⁴ E.g. Parrish, 'Personal Jurisdiction: The Transnational Difference' (n 73) 129.

⁷⁶⁵ *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873 (2011) (Plurality Opinion Justices Kennedy, Roberts, Scalia and Thomas).

⁷⁶⁶ *Hanson v. Denckla*, 357 U.S. 235 (1958) 251 (emphasis added), critically evaluated in Hazard Jr (n 307).

⁷⁶⁷ Borchers, 'Comparing Personal Jurisdiction in the United States and the European Community: Lessons for American Reform' (n 759) 125; Voils (n 301) 685.

domicile in Missouri. The action was served by publication in a newspaper after the defendant's final departure.⁷⁶⁸ Justice Holmes delivered the opinion of the U.S. Supreme Court. He began his legal analysis with the now famous line that '[t]he foundation of jurisdiction is physical power [...]',⁷⁶⁹ but then considered an exception to the strictly territorial rule in *Pennoyer*. Justice Holmes surmised that '[p]erhaps, in view of his [the defendant's] technical position and the actual presence of his family in the state, a summons left at his last and usual place of abode would have been enough.'⁷⁷⁰ Service in a newspaper, however, was, not.⁷⁷¹ The U.S. Supreme Court therefore held that the judgment was void for want of personal jurisdiction.⁷⁷²

In *Milliken v. Meyer*, the defendant had his domicile in Wyoming, the state of the proceeding, but was served personally in Colorado.⁷⁷³ Justice Douglas observed that '[s]ubstituted service in such cases has been quite uniformly upheld where the absent defendant was served at his usual place of abode in the state [...] as well as where he was personally served without the state [...]'.⁷⁷⁴ He referred to 'traditional notions of fair play and substantial justice [...] implicit in due process',⁷⁷⁵ the wording that the U.S. Supreme Court would build on in *International Shoe v. the State of Washington*. Accordingly, the U.S. Supreme Court upheld jurisdiction.

The year 1945 marks the definite break with this doctrine of strict territoriality. U.S. interstate commerce had increased, and with it the need to exercise jurisdiction over non-resident individuals and, even more so, corporations.⁷⁷⁶ Communications and technology in general had advanced to a point that made the defence in a foreign action less burdensome.⁷⁷⁷ Following the New Deal, federal power had increased and state borders had declined in

⁷⁶⁸ *McDonald v. Mabee*, 243 U.S. 90 (1917) 91.

⁷⁶⁹ *Ibid.*

⁷⁷⁰ *Ibid* 92.

⁷⁷¹ *Ibid.*

⁷⁷² *Ibid* 93.

⁷⁷³ *Milliken v. Meyer*, 311 U.S. 457 (1940) 459, 462.

⁷⁷⁴ *Ibid* 462.

⁷⁷⁵ *Ibid.*

⁷⁷⁶ *Hanson v. Denckla*, 357 U.S. 235 (1958) 251; Born (n 33) 2; Born and Rutledge (n 97) 84; Parrish, 'Personal Jurisdiction: The Transnational Difference' (n 73) 115; Congressional Research Service, 'Due Process Limits on the Jurisdiction of Courts: Issues for Congress' (2017) 5.

⁷⁷⁷ *Hanson v. Denckla*, 357 U.S. 235 (1958) 251; Austen Parrish, 'The Interplay Between Extraterritoriality, Sovereignty, and the Foundations of International Law' in Daniel S. Margolies and others (eds), *The Extraterritoriality of Law: History, Theory, Politics* (Routledge 2019) 173; Congressional Research , 'Due Process Limits on the Jurisdiction of Courts: Issues for Congress' (n 776) 5.

importance.⁷⁷⁸ Accordingly, in *International Shoe v. the State of Washington* (1945) the U.S. Supreme Court forged a new test for personal jurisdiction that took account of these changes.⁷⁷⁹

The issue was whether International Shoe, a Delaware company, rendered itself amenable to proceedings before a court in the state of Washington over unpaid unemployment contributions due to its activities there.⁷⁸⁰ Relying on *Milliken v. Meyer*, the U.S. Supreme Court observed that

‘Historically, the jurisdiction of courts to render judgment *in personam* is grounded on their *de facto* power over the defendant's person. Hence, his presence within the territorial jurisdiction of a court was prerequisite to its rendition of a judgment personally binding him. [...] But now that the *capias ad respondendum* has given way to personal service of summons or other form of notice, due process requires only that, in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend “traditional notions of fair play and substantial justice” [...]’.⁷⁸¹

The U.S. Supreme Court concluded that under the ‘Due Process Clause’ of the Fourteenth Amendment, the activities of the defendant in Washington satisfied the ‘minimum contact’ requirement and that the Washington court therefore validly exercised its jurisdiction.⁷⁸² No reference is made to public international law. However, *International Shoe v. the State of Washington* did cite *Pennoyer v. Neff* approvingly for the proposition that the ‘Due Process Clause’ ‘does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations [...]’.⁷⁸³ Some scholars have therefore pointed out that *International Shoe v. the State of Washington* did not break with *Pennoyer*’s emphasis on territoriality, but modified it to

⁷⁷⁸ Austen Parrish, ‘The Interplay Between Extraterritoriality, Sovereignty, and the Foundations of International Law’ (n 777); see also Dodge and Dodson (n 99) 1212; Parrish, ‘Personal Jurisdiction: The Transnational Difference’ (n 73) 115.

⁷⁷⁹ Redish (n 643) 1113; Parrish, ‘Sovereignty, Not Due Process: Personal Jurisdiction over Nonresident Alien Defendants’ (n 301) 12.

⁷⁸⁰ *International Shoe v. State of Washington*, 326 U.S. 310 (1945) 313.

⁷⁸¹ Ibid 316; see also Born and Rutledge (n 97) 84; Born (n 33) 3.

⁷⁸² *International Shoe v. State of Washington*, 326 U.S. 310 (1945) 320.

⁷⁸³ Ibid 319.

accommodate new commercial, political and technological realities.⁷⁸⁴ Others have rejected such continuity.⁷⁸⁵

While *International Shoe v. the State of Washington* remains the guiding precedent in both domestic U.S. cases as well as international cases,⁷⁸⁶ the decisions are characterised by disagreement on what the precedent stands for. Different Justices have emphasised different elements. Some members of the U.S. Supreme Court have favoured territorial sovereignty, others reasonableness and fairness.⁷⁸⁷ Scholars have criticised the U.S. Supreme Court for the lack of coherence in its decisions.⁷⁸⁸ Yet, even the following brief survey of the seven post-1945 U.S. Supreme Court decisions on personal jurisdiction involving non-U.S. defendants as well as selected decisions involving U.S. defendants illustrate that the differences persist.

The first international case on personal jurisdiction before the U.S. Supreme Court following *International Shoe* was *Perkins v. Benquet Consolidated Mining Co.* (1952).⁷⁸⁹ The U.S. Supreme Court did not refer to public international law or even international interests.

Hanson v. Denckla (1958) was a domestic case. However, it is noteworthy as the U.S. Supreme Court's referred to the restrictions on personal jurisdiction as a '**consequence of territorial limitations on the power of the respective States**'.⁷⁹⁰ This reference was downplayed in *Shaffer v. Heitner* (1977),⁷⁹¹ a domestic case as well, to mean no more than that 'States are

⁷⁸⁴ See e.g. Born and Rutledge (n 97) 85; see also Graham C Lilly, 'Jurisdiction Over Domestic and Alien Defendants' *Va L Rev* 85, 124: 'The doctrine of minimum contacts, indeed, originated in international law'.

⁷⁸⁵ See e.g. Hazard Jr (n 307) 244 who speaks of a 'depth of the doctrinal chasm' between the two decisions; Harold S Lewis Jr, 'Three Deaths of State Sovereignty and the Curse of Abstraction in the Jurisprudence of Personal Jurisdiction' (1982) 58 *Notre Dame L Rev* 699, 700: 'The author contends that, properly understood, the Court's fundamental reconceptualization of personal jurisdiction in *International Shoe* should have rendered obsolete both state sovereignty and its cousin, forum state interest, as determinants of personal jurisdiction'.

⁷⁸⁶ Redish (n 643) 1112.

⁷⁸⁷ Born and Rutledge (n 97) 83; Borchers, 'Comparing Personal Jurisdiction in the United States and the European Community: Lessons for American Reform' (n 759) 126: 'Over the course of the next forty-six years, however, the Court revived, then dismissed, then revived, then dismissed, then revived, a "sovereignty" factor in the jurisdictional calculus. This uneven conceptualization has made for erratic navigation' (references omitted).

⁷⁸⁸ Borchers, 'Comparing Personal Jurisdiction in the United States and the European Community: Lessons for American Reform' (n 759) 122 referred to it as a 'haphazard jurisdictional doctrine that has left matters in an unacceptable posture'. He further contended that the 'Supreme Court has evinced great uncertainty as to, and a great pre-occupation with, the theoretical underpinnings of its doctrine, while steering an erratic course that confuses courts, counsel, academicians, and often the Justices as well'; see also Redish (n 643) who criticises the U.S. Supreme Court's reliance on federalism concerns; see also Lewis Jr (n 758).

⁷⁸⁹ *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952).

⁷⁹⁰ *Hanson v. Denckla*, 357 U.S. 235 (1958) 251 (emphasis added), critically evaluated in Hazard Jr (n 307).

⁷⁹¹ *Shaffer v. Heitner*, 433 U.S. 186 (1977); in this case, the U.S. Supreme Court overruled *Pennoyer's* test for *in rem* jurisdiction (*Shaffer v. Heitner* 206, 212). In *Pennoyer v. Neff*, the U.S. Supreme Court stated that it would have accepted *in rem* jurisdiction if Mr Neff's Oregon property had been attached before the judgment, which had not been the case (*Pennoyer v. Neff* 733, 734). In *Shaffer v. Heitner* this was found to be insufficient for establishing

defined by their geographical territory’.⁷⁹² However, in another domestic case, *World-Wide Volkswagen Corp. v. Woodson* (1980), the Supreme Court reaffirmed *Hanson v. Denckla* and posited that the ‘Due Process Clause’

‘[...] protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States, through their courts, do **not reach out beyond the limits imposed on them by their status as coequal sovereigns** in a federal system’.⁷⁹³

The second international case was *Insurance Co. of Ireland v. Compagnie des Bauxites* (1982).⁷⁹⁴ The U.S. Supreme Court remarked that the requirement of personal jurisdiction concerns an ‘individual liberty interest’ that may be waived.⁷⁹⁵ It emphasised that ‘[i]t represents a restriction on judicial power **not as a matter of sovereignty, but as a matter of individual liberty**’.⁷⁹⁶ In a footnote, the Court expanded on its proposition and related it to the holding in *World-Wide Volkswagen Corp. v. Woodson* (1980), where the Court had relied on sovereignty:

‘The restriction on state **sovereign power** described in *World-Wide Volkswagen Corp.*, however, must be seen as **ultimately a function of the individual liberty interest** preserved by the Due Process Clause. That **Clause is the only source of the personal jurisdiction requirement**, and the Clause itself makes no mention of federalism concerns. Furthermore, **if** the federalism concept operated as an **independent restriction on the sovereign power of the court**, it would **not** be **possible to waive** the personal jurisdiction requirement: **individual actions cannot**

jurisdiction (*Shaffer v. Heitner* 217). The U.S. Supreme Court recalled that ‘an adverse judgment in rem directly affects the property owner by divesting him of his rights in the property before the court’ (ibid). As a result, it extended *International Shoe*’s test of ‘fair play and substantial justice’ (ibid 207) to *in rem* jurisdiction, noting that claims regarding property situated in the state will usually meet this test, but unrelated claims would not establish jurisdiction through the location of property alone (Ibid 208, 212).

⁷⁹² *Shaffer v. Heitner*, 433 U.S. 186 (1977) FN 20; Born and Rutledge (n 97) 86.

⁷⁹³ *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980) 292; on the first requirement, the ‘reasonableness’ requirement, the U.S. Supreme Court pointed out that the burden on the defendant who must litigate in a foreign forum is of primary concern, but that other factors are relevant as well: ‘the forum State’s interest in adjudicating the dispute [...]; the plaintiff’s interest in obtaining convenient and effective relief [...], at least when that interest is not adequately protected by the plaintiff’s power to choose the forum [...]; the interstate judicial system’s interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies [...]’ (ibid 292).

⁷⁹⁴ *Ins. Co. of Ireland v. Compagnie Des Bauxites*, 456 U.S. 694 (1982); for an appraisal of the case in the context of previous case law see Lewis Jr (n 758).

⁷⁹⁵ Ibid 702, 703.

⁷⁹⁶ Ibid 702 (emphasis added).

change the powers of sovereignty, although the individual can subject himself to powers from which he may otherwise be protected’.⁷⁹⁷

Again, the U.S. Supreme Court did not treat the case as distinctively international.⁷⁹⁸

Such concerns are also absent in the third international case, *Helicopteros Nacionales de Columbia, S.A. v. Hal* (1984).⁷⁹⁹

In the fourth international case *Asahi Metal Industry Co v Superior Court* (1987),⁸⁰⁰ the U.S. Supreme Court stressed the international character of the case:

‘In the present case, this advice calls for a court to consider the procedural and substantive policies of other *nations* whose interests are affected by the assertion of jurisdiction by the California court. The procedural and substantive interests of other nations in a state court's assertion of jurisdiction over an alien defendant will differ from case to case. In every case, however, those interests, as well as the Federal Government's interest in its foreign relations policies, will be best served by a careful inquiry into the reasonableness of the assertion of jurisdiction in the particular case, and an **unwillingness to find the serious burdens on an alien defendant outweighed by minimal interests on the part of the plaintiff or the forum State.**’ “Great care and reserve should be exercised when extending our notions of personal jurisdiction into the international field”. [...]’⁸⁰¹

The fifth international case on ICA-Jurisdiction did not reach the U.S. Supreme Court until 2011. *Goodyear Dunlop Tires Operations, S. A., et al. v. Brown* (2011)⁸⁰² is an important

⁷⁹⁷ Ibid FN 10 (emphasis added); Justice Powell, while concurring in the outcome, pushed back against this theoretical shift. He explained that the ‘Court's theory could require a sweeping, but largely unexplicated, revision of jurisdictional doctrine. This revision could encompass not only the personal jurisdiction of federal courts but “sovereign” limitations on state jurisdiction as identified in *World-Wide Volkswagen Corp. v. Woodson*’ (ibid 710 (Concurring Justice Powell)); the notion of individual liberty interest was relied on in subsequent cases, see e.g. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985) 471.

⁷⁹⁸ This approach is reminiscent of how the U.S. Supreme Court interprets treaties, not as international agreements, but using domestic statutory canons of construction, see Michael Waibel, ‘Principles of Treaty Interpretation: Developed for and Applied by National Courts?’ in Helmut Philipp Aust and Georg Nolte (eds), *The Interpretation of International Law by Domestic Courts: Uniformity, Diversity, Convergence* (Oxford University Press 2016).

⁷⁹⁹ *Helicopteros Nacionales v. Hal*, 466 U.S. 408 (1984).

⁸⁰⁰ *Asahi Metal Indus. v. Superior Court*, 480 U.S. 102 (1987).

⁸⁰¹ Ibid 115 (emphasis added).

⁸⁰² *Goodyear Dunlop Tires Operations, S. A., et al. v. Brown*, 564 U.S. 915 (2011).

contribution that aligns U.S. practice with international practice,⁸⁰³ but otherwise, it did not consider the international facets of the case.⁸⁰⁴

In *J. McIntyre Machinery, Ltd. v. Nicastro* (2011),⁸⁰⁵ despite the references to sovereignty, Justice Kennedy seems to have been concerned with a domestic federalist doctrine, not an international one.

The seventh international case is the most insightful. In *Daimler AG v. Bauman* (2014),⁸⁰⁶ the plaintiffs argued that Mercedes Benz Argentina was complicit in human rights atrocities committed throughout 1976 and 1983 in Argentina. The lawsuit filed in California and in part based on the U.S. Alien Tort Statute named the German Daimler-Chrysler stock company as the defendant. The plaintiffs based jurisdiction on another subsidiary's contacts (not Mercedes Benz Argentina) with California. This subsidiary was incorporated in Delaware with its principal place of business in New Jersey, distributing cars throughout the U.S., hence also California. Building on *Goodyear*, the U.S. Supreme Court denied jurisdiction. Justice Ginsberg delivered the opinion. With regard to the international elements of the case, her opinion contains the following remark that merits reproducing in full (omitting references):

‘The Ninth Circuit, moreover, paid little heed to the **risks to international comity** its expansive view of general jurisdiction posed. Other nations do not share the uninhibited approach to personal jurisdiction advanced by the Court of Appeals in this case. In the European Union, for example, a corporation may generally be sued in the nation in which it is “domiciled,” a term defined to refer only to the location of the corporation’s “statutory seat,” “central administration,” or “principal place of business.” [...] The Solicitor General informs us, in this regard, that “**foreign governments’ objections to some domestic courts’ expansive views of general jurisdiction have in the past impeded negotiations** of international agreements on the reciprocal recognition and enforcement of judgments.” [...] **Considerations of international rapport** thus reinforce our determination that subjecting Daimler

⁸⁰³ Parrish, ‘Personal Jurisdiction: The Transnational Difference’ (n 73) 124.

⁸⁰⁴ Donald Earl Childress III, ‘Rethinking Legal Globalization: The Case of Transnational Personal Jurisdiction’ (2012) 54 Wm & Mary L Rev 1489, 1523.

⁸⁰⁵ *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873 (2011) (Plurality Opinion Justices Kennedy, Roberts, Scalia and Thomas).

⁸⁰⁶ *Daimler AG v. Bauman*, 571 U.S. 117 (2014).

to the general jurisdiction of courts in California would not accord with the “fair play and substantial justice” due process demands. [...]’⁸⁰⁷

Overall, it has been acknowledged that the U.S. Supreme Court has made it increasingly difficult to sue a foreigner in the U.S. for acts occurring in other states.⁸⁰⁸

Turning to U.S. diplomatic exchanges on the matter post-*Lotus*, there seem to have been very few.⁸⁰⁹ In 1936, the U.S. instructed its minister in Panama to present a note to the Minister of Foreign Affairs of Panama protesting the exercise of civil jurisdiction over actions taking place in the Suez Canal zone involving residents thereof, which the Panama Supreme Court had contemplated.⁸¹⁰ Art III of the Convention of November 18, 1903 between the U.S. and Panama accorded to the U.S. ‘all the rights, power and authority within the Canal Zone which it would possess and exercise if it were the sovereign of that territory, to the entire exclusion of the exercise by the Republic of Panama of any such sovereign rights, power or authority’.⁸¹¹ The U.S. argued that judicial jurisdiction was without doubt an attribute of sovereignty and that it was therefore for the Suez Canal courts to exercise jurisdiction, not the courts of Panama.⁸¹² Since the U.S. exercised quasi-sovereign powers over the Canal Zone, this is akin to a state protesting another state’s exercise of ICA-Jurisdiction due to a lack of connection to this state.

In 1984, the Legal Advisor to the U.S. Department of State made the following remarks before the Association of the Bar of the City of New York in the context of discovery cases: ‘If there is a universally recognized prohibitive rule, it is that a state may not exercise jurisdiction

⁸⁰⁷ *Daimler AG v. Bauman*, 571 U.S. 117 (2014).

⁸⁰⁸ Austen L Parrish, ‘Fading extraterritoriality and isolationism: Developments in the United States’ (2017) 24 *Ind J Global Legal Stud* 207, 214.

⁸⁰⁹ See, however, ALI, *Restatement of the Law, Third, The Foreign Relations Law of the United States* (n 71) Chapter 2, Jurisdiction to Adjudicate, Introductory Note: ‘increasingly they [states] object to the improper exercise of jurisdiction as itself a violation of international principles’, but no examples are provided. The U.S. protest against Greece mentioned in Born and Rutledge (n 97) 98 and reprinted in Department of State, *Digest of United States Practice in International Law* (1973) 197 seems to concern criminal law jurisdiction since the summons was issued by the Court for the Trial of Misdemeanours of Athens. The case concerned a car accident that occurred in Louisiana involving a Greek citizen. However, the U.S. protest is of such general wording that it might encompass ICA-Jurisdiction as well: ‘The Department of State wishes to inform the Embassy of Greece that it does not recognize the basis of exercise of jurisdiction by a Greek court over a United States citizen for an accident occurring within the territory of the United States, nor is such exercise of jurisdiction generally accepted under international law. The Department of State believes, therefore, that it is inappropriate for the Consul of Greece to attempt in the territory of the United States to give effect to such jurisdiction’.

⁸¹⁰ Green Haywood Hackworth, *Digest of International Law* vol II (US Government Printing Office 1941) 172.

⁸¹¹ *Ibid.*

⁸¹² *Ibid.*; see Akehurst (n 42) 177 arguing that the U.S. was ‘really objecting to [...] the Court’s reasoning to the effect that the rights of the U.S. over the Canal Zone were limited to ensuring the operation of the Canal.

over events or persons abroad unless that state has some genuine link with those events or persons. I believe that U.S. law and practice are consistent with that core requirement.’⁸¹³ It is, however, unclear whether he expressed the view of the U.S. government or a personal opinion.

dd) Conclusions on U.S. *Opinio Juris*

There is no hard and fast rule on how much time may pass since the last explicit statement of *opinio juris*. It is therefore a matter of context, to be judged on a case-by-case basis. The following two questions may serve as useful guidelines. First, is current practice compatible with past expressions of *opinio juris* or indeed any *opinio juris* on the matter? Second, if yes, is it more reasonable to interpret the lack of recent expressions of *opinio juris* as abandonment or confirmation of past expressions?

Current U.S. practice does not accord to the strictly territorial limits identified in *Pennoyer v. Neff* (1878). Yet, this only proves that the U.S. does not uphold the exact *opinio juris* as expressed in *Pennoyer v. Neff*. Recent U.S. Supreme Court decisions have brought U.S. practice more in line with international practice,⁸¹⁴ which leaves scope for *opinio juris* on the matter.

The long timespan in which the U.S. has not expressly affirmed *opinio juris* may reasonably be regarded as a factor against any *opinio juris*.

The second factor concerns the tug of war between different doctrinal rationales for restricting personal jurisdiction among the U.S. Supreme Court Justices. U.S. Supreme Court Justices have invoked these justifications inconsistently in a merry-go-round of majority, plurality, concurring and dissenting opinions.⁸¹⁵ Some members of the U.S. Supreme Court have favoured territorial sovereignty, others individual liberty, reasonableness and fairness.⁸¹⁶ Accordingly, several cases emphasised the former.⁸¹⁷ In other cases, U.S. Supreme Court

⁸¹³ David R. Robinson, ‘Speech Before the Association of the Bar of the City of New York (Feb. 14, 1984)’ (1981-1988) 2 Cumulative Digest of United States Practice in International Law ch. 6, §1 at 1330.

⁸¹⁴ Parrish, ‘Personal Jurisdiction: The Transnational Difference’ (n 73) 124.

⁸¹⁵ Borchers, ‘Comparing Personal Jurisdiction in the United States and the European Community: Lessons for American Reform’ (n 759) 126: ‘Over the course of the next forty-six years, however, the Court revived, then dismissed, then revived, then dismissed, then revived, a “sovereignty” factor in the jurisdictional calculus. This uneven conceptualization has made for erratic navigation’ (references omitted).

⁸¹⁶ Born and Rutledge (n 97) 83.

⁸¹⁷ See in particular *Hanson v. Denckla*, 357 U.S. 235 (1958) 251; *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980) 292; *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873 (2011) (Plurality Opinion Justices Kennedy, Roberts, Scalia and Thomas); *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773 (2017); on

Justices have invoked individual liberty, reasonableness and fairness, often to the exclusion of a sovereignty rationale.⁸¹⁸ In particular in light of the U.S. Supreme Court decision in *Ins. Co. of Ireland v. Compagnie Des Bauxites* (1982) one may conclude that sovereignty has been abandoned as a rationale. Therein, the U.S. Supreme Court stated that the ‘Due Process Clause’ restricts judicial power not as a matter of sovereignty, but as a matter of individual liberty’,⁸¹⁹ that the ‘restriction on state sovereign power [...] must be seen as ultimately a function of the individual liberty interest [...]’⁸²⁰ and that ‘the Clause itself makes no mention of federalism concerns.’⁸²¹ However, more recent developments have demonstrated that sovereignty retains meaning in the jurisprudence of the U.S. Supreme Court that goes beyond semantics. In *Bristol-Myers Squibb Co. v. Superior Court of California* (2017), the U.S. Supreme Court clarified that personal jurisdiction is concerned with the sovereignty of *other* co-equal sovereigns. In the U.S. federalist context this is the sovereignty of the sister states.⁸²²

The question remains, what this disagreement implies for U.S. *opinio juris*? Arguably, this disagreement is best understood as one of domestic law.⁸²³ In *Ins. Co. of Ireland v. Compagnie Des Bauxites* (1982), the U.S. Supreme Court proclaimed that ‘[t]hat Clause [the ‘Due Process Clause’] is the only source of the personal jurisdiction requirement [...]’.⁸²⁴ However, the U.S. Supreme Court was interpreting the U.S. Constitution, not public international law.⁸²⁵ It was concerned with negating federalism as an independent source of ‘the personal jurisdiction

this point see Parrish, ‘Sovereignty, Not Due Process: Personal Jurisdiction over Nonresident Alien Defendants’ (n 301) 16; Parrish, ‘Personal Jurisdiction: The Transnational Difference’ (n 73) 114; Dodge and Dodson (n 99) 1230, who, however, accept sovereignty as a relevant factor only for domestic defendants; Voils (n 301) 681: ‘Reading *Milliken v. Meyer*, which first established the notion of fair play and substantial justice as a relevant consideration in personal jurisdiction, and *International Shoe* together makes clear that even *International Shoe*’s liberal minimum contacts test is still fundamentally a test of whether or not a forum state has the sovereign authority to exercise personal jurisdiction over a defendant’.

⁸¹⁸ E.g. *Shaffer v. Heitner*, 433 U.S. 186 (1977) FN 20 downplayed the focus on territorial limitations in *Hanson v. Denckla* to mean no more than that ‘States are defined by their geographical territory’; *Ins. Co. of Ireland v. Compagnie Des Bauxites*, 456 U.S. 694 (1982) 702: ‘[i]t [the ‘Due Process Clause’] represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty’.

⁸¹⁹ *Ibid* 702 (emphasis added).

⁸²⁰ *Ins. Co. of Ireland v. Compagnie Des Bauxites*, 456 U.S. 694 (1982) FN 10.

⁸²¹ *Ibid*.

⁸²² *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773 (2017).

⁸²³ See also Hazard Jr (n 307) 246 who explicitly distinguishes the domestic U.S. context from the international context; Redish (n 643) criticizes the U.S. Supreme Court’s reliance on federalism as a constitutional matter. However, he does not purport to deny public international law limits on ICA-Jurisdiction; see also Ronan E Degnan and Mary Kay Kane, ‘The Exercise of Jurisdiction Over and Enforcement of Judgments Against Alien Defendants’ (1988) 39 Hastings LJ 799, FN 69; Parrish, ‘Personal Jurisdiction: The Transnational Difference’ (n 73) 121, FN 133.

⁸²⁴ *Ins. Co. of Ireland v. Compagnie Des Bauxites*, 456 U.S. 694 (1982); see also Lewis Jr (n 758) who discusses this aspect of the case solely from the domestic perspective.

⁸²⁵ Parrish, ‘Personal Jurisdiction: The Transnational Difference’ (n 73) 119.

requirement', as it immediately clarified.⁸²⁶ On the other hand, the U.S. Supreme Court opinions, which refer to the interests of co-equal sovereigns, do not seem to go beyond the domestic context of federalism.⁸²⁷ Some lower U.S. courts have referred to the sovereignty of foreign states, but they apply domestic federalist doctrine by analogy, rather than appealing to public international law.⁸²⁸ These decisions state that the 'Due Process Clause' protects foreign states' sovereignty, but likely mean these states' interests.⁸²⁹ In sum, this important debate on U.S. domestic law should be viewed as neutral as regards *opinio juris*.

A third factor concerns certain statements made by the U.S. Supreme Court in *Asahi* (1987) and *Daimler* (2014). In *Asahi*, the U.S. Supreme Court emphasised the need to consider the interests of foreign states as well as U.S. foreign relations.⁸³⁰ In *Daimler*, the U.S. Supreme Court noted 'risks to international comity' and was guided by '[c]onsiderations of international rapport'.⁸³¹ While these comments refer to international relations, they may mean the opposite for public international law.⁸³² After all, the U.S. Supreme Court had the opportunity to invoke public international law, but chose to invoke 'interests'⁸³³, 'comity'⁸³⁴ and 'international rapport'⁸³⁵ instead. Even though the U.S. courts' use of the term comity has been ambiguous in the past, the statements still seem to fall short of an affirmation of international legal obligation.

⁸²⁶ *Ins. Co. of Ireland v. Compagnie Des Bauxites*, 456 U.S. 694 (1982) Fn 10; Parrish, 'Personal Jurisdiction: The Transnational Difference' (n 73) 119.

⁸²⁷ Dodge and Dodson (n 99) 1230; Parrish, 'Personal Jurisdiction: The Transnational Difference' (n 73) 116-118 explains that up until *Asahi Metal Industry Co v Superior Court* (1987), the U.S. Supreme Court treated cases against foreign defendants as if they were national cases. It 'focused on national issues, federalism debates, and the rise of legal realism' (ibid 117).

⁸²⁸ *Donahue v. Far Eastern Air Transport Corp.*, 652 F.2d 1032 (D.C. Cir. 1981) 1038: '[...] a foreign land's sovereignty is surely no less worthy of consideration than that of a sister state. Taiwan's interest in providing a forum for this litigation is evident — an event within its borders gave rise to the controversy and it is the place in which F.E.A.T.'s activities are centered. No similar sovereign interest can be attributed to California or the United States [...]'; *Brainerd v. Governors of the Univ. of Alberta*, 873 F.2d 1257 (9th Cir. 1989), 1260; *FDIC v. British-American Ins. Co.*, 828 F.2d 1439, 1444 (9th Cir. 1987); for a brief account of these cases see Bradley W Paulson, 'Personal Jurisdiction over Aliens: Unravelling Entangled Case Law' (1990) 13 Hous J Int'l L 117, 122.

⁸²⁹ Paulson (n 828) 123.

⁸³⁰ *Asahi Metal Indus. v. Superior Court*, 480 U.S. 102 (1987) 103.

⁸³¹ *Daimler AG v. Bauman*, 571 U.S. 117 (2014).

⁸³² See Gerlinde Berger-Walliser, 'Reconciling Transnational Jurisdiction: A Comparative Approach to Personal Jurisdiction over Foreign Corporate Defendants in US Courts' (2018) 51 Vand J Transnat'l L 1243, 1257: 'The elements of "fair play and substantial justice" are therefore not general principles of international law and the Supreme Court certainly does not intend to treat them as such. Rather, by linking "considerations of international rapport" to due process, the Court tries to pay tribute to other countries' sovereignty while remaining within the contours of its own precedent'.

⁸³³ *Asahi Metal Indus. v. Superior Court*, 480 U.S. 102 (1987) 103.

⁸³⁴ *Daimler AG v. Bauman*, 571 U.S. 117 (2014).

⁸³⁵ Ibid.

To summarize: Explicit statements of *opinio juris* accompanied U.S. practice more than a century ago. The practice has changed profoundly. No new statements of *opinio juris* have been made since. The result remains inconclusive.

5. Conclusion

Where does this leave *opinio juris* post-*Lotus*? Akehurst was right to be wary of the relevance for the present of 19th century U.K. and U.S. jurisprudence.⁸³⁶ He was right because it is doubtful that 19th century U.K. decisions expressed *opinio juris* beyond international recognition and enforcement of decisions, namely on the exercise of ICA-Jurisdiction itself, in the sense that it could be unlawful. He was also right because it is very doubtful that 19th century U.S. *opinio juris* on the requirement of strictly territorial exercise of ICA-Jurisdiction was shared by a sufficient number of states in practice and spirit to establish CIL. On the other hand, after Akehurst's writing at least Australia, Germany, the Netherlands and the U.K. have made explicit statements of *opinio juris* that require 'a substantial and bona fide connection between the subject matter of a dispute and the source of jurisdiction',⁸³⁷ a 'sufficient connection to [the state]',⁸³⁸ and 'a sufficiently close nexus to the forum State'.⁸³⁹ The U.S. courts, once so vocal, became silent on the matter. The other states have followed this example. Are these few statements of *opinio juris* enough to form a rule of CIL? **Chapter 7** will weave the strands of the preceding Chapters together and answer the question whether CIL limits states in their choices of bases of ICA-Jurisdiction.

⁸³⁶ Akehurst (n 42) 175.

⁸³⁷ *Dow Jones & Company Inc. v Gutnick*, 42 ILM 41 (2003) para 57.

⁸³⁸ Judgment of 2.7.1991 (XI ZR 206/90), BGHZ 115, 90 (ZaöRV 53 [1993], 372).

⁸³⁹ Brief of the Governments of the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland as Amici Curiae in Support of Neither Party of 13 June 2012, in *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013) 12; see also *BA v. United Kingdom* (1976), in which the European Commission of Human Rights alluded to CIL limits on ICA-Jurisdiction. It stated that 'the fact that the applicant's daughter lives with her mother in the U.K., added to her mother's British nationality, constitutes for the jurisdiction of the British courts a sufficient link according to general principles of international law' (*BA v. United Kingdom*, Dec. Adm. Com. Ap. 6988/75, 29 September 1975, Digest of Strasbourg Case-Law relating to the European Convention on Human Rights, Vol 2 (Article 6) 269; see also decision 6200/73 X/GB cited in Matscher, 'Vor Art IX EGJN: Allgemeines zur (inländischen) Gerichtsbarkeit' (n 98) Fn 17). *E contrario*, the European Commission of Human Rights seems to imply that without any sufficient link the British court could have violated public international law. For the decisions by the Chamber and Grand Chamber of the ECtHR in *Naït-Liman v. Switzerland* see Chapter 4 Section 3.1.

Chapter 7

Synthesis

‘A judgment, viz. a command conveyed through the courts, is not essentially different from a command expressed by legislative or administrative action. It cannot claim international validity except if and in so far as it keeps within the limits which public international law imposes.’

(Mann, 1964)⁸⁴⁰

‘[w]ith the significant exception of various forms of immunity, however, modern customary international law generally does not impose limits to jurisdiction to adjudicate.’

(Restatement (Fourth), 2018)⁸⁴¹

It is against the backdrop of the preceding Chapters that three hypotheses are put to the test. Hypothesis 1 states that the exorbitant bases of ICA-Jurisdiction as described in **Chapter 5** violate CIL (the content of which would then have to be defined). Hypothesis 2 posits that these exorbitant bases of ICA-Jurisdiction conform with the requirements of CIL, which, however, still mandates some connection to the state exercising jurisdiction. Hypothesis 3 denies any and all restrictions under CIL on states’ choices regarding bases of ICA-Jurisdiction.

Hypothesis 1: Exorbitant bases of ICA-Jurisdiction violate CIL

To test Hypothesis 1, one must bear in mind that there are two theoretical possibilities. For Hypothesis 1 to be true, either a prohibitive rule, or the absence of a permissive rule must be established (see **Chapter 2**). As the subsequent passages will show, Hypothesis 1 fails on both accounts.

The preceding Chapters make it clear that a prohibitive rule against the above-mentioned exorbitant bases of ICA-Jurisdiction cannot be established. Legislation on exorbitant bases of ICA-Jurisdiction is pervasive and invoked in litigation. They exist in 42 of the 75 sample legal

⁸⁴⁰ Mann, ‘The Doctrine of Jurisdiction in International Law’ (n 19) 73.

⁸⁴¹ ALI, *Restatement of the Law, Fourth, the Foreign Relations Law of the United States: Selected Topics in Treaties, Jurisdiction, and Sovereign Immunity* : §§ 301-313; 401-464; 481-490, *Tables and Index* (n 99) § 422, Reporter’s Notes 1.

systems. ICA-Jurisdiction based on applicable law has 14 counts, plaintiff-ICA-Jurisdiction has 9 counts, ICA-Jurisdiction based on transitory presence has 11 counts, asset-based ICA-Jurisdiction has 16 counts and ICA-Jurisdiction based on doing business has 15 counts (see **Chapter 5**). Furthermore, there is no evidence of *opinio juris* against exorbitant bases of ICA-Jurisdiction as they exist today (see **Chapter 6**). There is only one late 20th century outlier, which is the BGH's decision of 1991,⁸⁴² which limited asset-based ICA-Jurisdiction pursuant to Section 23 dZPO. Yet, the BGH's methodology is hardly convincing. It deduced from the absence of asset-based ICA-Jurisdiction in international treaties that CIL prohibited it. Moreover, as Lord Goff quipped with regard to a different decision, 'one swallow does not make a rule of international law'.⁸⁴³ There is no record of states protesting Art 23 dZPO or any other of the exorbitant provisions (see **Chapters 2 and 6**). In particular, the protests against the U.S. ATS did not concern ICA-Jurisdiction (see **Chapter 4**). That many states refuse enforcement of a judicial decision if it is based on an exorbitant basis of ICA-Jurisdiction due to a violation of their *ordre public* or due to similar reasons is no evidence of *opinio juris* against the exercise of ICA-Jurisdiction as such (see **Chapters 2 and 6**). Neither is the fact that several treaties have eliminated exorbitant bases of ICA-Jurisdiction from their catalogue of permissible grounds of jurisdiction such evidence (see **Chapter 5**). Conversely, the EU allows free movement of decisions based on such exorbitant grounds among member states if rendered against a non-EU party (see **Chapter 5**).

If a permissive rule is required, the conclusion is the same but requires more exposition. A respectable number of states exercises each exorbitant basis of ICA-Jurisdiction (see **Chapter 5**). Overall, this amounts to general practice. Regarding *opinio juris* on exorbitant bases of ICA-Jurisdiction, states are silent (with the outlier of BGHZ 115, 90) (see **Chapter 6**). As such, silence neither proves nor disproves *opinio juris*. Silence is neutral.⁸⁴⁴ For law creation public international law presumes under stringent circumstances that silence equals acquiescence.⁸⁴⁵ However, acquiescence to what? A lack of protests against a claim under CIL (hence with *opinio juris*) may create CIL. But here the issue is a different one: Is there a claim under CIL in the first place? In line with this it has been argued that protests are only required if a legal claim

⁸⁴² Judgment of 2.7.1991 (XI ZR 206/90), BGHZ 115, 90 (ZaöRV 53 [1993], 372).

⁸⁴³ Lord Goff in *Jones v. Ministry of Interior for the Kingdom of Saudi Arabia & Ors* [2006] UKHL 26 (14 June 2006) para 22: 'The *Ferrini* decision cannot in my opinion be treated as an accurate statement of international law as generally understood; and one swallow does not make a rule of international law'.

⁸⁴⁴ Baka (n 130) 62.

⁸⁴⁵ Azaria (n 140) 11 et seqq; ILC Draft Conclusions on CIL, Conclusion 10.3.

under public international law is made.⁸⁴⁶ Since courts do not express any *opinio juris* when they exercise ICA-Jurisdiction based on exorbitant grounds, it is doubtful that protests are required under such circumstances. One would have to presume courts to imply that their conduct not only accords with domestic law but also public international law. Be that as it may, those who require a permissive rule cannot deny that some rule of CIL has formed with regard to ICA-Jurisdiction. Otherwise, ICA-Jurisdiction based on e.g. the place of commission of the tort or the place of the conclusion of the contract would be contrary to CIL, which to the best of the author's knowledge no one has claimed in more recent times. After all, as these bases of ICA-Jurisdiction do not require the defendant to reside within the state of jurisdiction, they might be considered extraterritorial. At issue is then not the existence of a permissive rule, but its content. Consequently, state silence expresses some form of *opinio juris* with regard to the bases of ICA-Jurisdiction exercised. If nothing else, this *opinio juris* will cover the bases of ICA-Jurisdiction they themselves exercise. There is no convincing reason to assume that states consider approvingly some of their bases of ICA-Jurisdiction with (silent) *opinio juris*, but not others (again silently). States with legislation on asset-based ICA-Jurisdiction therefore believe that asset-based ICA-Jurisdiction accords with CIL etc. Yet, this only shows that states exhibit *opinio juris* towards their 'own' types of exorbitant bases of ICA-Jurisdiction, not that they do so (be it positively or negatively) towards the other types. There are two responses to this. The first appeals to reason, the second to the workings of CIL.

First, it would make little sense for states to distinguish between the different bases of exorbitant ICA-Jurisdiction as they are in fact functional equivalents. As demonstrated in **Chapter 3**, all the exorbitant bases of ICA-Jurisdiction examined originated more than a century ago and are deeply rooted in the traditions of many legal systems. While today plaintiff-ICA-Jurisdiction and ICA-Jurisdiction based on transitory presence are slightly underrepresented, overall, they are distributed roughly in equal numbers. Were one to include additional common law systems and additional former French colonies, one would expect the numbers to even out further. What may constitute an alien provision to one group of states, will be the most natural basis of ICA-Jurisdiction for another group, with no group being able to claim that their favoured exorbitant basis of ICA-Jurisdiction is the common one and the other ones the exceptions, as far as the numbers are concerned. Perhaps even more importantly, the exorbitant bases discussed – as different as they may appear at first sight – share the same

⁸⁴⁶ Ibid 13.

purpose and work in a very similar way.⁸⁴⁷ Although this is most apparent for plaintiff-ICA-Jurisdiction, all exorbitant bases seek to privilege or at least level the playing field for the local plaintiff. They were introduced for this reason and remain for this reason (see **Chapter 3**). A plaintiff will, however, only avail itself of this possibility, if there is any prospect of enforcement. Since judicial decisions rendered on an exorbitant basis will commonly not be recognised and enforced elsewhere, this will in most instances presuppose local assets of the defendant that suffice to satisfy the plaintiff's claim. Every other form of exorbitant ICA-Jurisdiction can thus in a way be seen as a functional equivalent of asset-based ICA-Jurisdiction.⁸⁴⁸ Where there is the prospect of recognition and enforcement elsewhere, the exorbitant bases of ICA-Jurisdiction of course exhibit an additional function. This, however, is true also for asset-based ICA-Jurisdiction itself. Why would assets of the defendant in Germany make it (more) legitimate to enforce the German judgment in Hungary? The real question is whether regarding this secondary purpose (enforcement elsewhere or threat thereof) some exorbitant bases of ICA-Jurisdiction are less legitimate than others. From the perspective of the state concerned and its powers, it is impossible to make such a case since every form of exorbitant ICA-Jurisdiction attaches in one way or the other to one of the constitutive elements of the state under public international law (population, territory, government - see below). When considering fairness to the defendant, one could make the case that plaintiff-ICA-Jurisdiction and ICA-Jurisdiction based on the applicable law (unless agreed upon in a contract) are distinct since in these instances the defendant has not undertaken any action at all that could justify assuming ICA-Jurisdiction against it. Yet, upon closer inspection, the premise is not entirely true. It may be possible to base asset-based jurisdiction on claims that the defendant has against a local debtor.⁸⁴⁹ These claims may arise without any action of the defendant (e.g. through a tort), or at least none concerning the state which exercises ICA-Jurisdiction. More importantly, ICA-Jurisdiction based on transitory presence and doing business may exist in instances where the defendant would never have dreamt of its actions having such a result. A passenger on an airplane flying through U.S. airspace is served with an U.S. lawsuit. A museum distributing promotional material about its exhibits in state X, but selling nothing there, is sued in state X; the claim concerns an artwork and has nothing to do with state X, but the museum is said to have conducted business in state X by distributing promotional material. Arguably, in such instances the actions taken by the defendants are functionally equivalent to no action at all since

⁸⁴⁷ Clermont and Palmer, 'French Article 14 Jurisdiction, Viewed from the United States' (n 258) 17 et seq.

⁸⁴⁸ Ibid.

⁸⁴⁹ Section 99 (2) Austrian JN; Section 97 Hungarian PILA.

understandably there is no expectation by the defendant that ICA-jurisdiction could arise on such basis. Also, asset-based ICA-Jurisdiction, ICA-Jurisdiction based on doing business, the applicable law or transitory presence can be accessed by any plaintiff in the world, plaintiff-ICA-Jurisdiction is open only to a limited number of plaintiffs, which in a way shields the defendant compared to the other exorbitant grounds. Common law jurisdictions may invoke their built-in counterbalances, i.e. the mostly discretionary possibilities to abstain from entertaining a lawsuit, first and foremost the doctrine of *forum non conveniens*. However, these mostly discretionary instruments may not prevent proceedings in the state of exorbitant ICA-Jurisdiction, for instance if some of the alleged witnesses reside there as well (which is no accepted basis of ICA-Jurisdiction either). All this goes to show that is impossible to establish one or the other form of exorbitant ICA-Jurisdiction as less legitimate than the other.

The second response is that it does not matter whether states have any *opinio juris* regarding exorbitant bases of ICA-Jurisdiction that they themselves do not exercise. Each group of states employs their respective exorbitant basis of ICA-Jurisdiction with the *opinio juris* that this is in conformity with CIL. No group of states has protested another group's exercise of a different form of exorbitant ICA-Jurisdiction (see **Chapters 2 and 6**). The EU even facilitates the movement of judgments based on these exorbitant bases of ICA-Jurisdiction against defendants from non-EU states (see **Chapter 5**). This lack of protests establishes permissive rules of CIL for each exorbitant basis of ICA-Jurisdiction.

Hypothesis 1 is thus refuted.

Hypothesis 2: Exorbitant bases of ICA-Jurisdiction are in conformity with CIL, which requires some connection to the state exercising ICA-Jurisdiction

States do not exercise limitless ICA-Jurisdiction. State practice therefore leaves open whether CIL limits exist. Due to the foregoing considerations, such CIL limits would, however, have to account for the exorbitant bases of ICA-Jurisdiction. As for *opinio juris*, this doctoral thesis has applied a stringent standard and discounted all expressions of *opinio juris*, which are not strictly on ICA-Jurisdiction, including those which are regularly linked to ICA-Jurisdiction, but in fact concern a different issue (see **Chapter 4 Section 3.2**). Still, some recent explicit statements of *opinio juris* remain. Australia: High Court of Australia in *Dow Jones & Company Inc. v Gutnick* (2002): 'principle of public international law obliging a substantial and bona fide

connection between the subject matter of a dispute and the source of jurisdiction of a national court over its resolution’; Germany: (i) BGH in BGHZ 115, 90 (1991): sufficient connection (‘hinreichende[r] Inlandsbezug’), (ii) Germany as *amicus curiae* in *Kiobel v. Royal Dutch Petroleum Co.* (2013): ‘overbroad exercises of jurisdiction are contrary to international law’, Netherlands and U.K. as *amici curiae* in *Kiobel v. Royal Dutch Petroleum Co.* (2013): ‘the basis for jurisdiction is always grounded in a sufficiently close nexus to the forum State’ [...] there is no basis for a nation to exercise general jurisdiction over a foreign corporation for activities having no close connection with the forum without its consent’ (see **Chapter 6**). These statements of *opinio juris* can be synthesised into a **rule requiring a sufficiently close connection between the elements of the lawsuit (parties and/or subject matter) on the one side and the state exercising ICA-Jurisdiction on the other side** (see on the details below). The Austrian Supreme Court’s statements in 1999⁸⁵⁰ and Lord Millet’s remarks in 2003,⁸⁵¹ which denied any (meaningful) role for CIL are outliers on the opposite end of the spectrum. Moreover, the Austrian Supreme Court concedes that any connection at all to the state may still be required under CIL. However, it is open to interpretation what constitutes a connection to a state (see below), so that the line between ‘a connection’ and ‘a sufficient connection’ will become blurred. The Italian Supreme Court’s declaration of universal civil jurisdiction for international crimes in 2004⁸⁵² lies outside the scope of this doctoral thesis (see **Chapter 1**).

While this is a small number of explicit statements, (i) the topic is not at the forefront of issues the international lawyer has to deal with on a daily basis and (ii) international practice can be said to be within the boundaries set by these statements.⁸⁵³ That means that occasions for reflection on the principles applicable to ICA-Jurisdiction and opportunities for protests are rare.⁸⁵⁴ As stated above, under such circumstances silence on the part of most states does not necessarily mean lack of *opinio juris*.⁸⁵⁵ However, it does also not necessarily mean approval either.

The inductive method cannot resolve this impasse. It has provided inconclusive evidence. However, the problem only arises if one requires a prohibitive rule to displace state freedom.

⁸⁵⁰ OGH 8 Ob 105/99w.

⁸⁵¹ Lord Millet in *Societe Eram Shipping Company Limited v Hong Kong and Shanghai Banking Corporation Limited* [2003] 3 All ER 465, 492, para 80.

⁸⁵² Corte di Cassazione, Sezioni unite, sentenza del 11/03/2004, Luigi Ferrini / Repubblica federale di Germania.

⁸⁵³ See on this also Michaels (n 67).

⁸⁵⁴ See on this also *Lotus* (n 16) (Dissenting Opinion Altamira) 98.

⁸⁵⁵ ILC Draft Conclusions on CIL 142.

In case a permissive rule is required, the foregoing Section has already established one to the outer limits of ICA-Jurisdiction exercised today – i.e. including the exorbitant bases of ICA-Jurisdiction. A CIL rule of a sufficiently close connection corresponds well with these limits, as will be explained below.

If a prohibitive rule is required to displace state freedom, the result seems to be a *non liquet*, as the researcher is confronted with a few explicit statements and otherwise silence. The ILC, when formulating their Draft Conclusions on CIL was acutely aware that such *non liquet* scenarios could occur if only inductive means are employed. Therefore, the ILC Draft Conclusions on CIL additionally foresee deduction as an ‘aid, to be employed with caution [...] in particular when considering possible rules of customary international law that operate against the backdrop of rules framed in more general terms that themselves derive from and reflect a general practice accepted as law’. References to such general rules in the context of the CIL of jurisdiction are legion. These are in particular sovereignty, equality of states and non-intervention.⁸⁵⁶ The problem, however, is that none of these general rules produces definite answers for ICA-Jurisdiction.⁸⁵⁷ This is evidenced by the proponents of deductive reasoning in the context of ICA-Jurisdiction themselves (see **Chapter 1 Section 3**). Derek Bowett analysed the relevance of the principles of equality of states, non-intervention and territorial integrity for establishing CIL limits to ICA-Jurisdiction.⁸⁵⁸ He highlighted non-intervention as the contextually most fundamental principle, but cautioned that the ‘very breadth and vagueness of the principle means that its application to a specific problem will require a good deal of judgment and subjective interpretation’.⁸⁵⁹ Similarly, Andrew L. Strauss contended that the ‘personal jurisdictional realm of states is [...] conceptually synonymous [*sic*] with defining the state and its corresponding powers’.⁸⁶⁰ Strauss concluded that if one accepts that the state is defined by public international law, one must also accept that public international law governs the state’s personal jurisdiction, including civil court jurisdiction, however, leaving open what these rules are.⁸⁶¹ Rudolf Dolzer argued that it follows from the rules of territoriality, equality of states and non-intervention that extraterritorial conduct violates CIL unless it can be generalized for all states without creating the kind of conflict that those rules seek to avoid.⁸⁶²

⁸⁵⁶ As one example of many see Bertele (n 21) 172 et seqq.

⁸⁵⁷ Ibid 182.

⁸⁵⁸ Bowett (n 14) 15.

⁸⁵⁹ Ibid 17.

⁸⁶⁰ Strauss (n 107) 405.

⁸⁶¹ Ibid 405.

⁸⁶² Dolzer (n 109) 82.

In case of doubt, extraterritorial rules are therefore to be interpreted restrictively. If a state exceeds the jurisdictional boundaries which the community of states has accepted in the past, discernible approval by the majority of states is necessary for that practice to become legal.⁸⁶³ However, what should be the standard for past acceptance, what the standard for discernible approval in the present? Gary Born and Peter Rutledge argue that the concept of sovereignty itself provides the answer. They contend that ‘detailed evidence of state practice’ is not necessary given that ‘the long-established jurisdictional limits rest on fundamental principles of national sovereignty’.⁸⁶⁴ However, what are these principles of sovereignty?

Akehurst and others therefore stood strongly opposed to this type of reasoning, arguing that derivations from first-order concepts such as sovereignty can vary significantly depending on the stance that is taken.⁸⁶⁵ Similarly, there is no theoretical justification for transferring – without empirical evidence of state practice and *opinio juris* – CIL rules of prescriptive jurisdiction, in particular criminal law jurisdiction, to ICA-Jurisdiction (see **Chapters 2 and 6**). As Akehurst put it, ‘limitations in criminal cases cannot be cited as authority for the existence of like limitations in civil cases’.⁸⁶⁶

While the criticism is justified, there is an underlying truth to these deductive statements. CIL limits states’ legal powers (i.e. their jurisdiction) because states collectively seek to guard against interventions by other states in what they consider to be their internal affairs and interests. One vital interest is the protection of its nationals (as evidenced by the CIL on diplomatic protection). As an example, criminal prescriptive and adjudicative jurisdiction may lead to a state imposing criminal penalties on the nationals of another state, including imprisonment or in some states even capital punishment. This in turn may lead to diplomatic conflict. Therefore, exercise of criminal jurisdiction is lawful only if it conforms to at least one of the well-known heads of jurisdiction. However, excessive ICA-Jurisdiction carries similar risks.⁸⁶⁷ If enforceable, payment orders can cause substantial harm and even bankruptcy. Conflict of laws rules are mostly not harmonized. Which court assumes ICA-Jurisdiction will therefore have an impact on which law is applied to the merits of the case. Additionally, there may be disadvantages for the defendant throughout the proceedings. These have already been

⁸⁶³ Ibid 84.

⁸⁶⁴ Born and Rutledge (n 97) 101.

⁸⁶⁵ Akehurst (n 42) 176; see also e.g. Bertele (n 21) 182.

⁸⁶⁶ Akehurst (n 42) 170.

⁸⁶⁷ The U.S. Supreme Court in *Daimler AG v. Bauman*, 571 U.S. 117 (2014) rightly speaks of ‘risks to international comity’; see e.g. also Bertele (n 21) 222 et seq.

described in **Chapter 5 Section 2.3**: the defendant may have to plead in an unfamiliar forum and in an unfamiliar language, bear higher costs than in proceedings at home and might be confronted with prejudice against foreigners. The argument is therefore nuanced. It is not plausible to assume that states would limit their jurisdiction in all kinds of areas, but not in one of obvious exertion of power over nationals of another state, with the very real potential of repercussions for these nationals. The very interesting question of whether rights of the individual under CIL are emerging in this context,⁸⁶⁸ is beyond the scope of this doctoral thesis.⁸⁶⁹ For the present purposes it suffices that states are evidently concerned about their nationals also in the context of ICA-Jurisdiction.⁸⁷⁰ The more convincing conclusion – which employs deductive reasoning as an aid and not a substitute – is therefore that the silence of the majority of states is not neutral, but tacit agreement with the statements made by Australia, Germany, the Netherlands and the U.K. **that CIL requires a sufficiently close connection between the elements of the lawsuit (parties and/or subject matter) on the one side and the state exercising ICA-Jurisdiction on the other side.**

Hypothesis 2 is thus confirmed and by implication Hypothesis 3 is refuted.

This rule of CIL accommodates also the exorbitant bases of ICA-Jurisdiction, as it must pursuant to the rejection of Hypothesis 1. The connection must exist between the parties and/or the subject matter on the one side and the state exercising ICA-Jurisdiction on the other side. A valid basis of ICA-Jurisdiction does not have to be connected to the parties and the subject matter as there are many uncontroversial grounds of ICA-Jurisdiction attaching to only the subject matter or the parties. The connection also does not have to be to both parties, as the venerable basis of ICA-Jurisdiction *actor sequitur forum rei* and the exorbitant basis of plaintiff-ICA-Jurisdiction show.

However, apart from these considerations, what is the content of this rule of CIL? The rule is a synthesis in the form of the smallest common ground of the statements of *opinio juris* of four states with the acquiescence of all others. It is on purpose that the word ‘genuine’ is not used since it carries a certain connotation that has led authors to disqualify exorbitant bases of

⁸⁶⁸ Mills, ‘Rethinking Jurisdiction in International Law’ (n 93) 213 et seqq; Mills, ‘Conceptualising Party Autonomy in Private International Law’ (n 93); see also Geimer, ‘Verfassung, Völkerrecht und Internationales Zivilverfahrensrecht’ (n 97) 334 and Cedric Ryngaert, ‘An Urgent Suggestion to Pour Old Wine into New Bottles: Comment on “A New Jurisprudential Framework for Jurisdiction”’ (2015) 109 AJIL Unbound 81, 84.

⁸⁶⁹ See Chapter 1 Section 4.

⁸⁷⁰ *Daimler AG v. Bauman*, 571 U.S. 117 (2014).

ICA-Jurisdiction as violations of CIL.⁸⁷¹ The core term ‘sufficiently close connection’, carries in it the original wordings ‘substantial and bona fide connection’ (Australia), ‘sufficient connection’ (Germany), ‘sufficiently close nexus to the forum State’ and ‘close connection’ (Netherlands and U.K.). However, it remains an indeterminate term. Two aspects are certain, however. There must be some connection and not every connection suffices. This follows from plain wording of the rule, which leaves no doubt in this regard as to the intention of the states creating this rule. But how to proceed from this point onwards?

The ongoing work of Panos Merkouris and others on the interpretability of CIL is instructive.⁸⁷² Just as for the formation of CIL, approaches among scholars differ.⁸⁷³ In this author’s view, formation and interpretation of CIL are so inextricably linked that the same methodology must be applied. Those who posit that the interpretation of CIL is the same intellectual exercise as establishing what CIL is at certain point of time are right.⁸⁷⁴ This is the logical conclusion when considering what CIL is and how it comes about. A practical difference lies in the fact that interpretation will try to establish the rule of CIL at the most granular level possible, so that application to specific facts is possible. This doctoral thesis has followed the ILC Draft Conclusions on CIL. According to the inductive method, this doctoral thesis examined what states do and what convictions they hold. This must hold true for the interpretation of a rule of CIL as well. As such, the content of the rule of CIL established above must be the best fit for existing practice and *opinio juris*. Since there is so little explicit *opinio juris*, the focus must be on the practice. When taking a closer look at bases of ICA-Jurisdiction it becomes apparent that they connect to the state exercising ICA-Jurisdiction pursuant to the traditional constitutive elements of public international law (population, territory, government).⁸⁷⁵ This applies even to the exorbitant bases of ICA-Jurisdiction. Thus, either one of the parties to the proceedings is a national of the state (see plaintiff-ICA-Jurisdiction), or the territory of the state is implicated (see ICA-Jurisdiction based on transitory presence, doing business and assets), or the governmental function is implicated (see ICA-Jurisdiction based on the applicable law). This holds true for the semi-exorbitant and common bases of ICA-Jurisdiction as well: *forum necessitatis* (governmental function in the form of protection; in certain cases, also population where the plaintiff is a national), *forum delicti* (territory), *forum*

⁸⁷¹ E.g. Bertele (n 21) 233 et seq.

⁸⁷² Panos Merkouris, Jörg Kammerhofer and Noora Arajärvi (eds), *The Theory, Practice, and Interpretation of Customary International Law* (Cambridge University Press 2022).

⁸⁷³ See the variety of contributions in Merkouris (n 872).

⁸⁷⁴ See as an example for all Beham (n 130) 87.

⁸⁷⁵ Just as Simma and Müller (n 97) 144 and Klabbers (n 436) 99 described for the heads of jurisdiction.

contractus (territory) and so on. **A detailed look therefore reveals that the requirement of a connection to the state can be further subdivided into a requirement of a connection to at least one of the constitutive elements of the state (population, territory, government).**⁸⁷⁶

An example with no such connection – and therefore a violation of CIL – would be to grant ICA-Jurisdiction to all plaintiffs who pay higher court fees.

However, this still leaves unanswered what the term ‘sufficiently close connection’ means. State practice does not offer any more detailed answer. CIL allows ICA-Jurisdiction based on connections as tenuous as the exorbitant bases of ICA-Jurisdiction in existence, and possibly beyond. State practice cannot answer the question where the limits lie, because state practice has not yet gone there. What is clear, however, from looking at the exorbitant bases of ICA-Jurisdiction is that the regulating state enjoys extensive discretion. It is not a matter of an even balance between the interests involved, but the scale weighs very much in favour of the local plaintiff.

Panos Merkouris has referred to the possibility of a systemic interpretation akin to Art 31 (3) (c) VCLT.⁸⁷⁷ Ryngaert has in particular called for the application of general principles of law (albeit for the area of prescriptive jurisdiction).⁸⁷⁸ This is a different intellectual exercise than trying to deduce rules for ICA-Jurisdiction from first order principles such as sovereignty, non-intervention and the equality of states. Here, the aim is to employ general principles of law pursuant to Art 38 (1) (c) VCLT as guidance in the interpretation of the term ‘sufficiently close connection’.

There are several contenders. Yet, in keeping with the inductive methodology, the aforementioned balance of interests struck by states in their practice must be respected and few general principles of law fit this balance. Otherwise, the application of general principles of law at this stage of the analysis would change the thesis’ methodology. For this very reason and without making any claim as to their qualification as general principles of law, the following principles – that are sometimes discussed in this context⁸⁷⁹ – are not suitable: reasonableness, proportionality and equity. All three principles are irreconcilable with the vast discretion

⁸⁷⁶ Alex Mills is right in that jurisdiction agreements likely form an additional connecting factor. This is, however, not within the scope of this doctoral thesis (Mills, ‘Conceptualising Party Autonomy in Private International Law’ (n 93)).

⁸⁷⁷ Merkouris (n 130) 358.

⁸⁷⁸ Ryngaert, ‘The Restatement and the Law of Jurisdiction: A Commentary’ (n 97) 1160.

⁸⁷⁹ E.g. Bertele (n 21) 178 et seqq.

accorded to the regulating state. They are more suited to legal regimes where the rights involved ought to be evenly balanced. This leaves the related principles of abuse of rights and good faith.⁸⁸⁰

The principle of abuse of rights may mean – among other things – that ‘the arbitrary exercise of its rights by a State, causing injury to other States but without clearly violating their rights’ is prohibited.⁸⁸¹ It is posited that arbitrary in the context of ICA-Jurisdiction would mean to exercise jurisdiction based on a connection to the state that is merely nominal, i.e. a connection that is merely one in name, but really no more than a hollow shell. This may for instance concern a legal fiction that deems the defendant resident on the territory of the state, while in fact it is not. However, many scholars dispute the status of abuse of rights as a general principle of law or at least claim that its content is uncertain.⁸⁸²

Conversely, the principle of good faith enjoys broad acceptance as a general principle of law.⁸⁸³ While the principle is amorphous,⁸⁸⁴ the High Court of Australia in its statement of *opinio juris* according to which the exercise of ICA-Jurisdiction requires a ‘substantial and **bona fide** connection’⁸⁸⁵ alludes to a meaning of good faith akin to that of meaningful connection, i.e. one that is not arbitrary as in an abuse of rights. This accords to the findings of some authors that abuse of rights is a subcategory of good faith or connected to it.⁸⁸⁶

It does not matter whether good faith understood as the prohibition of arbitrary exercises of jurisdiction can be established as a general principle beyond doubt. In that case it would be an independent source of obligation next to the rule of CIL established in this doctoral thesis. What matters is that this is a reasonable interpretation of the principle of good faith and that this interpretation provides a guideline that fits all the criteria discussed above. It is evident that the requirement of a ‘sufficiently close’ connection must be assessed qualitatively since there are too many possible parameters to make any purely quantitative assessment. Good faith as a

⁸⁸⁰ See also for these *ibid* 173 et seqq.

⁸⁸¹ Alexandre Kiss, ‘Abuse of Rights’ Max Planck Encyclopedia of Public International Law.

⁸⁸² See *ibid* for an overview; see also Bertele (n 21) 174 et seq.

⁸⁸³ Markus Kotzur, ‘Good Faith’ Max Planck Encyclopedia of Public International Law.

⁸⁸⁴ *Ibid*.

⁸⁸⁵ *Dow Jones & Company Inc. v Gutnick*, 42 ILM 41 (2003) para 57.

⁸⁸⁶ See Robert Kolb, *Good faith in international law* (Bloomsbury Publishing 2017) 133 et seqq; see also the authors cited in Bertele (n 21) 180; Régis Bismuth, ‘Abuse of process’ in Andreas Kulick and Michael Waibel (eds), *General International Law in International Investment Law: A Commentary* (Oxford Academic, Oxford University Press 2024) 605.

principle can operate qualitatively. It makes sense to say that a connection to at least one of the constitutive elements of the state must be non-arbitrary and otherwise in good faith. Such a statement has meaning. Furthermore, the standard of good faith does not require an evenly balanced legal regime, but can work as a minimum requirement, apt for a legal regime with great discretion for the regulating state. In addition, the principle is anchored in one of the statements of *opinio juris* on which the rule of CIL limiting ICA-Jurisdiction is built.

Importantly, this good faith requirement not only concerns novel bases of ICA-Jurisdiction, but also extreme versions of the established exorbitant bases. This is because the author has not encountered cases in which ICA-Jurisdiction was exercised to such extremes. Hence, there has likely not yet existed an opportunity to protest such exercises of ICA-Jurisdiction. Examples could be: A state which allows plaintiff-ICA-Jurisdiction for any plaintiff having been within the territory for only one day; a state which foresees asset-based ICA-Jurisdiction for any claims even if the assets only amount to 1 % of the amount in dispute; a state which holds that even the most unrelated, incidental and short-lived business activities amount to doing business within the state; a state which allows ICA-Jurisdiction based on transitory presence even if plaintiff has brought the defendant within the territory by force.

These are – as mentioned – extreme scenarios and there may be a lack of a ‘sufficiently close connection’ in far less extreme scenarios. This, however, will have to be decided on a case-by-case basis due to the fact specific nature of the inquiry.

To summarize: The Research Question asked whether CIL restricts states in their choice of bases of ICA-Jurisdiction and, if so, what the applicable limits are. This doctoral thesis has concluded that CIL restricts states in their choice of bases of ICA-Jurisdiction pursuant to the following rule:

There must be a sufficiently close connection, i.e. non-arbitrary and otherwise in good faith, between the parties and/or the subject matter of the lawsuit on the one side and at least one constitutive element of the state exercising ICA-Jurisdiction (population, territory, government) on the other side.

Epilogue

For some the content of the rule of CIL established in the previous Chapter may feel too tame. Schröder's infamous quip that the CIL limits in this area of the law lie somewhere in the mist of practical uselessness seems to echo from the past.⁸⁸⁷ There is some truth to it, but it also does not matter that much. There is a different perspective, and it is important. Very recently the Restatement (Fourth), supported by eminent scholars, claimed that CIL does not limit states in their choice of bases of ICA-Jurisdiction at all.⁸⁸⁸ Equally eminent scholars immediately pushed back.⁸⁸⁹ However, based on the pervasiveness of exorbitant bases of ICA-Jurisdiction and lack of protests, the Restatement (Fourth)'s position is defensible. Its inclusion in a U.S. Restatement, given the influence of these restatements, makes it plausible that especially U.S. scholars, judges and practitioners may assume this stance as well. Also outside of the U.S., it could push the divided scholarly opinion decisively in the direction of 'no limits'. Public international law is fundamental for the peaceful coexistence and cooperation of states. Therefore, whenever it is negated or said to be entirely permissive, a closer look is in order. The value of his contribution to the law of jurisdiction may hopefully lie in having taken a closer look in ways that have not been done before. The doctoral thesis traversed landscapes of public and private international law with their rich histories and their breadth of global practice, it took account of what it means for a state to exercise jurisdiction and it came to a conclusion – a conclusion that does not criticise the U.S. Restatement (Fourth)'s practical point, i.e. that the bases of ICA-Jurisdiction existing today generally do not violate CIL, but that very much opposes the Restatement (Fourth)'s conclusion: CIL limits states in their choice of bases of ICA-Jurisdiction. States' restrictions on their exercise of ICA-Jurisdiction are therefore not entirely voluntary. There is a limit to their exercise of ICA-Jurisdiction and this limit is mandated by public international law. As for now, this seems to be primarily a matter of principle. However, this conclusion also has a practical dimension. It is a counterweight to expansionist tendencies. Should states decide to further extend their bases of ICA-Jurisdiction in the future, they may come into conflict with public international law.

⁸⁸⁷ Schröder (n 68) 766.

⁸⁸⁸ ALI, *Restatement of the Law, Fourth, the Foreign Relations Law of the United States: Selected Topics in Treaties, Jurisdiction, and Sovereign Immunity* : §§ 301-313; 401-464; 481-490, *Tables and Index* (n 99) § 422, Reporter's Notes 1

⁸⁸⁹ See Chapter 1.

The Annex

The 75 sample legal systems analysed are as follows:

Albania, Algeria, Angola, Argentina, Austria, Australia, Belarus, Belgium, Bermuda, Bosnia and Herzegovina, Botswana, Brazil, Bulgaria, Canada, Cayman Islands, Chad, China, Democratic Republic of Congo, Croatia, Czech Republic, Dominican Republic, Estonia, Egypt, Ethiopia, France, Gambia, Germany, Ghana, Greece, Hungary, Iceland, India, Indonesia, Iran, Israel, Italy, Japan, Jersey, Jordan, Kazakhstan, Kenya, Korea, Lebanon, Lesotho, Macau, Mali, Mozambique, Namibia, Nigeria, Norway, Pakistan, Peru, Poland, Qatar, Romania, Russia, Saudi Arabia, Sierra Leone, Slovakia, Slovenia, South Africa, Spain, Sudan, Sweden, Thailand, Tunisia, Turkey, United Arab Emirates, Ukraine, England and Wales, USA, Venezuela, Vietnam, Zambia, Zimbabwe.

The information is up to date according to the date of the sources cited. Changes may have occurred since. The general cut-off date is March 2023, unless otherwise indicated. In ambiguous cases, bases of ICA-Jurisdiction are not labelled as exorbitant or semi-exorbitant.

‘Common bases of ICA-Jurisdiction’ are recorded only for some states as they are not the focus of this doctoral thesis. However, as the name indicates virtually all states have theses bases of ICA-Jurisdiction, in one way or a another.

For ease of reference the relevant descriptions are reprinted below:

Exorbitant bases of ICA-Jurisdiction

AL: ‘Applicable Law’ – The law governing the cause of action is sufficient to confer ICA-Jurisdiction to the courts of the corresponding state;

TP: ‘Transitory Presence’ – The transitory presence of the defendant at a defined time (most commonly the time of service) is sufficient to confer ICA-Jurisdiction on the courts of the corresponding state for any claim;

P: ‘Plaintiff Jurisdiction’ – The domicile/habitual residence/nationality of the plaintiff is sufficient to confer ICA-Jurisdiction on the courts of the corresponding state for any claim;

A: ‘Assets’ – The location of assets (mobile or immobile) of the defendant is sufficient to confer ICA-Jurisdiction on the courts of the corresponding state for any claim;

DB: 'Doing Business' – That the defendant is doing business in a state without being established there (formally or factually) is sufficient to confer ICA-Jurisdiction on the courts of the corresponding state for any claim. This includes a branch office, subsidiary and the mere selling of products;

Semi-Exorbitant bases of ICA-Jurisdiction

R: 'Reciprocity' – That the state of the defendant's nationality/domicile/habitual residence assumes ICA-Jurisdiction under these circumstances confers ICA-Jurisdiction;

N: 'Necessity' – That the defendant cannot access any other court or cannot be expected to do so is sufficient to confer ICA-Jurisdiction (with slight variations);

TP+: 'Transitory Presence' plus an additional connecting factor not of the 'Common'-type, e.g. nationality of the plaintiff, is sufficient to confer ICA-Jurisdiction for any claim;

P+: 'Plaintiff Jurisdiction' plus an additional connecting factor not of the 'Common'-type, e.g. reciprocity, is sufficient to confer ICA-Jurisdiction for any claim.

A+: 'Asset Jurisdiction' or arrest of the defendant plus an additional connecting factor not of the 'Common'-type, e.g. nationality of the plaintiff, is sufficient to confer ICA-Jurisdiction for any claim;

Common bases of ICA-Jurisdiction

D: domicile or habitual residence or formal or factual establishment of a juridical person;

C & P: the cause of action (or parts of it) arose in the state or the obligation is to be performed in the state;

C: connectedness of claims (personal connectedness, ancillary connectedness and counter-claims – and for one of the claims there exists ICA-Jurisdiction based on another 'Common'-type basis);

LBA: the location of a branch office or agency for claims pertaining to their activities;

L: the location of assets (mobile and immobile) for claims pertaining only to them, the place of formal or factual establishment of a company for claims pertaining to their registries and the validity of company decisions;

Possibility of Abstention: under certain circumstances the respective state court has discretion to or is mandated to abstain from exercising jurisdiction that would otherwise exist. The most prominent example is the common law doctrine of *forum non conveniens*.

The Republic of Albania⁸⁹⁰

Exorbitant:

AL	TP	P	A	DB

Semi-exorbitant:

R	N	TP+	P+	A+

Common:

C & S	D	C & P	C	LBA	L
x	x	x	x	x	x

Algeria⁸⁹¹

Exorbitant:

AL	TP	P	A	DB
		x		

Semi-exorbitant:

R	N	TP+	P+	A+

⁸⁹⁰ The information is based on the English translation of Albanian law in Aida Gugu Bushati, 'National Statutes and Provisions: Albania: Republic of Albania' in Basedow and others. For a country report see Aida Gugu Bushati and Christa Jessel-Holst, 'National Reports: Albania' in Basedow and others; see also Aida Gugu Bushati and Nada Dollani, 'Albanian PIL Act and its Implementation in Judicial Practice' (2016) Anali Pravnog Fakulteta Univerziteta u Zenici 147.

⁸⁹¹ The information is based on the text of the Code of Civil Procedure, available at <<https://www.joradp.dz/trv/fpcivil.pdf>>, accessed on 18 March 2023.

Angola⁸⁹²

Exorbitant:

AL	TP	P	A	DB
				x

Semi-exorbitant:

R	N	TP+	P+	A+
	x	x	x	

Common:

C & S	D	C & P	C	LBA	L
unknown	x	x	unknown	unknown	x

A new Civil Procedure Code is under discussion.⁸⁹³

Argentine Republic⁸⁹⁴

Exorbitant:

AL	TP	P	A	DB

Semi-exorbitant:

R	N	TP+	P+	A+
	x			

⁸⁹² The information is based on the English translation of Angolan law in Dulce Lopes, 'National Statutes and Provisions: Angola: Republic of Angola' in Basedow and others. For a country report see Dário Moura Vicente, 'National Reports: Angola' in Basedow and others.

⁸⁹³ <<https://julaw.ao/processo-civil-novo-codigo-ou-codigo-novo/>>, accessed on 3 March 2023.

⁸⁹⁴ The information is based on the English translation of Argentinian law in Rafael Carlos del Rosal Carmona, 'National Statutes and Provisions: Argentina: Argentine Republic' in Basedow and others. For a country report see Adriana Silvia Dreyzin de Klor, 'National Reports: Argentina' in Basedow and others; see also Cristian J.P. Mitrani, Francisco J. Cárrega and Matías Galice, 'Argentina' in Simon Bryan (ed), *Encyclopaedia of International Commercial Litigation* (Wolters Kluwer 2020) 8 and Cristian J.P. Mitrani, Roberto Berizonce and Eduardo Oteiza, 'Argentina' in Piet Taelman (ed), *International Encyclopaedia of Laws: Civil Procedure* (Wolters Kluwer 2021) 67; see also Permanent Bureau of the HCCH, 'Comparative Table on Grounds of Jurisdiction' (January 2015), available at <<https://assets.hcch.net/docs/03c39e9f-878b-400d-a359-e70b7937edde.pdf>>, accessed on 3 March 2023.

Common:

C & S	D	C & P	C	LBA	L
x	x	x	x	x	x

Commonwealth of Australia⁸⁹⁵

Australian rules of jurisdiction differ at the state, territory, and federal level. Each has its own set of rules, which are broadly based on the English common law tradition.⁸⁹⁶ In each case, jurisdiction is generally established if the defendant

- submits to the court's jurisdiction,
- is present in the relevant territory (Mills: 'This essentially means either physical presence for an individual, or a registered office or place of business for a company'.)
- is outside the territory and has been served with proceedings (Mills: 'Jurisdiction may only be exercised in this third category of case with the permission of the court, except (somewhat problematically) in the state of Queensland (Uniform Civil Procedure Rules 1999 (Qld), s 124)').⁸⁹⁷

Grounds for service out of the jurisdiction are similar across jurisdictions. Some examples are:

- a claim in respect of a contract which was breached in the territory,
- a claim in respect of a contract, which is governed by the law of the territory,
- a claim in respect of a tort where the wrongful act or damage took place in the territory,
- there is a jurisdiction agreement in favour of the court.⁸⁹⁸

⁸⁹⁵ The information is based on the following country reports: Alex Mills, 'National Reports: Australia' in Basedow and others; Gregory J. Reinhardt, 'Australia' in Piet Taelman (ed), *International Encyclopaedia of Laws: Civil Procedure* (Wolters Kluwer 2017) 36; Daisy Mallett and Sati Nagra, 'Australia' in Anthony Colman and Simon Bryan (eds), *Encyclopaedia of International Commercial Litigation* (Wolters Kluwer 2020) 16; see also Permanent Bureau of the HCCH, 'Comparative Table on Grounds of Jurisdiction' (January 2015), available at <<https://assets.hcch.net/docs/03c39e9f-878b-400d-a359-e70b7937edde.pdf>>, accessed on 3 March 2023.

⁸⁹⁶ Alex Mills, 'National Reports: Australia' in Basedow and others.

⁸⁹⁷ Alex Mills, 'National Reports: Australia' in Basedow and others.

⁸⁹⁸ Alex Mills, 'National Reports: Australia' in Basedow and others.

For further bases of ICA-Jurisdiction, see the HCCH table⁸⁹⁹ and, as an example, Part 7 of the Uniform Civil Procedure Rules of Queensland.⁹⁰⁰

However, significant variations exist. According to Mills ‘two Australian states (Queensland and Tasmania) and the federal courts require only that one cause of action in the claim document falls within the list of authorized grounds for service outside the territory in order for the court to have jurisdiction over the claim as a whole. Other Australian courts require that jurisdiction over each cause of action be tested and established independently’.⁹⁰¹

As in most other common law jurisdictions, the doctrine of *forum non conveniens* (service in the jurisdiction) and *forum conveniens* (service out of the jurisdiction) applies.⁹⁰² This means that ICA-Jurisdiction is discretionary.⁹⁰³ The test has been developed in the 1990 decision *Voth v Manildra Flour Mills Pty Ltd*.⁹⁰⁴ An Australian court will only stay proceedings if it finds that it is the ‘clearly inappropriate forum’.⁹⁰⁵

Exorbitant:

AL	TP	P	A	DB
x	x			

Semi-exorbitant:

R	N	TP+	P+	A+

Common:

C & S	D	C & P	C	LBA	L
x	x	x	x		x

⁸⁹⁹ Permanent Bureau of the HCCH, ‘Comparative Table on Grounds of Jurisdiction’ (January 2015), available at <<https://assets.hcch.net/docs/03c39e9f-878b-400d-a359-e70b7937edde.pdf>>, accessed on 4 March 2023; see also Reinhardt (n 895) 36; Mallett and Nagra (n 895) 17.

⁹⁰⁰ Uniform Civil Procedure Rules 1999 (Queensland), <<https://www.legislation.qld.gov.au/view/html/inforce/current/sl-1999-0111#ch.4-pt.7-div.1-sdiv.2>>, accessed on 4 March 2023.

⁹⁰¹ Alex Mills, ‘National Reports: Australia’ in Basedow and others.

⁹⁰² Alex Mills, ‘National Reports: Australia’ in Basedow and others.

⁹⁰³ Alex Mills, ‘National Reports: Australia’ in Basedow and others.

⁹⁰⁴ *Voth v Manildra Flour Mills Pty Ltd* [1990] HCA 55.

⁹⁰⁵ Alex Mills, ‘National Reports: Australia’ in Basedow and others.

Possibility of Abstention

Republic of Austria⁹⁰⁶

Exorbitant:

AL	TP	P	A	DB
			x ⁹⁰⁷	x ⁹⁰⁸

Semi-exorbitant:

R	N	TP+	P+	A+
	x			

Common:

C & S	D	C & P	C	LBA	L
x	x	x	x	x	x

Republic of Belarus⁹⁰⁹

Exorbitant:

AL	TP	P	A	DB
				x

⁹⁰⁶ The information is based on the Sections 28 (1) Z 2 and 65 to 104 of the Austrian Jurisdiktionsnorm (JN) as well as Walter H Rechberger and Daphne-Ariane Simotta, *Grundriss des österreichischen Zivilprozessrechts* (9 edn, Manz Verlag 2017) mn 72 et seqq.

⁹⁰⁷ Section 99 (1), (2) JN.

⁹⁰⁸ Section 99 (3) JN.

⁹⁰⁹ The information is based on the English translation of the Economic Procedure Code (Национальный реестр правовых актов Республики Беларусь”, 6 сентября 2004, N 138–139, 2/1064), available at <<http://law.by/document/?guid=3871&p0=HK9800219e>>, accessed on 4 March 2023, and the original version of the Civil Procedure Code (Национальный реестр правовых актов Республики Беларусь”, 17 марта 1999, № 18–19, 2/13), available at <<https://etalonline.by/document/?regnum=HK9900238>>, accessed on 4 March 2023. For a country report see Aliaksandr Danilevich, ‘National Reports: Belarus’ in Basedow and others; see also Natallia Raisanen, ‘Belarus’ in Piet Taelman (ed), *International Encyclopaedia of Laws: Civil Procedure* (Wolters Kluwer 2021) 68.

Semi-exorbitant:

R	N	TP+	P+	A+

Common:

C & S	D	C & P	C	LBA	L
x	x	x	x	x	x

Kingdom of Belgium⁹¹⁰

Exorbitant:

AL	TP	P	A	DB

Semi-exorbitant:

R	N	TP+	P+	A+
	x			

Common:

C & S	D	C & P	C	LBA	L
x	x	x	x	x	x

Bermuda⁹¹¹

Exorbitant:

AL	TP	P	A	DB
x	x			

⁹¹⁰ The information is based on the English translation of Belgian law in Caroline Clijmans and Paul LC Torremans, 'National Statutes and Provisions: Belgium: Kingdom of Belgium' in Basedow and others. For a country report see Stéphanie Francq, 'National Reports: Belgium' in Basedow and others; see also Piet Taelman and Claudia Van Severen, 'Belgium' in Piet Taelman (ed), *International Encyclopaedia of Laws: Civil Procedure* (Wolters Kluwer 2021) 80.

⁹¹¹ The information is based on the country report by Jonathan O'Mahony, 'Bermuda' in Anthony Colman and Simon Bryan (eds), *Encyclopaedia of International Commercial Litigation* (Wolters Kluwer 2023) 3.

Semi-exorbitant:

R	N	TP+	P+	A+

Common:

C & S	D	C & P	C	LBA	L
x	x	x	x		x

Possibility of Abstention

Bosnia & Herzegovina⁹¹²

Exorbitant:

AL	TP	P	A	DB

Semi-exorbitant:

R	N	TP+	P+	A+
x		x		

Common:

C & S	D	C & P	C	LBA	L
x	x	x	x		x

⁹¹² The information is based on the English translation of B & H law in Pablo Marcello Baquero, Lucas Lixinski and Claudia Lima Marques, 'National Statutes and Provisions: Brazil: Federative Republic of Brazil' in Basedow and others. For a country report see Zlatan Meškić, 'National Reports: Bosnia & Herzegovina' in Basedow and others; see also Nevena Jevremovic, 'Bosnia & Herzegovina' in Piet Taelman (ed), *International Encyclopaedia of Laws: Civil Procedure* (Wolters Kluwer 2017) 51.

Republic of Botswana⁹¹³

Exorbitant:

AL	TP	P	A	DB

Semi-exorbitant:

R	N	TP+	P+	A+
			x	

Federative Republic of Brazil⁹¹⁴

Exorbitant:

AL	TP	P	A	DB
				x

Semi-exorbitant:

R	N	TP+	P+	A+
x		x		

Common:

C & S	D	C & P	C	LBA	L
x	x	x			x

⁹¹³ Richard Frimpong Oppong, *Private International Law in Commonwealth Africa* (Cambridge University Press 2013) 68.

⁹¹⁴ The information is based on the English translation of Brazilian law in Pablo Marcello Baquero, Lucas Lixinski and Claudia Lima Marques, 'National Statutes and Provisions: Brazil: Federative Republic of Brazil' in Basedow and others. For a country report see Claudia Lima Marques, Lucas Lixinski and Pablo Marcello Baquero, 'National Reports: Brazil' in Basedow and others; see also Humberto Dalla Bernardina de Pinho and Renata Berlinski de Brito e Cunha, 'Brazil' in Piet Taelman (ed), *International Encyclopaedia of Laws: Civil Procedure* (Wolters Kluwer 2021) 67; see also Code of Civil Procedure] Código de Processo Civil, Lei No. 13.105, 16 Mar 2015. Diário Oficial, No. 51, Seção 1 (17 Mar 2015); for the original version see <http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2015/lei/L13105.htm>, accessed on 4 March 2023.

Republic of Bulgaria⁹¹⁵

Exorbitant:

AL	TP	P	A	DB
		x		

Semi-exorbitant:

R	N	TP+	P+	A+

Common:

C & S	D	C & P	C	LBA	L
x	x	x	x	x	x

Canada⁹¹⁶

Canada consists of ten provinces (British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Québec, New Brunswick, Prince Edward Island, Nova Scotia and Newfoundland and Labrador) and three northern territories (Yukon, the Northwest Territories and Nunavut). Each has its own law. Québec generally follows the French legal tradition; the other provinces and territories follow the English common law tradition. However, statutes have amended the common law rules.⁹¹⁷

⁹¹⁵ The information is based on the English translation of Bulgarian law in Apis Sofita Law, <<https://www.apis.bg/bg/>>, reprinted in 'National Statutes and Provisions: Bulgaria: Republic of Bulgaria' in Basedow and others. For a country report see Vessela Stancheva-Mincheva and Yordanka Zidarova, 'National Reports: Bulgaria' in Basedow and others; see also Valentina Popova, 'Bulgaria' in Piet Taelman (ed), *International Encyclopaedia of Laws: Civil Procedure* (Wolters Kluwer 2022) 69; see also Kodeks na mezhdunarodnogo chastno pravo. Law of 17 May 2005 (Code of Private International Law) in Durzhaven Vestnik 2005 no. 42, <<https://lex.bg/bg/laws/ldoc/2135503651>>, accessed on 4 March 2023.

⁹¹⁶ The information is based on the country reports Joost Blom, 'National Reports: Canada' in Basedow and others and Brett Harrison, Sidney Elbaz and Guneev Bhinder, 'Canada' in Anthony Colman and Simon Bryan (eds), *Encyclopaedia of International Commercial Litigation* (Wolters Kluwer 2022) 5; for a discussion on jurisdiction over corporate defendants based on doing business see Catherine Walsh, 'General Jurisdiction over Corporate Defendants under the CJPTA: Consistent with International Standards' (2018) 55 Osgoode Hall LJ 163; for a discussion of jurisdiction based on presence under Canadian common law see Tanya J Monestier, '(Still) a Real and Substantial Mess: The Law of Jurisdiction in Canada' (2013) 36 Fordham Int'l LJ 396, 446; *Chevron Corp. v. Yaiguaje*, 2015 SCC 42, [2015] 3 S.C.R. 69; *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, [2012] 1 S.C.R. 572.

⁹¹⁷ Joost Blom, 'National Reports: Canada' in Basedow and others.

In three provinces (British Columbia, Saskatchewan and Nova Scotia) and the Yukon territory⁹¹⁸ the Court Jurisdiction and Proceedings Transfer Act (CJPTA) applies.⁹¹⁹ The CJPTA introduces a real and substantial connection test in line with the constitutional requirements laid out by the Canadian Supreme Court in *Morguard Investments Ltd. v. De Savoye* and *Beals v Saldanha*.⁹²⁰ For the CJPTA (Version British Columbia) see <https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/03028_01>.

In the non-CJPTA common law provinces and territories similar rules apply, albeit derived from case law (*Club Resorts Ltd v Van Breda*), whereas the CJPTA contains a list.⁹²¹

In Québec, the rules on jurisdiction are contained in Sections 3148 to 3154 of the Québec Civil Code.⁹²² These grounds meet the constitutional standard of real and substantial connection (*Spar Aerospace v American Mobile Satellite Corp*).

The CJPTA, the laws of the non CJPTA provinces and territories as well as the Québec Civil Code incorporate the doctrine of *forum non conveniens*. Joost Blom writes: ‘The defendant must satisfy the court that some other forum is clearly more appropriate in light of the interests of the parties and of justice.’⁹²³ Under Québec law, the court ‘may, exceptionally and on an application by a party, decline jurisdiction if it considers that the authorities of another State are in a better position to decide the dispute’ (Section 3135 Québec Civil Code). Both the Québec Civil Code (Section 3136) and the *CJPTA provide for forum necessitatis jurisdiction*. Under Québec law, it is required that ‘the dispute has a sufficient connection with Québec’. Under the *CJPTA there is no such requirement*.⁹²⁴

Exorbitant:

AL	TP	P	A	DB
x	x			x

⁹¹⁸ Permanent Bureau of the HCCH, ‘Comparative Table on Grounds of Jurisdiction’ (January 2015), available at <<https://assets.hcch.net/docs/03c39e9f-878b-400d-a359-e70b7937edde.pdf>>, accessed on 16 February 2021.

⁹¹⁹ Joost Blom, ‘National Reports: Canada’ in Basedow and others.

⁹²⁰ Permanent Bureau of the HCCH, ‘Comparative Table on Grounds of Jurisdiction’ (January 2015), available at <<https://assets.hcch.net/docs/03c39e9f-878b-400d-a359-e70b7937edde.pdf>>, accessed on 16 February 2021.

⁹²¹ Joost Blom, ‘National Reports: Canada’ in Basedow and others.

⁹²² These are available at <<https://www.canlii.org/en/qc/laws/stat/cqlr-c-ccq-1991/latest/cqlr-c-ccq-1991.html>>.

⁹²³ Joost Blom, ‘National Reports: Canada’ in Basedow and others.

⁹²⁴ Joost Blom, ‘National Reports: Canada’ in Basedow and others.

Semi-exorbitant:

R	N	TP+	P+	A+
	x			

Common:

C & S	D	C & P	C	LBA	L
x	x	x	x	x	x

Possibility of Abstention

Cayman Islands⁹²⁵

Exorbitant:

AL	TP	P	A	DB
x				

Semi-exorbitant:

R	N	TP+	P+	A+

Common:

C & S	D	C & P	C	LBA	L
x	x	x	x	x	x

Possibility of Abstention

⁹²⁵ The information is based on the country report by Colette Wilkins and Nick Dunne, 'Cayman Islands' in Anthony Colman and Simon Bryan (eds), *Encyclopaedia of International Commercial Litigation* (Wolters Kluwer 2022) 6.

Chad⁹²⁶

Exorbitant:

AL	TP	P	A	DB

Semi-exorbitant:

R	N	TP+	P+	A+

People's Republic of China⁹²⁷

Exorbitant:

AL	TP	P	A	DB
			x	x

Semi-exorbitant:

R	N	TP+	P+	A+
			x	

Common:

C & S	D	C & P	C	LBA	L
x	x	x	x		x

Possibility of Abstention

⁹²⁶ The information is based on the text of the Code of Civil Procedure , available at <https://www.labase-lextenso.fr/sites/lextenso/files/lextenso_upload/tchad_loi_ndeg028_pr_2020_portant_code_de_procedure_civilec_civilecomm_et_sociale.pdf>, accessed on 18 March 2023.

⁹²⁷ The information is based on the English translation of Civil Procedure Code, available at <<http://cicc.court.gov.cn/html/1/219/199/200/644.html>>, accessed on 4 March 2023, Tu (n 10) 124, and the following country reports: Weizuo Chen, 'National Reports: China' in Basedow and others; Wang (n 755) 67; Tao (n 135) 8.

Democratic Republic of Congo⁹²⁸

Exorbitant:

AL	TP	P	A	DB
		x		

Semi-exorbitant:

R	N	TP+	P+	A+

Republic of Croatia⁹²⁹

Exorbitant:

AL	TP	P	A	DB

Semi-exorbitant:

R	N	TP+	P+	A+
	x			

Common:

C & S	D	C & P	C	LBA	L
x	x	x	x	x	x

⁹²⁸ The information is based on the text of the Loi organique n° 13/011-B du 11 avril 2013 portant organisation, fonctionnement et compétences des juridictions de l'ordre judiciaire, available at <<http://www.leganet.cd/Legislation/Droit%20Judiciaire/LOI.13.011.11.04.2013.htm#TIICII>>, accessed on 18 March 2023.

⁹²⁹ The information is based on the text of the Croatian Private International Law Act 2017, Zakon o međunarodnom privatnom pravu (Official Gazette, No. 101/17), available at <https://www.sabor.hr/sites/default/files/uploads/sabor/2019-01-18/081234/PZ_141.pdf> and <<https://www.zakon.hr/z/947/Zakon-o-me%C4%91unarodnom-privatnom-pravu>>, accessed on 4 March 2023.

Czech Republic⁹³⁰

Exorbitant:

AL	TP	P	A	DB
			x	x

Semi-exorbitant:

R	N	TP+	P+	A+

Common:

C & S	D	C & P	C	LBA	L
x	x	x	x	x	x

Dominican Republic⁹³¹

Exorbitant:

AL	TP	P	A	DB

Semi-exorbitant:

R	N	TP+	P+	A+
	x			

Common:

C & S	D	C & P	C	LBA	L
x	x	x	x	x	x

⁹³⁰ The information is based on the English translation of Czech law in Bríza & Trubač – Attorneys at Law, ‘National Statutes and Provisions: Czech Republic: Czech Republic’ in Basedow and others. For a country report see Monika Pauknerová, ‘National Reports: Czech Republic’ in Basedow and others, Alena Macková, ‘Czech Republic’ in Piet Taelman (ed), *International Encyclopaedia of Laws: Civil Procedure* (Wolters Kluwer 2022) 38 and Vladimír Cížek and Rudolf Bicek, ‘Czech Republic’ in Anthony Colman and Simon Bryan (eds), *Encyclopaedia of International Commercial Litigation* (Wolters Kluwer 2022) 7.

⁹³¹ The information is based on the English translation of DR law in Rafael Carlos del Rosal Carmona, ‘National Statutes and Provisions: Dominican Republic: Dominican Republic’ in Basedow and others. For a country report see José Carlos Fernández Rozas, ‘National Reports: Dominican Republic’ in Basedow and others.

Possibility of Abstention

England & Wales

In England and Wales, ICA-Jurisdiction depends on the proper execution of service of process. Rules on ICA-Jurisdiction are therefore essentially rules of service. The law of England and Wales distinguishes service inside and outside of the jurisdiction.⁹³²

Service in:

A court may exercise jurisdiction over a defendant that is duly served with process while present (if only temporarily) in England and Wales.⁹³³

The courts have jurisdiction over companies that have a registered office in England and Wales.⁹³⁴ In the case of overseas companies, process may be served ‘by leaving it at, or sending it by post to, the company’s registered address’⁹³⁵ or ‘by leaving it at, or sending it by post to, the registered address of any person resident in the U.K. who is authorised to accept service of documents on the company’s behalf’.⁹³⁶ Section 6.9 CPR additionally provides for Limited Liability Partnerships, Corporations and Companies that service may be made at ‘any place of business of the [Limited Liability Partnership, Corporation or Company] within the jurisdiction which has a real connection with the claim’.⁹³⁷

For claims related to a contract concluded by the defendant’s agent within the jurisdiction, process may also be served on the agent (regarding the principle) if certain conditions are met.⁹³⁸

⁹³² Sir Simon Bryan and others, ‘England and Wales’ in Anthony Colman and Simon Bryan (eds), *Encyclopaedia of International Commercial Litigation* (Wolters Kluwer 2022) 15; Andrew Dickinson, ‘National Reports: United Kingdom’ in Basedow and others.

⁹³³ Ibid.

⁹³⁴ Section 1139 (1) Companies Act 2006.

⁹³⁵ Section 1139 (2) (b) Companies Act 2006.

⁹³⁶ Section 1139 (2) (b) Companies Act 2006.

⁹³⁷ Section 6.9 (2) Civil Procedure Rules 1998.

⁹³⁸ Section 6.12 Civil Procedure Rules 1998; Bryan and others (n 932) 15.

Irrespective of the foregoing requirements, specific statutes may vest a court with jurisdiction.⁹³⁹ The defendant may also agree to the jurisdiction of the court⁹⁴⁰ or submit to its jurisdiction in various ways.⁹⁴¹

Service out:

If a plaintiff seeks to serve a defendant outside of the jurisdiction, it has to apply to the court for service out (subject to certain exceptions where this is not the case). The court's decision is discretionary. At least one of the grounds listed in Section 3.1 of the Practice Directive 6B must be fulfilled. For the grounds for service out reference is made to

<<https://www.gov.uk/guidance/civil-procedure-rules/practice-direction-6b-service-out-of-the-jurisdiction>>.

In any event, the court may still stay the proceeding on the basis of the doctrine of *forum non conveniens*, if another forum is available, in which the case may be tried (i) more suitably for the interests of all the parties and (ii) the ends of justice.⁹⁴²

Exorbitant:

AL	TP	P	A	DB
x	x			

Semi-exorbitant:

R	N	TP+	P+	A+

Possibility of Abstention

⁹³⁹ Bryan and others (n 932) 15; Stuart Sime, *A Practical Approach to Civil Procedure* (Oxford University Press 2020) mn 6.14; Permanent Bureau of the HCCH, 'Comparative Table on Grounds of Jurisdiction' (January 2015), available at <<https://assets.hcch.net/docs/03c39e9f-878b-400d-a359-e70b7937edde.pdf>>, accessed on 31 January 2025.

⁹⁴⁰ Bryan and others (n 932) 16.

⁹⁴¹ Ibid 16; Andrew Dickinson, 'National Reports: United Kingdom' in Basedow and others.

⁹⁴² As per its classic formulation in *Spiliada Maritime Corporation v. Consulex Ltd.* [1987] A.C. 460; see also Von Mehren and Gottschalk (n 35) 267, 269.

Arab Republic Egypt⁹⁴³

Exorbitant:

AL	TP	P	A	DB

Semi-exorbitant:

R	N	TP+	P+	A+

Estonia⁹⁴⁴

Exorbitant:

AL	TP	P	A	DB
			x	

Semi-exorbitant:

R	N	TP+	P+	A+
	x			

Common:

C & S	D	C & P	C	LBA	L
x	x	x	x	x	x

⁹⁴³ The information is based on the country report Fathi Waly, 'Egypt' in Piet Taelman (ed), *International Encyclopaedia of Laws: Civil Procedure* (Wolters Kluwer 2020) 39.

⁹⁴⁴ The information is based on the English translation of Estonian law provided in the Estonian Ministry of Justice, <www.riigiteataja.ee/en/eli/514022014002/consolide>, accessed on 4 March 2023. For a country report see Liis Halling, 'National Reports: Estonia' in Basedow and others; for the original version of Tsiviilkohtumenetluse seadustik (The State Gazette, 'Riigi Teataja' I 2005, 26, 197) see <<https://www.riigiteataja.ee/akt/106022014015>>, accessed on 4 March 2023.

Federal Democratic Republic of Ethiopia⁹⁴⁵

Exorbitant:

AL	TP	P	A	DB

Semi-exorbitant:

R	N	TP+	P+	A+

Common:

C & S	D	C & P	C	LBA	L
x	x	x			x

French Republic⁹⁴⁶

Exorbitant:

AL	TP	P	A	DB
		x		

Semi-exorbitant:

R	N	TP+	P+	A+

⁹⁴⁵ The information is based on the country report by Mohammed Abdo, 'Ethiopia' in Piet Taelman (ed), *International Encyclopaedia of Laws: Civil Procedure* (Wolters Kluwer 2015) 70; see also Mekuria Tsegaye Setegn, 'Legislative Inaction and Judicial Legislation under the Ethiopian Private International Law Regime: An Analysis of Selected Decisions of the Federal Supreme Court's Cassation Division' (2020) 16 J Priv Int'l L 112.

⁹⁴⁶ The information is based on the consolidated legislation, available at <https://www.legifrance.gouv.fr/>, accessed on 4 March 2023. For a country report see Gilles Cuniberti, 'National Reports: France' in Basedow and others; see also Elie Kleiman and Claire Pauly, 'France' in Anthony Colman and Simon Bryan (eds), *Encyclopaedia of International Commercial Litigation* (Wolters Kluwer 2022) 14.

Republic of The Gambia⁹⁴⁷

Exorbitant:

AL	TP	P	A	DB
x	x			

Semi-exorbitant:

R	N	TP+	P+	A+

Possibility of Abstention

Federal Republic of Germany⁹⁴⁸

Exorbitant:

AL	TP	P	A	DB

Semi-exorbitant:

R	N	TP+	P+	A+
				x

Common:

C & S	D	C & P	C	LBA	L
x	x	x	x	x	x

⁹⁴⁷ Oppong (n 913) 47.

⁹⁴⁸ The information is based on sections 12-40 of the German Zivilprozessordnung (dZPO) and the country reports by Jan von Hein, 'National Reports: Germany' in Basedow and others and Claudia Krapfl and Stephan Wilske, 'Germany' in Anthony Colman and Simon Bryan (eds), *Encyclopaedia of International Commercial Litigation* (Wolters Kluwer 2024) 7: 'According to its literal wording, section 23 ZPO contains no minimum requirements as to the value of the prospective defendant's assets or any other connection of the dispute to Germany. However, German courts have repeatedly held that for a German court to assume jurisdiction based on this provision, the subject matter of the dispute must have a 'sufficient domestic link' to Germany, thereby limiting the otherwise wide wording of section 23 ZPO (except for matters relating to enforcement of foreign judgments). German courts have found that a sufficient domestic link exists, for example, when the plaintiff was a German resident, when contract negotiations took place in Germany, or when contractual obligations of one of the parties were to be performed in Germany'.

Republic of Ghana⁹⁴⁹

Exorbitant:

AL	TP	P	A	DB
x	x			x

Semi-exorbitant:

R	N	TP+	P+	A+

Possibility of Abstention

Hellenic Republic⁹⁵⁰

Exorbitant:

AL	TP	P	A	DB
			x	

Semi-exorbitant:

R	N	TP+	P+	A+

Hungary⁹⁵¹

Exorbitant:

AL	TP	P	A	DB
			x	

⁹⁴⁹ The information is based on the country report by Richard Frimpong Oppong, 'National Reports: Ghana' in Basedow and others; see also Oppong (n 913) 49.

⁹⁵⁰ The information is based on the English translation in Constantin Taliadoros, 'National Statutes and Provisions: Greece: Hellenic Republic' in Basedow and others. For a country report see Ioanna Thoma, 'National Reports: Greece' in Basedow and others; see also Alkistis Christofilou Partner and Viktoria Chatzara, 'Greece' in Anthony Colman and Simon Bryan (eds), *Encyclopaedia of International Commercial Litigation* (Wolters Kluwer 2022) 5.

⁹⁵¹ The information is based on the country report by Balázs Fazakas, 'Hungary' in Anthony Colman and Simon Bryan (eds), *Encyclopaedia of International Commercial Litigation* (Wolters Kluwer 2024) 7.

Iceland⁹⁵²

Exorbitant:

AL	TP	P	A	DB

Semi-exorbitant:

R	N	TP+	P+	A+
		x	x	

Common:

C & S	D	C & P	C	LBA	L
x	x	x	x	x	x

Republic of India⁹⁵³

Exorbitant:

AL	TP	P	A	DB

Semi-exorbitant:

R	N	TP+	P+	A+

⁹⁵² The information is based on the English translation of Artt 34-43 of the Code of Civil Procedure of Iceland in Eiríkur Elís Þorlákss, 'National Statutes and Provisions: Iceland: Republic of Iceland' in Basedow and others; see also the translation available at <<https://www.government.is/library/01-Ministries/Ministry-of-Justice/Code%20of%20Civil%20Procedure%20No.%2091,%2031%20December%201991..pdf>>, accessed on 4 March 2023. For a country report see Eiríkur Elís Thorláksson, 'National Reports: Iceland' in Basedow and others.

⁹⁵³ The information is based on the text of the Civil Procedure Code, available at <https://legislative.gov.in/sites/default/files/A1908-05_0.pdf>, accessed on 4 March 2023. For country reports see Tushar Kumar Biswas, 'National Reports: India' in Basedow and others, K.B. Agrawal, 'India' in Piet Taelman (ed), *International Encyclopaedia of Laws: Civil Procedure* (Wolters Kluwer 2019) 99 and Gourab Banerji, 'India' in Anthony Colman and Simon Bryan (eds), *Encyclopaedia of International Commercial Litigation* (Wolters Kluwer 2022) 10.

* Indian courts do not recognize jurisdiction agreements in their favour if their jurisdiction is not otherwise established. However, they will honour such agreements in favour of foreign courts (Tushar Kumar Biswas, 'National Reports: India' in Basedow and others with reference to *Modi Entertainment Network and Another v WSG Cricket PTE* [Ltd 2003 (1) SCR 480]).

Common:

C & S	D	C & P	C	LBA	L
*	x	x	x		x

Possibility of Abstention

Republic of Indonesia⁹⁵⁴

Exorbitant:

AL	TP	P	A	DB

Semi-exorbitant:

R	N	TP+	P+	A+
			x	

Common:

C & S	D	C & P	C	LBA	L
x	x				x

Islamic Republic of Iran⁹⁵⁵

Exorbitant:

AL	TP	P	A	DB
		x	x	

⁹⁵⁴ The information is based on the country report by Yu Un Oppusunggu and Gary F Bell, 'National Reports: Indonesia' in Basedow and others and Sudargo Gautama, 'International Civil Procedure in Indonesia' (1996) 6 Asian Yearbook of International Law 87. In addition, see the original language version of the Herziene Indonesisch Reglement (Revised Indonesian Regulation (Stb 1941-44) (HIR)), available at <[https://m.hukumonline.com/pusatdata/detail/27228/nprt/lt49f130360d8fe/herzien-inlandsch-reglement-\(h.i.r\)-\(s.-1941-44\)-reglemen-indonesia-yang-diperbaharui-\(r.i.b.\)](https://m.hukumonline.com/pusatdata/detail/27228/nprt/lt49f130360d8fe/herzien-inlandsch-reglement-(h.i.r)-(s.-1941-44)-reglemen-indonesia-yang-diperbaharui-(r.i.b.))>, accessed on 4 March 2023.

⁹⁵⁵ The information is based on the English translation in Nadjma Yassari 'National Statutes and Provisions: Iran: Islamic Republic of Iran' in Basedow and others. For a country report see Nadjma Yassari, 'National Reports: Iran' in Basedow and others. See also Procedure of general and revolutionary courts. Law of 21 Jan 1379 (2000) MQ1379 pg. 177 in Gazette 11 Feb 1379, <<https://wipo.lex.wipo.int/en/text/324556>>, accessed on 4 March 2023.

Semi-exorbitant:

R	N	TP+	P+	A+
			x	

Israel⁹⁵⁶

Exorbitant:

AL	TP	P	A	DB
x	x			

Semi-exorbitant:

R	N	TP+	P+	A+

Common:

C & S	D	C & P	C	LBA	L
x	x				x

Possibility of Abstention

Republic of Italy⁹⁵⁷

Exorbitant:

AL	TP	P	A	DB
				x

⁹⁵⁶ For country reports see Talia Einhorn, 'National Reports: Israel' in Basedow and others, Ido Baum Stephen Goldstein, Nili Karako-Eyal, 'Israel' in Piet Taelman (ed), *International Encyclopaedia of Laws: Civil Procedure* (Wolters Kluwer 2017) 70 and Eric Sherby, 'Israel' in Anthony Colman and Simon Bryan (eds), *Encyclopaedia of International Commercial Litigation* (Wolters Kluwer 2023) 11.

⁹⁵⁷ The information is based on the English translation in Alberto Montanari and Vincent A. Narcisi 'National Statutes and Provisions: Italy: Italian Republic' in Basedow and others. For country reports see Andrea Bonomi and Tito Ballarino, 'National Reports: Italy' in Basedow and others, Michele de Meo and Daniela Jouvenal Long, 'Italy' in Anthony Colman and Simon Bryan (eds), *Encyclopaedia of International Commercial Litigation* (Wolters Kluwer 2022) 10 and Michele Angelo Lupoi, 'Italy' in Piet Taelman (ed), *International Encyclopaedia of Laws: Civil Procedure* (Wolters Kluwer 2018) 88.

Semi-exorbitant:

R	N	TP+	P+	A+

Common:

C & S	D	C & P	C	LBA	L
x	x	x	x	x	x

Japan⁹⁵⁸

Exorbitant:

AL	TP	P	A	DB
			x	

Semi-exorbitant:

R	N	TP+	P+	A+

Possibility of Abstention

Jersey⁹⁵⁹

Exorbitant:

AL	TP	P	A	DB
x	x			

⁹⁵⁸ The information is based on the English translation by the Japanese Law Translation Database System, available at <<https://www.japaneselawtranslation.go.jp/en/laws/view/4421/en>> (up to date to 4 July 2023), accessed on 4 July 2023; for country reports see Toshiyuki Kono, 'National Reports: Japan' in Basedow and others and Akiko Yamakawa, 'Japan' in Anthony Colman and Simon Bryan (eds), *Encyclopaedia of International Commercial Litigation* (Wolters Kluwer 2023) 13 et seq.

⁹⁵⁹ The information is based on the country report Nick Williams, 'Jersey' in Anthony Colman and Simon Bryan (eds), *Encyclopaedia of International Commercial Litigation* (Wolters Kluwer 2016) 6.

Semi-exorbitant:

R	N	TP+	P+	A+

Possibility of Abstention

Hashemite Kingdom of Jordan⁹⁶⁰

Exorbitant:

AL	TP	P	A	DB

Semi-exorbitant:

R	N	TP+	P+	A+

Republic of Kazakhstan⁹⁶¹

Exorbitant:

AL	TP	P	A	DB
		x	x	

Semi-exorbitant:

R	N	TP+	P+	A+

⁹⁶⁰ The information is based on the country report Khaled Saqqaf, 'Jordan' in Anthony Colman and Simon Bryan (eds), *Encyclopaedia of International Commercial Litigation* (Wolters Kluwer 2015) 2.

⁹⁶¹ The information is based on the English translation provided by the Ministry of Justice of the Republic of Kazakhstan, <<http://adilet.zan.kz/eng/docs/K1500000377>> accessed on 5 March 2023; see also Farkhad Karagussov 'National Statutes and Provisions: Kazakhstan: Republic of Kazakhstan' in Basedow and others. For a country report see Farkhad Karagussov, 'National Reports: Kazakhstan' in Basedow and others and Kuben Abzhanov and Alexander Korobeinikov, 'Kazakhstan' in Anthony Colman and Simon Bryan (eds), *Encyclopaedia of International Commercial Litigation* (Wolters Kluwer 2020) 4.

Republic of Kenya⁹⁶²

Exorbitant:

AL	TP	P	A	DB
x	x			

Semi-exorbitant:

R	N	TP+	P+	A+

Possibility of Abstention

Republic of Korea⁹⁶³

Exorbitant:

AL	TP	P	A	DB

Semi-exorbitant:

R	N	TP+	P+	A+

Republic of Lebanon⁹⁶⁴

Exorbitant:

AL	TP	P	A	DB

⁹⁶² The information is based on the country report Oppong (n 913) 54.

⁹⁶³ The information is based on the country report Tae Hee Lee, 'Korea' in Anthony Colman and Simon Bryan (eds), *Encyclopaedia of International Commercial Litigation* (Wolters Kluwer 2023) 9.

⁹⁶⁴ The information is based on the English translation in Marie-Claude Najm Kobeh 'National Statutes and Provisions: Lebanon: Lebanese Republic' in Basedow and others. For a country report see Nadjma Yassari, 'National Reports: Iran' in Basedow and others.

Semi-exorbitant:

R	N	TP+	P+	A+
	x			

Common:

C & S	D	C & P	C	LBA	L
x	x	x	x	x	x

Lesotho⁹⁶⁵

Exorbitant:

AL	TP	P	A	DB

Semi-exorbitant:

R	N	TP+	P+	A+
			x	

Macau⁹⁶⁶

Exorbitant:

AL	TP	P	A	DB
				x

Semi-exorbitant:

R	N	TP+	P+	A+
	x		x	

⁹⁶⁵ The information is based on the country report Oppong (n 913) 71.

⁹⁶⁶ The information is based on the country reports Guangjian Tu, 'National Reports: Macau' in Basedow and others and David Lai, 'Macau' in Anthony Colman and Simon Bryan (eds), *Encyclopaedia of International Commercial Litigation* (Wolters Kluwer 2019) 45. For the Portuguese version of the Código de Processo Civil, Decreto-Lei n.º 55/99/M see <<https://bo.io.gov.mo/bo/i/99/40/codprocivpt/codprociv0001.asp#t1a1>>, accessed on 5 March 2023.

Common:

C & S	D	C & P	C	LBA	L
x	x	x	x		x

Mali⁹⁶⁷

Exorbitant:

AL	TP	P	A	DB
				x

Semi-exorbitant:

R	N	TP+	P+	A+

Mozambique⁹⁶⁸

Exorbitant:

AL	TP	P	A	DB
				x

Semi-exorbitant:

R	N	TP+	P+	A+
	x	x	x	

Namibia⁹⁶⁹

Exorbitant:

AL	TP	P	A	DB

⁹⁶⁷ The information is based on the text of the Code of Civil Procedure, available at <<https://sgbv-ihnda.uwazi.io/en/entity/524aqdrg3og?searchTerm=civil%20procedure&page=2>>, accessed on 18 March 2023.

⁹⁶⁸ The information is based on the English translation provided by Dulce Lopes 'National Statutes and Provisions: Mozambique: Republic of Mozambique' in Basedow and others. For a country report see Dário Moura Vicente, 'National Reports: Mozambique' in Basedow and others.

⁹⁶⁹ The information is based on the country report Oppong (n 913) 72.

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Semi-exorbitant:

R	N	TP+	P+	A+
			x	

Federal Republic of Nigeria⁹⁷⁰

Exorbitant:

AL	TP	P	A	DB
x				x

Semi-exorbitant:

R	N	TP+	P+	A+
			x	

Common:

C & S	D	C & P	C	LBA	L
x	x	x	x		x

Possibility of Abstention

Kingdom of Norway⁹⁷¹

Exorbitant:

AL	TP	P	A	DB

⁹⁷⁰ The information is based on the country reports Richard Frimpong Oppong, 'National Reports: Nigeria' in Basedow and others and Caroline Omoachawe Oba, 'Nigeria' in Piet Taelman (ed), *International Encyclopaedia of Laws: Civil Procedure* (Wolters Kluwer 2021)133; see also Oppong (n 913) 56.

⁹⁷¹ The information is based on the country reports by Giuditta Cordero-Moss, 'National Reports: Norway' in Basedow and others and Anna Nylund, 'Norway' in Piet Taelman (ed), *International Encyclopaedia of Laws: Civil Procedure* (Wolters Kluwer 2022) 53.

Semi-exorbitant:

R	N	TP+	P+	A+
			x	

Possibility of Abstention

Islamic Republic of Pakistan⁹⁷²

Exorbitant:

AL	TP	P	A	DB

Semi-exorbitant:

R	N	TP+	P+	A+

Possibility of Abstention

Republic of Peru⁹⁷³

Exorbitant:

AL	TP	P	A	DB

Semi-exorbitant:

R	N	TP+	P+	A+

⁹⁷² The information is based on the text of the Civil Procedure Code, available at <https://khalidzafar.com/wp-content/files_mf/1527158634CivilProcedureCode1908.pdf>, accessed on 6 March 2023 and the country report by Farrukh Zia Shaikh, 'Pakistan' in Anthony Colman and Simon Bryan (eds), *Encyclopaedia of International Commercial Litigation* (Wolters Kluwer 2022) 8.

⁹⁷³ The information is based on the English translation in Jimena María Solar Alvarez 'National Statutes and Provisions: Peru: Republic of Peru' in Basedow and others. For a country report see Aurelio López-Tarruella Martínez, 'National Reports: Peru' in Basedow and others; for the an up-to-date version (2020) of the Civil Code see < <https://lpderecho.pe/codigo-civil-peruano-realmente-actualizado/> >, accessed on 6 March 2023.

Common:

C & S	D	C & P	C	LBA	L
x	x	x	x		x

Republic of Poland⁹⁷⁴

Exorbitant:

AL	TP	P	A	DB
			x	

Semi-exorbitant:

R	N	TP+	P+	A+
	x			

Common:

C & S	D	C & P	C	LBA	L
x	x	x	x	x	x

State of Qatar⁹⁷⁵

Exorbitant:

AL	TP	P	A	DB

Semi-exorbitant:

R	N	TP+	P+	A+

⁹⁷⁴ The information is based on the country report Andrzej Mączyński, 'National Reports: Poland' in Basedow and others, Michal Gruca, 'Poland' in Anthony Colman and Simon Bryan (eds), *Encyclopaedia of International Commercial Litigation* (Wolters Kluwer 2015) 7 and the English translation available at <<https://www.global-regulation.com/translation/poland/7049655/act-of-17-november-1964%252c-the-code-of-civil-procedure.html>>, accessed on 6 March 2023.

⁹⁷⁵ The information is based on the country report Hani Al Naddaf, 'Qatar' in Anthony Colman and Simon Bryan (eds), *Encyclopaedia of International Commercial Litigation* (Wolters Kluwer 2022) 7.

Romania⁹⁷⁶

Exorbitant:

AL	TP	P	A	DB
			x	x

Semi-exorbitant:

R	N	TP+	P+	A+
	x			

Common:

C & S	D	C & P	C	LBA	L
x	x	x	x	x	x

Russian Federation⁹⁷⁷

Exorbitant:

AL	TP	P	A	DB
x		X (in some instances)	x	

Semi-exorbitant:

R	N	TP+	P+	A+

⁹⁷⁶The information is based on the English translation provided by Nicolae-Dragos Ploesteanu 'National Statutes and Provisions: Romania' in in Basedow and others. For a country report see Andra Cotiga-Raccach, 'National Reports: Romania' in Basedow and others; see also Viorel Mihai Ciobanu and Claudia Ana Costea, 'Romania' in Piet Taelman (ed), *International Encyclopaedia of Laws: Civil Procedure* (Wolters Kluwer 2016) 101. See for the original language version Codul de procedură civilă. Lege 134 of 1 Jul 2010. Promulgated by Presidential decree 773 of 30 Jun 2010 in Monitorul Oficial 15 Jul 2010 no. 485, <<http://legislatie.just.ro/Public/DetaliiDocument/140271>>, accessed 6 March 2023.

⁹⁷⁷The information is based on the English translation of the Civil Procedure Code by NPP Garant-Service reprinted in 'National Statutes and Provisions: Russian Federation' in Basedow and others and the country reports Asoskov, 'National Reports: Russian Federation' in Basedow and others and Alexei Panich and Maria Dolotova, 'Russian Federation' in Anthony Colman and Simon Bryan (eds), *Encyclopaedia of International Commercial Litigation* (Wolters Kluwer 2022) 16; see also Permanent Bureau of the HCCH, 'Comparative Table on Grounds of Jurisdiction' (January 2015), available at <<https://assets.hcch.net/docs/03c39e9f-878b-400d-a359-e70b7937edde.pdf>>, accessed on 6 March 2023.

Kingdom of Saudi Arabia⁹⁷⁸

Exorbitant:

AL	TP	P	A	DB

Semi-exorbitant:

R	N	TP+	P+	A+

Common:

C & S	D	C & P	C	LBA	L
x	x	x	x		x

Republic of Sierra Leone⁹⁷⁹

Exorbitant:

AL	TP	P	A	DB
x				

Semi-exorbitant:

R	N	TP+	P+	A+

Possibility of Abstention

⁹⁷⁸ The information is based on the English translation by the Embassy of Saudi Arabia in the U.S., available at <<https://www.saudiembassy.net/law-procedure-shariah-courts>>, accessed on 6 March 2023. For a country report see Hilmar Krüger, 'National Reports: Saudi Arabia' in Basedow and others.

⁹⁷⁹ Oppong (n 913) 60.

Slovak Republic⁹⁸⁰

Exorbitant:

AL	TP	P	A	DB

Semi-exorbitant:

R	N	TP+	P+	A+

Common:

C & S	D	C & P	C	LBA	L
x	x	x	x	x	x

Republic of Slovenia⁹⁸¹

Exorbitant:

AL	TP	P	A	DB

Semi-exorbitant:

R	N	TP+	P+	A+
x				x

⁹⁸⁰ The information is based on the English translation of the Act No 97/1963 of 4 December 1963 (Act on Private International Law and Procedural Law), as amended, in Natalia Stefankova, 'National Statutes and Provisions: Slovakia: Slovak Republic' in Basedow and others as well as the translation available at <<http://jafbase.fr/docUE/Slovaquie/LoiDIP.pdf>>, accessed on 12 March 2023, and the country reports by Natalia Stefankova, 'National Reports: Slovakia' in Basedow and others; Katarína Gešková, 'Slovakia' in Piet Taelman (ed), *International Encyclopaedia of Laws: Civil Procedure* (Wolters Kluwer 2015) 58.

⁹⁸¹ The information is based on the English translation of Law of 8 Jul 1999 (Act on Private International Law and Procedural Law), Uradni list Republike Slovenije 13 Jul 1999 no. 1, in Jerca Kramberger Škerl, 'National Statutes and Provisions: Slovenia: Republic of Slovenia' in Basedow and others and the country reports by Jerca Kramberger Škerl, 'National Reports: Slovenia' in Basedow and others, Aleš Galic, 'Slovenia' in Piet Taelman (ed), *International Encyclopaedia of Laws: Civil Procedure* (Wolters Kluwer 2022) 78 and Urban Vrtacnik and others, 'Slovenia' in Anthony Colman and Simon Bryan (eds), *Encyclopaedia of International Commercial Litigation* (Wolters Kluwer 2022) 13.

Common:

C & S	D	C & P	C	LBA	L
x	x	x	x	x	x

Possibility of Abstention

South Africa⁹⁸²

The rules of ICA-Jurisdiction are largely based on South African common law, which is shaped in particular by continental civil law (especially Roman-Dutch law) and English law.⁹⁸³ In general, the South African courts require a sufficiently strong connection between the forum and the parties or the dispute.⁹⁸⁴ South African common law distinguishes between persons domiciled or resident in a specific South African court's jurisdictional area (*incola*) and persons for which this is not the case (either local or foreign peregrine depending on whether the person is domiciled in another South African court's jurisdictional area or abroad).⁹⁸⁵

Jurisdiction of the High Court (which handles most of the private international law matters⁹⁸⁶):

Money claims:

For *incolas* and *local peregrines*, the South African courts exercise jurisdiction pursuant to the principle of *actor sequitur forum rei* or at the place where the cause of action arose.⁹⁸⁷ For foreign peregrines, the South African courts may exercise jurisdiction at the place where the plaintiff is an *incola* or where the cause of action arose. However, in both cases attachment of the defendant's property in South Africa is a further requirement. If attachment is not possible, service of process within South Africa together with an 'an adequate connection between the action and the court's jurisdictional area' is sufficient as well.⁹⁸⁸

⁹⁸² The information is based on country reports by Elsabe Schoeman, 'National Reports: South Africa' in Basedow and others, Cassim and Kelbrick (n 758) 44-50, Miles Carter and others, 'South Africa' in Anthony Colman and Simon Bryan (eds), *Encyclopaedia of International Commercial Litigation* (Wolters Kluwer 2016) 6 and Oppong (n 913) 73.

⁹⁸³ Elsabe Schoeman, 'National Reports: South Africa' in Basedow and others.

⁹⁸⁴ Ibid.

⁹⁸⁵ Cassim and Kelbrick (n 758) 44.

⁹⁸⁶ Elsabe Schoeman, 'National Reports: South Africa' in Basedow and others.

⁹⁸⁷ Cassim and Kelbrick (n 758) 45.

⁹⁸⁸ Ibid.

Property claims:

The South African courts have jurisdiction regarding claims concerning movable and immovable property if the location of property is in South Africa.⁹⁸⁹

Exorbitant:

AL	TP	P	A	DB

Semi-exorbitant:

R	N	TP+	P+	A+
		x	x	

Kingdom of Spain⁹⁹⁰

Exorbitant:

AL	TP	P	A	DB

Semi-exorbitant:

R	N	TP+	P+	A+

Common:

C & S	D	C & P	C	LBA	L
x	x	x	x	x	x

⁹⁸⁹ Elsabe Schoeman, 'National Reports: South Africa' in Basedow and others; Cassim and Kelbrick (n 758) 45.

⁹⁹⁰ The information is based on the English translation in Pedro A. de Miguel Asensio, 'National Reports: Sweden' in 'National Statutes and Provisions: Spain: Kingdom of Spain' in Basedow and others and the English translation provided by WIPO, <<https://wipo.lex.wipo.int/en/text/506887>>, accessed on 14 March 2023. For country reports see Pedro de Miguel Asensio 'National Reports: Spain' in Basedow and others, Fernando Castillo Rigabert, 'Spain' in Piet Taelman (ed), *International Encyclopaedia of Laws: Civil Procedure* (Wolters Kluwer 2018) 37, Jesús Remón Peñalver and others, 'Spain' in Anthony Colman and Simon Bryan (eds), *Encyclopaedia of International Commercial Litigation* (Wolters Kluwer 2022) 10 and Permanent Bureau of the HCCH, 'Comparative Table on Grounds of Jurisdiction' (January 2015), available at <<https://assets.hcch.net/docs/03c39e9f-878b-400d-a359-e70b7937edde.pdf>>, accessed on 14 March 2023.

Sudan⁹⁹¹

Exorbitant:

AL	TP	P	A	DB

Semi-exorbitant:

R	N	TP+	P+	A+

Sweden⁹⁹²

Exorbitant:

AL	TP	P	A	DB
			x	

Semi-exorbitant:

R	N	TP+	P+	A+

Common:

C & S	D	C & P	C	LBA	L
x	x	x	x	x	x

Possibility of Abstention

⁹⁹¹ The information is based on the text of the Code of Civil Procedure, available at <<https://sgbv-ihrda.uwazi.io/en/entity/31amytfaopr?page=51>>, accessed on 18 March 2023.

⁹⁹² The information is based on the English translation by the Government of Sweden available at <https://www.government.se/contentassets/a1be9e99a5c64d1bb93a96ce5d517e9c/the-swedish-code-of-judicial-procedure-ds-1998_65.pdf>, accessed on 14 March 2023 and the country reports Michael Hellner, 'National Reports: Sweden' in Basedow and others, Foerster and Razani (n 562) 5 and Lindell (n 562) 77. For the original language version see <https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/rattegangsbalk-1942740_sfs-1942-740>, accessed on 14 March 2023.

Thailand⁹⁹³

Exorbitant:

AL	TP	P	A	DB
		x	x	

Semi-exorbitant:

R	N	TP+	P+	A+

Republic of Tunisia⁹⁹⁴

Exorbitant:

AL	TP	P	A	DB

Semi-exorbitant:

R	N	TP+	P+	A+

Turkey⁹⁹⁵

Exorbitant:

AL	TP	P	A	DB

⁹⁹³ The information is based on the English translation available at <https://www.imolin.org/doc/amlid/Thailand_The%20Civil%20Procedure%20Code.pdf>, accessed on 14 March 2023 and the country reports Kittisak Prokati and Akawat Laowonsiri, 'National Reports: Thailand' in Basedow and others and Stephen Frost, 'Thailand' in Anthony Colman and Simon Bryan (eds), *Encyclopaedia of International Commercial Litigation* (Wolters Kluwer 2022) 7. For the original language version see <<https://www.krisdika.go.th/librarian/get?sysid=570093&ext=htm>>, accessed on 14 March 2023.

⁹⁹⁴ The information is based on the country report Imen Gallala-Arndt, 'National Reports: Tunisia' in Basedow and others.

⁹⁹⁵ Regarding the Code of Private International Law and International Civil Procedure 2007 the information is based on the English translation in N. Ayşe Odman Boztosun in 'National Statutes and Provisions: Turkey: Republic of Turkey' in Basedow and others. Regarding the Code of Civil Procedure 2011 the information is based on the country report Duygu Damar 'National Reports: Turkey' in Basedow and others. See also Can Güner and others, 'Turkey' in Anthony Colman and Simon Bryan (eds), *Encyclopaedia of International Commercial Litigation* (Wolters Kluwer 2022) 6.

Semi-exorbitant:

R	N	TP+	P+	A+
			x ⁹⁹⁶	

United Arab Emirates⁹⁹⁷

Exorbitant:

AL	TP	P	A	DB

Semi-exorbitant:

R	N	TP+	P+	A+

Ukraine⁹⁹⁸

Exorbitant:

AL	TP	P	A	DB
		x ⁹⁹⁹	x	x

Semi-exorbitant:

R	N	TP+	P+	A+

⁹⁹⁶ This only applies to claims regarding the infringement of personality rights.

⁹⁹⁷ The information is based on the English translation of the Civil Procedure Code at <<https://legaladvice.me.com/legislation/143/uae-federal-law-11-of-1992-concerning-issuance-of-civil-procedures-code>>, accessed on 14 March 2023 and the country report Hassan Arab, 'United Arab Emirates' in Anthony Colman and Simon Bryan (eds), *Encyclopaedia of International Commercial Litigation* (Wolters Kluwer 2018) 7.

⁹⁹⁸ The information is based on the English translation in William E. Butler in 'National Statutes and Provisions: Ukraine: Ukraine' in Basedow and others. For the original language version see <<https://zakon.rada.gov.ua/laws/main/2709-15#Text>>, accessed on 14 March 2023. For a country report see Anatoliy Dovgert and Anatoliy Dovgert 'National Reports: Ukraine' in Basedow and others, Ihor Siusel and Nataliya Lipska, 'Ukraine' in Anthony Colman and Simon Bryan (eds), *Encyclopaedia of International Commercial Litigation* (Wolters Kluwer 2022) 4 and Anna Tsirat and Gennadii Tsirat, 'Ukraine' in Piet Taelman (ed), *International Encyclopaedia of Laws: Civil Procedure* (Wolters Kluwer 2019) 77.

⁹⁹⁹ For claims in damages by a natural person.

Uruguay¹⁰⁰⁰

Exorbitant:

AL	TP	P	A	DB
x				

Semi-exorbitant:

R	N	TP+	P+	A+
	x			

United States of America¹⁰⁰¹

U.S. law traditionally distinguishes between *in rem*, *quasi in rem* and *in personam* jurisdiction.¹⁰⁰² If a court has jurisdiction *in personam*, it has authority over the defendant as a person. It may impose an obligation on the defendant, which is enforceable against the defendant and its assets.¹⁰⁰³ On the other hand, '[a] judgment in rem affects the interests of all persons in designated property'.¹⁰⁰⁴ Jurisdiction *quasi in rem* 'affects the interests of particular persons in designated property. The latter is of two types. In one, the plaintiff is seeking to secure a preexisting claim in the subject property and to extinguish or establish the nonexistence of similar interests of particular persons. In the other, the plaintiff seeks to apply what he concedes to be the property of the defendant to the satisfaction of a claim against him'.¹⁰⁰⁵

State laws as well as federal law regulate bases of ICA-jurisdiction.¹⁰⁰⁶ State statutes either list specific grounds or grant ICA-Jurisdiction to the full extent allowed under the U.S. Constitution and/or the state constitution.¹⁰⁰⁷ Federal courts may exercise ICA-Jurisdiction *inter alia*

¹⁰⁰⁰ The information is based on the text of the 2020 Private International Law Act, <<http://www.diputados.gub.uy/wp-content/uploads/2020/11/00130.pdf>>, accessed on 14 March 2023.

¹⁰⁰¹ For an overview see Permanent Bureau of the HCCH, 'Comparative Table on Grounds of Jurisdiction' (January 2015), available at <<https://assets.hcch.net/docs/03c39e9f-878b-400d-a359-e70b7937edde.pdf>>, accessed on 16 February 2021.

¹⁰⁰² American Law Institute, *Restatement of the Law, Fourth, the Foreign Relations Law of the United States: Selected Topics in Treaties, Jurisdiction, and Sovereign Immunity* : §§ 301-313; 401-464; 481-490, *Tables and Index* (American Law Institute Publishers 2018) (n 99) § 422, Comment a.

¹⁰⁰³ *Shaffer v. Heitner*, 433 U.S. 186 (1977) 199; *Hanson v. Denckla*, 357 U.S. 235 (1958) FN 12; Born and Rutledge (n 97) 79.

¹⁰⁰⁴ *Hanson v. Denckla*, 357 U.S. 235 (1958) FN 12.

¹⁰⁰⁵ *Ibid*; see also American Law Institute § 422, Comment a with reference to *Shaffer v. Heitner*, 433 U.S. 186 (1977) 207.

¹⁰⁰⁶ Born and Rutledge (n 97) 79.

¹⁰⁰⁷ *Ibid* 80.

according to the rules of the state they are located in.¹⁰⁰⁸ All bases of ICA-Jurisdiction are subject to the following constitutional limits:¹⁰⁰⁹

The constitutional limits derive from the Fifth (for federal cases) and Fourteenth (for state cases) Amendment of the U.S. Constitution, which contain the Due Process Clause (‘nor be deprived of life, liberty, or property, without due process of law’; ‘nor shall any state deprive any person of life, liberty, or property, without due process of law’).¹⁰¹⁰ In *International Shoe v. State of Washington* (1945), the U.S. Supreme Court held that the defendant ‘if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend “traditional notions of fair play and substantial justice.”’.¹⁰¹¹ The test applies to domestic cases as well as cases against non-U.S. defendants.¹⁰¹² However, even for non-U.S. defendants, U.S. courts inquire whether a given federal or state court has jurisdiction, not the U.S. in general.¹⁰¹³

The test has two prongs: minimum contacts and reasonableness.¹⁰¹⁴ The required contacts differ depending on whether general or specific jurisdiction is at issue. If a court has general jurisdiction over the defendant, it can adjudicate any claim against it.¹⁰¹⁵ The U.S. Constitution requires that the ‘defendant’s affiliations with the forum must be “so continuous and systematic as to render them essentially at home” in the forum’.¹⁰¹⁶ This allows general jurisdiction at the place of residence or domicile of the defendant, on the basis of the defendant’s physical presence in the state where he or she is served with process.¹⁰¹⁷ For corporations, the place of general jurisdiction is primarily at the place of the corporation’s place of incorporation or principal place of business. Whether service of process of an officer within the state (tag jurisdiction) establishes jurisdiction for corporations is disputed.¹⁰¹⁸ Defendants may also agree

¹⁰⁰⁸ Ibid 81.

¹⁰⁰⁹ Linda Silberman, ‘National Reports: USA’ in Basedow and others; Born and Rutledge, *International Civil Litigation in United States Courts* (n 97) 79.

¹⁰¹⁰ U.S. Const. amend. V and XIV Sec 1.

¹⁰¹¹ *International Shoe v. State of Washington*, 326 U.S. 310 (1945).

¹⁰¹² Dodge and Dodson (n 99).

¹⁰¹³ *J. McIntyre Machinery, Ltd. v. Nicaastro*, 564 U.S. 873 (2011) 884; Berger-Walliser (n 832) 1253.

¹⁰¹⁴ American Law Institute § 422 Comment b with reference to *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987).

¹⁰¹⁵ Born and Rutledge (n 97) 88, 106; American Law Institute § 422 Comment c.

¹⁰¹⁶ *Goodyear Dunlop Tires Operations, S. A. v. Brown*, 564 U.S. 915 (2011); see also *Daimler AG v. Bauman*, 571 U.S. 117 (2014); American Law Institute § 422 Reporters’ Notes 4.

¹⁰¹⁷ Born and Rutledge (n 97) 88.

¹⁰¹⁸ Ibid 126; in favour of unlawfulness American Law Institute § 422 Reporters’ Notes 5.

and submit to ICA-Jurisdiction.¹⁰¹⁹ If a state statute provides that registration of a corporation is a prerequisite for doing business there and that such registration is a sufficient basis of personal jurisdiction, this conforms to the constitutional requirements.¹⁰²⁰

Specific jurisdiction may exist for claims arising out of or related to a particular activity in a particular state¹⁰²¹ and ‘[w]hen no such connection exists, specific jurisdiction is lacking regardless of the extent of a defendant’s unconnected activities in the State’.¹⁰²² While the contacts required for specific jurisdiction are less than that required for general jurisdiction,¹⁰²³ the threshold is ‘some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws’.¹⁰²⁴

The reasonableness prong of the test ‘applies several factors including the burden on the defendant, the plaintiff’s interest in obtaining relief, the interests of the forum State, the interests of other States or nations, and the judicial system’s interest in obtaining the most efficient resolution of controversies’.¹⁰²⁵ In general jurisdiction cases, the contacts prong of the due process test is usually conclusive. There is no additional reasonableness inquiry.¹⁰²⁶ It is unclear whether this also applies to tag jurisdiction.¹⁰²⁷

Instances of (potential) specific jurisdiction are:

- location of property:

The U.S. Supreme Court observed that ‘when claims to the property itself are the source of the underlying controversy between the plaintiff and the defendant, it would be unusual for the

¹⁰¹⁹ Linda Silberman, ‘National Reports: USA’ in Basedow and others; Congressional Research Service, ‘Due Process Limits on the Jurisdiction of Courts: Issues for Congress’ (n 776) 6. these grounds of general jurisdiction are summarised in *J. McIntyre Machinery, Ltd. v. Nicastró*, 564 U.S. 873 (2011) (Opinion Kennedy); for submission to jurisdiction and choice of court agreements see American Law Institute § 422 Comment b.

¹⁰²⁰ *Mallory v. Norfolk Southern Railway Co.*, 600 U.S. ____ (2023).

¹⁰²¹ Linda Silberman, ‘National Reports: USA’ in Basedow and others; Born and Rutledge (n 97) 88; American Law Institute § 422 Comment c.

¹⁰²² *Bristol-Myers Squibb Co. v. Superior Court of California*, 582 U.S. ____ (2017).

¹⁰²³ Born and Rutledge (n 97) 88.

¹⁰²⁴ *Hanson v. Denckla*, 357 U.S. 235 (1958) 253; American Law Institute § 422 Reporters’ Notes 6.

¹⁰²⁵ Ibid § 422 Comment d.

¹⁰²⁶ Ibid § 422 Comment d.

¹⁰²⁷ Ibid § 422 Reporters’ Notes 7.

State where the property is located not to have jurisdiction.’¹⁰²⁸ However, for unrelated claims, the minimum contacts and reasonableness must be established as for any *in personam* claim.¹⁰²⁹

- torts

Jurisdiction may be ‘based on intentional conduct by the defendant that creates the necessary contacts with the forum’.¹⁰³⁰ In product liability cases, the U.S. Supreme Court has not been able to agree on the appropriate measure of contacts.¹⁰³¹ In particular, it is controversial whether the placing into commerce of a product alone, or at least when knowing that it will reach a particular market, is sufficient.¹⁰³²

- contractual disputes

The place of contracting or performance do not automatically establish jurisdiction.¹⁰³³ However, the existence of a contract is still highly relevant.¹⁰³⁴ Factors such as ‘prior negotiations and contemplated future consequences, along with the terms of the contract and the parties’ actual course of dealing -- that must be evaluated in determining whether the defendant purposefully established minimum contacts within the forum’.¹⁰³⁵ Choice of law clauses are by themselves insufficient, but may be an important element.¹⁰³⁶ It is unclear whether there is also pendant jurisdiction, meaning that the claim is insufficiently related to the defendant’s contacts with the forum, but sufficiently connected to another claim.¹⁰³⁷

As regards reasonableness in instances of specific jurisdiction, the U.S. Supreme Court accords special weight to the burden of the foreign defendant.¹⁰³⁸

Finally, even if an U.S. court has ICA-Jurisdiction, it may decline to exercise jurisdiction if another forum is ‘substantially more convenient or appropriate’ (*forum non conveniens* doctrine).¹⁰³⁹ The Restatement (Fourth) states: ‘(1) Under the federal doctrine of *forum non*

¹⁰²⁸ *Shaffer v. Heitner*, 433 U.S. 186 (1977) 207.

¹⁰²⁹ *Shaffer v. Heitner*, 433 U.S. 186 (1977) 209.

¹⁰³⁰ *Walden v. Fiore*, 134 S. Ct. 1115 (2014) 1123; American Law Institute § 422 Reporters’ Notes 6.

¹⁰³¹ Born and Rutledge (n 97) 128.

¹⁰³² Ibid 129.

¹⁰³³ *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985) 478.

¹⁰³⁴ Born and Rutledge (n 97) 152.

¹⁰³⁵ *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985) 479.

¹⁰³⁶ Ibid 482.

¹⁰³⁷ Born and Rutledge (n 97) 165.

¹⁰³⁸ Ibid 129.

¹⁰³⁹ Ibid 349.

conveniens, a federal court may dismiss a case if: (a) there is an available and adequate alternative forum; and (b) despite the deference owed to the plaintiff's choice of forum, the balance of private and public interests favors dismissal. (2) A federal court may impose certain conditions to protect the party opposing dismissal.¹⁰⁴⁰ Several states have adopted a *forum non conveniens* doctrine that mirrors the federal doctrine, while other states have adopted the doctrine in a different form.¹⁰⁴¹ Some state courts have also rejected the doctrine's application.¹⁰⁴²

Certain federal courts have allowed dismissal of a case based on comity 'in favor of a pending and parallel foreign proceeding upon a showing of exceptional circumstances'.¹⁰⁴³ Some courts have allowed the comity abstention even without such pending parallel proceedings.¹⁰⁴⁴

Exorbitant:

AL	TP	P	A	DB
	x			

Semi-exorbitant:

R	N	TP+	P+	A+

Possibility of Abstention

Bolivarian Republic of Venezuela¹⁰⁴⁵

Exorbitant:

AL	TP	P	A	DB
	x			

¹⁰⁴⁰ American Law Institute § 424.

¹⁰⁴¹ Ibid § 424 Comment b.

¹⁰⁴² Linda Silberman, 'National Reports: USA' in Basedow and others.

¹⁰⁴³ American Law Institute § 424 Reporters' Notes 9.

¹⁰⁴⁴ Ibid; for the doctrine of prudential exhaustion for claims brought under international law see ibid Reporters' Notes 10.

¹⁰⁴⁵ The information is based on the English translation in 'National Statutes and Provisions: Venezuela: Bolivarian Republic of Venezuela' in Basedow and others. For a country report see Claudia Madrid Martínez 'National Reports: Venezuela' in Basedow and others.

Semi-exorbitant:

R	N	TP+	P+	A+
		x	x	

Socialist Republic of Vietnam¹⁰⁴⁶

Exorbitant:

AL	TP	P	A	DB
			x	

Semi-exorbitant:

R	N	TP+	P+	A+

Republic of Zambia¹⁰⁴⁷

Exorbitant:

AL	TP	P	A	DB
x				

Semi-exorbitant:

R	N	TP+	P+	A+

Possibility of Abstention

¹⁰⁴⁶ The information is based on the English translation provided by the WIPO, <<https://www.wipo.int/edocs/lexdocs/laws/en/vn/vn083en.pdf>>, accessed on 31 January 2025. For a country report see Trinh Nguyen, Keith D. Handley and Le Cong Dinh, 'Vietnam' in Anthony Colman and Simon Bryan (eds), *Encyclopaedia of International Commercial Litigation* (Wolters Kluwer 2022) 18.

¹⁰⁴⁷ The information is based on the country report Oppong (n 913) 63.

Republic of Zimbabwe¹⁰⁴⁸

Exorbitant:

AL	TP	P	A	DB

Semi-exorbitant:

R	N	TP+	P+	A+
			x	

¹⁰⁴⁸ The information is based on the country reports Ellen Sithole, 'Zimbabwe' in Piet Taelman (ed), *International Encyclopaedia of Laws: Civil Procedure* (Wolters Kluwer 2022) 33 and Oppong (n 913) 82.

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Abstract

While most grounds of international civil jurisdiction are acceptable to most stakeholders, certain rules have been met with recurring criticism and have been labelled ‘exorbitant’, meaning inappropriate from an international standpoint or simply impermissible. The charge of exorbitance has a dimension, which is understudied: certain rules of civil court jurisdiction may not only be unfair and undesirable internationally, but they may also violate customary international law. After approximately 200 years of theorising, opinion on this issue remains divided. The recently published Restatement Fourth of U.S. Foreign Relations Law, supported by eminent scholars, claims that customary international law does not limit states in their choice of bases of international civil law jurisdiction at all. Equally eminent scholars have disagreed. Nevertheless, the Restatement Fourth is well-positioned to push the divided scholarly opinion decisively in the direction of ‘no limits’.

Three aspects are striking when considering the collection of Western scholarly opinion on the subject. First, virtually all examples of state practice are from the U.S. and Europe, predominantly from Germany and the U.K. There is no truly representative empirical study. Second, the proponents of customary international law limits offer little (or no) analysis of concrete examples of *opinio juris*. Third, they do not define the proper role for deductive arguments from principles such as sovereignty.

This doctoral thesis analyses a sample of 75 legal systems, reviews expressions of *opinio juris* canvassed from a wide array of source material spanning more than two centuries and considers (with much restraint) deductive forms of reasoning as an aid in the analysis. It comes to the following conclusions:

Exorbitant bases as they exist today do not violate customary international law. There is no prohibitive rule against them; instead, they conform to a permissive rule. The broad sample of analysed legal systems shows that exorbitant bases are pervasive. Moreover, there is no evidence of opposing *opinio juris* to any relevant degree. Yet, this does not mean that customary international law allows unbridled international civil court jurisdiction. Rather, the exorbitant bases remain within established rules. State practice and statements of *opinio juris* can be synthesised into the following rule: All international civil court jurisdiction (specifically a

subgroup referred to in the doctoral thesis as ICA-Jurisdiction – see Chapter 1 Section 4) must be exercised based on a rule of a sufficiently close connection, i.e. one that is non-arbitrary and otherwise in good faith, between the parties and/or the subject matter of the lawsuit on the one side and at least one constitutive element of the state exercising ICA-Jurisdiction (population, territory, government) on the other side.

Während die meisten Gerichtsstände des internationalen Zivilverfahrens allgemeine Akzeptanz genießen, gibt es bestimmte Gerichtsstände, die wiederholt kritisiert und als „exorbitant“ bezeichnet wurden. Sie werden aus internationaler Sicht als unangemessen oder schlicht unzulässig angesehen. Der Vorwurf der Exorbitanz schließt einen Aspekt mit ein, der unzureichend erforscht ist: Bestimmte Gerichtsstände mögen nicht nur unfair und international unerwünscht sein, sondern auch gegen das Völkergewohnheitsrecht verstoßen. Nach ca. 200 Jahren der Theoriebildung sind die Meinungen zu diesem Thema weiterhin geteilt. Das kürzlich veröffentlichte Restatement Fourth of U.S. Foreign Relations Law, das von namhaften Wissenschaftlern unterstützt wird, behauptet, dass das Völkergewohnheitsrecht die Staaten in ihrer Wahl der Gerichtsstände im internationalen Zivilverfahren überhaupt nicht einschränkt. Ebenso namhafte Wissenschaftler haben dem widersprochen. Dennoch ist das Restatement Fourth geeignet, den Diskurs entscheidend in die Richtung „keine Grenzen“ zu lenken.

Drei Aspekte stechen bei der Betrachtung der westlichen Literatur zu diesem Thema hervor. Erstens stammen so gut wie alle Beispiele für die Staatenpraxis aus den USA und Europa, vor allem aus Deutschland und dem Vereinigten Königreich. Zweitens setzen sich jene, die völkergewohnheitsrechtliche Grenzen befürworten, kaum (oder gar nicht) mit konkreten Beispielen für *opinio iuris* auseinander. Drittens untersuchen sie nicht, welche Bedeutung deduktiven Argumenten, welche aus Grundprinzipien wie der Souveränität gewonnen werden, zukommen soll.

Diese Dissertation analysiert eine Stichprobe von 75 Rechtsordnungen, untersucht ein umfassendes Quellenmaterial aus über zwei Jahrhunderten und berücksichtigt (mit viel Zurückhaltung) deduktive Argumente als unterstützende Erkenntnisquelle. Die Arbeit gelangt zu den folgenden Schlussfolgerungen:

Exorbitante Gerichtsstände, wie sie derzeit bestehen, verstoßen nicht gegen das Völkergewohnheitsrecht. Es gibt keine Verbotsnorm, die sie verbietet, sondern sie entsprechen einer Erlaubnisnorm. Die 75 untersuchten Rechtsordnungen zeigen, dass exorbitante Gerichtsstände weit verbreitet sind. Außerdem besteht keine ausreichende ihnen entgegengesetzte *opinio iuris*. Dies bedeutet jedoch nicht, dass das Völkergewohnheitsrecht der Ausübung internationaler Zivilgerichtsbarkeit keine Schranken setzt. Vielmehr bewegen sich die exorbitanten Gerichtsstände im Rahmen des vom Völkergewohnheitsrecht Erlaubten. Aus Staatenpraxis und *opinio iuris* kann folgende Regel gewonnen werden: Internationale

Zivilgerichtsbarkeit (konkret ein Ausschnitt davon, der als ICA-Jurisdiction definiert wird - siehe Kapitel 1 Abschnitt 4) muss auf der Grundlage einer hinreichend engen, d.h. *bona fide* und vor allem nicht willkürlichen, Nahebeziehung zwischen den Parteien und/oder dem Streitgegenstand auf der einen Seite und mindestens einem der konstitutiven Elemente des Gerichtsstaats (Staatsvolk, Staatsgebiet, Staatsgewalt) auf der anderen Seite ausgeübt werden.