10 Legality of Extraterritorial Jurisdiction under International Law

The case for extraterritorial jurisdiction in animal law is strong, and I have outlined reasonable and desirable ways for this tool to revolutionize animal law in an age of globalization. But no matter how valuable, plausible, or necessary the jurisdictional means to protect animals across and within the border, extraterritorial animal law can still violate international law. We must next ask when a state’s jurisdiction will prevail if claims to jurisdiction overlap and—regardless of concurring jurisdiction—when extraterritorial jurisdiction breaches international law and what consequences this breach would entail. Answering these questions will help states determine the political and legal risks associated with extraterritorial jurisdiction and assess whether these are worth taking. In the first part of this chapter, I turn to common objections to extraterritorial animal law before examining how jurisdictional conflicts are formed in animal law, and how they can be prevented through unilateral and bilateral action. Following this, I examine what the limits of extraterritorial animal law are under international law, and the legal consequences of a breach.

§1 Countering Extraterritorial Animal Law

A. Objections

States might object or actively oppose other states’ extraterritorial animal laws for a variety of reasons. A state may feel that such efforts undermine its authority as the sole regulator within its borders or that foreign animal law interferes in its domestic affairs.1 A state might also

1 Staker, Jurisdiction, in International Law 309 (2018). Judge Weiss argues that not objecting to foreign
object to extraterritoriality because it believes the principle of sovereign equality precludes foreign states from asserting their authority over it. It may argue that accepting that one state’s laws apply in another state’s territory risks shifting the character of international law from egalitarian to hegemonic.

States may also feel that using extraterritorial jurisdiction unduly improves the socio-economic position of some states, by offering benefits to them that would have to be negotiated in bi- or multilateral treaty processes. During negotiations, states are expected to make reciprocal concessions, but if states instead resort to unilateral extraterritorial animal law, they simply cherry-pick their policies across the border without regard to the preferences and priorities of other states and their people. For example, if the United Kingdom prohibited exports of calves to spare them conditions of extreme confinement abroad, it might invoke the subjective territoriality principle to impose a duty on all transporters not to export calves under a certain age. In reaction thereto, affected countries might accuse the United Kingdom of evading its international obligations, arguing that it should have negotiated export bans with them, and, in turn, adapted its tariffs concessions for other products.

A pragmatic view suggests that extraterritorial jurisdiction creates a lot of legal uncertainty, which stirs up unnecessary conflict, creates diplomatic impasses, and increases costs. Extraterritorial jurisdiction also reduces transnational efficiency by requiring more cooperation and information exchange and by raising costs that no state is willing to bear. The effects on individuals are equally disruptive. People will no longer know which laws apply to them, not even when they operate in their home state. Corporations exposed to these risks will try to avoid these pitfalls by objecting to extraterritorial jurisdiction and lobbying against its adoption. Should they fail, corporations are likely to redirect streams of investment and commerce as a reaction to uneven playing fields.

States will most likely object to extraterritorial jurisdiction on the grounds that it is a form of ethical, social, or cultural value imposition, imperialism, hegemony, parochialism, neocolonialism, and the like. Some argue that resistance to foreign extraterritorial animal extraterritorial jurisdiction in matters that intrude in a state’s own territory would amount to the affected state not assuming its duties as a state: Lotus, 1927 P.C.I.J. 44 (Dissenting Opinion by Weiss, M.).


See in this context Case C-1/96, The Queen and Minister of Agriculture, Fisheries and Food, ex parte Compassion in World Farming Limited, 1998 E.C.R. I-1251.


law springs from a “vague sense of superiority or exceptionality” that states have about their own laws. This claim, however, goes beyond what can be reasonably demanded of a democratic society in our age of globalization. Since we continue to rely on nation-states to organize international affairs, people cannot be expected to fully succumb to foreign laws even if they are, rationally speaking, the “better” laws. What is more, objections to extraterritorial jurisdiction on grounds of value imposition are often justified. After all, the West has continually used animal welfare (the ways in which animals are raised, killed, or eaten) as a tool to discriminate against others. Mexican immigrants in the United States are targeted for horse-tripping and cock-fighting, Asian immigrants are accused of engaging in “barbaric” practices by eating dogs, and native peoples are condemned for hunting whales. In these cases, practices predominantly associated with non-whites are portrayed as “culturally backward” and “uncivilized,” while mainstream practices of dominant cultures, such as factory farming or animal research, are considered “normal” or “neutral” even though they inflict as much or more harm on animals. These forms of ethnocentrism are exacerbated by extraterritorial jurisdiction in animal law, which cannot be separated from the long history of white aggression against people of “other” cultures in an ongoing process of cultural imperialism.

Minority practices can and certainly do cause great suffering for animals, but it can reinforce existing inequities if we focus exclusively on abridging rights of minorities while failing to criticize majority practices that are just as cruel and may even harm many more animals. Simply expanding the “European” way of using and killing animals across the world will not improve the lot of animals or challenge their exploitation. It simply leaves unchecked and accepts as legitimate the way majorities subjugate animals by the millions, and thereby glosses over their exploitation. It also shows that we fail to understand that many of the practices of minorities are a form of cultural resistance to the dominant culture that usurped its standards onto them in the first place. So by targeting marginalized groups, these laws risk producing and reproducing forms of oppression including racism, sexism, ableism, and speciesism.

The case of Michael Vick is a good illustration of this problem. Michael Vick is a former American football quarterback whose stellar career in the National Football League quickly came to a halt in 2007 after the media revealed his involvement in the dog-fighting ring

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12 Oh & Jackson 45 (2011).
“Bad Newz Kennels.” The police investigation showed that Vick had killed several of his
dogs by drowning and hanging, and that he left many more neglected on his property.14
When the press described these events, Vick became the victim of extreme racism. His
acts were framed as the epitome of animal cruelty and his blackness was considered instru-
mental to his acts of cruelty, since “only black people” treat animals so horrendously. Some
people went so far as to call for Vick’s execution.15 The Vick case underlines how easily an-
imal law is appropriated to serve underlying motives of racism or other forms of oppression
like sexism and ableism.16

Consider also the long-standing public debate in Australia on live exports of animals. Aus-
tralia is one of the largest exporters of live animals, in particular to the Middle East and
South East Asia. In March 2011, Animals Australia, an animal advocacy organization, released
footage that showed how cows were subjected to “abuse through eye gouging, kicking, tail
twisting and tail breaking”17 before being slaughtered in Indonesian abattoirs. These events
led to media coverage and protests across Australia on a scale unmatched by any other
Australian animal welfare campaign.18 The discourse centered around “our” “Australian” ani-
mals or cows—prefaces and adjectives that indicate an emotional connection and proximity
wholly absent in debates about animal abuse in Australian facilities.19 Where Indonesian
practices of slaughter attracted shame and reprobation, Australian ways of killing animals
were neither discussed nor criticized, though they are just as prevalent. To base extraterrito-
rial animal laws on this racialized terrain suggests that there is a “tacit acceptance of the fact
that animals do not require saving in general, they require saving from non-white others.”20

Similarly, the 2002 Olympics in South Korea sparked massive protests in the country
and around the world against dog meat production and trade. Protestors demanded dog
slaughter be halted in South Korea, at least during the games.21 If the International Olympic

14 US District Court Judge Henry E. Hudson sentenced Vick to 23 months in prison, more than Vick’s co-
defendants and more than the 12 to 18 months prosecutors originally suggested as part of Vick’s plea agree-
15 See for a thoughtful analysis of these events: Melissa Harris-Perry, Michael Vick, Racial History and Animal
16 See for an intersectional analysis of race and speciesism: Aph Ko & Syl Ko, Aphro-ism: Essays on Pop
Culture, Feminism, and Black Veganism from Two Sisters (2017). See for an intersectional
analysis of ableism and speciesism: Sunaura Taylor, Beasts of Burden: Animal and Disability
Liberation (2017). See for an intersectional analysis of patriarchy and speciesism: Carol J. Adams & Lori
See further on racism in the guise of animal welfare: Vicki Hearne, Bandit: Dossier of a Dangerous
Dog (2d ed. 2002).
com/documents/FactSheet-cases.pdf (last visited Jan. 10, 2019).
19 Dalziell & Wadiwel, Live Exports, Animal Advocacy, Race and “Animal Nationalism,” in Meat Culture 77
(2017).
20 Id. at 85.
21 These protests continue until this day: Claire Czajkowski, Dog Meat Trade in South Korea: A Report on the
Committee (the NGO committee of the Olympic games, based in Lausanne, Switzerland) was obliged under Swiss law not to offer dog meat during any of its activities abroad, South Korea might protest on grounds of moral and legal imperialism. If protests to dog meat (which certainly do not have the force of extraterritorial laws) are already accused of feeding and fueling neocolonialist motives, this is even more the case for extraterritorial jurisdiction.

These cases and examples make apparent that, whether done on purpose or unintentionally, unchecked attempts to protect animals abroad may easily become a fig leaf for oppressing others. They point to structural problems that underlie the law of jurisdiction, in particular, clashes between majority and minority cultures, and raise the question of whether it is necessary, desirable, or even possible for the majority to accommodate “troubling” minority traditions. In ethics, there is a broad consensus that there should be no “cultural defense” or “cultural exemption” for minority practices that contravene animal laws. But this does not mean that we should condone selective enforcement that holds minorities accountable and exempts majority practices. We require a symmetry of moral scrutiny, as Kymlicka argues:

If it is indeed true that all practices and traditions are morally accountable for their treatment of animals, then it seems possible, indeed likely, that very few of our practices are likely to pass a test of moral acceptability. Everyday majority practices of eating meat or visiting zoos stand in need of moral justification as much as minority practices of ritual slaughter. And virtually all philosophers who have attempted to evaluate these practices have concluded that they fail basic tests of moral acceptability, since they involve sacrificing the most basic interests of animals for trivial interests of humans.

Until minority and majority practices are measured by the same yardstick, we must expect extraterritorial jurisdiction to reinscribe Eurocentric thinking and to impose laws on people

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22 Oh & Jackson 33 (2011). Koreans now feel more protective of these cultural rights than during the Olympic games in 1988 (id.). Interestingly, South Korea has decided to label dog meat as “non-livestock meat” (ostriches are also classified as such): Czajkowski 50 (2015).

23 Though portrayed as an international conflict, the dog meat debate is as heated in affected states as it is between them. See Peter J. Li et al., Dog “Meat” Consumption in China: A Survey of the Controversial Eating Habit in Two Cities, 25 Soc. & Ani. 513, 530 (2017): “In China, the decline of dog ‘meat’ consumption is mostly a result of domestic opposition. A conflict over dog ‘meat’ consumption is in fact a Chinese ‘civil war’ between two Chinese groups. This is not a conflict between China and the outside world. With this in mind, international animal advocacy groups can confidently support the Chinese activists without worrying about being accused of imposing Western values on these countries. The bond between humans and companion animals is not Western. It is a trans-cultural phenomenon.”


25 See especially Luis Cordeiro-Rodrigues & Les Mitchell (eds.), Multiculturalism, Race and Animals: Contemporary Moral and Political Debates (2017). See also Will Kymlicka, Afterword: Realigning Multiculturalism and Animal Rights, in MULTICULTURALISM, RACE AND ANIMALS 295, 296 (2017): “All of us, majority or minority, are morally accountable for our treatment of animals, and merely saying that a practice is ‘traditional’ does not show that it meets standards of moral acceptability.”

who may never have had the opportunity to participate in any democratic form in the formation of that law.\textsuperscript{27}

B. FORMS OF PROTEST

For the reasons mentioned above, states traditionally object to foreign jurisdiction through letters and statements, \textit{amicus curiae} briefs, blocking and clawback statutes, or lawsuits. These tools have not yet been used in animal law, but it is easy to imagine how they could be. If the United States introduces an act to try its nationals for killing endangered animals abroad, South Africa could send a letter or statement to the US government to give its opinion on the right- or wrongfulness of the decision to assume jurisdiction over those animals.\textsuperscript{28} States can in principle counter foreign extraterritorial animal laws in this abstract manner, but they are more likely to respond by intervening in a pending case court. South Africa might, for instance, choose to file an \textit{amicus curiae} brief to the US court—a letter addressed to the court that offers information, expertise, insights, or simply an opinion about the issue at hand.\textsuperscript{29} The court receiving the brief considers it at its sole discretion. If the brief goes unnoticed, South Africa can use diplomatic tactics, like protests, to oppose the reach of foreign laws.

When protests are ignored or there is a lot at stake, states tend to enact blocking statutes. Blocking statutes are intended to bar any extraterritorial effect of foreign (animal) laws by preventing foreign authorities from investigating and enforcing foreign judgments on domestic territory. Blocking statutes may also make it illegal for nationals or residents to abide by foreign laws, to cooperate with foreign authorities, or even to react to foreign laws. In antitrust law, which was heavily debated in the 1970s throughout the 1990s, states including Australia, Canada, the European Union, France, Germany, South Africa, and the United Kingdom have repeatedly enacted blocking statutes.\textsuperscript{30} During the 1990s, the statutes gradually shifted from antitrust law to export control law.\textsuperscript{31} A well-known and far-reaching blocking statute was enacted by the European Union in 1996, by which it sought to halt the

\textsuperscript{27} States that adopt extraterritorial laws are not typically held accountable to those affected by their laws. In detail on this deficit: \textit{Ryngaert, Jurisdiction} 192 ff. (2015); \textit{Ryngaert, Unilateral Jurisdiction and Global Values} 125 ff. (2015).


\textsuperscript{29} \textit{E.g.}, the Brief of the United Kingdom of Great Britain and Northern Ireland and the Kingdom of the Netherlands as Amici Curiae in Support of Petitioners, No. 03-724, Feb. 3, 2004, F. Hoffmann-La Roche v. Empagran, Ltd. 541 U.S. 155 (2004) (U.S.) expressed that the extraterritorial application of the FTAIA “is contrary to basic principles of international law regarding the allocation of jurisdiction between states.”


United States’ aggressive embargoes against Cuba.\textsuperscript{32} Council Regulation 2271/96 included a duty to inform the Commission if persons were indirectly or directly affected by the legislation (article 2). All authorities were told not to recognize or enforce judgments of foreign courts or tribunals and decisions of foreign administrative authorities (article 4). And private persons were not allowed to comply with any requirement or prohibition of foreign laws, either actively or by deliberate omission (article 5).

Blocking statutes are a popular countermeasure to extraterritorial jurisdiction in banking law, competition law, mergers and acquisitions, but they have also been used in fields of law dealing with social welfare, worker rights, and the like. In 1978, South Africa enacted the Protection of Business Act (PBA), which prohibited corporations and individuals from complying with US Ex-Im Bank laws on fair employment standards. The US Office of Southern African Affairs developed a fair labor standards questionnaire to assess if projects were eligible for funding. As a reaction to these inquiries, the PBA barred cooperation in all civil matters and stated that no person “shall in compliance with or in response to any order, direction, interrogatory, commission rogatoire, letters of request or any other request issued or emanating from outside the Republic in connection with any civil proceedings, furnish any information as to any business whether carried on in or outside the Republic.”\textsuperscript{33} South Africa could adopt the same or similar measures if the United States initiated proceedings against people for trophy hunting in South Africa. It might prohibit all persons from cooperating with US agencies and declare void all efforts of the United States to obtain evidence in South Africa. This is not unlikely because it seems that blocking statutes are at least partly driven by states’ desire to counteract laws perceived as imperialist and not just to protect individuals from the effects of foreign laws.

In the labor law case mentioned above, a 2008 media statement from the South African Law Reform Commission indicated its change in opinion, 30 years after the laws were put in effect. The statement notes that the “principal aim of the Protection of Businesses Act 99 of 1978 was to protect South Africans from the draconian effects of certain foreign laws, in particular those allowing awards of penal or multiple damages,” but that “[t]he Act frustrates what are, in the majority of cases, uncontroversial requests for serving process, taking evidence or enforcing foreign judgments.”\textsuperscript{34} As South Africa’s experience shows, we must find ways to begin a meaningful discussion about substantive standards that lay down the treatment of animals, rather than using extraterritorial animal laws in a “draconian” manner or blocking them off on the basis of these fears.

In addition to blocking statutes, states have provided for clawback statutes that grant addressees of foreign laws the right of recovery for all or for particular costs associated with the exercise of foreign extraterritorial jurisdiction.\textsuperscript{35} Sometimes, blocking statutes directly provide for clawback clauses. Finally, states can always initiate proceedings at the ICJ.\textsuperscript{36}
§2 Conflicts of Animal Laws

A. Addressing Cultural Clashes

Before we begin to explore what must be observed legally, as a minimum, when states’ animal laws conflict, we need to determine if using extraterritorial jurisdiction in animal law makes sense in the first place, considering the fact that it is likely to be used as a tool to oppress minorities. As we saw earlier, there is a great deal of intersectional oppression at play in animal law in general, and this risk is exacerbated in cases of extraterritorial jurisdiction, when the different ways in which humans use and exploit animals are highlighted. It is easy to see how the danger of cultural imperialism and neocolonialism compels us to take a hands-off approach to extraterritorial jurisdiction. The chance this tool will be used to advance hidden agendas is so great that we may virtually end up entitling majority cultures to oppress minorities. The West would view itself as coming to the rescue of “uncivilized,” “savage” nations and showing them how to “properly” use, kill, and eat animals. Instead of helping animals and advancing a just interspecies vision of society, we will find ourselves caught up in recurring spirals of discrimination and injustice.

We cannot solve this problem by making a shallow claim that many animal laws do not have hidden agendas and that, consequently, extraterritorial jurisdiction does not bear the danger of targeting minorities. Nor can we solve it by giving a free pass to cultural minorities when they violate the interests of animals. This dilemma may seem insurmountable but it can be eased by using what Claire Jean Kim calls a “multi-optic vision.” Kim has advocated for a multi-optic vision as a way of seeing that takes disparate justice claims seriously without presumptively privileging one over another. Kim argues: “Animals suffer under minority practices just as they do under majority practices, and while the first type of suffering is no more important, morally speaking, than the second, it is no less important either.” Using the multi-optic vision, we should take a broader and less prejudiced view when we determine which practices result in harm for animals, while remaining sensitive to the unconscious appropriation of animal law to serve hidden discriminatory agendas. What the caveats of cultural imperialism and neocolonialism mandate, then, is not a hands-off approach to extraterritorial jurisdiction, but much more careful management of these laws.

So what would a thoughtful approach to these issues look like? Maneesha Deckha, drawing on a postcolonial and posthuman theory of cultural rights, argues that we need to base our legal efforts at the interface of animal law and multiculturalism on three pillars: (i) we must listen to other perspectives and be aware that colonialism taints Western ways of knowing; (ii) we must strive for consistency by criticizing mainstream practices and “conscientiously

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37 DSU, arts. 3 ff.
38 E.g., DSU, art. 25.
39 See Chapter 10, §1 A.
40 Id.
42 Id. at 196.
and systematically avoiding the racialization of animal exploitation by selective practices;”\(^{43}\) and (iii) we should make judgments only after good faith consultation and collaboration.\(^{44}\) Ensuring that the law of jurisdiction rests stably on these pillars will be difficult, and we will have to fundamentally rethink and reverse many of our current practices. But this task is necessary, for otherwise, we would open the door to immense suffering, either by oppressing other humans or by letting free market principles govern the treatment of animals around the world. In the following, I foreground these principles in my inquiries, classifications, and proposals for resolution. I begin by disentangling the different types of legal conflicts that may emerge, and explore how they can be prevented, mitigated, and resolved.

B. EMERGENCE AND CLASSIFICATION OF JURISDICTIONAL CONFLICTS

A state may have strong and valid claims to extend its laws to animals in foreign countries, but its jurisdiction might still infringe on another state’s personal, territorial, and organizational sovereignty, or it might simply prove less potent than another state’s jurisdiction. In other words, the jurisdictional principles sketched by customary international law are only \(\textit{prima facie}\) legal under international law.\(^{45}\) We can see this as an advantage because multiple laws applied across the border create a strong jurisdictional net across the world that will help fill governance gaps. Some, however, may be dissatisfied with a solution they think will increase inter-state conflict and give rise to high legal and judicial costs. One way to reduce overlapping jurisdiction would be to give jurisdictional principles more than \(\textit{prima facie}\) legality in international law by establishing a hierarchy of jurisdictional principles. For example, there are salient, but recurring claims that some (extraterritorial) jurisdictional principles are inferior to and must make way for territorial jurisdiction.\(^{46}\) These claims may be a product of duties set up in special treaties or they may emerge from domestic law, but the law of jurisdiction as it exists under customary international law does not support this form of favoritism.\(^{47}\) Chapter 2 has shown that the practice of states and international courts

\(^{41}\) Deckha 220–3 (2007).

\(^{42}\) Id. at 223.

\(^{43}\) Bantekas, \textit{Criminal Jurisdiction of States under International Law}, in MPEPIL 1 (2011); Bowett 15 (1982); Oppenheim’s \textit{International Law} 457 (1992). The final judgment on their legality under international law is determined by examining the claims of other states. See Crawford 457 (2012): “[S]ufficiency of grounds for jurisdiction is normally considered relative to the rights of other states.”

\(^{44}\) Bowett bases this prerogative on the equality of states, the principle of nonintervention, and the principle of territorial integrity: Bowett 15–7 (1982). See also Mann 90–1 (1964).

supports neither the prevalence of territoriality nor a presumption against extraterritoriality in international law. In this respect, the ICTY noted in *Jankovic*:

>[A]ttempts among States to establish a hierarchy of criteria for determining the most appropriate jurisdiction for a criminal case, where there are concurrent jurisdictions on a horizontal level (i.e. among States), have failed thus far. Instead, States have agreed on various criteria and opted to give weight to certain criteria over others depending on the circumstances of a particular case.\(^{48}\)

One reason why international law has not established a hierarchy of jurisdictional bases, is that they are shifting from field to field. In securities law, the place of conduct is considered decisive, but in anticompetition law, the place of effect is most important. And in export controls law, nationality indicates which state has jurisdiction.\(^{49}\) Jurisdictional bases are thus sensitive to the substantive law at hand. States also dislike limiting their choice of jurisdictional principles. In practice, Kamminga explains, states simply pick and choose from the principles in order to justify the policies they want to adopt.\(^{50}\) This, they claim, helps affected parties. Even if the absence of a clear hierarchy compromises predictability and legal certainty, a broad variety of jurisdictional principles is more likely to provide for justice in individual cases because it takes into account distinct features of each field of law.

Accepting many grounds of jurisdiction is bound to result in several (legitimate) claims of jurisdiction being made for the same state of facts. By and large, jurisdiction is therefore not exclusive, but concurrent, competing, or overlapping (these terms are used interchangeably). Concurrent jurisdiction points to a positive competency conflict: more than one state or regulatory entity purports to regulate the same state of facts. The opposite is a negative competency conflict, in which no state or regulatory entity claims jurisdiction and the matter remains essentially unregulated. In a perfect world, neither of these competency conflicts would arise. Regulatory authority would be properly allocated among states, generating neither overlapping jurisdiction nor legal loopholes. Although desirable in theory, aiming for this balance in the real world is pointless, considering our advanced levels of transborder interconnectedness. Faced with the choice between conflict-laden concurring jurisdiction and utopian allocation of jurisdiction that risks legal gaps, international law has chosen the lesser of the two evils. International law favors concurrent jurisdiction and, thus, legal pluralism, over legal loopholes.\(^{51}\)

\(^{48}\) *Prosecutor v. Gojko Jankovic, Case No. IT-96-23/2-AR1bis2, Decision on Rule 11bis Referral ¶ 34* (Nov. 15, 2005).

\(^{49}\) *IBA Report Extraterritorial Jurisdiction* 23 (2009).

\(^{50}\) *Menno T. Kamminga, Extraterritoriality, in MPEPIL 16* (Rüdiger Wolfrum ed., online ed. 2012).

\(^{51}\) *Inazumi 5 (2005); Robert Cover, The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation, 22 WM. & MARY L. REV. 659* (1981). Concuring jurisdiction creates competition between substantive provisions, which brings about many benefits. Berman uses the example of universal jurisdiction to illustrate this claim, arguing that efforts by the Spanish judiciary to assert jurisdiction over former Argentine military members supported human rights efforts within Argentina. The Pinochet case initiated in Spain caused the Chilean Supreme Court to remove Pinochet’s immunity and apply the Geneva Conventions without regard to limits like amnesties or statutory limitations. As a result, several hundred officers were convicted, many suspects indicted, and even more cases investigated: *BERMAN, GLOBAL LEGAL PLURALISM 237* (2012).
Now that the nature and desirability of positive competency conflicts are clearer, we can examine in more detail the potential for conflicts between states’ laws. A state that exercises extraterritorial jurisdiction may prohibit acts done on animals, or require or permit certain acts be done with or on animals. It may also decide not to regulate such actions. Out of the four options (prohibiting, permitting, requiring actions or omissions, or not doing any of the three), 10 types of concurrent jurisdiction may emerge. If one state explicitly permits behavior another state is silent about, there is a permissive-omissive conflict. This is the case if state A expressly permits (but does not require) keeping dogs inside at all times, while state B’s laws contain nothing about whether dogs must have opportunities to exercise (or, more generally, about whether dog owners have to ensure their dogs’ well-being). If state A requires all dog owners to exercise dogs outside at least three hours a day, while state B remains silent on the point, a requisite-omissive conflict emerges. If state A prohibits keeping dogs inside at all times, while state B has still not enacted any laws on the matter, there is a prohibitive-omissive conflict. Though dog owners may not find themselves in a compliance conflict if they conform to state A’s laws, state B might nevertheless claim that state A’s laws are intrusive.\textsuperscript{52}

If one state requires certain behavior that another state permits, this creates a permissive-requisite conflict. In this case, the laws of the state that calls for an action or omission are more intrusive than the laws of the other state. For example, state B allows owners of hens to debeak them, but state A obliges the owners to do so. If the owner of the CAFO abides by the laws of state A, the owner does not, in principle, violate the laws of state B. But if state B expressly permits what state A prohibits, this creates a permissive-prohibitive conflict, which is more delicate.\textsuperscript{53} For example, state B still allows factory farmers to debeak hens, but state A has decided to prohibit debeaking because it inflicts immense and unnecessary suffering on animals. In this case, the factory owner does not violate state B’s laws when conforming to state A’s no-debeak policy.

The most precarious situation is created if one act prohibits what another requires (prohibitive-requisite conflict). This conflict emerges if state B introduces a law that makes it mandatory for factory farmers to debeak hens, but state A sticks to its policy of banning the mutilation of hens. The egg producer, if subject to the laws of both states, is now trapped in a compliance conflict. Abiding by state A’s laws will cause the producer to violate state B’s laws, and vice versa. States may also be caught in omissive-omissive, permissive-permissive, requisite-requisite, and prohibitive-prohibitive conflicts. In these cases, addressees of norms are not usually in conflict over compliance, but states may nevertheless claim that their jurisdiction should precede the others’ or that the prescriptive jurisdiction of other states violates their rights under international law.

Sorting out the types of jurisdictional conflict can help us understand the severity of a given conflict, since the types indicate the extent to which a state will claim its sovereignty is

\textsuperscript{52} Omission to regulate conduct cannot be interpreted as being open to other state’s extraterritorial laws, or as implicitly refusing them: Schuster 592–3 (1996).

\textsuperscript{53} A famous example of this conflict is the Microsoft case, in which the European Union regarded Microsoft’s position on the market as abuse, while the United States viewed it as a legitimate form of competition: Case T-201/04, Microsoft Corp. et al. v. Commission, 2007 E.C.R. II-3601.
violated, and the force with which it will protest the jurisdiction of another state. In the past, prohibitive-requisite conflicts were the most likely cause of international disputes locked in a stalemate. These are the conflicts attracting the most attention. The United States, for example, considers only such prohibitive-requisite conflicts to be “direct conflicts of jurisdiction” that demand special attention from the government and its agencies. Prohibitive-prohibitive conflicts can also give rise to conflicts in criminal law because there is a real danger an addressee of a norm will be prosecuted by two or more states for the same act.

C. PREVENTING AND MITIGATING JURISDICTIONAL CONFLICTS
I. The Rule of Law and the Prohibition of Double Jeopardy

Before serious conflicts arise, there are a number of unilateral measures states can take to prevent or mitigate conflicts of jurisdiction. In matters of criminal animal law, the rule of law and the rule of double jeopardy help states design and use extraterritorial norms with this goal in mind.

States that link criminal sanctions to their extraterritorial animal laws are called upon to pay attention to the principle of legality (also called the principle of the rule of law, nulla poena nullum crimen sine lege) and to the principle against the application of retroactive legislation (nullum delictum, nulla poena sine praevia lege). These are sometimes viewed as equivalent to or emanating from the principle of the rule of law, which mandates that criminal norms be formulated sufficiently clearly and precisely, that they be published, and that they not be retroactively applied. The principle of the rule of law is recognized by the drafters of the UDHR, the Geneva Conventions and Additional Protocols, the International Covenant on Civil and Political Rights (ICCPR), the African Charter on Human and Peoples’ Rights, the American Convention on Human Rights, and the European Convention on Human Rights.

If states did not abide by the rule of law, acts or omissions of persons could be criminalized ex post facto. Ensuring that addressees know the law before criminal behavior is manifested is not just a matter of fairness and justice. Lack of knowledge and foreseeability undermines the law’s purpose and effectiveness. Knowledge about the law is a precondition for its observance,

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55 On direct conflict or foreign sovereign compulsion, see Chapter 11, §2 B.
57 UDHR, art. 11 para. 2.
58 Geneva Convention (III), art. 99; Protocol Additional to the Geneva Conventions (I), art. 2 lit. c.
since, as Raz famously stated, “the law must be capable of being obeyed.” The same is true for extraterritorial laws, as underlined by the Council of Europe Report on Extraterritorial Criminal Law. The drafters of the report argue that, under the principle of the rule of law, the requirements of recognizability and predictability of law must apply to extraterritorial jurisdiction. Once recognizable and predictable to its addressees, the law can legitimately be applied across borders (given the necessary jurisdictional basis). In this sense, the European Court of Human Rights determined in Jorgic v. Germany that Germany’s crime of genocide extends to Jorgic’s acts of ethnic cleansing in Bosnia and Herzegovina because the application of the law was foreseeable to the defendant at the time he committed the crime.

It is fairly easy for a state to inform its citizens about the laws they must comply with, but how does it alert foreign addressees that its laws apply to them? As a first step, it is necessary for a state to publish the law, translate it into the most common languages (especially the languages of the countries where the law will apply), and make it freely and easily accessible. A state could notify its citizens residing abroad about changed regulations, it could warn people suspected of violating its law, it could announce its position in international fora, held by states or NGOs, or it could inform affected states. The duty to respect the rule of law applies preeminently to cases of direct extraterritorial jurisdiction (where there is an extraterritorial anchor point or extraterritorial content regulation). In contrast, indirect regulation (whose only extraterritorial facet is its ancillary repercussions) does not need to be foreseeable or known in order to be effective.

States should also be mindful of the risks of double prosecution and punishment when they apply criminal animal law across the border. The rule of ne bis in idem (nemo debet bis vexari pro uma et eadem causa), known as the prohibition of double jeopardy in common law, states that a person shall not be prosecuted more than once for the same conduct. International treaties, like the ICCPR and the Rome Statute, establish protection against double jeopardy for a limited category of crimes, or they limit the rule of double conviction to a single state (so cross-border double jeopardy remains legal). Because of its limited application, some scholars deny that ne bis in idem is a general principle or customary norm of international law. However, numerous drafts

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63 Joseph Raz, The Rule of Law and Its Virtue, in The Authority of Law 210, 213 (Joseph Raz ed., 2009). The rule of law is thus based on the logic that only if addressees of legal norms are aware of them, and only if the norms are sufficiently clear to them, can the law have a deterrent effect: Petrig 35 (2013). Seminal: Wilfried Küper ed., Paul Johann Anselm Feuerbach: Reflexionen, Maximen, Erfahrungen (1993).


66 Uta Kohl, Jurisdiction and the Internet: Regulatory Competence over Online Activity 153 (2007).

67 See the Fifth Amendment to the U.S. Constitution: no person shall “be subject for the same offence to be twice put in jeopardy of life or limb.”

68 ICCPR, art. 14 para. 7; Rome Statute, art. 20 para. 3.

69 Ireland-Piper 80 (2015). Conway explains this broad rejection: “Especially in the area of criminal liability, many states appear to have traditionally held to the view that they are best placed to protect their own interests through the application of the criminal law; in contrast, the effect of an international ne bis in idem principle would be to restrict the application of national criminal law.” (Gerard Conway, Ne Bis in Idem in International Law, 3 Int’l Crim. L. Rev. 217, 218 (2005)).
and proposals for treaties suggest that the principle should be binding in international law.\textsuperscript{70}

I propose a pragmatic solution to this problem. Even if the rule of law and the prohibition against double jeopardy might not be fully established in international law, states should observe them when they apply animal laws across the border to err on the safe side. Animal law has nothing to gain from punishing people twice for their behavior, but it has everything to lose if it becomes a tool used to undermine human rights guarantees. This being said, outside the criminal realm, addressees have no right to have their actions and omissions regulated by a single sovereign. Especially when people routinely act or do business on the territory of multiple states, they are seen as having waived such a claim. Multinational enterprises, for instance, are confronted on a daily basis by several states applying their norms to their actions. The real objection to concurring jurisdiction, Bowett argues, “lies in the quite different consideration that the jurisdiction assumed by State A may involve unwarranted interference in matters which have little or nothing to do with State A and are more properly the concern of State B and therefore more properly left to its jurisdiction.”\textsuperscript{71}

II. Principle of Reasonableness

Also under general international law, there are standards that help states prevent and mitigate conflicts of jurisdiction. These include the principle of reasonableness, the balance of interests test, and the principle of comity. There is little agreement on the application, scope, and content of these principles because they are uncodified, vary from state to state, and sometimes overlap. In the following, I will sketch them out and differentiate them as clearly as possible. I will argue that the principle of reasonableness is most helpful at a preconflict stage, and that the balance of interests test and the principle of comity should be applied after a jurisdictional dispute has emerged.

The purpose of the principle of reasonableness is to prevent conflicts of jurisdiction from arising. It refers to the process by which jurisdiction is unilaterally administered by states, by deciding whether, when, and how they ought to exercise jurisdiction. As codified in the US Restatement of Foreign Relations, the principle states that “[e]ven when one of the bases for jurisdiction […] is present, a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable.”\textsuperscript{72} The principle mandates states employ a reasonableness test before they exercise jurisdiction, and that they refrain from exercising jurisdiction if extraterritorial jurisdiction is likely to produce unreasonable effects.\textsuperscript{73}

\textsuperscript{70} Harvard Research in International Law, Jurisdiction with Respect to Crime (1935), art. 13; The Princeton Principles on Universal Jurisdiction (2001), principle 9; IBA Report Extraterritorial Jurisdiction 192 (2009). Among the treaties in force, only the Schengen Convention endows the principle with \textit{erga omnes} character, but limits it to instances of \textit{res iudicata}: Convention Implementing the Schengen Agreement, June 14, 1985, 2000 O.J. (L 239) 13, art. 54 [CISA].

\textsuperscript{71} Bowett 15 (1982).

\textsuperscript{72} U.S. Restatement (Third) of the Foreign Relations Law, § 403 para. 1.

\textsuperscript{73} CoE, Extraterritorial Criminal Jurisdiction 469 (1992); Zerk, Extraterritorial Jurisdiction 212 (2010). As the commentary to section 403 clarifies, the reasonableness test is not part of a reciprocal duty. It
The reasonableness test does not give guidance to states on when effects are unreasonable or which values must be prioritized. Most states have their own views and guidelines that specify the values that are most important to them, and determine how they should be weighted. In its Third Restatement, the United States took the view that the following factors must be considered:

(a) the link of the activity to the territory of the regulating state, i.e., the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;
(b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;
(c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;
(d) the existence of justified expectations that might be protected or hurt by the regulation;
(e) the importance of the regulation to the international political, legal, or economic system;
(f) the extent to which the regulation is consistent with the traditions of the international legal system;
(g) the extent to which another state may have an interest in regulating the activity; and
(h) the likelihood of conflict with regulation by another state.\footnote{U.S. Restatement (Third) of the Foreign Relations Law, § 403, cmt. a.}

Factors (c) and (e) demand states take into account the importance of the matter, the desirability of its regulation, and universal values. The greater the need to protect animals abroad, the more justified the exercise of jurisdiction by a state. The more universally shared a certain treatment of animals is (consider the general principle of animal welfare), the more important it is to ensure its regulation. Overall, (c) and (e) allow considering the effects of jurisdiction on animals when making a decision about whether to exercise jurisdiction. But these considerations are only two of several factors that could be weighed differently.

Factors listed in (a) and (b) can be objectively determined; these links or connections are present, or they are not. But it seems harder to assess factors (c) to (h), the importance of regulation to the regulating state and the likelihood of conflict with regulation by another state. The more important a certain matter is to a state (for example, protecting animals), the easier it is for it to assume that another state's interests are negligible. To prevent subjective views from distorting their judgment, states would ideally use subfactors that consider the level of regulation and the issuer. For example, if Congress demands that an offense in animal law be

\footnote{U.S. Restatement (Third) of the Foreign Relations Law, § 403 para. 2. This list is not exhaustive, see id. § 403, cmt. b. In the brand-new Fourth Restatement, these factors are not anymore listed: U.S. Restatement (Fourth) of the Foreign Relations Law, § 405.}
investigated, this is more forceful than when a commission initiates an investigation. States should further investigate the interests of other states by drawing on their public statements, legislation, case law, and participation in international fora on matters of animal law.

D. RESOLVING JURISDICTIONAL CONFLICTS

I. Unilateral Resolution

Once a state decides to exercise jurisdiction, as a consequence of which a jurisdictional conflict emerges, it can unilaterally resolve the conflict through the principle of reasonableness or the balance of interests test. Both are designed to solve jurisdictional conflicts by examining and assessing the strength of a state’s links to a state of facts and weighing them against those of other states.

The balance of interests test is a product of US-American jurisprudence and emerged from the *Timberlane* (1976) and *Mannington Mills* (1979) decisions. Section 403 para. 3 of the Third US Restatement provides that if the laws of two (or more) states conflict, states should evaluate their own and the others’ interest in regulation and defer to the state with the greatest interest. The balance of interests test applies after a conflict has been ascertained but considers the same factors as the preconflict reasonableness test, including where an act was committed, where evidence is available, where the accused person has their domicile, the center of the wrong, the likelihood of adjudication, and interests of justice, among others. The stronger these factors are linked to a state, the more reasonable it is to let it have jurisdiction over the case. The balance of interests test is well-established in US jurisprudence and increasingly accepted by European courts. Concern for animals are relevant for this test as

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75 U.S. Restatement (Third) of the Foreign Relations Law, § 403, cmts. b and c; U.S. Restatement (Fourth) of the Foreign Relations Law, § 405, reporters’ note 4.
76 Peters, for example, argues that the principles of reasonableness and comity allow finding a balance of interests: Peters, Völkerrecht 162 (2016). The IBA treats the principles as exchangeable: IBA Report Extterritorial Jurisdiction 168 (2009).
78 The development of reasonableness in this two-tiered fashion is not necessarily an international phenomenon. Though it may make sense for the United States to employ the test in this manner, other states may decline to do so. Applying a set of factors to determine if one will exercise jurisdiction and then applying the same set of factors in case of conflict to determine how to solve the conflict will probably have the same outcome, unless one shifts its priorities. Many states thus use one procedure to determine whether or not to exercise jurisdiction. But because the tests are so diffuse, it might well be that some legislators do an internal “exercise-jurisdiction-or-not” test and a “whose-jurisdiction-prevails” test.
79 The principle of reasonableness is a general principle of EU law: Adelina Adinolfi, *The Principle of Reasonableness in European Union Law, in REASONABLENESS AND LAW* 381, 394 (Giorgio Bongiovanni et al. eds., 2009). An alternative argument is that the principle of reasonableness derives from the principle of proportionality. Ryngaert explains: “Proportionality may require that one State’s jurisdictional assertion not encroach upon the interests of another State to an extent that is disproportionate to the object or aim of that assertion.” (RynGaert, Jurisdiction 158 (2015)).
it is for the preconflict reasonableness test—based on the importance of regulation and the presence of shared values (section 403 para. 1(c) and (e) of the Restatement).

In the criminal domain, a similar balance of interests test was devised to deal with conflicts of jurisdiction. Principle 8 of the Princeton Principles, developed by the Princeton University Program in Law and Public Affairs, asks states to base their decision on an aggregate balance of the following criteria:

(a) multilateral or bilateral treaty obligations;
(b) the place of commission of the crime;
(c) the nationality connection of the alleged perpetrator to the requesting state;
(d) the nationality connection of the victim to the requesting state;
(e) any other connection between the requesting state and the alleged perpetrator, the crime, or the victim;
(f) the likelihood, good faith, and effectiveness of the prosecution in the requesting state;
(g) the fairness and impartiality of the proceedings in the requesting state;
(h) the convenience to the parties and witnesses, as well as the availability of evidence in the requesting state; and
(i) the interests of justice.\(^80\)

These principles suggest that states with connections of territoriality and nationality are more likely to have stronger claims to jurisdiction. States with territorial jurisdiction often also satisfy other criteria, such as the likelihood of prosecution (f), conveniences to parties and witnesses, and availability of evidence (b). Indirect regulation via owners’ nationality (c) and functional animal nationality (d) represent useful alternatives because they have a strong territorial connection but regulate content abroad. Resorting to interests of justice (h) may demand that we consider the interests of animals, since animals are sentient, conscious beings to whom the outcome of these legal disputes is of great importance.\(^81\)

As previously mentioned, states each have established their own reasonableness and balance interests tests, which are unilaterally applied. The balance of interests test of section 403 para. 3 of the Third Restatement of the United States, for example, is performed by US authorities. The Canadian Supreme Court uses a “real and substantial connection test” in criminal matters that allows it to determine unilaterally whether and when to exercise jurisdiction.\(^82\) And the European Union adopted a similar test as part of the European Arrest Warrant System.\(^83\) Even if these tests consider foreign interests, they were unilaterally designed

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\(^80\) The Princeton Principles on Universal Jurisdiction (2001), principle 8. This list is not exhaustive: id. at 53.

\(^81\) See Chapter 8, §1 on the role of animals in global justice.

\(^82\) R v. Hape, [2007] 2 SCR 292, para. 62 (Can.): “Where two or more states have a legal claim to jurisdiction, comity dictates that a state ought to assume jurisdiction only if it has a real and substantial link to the event.”

\(^83\) Council Framework Decision on the European Arrest Warrant and the Surrender Procedures between Member States (2002/584/JHA), 2002 O.J. (L 190) 1. Art. 16 para. 1 demands that decisions on multiple requests must be taken “by the executing judicial authority,” taking into account all circumstances, the place of the offenses, the dates of the European arrest warrants, and whether the warrant was issued for the purposes of prosecution or execution.
and are unilaterally applied without involving or consulting affected states. Consequently, these tests risk being used in an overly subjective manner and giving perfunctory consideration to other states, which may return inconsistent, unpredictable, and unjust results. A better approach would be to determine, on a multilateral basis, the factors that bear on the test and their relative weight. Under general international law, however, no treaty has yet been concluded that meets these goals.

Instead of claiming that the principle of reasonableness (in its preconflict “exercise-jurisdiction-or-not” application) or the combined balance of interests test and principle of reasonableness (in their acute conflict “whose-jurisdiction-prevails” application) objectively assess the interests of all involved parties, they should best be regarded as applications of the principle of comity. Comity, whose acceptance and nature is disputed, is based on the “reciprocal recognition of equality by the participants in international intercourse” and “a mutual respect for the integrity of each of the participants in international intercourse.” These mandate that states adopt an attitude of moderation and restraint in jurisdictional matters that affect other states. Based on comity, states interested in extending their laws to a state of facts abroad may decline to claim jurisdiction if another state has a greater interest (referred to as negative comity). Under the principle of comity, states sometimes also incur soft duties to exchange information, mutually consult on a matter, or request adjudication (referred to as positive comity). Together, negative and positive comity form the heart of the principle of comity, which applies to all cases where states’ laws conflict, in particular, but not only, to prohibitive-requisite conflicts.


85 Treaties on double taxation commonly include such factors: Mann 10 (1964); Oxman, Jurisdiction of States, in MPEPIL 54 (2007).

86 This is also acknowledged in the Fourth Restatement, in which the balance of interests was dropped in favor of prescriptive comity and foreign state compulsion: U.S. Restatement (Fourth) of the Foreign Relations Law, § 405.

87 There is little agreement on how widely the principle of comity is accepted. According to the Criminal Committee to the IBA Report, the scope of the principle in criminal law is unclear: IBA Report Extraterritorial Jurisdiction 25 (2009). The US Supreme Court has used comity in deciding if there is a presumption against extraterritoriality in the FTAIA in F. Hoffmann-La Roche v. Empagran, 542 U.S. 155 (2004) (U.S.). In Europe, the comity principle is treated as discretionary: Ryngaert, Jurisdiction 179 (2015).


89 Negative comity was used in Empagran, see F. Hoffmann-La Roche v. Empagran, 542 U.S. 155, 164–5 (2004) (U.S.): “This rule of statutory construction cautions courts to assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws. It thereby helps the potentially conflicting laws of different nations work together in harmony—a harmony particularly needed in today’s highly interdependent commercial world.”

90 The United States, in contrast, has limited the test of weighing state interests to prohibitive-requisite conflicts or what it terms “direct conflicts” or “foreign sovereign compulsion.” These are conflicts in which a person is
II. Bilateral and Multilateral Resolution

The best option for states to resolve jurisdictional conflicts is to conclude bilateral or multilateral agreements that define conflicts of jurisdiction, describe how states can manage these conflicts unilaterally and independently on a daily basis, and determine how they should proceed if unilateral deference does not prevent conflict. Agreements that lay down rules on consultation and cooperation are among the most common treaties on jurisdiction in international law. In criminal law, cooperative agreements include mutual legal assistance treaties (MLATs), the European Convention on Laundering of Search, Seizure and Confiscation of the Proceeds from Crime, and the European Convention on Mutual Assistance in Criminal Matters. In animal law, there is no agreement that obliges states to consult or cooperate on jurisdictional matters, but most of the 433 MLATs currently in force apply to criminal law in a generic manner and hence cover criminal animal law.

Another area in which states have readily concluded agreements to consult and cooperate on jurisdictional matters is antitrust law. In 1991, after decades-long disputes about the reach of domestic antitrust policies, the United States and the European Union concluded an agreement that placed each country’s competition authorities under a duty to cooperate and coordinate (positive comity, laid down in articles IV and V). Each state agreed to take into account important interests of the other when deciding “whether or not to initiate an investigation or proceeding, the scope of an investigation or proceeding, the nature of the remedies or penalties sought, and in other ways” (negative comity, laid down in article VI).

In 1998, the European Union and the United States concluded another agreement, as a partial revision of the initial agreement. According to the new treaty, one party may request the other to investigate and remedy anticompetitive activities, “regardless of whether the required (not only permitted) to commit or to refrain from committing an act by the laws of one state, which is at the same time prohibited by the laws of another state (U.S. Restatement (Third) of the Foreign Relations Law, § 403, cmt. c). In these cases, foreign sovereign compulsion operates as a defense, which is permissible under certain circumstances: DOJ, ANTITRUST ENFORCEMENT GUIDELINES, para. 3.32. The shortcomings of this approach are discussed by Ryngaert, JURISDICTION 166 (2015).

MLATs are agreements between governments that facilitate the exchange of information relevant to an investigation, hence, they are primarily criminal in nature. MLATs may be bilateral, multilateral, or regional. See Mutual Legal Assistance Treaties, MLAT Index, available at https://mlat.info/lat-index (last visited Jan. 10, 2019).


Deciding whether administrative laws are covered by criminal assistance treaties will depend on the system of law, the characterization of administrative measures (e.g., seizure as a part of criminal or administrative law), and the specific scope of the assistance treaties.


activities also violate the Requesting Party’s antitrust laws, and regardless of whether the competition authorities of the Requesting Party have commenced or contemplate taking enforcement activities under their own competition laws” (article III). Although requests to investigate do not lead to the extraterritorial application of a state’s law, they help close legal loopholes abroad that would otherwise have reverse repercussions on domestic territory. But because states can, at their own discretion, decide whether to follow such a request, this rule is only a marginally useful alternative to extraterritorial jurisdiction.

The OECD also created guidelines for state cooperation in its 1995 Recommendation Concerning Cooperation Between Member Countries on Anticompetitive Practices Affecting International Trade. And in 2007, with a view toward mitigating jurisdictional conflicts, the attorney-generals of the United Kingdom and the United States issued a joint paper titled “Domestic Guidance for Handling Criminal Cases with Concurrent Jurisdiction.” Both papers provide for early notification, coordination of proceedings, exchange of information, proper consultation, and requests for remedial action.

States may also conclude agreements aimed at mitigating and preventing conflicts of jurisdiction in a substantive sense, by specifying which state has jurisdiction in particular a case. Examples include the Hague conventions, the Brussels Regulation, and the Rome Regulations. These treaties are considerably less common than treaties that focus on procedural aspects of jurisdiction, for several reasons. First, the likelihood of setting up a treaty that covers the entire field of extraterritorial jurisdiction is very low, because it is improbable that meaningful rules can be established where there are so many conflicting and differently aligned policy interests. Second, even if drafted only for a specific field (e.g., animal law), states can profoundly disagree on the optimal regulatory measures needed to address or resolve a specific problem. The difficulty of reaching a broad agreement is easily underestimated, and failure to reach an agreement is the rule, rather than the exception.

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102 See the analysis in Chapter 2, §2. Attempts have even been made to codify general rules on extraterritorial jurisdiction. In 1992, The Hague Conference on Private International Law launched an international convention on jurisdiction and enforcement of judgments of municipal courts in civil and commercial matters, modeled after the Council Regulation 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2000 O.J. (L 12) 1. The convention was never concluded due to “irreconcilable conflicts.” The fact that treaties exist in matters of adjudicative and enforcement jurisdiction in civil and commercial matters, but not in matters of prescriptive jurisdiction and not in the fields of antitrust
But this is not necessarily bad, as Guzman claims. He points to what should be the core motivation of states to enter into agreements. Treaties, he argues, should be benchmarked at an optimal level of welfare that is determined from the perspective of the “global planner,” whose goal it is to maximize the overall well-being of all global players.\footnote{Guzman defines the global welfare-maximizing policy as one that maximizes the sum of the consumer and producer surplus (Guzman 1510–1 (1998)), but his is not the only model.} Mutatis mutandis, we should use the metric of “maximum level of global animal welfare” to assess the benefits of an international agreement on jurisdiction in animal law.\footnote{See further on this topic Chapter 2, and Guzman 1548 (1998).} If the agreement only benefits a few but does not address or even legitimates oppressing other humans and animals, finding agreement is not advisable. Conversely, if treaties on jurisdictional authority are diligently drafted and have a reasonable chance of creating net positive effects for a majority of animals and people, they are a useful complement to extraterritorial jurisdiction.

Economists have long recognized the benefits of cooperation in economic game theory. The prisoner’s dilemma uses game-theoretic strategies to illustrate the advantages cooperation offers over aggregate but self-interested individual choices.\footnote{The prisoner’s dilemma is often used to illustrate the race to the bottom and operates as its main rationale: Koenig-Archibugi, Global Regulation, in The Oxford Handbook of Regulation 414 (2010). See for a philosophical inquiry: Martin Peterson ed., The Prisoner’s Dilemma (2015).} If a state pursues extraterritorial jurisdiction in its own interest and fails to coordinate with other governments, the result is likely damaging to all parties. But if governments cooperate over extraterritorial jurisdiction, jurisdictional gaps can be adequately filled, overlaps and international disputes prevented, and administrative costs reduced.

§3 International Legal Limits

Whether or not an attempt to protect animals abroad conflicts with the jurisdiction of another state, this may per se violate international law. Because state practice on extraterritorial animal law is not yet established and cases decided by international adjudicatory bodies on this matter are scarce,\footnote{The situation is different for international bodies that have dealt with the matter in trade law. See Chapters 3 and 4.} determining when and how states overstep the limits of international law when they adopt extraterritorial animal law must be done on the basis of the law of jurisdiction in general.\footnote{Because these cases are rare and because extraterritoriality plays a role in many fields of law, it is difficult to be certain about the legality of extraterritorial jurisdiction under general international law. As Zerk argues, media usually only pick up overt and offensive assertions of extraterritorial jurisdiction, so diversity in state practice has been obscured and academic debate has been oversimplified: Zerk, Extraterritorial Jurisdiction 12 (2010).}

States that called an international court or tribunal to declare another state’s extraterritorial laws void have typically argued that these laws violate the principle of sovereign equality, their right to territorial integrity, and the duty of noninterference. I next ask if and to what extent
extraterritorial jurisdiction in animal law threatens these principles. I begin with the principle of sovereign equality and then examine the right to territorial integrity, the principle of non-intervention, and the principle of self-determination of peoples.

A. PRINCIPLE OF SOVEREIGN EQUALITY

The principle of sovereign equality belongs to the fundamental rights of states and is a Grundnorm of the international legal order. The ordering concept of international law as basically egalitarian and anti-hegemonial is central to an understanding of states’ coexistence. As subjects of the international community, states are equal in the enjoyment of all rights and duties. As such, sovereign equality precludes a state from ascertaining its authority over another. States are subordinated to international law only; vis-à-vis one another, they are limited by the sovereignty of other states that are on an equal footing. An integral part of the commitment to sovereign equality forms the recognition of states’ juridical equality. Being recognized as equal before the law means that states hold the same position in the international legal order and have identical rights and duties. This is not to say that international law ensures states are equal in power, wealth, territory, or the like. Instead, juridical equality recognizes and ensures states have equal rights and bear equal duties.

If the principle of sovereign equality demands states be treated as equal bearers of jurisdictional authority, then it seems that extraterritorial jurisdiction, where one state purports to have a stronger interest in regulating a state of facts that properly seem to belong to another, violates or at least threatens this principle. These and similar arguments were advanced, for example, by the Congo in Arrest Warrant and in Certain Criminal Proceedings in France.

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109 Peters, Humanity as the A and Ω of Sovereignty 528 (2009); Schwarze 13 (1994).


111 As famously stated by Vattel: “A dwarf is as much a man as a giant; a small republic is no less a sovereign state than the most powerful kingdom.” (Emel de Vattel, Le Droits des gens, ou Principes de la Loi Naturelle, vol. I, 47, préliminaires § 18 (1830)). Or, as Crawford puts it: “Obviously, the allocation of power and the capacity to project it in reality are different things, which suggests that while all states are equal, some are more equal than others.” (Crawford 449 (2012)). See also James Crawford, Sovereignty as a Legal Value, in The Cambridge Companion to International Law 117, 119 (James Crawford & Martti Koskenniemi eds., 2012); Kokott, Sovereign Equality of States, in MPEPIL 2, 23 (2011).


The guarantee of juridical equality demands, in essence, a condition of reciprocity among states under international law. Reciprocity means that, in principle, one state cannot have rights another is denied, and one state cannot be exempted from duties another must incur. But extraterritorial jurisdiction is not a right or privilege given to one state and denied to another. Each state is equally entitled to use any principle of jurisdiction at any point in time. As long as this rule of reciprocity is guaranteed, we have no reason to believe the principle of sovereign equality has been violated.

Assume New Zealand uses functional animal nationality as a basis for protecting national animals from severe bodily and mental impairments on foreign territory. Some keas (the only alpine parrot in the world) born on New Zealand soil (which were declared nationals of New Zealand based on the *jus soli* rule) are shipped to Australia, where they will be used in invasive research. New Zealand asks the Australian research institutions to inform it about what they do to the animals. The information New Zealand receives is alarming, and it has reason to believe that the researchers are not meeting basic standards, so it orders the researchers to immediately cease experimentation. The Australian government quickly gets involved, raises objections, and files a complaint at the ICJ, arguing that New Zealand violated the principle of sovereign equality by attempting to regulate events on its soil. But sovereign equality, which includes the right to juridical equality, would only be violated if international law, while granting New Zealand extraterritorial jurisdiction, denied Australia the same right, namely, the right to extend its laws to New Zealand soil over national animals shipped to New Zealand. If international law treats all states equally, giving each the right to invoke the jurisdictional principles under the same conditions, then Australia’s right to juridical equality is not violated. When the jurisdictional principles apply to all states equally, states do not, in principle, violate other states’ juridical or sovereign equality by protecting animals across the border.

**B. RIGHT TO TERRITORIAL INTEGRITY**

That states have a right to territorial integrity is an established principle of international law. Historically, territorial integrity served to protect state territory from military aggression and threat. Today, the principle more broadly protects a state’s exclusive dominion within its territory and precludes other states from exercising authority on or over it. Extraterritorial animal law could violate the principle of territorial integrity by challenging a state’s exclusive dominion over its territory. For this to happen, jurisdiction must qualify as an authoritative state act capable of compromising dominion. Few scholars believe that territorial integrity can be threatened by all acts of another state, including extraterritorial prescriptive

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115 Art. 2 para. 4 UN Charter prohibits the use of force against the territorial integrity and political independence of any state and art. 2 para. 7 UN Charter protects domestic jurisdiction by the prohibition of intervention. Together, they accord states a right to territorial integrity.

Protecting Animals Within and Across Borders

jurisdiction. Most argue that the protection of states’ territorial integrity from authoritative acts of foreign states primarily relates to a physical dimension. Though the principle of territorial integrity has expanded from the use of force at war to other governmental actions, these must have a distinctly physical dimension. In their view, the essence of the right to territorial integrity is the right not to be subjected to force by other states. The exercise of enforcement jurisdiction, which includes issuance of writs, service of documents, approaching or hearing witnesses, arrests of suspects, seizure of animals, entry into buildings, etc., has such a physical component and, as such, may endanger territorial integrity. But since prescriptive jurisdiction lacks this physical dimension, it cannot violate another state’s territorial integrity.

This narrower interpretation was confirmed by the ICJ in Certain Criminal Proceedings in France, where the Court rejected the Congo’s request to suspend French proceedings against several Congolese officials for grave human rights violations, holding that the Congo’s territorial integrity had not been violated. It is also supported by the ICJ ruling in Corfu Channel, where the Court declared that the United Kingdom’s acts of minesweeping Albanian waters violated Albania’s territorial sovereignty. The ICJ thus considers it conceivable for territorial integrity to be violated if physical state acts are carried out on foreign territory, but not if states initiate proceedings without using physical force. In jurisdictional disputes involving acts of prescriptive jurisdiction, as in the case of extraterritorial animal law discussed herein, the principle of territorial integrity is of limited relevance because there is no use or threat of physical force.

C. DOMAINE RÉSERVÉ AND THE PRINCIPLE OF NONINTERVENTION

Another principle of international law that may be violated by extraterritorial animal law is that of nonintervention, the “core legal incident of external state sovereignty.” The 1970 Friendly Relations Declaration puts the principle in a nutshell:

No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. [. . .] No State may use or encourage the use of economic political or any other type of measures to

120 This was decided because there was “no irreparable prejudice to the rights” of the accused persons: Certain Criminal Proceedings in France, 2003 I.C.J. 102, 110–1.
coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind. [. . . ] Every State has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another State.\textsuperscript{123}

The core idea of the principle of nonintervention is that every state should be able to regulate its own affairs without outside interference by another state. Interference is not always impermissible, but it is illegal when it affects a state’s domaine réservé. The reserved domain covers a state’s jurisdiction over sovereign territory and the people, properties, and events on it, its choice of a political, economic, social, and cultural system, and the formulation of foreign policy.\textsuperscript{124}

In relation to international law, strictly seen, this principle seems to create some obvious problems by declaring impermissible virtually every rule of international law. However, in its Advisory Opinion in \textit{Nationality Decrees}, the PCIJ clarified that the reserved domain denotes matters where states remain the sole judges and which are not, in principle, governed by international law. Given the fast pace at which international norms emerge and evolve in response to global challenges, it might not always be easy to determine which matters are part of the domaine réservé of states. After all, “[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.”\textsuperscript{125} The domaine réservé is a dynamic concept that develops relative to the state of international law, determined both by treaty obligations and customary international law.\textsuperscript{126} In order to remove matters from the domaine réservé, international law does not have to be fully established in a certain matter.\textsuperscript{127} And because international law has evolved from creating and preserving peace among nations to a highly developed legal system that today regulates a substantial portion of the domain previously reserved to states—including space exploration and use, the maritime sea and the continental sea shelf, the international monetary system, international environmental protection, rules on corruption and anti-bribery, the entire trade law system, international criminal responsibility, aspects of immigration, citizenship, and nationality, the guarantees of human rights, the conservation and preservation of natural resources (including animals), and much more—it leaves little room for issues that belong exclusively to the domestic affairs of states.\textsuperscript{128}

\textsuperscript{123} Friendly Relations Declaration.
\textsuperscript{125} Nationality Decrees, 1923 P.C.I.J. 24.
\textsuperscript{127} Verzijl argues there are three ways to define the reserved domain. First, it may refer to the entire domain of matters not (yet) regulated by international law (negative definition). Second, it may denote matters a state does not yet want to regulate (positive definition). Third, it may denote matters that international law has not yet succeeded in regulating, but that require international regulation: Verzijl, vol. I, 274–5 (1972).
If protecting animals is part of the exclusive competence of a state, the principle of non-intervention can be used as a means to block foreign extraterritorial jurisdiction. But if jurisdictional authority over animal welfare matters is not of exclusive concern to a state, the principle cannot be invoked. Prima facie, it is an important concern of legislators to determine the circumstances in which animals must be protected. These laws respond to societal demands and signal the public’s opposition to violent, oppressive, and unethical behavior. Animal laws are conducive to the orderly structure of a state and are a manifestation of its organizational sovereignty. At the international level, no treaty or declaration yet safeguards states’ interests in protecting animals. And the small body of customary international law that regulates human-animal relationship seems too weak to remove it from the exclusive jurisdiction of states. Accordingly, animal protection matters seem to be, in principle, a matter of the reserved domain of states.

But the increasing entanglement and interdependence of states might weigh heavily against assuming the reserved domain has a large scope since “indisputable sovereign prerogatives of the territorial state have been subjected to a steady process of erosion.” Norms that protect animals across the border aim to establish obligations (e.g., duties to refrain from cruelty or duties to provide for care), or give rise to legal relations (e.g., functional animal nationality), but generally do not regulate the organization of foreign state institutions or policies. As such, the laws do not supplant domestic animal law and, therefore, they do not go to the core of jurisdictional authority. In cases where legal relations and obligations are established across the border, jurisdiction must be exercised on the basis of a valid and objectively demonstrable anchor to the prescribing state (e.g., nationality, domicile, effects, constituent elements, special affectedness, or the issuance of funds). Because extraterritorial animal law neither threatens a state’s organizational sovereignty nor assumes a state’s animal laws apply to a state of facts unrelated to it, it is difficult to argue that these matters fall into another state’s reserved domain. For example, if New Zealand demands its corporations that operate abroad adhere to the 3Rs in research, then it has a clear anchor to the subject matter, namely nationality jurisdiction. Australia, in whose territory New Zealand’s 3Rs are applied, may claim to be threatened in its reserved domain because the way it regulates the use of animals in research on its territory is part of its organizational sovereignty. But since the 3Rs have limited application to New Zealand corporations, Australia’s claim that its domaine réservé was violated is unjustified. Australia, in other words, does not have exclusive jurisdiction over foreign corporations operating on its territory.

Most cases in which extraterritorial law is prescribed are in fact about more than purely intraterritorial facts. Consider Norway’s attitude toward whale and seal hunting. Its practice may

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131 Jennings argues that the point at which a state interferes in another’s foreign affairs is reached when extraterritorial laws supplant local laws: Jennings, Extraterritorial Jurisdiction and the United States Antitrust Laws 152–3 (1957).
be disparaged internationally, but the question of whether this is legal and legitimate seems to be left to its discretion. In scenario A, where Norwegians hunt whales and seals and consume their kill, it is difficult to justify the claim that the international community or another state has a legitimate interest in the matter (unless they concluded a treaty on the matter). In scenario B, where Norway exports dead or live seal and whale bodies, the international community has more valid reasons to be concerned about this practice, since it has established anchors to the subject matter. This logic can be extended to other cases. Hunting becomes a concern of another state when animals cross state borders. Animal research is of interest to another state if research is outsourced to it. Animal slaughter is a concern of another state when animals are exported alive to that state. Farming becomes a cross-border issue where there is foreign investment, and so on. Only if there is no identifiable anchor to another state, the situation is different. In essence, the stronger the jurisdictional anchor to the prescribing state, the weaker the affected state’s claim to exclusive jurisdiction over animal matters.

Even in the unlikely case that extraterritorial animal laws are regarded as interfering in another state’s reserved domain, they are not necessarily illegal because not every form of interference constitutes an intervention. Only coercion renders an act of interference a prohibited intervention. Coercion, as the ICJ held, is “the very essence of the prohibition of intervention.” Historically, coercion was understood as military coercion but the contemporary understanding is that it encompasses all forms of political, economic, and other pressure. The principle of nonintervention thus applies to a range of cases that exceed pure forms of military force, yet, intervention must still be forcible, dictatorial, or otherwise coercive for it to constitute an intervention. The ICJ held that forced intervention took place where states indirectly supported subversive or terrorist activities in another state and where they secured evidence in another state’s territory. Such coercive elements are also often found in cases of extraterritorial enforcement, where witnesses are approached, evidence is secured, people are tried, arrested, etc. But, as President Guillaume emphasized in his Separate Opinion in the Arrest Warrant, the claim that territorial integrity prohibits coercive action in principle leaves prescriptive jurisdiction unaffected. Prescriptive extraterritorial jurisdiction that is not enforced in another state is not coercive and does therefore

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137 In 1949, the ICJ found the United Kingdom’s “Operation Retail,” which secured evidence in the territory of Albania for a future case the United Kingdom would bring before an international tribunal, was an unlawful form of self-help and constituted an intervention under international law: Corfu Channel, 1949 I.C.J. 35.
not violate the principle of nonintervention. Purely and simply, interference and intervention are not the same.\footnote{CoE, Extraterritorial Criminal Jurisdiction 459–60 (1992): “Not every outside influence on the freedom of action of a state should be considered as inadmissible intervention under public international law. The point has already been made that acts of executive jurisdiction, which are performed within the territory of another state without its consent, may be assumed to be inadmissible. But this cannot in general be contended with respect to acts of legislative jurisdiction.”}

The international community has sometimes been accused of taking too narrow a view by limiting the principle of nonintervention to forcible, dictatorial, and other coercive measures. A wider interpretation suggests that the principle can be violated in extreme cases of extraterritorial prescriptive jurisdiction.\footnote{Maier, Jurisdictional Rules in Customary International Law, in Extraterritorial Jurisdiction in Theory and Practice, Comment by Andrea Bianchi 97 (1996); Meng 67 (1994); Oppenheim’s International Law 430–1 (1992).} This is the case when one country calls for the laws of another country to be violated or when it prescribes laws extraterritorially that serve solely to undermine the jurisdiction of another state or to destroy its regime.\footnote{Colombian-Peruvian Asylum Case (Colom. v. Peru), Judgment, 1950 I.C.J. Rep. 166, 186 (Nov. 20); Lowe, International Law 109 (2007). Ratner argues that the principle applies to intelligence operations aimed at overthrowing a state’s government, providing financial assistance to armed groups, and sabotaging computer networks with viruses: Ratner 128 (2015).} For example, India is frequently criticized for using its laws on cow protection to discriminate against minority religious groups, especially Muslims.\footnote{See Chapter 9, §2 C.} If India then extraterritorially employed only animal laws that protected cows, and only in Muslim countries like Bangladesh, and if there is evidence that India’s ulterior motive is to subjugate Bangladeshi citizens or the country itself, these laws could violate the principle of nonintervention, even if India did not attempt to enforce them.

D. PRINCIPLE OF SELF-DETERMINATION OF PEOPLES

The principle of self-determination figures prominently in the UN as one of the central measures to strengthen and preserve universal peace.\footnote{The principle builds on art. 1 para. 2 UN Charter as one of the purposeful means to the UN, and is further substantiated in arts. 55 and 73 of the UN Charter. It is enshrined in the ICCPR (art. 1) and in the International Covenant on Economic, Social and Cultural Rights (Dec. 16, 1966, 933 U.N.T.S. 3, art. 1 in conjunction with art 27 [ICESCR]).} The principle has an internal and an external dimension. In its external dimension, the principle of self-determination has been invoked to entitle non-self-governing territories, trust territories, and mandates to form independent states, as in the Western Sahara case and in the Legal Consequences for States of the Continued Presence of South Africa in Namibia case.\footnote{Western Sahara, Advisory Opinion, 1975 I.C.J. Rep. 12, 31–33 ¶¶ 54–59 (Oct. 16); Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. Rep. 16, 31 ¶ 52 (June 21). See also G.A. Res. 1514, UN, GAOR 15th Sess., Declaration on the Granting of Independence to Colonial Countries and Peoples, U.N. Doc. A/RES/1514(XV) (Dec. 14, 1960).} This external dimension has proved critical in fostering processes of decolonization and restorative justice. Later, the principle was centered for debate in cases where peoples claimed a right to self-determination
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against their own state, i.e., concerning the internal dimension of the principle.\textsuperscript{145} Outside these debates about decolonialization and secession, however, there is a remarkable degree of uncertainty about the principle. An obvious assumption is that in this sphere, self-determination encompasses the right of peoples to freely choose their own political system and to pursue their own economic, social, and cultural development.\textsuperscript{146}

To violate this principle, extraterritorial animal law would have to deprive the people of another state of the ability to fully determine their political status and pursue their economic, social, and cultural development. In this context, it is conceivable that, if the EU ban on seal products—which had indirect effects on (indigenous) peoples of Canada\textsuperscript{147}—had been designed as an extraterritorial measure \textit{stricto sensu}, it would violate the principle of self-determination, because it singled out in its effects a unified group of persons that constitute a people. But the measure would also have had to prevent or make it very difficult for these people to choose its political system or pursue its own economic, social, and cultural development. It is certainly possible that animal laws have a major impact on a people’s economic, social, or cultural environment, particularly when power relations are as asymmetrical as that between the European Union and indigenous peoples of other countries. But these are exceptional cases. It is difficult to imagine that extraterritorial animal law typically hinders the full economic, social, and cultural development of the people of another state. International case law suggests that, for this to happen, there must be some form of gravity or even subjugation involved. For example, Israel built a wall that the ICJ held was “reducing and parceling out the territorial sphere over which the Palestinian people are entitled to exercise their right to self-determination.”\textsuperscript{148} The \textit{Wall Opinion} might be a straightforward case in this respect, but this is far from suggesting that merely prescribing law that aims to protect animals abroad subjugates, parcels out, and severely affects the people of that state.

Apart from the claims of peoples, it seems that noncolonial, nonsecessional, and non-intra-state aspects of the principle of self-determination are already captured by the principle of non-intervention, which ensures the choice of a state for a political, economic, social, and cultural system.\textsuperscript{149} In this area, as Thürer and Burri note, the principle of self-determination “essentially refers to the principle of sovereign equality of States and the prohibition of intervention which

\begin{itemize}
\item \textsuperscript{146} RATNER 14.4 (2015); Thürer & Burri, \textit{Self-Determination, in MPEPIL} 17 (2008).
\item \textsuperscript{147} The exceptions granted a \textit{de facto} advantage to products from Greenland (more specifically its Inuit population), which was not immediately and unconditionally accorded to like products from Canada. \textit{See Seals, AB Report} ¶ 5-95.
\item \textsuperscript{148} \textit{Wall Opinion, 2004 I.C.J.} 182 ¶ 115.
\end{itemize}
are already part of international law.” Accordingly, the limits established in this context are decisive.

E. INFLUENCE OF THE EXTRATERRITORIALITY FRAMEWORK ON INTERNATIONAL LEGAL LIMITS

So far, we have examined the legality of extraterritorial animal law on the basis of relatively abstract principles, but any judgment will strongly depend on the manner and means by which jurisdiction is exercised, in particular how directly or indirectly it is exercised. For example, norms that have ancillary repercussions abroad are less likely to violate established principles of international law because they do not regulate content abroad. Or, if regulation is based on intraterritorial anchor points to regulate content extraterritorially (type γ), this is often considered less intrusive than regulation that uses extraterritorial anchor points to regulate content extraterritorially (type α). For example, it is less problematic to impose a duty to respect the rights of animals on a domestic parent corporation that manages foreign subsidiaries than to regulate the foreign subsidiary.

International case law reinforces the claim that the legality of jurisdiction is assessed by taking into account the anchor point, content regulation, and ancillary repercussions. In *Arrest Warrant*, the ICJ decided not to address the legality of the universality principle, where the jurisdictional assertion relied on extraterritorial anchor points (heinous crimes committed abroad) and regulated content extraterritorially (holding a foreign minister responsible for crimes committed abroad) (type α regulation). In *Lotus*, by contrast, the Court declared legal norms with intraterritorial anchor points (the crime consummated on domestic territory) that regulated content extraterritorially (holding a foreigner responsible for the crime) (type γ regulation). But this does not release states from the duty to take into account foreign interests, viewpoints, and reactions, since courts use the presence or absence of protests as evidence of *opinio juris*. Overall, factors like the subject matter,

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151 See Chapter 10, §3 C.


154 Cf. *Lotus, 1927 P.C.I.J. 29*: “[T]he Court feels called upon to lay stress upon the fact that it does not appear that the States concerned have objected to criminal proceedings in respect of collision cases before the courts of a country other than that the flag of which was flown, or that they have made protests: their conduct does not appear to have differed appreciably from that observed by them in all case; of concurrent jurisdiction. This fact is directly opposed to the existence of a tacit consent on the part of States to the exclusive jurisdiction of the State whose flag is flown, such as the Agent for the French Government has thought it possible to deduce from the infrequency of questions of jurisdiction before criminal courts. It seems hardly probable, and it would not be in accordance with international practice, that the French Government in the *Ortigia-Oncle-Joseph* case and the German Government in the *Ekbatana-West-Hinder* case would have omitted to protest against the exercise of criminal jurisdiction by the Italian and Belgian Courts, if they had really thought that this was a violation of international law.” (Emphasis in original).
degree of consensus and the degree of potential to generate conflicts, proportionality, expected and achieved effects, the degree to which foreign interests are taken into account, flexibility, levels of consultation and cooperation, and availability of procedures for resolution all strongly influence the outcome of a dispute.\textsuperscript{155} Judging the legality or illegality of an extraterritorial norm under international law is thus not the result of an elaborate scientific process, but remains a matter of degree and is susceptible to political climate.

\textbf{§4 Legal Consequences of Exorbitant Extraterritorial Animal Law}

If extraterritorial animal laws of a state violate established principles of international law, it must be determined when and how the state will be held accountable. On the international level, the law of state responsibility determines “the legal consequences of the international wrongful act of a State, the obligations of the wrongdoer, on the one hand, and the rights and powers of any State affected by the wrongdoing, on the other.”\textsuperscript{156} According to article 1 of the International Law Commission’s Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), “[e]very internationally wrongful act of a State entails the international responsibility of that State.”\textsuperscript{157} If a state addresses the Court to determine another state’s international responsibility, it may demand cessation (if the law is still in effect) and nonrepetition (article 30 ARSIWA), and reparation (articles 31 and 34 \textit{et seq.} ARSIWA) in the form of restitution (article 35 ARSIWA), compensation (article 36 ARSIWA), or satisfaction (article 37 ARSIWA). Any affected state may itself react to the breach with unilateral countermeasures, retorsion, or reprisal (articles 49 \textit{et seq.} ARSIWA).

To date, no court or tribunal has yet determined the consequences of excessive prescriptive jurisdiction. In \textit{Lotus}, the ICJ held that Turkey had not violated international law, and that “there is no occasion to give judgment on the question of the pecuniary reparation which might have been due to Lieutenant Demons if Turkey, by prosecuting him as above stated, had acted in a manner contrary to the principles of international law.”\textsuperscript{158} Accordingly, the prosecution of Lieutenant Demons (which forms part of enforcement jurisdiction), and not prescriptive jurisdiction, was considered critical to give rise to pecuniary reparation. In the \textit{Corfu Channel} case, where the United Kingdom seized evidence in Albania, the Court determined that the United Kingdom violated Albania’s sovereignty and stated that the declaration of the Court “constitutes in itself appropriate satisfaction.”\textsuperscript{159} In the \textit{Arrest Warrant}, Belgium violated international law by issuing and circulating an arrest warrant against Mr. Adbulaye Yerodia Ndombasi, and was ordered to cancel it.\textsuperscript{160} Attempting enforcement may therefore lead to the revocation of the enforcement order, not to the annulment of the law.

\begin{itemize}
\item \textsuperscript{155} Peters, Völkerrecht 318 (2016); Zerk, Extraterritorial Jurisdiction 12, 213–4 (2010).
\item \textsuperscript{156} Antonio Cassese, International Law 261 (2d ed. 2005) (emphasis omitted).
\item \textsuperscript{157} The ILC Draft Articles are not legally binding, but they reflect the current state of international law: Parry et al. 577 (2009) “state responsibility.” Or, at the very least, they are soft law, representing a mix of existing responsibilities and a desirable future development of international law: Peters, Völkerrecht 363 (2016).
\item \textsuperscript{158} Lotus, 1927 P.C.I.J. 32 (emphasis added).
\item \textsuperscript{159} Corfu Channel, 1949 I.C.J. 36.
\item \textsuperscript{160} Arrest Warrant, 2002 I.C.J. 33.
\end{itemize}
that gave rise to the order. In sum, case law indicates that excessive enforcement jurisdiction may give rise to declaration of violation, cancellation of orders, or pecuniary reparation, but it provides no guidance on what legal consequences a state faces when its prescriptive jurisdiction violates international law.

Given the lack of guidance in international law, legal scholars have developed different answers to this question. Some believe that excessive laws will give rise to the law of international responsibility in toto. In this sense, the Inter-American Court of Human Rights, in its Advisory Opinion in International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention, argued that “the promulgation of a law that manifestly violates the obligations assumed by a state upon ratifying or acceding to the Convention constitutes a violation of that treaty and, if such violation affects the guaranteed rights and liberties of specific individuals, gives rise to international responsibility for the state in question.”161 Accordingly, if extraterritorial animal law violates human rights guarantees of persons abroad, it will give rise to full international legal responsibility.162 This seems to be a logical conclusion, since no state is reasonably interested in violating basic rights of individuals abroad. But the rule does not guide us in cases where extraterritorial laws do not affect human rights but still violate the rights of another state under international law.

In the context of extraterritorial naturalizations, Peters argues that excessive naturalization must be treated as an internationally illegal act and be tied to the usual consequences for illegality under the law of state responsibility. Alternatively, if the act cannot be declared illegal, it must be made inoperable under international law by entitling the affected state not to recognize the laws of another state that excessively reach into its territory. As a third option, the act could be treated as prima facie valid, but objectionable.163 We thus have the choice of declaring the law strictly illegal, exorbitant, or legal but opposable.

The majority believes that excessive prescriptive jurisdiction may encroach on the reserved domain or territorial integrity of other states, but the mere adoption of laws is not illegal and does not, therefore, lead to full international legal responsibility.164 Only when a state attempts to enforce or actually enforces these laws does it assume full responsibility for illegality in international law.165 The scholarly consensus is supported by the judgments of Lotus, Corfu Channel, and the Arrest Warrant, where the ICJ could have, but decided not to declare illegal extraterritorial prescriptive jurisdiction.

162 This rule is limited to instances of extraterritorial content regulation and does not affect indirect extraterritorial jurisdiction, i.e., where extraterritorial effects are ancillary: MENG 88 (1994).
163 Peters, Extraterritorial Naturalizations 709, 714 (2010).
164 Akehurst 187 (1972–3); CoE, Extraterritorial Criminal Jurisdiction 455 (1992); Coughlan et al. 32 (2007); Dixon 150 (2013) (a contrario); Fox, Jurisdiction and Immunity, in Fifty Years of the International Court of Justice 213 (1996); Mann 14 (1964); O’Keefe 741, n. 22 (2004).
165 Ryngaert, Jurisdiction 154–5 (2015). Ryngaert argues that this does not mean that the principle of non-intervention does not restrict prescriptive jurisdiction. The principle, he argues, mandates a prudent balance of interests: id. at 155.
Does this, a contrario, mean that excessive extraterritorial animal law is legal? Traditionally, the law of state responsibility categorized acts as either legal or illegal, so this suggests that excessive extraterritorial animal law is legal. As Peters’ examination of extraterritorial naturalizations shows, exorbitance is a third item that was added to the law of state responsibility (which categorizes acts as either legal or illegal) following the ILC Report on Nationality by Special Rapporteur Mikulka.166 Peters acknowledges this development but cautions against it:

Once it is acknowledged that international law has a negative role to play [...] by setting up limits, any disregard of these limits should render the act illegal. In the modern law of State responsibility, there is no room for an intermediate category of acts which are neither legal nor illegal but merely opposable.167

Nevertheless, the strange intermediate category of exorbitance has persisted in practice and scholarship, creating distinct legal consequences that are neither covered by legality nor by illegality.168 In Nottebohm, Liechtenstein’s grant of nationality to Nottebohm was considered excessive and treated as having no effect on the international level. The Court stated:

Guatemala is under no obligation to recognize a nationality granted in such circumstances. Liechtenstein consequently is not entitled to extend its protection to Nottebohm vis-à-vis Guatemala and its claim must, for this reason, be held to be inadmissible.169

By the same token, the only legal consequences of excessive extraterritorial animal law are that (i) these laws will have no effect beyond the domestic territory of the state which enacted them,170 and (ii) affected states are not obliged to recognize these laws or the jurisdiction on which they are founded.171 This view is supported by state practice. When states consider

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166 International Law Commission, 47th Sess., First Report on State Succession and its Impact on the Nationality of Natural and Legal Persons (Special Rapporteur Vaclav Mikulka), U.N. Doc. A/CN.4/467 (Apr. 17, 1995): “States are therefore subject to two types of limitations in the area of nationality, the first type relating to the delimitation of competence between States (whose non-compliance with the rules results in the nonenforceability against third States of the nationality thus conferred) and the second, to the obligations associated with the protection of human rights (whose nonobservance entails international responsibility).”

167 Peters, Extraterritorial Naturalizations 710 (2010).


170 Dixon argues that jurisdiction in violation of international law is only effective at the local level: Dixon 150 (2013). Mann pleads for declaring such jurisdiction null outside that state’s territory. Excessive jurisdiction will simply be ignored and treated as void by other states’ courts: Mann 12 (1964).

171 Fox, Jurisdiction and Immunity, in Fifty Years of the International Court of Justice 213 (1996); Robert Y. Jennings, Nullity and Effectiveness in International Law, in Cambridge Essays in International Law: Essays in Honour of Lord McNair 64, 82 (Robert Y. Jennings ed., 1965). In the context of excessive prescriptive jurisdiction, Geisser argues that jurisdiction that violates another state’s sovereignty gives the affected state the right to deny recognition: Geisser 250 (2013). In the context of excessive nationalization: Peters, Extraterritorial Naturalizations 712 (2010).
the laws of another state to be exorbitant, they sometimes resort to blocking statutes, which indicate that the laws of another state are \textit{neither recognized, nor declared enforceable} on the territory of affected states.\textsuperscript{172}

\section*{§5 Interim Conclusion}

States tend to oppose extraterritorial animal law of another state by claiming that it interferes in their domestic affairs, violates the principle of sovereign equality, causes unnecessary costs and increases legal risks, constitutes inappropriate cherry-picking, and imposes ethical and cultural values of majority cultures on minorities. These concerns are expressed through states’ public statements, diplomatic notes, intervention in court cases through \textit{amicus curiae} briefs, adoption of blocking statutes and clawback clauses, and in legal proceedings at an international court or tribunal.

Conflicts arise because the principles of jurisdiction have only relative validity (they do not give guidance on which state has “the better claim to jurisdiction”\textsuperscript{173}) and because states have not explicitly or implicitly agreed on a hierarchy of the principles. Consequently, states are confronted with different forms of concurrent and conflicting jurisdictions, which can be classified along lines that indicate the severity of a conflict (depending on whether laws prohibit, permit, require, or omit certain conduct). Where laws lead to foreign compulsion, there is a greater likelihood of conflict than when addressees of conflicting norms can decide which laws they will obey. To mitigate and prevent conflict, a state should observe the principle of the rule of law and the prohibition of double jeopardy when it prescribes criminal animal law extraterritorially. Another unilateral measure that helps avoid and resolve conflict is the principle of reasonableness, which prompts a state to inform the prospectively affected state before a conflict emerges, and to consider deferring to that state. Concerns for animals can play a role in this assessment if they are a high priority on the regulator’s agenda or if they are a common concern of states.

Closely related to the principle of reasonableness are efforts of states to unilaterally resolve international disputes at a conflict stage. These include the balance of interests test and the principle of comity—tests that are flawed because they create the perception that other states’ interests are fully internalized, while foreign states have no say in their design or application. Conflicts might be more effectively resolved by establishing balances of interests through bi- or multilateral negotiations. Optimally, states enter cooperative and collaborative agreements that lay down duties of mutual assistance. In contrast, concluding substantive jurisdictional agreements that determine which state is competent to prescribe animal law should only be pursued if it is clear that these treaties will increase the global level of animal welfare.

\textsuperscript{172} E.g., Council Regulation 2271/96, 1996 O.J. (L 309) 1, art. 4. Blocking statutes are thus a form of counter-measure to extraterritorial enforcement jurisdiction: Crawford 478 (2012); Kamminga, Extraterritoriality, \textit{in} MPEPIL 26 (2012).

\textsuperscript{173} Bowett 14 (1982).
Whatever the extent of conflict, a state can always violate established principles of international law by adopting extraterritorial animal laws. The principles most discussed in this context are those of sovereign equality, territorial integrity, nonintervention, and self-determination of peoples. Sovereign equality can be violated where states’ juridical equality is disregarded. Because jurisdictional principles apply equally to all states, states have the same rights under the law to realize their claims to protect animals abroad. Therefore, the principle of juridical equality is not violated by animal laws with extraterritorial reach as long as they are based on rules of customary international law that apply equally to all states.

There are two views on whether extraterritorial animal law violates territorial integrity. In the first, nonforcible prescriptive extraterritorial jurisdiction is thought to have the potential to violate a state’s territorial integrity. In the second, only extraterritorial enforcement jurisdiction can violate the territorial integrity of another state because enforcement has a physical component. Purely prescriptive jurisdiction, however, does not encroach on the territorial integrity of another state.

Of all principles, a state is most likely to violate the principle of nonintervention when it adopts animal laws with extraterritorial reach. For this to happen, the regulated matter must be part of the domaine réservé of another state, which is likely because states have not concluded an international treaty in animal law. However, as animal law has become so entangled across borders, many states now have a vested interest in protecting animals abroad. So the stronger the jurisdictional anchor of a prescribing state to a subject matter, the less probable it is that the matter belongs to another state’s reserved domain. But even if it does, the principle of nonintervention will only be violated if a state uses forcible, dictatorial, or otherwise coercive means when it interferes in the affairs of another state. Most scholars argue that noncoercive extraterritorial jurisdiction falls below this threshold and simply coexists with another state’s jurisdiction. Some hold a stricter view and claim that the principle can be violated without physical coercion if a state engages in foreign sovereign compulsion, subjugation, or regime destruction. The principle of self-determination of the people may thus be violated where extraterritorial animal laws single out particular peoples and make it impossible for them to freely choose their political system or to pursue their own economic, social, and cultural development. This may be the case, for example, when extraterritorial animal laws fundamentally affect the lives and livelihoods of indigenous communities.

A decisive factor in assessing the legality of extraterritorial animal laws is the extent to which the prescribing state takes into account the interests of affected states and the means it uses to protect animals abroad. Laws that create only extraterritorial ancillary repercussions are unlikely to violate principles of international law because they do not regulate content abroad. ICJ case law further suggests that jurisdiction based on intraterritorial anchor points to regulate content abroad is less likely to be considered excessive than jurisdiction that uses extraterritorial anchor points and regulates content extraterritorially.

In summary, the legality of extraterritorial animal law depends on four key factors. First, extraterritorial jurisdiction must be based on a reasonable link. Only where a state relies on a recognized principle of jurisdiction, and operates within its limits, can it be seen as observing international law. Second, the legality of extraterritorial animal law depends on the specific subject matter and the extent of its regulation under international law. Third, jurisdiction must be exercised for legitimate purposes. Fourth, a state must pay attention to the manner and the means by which it exercises jurisdiction.
When the laws of a state violate a principle of international law, the law of state responsibility is used to determine the legal consequences. There are broadly two views on the legal consequences of excessive extraterritorial jurisdiction. Some claim that states bear full responsibility under international law, which includes claims to cessation (if the law is still in effect), nonrepetition (to prevent the state from doing the same wrong in the future), and reparation (for the damage suffered). An alternative view, supported by the sparse judgments in international law and majority scholarly opinion, is that excessive extraterritorial animal laws are exorbitant but not illegal and that they can therefore be countered by a declaration of nullity, and a right to nonrecognition by affected states.

The legal limits that states face under international law may help dispel concerns about extraterritorial jurisdiction but they still leave ample room for the imperialist exercise of extraterritorial animal law that targets ethnic and cultural minorities, their forms of government, and their ideologies. Postcolonial studies have long demonstrated the need and urgency to go beyond limited legal approaches and strive to avoid continued imperialism. After all, majority cultures have suppressed minorities for centuries to impose on them their ways of using and abusing animals. To allow this to happen in extraterritorial jurisdiction would be to accept that the protection of animals is not an end itself but a means of oppressing others. Neither international law nor animal law can afford to take this risk. Ways to preclude this and ensure extraterritorial jurisdiction benefits both humans and animals include listening to other perspectives and being aware that colonialism taints Western ways of knowing, striving for consistency by criticizing mainstream practices and engaging in self-reflective inquiry, and making judgments only after good faith consultation and collaboration.

175 Deckha 223 (2007); Will Kymlicka & Sue Donaldson, Animal Rights and Aboriginal Rights, in Canadian Perspectives on Animals and the Law 159, 177 (Peter Sankoff, Vaughan Black, & Katie Sykes eds., 2015).