1 Mapping the Territory of Animal Law

§1 Cornerstones of Jurisdiction

The law of jurisdiction is a topic that is becoming increasingly important in international law, at a time when trade, commerce, finance, and their spillover effects are ever more entangled. Sorting out which state is competent to regulate an entangled matter brings order into chaos, it connects threads that are currently in disarray, and helps to resolve disputes that arise at this interface. But the concept of jurisdiction is not a simple one. What it is, how it can be used, and who defines it are all questions that defy succinct summation. This chapter aims to shed light on these foundational questions and bring to the fore the historical and conceptual factors that have led states to redistribute jurisdictional space. I then define and unpack the terms and concepts of territoriality and extraterritoriality. To do so, I develop a comprehensive extraterritoriality framework that categorizes jurisdictional norms by splitting them into different structural elements: anchor points, content regulation, and ancillary effects. These tools will help unravel complex cross-border relationships and determine the roles animals play in them. To demonstrate the feasibility of the framework, I develop four case groups that each highlight a key area: corporate exploitation of low animal protection standards abroad (i.e., outsourcing), trade in animals and animal products, animal migration, and exploitation of weak animal laws abroad by individuals (e.g., trophy hunting or bestiality).
A. JURISDICTION AS A META-ORDERING DOCTRINE

In principle, states are their own regulators and have jurisdictional Kompetenz-Kompetenz or originary jurisdiction.\(^1\) In this first, very abstract state, states gradually placed limits on their authority and began to define when and how they can use that authority. Many states decided to transfer some of their jurisdictional authority to another state, a regulatory entity, an institution, or an international court, like the UN,\(^2\) the ICJ,\(^3\) the International Criminal Court (ICC),\(^4\) or special tribunals.\(^5\) The jurisdictional authority a state confers on another such entity is called derivative jurisdiction. Supranational bodies may also exercise jurisdiction, but they rely on international agreements that reach beyond the nation-state and create an “autonomous and sui generis constitutional order.”\(^6\) Herein, however, I am primarily interested in originary jurisdiction of states and the jurisdiction of supranational organizations that perform acts in lieu of states, like the European Union that possesses jurisdictional competence in a quasi-originary position. In other words, this study inquires into extraterritorial jurisdiction that expands horizontally rather than vertically.

Although states enjoy inalienable and originary jurisdictional authority, they are not competent to determine the spatial limits of their jurisdictional competence individually and autonomously. Because disagreements over the reach of the jurisdictional competences of states, ratione loci, only arise when jurisdiction conflicts or concurs, they rarely touch matters under the exclusive purview of a single state.\(^7\) In most cases, international law is the competent body to govern questions concerning the territorial powers of states, not least because the regulatory ideals of international law are to create order and peace, and to ensure states’ sovereign equality.\(^8\)

The jurisdictional limits determined by international law operate in an ultima ratio manner. The norms of international law do not provide an optimum level of regulation but require that states meet minimum standards when they exercise jurisdiction in cross-border

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\(^1\) Meng 4 (1994); Anne Peters, *Humanity as the A and Ω of Sovereignty*, 20 EJIL 513, 515, n. 4 (2009).
\(^3\) Statute of the International Court of Justice, June 26, 1945, 33 U.N.T.S. 993, arts. 36, 37, and 53 para. 2 [ICJ Statute].
\(^7\) Moreover, the reserved domain may shrink as international law incrementally expands because “[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” (Nationality Decrees in Tunis and Morocco, Advisory Opinion, Judgment, 1923 P.C.I.J. (ser. B) No. 4, at 24 (Feb. 7) [Nationality Decrees, 1923 P.C.I.J.]).
scenarios. These minimum standards manifest as prohibitory rules like the duty not to intervene in the domestic affairs of another state. They can also take the form of positive, permissive rules on which states can base their extraterritorial jurisdiction. Conversely, international law does not require states to legislate extraterritorially. A notable anomaly in this respect is human rights law, where mandatory jurisdictional rules for states to respond to governance gaps that facilitate human rights violations is widely debated.

The international doctrine of jurisdiction provides a framework of rules and principles that apply to all fields of law: criminal, administrative, constitutional, and private law. In matters of public law, which encompasses criminal, administrative, and constitutional law, states usually apply domestic law to a case or dismiss it. This approach is known as the unilateral determination of the application of domestic law. In contrast, private law uses all-sided rules of conflict that mandate applying either domestic or foreign substantive law. When it applies foreign law, a state’s court simply borrows another state’s laws to resolve the dispute. The legal rules that address the territorial reach of private law are well established and methodologically independent. But “private international law,” contrary to what the term seems to indicate, is by and large domestic law, while its reference or function is international. Where private international law forms part of states’ domestic law, it must stand the test of public international law, just as domestic law generally does. Some states have entered harmonized jurisdictional rules in the realm of private law, like those established under the European Union’s aegis. In this case, the international doctrine of jurisdiction uses both customary international law and treaty law.

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Critics repeatedly voice their fears about extraterritorial jurisdiction, arguing that politically stronger states can use it to oppress and impose values on economically weaker or dependent states. The law of jurisdiction undoubtedly is politically charged, which can, at least in part, be explained by its close connection to the concept of power. Earlier rulings make the link clear, as when the US Supreme Court ruled in McDonald v. Mabee in 1917 that “[t]he foundation of jurisdiction is physical power.”14 Though jurisdiction may be intricately tied to physical power, this does not imply that power legitimates jurisdiction or, indeed, that it is equivalent to jurisdiction. The relationship between the two is vexed, and this becomes apparent in scholars’ struggle to define jurisdiction. Two elements reappear in their definitions. The first cluster of definitions relates to physical power (i.e., the power,15 ability,16 or capacity17 to act or affect), and the second relates to legality (i.e., the competence18 or right19 to decide or regulate). The definitional dichotomy of jurisdiction reflects broader debates about the legitimation of power either by one’s capacity to use force (potentia) or by the authorization to use force (potestas).20 Earlier conceptions of jurisdiction might have been correct in identifying power as their base, but jurisdiction, as understood today, does not represent a physical, forcible act as an expression of sovereign power per se, but is preoccupied with (international) law-bound state acts that prescribe and enforce law. Because the law of jurisdiction is a system of rules-based authorization of power, the relatively neutral term authority21 seems to be the closest and best definitional equivalent of jurisdiction.

The law of jurisdiction operates by different sets of rules when it determines the limits of states’ jurisdiction, depending on whether it deals with regulatory or enforcement authority. Enforcement authority is the authority of states to induce compliance and punish noncompliance with their norms.22 Law enforcement is brought about by governmental force but may also include elements of persuasion. In exercising regulatory authority, in contrast, states connect a state of affairs with legal consequences. Regulatory authority refers to the authority to create and pass laws, binding rules below the level of laws by the legislature (e.g., decrees, nonadministrative regulations, etc.), regulation by administrative agencies, and judgments issued by courts (judge-made law and interpretation of other laws).

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17 E.g., Derek W. Bowett, Jurisdiction: Changing Patterns of Authority over Activities and Resources, 53 BYIL 1, 1 (1982).
19 E.g., Frederick A. Mann, The Doctrine of Jurisdiction in International Law, 111 RCADI 1, 9 (1964).
20 The dichotomy between potentia and potestas was originally established by Spinoza: Jiří Přibáň, Sovereignty in a Post-Sovereignty Society: A Systems Theory of European Constitutionalism 54 (2015).
22 U.S. Restatement (Fourth) of the Foreign Relations Law, § 401(c).
Regulatory authority operates both abstractly and concretely. Abstract regulatory authority manifests when a state prescribes law; concrete regulatory authority is exercised by applying law. The prescription of law is abstract, as it regulates a multitude of facts, and it is general, as it applies to an unknown circle of prospective addressees. Prescriptive jurisdiction is aimed at organizing state institutions, determining substantive values of the state order (basic rights and axiomatic principles of a state, such as good faith or public morality), creating obligations (actions and omissions), and creating legal relationships or statuses of persons (e.g., legal personhood or civil status) and goods (e.g., property or ownership). The application of law, in contrast, is concrete, as it applies to a specific situation, and it is individual, as it applies to a specific circle of addressees. The law is applied either through decisions of the court or through administrative acts. Adjudicative jurisdiction arises as a distinct legal question only in private international law, where a state court’s jurisdiction over a case and the application of domestic law might not be congruent. Under international law, we still speak of adjudicative jurisdiction in reference to all fields of law. Figure 1.1 illustrates the elements of jurisdictional authority and the three types of jurisdiction: prescriptive, adjudicative, and enforcement jurisdiction.

Under public international law, enforcement jurisdiction is clearly distinct from all other types of jurisdiction. The basic rule is that every state’s jurisdiction to enforce law is limited to its own territory, marked by the “continued salience of territorialism.” Acts of enforcement include the use of physical force and other acts of imperium, like investigations, issuance of writs, service of documents, and approaching or hearing witnesses. The prohibition of enforcement jurisdiction on foreign territory derives from the principle of territorial integrity and the principle of nonintervention as enshrined in article 2 paras. 4 and 7 of the UN Charter. Exceptions to this rule can only be created by consent, say, through mutual

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24 Id. at 6–8.
25 This is because private international law includes all-sided rules of conflict that may point to the application of foreign or domestic law: Jürgen Schwarze, Die Jurisdiktionsabgrenzung im Völkerrecht 20 (1994).
26 Hannah L. Buxbaum, Territory, Territoriality and the Resolution of Jurisdictional Conflict, 57 AJCL 631, 673 (2009). The principle of territorial enforcement jurisdiction was reinforced by the PCIJ in the Lotus case: “[T]he first and foremost restriction imposed by international law upon a State is that—failing the existence of a permissive rule to the contrary—it may not exercise its power in any form in the territory of another State” (S.S. Lotus (Fr. v. Turk.), Judgment, 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7) [Lotus, 1927 P.C.I.J.]).
assistance treaties in criminal law, or by customary international law, like customary rules governing the issuance of passports or visas on foreign soil.

C. USEFULNESS OF PRESCRIPTIVE JURISDICTION

Though extraterritorial enforcement raises interesting questions and debates in international law, I here focus solely on the admissibility of extraterritorial prescriptive jurisdiction. This analysis may appear unduly narrow and may throw into question the usefulness of extraterritorial prescriptive jurisdiction. Why should states seek to regulate certain facts, persons, or things present on foreign territory, if they lack the necessary jurisdiction to enforce their laws? States continue to regulate matters on foreign territory because they may hark back to judicial assistance treaties with foreign states to ensure their laws are enforced abroad. However, assistance agreements commonly cover only a fraction of prescriptive authority (e.g., only certain criminal laws) and do not enshrine a strict duty to assist. The promise of enforcement across the border, hence, is a feeble one.

Alternatively, states may use indirect means to ensure compliance with their norms on foreign territory. By leading addressees of a norm into a conflict of compliance, states can expect adherence to their laws even where they cannot enforce them. A state prescribing laws with extraterritorial reach may threaten to sue the foreign addressee of the norm on its territory, to seize their assets, to bar them from entering its territory, or to prevent them from establishing an enterprise on its territory. Diplomatic or financial cooperation might also be ended or frozen, and indirect penalties might be imposed through international money markets. These means of territorial enforcement ensure that norms are observed even across the border. The addressee of a norm performs a cost-effectiveness analysis of available options and finds that the potential negative effects of not complying with the norms are greater than the positive effects of ignoring them. Through “the appeal of persuasion,” states can affect people, places, and things beyond their territories, and this gives practical relevance to their extraterritorial animal laws without raising controversial issues of extraterritorial enforcement.

28 These treaties may be multilateral, e.g., CoE, Convention on Mutual Assistance in Criminal Matters, Apr. 20, 1959, C.E.T.S. No. 30; CoE, Convention on Laundering of Search Seizure and Confiscation of the Proceeds from Crime, Nov. 8, 1990, C.E.T.S. No. 141, or bilateral, see e.g., Agreement Between the United States and Cuba for the Lease of Lands for Coaling and Naval Stations, Feb. 23, 1903, T.S. 418.


30 In other words, a state follows another state’s assistance request at its own discretion. When the requesting state’s jurisdiction conflicts with the requested state’s jurisdiction, it is unlikely the latter will follow the former’s request.


§2 The Rise of Extraterritorial Jurisdiction

A. THE HISTORICAL RISE

At the beginning of the twentieth century, the territorial ambit of states’ jurisdictional authority was nearly unfettered. The Permanent Court of International Justice’s (PCIJ) judgment in the 1927 *Lotus* case represents the last cornerstone of the then-predominant laissez-faire attitude. The Court determined that states are free to exercise jurisdiction beyond their territory unless international law explicitly restricts them from doing so. The judgment was decided by the casting vote of the president and has been widely criticized by scholars and in subsequent court rulings for taking a stance toward states’ authority that was too libertarian, and for prompting an increase in jurisdictional disputes.

In the following decades, scholars moved to view the territorial connection of a state as “the strongest ground for asserting that a state has jurisdiction.” It was frequently maintained that states enjoy exclusive jurisdiction within and over their territory. In the *Island of Palmas* case, the sole arbitrator, Max Huber, held that the “principle of exclusive competence of the State in regard to its own territory” is the “point of departure in settling most questions that concern international relations.” From the alleged exclusivity of territorial jurisdiction, some inferred that other jurisdictional principles merely function as exceptions to the territoriality principle and that there is a complementary *prima facie* illegality of extraterritorial jurisdiction. For instance, in India, the United Kingdom, and the United States, crime was commonly viewed as local and excluded jurisdiction over aliens abroad.

After World War II, jurisdictional principles in criminal law were in upheaval, since traditional territorial interpretations stoked the public’s fears of impunity for war criminals. The failure of the international community to establish effective criminal tribunals and fears that foreign corporations would come to dominate national markets spurred demands for jurisdictional expansion. During the advent of the first wave of globalization in the 1970s through 1980s, the extraterritoriality dispute gained momentum in antitrust law and securities regulation. From the 1990s on, terrorist activities increased around the globe and so did the jurisdictional responses to them (including the Tokyo Convention, the Hague Hijacking Convention, and the Montreal Convention).

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34 Mann, for instance, views the *Lotus* principle as “a most unfortunate and retrograde theory” (Mann 35 (1964)). He finds it “difficult to believe” that an international court would deny the pervasive influence of international law (Mann 32 (1984)). See, for a critique of the *Lotus* decision, Chapter 5, §1.
36 *Island of Palmas* Case (U.S. v. Neth.), 2 R.I.A.A. 829, 838 (Perm. Ct. Arb. 1928) [Island of Palmas, 1928 R.I.A.A.]. Similarly, in *The Schooner Exchange v. McFaddon*, the US Supreme Court stated: “The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. All exceptions, therefore, must be traced up to the consent of the nation itself.” (The *Schooner Exchange v. McFaddon*, 11 U.S. 116, 136 (1812) (U.S.)).
of criminal jurisdiction peaked with the prosecutions of universal crimes in the 1990s, including the creation of the International Criminal Court (ICC), the International Criminal Tribunal for the former Yugoslavia (ICTY), and the International Criminal Tribunal for Rwanda (ICTR). In the following years, spurred by these legal developments and the need to tackle some of the most sweeping onsets of globalization, states began to use extraterritorial jurisdiction in antitrust law, banking law, bribery and corruption regulation, criminal law, insolvency law, securities law, tax law, tort law, trade law, data protection, human rights law, and other areas. Questions of how far, and under which conditions the laws of one state can or must reach into the territory of another are now emerging in areas like labor law, environmental law, and animal law.

B. EMERGING SPHERES OF JURISDICTION

Possibly because extraterritorial jurisdiction appears to be a self-explicating term, it invites a host of *prima facie* value judgments that fail to pay sufficient regard to the different forms and types of jurisdiction. Jurisdictional spheres, as established by Meng and Rudolf, can help us unpack these confusions and begin to understand why extraterritorial jurisdiction is a popular means of persuasion for states and why and when it is considered legal.

The sphere of jurisdiction (Regelungsgebiet) describes the spatial sphere in which a state’s regulation is designed to operate. The sphere of jurisdiction has two aspects: the sphere of regulation and the sphere of validity. The sphere of validity (Geltungsbereich) is the spatial area within which prescriptive jurisdiction can be enforced autonomously by a state. Due to the prohibition of extraterritorial enforcement, a state’s sphere of validity is in principle limited to its territory. The sphere of regulation (Regelungsbereich) is the sphere in which

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41 See supra note 5. See also Inazumi 44 (2005).
45 The same translation is used by ERICH VRANES, TRADE AND THE ENVIRONMENT: FUNDAMENTAL ISSUES IN INTERNATIONAL LAW, WTO LAW, AND LEGAL THEORY 97 (2009).
46 Vranes calls this the “area of application” (Vranes 97 (2009)).
persons, things, and legal relationships subject to regulation are situated. The sphere of regulation can be larger or narrower than the territory of the state, and thus broader or narrower than the sphere of validity. The sphere of regulation is defined by means of local (e.g., the location of goods or legal relationships, residence, domicile, or seat), personal (e.g., nationality or domicile of persons), and material (i.e., criteria of substantive matter, e.g., security) nexuses.

The sphere of regulation can be further divided into the sphere of anchor points and the sphere of regulatory content. The sphere of anchor points (Anknüpfungsbereich) is the spatial area in which persons, things, and legal relationships connected to their legal consequences are located. The sphere of regulatory content (Regelungsinhaltbereich/Rechtsfolgebereich) is the sphere in which the legal consequences of a regulation should manifest. Figure 1.2 illustrates these jurisdictional spheres.

Extraterritorial prescriptive jurisdiction arises when the sphere in which persons, things, or legal relationships subject to regulation are located (the sphere of regulation) exceeds the sphere within which prescriptive jurisdiction can be autonomously enforced (the sphere of validity). We should always be clear what sphere of jurisdiction we are talking about when we debate the legality of extraterritorial jurisdiction. For instance, when we speak of “exclusive territorial jurisdiction,” we typically refer to a state’s sphere of validity and not its sphere of regulation. Yet many infer from this principle that a state’s regulatory sphere may not exceed its territory, which runs counter to the manifold regulatory interests of states and the international law of jurisdiction that has emerged in response thereto. Scholars in the seventeenth century were the first to notice discrepancies between the sphere of regulation and the sphere of validity. Grotius, in particular, used *territorium* “not only to refer to territory in the geographical sense, but also to the sphere within which state jurisdiction exists.”

### C. GLOBALIZATION AND DETERRITORIALIZATION OF SOVEREIGN SPACE

As globalization has advanced, the discrepancy between the sphere of validity and the sphere of regulation has increased along with it and is now much larger than when Grotius first observed this development. Yet, how, exactly, did globalization trigger this shift? Before we can explain this development, we must first unpack the disputed notion of globalization.

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Globalization is an umbrella term for multileveled instances of increased global connectedness and can be conceptualized as having three dimensions: an economic dimension, the dimension of its global repercussions, and the dimension of juridico-political responses thereto.\(^\text{48}\) The first dimension of globalization is economic and was notably triggered by rapid technological advancements. Communication technologies of the early 1950s, combined with the trend toward linguistic convergence, quickly granted countless people access to a vast amount of information served at great speed.\(^\text{49}\) In the following decades, the means of transportation greatly improved and became accessible to vast numbers of people, which spurred cross-border business activity.\(^\text{50}\) This activity increased as states began to adopt open border policies. The 1970s and early 1980s heralded the first meaningful rounds of trade and services liberalization at an international level. The launch of the Uruguay Round in 1985 created the WTO with its explicit goal of liberalizing trade around the globe. In 1986, EU member states agreed to adopt the Single Europe Act (SEA), which established a single European market. The SEA was followed by the Maastricht Treaty in 1992, designed to foster more economic and political cooperation among the newly created European Union and its members.\(^\text{51}\) Around the same time, Canada and the United States concluded their first free trade agreement in 1988, and in 1992, they extended it to Mexico under the North American Free Trade Agreement (NAFTA).\(^\text{52}\) Liberalizing trade through international conventions led to unprecedented increases of flows of goods, services, and capital between countries.

The driving factors behind globalization (enhanced transport, communication technologies, flow of goods and services) radically cut costs and saved time. New structures of production appeared, where loosely connected industries became part of a web of multinational entities, pieces of an unimaginably vast puzzle.\(^\text{53}\) Lower costs and technological change gradually began to shift investment flows. The accelerated mobility of capital led to

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\(^\text{49}\) Johnston & Powles, The Kings of the World and Their Dukes’ Dilemma, in Globalisation and Jurisdiction 14 (2004). Strange’s description vividly exemplifies the rise of communication technology: “It took hundreds—in some places, thousands—of years to domesticate animals so that horses could be used for transport and oxen […] could be used to replace manpower to plough and sow ground for the production of crops in agriculture. It has taken less than 100 years for the car and truck to replace the horse and for aircraft to partly take over from road and rail transport. The electric telegraph as a means of communication was invented in the 1840s and remained the dominant system in Europe until the 1920s. But in the next eighty years, the telegraph gave way to the telephone, the telephone gave way to radio, radio to television and cables to satellites and optic fibres linking computers to other computers” (Susan Strange, The Retreat of the State 7 (1996)).

\(^\text{50}\) Wenhua Shan et al. eds., Redefining Sovereignty in International Economic Law xiii (Wenhua Shan, Penelope Simons, & Dalvinder Singh eds., 2008).

\(^\text{51}\) The SEA was the first major amendment of the Treaty establishing the European Economic Community (EEC): European Union, Consolidated Version of Treaty on European Union, Treaty of Maastricht, 1991 O.J. (C 191) 1 [TEU].


more interconnectedness in finance and culminated in the liberalization of foreign direct investment (FDI). The benefits of being a host or home state to multinational corporations raised investment levels and technology output in agriculture, manufacturing, and, more broadly, the mobilization of services, products, and processes.\textsuperscript{54}

The first, economic dimension of globalization set in motion its second dimension, the problematic repercussions of economic growth, clearly noticeable on a global scale. Among its disruptive effects are environmental degradation and pollution, human migration and class segregation, transnational organized crime, terrorism, the pitfalls of the internet, as well as increased migration of animals, trade in animals, cross-border production, and spread of disease.

This gave rise to the third dimension of globalization, which encompasses the juridico-political responses to the first two dimensions. This is the realm in which challenges posed by globalization to regulatory regimes and political branches must be resolved and the role of states as regulators—whose ability to individually fulfill state duties, such as ensuring security, rights, welfare, and protection from crime and environmental pollution, is dwindling—must be determined. Globalization modified these previously centralist concerns, because solving them now requires coordination and cooperation between multiple states.\textsuperscript{55}

The three dimensions of globalization have shifted our understanding of sovereign space. Many scholars have asked what role is left for the state to play when borders begin to dissolve, and consequently lose relevance—factually, economically, and politically. The most extreme prediction of the outcome of globalization is the decline of the sovereign state.\textsuperscript{56} The argument that globalization will lead to a complete loss of state sovereignty, however, is primarily political in nature and defended by a minority of hyperglobalist scholars.\textsuperscript{57} Legal scholarship, in contrast, finds that the concept of sovereignty has been “remarkably resilient both epistemically and normatively.”\textsuperscript{58} State sovereignty still plays a central role in international law;

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\item \textsuperscript{54} John Stopford & Susan Strange, Rival States, Rival Firms: Competition for World Market Shares 5 (1991); Strange 9 (1996).
\item Globalization and internationalization must be strictly distinguished. Rather than internationalizing the international legal order, globalization has shifted the focus away from state-centered issues to transnational ones: Christine Kaufmann, Globalisation and Labour Rights: The Conflict between Core Labour Rights and International Economic Law 6–7 (2007); James Turner Johnson, Sovereignty: Moral and Historical Perspectives 117 ff. (2014).
\end{itemize}
it is the starting point of any inquiry into legal responsibility and the introduction of new rights and duties. Newer developments suggest that states are in fact re-emphasizing state sovereignty, such as during the rise of the BRIC states (Brazil, Russia, India, and China).\(^{59}\)

Although state sovereignty remains a core pillar of the international legal order, it has changed fundamentally. The main factors that drive globalization—political, economic, social, and ecological activities—have caused seismic shifts in traditional conceptions of sovereignty. Globalization, as some say, has “unbundled” territoriality from state sovereignty, it has deterritorialized state sovereignty.\(^{60}\) Three processes support this claim: the movement from state independence to interdependence, the shift from state sovereignty to sovereignty of the people, and the rise of global legal pluralism. I will briefly look at each of these in turn.

First, we are observing a movement from state independence to interdependence. Goods are often produced in the territories of several states, and diverse suppliers, producers, workers, buyers, managers, consultants, etc., contribute to their manufacture. Seemingly trivial business decisions made in one state may fundamentally shape the interests of foreign individuals, groups, or states, so government institutions cannot satisfactorily coordinate these actions without cooperating, or at least coordinating, across borders.\(^{61}\) In an attempt to recover their capacity to solve problems caused and exacerbated by globalization, states resort to global, nonterritorial regulatory structures. Sovereign independence thus has given way to state interdependence.\(^{62}\)

The second observation is that sovereignty of the state has shifted to sovereignty of the people. In an era of interdependence, the Westphalian model of sovereign, exclusive state power no longer matches reality: matters are no longer left as far as possible to states’ discretion. State sovereignty now entails fundamental duties like protecting people from serious crimes or ensuring their human rights. When the people become the ultimate units of concern, sovereignty no longer lies with the ruler, but shifts to the people (from *imperium*...
to \textit{populus}). In Peters’ view, a new principle of humanity has thus emerged—the principle that human rights, human interests, and human needs must be respected—and this has become the first principle of sovereignty.\footnote{From this follows that “[…] conflicts between state sovereignty and human rights should not be approached in a balancing process in which the former is played off against the latter on an equal footing, but should be tackled on the basis of a presumption in favour of humanity.” (Peters, \textit{Humanity as the A and Ω of Sovereignty} 514 (2009)). Hobe calls this “enlightened sovereignty” (Stephan Hobe, \textit{Globalisation: A Challenge to the Nation State and to International Law}, in \textit{Transnational Legal Processes: Globalisation and Power Disparities} 378, 388 (Michael Likosky ed., 2002)). Dederer calls it “functional sovereignty” because the function of sovereignty is to establish state responsibility: (Hans-Georg Dederer, \textit{Responsibility to Protect’ and ‘Functional Sovereignty},” in \textit{Responsibility to Protect (R2P): A New Paradigm of International Law?}, 156, 157 (Peter Hilpold ed., 2015)). \textit{See also} Cohen 180 ff. (2012); Turner Johnson 137 ff. (2014).}

The rise of popular sovereignty can be seen in major founding documents of international law. Article 1 of the UN Charter lays down the duty to respect the principles of equal rights and self-determination of the peoples. Article 21 para. 3 of the 1948 UDHR declares that “[t]he will of the people shall be the basis of the authority of government […].”\footnote{UDHR, art. 21 para. 3.} Sovereignty, previously bundled in a few powerful governments, now emphasizes collective, popular sovereignty.\footnote{Howse, \textit{Sovereignty, Lost and Found}, in \textit{Redefining Sovereignty in International Economic Law} 64 (2008).}

The third factor that weakens a strong territorial understanding of sovereignty is the shift from territorially defined regulatory structures to multilayered governance that “more closely reflect[s] the different spatial structures in which issues and problems arise.”\footnote{Alexander B. Murphy, \textit{The Sovereign State System as Political-Territorial Ideal: Historical and Contemporary Considerations}, in \textit{State Sovereignty as a Social Construct} 81, 84 (Thomas J. Biersteker & Cynthia Weber eds., 1996).} The creation of adjudicatory bodies on the international level (including the ICC, ICTY, and ICTR) and the ongoing proliferation and fragmentation of international law gave rise to a new structure of regulation that is heterogeneous, multilayered, and overlapping. As a consequence, there are “many alternative competing and contending sovereignties,”\footnote{Aoileann Ní Mhurchú, \textit{Citizenship beyond State Sovereignty}, in \textit{Routledge Handbook of Global Citizenship Studies} 119, 120 (Engin F. Isin & Peter Nyers eds., 2014).} which lie at the heart of modern global legal pluralism.\footnote{Paul Schifff Berman, \textit{Global Legal Pluralism: A Jurisprudence of Law Beyond Borders} (2012); Cohen 58 ff. (2012); Martti Koskenniemi, \textit{The Politics of International Law} 228–9 (2011); Ralf Michaels, \textit{Global Legal Pluralism}, 5 ANN. REV. L. & SOC. SCI. 243 (2009). The mechanism of multilayered governance is also called “Althusian” (Inocencio 196 (2014)).}

D. THE RISE OF JURISDICTION BASED ON PERSONAL AND ORGANIZATIONAL SOVEREIGNTY

Because sovereignty is the foundation on which jurisdiction is exercised,\footnote{Ian Brownlie, \textit{Principles of Public International Law} 204 (7th ed. 2008). In the words of the PCIJ in \textit{Lotus}, a state’s “title to exercise jurisdiction rests in its sovereignty” (\textit{Lotus}, 1927 P.C.I.J. 19). \textit{See also}} its deterritorialization has begun to shift our understanding of the doctrine of jurisdiction as primarily
terrestrial. Reliance on territorial considerations is today regarded as “static preservation of the legal order,” a “jurisdictional artifact,” that stems from the “obsolescent and no longer viable notion of state sovereignty.”\textsuperscript{70} The principle of territorial jurisdiction is said to suffer from the categorical shortcoming of never having been able to satisfactorily and permanently resolve conflicts. As early as 1957, Jennings pointed out: “In our present shrunken world such a strictly territorial division of jurisdiction may, it can be suggested, be unworkable [...].”\textsuperscript{71}

While mere geographical boundaries might have effectively allocated state competence for earlier, simpler forms of government, business, and private activities, these boundaries are today less practicable. The traditional image of states as bodies with prescriptive authority limited to their territories cannot capture the complex realities of modern life or serve the plethora of interests that states and the international community at large have. Events that occur nowhere (cyberspace) and everywhere (global markets) have caused jurisdictional gaps and overlaps that recompose jurisdictional space. As states’ territories and the regulatory scope of their laws are increasingly losing congruence, the chief function of territorial jurisdiction—the effective organization of jurisdictional space—is withering away. In a highly connected world, territorial jurisdiction can no longer serve as a reliable guide for the doctrine of jurisdiction.\textsuperscript{72}

In an effort to find workable bases of jurisdiction that respond to these challenges, states have established solutions freed from territorial underpinnings.\textsuperscript{73} Each of the common principles (the nationality principle, the protective principle, the universality principle, the effects principle, and the objective and subjective territoriality principles) is evidence “that in some circumstances a state is legally free to act, outside its territory to apprehend and punish activities.”\textsuperscript{74} In the \textit{Arrest Warrant}, a landmark judgment on extraterritorial jurisdiction, former ICJ President Guillaume considered established the territoriality principle, the nationality principle (both the active and passive version), the protective principle, and the universality principle.\textsuperscript{75} The growing acceptance that jurisdictional principles must be decoupled from territoriality is not as remarkable as it may first appear since state sovereignty is defined by more than territory. The three aspects that together constitute sovereignty are: territorial sovereignty, personal sovereignty, and organizational sovereignty.\textsuperscript{76} And while the law of

\begin{itemize}
  \item Lotus, 1927 P.C.I.J. 305 (Dissenting Opinion by Altamira, M.): “Of course, every sovereign State may by virtue of its sovereignty legislate as it wishes within the limits of its own territory” (emphasis added).
  \item Maier, \textit{Jurisdictional Rules in Customary International Law, in Extraterritorial Jurisdiction in Theory and Practice} 64, Comment by Andrea Bianchi 84 (Karl M. Meessen ed., 1996).
  \item Arrest Warrant, 2002 I.C.J. 35, 44 (Separate Opinion of President Guillaume).
  \item See also Benedict Kingsbury, \textit{Sovereignty and Inequality}, 9 EJIL 599, 615 (1998).
\end{itemize}
jurisdiction has so far been concerned, mostly, with territoriality, jurisdictional principles that have emerged from personal sovereignty (e.g., the nationality principle) or from organizational sovereignty (e.g., the protective principle) rank equally with territorial jurisdiction. The jurisdictional principles founded on personal and organizational sovereignty are gaining relevance in this age of globalization. Examples include the US Alien Tort Claims Act, which permits foreign citizens to seek remedies in national courts for human rights violations committed abroad, or the European Union’s Derivatives Regulation, which imposes obligations on nonresident entities to prevent them from evading its provisions. Zerk, who assisted the Special Representative of the UN Secretary-General (SRSG) on Business and Human Rights, finds in her report on extraterritorial jurisdiction that “increasingly, governments recognize that, in some areas, effective regulation of activities within their territories demands some degree of control over private activities beyond their borders.”

As expressed by Judges Higgins, Koojmans, and Buergenthal in their Separate Opinion in the Arrest Warrant, “the movement is towards bases of jurisdiction other than territoriality.”

§3 The Extraterritoriality Framework

A. JURISDICTIONAL NORMS AND THE EXTRATERRITORIALITY FRAMEWORK

Even though states increasingly resort to extraterritorial jurisdiction, certainty about the legal limits of their jurisdictional authority has not developed at the same rate. To date, there is no authoritative determination in international law, much less a consensus on the grasp of the term “extraterritorial jurisdiction” or “extraterritoriality,” which explains the mixed views on its legality. Extraterritorial jurisdiction has often been associated with the extraordinary, illegality, excessive governance, outrageousness, aggressive unilateralism, or legal hegemony, and this exacerbated existing uncertainties. The law of jurisdiction seems trapped...
in a dichotomy between “legitimate” territorial jurisdiction and “problematic” extraterritorial jurisdiction. This pejorative connotation has caused scholars and practitioners to avoid the term, but bypassing the terminological obstacles of extraterritoriality only delays what will inevitably reappear when we must determine the legality of extraterritorial jurisdiction. Unpacking this charged terminology is a necessary first step.

The starting point of extraterritorial jurisdiction is territory, because in the absence of territory, the law of jurisdiction (or of extra-territoriality, as it were) has no meaning. “Territory” denotes a stable, physically identified base, delimited in space by means of natural frontiers, by undisputed outward signs of delimitation, by frontier conventions, and by mutual recognition of states. Extraterritoriality, which comes from the Latin extra territorium, must a contrario mean “outside a state’s territory.” Approaching the term in this negative sense leaves extraterritoriality with two possible meanings: it can mean “on the territory of another state” or “on state-free territory.”

These definitions may appear to be relatively clear and unequivocal, but there are several problems with them. Extra-territoriality implies that jurisdiction is exercised without any link to sovereign territory, and hence without a link to the state exercising jurisdiction. The nationality principle, in which nationality rather than territory is the decisive criterion, would thus be extraterritorial, as would the protective and universality principles. Yet, if we look closer, all of these hinge on a territorial base. Nationality can only be defined by the state that endows a person with nationality. Since states are distinguished from one another mainly by their territory, nationality is valid only because a territorially defined state has granted it, so every single jurisdictional principle is ultimately linked to the distinct territories of states. The effects principle is based on the territorial effects of an extraterritorial measure. The protective principle is based on the desire of each state to ensure its territorial security, and so on. Every jurisdictional principle is based on some territorial link, but, the crux is, that might not be the only territorial link to a state. So a strictly linguistic definition of extraterritorial jurisdiction leaves unresolved the problems that plague the law of jurisdiction.

To tackle these terminological inadequacies, we must first acknowledge that all forms and types of extraterritorial jurisdiction are (intra)territorial by their provenance. Extraterritorial norms are generated through domestic legislative or adjudicative processes. Judges Higgins, Kooijmans, and Buergenthal recognized this in the Arrest Warrant when they argued that “territorial jurisdiction for extraterritorial events” more accurately describes extraterritorial...
jurisdiction. But norms that are (intra)territorial still capture (more or less considerable) extraterritorial aspects. So far, legal scholarship has unjustifiably collapsed these aspects and failed to ask the pivotal question: What factor is decisive in rendering jurisdiction territorial or extraterritorial? This question goes to the core of jurisdiction, and to answer it, we must scrutinize in detail the structure of jurisdictional norms.

Jurisdictional norms aim to identify connecting points to establish a state’s regulatory competence. From these points, links or nexuses can be made to the state’s jurisdiction. For instance, the nationality of persons is the source of the prescriptive authority that the state of nationality exercises over them. The connecting point “nationality” anchors and legitimizes attaching content to it, making it an anchor point. Anchor points might seem to represent the object and ends of regulation. For example, if a state intends to assert jurisdiction over a case that involves a dog’s well-being, it establishes a territorial anchor to the dog based on the dog’s current location. The dog, in this case, is both the anchor point and the object of regulation because the norm’s purpose is to ensure the dog’s well-being. But this is not necessarily the case for all forms of jurisdiction. Imagine a state that wishes to prescribe minimum standards of parental leave for corporations. The anchor point for the jurisdictional norm will be the corporation (by way of the corporation’s nationality or seat). But the regulated content pertains to social rights of third persons (in this case, parental leave for employees), so the anchor point is not necessarily the object of regulation where the consequences of a norm are intended to be felt.

The regulated content represents the centerpiece of every jurisdictional norm. Its purpose, by and large, is to fulfill the norm’s Regelungszweck. Put differently, the regulated content is a norm’s raison d’être. The anchor literally anchors, thus, legitimizes and rationalizes, the sphere of regulated content to a state. Sometimes the anchor is cast exactly into the sphere of regulated content, and sometimes it is not. Moreover, dropping anchors and regulating content may cause ripple effects, so-called ancillary repercussions. A jurisdictional norm can thus be structured by its anchor point, by its regulated content, and by its ancillary repercussions.\(^9\)

Adding spatial dimensions to the jurisdictional norm generates a new set of considerations that brings us closer to distinguishing territorial from extraterritorial jurisdiction. A norm’s anchor point can lie within or outside a state’s territory, as can regulated content and ancillary repercussions. The three elements of a jurisdictional norm can thus be distinguished

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\(^9\) Scholars other than Meng and Rudolf have proposed ways to define extraterritorial jurisdiction. Vranes distinguishes between unilateral or multilateral creation of norms, the regulation of domestic or foreign conduct, and the pursuance of territorial or extraterritorial concerns (Vranes 174 ff. (2009)). Vranes’ distinction of norms/regulation/pursuance of concerns is almost the same as the anchor point/content regulation/ancillary repercussion distinction I apply. Scott has conceptualized extraterritorial laws, differentiating between so-called extraterritorial laws and territorial extensions. Extraterritorial laws translate into “[t]he application of a measure triggered by something other than a territorial connection with the regulating state.” Territorial extensions, by contrast, occur where “[t]he application of a measure is triggered by a territorial connection but in applying the measure the regulator is required, as a matter of law, to take into account conduct or circumstances abroad.” See Scott 90 (2014). But Scott’s conceptualization fails to determine which factors should be territorial and which not, so it is not specific enough to address the prevailing problems of extraterritorial jurisdiction.
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by their location: territorial and extraterritorial anchor point, territorial and extraterritorial regulated content, and territorial and extraterritorial ancillary repercussions. Figure 1.4 illustrates the spatial dimensions of a jurisdictional norm, which form the backbone of the extraterritoriality framework.

B. EXTRATERRITORIAL JURISDICTION STRICTO SENSO, OR DIRECT EXTRATERRITORIALITY

The extraterritoriality framework distinguishes between direct and indirect extraterritorial jurisdiction. A jurisdictional norm is indirect extraterritorial if and only if ancillary repercussions occur on foreign territory, or, put differently, if there is neither an extraterritorial anchor point nor an extraterritorial content regulation. By contrast, a norm is extraterritorial stricto sensu (or direct extraterritorial) if its anchor point or the regulated content lies outside the prescribing state’s territory. Figure 1.5 illustrates this limited focus of extraterritorial jurisdiction stricto sensu.

As we approach the many conundrums of the extraterritoriality framework, it is crucial to keep the following caveat in mind: the extraterritoriality framework is an analytical tool that seeks to impartially define jurisdictional norms as extraterritorial or territorial. The framework dissects any jurisdictional norm into subfactors ([extra]territorial anchor point, [extra] territorial regulated content, and [extra]territorial ancillary repercussions) on the basis of which it classifies the norm as extraterritorial or territorial. The extraterritoriality framework is a formidable tool for tackling definitional conundrums and for conducting empirical research on jurisdictional practices (examining, e.g., what types of jurisdiction states use and how often they do so). However, the framework does not allow us to judge the legality of a
norm under international law. Only after this framework is applied to the norm under scrutiny can questions of legality or illegality be addressed.

Returning to the two forms of extraterritorial jurisdiction *stricto sensu*, I will now examine extraterritorial anchor points and extraterritorial content regulation. Extraterritorial anchor points may focus on personal, objective, or legal factors. Anchor points that relate to *persons* include the nationality of natural or legal persons, their seat, domicile, or residence. For instance, pursuant to section 5 para. 8 of the German Criminal Code, German criminal law applies when German nationals commit offenses against a person’s sexual self-determination abroad. The offender’s nationality is the anchor point to the state’s jurisdiction; it is personal in character and was created by a loyalty connection from the person to the state (intraterritorial anchor point). In some states, animals might qualify as person-related anchors. Animals could operate as anchors to a state either by virtue of their “nationality” (as arguably created by, for example, pet passports), or by their domicile or residence.

A state may also base its jurisdiction on anchor points related to *objects*, including the location of assets, events, or circumstances. Even if animals are considered mere property, they can constitute an independent anchor point as property, just as immovable property. Or, in the criminal realm, wrongs (e.g., cruelty or unnecessary suffering) inflicted on animals could be brought under a state’s jurisdiction by linking it to the place where the crime was committed.

A state may also link its jurisdiction to anchor points that relate to *legal relations and statuses*, like the place where matrimony was entered, or where someone’s legal personhood was established. So if animals are recognized as legal persons, the place that gave rise to this status would operate as an anchor point.

Since an anchor point is not necessarily the object of regulation where the intended consequences of a norm are felt, animals can also be part of a norm’s regulated content. Extraterritorial content regulation determines the content of a regulation outside a state’s territory by regulating, e.g., the institutions and substantive values of a state, obligations and rights, and legal relations of persons and of goods. For instance, article 3-2 of the Japanese

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94 Strafgesetzbuch [StGB] [Criminal Code], Nov. 13, 1998, BGBl. I at 3322, art. 5 para. 8 (Ger.).
96 Meng 5, 75 (1994).
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Criminal Code states: “This Code shall apply to any non-Japanese national who commits one of the following crimes against a Japanese national outside the territory of Japan […].”

Article 3-2 uses a personal anchor point (a Japanese national) that is intraterritorial since nationality is a permanent loyalty bond between the territorial state and the national. The content that article 3-2 regulates is extraterritorial: “None of the following crimes shall be committed outside Japan against a Japanese national.”

Animals can be part of the regulated content of a norm in several ways. They can be involved in the creation of duties. Anti-cruelty norms, for instance, create duties owed to animals by the people who are considered their owners, and by people who are not part of the property relationship. Animals can arguably also be rights holders. For instance, the United Kingdom’s Five Freedoms of Animal Welfare confer—as the name implies—five freedoms on animals: freedom from hunger or thirst, freedom from discomfort, freedom from pain, injury, or disease, freedom to express normal behavior, and freedom from fear and distress. These freedoms are sometimes regarded as freedom rights of animals. If these rights are created for animals located abroad, we identify this as extraterritorial content regulation. Finally, it is possible to create legal relations or statuses that involve animals in foreign territory. This is the case when ownership or some form of usufruct is asserted over animals, or when animals are accorded legal personality.

The two types of extraterritorial jurisdiction _stricto sensu_—extraterritorial anchor point and extraterritorial content regulation—can be combined in different ways. I explore and differentiate these combinations by flagging them as types of jurisdiction (α, β, γ, and δ). Extraterritorial anchor points can entail intraterritorial or extraterritorial content regulation. A person whose primary business is in the territory of one state may possess assets abroad (extraterritorial anchor point) subject to taxation in their home country (intraterritorial content regulation), which is type β. Conversely, extraterritorial content regulation can be based on intraterritorial or extraterritorial anchor points. Foreigners might have a duty to pay taxes (extraterritorial content regulation) based on real property in the state’s territory (intraterritorial anchor point), which is type γ. Another example of type γ is a domestic duty a state imposes on a domestic corporate parent (intraterritorial anchor point), demanding the corporation’s foreign subsidiaries report on their employee policies (extraterritorial content regulation). Extraterritorial anchor points and extraterritorial content regulation may also overlap, and so may intraterritorial anchor points and intraterritorial content regulation. An intraterritorial norm may use an extraterritorial anchor point and aim to regulate content outside its territory. An example of this is the direct duty imposed on a foreign subsidiary (extraterritorial anchor point) to report on its human rights performance (extraterritorial content regulation).

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97 刑法 Keihō [Penal Code], Act No. 45 of 1907, art. 3-2 (Japan) [Keihō [Penal Code] (Japan)], _translation at_ http://www.cas.go.jp/jp/seisaku/hourei/data/PC.pdf.

98 Early animal protection laws protected only the interests of people owning animals, whereas contemporary anti-cruelty laws criminalize acts against animals regardless of ownership: Bruce A. Wagman & Matthew Liebman, A Worldview of Animal Law 148–9 (2011).


100 See Chapter 8, §3 VII, on freedoms and animal rights.
content regulation), which is type \(\alpha\). The simplest form is type \(\delta\), which is intraterritorial prescription of content based on an intraterritorial anchor point, such as prohibiting nationals from committing murder on domestic territory. Figure 1.6 illustrates the different combinations of these types of jurisdiction.

### C. THE ANIMAL RELATION

Though the extraterritoriality framework is already fairly complex, it requires another set of factors. Here, I examine how the different types of jurisdiction just explained relate to animals, such as when states use them as anchors or regulate aspects of their lives. I use the term *animal-related* to determine if animals are an integral part of anchor points or regulated content in jurisdictional norms. As noted above, type \(\alpha\) norms regulate content extraterritorially and use extraterritorial anchor points. If we add to that the *animal-related* dimension, three distinct types of jurisdiction emerge. First, type \(\alpha_1\) emerges when animal-related extraterritorial anchor points and animal-related extraterritorial content regulation correlate (type \(\alpha_1\)): a state uses extraterritorial animal-related anchor points, and also aspires to regulate animal-related content outside its territory. This, likely, is the most extreme form of extraterritoriality. An example of type \(\alpha_1\) jurisdiction is when a state imposes duties on foreign owners of animals (extraterritorial anchor points) to ensure adherence to its animal law (extraterritorial content regulation) (type \(\alpha_1\)). Second, animal-related extraterritorial anchor points can meet non-animal-related extraterritorial content regulation (type \(\alpha_2\)). One can imagine a state imposing a tax on dog owners if their dog is located on domestic territory, regardless of where the owners live. Third, animal-related extraterritorial content regulation can be based on non-animal-related extraterritorial anchor points (type \(\alpha_3\)), as, for example, when a direct duty is imposed on a foreign subsidiary to report on its compliance with domestic animal welfare standards.

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The same dimensions emerge in type β jurisdictional norms. Animal-related extraterritorial anchor points can entail the regulation of intraterritorial animal-related or intraterritorial non-animal-related content. For instance, a person with their main business on domestic territory possesses animals abroad (extraterritorial anchor point); these are subject to taxation in the person’s home country (non-animal-related intraterritorial content regulation, type β), or subject to animal welfare regulation in the person’s home country (animal-related intraterritorial content regulation, type β).

Animal-related extraterritorial content regulation can moreover be based on an animal-related or non-animal-related intraterritorial anchor point (type γ). Type γ jurisdiction occurs when a state obliges a domestic parent corporation (non-animal-related intraterritorial anchor point) to report on its foreign subsidiaries’ compliance with domestic animal welfare standards (animal-related extraterritorial content regulation). Type γ jurisdiction also exists where a state requires its nationals (non-animal-related intraterritorial anchor points) to adhere to its animal laws when operating abroad (animal-related extraterritorial content regulation). Type γ jurisdiction is different. Based on the universality principle, a state may criminalize especially gruesome acts committed against animals wherever they are (animal-related extraterritorial content regulation), after the animal returns to the forum (animal-related intraterritorial anchor point) (type γ). Table 1.1 illustrates the animal relation of anchor points and regulated content by the types presented and exemplified, and makes clear this book’s focus on the animal-relation of extraterritorial jurisdiction stricto sensu.

<table>
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<tr>
<th>Table 1.1</th>
<th>Types of Jurisdiction in Animal Law under the Extraterritoriality Framework</th>
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<tr>
<td><strong>Anchor point</strong></td>
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<td>Animal-related</td>
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<td>Extraterritorial</td>
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<tr>
<td>Non-animal-related</td>
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D. Extraterritorial Ancillary Repercussions, Or Indirect Extraterritoriality

Ancillary repercussions have no bearing on whether a norm is extraterritorial *stricto sensu* or not. In contrast to anchor points and regulated content, ancillary repercussions refer to the many implications of a norm that extend beyond the effects it was intended to have, i.e., beyond the regulated content. Lawmakers may be able to predict a norm’s ancillary repercussions, but those are not the reason a norm was initially enacted for or the reason why it is still upheld. Animals may be part of or an ancillary repercussion where they are positively or negatively affected by a norm, as a side effect. If a norm has such an effect, it has an animal-related ancillary repercussion.

Extraterritorial ancillary repercussions—also known as indirect extraterritorial jurisdiction or domestic measures with extraterritorial implications—are considered another attribute of the two forms of extraterritorial jurisdiction, rather than a distinct third form.\(^\text{102}\)

Not including ancillary repercussions in the definition of extraterritoriality *stricto sensu* means we make some delineation to a potentially vast causal chain of events triggered by a norm. The purpose of this delineation, ideally, is to mirror a norm’s reasonable sphere of influence.\(^\text{103}\)

Distinguishing extraterritorial content regulation from extraterritorial ancillary repercussions can be challenging, and the most useful test to make this task easier is the *sine qua non* test. If the purpose of the jurisdictional norm is not met by the extraterritorial ancillary repercussion, then the norm does not regulate content extraterritorially. Subsidy regulations are an apt example: a regulation that grants a recipient a domestic subsidy improves its market position both on the domestic and on the global market. To judge what type of extraterritorial jurisdiction the regulation is, we must determine which effects of the norm form part of the regulated content and which are ancillary repercussions. We can distinguish between the two by examining the purpose of the jurisdictional norm. Typically, subsidy regulations seek to strengthen the recipient’s economic position on the domestic market (intraterritorial content regulation). We can verify the proposition by applying the *sine qua non* test. If the global market position of the subsidized body does not improve (i.e., there are no extraterritorial ancillary repercussions), has the norm missed the mark? In most cases, the subsidy norm will retain its regulatory purpose since it is designed to improve the recipient’s position on the domestic market. We are thus dealing with intraterritorial content regulation that potentially has extraterritorial ancillary repercussions, and is therefore, at best, a form of indirect extraterritorial jurisdiction.


\(^{103}\) Meng 76 (1994).
§4 Spatial Dimensions of Animal Law

Though I have established the necessary tools for beginning an inquiry from the perspective of the law of jurisdiction, we must also determine the tools of animal law. In this section, I define the scope of this study from the perspective of animal law and show why animal law deserves a distinct and careful examination under the law of jurisdiction.

A. OF HUMANS AND OTHER ANIMALS

Questions about our treatment of animals have received broad scholarly attention only in the past two decades. New insights from neurological, biological, and psychological studies about animal behavior and cognition, like Jane Goodall’s research with chimpanzees, began garnering the attention of scholars outside these disciplines. Social sciences and humanities were the site of the initial explosion of writings and teachings about animals. Philosophy quickly caught up by developing ethical imperatives that ought to govern our manifold interactions with animals. With a heightened academic focus on the study of human-animal relationships, a new research paradigm emerged in scholarship: the animal turn.104 From a legal perspective, the animal turn eventually culminated in what is now known as animal law, namely, the study of legal norms related to animals.

In the legal discourse on the human-animal relationship, we typically identify animals as such in a generalizing and sweeping way. From a linguistic perspective, “animal” comes from the Latin word *animalis*, meaning “having breath of life.”105 The term was first used to describe any living being, as opposed to inanimate objects.106 Natural science then produced the necessary knowledge to distinguish between distinct forms of animate life. Contemporary science recognizes animals as eukaryotic (organisms that dispose over a membranous cell nucleus), heterotroph (they ingest other organisms or their products), multicellular, and mostly freely movable organisms of the kingdom *Animalia* (also called *Metazoa*).107 Animals differ from plants in having cells without cellulose walls, in lacking chlorophyll and the capacity for photosynthesis, in requiring more complex food materials, in being organized to a greater degree of complexity, and in having the capacity for spontaneous movement.


106 Cresswell 16 (2010).

and rapid motor responses to stimulation.\textsuperscript{108} Members of the kingdom \textit{Animalia} are commonly divided into multiple subgroups called \textit{phyla}. These include vertebrates (mammals [including humans], birds, amphibians, reptiles, and fishes), arthropods (insects, spiders, crabs, millipedes, centipedes, scorpions, lobsters, shrimp), mollusks (octopuses, snails, oysters, clams, and squid), annelids (leeches and earthworms), jellyfish, and sponges. Because the kingdom \textit{Animalia} includes both those commonly referred to as “animals” and those commonly referred to as “humans,” taxonomies of natural science are a testament the continuity of species: any proclaimed difference between humans and animals is, at most, one of degree, not kind.\textsuperscript{109}

Because humans are—biologically speaking—animals, every single legal document that was ever passed is—strictly speaking—a document of animal law. Obviously, legislators who enacted laws on bodily liberty, property, nuisance, territory, and so forth, did not intend to imbue these laws with such a wide application. A famous example for the law’s narrow reading is the \textit{Tilikum} case, brought by People for the Ethical Treatment of Animals (PETA) on behalf of Tilikum, an orca kept in the SeaWorld Orlando park, against the SeaWorld corporation. The plaintiff asked the court to rule that the terms of the Thirteenth Amendment to the US Constitution applied to Tilikum, and thus that the orca’s confinement amounted to involuntary servitude or slavery. The Court was not convinced by the plaintiff’s arguments and held that the Thirteenth Amendment only applied to persons. Because Tilikum was not a person, the Court argued, he could not be accorded constitutional protection.\textsuperscript{110} The legal definition of animals is thus often much narrower than its linguistic and natural science counterpart: animals are all animals except human animals. As we tend to forget about our own taxonomic nomenclature, anthropologists and ethicists developed the expression “nonhuman animals” as a more correct term to describe the group generally referred to as animals in common usage.\textsuperscript{111} The term “nonhuman animal” is widely used in ethics, politics, anthropology, and natural sciences, but is less common in legal academic writing. In this

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\textsuperscript{109} Seminal: \textit{Charles Darwin}, \textit{On the Origin of Species by Means of Natural Selection, or the Preservation of Favoured Races in the Struggles for Like} (1859); \textit{Charles Darwin}, \textit{The Descent of Man, and Selection in Relation to Sex} (1871).

\textsuperscript{110} \textit{Tilikum v. SeaWorld Parks & Ent., Inc.}, 842 F. Supp. 2d 1259, 1261 (S.D. Cal. 2012) (U.S.). The court held: “The Amendment’s language and meaning is clear, concise, and not subject to the vagaries of conceptual interpretation—‘Neither slavery nor involuntary servitude [. . .] shall exist within the United States or any place subject to their jurisdiction.’ As ‘slavery’ and ‘involuntary servitude’ are uniquely human activities, as those terms have been historically and contemporaneously applied, there is simply no basis to construe the Thirteenth Amendment as applying to non-humans.” (\textit{Id.} at 6). \textit{See} for a useful discussion of the case: Jeffrey S. Kerr et al., \textit{A Slave by Any Other Name Is still a Slave: The Tilikum Case and Application of the Thirteenth Amendment to Nonhuman Animals}, 19 \textit{Animal L.} 221 (2013).

\textsuperscript{111} \textit{See}, e.g., \textit{Arran Stibble}, \textit{Animal Erased: Discourse, Ecology, and Reconnection with the Natural World} (2012), stating: “Non-speciesist language guidelines are receiving a similar treatment. Lists of pseudo ‘politically correct’ terms related to animals have started appearing on a number of numerous websites.” \textit{See also} Michael Tooley, \textit{Are Nonhuman Animals Persons?}, in \textit{The Oxford Handbook of Animal Ethics} 332 (Tom L. Beauchamp & R.G. Frey eds., 2011).
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work, I use the word “animal” for reasons of conformity and because I want to refrain from defining a group of individuals by what they are not; however, it should be clear that I mean nonhuman animal.

Animal law is typically concerned with both the protection of animals and their welfare. Animal protection law describes all regulatory measures designed to protect animals from negative affective states, like pain, suffering, harm, anxiety, or distress. These laws negatively determine how animals should be treated by prohibiting acts of cruelty or neglect. Animal law has also evolved to regulate the welfare of animals. The origins of animal welfare can be traced back to the science of animal welfare, which identifies indicators for animal well-being or lack thereof from the perspectives of physiology, veterinary science, ethology, and comparative psychology. The World Organization for Animal Health (OIE) defines animal welfare in article 7.1.1. of its Terrestrial Animal Health Code:

"Animal welfare means how an animal is coping with the conditions in which it lives. An animal is in a good state of welfare if (as indicated by scientific evidence) it is healthy, comfortable, well nourished, safe, able to express innate behaviour, and if it is not suffering from unpleasant states such as pain, fear, and distress. Good animal welfare requires disease prevention and appropriate veterinary treatment, shelter, management and nutrition, humane handling and humane slaughter or killing."

The OIE’s definition of animal welfare features two elements: the state of the animal, which corresponds to the scientific definition of animal welfare and refers to the physical and mental health of an animal, their well-being, and life; and the corollary treatment of animals by humans, which typically relates to humane treatment, or good animal husbandry. These terms are closely related and often mutually dependent. For example, where humans dominate important dimensions of animals’ lives, the ability of animals to thrive and experience good physical and mental well-being largely depends on humans treating them properly. And because life is a prerequisite to any enjoyment of well-being, animal welfare also covers animal life. In contrast to animal protection law, animal welfare laws positively regulate...

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114 OIE, Terrestrial Animal Health Code, art. 7.1.1 (OIE, Paris 2018) (emphasis omitted). See for a discussion, Barry Bousfield & Richard Brown, What Is Animal Welfare?, 1 Animal Welfare 1, 1 (2010), noting that animal welfare ensures that an animal’s physical and mental state and their ability to fulfill their natural needs and desires are considered, and that animals are not treated cruelly, or subjected to unnecessary pain or suffering.

the treatment of animals. Taken as a whole, laws on animal welfare and animal protection positively and negatively protect the same values (i.e., animal life and physical and mental well-being), so they are best seen as two sides of the same coin.\footnote{116}{Clare Palmer & Peter Sandøe, Welfare, in Critical Terms for Animal Studies 424, 427–8 (Lori Gruen ed., 2018).}

Examining the territorial limits of animal protection or animal welfare laws can easily be mistaken for identifying with the welfare position in the animal welfare versus animal rights debate in animal ethics.\footnote{117}{See generally on this debate Sue Donaldson & Will Kymlicka, Zoopolis: A Political Theory of Animal Rights 73 ff. (2011); Sabine Lennkh, Die Kodifikation des Tierschutzrechts, Modellvorstellungen 28 ff. (2012); Bernard E. Rollin, Animal Rights and Human Morality (3d ed. 2006); Paul Waldau, Animal Rights: What Everyone Needs to Know (2011); Steven M. Wise, Drawing the Line: Science and the Case for Animal Rights (2013).} The animal welfare position (also called legal welfarism or new welfarism) recognizes animal interests are worthy of protection but regards the use of animals for human interests and benefits per se as morally justifiable. Animals are only protected from human exploitation if the pain or suffering inflicted upon them is deemed unnecessary. Because humans unilaterally determine when animal suffering is necessary, laws enacted on this basis are virtually meaningless. Animal rights theorists maintain that, instead of effectively protecting animals, animal protection or welfare standards legitimate the use and exploitation of animals.\footnote{118}{See Gary Francione, Animals, Property, and the Law 18 (2007): “I refer to the current regulatory structure in this country as it pertains to animals as legal welfarism, or the notion, represented by and in various legal doctrines, that animals, which are the property of people, may be treated solely as means to ends by humans as long as this exploitation does not result in the infliction of ‘unnecessary’ pain, suffering or death.” (Emphasis in original).} For animals to enjoy meaningfully protected interests, they should have fundamental and actionable rights instead of simple protections.\footnote{119}{E.g., Steven M. Wise, Rattling the Cage: Toward Legal Rights for Animals 53 ff. (2000).}

\textit{Prima facie}, both welfarist and abolitionist norms can be examined for their territorial reach. For example, we can study the territorial limits of laws that protect whales from unnecessary suffering or of laws that respect whales’ right to life. Though I defend a strong animal rights position, the inquiry into extraterritorial jurisdiction applies to both a welfarist and an abolitionist approach. Most modern legal systems are founded on the premise that animals are property and take the welfarist position, but some have introduced certain absolute prohibitions, which may be manifestations of abolitionism as negative freedom rights.\footnote{120}{From the legal perspective of the status quo, attempts to distinguish protections and rights might be overstated: Joan E. Schaffner, An Introduction to Animals and the Law 171 (2011).} For example, Australia, Belgium, the Balearic Islands, the Netherlands, and New Zealand have banned invasive research on great apes, which some scholars view as negative freedom rights of great apes.\footnote{121}{Bundesgesetz über Versuche an lebenden Tieren [Tierversuchsgesetz, TVG] [Austrian Animal Experimentation Act], BGBl. I No. 114/2012, § 4(5)(a) (Austria), stating that experimentation with great apes is illegal in all cases (including gibbons). Animal Welfare Act, Public Act No. 142, Oct. 14, 1999 §§ 85 ff. (N.Z.) forbids use of nonhuman hominids in research, testing, or teaching without the Director-General’s approval, and only “in the interests of the species to which the non-human hominid belongs.” See also id. § 85(5)(a). For the other states, see Colin Goldner, Lebenslänglich hinter Gittern: Die}
embedded in widely different cultural contexts, this study applies to laws that protect animals, as well as to laws that more effectively respect animals’ interests by giving them rights.

B. UNCONQUERED JURISDICTIONAL TERRITORY

Though the law of jurisdiction typically operates by the same few jurisprudential principles—the objective and subjective territoriality principles, the nationality principle, the effects principle, and the universality principle—their application to animal law is anything but simple and straightforward. Animals, or animal law, deserve distinct consideration in the law of jurisdiction, based on four considerations.

First, most animal welfare acts and regulations are silent about their territorial scope. Laws that fail to speak to this issue include those of Argentina, the states and territories of Australia, Austria, Belgium, Botswana, Brazil, Bulgaria, Canada and its provinces and territories, Costa Rica, Croatia, Estonia, the European Union.


This list, though not comprehensive, is representative of a host of states that have adopted animal welfare or animal protection acts.


Tierschutzgesetz [TSchG] (Austria).


Cruelty to Animals Act, Cap. 37:02, May 8, 1936, consolidated version of the Proclamation 27 of 1936 as of Dec. 31, 2008 (Bots.).

Decreto Lei Nº 24.645, de 10 de Julho de 1934 [Federal Decree on Anti-Cruelty Nº 24.645], July 10, 1934 (Braz.).


Decreto Ley de Bienestar de los Animales [Decree on the Well-being of Animals], No. 7451, June 20, 2012, (Costa Rica) [Decree on the Well-being of Animals (Costa Rica)].

Zakon o zaštiti životinja [Animal Protection Act], No. 71-05-03/1-06-2, Dec. 7, 2006 (Croat.).


135 Animals (Control of Experiments) Act, May 13, 1957, c. 161, by Ordinance No. 11 of 1957 (Fiji) [Animals (Control of Experiments) Act (Fiji)].

136 Eläinsuojelulaki [Animal Welfare Act], 247/1996 (Fin.) [Animal Welfare Act (Fin.)].

137 Tierschutzgesetz [TierSchG] [Animal Welfare Act], May 18, 2006, BGBl. I, at 1206 (Ger.) [Animal Welfare Act (Ger.)].

138 Animal Experiments (Scientific Procedures) Act, Principal Act, No. 1999-03, Mar. 3, 1999 (Gibr.) [Animal Experiments Act (Gibr.)].

139 Nomos (2012:4039) Gia Tà Deopozomena Kai Tà Adeopota Zōa Syntrophiaskai Tēn Zōōnapotē Ekmetalleysē ē Tē Chrēsimorritoioēse me Kerdookopikookotto [Law Concerning Domestic and Stray Companion Animals and the Protection of Animals from any Exploitation or Use for Economic Profit], Ephemeris Tes Kyverneseos Tes Hellenikes Demokratias [E.K.E.D.] 2012 (Greece) [Law No. 4039 (Greece)].


141 Act on Animal Welfare, No. 55, Apr. 8, 2013 (Ice.) [Act on Animal Welfare (Ice.)].


143 の動物の愛護及び管理に関する法律 [Act on Welfare and Management of Animals], Law No. 105 of 1973 (Japan).


146 Tierschutzgesetz [TSchG] [Animal Welfare Act], Sept. 23, 2010 (Liech.) [Animal Welfare Act (Liech.)].


148 Animals Act, Apr. 30, 1953, LAWS OF MALAYSIA, Act 647, (Malay.) [Animals Act 1953 (Malay.)].

149 Animal Welfare Act, Feb. 8, 2002, c. 439, Act No. XXV of 2001 (Malta) [Animal Welfare Act (Malta)].


151 Wet van 19 mei 2011, houdende een integraal kader voor regels over gehouden dieren en daaraan gerelateerde onderwerpen (Wet dieren) [Act of May 19, 2011, containing an integrated framework for rules on animals kept and related subjects (Animal Law)], May 19, 2011 (Neth.) [Animal Law (Neth.)].


153 Ley para la Protección y el Bienestar de los Animales Domésticos y Animales Silvestres Domesticados [Law for the Protection and Well-being of Pets and Wild Animals in
Guinea, Paraguay, the Philippines, Poland, Portugal, Puerto Rico, Slovenia, Solomon Islands, South Africa, South Korea, Sri Lanka, Sweden, Switzerland, Taiwan, Tonga, Turkey, Uganda, Ukraine, Vanuatu, Venezuela, Zimbabwe,

Protecting Animals Within and Across Borders


Protection aos Animais [Protection of Animals Act], Sept. 12, 1995, No. 92/95, DIARIO DO GOVERNO Ser. 1, 5722 (Port.) [Protection of Animals Act (Port.).]


Zakon o Zaščiti Živali [Animal Protection Act], Nov. 18, 1999, URADNII LIST No. 98/1999, 14645 (Slovn.) [Animal Protection Act (Slovn.).]

Animals (Control of Experiments) Act, Sept. 11, 1957, c. 97, 63 of 1957, LN 46A of 1978 (Solom. Is.) [Animals (Control of Experiments) (Solom. Is.).]

Animals Protection Act, No. 71 of 1962 (S. Afr.) [Animals Protection Act (S. Afr.).]


Prevention of Cruelty to Animals Ordinance, Cap. 573, July 10, 1907 (Sri Lanka) [Prevention of Cruelty to Animals Ordinance (Sri Lanka)].


SCHWEIZERISCHES Tierschutzgesetz [TSchG] [Animal Welfare Act], Dec. 16, 2005, SR 455 (Switz.) [Animal Welfare Act (Switz.).]

動物保護法 [Japanese Animal Protection Law], Nov. 4, 1998, XIANXING FAGUI HUIBIAN (Taiwan) [Animal Protection Act (Taiwan)].

Pounds and Animals Act, 1988, c. 147 (Tonga) [Pounds and Animals Act (Tonga)].


Pro Zakhyst Tvaryn Vid Zhorstokoho Povodzhennya [On the Protection of Animals from Cruelty], Feb. 21, 2006, No. 1447—IV (Ukr.) [Law on the Protection of Animals from Cruelty (Ukr.)].


LA ASAMBLEA NACIONAL DE LA REPUBLICA BOLIVARIANA DE VENEZUELA [LAW FOR THE PROTECTION OF DOMESTICATED ANIMALS AND WILDLIFE IN CAPTIVITY], GACETA OFICIAL [G.O.] [Official Gazette of Venezuela], 19318, Jan. 4, 2010 (Venez.) [Law for the Protection of Domesticated Animals and Wildlife in Captivity (Venez.).]

and Zambia. Because these laws are silent on their territorial reach, it is prima facie unknown how they apply to cases involving a cross-border element. Only India, Norway, Tanzania, and the United Kingdom have placed limits on their animal protection acts. The Norwegian Animal Welfare Act, for example, applies “to Norwegian land territory, territorial waters, the Norwegian economic zone, aboard Norwegian ships and aircraft, on installations located on the Norwegian continental shelf, and to Svalbard, Jan Mayen and the dependencies.” Borrowing Norway’s model and tailoring it to the territorial specifics of another country is a possibility, but these countries would end up placing stricter limits on their jurisdictional authority than international law requires. So neither do they serve as apt role models, nor do they illuminate the limits of jurisdiction under international law.

The second argument refuting the general applicability of the principles of jurisdiction to animal issues is conceptual. The field of animal law draws its content from criminal, civil, and administrative norms. Most animal laws are administrative or criminal in nature, but they are also found in states’ constitutions, civil codes, trade treaties, etc. Under the doctrine of jurisdiction, the reach and regulatory density of these provisions may prima facie differ depending on whether, for example, civil or criminal jurisdiction centers the debate. It is unclear if, in a case of animal abuse on foreign soil, a state can use administrative orders that prohibit a person from keeping animals in the future, or only grant extraterritorial reach to criminal provisions that sanction animal abuse. Since the legality of extraterritorial jurisdiction may depend on the nature of a norm, these criminal, civil, and administrative animal laws must be carefully examined.

Third, more and more countries are changing the status of animals in civil law, and this forces us to reconsider the default jurisdictional connection to animals as objects of law. Based on the Roman law divide between objects of law and subjects of law, it was standard to deny animals subjecthood and relegate them to the category of objects along with chairs, cups, or pieces of wood. Since the advent of the Roman era, our conception and our knowledge of animals has greatly changed. Today, we recognize that animals do not fit into the category of objects because they are sentient beings who greatly influence their environment.

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175 Prevention of Cruelty to Animals Act (1921), Cap. 245, LAWS REP. OF ZAMBIA (1994) (Zam.) [Prevention of Cruelty to Animals Act (Zam.)].

176 The Prevention of Cruelty to Animals Act, Act No. 59 of 1960, art. 1 para. 2 (India) [The Prevention of Cruelty to Animals Act (India)]: “It extends to the whole of India except the State of Jammu and Kashmir.” Animal Welfare Act (U.K.), Explanatory Note No. 8: “The Act extends to England and Wales. It extends to Scotland only in respect of (a) section 46, which enables disqualification orders made by the courts in England and Wales to have force in Scotland, (b) sections 47 to 50, which make provision about the powers of the Scottish courts to enforce in Scotland of disqualification orders under the Act, (c) repeals of certain legislation and (d) commencement orders. It extends to Northern Ireland in respect of certain consequential and minor amendments only.” The Animal Welfare Act, No. 19 of 2008, art. 2 para. 1 (Tanz.): “This act shall apply to Mainland Tanzania.”

177 Animal Welfare Act, 2009, LOV I 2009 hefte 7, § 2 (Nor.) [Animal Welfare Act (Nor.)].

178 Akehurst is a strong defender of the view that we must strictly distinguish between civil and criminal norms, and that the law of jurisdiction gives each of these a different ambit: Akehurst (1972–3).

A conflict between the legal classification and our social conception of animals emerged in divorce proceedings because, unlike common property, companion animals cannot be split 50/50 after separation, and because paying off a partner did not make up for the emotional loss suffered by them. Over the past decades, states began to recognize that this mismatch pervades other areas of law and started to amend legal standards to fit public perception, by declaring that animals are not mere objects of the law. For instance, in 2002, a new provision was added to the Swiss Civil Code, stipulating that “[a]nimals are not objects.”¹⁸⁰ A special report by the Legal Affairs Committee of the Council of States (Ständerat), which formed part of the parliamentary debates preceding the adoption of article 641a, revealed that its declared aim was to meet society’s growing concern for animals and to ameliorate the legal status of animals. The traditional conception that animals are things, as the Federal Council explained, is now seen by society as an ancient relict.¹⁸¹ Similar content to that of article 641a of the Swiss Civil Code is also found in the laws of Austria, Brussels, California, Canada, Colombia, the Czech Republic, France, Germany, the City of Mexico, New Zealand, Portugal, Québec, and Spain.¹⁸²

These ongoing developments point to the dangers and inadequacies of law when it lags behind social developments and scientific insights. Yet, as we will see when we examine these provisions in detail, far from adequately responding to the growing recognition that animals are sentient beings to whom life greatly matters, many of these laws provide that animals will continue to be treated as objects for the purposes of the law. The growing dissolution of the Roman law divide between objects and subjects of the law is far from resolved and will undoubtedly continue to dominate social and political discourse. Despite, or even because of this indeterminacy, the doctrine of jurisdiction can no longer assume that animals are merely property that blindly follows the jurisdiction of its owner. That many countries no longer regard animals as objects seems to speak for their independent legal visibility as anchor points under the doctrine of jurisdiction. For instance, dogs of some countries have passports that provide information about their name, domicile, looks, fur color, and more, much as is done in human passports. Because these passports travel with the animal, regardless of ownership, this practice might be seen as giving rise to de facto nationality of dogs and enabling the issuing state to manifest its jurisdiction over the dogs, without regard to the owner or their whereabouts. To respond in time to these ongoing changes, the doctrine of jurisdiction must anticipate solutions now.

Fourth, though the law is shaped and co-influenced by different, often conflicting stakeholder views, the field of animal law attracts an exceptionally wide array of interested parties, including corporate actors that want to use animals, animal advocates concerned about the welfare of animals, conservationists who seek to protect animals as ambassadors of a species, social justice movements fighting intersectional oppressions, or minorities concerned about being forced to abandon their cultural practices. These stakeholders often

¹⁸⁰ The exact wording is “Tiere sind keine Sachen” (Schweizerisches Zivilgesetzbuch [ZGB] [Civil Code], Dec. 10, 1907, SR 210, art. 641a para. 1 (Switz.) [Civil Code (Switz.)]).
¹⁸² These amendments are examined in detail in Chapter 7, §1 A. IV.
have diametrically opposed views about what we owe to animals and what our relationships with them must look like. Given these disparate interests, and the fact that the animals themselves are absent in the formation, application, and enforcement of law, the law of jurisdiction is faced with a particularly complex set of issues when debating the geographical reach of such norms.

These four factors—the absence of known limits to animal protection acts; the criminal, civil, and public law nature of animal law that may give rise to different jurisdictional limits; the ongoing disobjectification of animals in the law; and the multilevel and often opposed interests in animals—evidence a high degree of legal “otherness” of animal law for the purposes of studying its spatial reach under international law. We must therefore carefully scrutinize applicable, and potentially inapplicable jurisdictional axioms.

§5 Assistants along the Way: Four Case Groups

The question of how far a state’s animal laws reach ratione loci is raised on various fronts. It needs to be answered for a natural person who crosses borders with their companion animal, for a corporation that conducts animal research and establishes new branches or subsidiaries on foreign territory, for an international marketing company that helps domestic foie gras producers reach as many foreign markets as possible, for regulatory authorities that intend to prevent hormonally produced beef from entering their territory, for tourists who import products manufactured from the skins of endangered species, and many others. This book will shed light on the legality of all conceivable cross-border cases that involve animals by expounding a panoply of regulatory possibilities and analyzing them in the extraterritoriality framework. To guarantee this rather abstract framework is feasible, I will test and evaluate the theoretical approaches I establish herein by using them on four case groups that stand for the most common challenges now faced under the law of jurisdiction: outsourcing, trade, migration, and trophy hunting. I next present each case group and explain to what extent it is representative of broader debates faced in animal law, and in what sense it may illuminate our understanding of the doctrine of jurisdiction.

The first case group includes the increasing instances of multinational enterprises outsourcing corporate branches or entire corporations to foreign territory. Today, most domesticated animals are owned by legal persons who deal with animals for commercial reasons—not by breeding, raising or keeping them, using them for work, research, entertainment, display, or other purposes, or slaughtering them. Corporate behavior thus has a quantitatively and qualitatively high influence on whether animals fare well or ill in this world. It is likely a corporation will outsource its activities where an industry’s capital is mobile and home states introduce or announce stricter animal protection standards. For

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183 Park & Singer 122 (2012).
example, in the United States, the public and several politicians have fought for years to ban horse slaughter state- and nationwide. Instead of banning horse slaughter directly—a strategy that proved impossible— the federal government in 2006 introduced the Appropriation Act that prohibited governmental funding for federal inspectors of horse meat. Because institutions that slaughter horses cannot legally run their business, the funding ban on inspections effectively rendered horse slaughter illegal in the United States. From 2006 to 2007, in reaction to the ban, horse exports to Mexico increased by 312 percent. The entire horse-slaughter industry of the United States was effectively outsourced to Mexico as a consequence of the ban, a development that was publicly decried both by animal advocates who feared lax slaughter standards in Mexico and the meatpacking industry fearing loss of jobs. In an effort to reverse this process, parties proposed to also ban exporting horses with the proposed Safeguard American Food Exports Act in 2015, a bill that the House and the Senate failed to enact in the 114th Congress.

That outsourcing attracts the attention of stakeholders along the entire spectrum, from ethical to economic, becomes apparent when we look at a few other examples. Live exports of farmed animals from Australia to the rest of the world are a form of outsourcing hailed or criticized by different groups. Some point to the fact that Australia loses 40,000 jobs by outsourcing sheep and cow slaughter to countries with significantly lower or no protection laws; others argue it gains economically by raising and selling the animals. For animals, outsourcing amounts to more suffering through dreadful, long, harsh, and taxing transportation only to end up at another location where people will kill them.

The research industry also increasingly outsources its businesses. Rice, CEO of a US pharmaceutical corporation, said in 2006: “Animal testing [. . .] does not have the political issues it has in the US or Europe or even India, where there are religious issues as well. So now big pharma is looking to move to China in a big way.” Few rules, few protestors, large supplies of lab primates and beagles are part of a “whole menu of advantages” that attract multinationals like Bridge Pharmaceuticals, Novartis, Pfizer, Eli Lilly, and Roche.

185 In 2005, the Horse Slaughter Prohibition Bill was proposed by John Sweeney, passed by the House of Representatives, but died in the Senate: Horse Slaughter Prohibition Bill, H.R. 503 (109th) 2005–6 (U.S.).

186 The Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2006, 119 U.S. 2120, Public Law 109-97, H.R. 2744-45, § 794 (U.S.): “Effective 120 days after the date of enactment of this Act, none of the funds made available in this Act may be used to pay the salaries or expenses of personnel to inspect horses under section 3 of the Federal Meat inspection Act (21 U.S.C. 603) or under the guidelines issued under section 903 the Federal Agriculture Improvement and Reform Act of 1996 (7 U.S.C. 1901 note; Public Law 104-127).” The ban was upheld in the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2014, 128 U.S. 5, Public Law 113-76, H.R. 3547 (U.S.).


189 For an insightful analysis of these conflicting views in Australia, see Katrina J. Craig, Beefing up the Standard: The Ramifications of Australia’s Regulation of Live Export and Suggestions for Reform, 11 MACQUARIE L.J. 51 (2013).


191 Id.
Breeding institutions that supply research facilities with new stocks of animals have also been outsourced in large numbers. Bioculture Ltd., for example, owns 19 facilities worldwide and has outsourced all primate breeding operations to Guayama, Puerto Rico. These practices are lamented by Bioculture Ltd.’s home state but have also led to protests in the countries to which they moved.192

The second case group concerns trade restrictions that are frequently accused of having some extraterritorial effect and of imposing values across borders. The most recent and exemplary case for this is the 2014 Seals case decided at the WTO.193 Iceland and Canada, with a number of intervening third parties, challenged the legality of EU measures that prohibited importing and marketing seal products within the European Union. The AB, a standing body of seven persons that hears appeals from reports issued by panels as part of the WTO’s Dispute Settlement Body (DSB), confirmed that animal welfare is an aspect of public morality and that measures that seek to protect the welfare of animals can, under narrow circumstances, justifiably restrict trade among states.194 Because the European Union’s trade measures were considered legitimate on the basis that they only indirectly protected seals found outside the European Union, scholars argue that the AB effectively acknowledged that a state can have a legitimate interest in the welfare of animals on foreign soil.195 The legality of trade restrictions employed for animal welfare reasons formed the center of debate at the WTO prior to Seals,196 and it will likely continue to do so in the future.

The third case group deals with cross-border issues that arise when animals migrate. Animal migration denotes a type of locomotory activity in which populations move seasonally to-and-fro between regions where conditions are alternately favorable or unfavorable. Migration can also be a one-way movement that leads to redistribution of an animal population.197 Animals migrate at sea, in the air, or on land, and they do so for behavioral reasons or in order to escape habitat destruction and fragmentation, armed conflict, resource scarcity, seasonal temperature changes, or climate change.198 Migratory animals include birds, mammals, fishes, reptiles, amphibians, insects, and crustaceans. Since I am concerned with cross-border movements, I focus on migration across state borders, which can be a quite arbitrary threshold for inquiry from the animals’ point of view.

Cross-border animal migration was subject to dispute as early as 1893. The Bering Sea Arbitration asked if states could assert their jurisdiction over migratory Pacific seals once

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193 Seals, AB Report.
194 Seals, AB Report. See also Seals, Panel Report, ¶ 7.395: “For several years, many members of the public have been concerned about the animal welfare aspects of the killing and skinning of seals and about trade occurring in products possibly derived from seals that have been killed and skinned with avoidable pain, distress and other forms of suffering, which seals, as sentient mammals, are capable of experiencing. Those concerns have therefore been expressed by members of the public out of ethical reasons.” (Emphasis in original).
the seals had left their jurisdictional authority at sea.\textsuperscript{199} The United States claimed a right of property and protection over the seals that sojourned in and subsequently left its territorial sea.\textsuperscript{200} The United Kingdom claimed a right to harvest the seals, even if it meant rendering them extinct, based on the principle of the freedom of the high seas. The arbitral tribunal found no basis under international law for the United States to apply its standards outside its territory, whether formulated in property-related or protective terms, and decided in favor of the freedom on the high seas, hence in favor of the United Kingdom.\textsuperscript{201} More than a century after the \textit{Bering Sea Arbitration} verdict, international law gives a different answer to the very same question. In \textit{Shrimp/Turtle}, the United States passed an import ban on shrimp caught in a manner that threatened five species of sea turtles protected under the US Endangered Species Act (ESA) of 1973.\textsuperscript{202} Shrimp harvested with technology that adversely affected sea turtles could not be imported into the United States unless the exporting state used a fishing tool that offered a similar level of protection as the US domestic “turtle excluder device.” The AB held that US claims were provisionally justified because the country had a legally valid interest in protecting shared and endangered animals outside its jurisdiction.\textsuperscript{203} Even though the United States lost the case because of the way it implemented and applied these laws—namely, in a discriminatory and disproportional manner—an international body had recognized that a state’s interest in animal welfare may rightfully reach across territorial boundaries. More than a century before, no such legal interest was recognized or protected.\textsuperscript{204} This change of position was likely influenced by conservationist laws that emerged post-\textit{Bering}, and which protect species of seals, whales, polar bears, birds, elephants, and others in treaties like the International Convention for the Regulation of Whaling (ICRW)\textsuperscript{205} or the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).\textsuperscript{206}

The fourth case group highlights global ramifications and cross-border interests in trophy hunting. In July 2015, the world was outraged to hear about the death of Cecil, a black-maned lion killed by an American game hunter in Zimbabwe. Cecil was resident of the Hwange National Park, where he was a star attraction to many visitors and part of a national study on lion movement across the park that had begun in 2008. Mid-2015, Cecil was lured out of the

\textsuperscript{199} Award between the United States and the United Kingdom Relating to the Rights of Jurisdiction of the United States in the Bering’s Sea and the Preservation of Fur Seals (U.S. v. U.K.), R.I.A.A. 263, 279 (Arbitral Tribunal 1893) [Bering Sea Arbitration, 1893 R.I.A.A. 267].

\textsuperscript{200} Id.

\textsuperscript{201} Id. 269: “[T]he United States has not any right of protection or property in the fur-seals frequenting the islands of the United States in Behring Sea, when such seals are found outside the ordinary three-mile limit.”


\textsuperscript{203} According to the AB, there is “a sufficient nexus between the migratory and endangered [sea turtles] involved and the United States for the purposes of [WTO law]” (\textit{Shrimp/Turtle I}, AB Report, ¶ 133).

\textsuperscript{204} Sands 535 (2001).


park by carcasses tied to a car driven by trophy hunters, and then shot with a bow and arrow by Walter Palmer, a US citizen who paid 50,000 USD to kill the animal. Cecil was severely wounded and killed by the hunters over 40 hours after the initial shot was released.\(^{207}\) After these events became public, Palmer was subject to “a global storm of internet indignation,” and “an online witch-hunt,” as journalists reported.\(^{208}\)

Trophy hunting is a form of sports or recreational hunting, in which individuals hunt animals to take their head or other features with them for display. Typically, hunters target the rarest and biggest animals, or those that are hardest to chase and shoot. Trophy hunting is practiced in many states but has been subject to debates particularly in the United States. According to the Humane Society International’s report, “Trophy Hunting by Numbers,” the United States imported 1.26 million wildlife trophies between 2005 and 2014.\(^{209}\) Most trophies originated in Canada and South Africa; fewer came from Argentina, Botswana, Mexico, Namibia, New Zealand, Tanzania, and Zambia. Trophy hunters are known to pay large sums to kill wildlife animals. For an African lion trophy, for instance, they pay between 13,500 USD and 49,000 USD and for an African elephant between 11,000 USD and 70,000 USD. Among the animals hunted and imported during the same period, 32,500 were members of African Big Five: 5,600 African lions, 4,600 African elephants, 4,500 African leopards, 330 Southern white rhinos, and 17,200 African buffaloes.\(^{210}\) Although the United States has prohibited some of these trophy imports under the ESA,\(^ {211}\) people continue to practice trophy hunting, among other things because trophy hunting remains legal in over 20 African countries while illicit trade in the United States continues unabated.\(^ {212}\)

Trophy hunting, in contrast to corporate outsourcing, is a form of exploitation of low animal laws abroad by individuals or groups of people. An issue that is structurally similar to trophy hunting is using another state’s low animal protection standards to commit acts of bestiality. Consider Denmark, a country that legally ran animal brothels for years. According to journalists, zoophilia was not only practiced among Danish nationals, but Denmark became internationally known as “a hotspot for animal sex tourists,”\(^ {213}\) where “foreigners visit the country specifically to go to […] brothels that sexually exploit animals.”\(^ {214}\) A 2006 report issued by the Danish Ethical Council revealed that 17 percent of the Danish veterinarians


\(^{208}\) Christina Capecchi & Katie Rogers, *Killer of Cecil the Lion Finds Out That He Is a Target Now of Internet Vigilantism*, N.Y. Times, July 19, 2015.


\(^{210}\) Other animals subject to trophy hunting are snow geese, mallards, Canada geese, American black bears, impalas, common wildebeests, greater kudus, gemsboks, springboks, and bonteboks: *Id.* at 1.

\(^{211}\) The African lion is endangered and threatened under the ESA, the African elephant is threatened under the ESA, the African leopard is endangered and threatened under the ESA, and the Southern white rhino is threatened under the ESA. If animals are endangered, the trophy import requires a permit (§ 9 ESA, Appendices to the ESA).


\(^{213}\) *Denmark Passes Law to Ban Bestiality*, BBC Newsbeat, Apr. 22, 2015.

\(^{214}\) *At Last! Denmark Bans Bestiality*, PETAUK, Apr. 2015.
suspected an animal they treated had been subjected to sex with a human.\textsuperscript{215} In April 2015, Denmark finally banned sexual intercourse and other sexual relations with animals by amending its Animal Protection Act.\textsuperscript{216} Denmark’s efforts are laudable but continue to be undermined until this day because sexual interactions with animals—violent or not—are still legal in neighboring countries including Finland, Hungary, and Romania.

\section*{§6 Interim Conclusion}

Mapping the territory of animal law means assembling the tools necessary to begin a careful study of extraterritorial jurisdiction in animal law. Both jurisdiction and extraterritoriality have suffered from terminological deficiencies that have hampered the legal debate on the legality of extraterritorial jurisdiction. In this chapter, I built up a definitional structure that allows us to approach these charged terms systematically and impartially. States enjoy two types of jurisdictional authority—regulatory and enforcement authority—that are tied to different consequences under international law. When the sphere in which persons, things, and legal relationships subject to regulation are situated (the sphere of regulation) began to exceed the sphere in which law can be autonomously enforced by a state (the sphere of validity), the limits of the prescriptive jurisdiction of states lost congruence with the limits of their enforcement jurisdiction. As a result, international law introduced two sets of rules that apply to prescriptive and enforcement jurisdiction, respectively. Enforcement jurisdiction is in principle limited to a state’s own territory, based on the principles of territorial integrity and nonintervention. Even when enforcement in a foreign state is precluded, states opt for extraterritorial prescriptive jurisdiction because they presume compliance with their laws. A common way of ensuring cross-border compliance is to use territorial enforcement that forces addressees of a norm to determine how cost-effective the available options are, and to find, eventually, that the potential negative effects of not complying with foreign law will be worse than the positive effects of ignoring it.

Contemporary voices on sovereignty converge on the idea that states have often failed to effectively organize economic, social, and political life along territorial boundaries. Sovereignty has evolved from a concept associated with state independence to one characterized by state interdependence, from bundling sovereignty in the ruler to justifying sovereignty with reference to the people, and from accentuating territorial supremacy to celebrating global legal pluralism. These developments are part and parcel of the broader deterritorialization of state sovereignty and have had a noticeable effect on how jurisdictional space is perceived and


\textsuperscript{216} Animal Protection Act, Act No. 473, May 15, 2014, para. 3a) chapter 1 (Den.), available at https://www.retsinformation.dk/forms/R0710.aspx?id=174047, implemented by LOV Nr. 533, Apr. 29, 2015 (Forbud mod seksuel omgang eller seksuelle handlinger med dyr, forbud mod salg af hunde på markeder, avl af familie- og hobbydyr, ændret rådsstruktur m.v.): “Det er forbudt at have seksuel omgang med eller foretage seksuelle handlinger med dyr, jf. dog stk.”
regulated. Deterritorializing state sovereignty has eroded the primacy of the territoriality principle, which declares the home state competent to prescribe law over all matters relating to that territory. As territorial jurisdiction dwindled, states began to invoke jurisdictional bases that derive from the two other pillars of state sovereignty: personal and organizational sovereignty. The nationality, effects, protective, and universality principles—all of which emerged from personal and organizational sovereignty—gradually supplanted territorial jurisdiction and came to be seen as bases of jurisdiction that successfully respond to transnational problems.

Despite the growing popularity of extraterritorial jurisdiction, legal scholarship has not yet managed to readily distinguish between territorial and extraterritorial jurisdiction. Customary international law and scholarly opinions on the concept of extraterritorial jurisdiction have thus far failed to provide a satisfactory definition of the terms, which exacerbated the debate about the legality of extraterritorial jurisdiction. The extraterritoriality framework established in this chapter attempts to fill this gap. It enables us to disassemble norms into discrete parts, from which we can determine their geographical locus. The starting point for defining extraterritorial jurisdiction is the basic structure of a jurisdictional norm. A norm uses one or more anchor points to regulate content, which can have manifold ancillary repercussions. By adding territorial considerations to the structure, it is possible to distinguish norms with (extra)territorial anchor points, (extra)territorial content regulation, and (extra)territorial ancillary repercussions. To be regarded as extraterritorial jurisdiction stricto sensu, jurisdictional norms must have an extraterritorial anchor point and extraterritorial content regulation (type α jurisdiction), an extraterritorial anchor point and intraterritorial content regulation (type β jurisdiction), or an intraterritorial anchor point and extraterritorial content regulation (type γ jurisdiction). The personality, protective, effects, and objective and subjective territoriality principles are all forms of direct extraterritorial jurisdiction because they use extraterritorial anchor points or regulate content extraterritorially. The definition of extraterritorial jurisdiction stricto sensu, or direct extraterritoriality, uses the sphere of states’ regulatory influence as a guiding tool and ignores unintended effects of norms. Adding the dimension of animal relation—where animals form part of jurisdictional norms as anchor points or regulated content—to the jurisdictional types in the extraterritoriality framework gives rise to a new set of considerations needed to disassemble norms (types α₁, α₂, α₃, β₁, β₂, γ₁, and γ₂ jurisdiction).

If a norm’s only extraterritorial facet is its extraterritorial repercussions, the norm is not considered extraterritorial stricto sensu, but instead is a territorial norm with indirect extraterritorial effects. Trade measures are typically indirect extraterritorial because they do not claim application or validity outside the state that passed the laws. Although they do not form part of extraterritorial jurisdiction stricto sensu, trade restrictions are examined in later chapters because they represent a popular instrument of states and are frequently accused of unduly challenging the regulatory authority of states.

The extraterritoriality framework is first and foremost a definitional tool and a tool for conducting empirical studies on the jurisdictional practices of states. As such, the framework does not claim or even allow an assessment of the legality of a jurisdictional norm, be it direct or indirect extraterritorial. The framework does, however, force us to abandon the oversimplified, conceptually problematic, and politically charged dichotomy between legal territorial and illegal extraterritorial jurisdiction. Extraterritoriality does not
denote unlawful jurisdiction and vice versa, territoriality is not synonymous with lawful jurisdiction.

From a legal standpoint, animal law evidences a high degree of otherness that mandates careful scrutiny of the jurisdictional axioms applicable and potentially inapplicable to the field. Animal law is unique in four respects. First, most animal welfare or protection acts do not determine, much less address their territorial scope. Second, different jurisdictional limits may apply depending on whether we are dealing with civil, criminal, or public norms of animal law. Third, because animals are increasingly recognized as sentient beings under the law, rather than as mere objects, this throws into question the jurisdictional parameters used to date. Finally, the complex and often conflicting interests in using or protecting animals make it difficult to settle jurisdictional disputes promptly. All of these factors call into question the law of jurisdiction in its traditional form and require us to be vigilant when using extraterritorial norms in animal law.

These points of reference of the law of jurisdiction can be very technical, and it can be hard to see their practical applications. In this chapter, I developed four case groups that add plasticity to the extraterritoriality framework, and that will help us verify its legal propositions: corporate exploitation of low animal protection standards abroad (i.e., outsourcing), trade in animals and animal products, animal migration, and exploitation of weak animal laws abroad by individuals (e.g., trophy hunting or bestiality). As we inquire into the law of jurisdiction in the coming chapters, I will use these four case groups as a speculum to examine the feasibility and adequacy of existing laws and proposals made to remedy their shortcomings.