XLV POLISH YEARBOOK OF INTERNATIONAL LAW
2025
DOI 10.24425/PYIL.2026.3107
PL ISSN 0554-498X
e-ISSN 2957-1510

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LIMITS OF CRIMINAL JURISDICTION IN INTERNATIONAL LAW

Abstract: *Criminal jurisdiction is subject to the norms of international law, which can be divided into treaty and non-treaty norms. Non-treaty norms are vague and have been extensively elaborated. The findings are far from converging. The limits of jurisdiction have been analysed on three levels: legislative jurisdiction, judicial jurisdiction and enforcement jurisdiction. The impact of the following actual or postulated norms on criminal jurisdiction has been examined: the rule of reason, the principle of sovereign equality and its derivative – principle of non-intervention, the principle of equity, the principle of respect for the duty of allegiance, lawful combatant privilege, the principle of proportionality, the prohibition against abuse of rights, the principle of nemo plus iuris ad alium transferre potest quam ipse habet and the principle of responsibility to protect. Research has shown that self-standing limitations on jurisdiction represent a minority of these principles. Judicial and enforcement jurisdiction may also be subject to treaty limitations. The exercise of jurisdiction is subject to other limitations. The international-law limits of criminal jurisdiction are more stringent than in other fields of law.*

Keywords: jurisdiction, sovereignty, equity, criminal jurisdiction, rule of reason

INTRODUCTION

It is beyond doubt that criminal jurisdiction is subject to international regulation.[1] Although much ink has been spilt on the issue of the international-law limits of

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criminal jurisdiction, the most fundamental questions remain unresolved. There is no consensus on whether the norms of international law that restrict criminal jurisdiction are identifiable.[2] Nor have the principles giving rise to such constraints been identified. Despite being extensively elaborated, in particular the list of non-treaty norms limiting jurisdiction remains far from established.[3]

Answers to these questions are expected from penalists. Instead of clear-cut solutions to problems pertaining to their field, they are presented with a vast body of inconsistent literature produced by publicists. This leads penalists to adopt certain selected works as their point of departure; however, this may provide an incomplete picture, leaving any resulting conclusions open to challenges.[4]

The aim of this article is to identify the international-law limits of criminal jurisdiction. Delimiting the precise content of each principle serving as such a limit is not the aim of the study. Identifying the sources of such limits is controversial enough to be given special attention.[5] Despite the controversies, the discussion on the limits of criminal jurisdiction seems not to be heated, which may produce a false image

[1] Permanent Court of International Justice (PCIJ), *The Case of the S.S. Lotus (France v. Turkey)*, Judgment, 7 September 1927, PCIJ (ser. A) No. 10, p. 19; M.N. Shaw, *Prawo międzynarodowe* [International law], Książka i Wiedza, Warszawa: 2011, p. 411; J. Kranz, *Pojęcie suwerenności we współczesnym prawie międzynarodowym* [The concept of sovereignty in contemporary international law], Dom Wydawniczy Elipsa, Warszawa: 2015, pp. 97, 101 and 231; F.A. Mann, *The Doctrine of Jurisdiction in International Law*, 111(I) Recueil des Cours. Académie de Droit International 8 (1964), pp. 10–11 and 17; M. Płachta, *Jurysdykcja państwa w sprawach karnych wobec cudzoziemców* [State jurisdiction in criminal matters over foreigners], 1-2 Studia Prawnicze 97 (1992), p. 97; W.S. Dodge, *Jurisdictional Reasonableness under Customary International Law: The Approach of the Restatement (Fourth) of US Foreign Relations Law*, 62 Questions of International Law 5 (2019), p. 6; K.S. Gallant, *International Criminal Jurisdiction. Whose Law Must We Obey?*, Oxford University Press, Oxford: 2022, p. 89; O. Kahn-Freund, *General Problems of Private International Law*, 143(III) Recueil des Cours. Académie de Droit International 165 (1974), p. 177; N. Boister, *An Introduction to Transnational Criminal Law*, Oxford University Press, Oxford: 2018, p. 245.

[2] M. Wasiński, *Jurysdykcja legislacyjna państwa w prawie międzynarodowym publicznym* [Legislative jurisdiction of a state in public international law], 3 Państwo i Prawo 56 (2002), p. 64; Płachta, *supra* note 1, p. 98; L. Gardocki, *Zagadnienia internacjonalizacji odpowiedzialności karnej za przestępstwa popełnione za granicą* [Questions of the internationalisation of criminal liability for crimes committed abroad], Wydawnictwa Uniwersytetu Warszawskiego, Warszawa: 1979, p. 26. Lech Gardocki's views evolved. *Cf.* L. Gardocki, *The Principle of Universality*, 76 Nordisk Tidsskrift for Kriminalvidenskab 57 (1989), p. 61. *See also* J. Piskorski, *Odpowiedzialność karna cudzoziemców w Polsce* [Criminal liability of aliens in Poland], Dom Wydawniczy ABC, Warszawa: 2003, pp. 105 and 111.

[3] Mann, *supra* note 1, p. 127.

[4] This can be illustrated by a monograph by Dominik Zając, in which he relies on the view that criminal jurisdiction is limited by the rule of reason, whose status is questioned in this article. D. Zając, *Odpowiedzialność karna za czyny popełnione za granicą* [Criminal liability for acts committed abroad], Krakowski Instytut Prawa Karnego, Kraków: 2017, pp. 89–111 and 231–271.

[5] These controversies can be illustrated by the fact that among publications of international reach there are statements suggesting that territory or territory together with personality are the only permitted bases of jurisdiction. *See* C. Staker, *Jurisdiction*, in: M.D. Evans (ed.), *International Law*, Oxford University Press, Oxford: 2014, p. 315. Others include more bases as recognised connection factors. *See* Gallant,

of unanimity. The method of the study was to organise and supplement scholarly and judicial statements on the subject matter. The first section provides a definition of jurisdiction, while the second draws attention to the distinction between treaty and non-treaty norms on jurisdiction. Subsequent sections briefly discuss the principles coming into play as sources of limitations on criminal jurisdiction. The findings are then synthesised in the summary. Customary norms of international law relating to immunities are included in the conclusions of the research. They are not given separate attention in the research section due to the lack of controversy over the fact that they limit judicial jurisdiction.

1. THE CONCEPT OF JURISDICTION

In contemporary approaches, the concept of state jurisdiction is seen as the capacity to independently regulate, by means of law, the situation of subjects, objects or events subject to the authority, taking into account international-law obligations.[6] It is sometimes stressed that an action of a state, in order to constitute an act of exercising jurisdiction, must be recognised as such by other subjects of international law.[7]

Publicists distinguish between three categories of jurisdiction:

1. legislative jurisdiction (*compétence législative*), comprising the legislative competence of the state;
2. judicial jurisdiction (*compétence judiciaire*), encompassing the competence of the judicial authorities to interpret the law and to decide on the legal situation of individuals; and
3. enforcement jurisdiction (*compétence exécutive*), which includes the use of coercion to enforce the obligations imposed upon individuals.[8]

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supra note 1, pp. 27, 143, 307 and 551-552. There are also approaches in which no nexus is required (due to the claimed freedom to exercise jurisdiction). *See* Gardocki (*The principle*), *supra* note 2, pp. 58–60.

[6] Kranz, *supra* note 1, p. 30. *See also* Mann, *supra* note 1, p. 9; Płachta, *supra* note 1, p. 97; Gallant, *supra* note 1, p. 6; Shaw, *supra* note 1, p. 410.

[7] W.W. Cook, *The Logical and Legal Bases of the Conflict of Laws*, Harvard University Press, Cambridge: 1942, pp. 81–83.

[8] T. Ostropolski, *Zasada jurysdykcji uniwersalnej w prawie międzynarodowym* [The principle of universal jurisdiction in international law], EuroPrawo, Warszawa: 2008, p. 20; L. Chen, *An Introduction to Contemporary International Law. A Policy-Oriented Perspective*, Yale University Press, New Haven: 1989, p. 234; K. Wierczyńska, *Przesłanki dopuszczalności wykonywania jurysdykcji przez Międzynarodowy Trybunał Karny* [Conditions of the admissibility of exercising jurisdiction by the International Criminal Court], Scholar, Warszawa: 2016, p. 18; W. Czapliński, A. Wyrozumska, *Prawo międzynarodowe publiczne. Zagadnienia systemowe* [Public international law. Systemic questions], CH Beck, Warszawa: 2014, p. 291; Shaw, *supra* note 1, pp. 413–414; Staker, *supra* note 5, pp. 312–313; M. Akehurst, *Jurisdiction in International Law*, 46 The British Yearbook of International Law 145 (1972–1973), p. 145; Kahn-Freund, *supra* note 1, pp. 165–166; Cook, *supra* note 7, p. 71; Dodge, *supra* note 1, pp. 6–7; Gallant, *supra* note 1,

Some scholars omit legislative[9] or enforcement jurisdiction.[10]

Having discussed the concept of jurisdiction, it is necessary to reflect on how international law shapes the framework within which jurisdiction operates. There are two clashing views on that matter. The first holds that a state can establish and exercise jurisdiction at will, and that the role of public international law is to set the limits and exercise of jurisdiction. According to the second view, public international law is the source of a state's power to exercise jurisdiction in cases with a cross-border element.[11] Both approaches are theoretically possible.

In fact, states, acting through their leaders, do not regard jurisdiction as having been conferred on them by public international law. States act as creators of international law, not vice versa.[12] The Permanent Court of International Justice, in its judgment of 7 September 1927 in the *Lotus* case, favoured the former view. Given the historical development of international law, despite the harsh criticism this judgment has been subjected to,[13] one has to agree that the view taken in the *Lotus* judgment reflects the state of the law, which has remained unchanged since the judgment was delivered.[14] International practice also favours the view that states have the freedom to shape the scope of their competences – i.e. in international relations there is no international legal principle of legalism (understood as the requirement to act on a legal basis).[15] In consequence, a state is allowed to do anything that is not prohibited by international law.[16]

The limits of jurisdiction should be distinguished from restrictions on the exercise of jurisdiction.[17] The latter do not deprive a state of jurisdiction; they may result from a state's international obligations to refrain from exercising jurisdiction or to transfer part of its competences.

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pp. 7 and 16–17; C. Ryngaert, *Jurisdiction in International Law*, Oxford University Press, Oxford: 2015, pp. 9–10; Wasiński, *supra* note 2, p. 57.

[9] *Юрисдикция государства* [State jurisdiction], in: B.M. Klimenko, V.F. Petrovskij, J.M. Rybakov (eds.), *Словарь международного права* [Dictionary of international law], Международные Отношения, Москва: 1982, pp. 232–233.

[10] Chen, *supra* note 8, p. 234; Staker, *supra* note 5, pp. 312–313. *Cf.* Płachta, *supra* note 1, p. 97.

[11] Ryngaert, *supra* note 8, pp. 29–30 and 128–129; Gallant, *supra* note 1, p. 67.

[12] *See* Gallant, *supra* note 1, pp. 67–68.

[13] Ryngaert, *supra* note 8, p. 34.

[14] Gallant, *supra* note 1, p. 69; Ryngaert, *supra* note 8, p. 33.

[15] Gardocki (*The principle*), *supra* note 2, pp. 58-60; Gallant, *supra* note 1, p. 68.

[16] *See* W. Góralczyk, S. Sawicki, *Prawo międzynarodowe publiczne w zarysie* [Public international law in outline], Wolters Kluwer Polska, Warszawa: 2017, p. 143.

[17] Jerzy Kranz distinguished limits to competence and limits to the exercise of competence – J. Kranz, *Suwerenność państwa i prawo międzynarodowe* [Sovereignty of a state and international law], in: W.J. Wołpiuk (ed.), *Spór o suwerenność* [Dispute over sovereignty], Wydawnictwo Sejmowe, Warszawa: 2001, pp. 108–109 and 133; Kranz, *supra* note 1, p. 110.

The constraints imposed on jurisdiction by prohibitive norms of international law tend to be imprecise. They are only exceptionally a treaty matter.[18] They primarily stem from customary law and general principles of law.[19] Expressions of the consensual practice of states and *opinio iuris*, necessary for forming a customary law norm, consist of diplomatic protests[20] and other forms of traditional international practice, including treaties and notes, exchanged in connection with the consular notification procedure.[21] It has also been submitted that acts of internal practice may also be a means of ascertaining customary norms of international law.[22]

2. TREATY AND NON-TREATY NORMS

Norms of international law governing criminal jurisdiction can be categorised into treaty and non-treaty norms. This section outlines the distinct characteristics of both categories.

The development of treaty jurisdictional provisions varies depending on the field of law.[23] In criminal law, they do not form a coherent system. Mostly, they oblige states to place certain matters within the scope of their judicial jurisdiction.[24] Such norms derive from international agreements to supress crime of international concern or to cooperate in criminal matters.[25] These conventions often contain an *aut dedere aut iudicare* clause, which obliges signatories to exercise judicial jurisdiction.[26] The limitations of jurisdiction are found in immunity treaties, status of forces agreements (SOFAs; international agreements on the legal status of one state's armed forces stationed in the territory of another), treaties conferring on international organisations and judicial bodies exclusive jurisdiction in certain matters and conventions on the law of the sea conferring on flag states exclusive

[18] Kranz, *supra* note 1, p. 103.

[19] Research in International Law under the Auspices of the Faculty of the Harvard Law School, *Jurisdiction with Respect to Crime*, 29(3) American Journal of International Law 437 (1935), p. 444.

[20] Akehurst, *supra* note 8, p. 176; Z. Cybichowski, *Międzynarodowe prawo karne. Kompetencja sądów do ścigania przestępstw zagranicznych* [International criminal law. The competence of courts to prosecute foreign crimes], Wydawnictwo Seminarjum Prawa Publicznego (Państwowego i Międzynarodowego) Uniwersytetu Warszawskiego, Warszawa: 1927, p. 42.

[21] Gallant, *supra* note 1, pp. 113–115.

[22] Ibidem, pp. 28 and 101–113. In 1984 Frederick Alexander Mann pointed out that material of international origin for the study of jurisdictional state practice is extremely scarce, while material of intrastate origin is vast. F.A. Mann, *The Doctrine of Jurisdiction Reconsidered after Twenty Years*, 186 Recueil des Cours. Académie de Droit International 9 (1984), p. 53.

[23] Ryngaert, *supra* note 8, p. 145–146.

[24] They also contain provisions providing for the optional criminalisation of certain acts. Boister, *supra* note 1, p. 250.

[25] Gallant, *supra* note 1, pp. 86 and 522–523.

[26] *Ibidem*, pp. 583-584; Ryngaert, *supra* note 8, pp. 123 and 125.

judicial and enforcement jurisdiction over criminal and disciplinary matters relating to incidents on the high seas.[27] All these provisions limit judicial jurisdiction. Only SOFAs could theoretically limit legislative jurisdiction at the same time, though they do not so in practice.

Restrictions on jurisdiction are not created by treaties conferring on international organisations competence over matters that previously belonged to state jurisdiction. The transfer of competence only results in a change of its holder, without affecting its scope. Such transfer is revocable.[28] Thus, it is called "delegation", "entrustment" or "conferral".[29] It is a limitation on the exercise of jurisdiction by the entity which transfers its competence. The two preceding paragraphs demonstrate that there are no treaty restrictions on legislative jurisdiction.

Non-treaty norms of international law which limit jurisdiction form a narrow set, composed of customary norms and general principles of law. Conversely to treaty norms, they are mostly prohibitive.[30] Before they are discussed individually, separate attention should be paid to the attempts to pack international non-treaty limitations of jurisdiction into a single customary norm of international law.

3. THE RULE OF REASON

Such an attempt has been the postulated principle referred to as the "rule of reason". As demonstrated in this section, the rule of reason dominated the discourse on the limits of criminal jurisdiction over the last 50 years. It was based on the assumption that international law determines which state has jurisdiction in each case. This principle was discussed almost exclusively in the context of legislative jurisdiction.[31] The rule of reason was sometimes distinguished from the "principle of genuine connection".[32] In practice, the application of these two principles did not differ. Under the rule of reason, jurisdiction was to be vested in the state that had a direct connection with and a sufficiently important interest in the facts in question.[33] This general standard was supplemented by a general test of close connection,[34] or detailed criteria to determine the relative importance of the connections

[27] Art. 11 of the Convention on the High Seas (adopted 29 April 1958, entered into force 30 September 1962), 450 UNTS 11, and Art. 97 of the United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994), 1833 UNTS 3.

[28] Kranz, *supra* note 1, p. 216.

[29] *Ibidem*, p. 213.

[30] Ryngaert, *supra* note 8, p. 22.

[31] Dodge, *supra* note 1, p. 7.

[32] Gallant, *supra* note 1, pp. 539–548.

[33] Mann, *supra* note 1, pp. 49 and 83. *Cf.* Mann, *supra* note 22, pp. 24, 29 and 31.

[34] Mann, *supra* note 1, p. 126.

between the states concerned and a given field or individual facts. The proposed lists of connecting factors were neither exhaustive nor fixed. Some authors favoured well-established nexuses and were cautious about non-specific nexuses affected by political conditions.[35] A criminal-law variant of such a list has also been elaborated:

1. the act being committed within the territory of a state or its direct effect occurring in that territory;
2. the relationship between the offender and the victim state;
3. the nature of the offence, particularly its impact on the state;
4. the extent to which the act in question is criminalised in other countries and the prevalence of such a regulation;
5. the type of legal interests infringed or threatened by the offence;
6. the criminal regulation's relevance to the international political, legal and economic system;
7. the regulation's conformity with the traditions of the international legal system; and
8. the extent to which another state may have an interest in regulating the same act.[36]

This method has been referred to as "jurisdictional balancing",[37] "interest balancing",[38] "weighing of interests", "balancing of interests"[39] and so on.[40]

The rule of reason gained popularity.[41] In 1987, the American Law Institute published the *Restatement (Third) of the Foreign Relations Law of the United States*.[42] Section 403 laid out the principle of jurisdictional reasonableness.[43] The drafters of the Restatement (Third) took the position that it was a norm of public international law.[44] Nonetheless, no practice of states other than the United States of

[35] Mann, *supra* note 22, pp. 20 and 91.

[36] Płachta, *supra* note 1, pp. 117–118.

[37] Shaw, *supra* note 1, p. 437.

[38] J.H. Knox, *A Presumption Against Extrajurisdictionality*, 104(3) American Journal of International Law 351 (2010), p. 361; H.L. Buxbaum, *Territory, Territoriality, and the Resolution of Jurisdictional Conflict*, 57(3) American Journal of Comparative Law 631 (2009), p. 646.

[39] A.V. Lowe, *The Problems of Extraterritorial Jurisdiction: Economic Sovereignty and the Search for a Solution*, 34(4) International and Comparative Law Quarterly 724 (1985), pp. 730–731.

[40] Płachta, *supra* note 1, p. 117.

[41] Chen, *supra* note 8, p. 249. The balancing method gained the approval of the Supreme Court of the United States in *Lauritzen v. Larsen* [1953], 25 May 1953, 345 U.S. 571, pp. 582, 583 and 586.

[42] American Law Institute, *Restatement (Third) of the Foreign Relations Law of the United States*, Philadelphia: 1987.

[43] Ryngaert, *supra* note 8, p. 146.

[44] Dodge, *supra* note 1, p. 5; Buxbaum, *supra* note 38, p. 648.

America was cited in support of this principle, and the cited practice of American courts was limited to rulings recognising the rule of reason as a comity requirement.[45]

The rule of reason has met with international criticism.[46] It has been also opposed within the United States of America.[47] The doctrine of jurisdictional balancing was ultimately rejected by American courts.[48]

In 2018 the American Law Institute published the *Restatement (Fourth) of the Foreign Relations Law of the United States*.[49] The Restatement (Fourth) frames the rule of reason as a requirement that the regulating state has a genuine connection to the subject matter.[50] However, it does not seem to posit the principle as a norm of international law, but as a guideline to assess the lawfulness of exercising jurisdiction.[51] The fact that it is no longer recognised as a norm of international law has met with the approval of scholars.[52]

To sum up, the rule of reason is not a norm of international law.[53] The paucity of state practice and the lack of *opinio iuris* relating to it lead to the conclusion that it is impossible to distinguish a customary norm of international law that would subject the jurisdictional claims of states to the requirement of reasonableness.[54] Moreover, from a historical perspective, it seems that the attempt to make the rule of reason a norm of international law has failed. Despite its proclamation, the judicial organs of states have not adhered to it in a unanimous sense of legal obligation.[55]

A careful analysis of the literature uncovers views resembling residual forms of the rule of reason, so it persists in the international discourse. The widespread view remains that a state cannot exercise jurisdiction over facts with which it has no

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[45] Dodge, *supra* note 1, p. 9; Ryngaert, *supra* note 8, p. 167.

[46] E.J. de Arechaga, *Современное международное право* [Contemporary international law], Прогресс, Москва: 1983, pp. 271-274; Shaw, *supra* note 1, pp. 439–440.

[47] *See* Ryngaert, *supra* note 8, pp. 167 and 185; Lowe, *supra* note 39, pp. 730–731 and the literature cited therein. *See also* Buxbaum, *supra* note 38, p. 648; Knox, *supra* note 38, p. 380; Gallant, *supra* note 1, pp. 287 and 547.

[48] Shaw, *supra* note 1, pp. 437–438; *McCulloch v. Sociedad Nacional de Marineros de Honduras* [1963], 18 February 1963, 372 U.S. 10, p. 19; *Laker Airways Ltd v. Sabena, Belgian World Airlines* [1984], 6 March 1984, 731 F2d 909, pp. 948–955; *Hartford Fire Ins Co v. California* [1993], 28 June 1993, 509 U.S. 764, pp. 797–798; *F Hoffman-La Roche v. Empagran SA* [2004], 14 June 2004, 542 U.S. 155, p. 164.

[49] American Law Institute, *Restatement of the Law (Fourth), The Foreign Relations Law of the United States*, Philadelphia: 2018.

[50] Dodge, *supra* note 1, pp. 6, 12, 15–16 and 18.

[51] *Ibidem*, pp. 12–13.

[52] Gallant, *supra* note 1, p. 287, fn 595.

[53] *See* Ryngaert, *supra* note 8, pp. 180–181. Ryngaert claims that more specific general principles of law than the rule of reason can be distinguished in the field of jurisdiction. And the rule of reason has not yet been fully formed (pp. 184–187).

[54] Ryngaert, *supra* note 8, pp. 143 and 182; Dodge, *supra* note 1, p. 13; Gallant, *supra* note 1, p. 536.

[55] Dodge, *supra* note 1, p. 10. *Cf.* Gallant, *supra* note 1, pp. 570–571.

internationally recognised connecting factor.[56] It is also argued that the connecting factors – on which the principles of territoriality, nationality, protective, passive nationality and universal jurisdiction are based – are so firmly established in state practice that they themselves form a collective norm of international law setting the limits of the permissible exercise of jurisdiction.[57]

This view stands in contradiction to the state of international law pronounced in the *Lotus* case. It would lead to the conclusion that, in the field of jurisdiction, everything which is not expressly permitted to a state is prohibited. It also raises the question of whether atypical nexuses that may be devised in future will be compatible with international law. Such a prohibition would stifle the development of international law in the field of jurisdiction.[58]

It should be concluded that there is no single customary norm in international law that prohibits a subject of international law from exercising jurisdiction beyond the cases of recognised connecting factors. Having ascertained that there is no single norm of international law encompassing all limitations on criminal jurisdiction stemming from it, it is now time to discuss the individual norms that come into play as sources of constraints on jurisdiction.

4. THE PRINCIPLE OF THE SOVEREIGN EQUALITY OF STATES AND THE PRINCIPLE OF NON-INTERVENTION

The principle of the sovereign equality of states appears under this name in Art. 2(1) of the Charter of the United Nations.[59] Jerzy Kranz notes that this name is misleading: the content of the principle would be better captured by the name "equal sovereignty".[60] State sovereignty itself is not a legal norm, but an object of protection of public international law.[61]

The principle of the sovereign equality of states consists of the obligation to treat all states as equal, the recognition that each state enjoys full sovereignty and the obligation to respect their legal personality, territorial integrity and

[56] Staker, *supra* note 5, p. 315; Gallant, *supra* note 1, pp. 541–543. *See also* Kranz, *supra* note 1, p. 32.

[57] Gallant, *supra* note 1, p. 26, fn 97, pp. 27, 143, 307 and 551–552. *See also* Ryngaert, *supra* note 8, p. 35.

[58] W. Meng, *Neuere Entwicklungen im Streit um die Jurisdiktionshoheit der Staaten im Bereich der Wettbewerbsbeschrängungen*, 41 Zeitschrift für Ausländisches Offentliches Recht und Völkerrecht 469 (1981), p. 471.

[59] United Nations Charter (adopted 26 June 1945, entered into force 24 October 1945), 1 UNTS xvi.

[60] Kranz, *supra* note 17, pp. 104-105 and 139-140; Kranz, *supra* note 1, pp. 81 and 230; J. Kranz, *Państwo i jego suwerenność* [The state and its sovereignty], 7 Państwo i Prawo 3 (1996), p. 5.

[61] R. Kwiecień, *Suwerenność państwa. Rekonstrukcja i znaczenie idei w prawie międzynarodowym* [State sovereignty. Reconstruction and significance of the idea in international law], Zakamycze, Kraków: 2004, p. 146; Kranz, *supra* note 1, pp. 50, 89 and 227–228; Kranz, *supra* note 60, p. 24.

political independence.[62] It is expressed in the Latin maxim "*par in parem non habet imperium*".

It is essential to reflect on how the principle of sovereign equality could limit jurisdiction. One can encounter reasoning that derives from the sovereign equality of states a thesis that the limits and exercise of state competence are set by the competences of other states.[63] In fact, the competences of many states may overlap. The thesis that the external manifestations of sovereignty find their limits in the sovereignty of other states seems to put it better.[64] Similar statements are also encountered in the context of criminal jurisdiction. It is argued that states, when determining the territorial scope of their own criminal laws, cannot leave them unlimited; they must respect the sovereignty of foreign states.[65]

The principle of sovereign equality of states has its derivatives. One of them is the prohibition against exercising authority in the territories of other states without their consent.[66] Acts of exercising jurisdiction cannot be performed on foreign territory except under a convention or customary norm permitting it.[67] This principle operates primarily at the level of enforcement jurisdiction. The prohibition against a state enforcing its law in foreign territory is strongly emphasised in both jurisprudence and literature.[68] For the sake of clarity it should be noted that mere legislation or adjudication is not tantamount to enforcement.

The customary norm discussed in the preceding paragraph is not coextensive with the principle of non-intervention, another customary rule. It stems from the obligation to respect the legal personality of each state. It prohibits intervention; intervention under international law is *ex definitione* illegal.[69] It consists of another state exerting pressure that interferes with the exercise of exclusive competence, involving the use or the threat of using armed force or disproportionate non-military coercive measures without entitlement in international law.[70] An intervention

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[62] Góralczyk & Sawicki, *supra* note 16, p. 147.

[63] Kranz, *supra* note 1, pp. 101 and 231.

[64] Kwiecień, *supra* note 61, p. 146.

[65] B. Kunicka-Michalska, *Art. 5*, in: G. Rejman (ed.), *Kodeks karny. Część ogólna. Komentarz* [Criminal Code. General part. A commentary], CH Beck, Warszawa: 1999, pp. 313–314.

[66] Kwiecień, *supra* note 61, p. 146. *See* PCIJ, *Island of Palmas Case (Netherlands v. USA)*, Award, 4 April 1928, 2 RIAA 829, pp. 829 and 838.

[67] PCIJ, *The Case of the S.S. Lotus (France v. Turkey)*, pp. 18–19.

[68] *Ibidem*; R.Y. Jennings, *General Course on Principles of International Law*, 121(II) Recueil des Cours. Académie de Droit International 323 (1967), p. 516; Dodge, *supra* note 1, p. 7; Shaw, *supra* note 1, p. 414; Gallant, *supra* note 1, p. 20; A. Chase, *Aspects of Extraterritorial Criminal Jurisdiction in Anglo-American Practice*, 11(3) The International Lawyer 555 (1977), p. 556; P.C. Jessup, *Transnational Law*, Yale University Press, New Haven: 1956, p. 59; Boister, *supra* note 1, pp. 3 and 281; Buxbaum, *supra* note 38, p. 664.

[69] Kranz, *supra* note 1, pp. 142 and 233.

[70] Kranz, *supra* note 17, p. 127; Kranz, *supra* note 1, 143; Kranz, *supra* note 60, p. 22.

need not have a tangible effect; pressure itself may amount to an intervention.[71] An attempt to influence legal relations in another state may be considered a violation of that state's sovereignty.[72] More precisely, it can be read as challenging the exclusive nature of that state's competence.[73] An action amounts to an intervention only if it usurps the sovereign authority of another state.[74] It is therefore too far-fetched to claim that one state's attempts to legislate with regard to persons residing in another state infringe on the right of that state to exercise jurisdiction over those persons in its own territory.[75]

The principle of sovereign equality and its derivative, the prohibition against intervention, are real limits of jurisdiction. Firstly, they limit the scope of jurisdiction, protecting competences linked to the essence of statehood and forming the reserved domain (*domaine réservé*). Secondly, they exclude the possibility of legislating and applying law to such an extent that the acts of lawmaking or application would constitute a disproportionate measure of non-military coercion or could influence the situation in that state.[76] Thirdly, by establishing a prohibition against exercising public authority in the territory of other states, they prohibit performing official acts there.[77]

5. THE PRINCIPLE OF EQUITY

Another principle which is sometimes said to be an international-law limit on jurisdiction is the principle of equity.[78] It is argued that the principle of equity in international law operates as a general principle of law.[79] The concept of equity in international jurisprudence is found in disputes over the delimitation of the continental shelf, over the use of waters of boundary rivers and over compensation, providing a guideline in awarding an appropriate sum whenever the extent of the damage cannot be accurately determined.[80] However, the claim that the principle

[71] Kranz, *supra* note 1, p. 144.

[72] Gallant, *supra* note 1, p. 293.

[73] Kranz, *supra* note 1, p. 132.

[74] Akehurst, *supra* note 8, p. 146.

[75] *Cf.* Staker, *supra* note 5, p. 315.

[76] *See* Ryngaert, *supra* note 8, p. 194.

[77] *Cf. Ibidem*, pp. 154–156.

[78] Zając, *supra* note 4, pp. 99-102; Ryngaert, *supra* note 8, p. 157.

[79] Czapliński & Wyrozumska, *supra* note 8, p. 138; Zając, *supra* note 4, pp. 99–100; Ryngaert, *supra* note 8, pp. 157–158.

[80] Czapliński & Wyrozumska, *supra* note 8, pp. 138-142. *See* ICJ, *Continental Shelf Case* (*Case Concerning the Coninental Shelf, Tunisia v. Libyan Arab Jamahiriya*), Judgment, 24 February 1982, ICJ Rep 1982, pp. 57–61, paras. 66–72; *North Sea Continental Shelf Cases*, Judgement, 20 February 1969, ICJ Rep 1969, p. 3; *Armed Activities on the Territory of the Congo, Democratic Republic of the Congo v. Uganda –*

of equity is a norm of public international law should be taken with caution. The usage of the concept of equity shows that it is substantially influenced by the concept of equity in common-law legal orders.

The equity system in common-law legal orders has traditionally been a normative system separate from positive law. The characteristic features of the equity system are its separation from strictly understood law (common law), the aim of ensuring that the legal system is both operative and fair, the discretionary nature of decisions taken on the basis of equity,[81] the protection of good faith derived from the protection of good conscience,[82] the absence of protection of bad faith (unconscionability),[83] flexibility,[84] the creation of legal titles that do not derive from common law[85] and the subordination to certain guiding principles, expressed in the form of maxims of equity. Notable maxims of equity include "those who seek equity must do equity",[86] "those who come to equity must come with clean hands",[87] "equity treats as done that which ought to be done",[88] "equity follows the law",[89] "equity will not assist a volunteer",[90] "equity is equality",[91] "equity looks to substance rather than form"[92] and "where the equities are equal, the first in time shall prevail."[93]

Thus, if the term *equity* appears in an English-language text on international law, one needs to reflect on the essence of the concept the author has in mind. Some authors make it clear that they are referring to the concept of equity as it is understood in the common-law tradition.[94] Posing the question of whether equity is part of the law, describing the relation between equity and the law,[95] treating

Reparations, Judgment, 9 February 2022, ICJ Rep 2022, p. 13; PCIJ, *Case Relating to the Diversion of the Water From the Meuse (Netherlands v. Belgium)*, Judgment, 28 June 1937, PCIJ (ser. A/B) No. 70, p. 3.

[81] R. Edwards, N. Stockwell, *Trusts and Equity*, Pearson, Harlow: 2004, p. 4; P.S. Davies, G. Virgo, *Equity & Trusts. Text, Cases, and Materials*, Oxford University Press, Oxford: 2019, p. 6–7.

[82] Including in particular a "bona fide purchaser for value without notice". Edwards & Stockwell, *supra* note 81, p. 4.

[83] Davies & Virgo, *supra* note 81, pp. 7–8.

[84] There is a contemporary tendency to give equity even greater flexibility. *See* M. Yip, J. Lee, *The Commercialisation of Equity*, 37(4) Legal Studies 647 (2017), pp. 668–671.

[85] For an overview of equitable rights *see* Davies & Virgo, *supra* note 81, pp. 11–15.

[86] *Ibidem*, pp. 15–16.

[87] *Ibidem*, pp. 16–17.

[88] *Ibidem*, pp. 17–18.

[89] *Ibidem*, pp. 18–19.

[90] *Ibidem*, p. 19.

[91] *Ibidem*, pp. 19–21.

[92] *Ibidem*, p. 21.

[93] *Ibidem*, pp. 21–22.

[94] A. Cassese et al., *Cassese's International Law*, Oxford University Press, Oxford: 2020, p. 197.

[95] *Ibidem*, pp. 197–198; R. Lapidoth, *Equity in International Law*, 81 Proceedings of the Annual Meeting (American Society of International Law) 138 (1987), pp. 138 and 143–144; V. Lowe, *The Role of Equity in International Law*, 12 Australian Year Book of International Law 54 (1988); S.K. Chattopadhyay, *Equity*

equity as a judicial tool for correcting positive law,[96] referring to a number of principles within equity ("equitable principles" or "principles of equity"),[97] ascribing equity the task of preventing injustice and filling gaps[98] or referring to maxims of equity developed in common-law culture[99] all suggest that an author is discussing a concept rooted in the common-law tradition of equity.

The concept of equity in the culturally conditioned sense of the term used herein occurs frequently in the international literature, leaving its mark on it. This has important implications for readers. Firstly, understood in this way, equity is not a legal norm but a system of certain general principles. Secondly, equity does not have a predetermined content, but is rather a way of resolving disputes, characterised by flexibility and discretion.[100] Thirdly, the influence of the common-law notion of equity on the concept of equity in international law cannot be determined precisely. It was therefore rightly concluded that the concept of equity in international law is subject to such divergent interpretations that an analysis of the concept can serve as a warning of how dangerous it is to assume that a given term in international law necessarily has one fixed meaning.[101]

It should be assumed that there is no settled "principle of equity" in international law. Nonetheless, the concept of equity functions in international legal theory and practice. It denotes a set of general principles and guidelines performing supportive, complementary and corrective functions in international law for interpretation and dispute resolution. As such, it always refers to other legal concepts and norms.[102] The view that equity forms part of international law in the same way that considerations of morality, conscience and good faith form part of the internal

in International Law: Its Growth and Development, 5(2) Georgia Journal of International and Comparative Law 381 (1975), p. 382; PCIJ, *Case Relating to the Diversion of the Water From the Meuse (Netherlands v. Belgium)*, Individual Opinion of Hudson, 28 June 1937, PCIJ (ser. A/B) No. 70, pp. 76–78.

[96] Lapidoth, *supra* note 95, p. 139; M.W. Janis, *The Ambiguity of Equity in International* Law, 9(1) Brooklyn Journal of International Law 7 (1983), pp. 19–20 and 22; Cassese et al., *supra* note 94, p. 198; Lowe, *supra* note 95, pp. 74 and 79.

[97] Lapidoth, *supra* note 95, pp. 139 and 142; Janis, *supra* note 96, pp. 9–11, 13–15, 18, 20–23, 25–26, 28–29 and 31; Cassese et al., *supra* note 94, pp. 197–198; Lowe, *supra* note 95, pp. 61, 72–75 and 80–81; A. Bufalini, *Remarks on the role of equity in determining war reparations before the International Court of Justice*, 95 Questions of International Law 25 (2022), pp. 25-42; Chattopadhyay, *supra* note 95, pp. 383–394, 387–397, 399–402 and 404–405; ICJ, *North Sea Continental Shelf Cases*, p. 3.

[98] Lapidoth, *supra* note 95, p. 147; Lowe, *supra* note 95, pp. 56, 58, 61–63, 69; Chattopadhyay, *supra* note 95, pp. 387, 389 and 397.

[99] Janis, *supra* note 96, p. 11, fn 13; Lowe, *supra* note 95, p. 80.

[100] This understanding of equity was apparent in: ICJ, *North Sea Continental Shelf Cases*, p. 3, para. 93.

[101] Janis, *supra* note 96, p. 7.

[102] Lowe, *supra* note 95, p. 79.

laws of states[103] seems apposite. The grounds for believing that equity constitutes a general principle of law (within the meaning of Art. 38(1)(c) of the Statute of the International Court of Justice) seem too tenuous. Determining the content of such a principle would raise insurmountable obstacles.

The concept of equity cannot alone *in abstracto* limit the scope of state jurisdiction, for two reasons. Firstly, it always refers to the interpretation or application of other norms of international law. Secondly, the concept is by its very nature imprecise. It is difficult to derive any intelligible limitation from it in isolation of individual cases. The concept of equity may interact with the prohibitive norms of international law limiting jurisdiction by shaping their scope and influencing decisions on the exercise of jurisdiction in individual cases.

6. CUSTOMARY NORMS OF INTERNATIONAL LAW OF ARMED CONFLICT

Some customary norms of international law of armed conflict are also invoked as limitations of legislative jurisdiction (and consequently, judicial and enforcement jurisdiction). One of them is a customary norm of international law that an alien must not be required to betray the state of which they are a national or to render active service, especially military service, against that state.[104] This principle stems from the duty of allegiance of a citizen to their home state, recognised by international law. This principle is codified in the Geneva Conventions. The Conventions protect residents of occupied territories from being compelled to serve in the armed or auxiliary forces of the occupying power. Prisoners of war and civilians are protected against compulsory work other than that listed in the Conventions.[105] This principle is a limitation of jurisdiction. It excludes lawmaking within a specific scope.

Another limitation arises from the lawful combatant privilege. According to this norm, a soldier in an international armed conflict on enemy territory is not bound by the criminal law of the enemy state as long as the soldier complies with the international law of armed conflict. This principle applies primarily to conduct related to the hostilities, such as killing, causing a serious danger or destroying property. It

[103] H. Lauterpacht, *General Rules of the Law of the Peace*, in: E. Lauterpacht (ed.), *International Law: Being the Collected Papers of Hersch Lauterpacht*, Cambridge University Press, Cambridge: 1978, p. 257. *See also* Lowe, *supra* note 95, p. 55.

[104] Gallant, *supra* note 1, p. 341.

[105] Art. 50 of the Geneva Convention Relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950), 75 UNTS 135; Arts. 40 and 51 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950), 75 UNTS 287.

does not apply to non-international armed conflicts.[106] This norm also excludes the jurisdiction of the state to regulate within a specific scope, related to armed conflict.

7. THE PRINCIPLE OF PROPORTIONALITY

Another principle – purportedly a norm of international law limiting state jurisdiction – is the principle of proportionality.[107] To analyse the content of the principle of proportionality, it must be stated what should be proportionate in relation to what. It has been proposed in the context of jurisdiction that the rule of proportionality requires that regulation should be proportionate in relation to needs (implying that it is the relation of regulation to needs which constitutes the relationship which should be marked with proportionality).[108] The validity of such a customary norm of international law would imply that international law controls the exercise of a state's legislative jurisdiction in terms of expediency. This would constitute a denial of state political independence. Another proposed relationship is that between interference in the internal affairs of another state and its interests.[109] In this view, proportionality merely further defines the rule of non-intervention and does not create an independent principle of law.

It has been noted that the principle of proportionality has so far played a minor role in international law. The principle has never been applied in international legal practice in the field of jurisdiction. It is denied the status of a general principle of international law.[110] It has gained a specific meaning in European Union law, however.

To summarise, the requirement of proportionality shapes the content of the principle of non-intervention. In European Union law, the principle of proportionality, together with the principle of subsidiarity, limits the exercise of jurisdiction by the Union and, to the extent covered by European Union law, by the Member States.[111]

8. THE PROHIBITION AGAINST ABUSE OF RIGHTS

The prohibition against abuse of rights (*abus de droit*) is another norm invoked as a source of limits to state jurisdiction.[112] It is also cited as the prohibition against

[106] Gallant, *supra* note 1, p. 342.

[107] Zając, *supra* note 4, pp. 102–103; Ryngaert, *supra* note 8, pp. 158–159; Boister, *supra* note 1, pp. 248–249.

[108] Zając, *supra* note 4, p. 103.

[109] Ryngaert, *supra* note 8, pp. 158–159; Wasiński, *supra* note 2, p. 64.

[110] Ryngaert, *supra* note 8, pp. 158–159.

[111] J. Maśnicki, in: A. Łazowski, A. Zawidzka-Łojek (eds.), *Podręcznik prawa Unii Europejskiej. Instytucje i porządek prawny. Prawo materialne* [Textbook of European Union law. Institutions and legal order. Substantive law], Instytut Wydawniczy EuroPrawo, Warszawa: 2018, pp. 30 and 33–36.

[112] Zając, *supra* note 4, pp. 104–105.

abuse of competence (*détournement de pouvoir*).[113] It is regarded as a general principle of law. With regard to state jurisdiction, the prohibition against abuse of rights refers primarily to abuses of the freedom to exercise jurisdiction, as articulated by the Permanent Court of International Justice in the *Lotus* judgment.[114]

The prohibition on abuse of rights shapes the prohibition against intervention,[115] but its role is undoubtedly not limited to this. In the field of jurisdiction, enacting a law aimed at causing harm to another state without serving any legitimate interest is considered an abuse of the freedom to exercise legislative jurisdiction.[116]

Deciding whether the prohibition against abuse of rights is a restriction of jurisdiction or merely of the exercise of jurisdiction is problematic. On the one hand, the fact that an abuse of rights is covered by the prohibition makes it a violation of the legal norm that prohibits it. For this reason, an abuse of jurisdiction has effects identical to overstepping the scope of jurisdiction, which amounts to a violation of a prohibitive norm of international law.[117]

On the other hand, the prohibition against an abuse of rights does not establish a prohibition in a sphere defined in abstract terms. A finding of an abuse of rights can only be made based on analysis of the objectives of a specified act of the state. Thus, it could be inferred that the prohibition refers to the manner in which jurisdiction is exercised.

It must be assumed that the prohibition against abuse of rights results in the absence of a right. Abuse of jurisdiction is tantamount to a lack of jurisdiction. Therefore, the prohibition against abuse of rights sets a limit of jurisdiction. It excludes jurisdiction in cases where its exercise would not serve a legitimate purpose and would simultaneously be aimed at distorting the situation of another state.

9. THE PRINCIPLE OF *NEMO PLUS IURIS AD ALIUM TRANSFERRE POTEST QUAM IPSE HABET*

The principle of *nemo plus iuris ad alium transferre potest quam ipse habet* forms part of international law as a general principle of law.[118] Any delegation of powers falling within the jurisdiction of the state to an international organisation or tribunal is subject to this principle. The bases of their authority are the consent of

[113] Kranz, *supra* note 1, p. 28.

[114] Ryngaert, *supra* note 8, pp. 160–161; M. Byers, *Abuse of Rights: An Old Principle, a New Age*, 47 McGill Law Journal 389 (2002), pp. 397–404 and 410–419.

[115] Ryngaert, *supra* note 8, p. 161.

[116] Akehurst, *supra* note 8, p. 189.

[117] *See* Akehurst, *supra* note 8, pp. 168 and 189.

[118] Góralczyk & Sawicki, *supra* note 16, p. 70.

a state and the delegation of its powers.[119] This principle exists in European Union law as the principle of conferral.[120] In fact, no limitation on jurisdiction or its exercise follows from this principle. In the context of jurisdiction, it functions as a reminder that, after the transfer of competence, its scope remains no greater than before the transfer.

10. RESPONSIBILITY TO PROTECT

The scope of jurisdiction is not limited by the doctrine of responsibility (duty) to protect.[121] This duty would oblige states to make, apply and enforce laws, thus limiting their freedom to exercise jurisdiction in cases of mass atrocities. Currently, however, the doctrine of responsibility to protect does not form a norm of international law. From the legal perspective, it is regarded as a *de lege ferenda* proposal.[122]

CONCLUSION

To recapitulate, legislative criminal jurisdiction is limited only by the norms of customary international law: the principle of sovereign equality of states; its derivative, the principle of non-intervention;[123] the principle of prohibition against abuse of rights; in international law of armed conflict, the principle of protection against coercion to service for the military power of the enemy state; and the principle of the privilege of the lawful combatant. Judicial jurisdiction is subject to the same international-law limitations as legislative jurisdiction[124] and, in addition, to limitations arising from customary and treaty norms providing immunities and other treaty exemptions from the jurisdiction of courts. Enforcement jurisdiction is subject to the same limitations as judicial jurisdiction. The principle of the sovereign equality of states further limits enforcement jurisdiction to the territory of a state, and for other territories the consent of the state to which a territory belongs is

[119] A. von Bogdandy, I. Venzke, *International Judicial Institutions in International Relations. Functions, Authority, and Legitimacy*, in: B. Reinalda (ed.), *Routledge Handbook of International Organization*, Routledge, Abingdon: 2013, pp. 468–469.

[120] Maśnicki, *supra* note 111, p. 30.

[121] *Cf.* Zając, *supra* note 4, p. 84. At this point the reader is referred to the literature on the subject: A.J. Bellamy, T. Dunne, *R2P in Theory and Practice*, in: A.J. Bellamy, T. Dunne (eds.), *The Oxford Handbook of the Responsibility to Protect*, Oxford University Press, Oxford: 2016, pp. 3–14; N. Rodley, *R2P and International Law: A Paradigm Shift?*, in: A.J. Bellamy, T. Dunne (eds.), *ibidem*, pp. 186–202.

[122] Ryngaert, *supra* note 8, p. 162. *Cf.* M. Labonte, *R2P's Status as a Norm*, in: A.J. Bellamy, T. Dunne (eds.), *The Oxford Handbook of the Responsibility to Protect*, Oxford University Press, Oxford: 2016, pp. 134–139 and 145-146.

[123] *See* Boister, *supra* note 1, p. 247; Buxbaum, *supra* note 38, pp. 656–657.

[124] Gallant, *supra* note 1, p. 21.

required. The exercise of all three types of jurisdiction is subject to the requirement of proportionality. In European Union law, the exercise of jurisdiction is further constrained by the treaty-based principle of subsidiarity. These conclusions have been drawn from the scholarly literature and jurisprudence, reflecting the state of the law. With the exception of enforcement jurisdiction, there are no norms in international law that limit the scope of a state's jurisdiction to its own territory.[125]

[125] Płachta, *supra* note 1, p. 98.