European Journal of International Law

Cooperative National Regulation to Secure Transnational Public Goods: A Reply to Nico Krisch

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Abstract

There is no doubt, as vividly highlighted in Nico Krisch's 'Jurisdiction Unbound: (Extra)territorial Regulation as Global Governance', that in certain sectors some economically weighty states seek to take advantage of the international law of jurisdiction with a view to determining unilaterally how particular transnational economic activities are conducted. This same law, however, particularly the jurisdictional obligations provided for among states parties by multilateral treaties, is not only capable of serving cooperative national regulation to secure transnational public goods but in respect of a wide range of activities is already doing so. Rather than a fundamental 'reorientation of jurisdiction towards the solution of common problems and the protection of global interests', what is needed is political will and diplomatic agreement to use even further the existing law, especially the treaty-based possibilities that it offers, to these ends.

1 Introduction

An article by Nico Krisch, like the first espresso in the morning, is a pleasurable stimulant to which one looks forward. 'Jurisdiction Unbound: (Extra)territorial Regulation as Global Governance' is no exception. Bursting with ideas, imaginative and rich in insight gained from deep reflection, lateral vision and an enviable breadth and sophistication of interdisciplinary learning, the thought it provokes has the mind buzzing all day and can keep one up at night. Its most basic insight – that in at least a few spheres some states avail themselves of the international rules governing the permissible scope of application of their national law to seek to leverage their economic power with a

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view to determining unilaterally how particular transnational economic activities are conducted – is hard to gainsay.

At the same time, and as likely not denied by Nico Krisch himself, a wider, more formally legal and less single-minded survey of the contemporary reality of the international law and practice of jurisdiction would enable one to glimpse that this law, particularly the jurisdictional obligations provided for among states parties by multilateral treaties, is not only capable of serving cooperative national regulation to secure transnational public goods but in respect of a wide range of activities is already doing so, even if its customary rules can also be relied on to attempt to 'govern' unilaterally certain transnational economic activities. Nothing of an international legal nature stands in the way of further harnessing the progressive potential of the international law of jurisdiction, including to multilateralize the 'global governance' of the transnational economic activities highlighted. What is needed is political will and diplomatic agreement. Insofar as the necessarily circumscribed focus and the rhetorical emphasis of the article might serve to obscure the progressive possibilities of the international law of jurisdiction, what follows is by way of intended, if prosaic, corrective.

2 The Article in Brief

A *Terminological Clarifications*

The term 'jurisdiction', never defined in the article more precisely than as 'the power to "speak" or determine the law in a given domain',[1] is used throughout effectively to denote, on the one hand, a state's authority under international law to assert the applicability of its national law to given conduct, which is to say its jurisdiction to prescribe or prescriptive jurisdiction, and, on the other hand, the body of rules of international law that govern the scope of this authority, which is to say the international law of jurisdiction to prescribe or prescriptive jurisdiction.[2] As to the first sense, although it is never actually specified whether reference to a state's jurisdiction is to its jurisdiction to prescribe, to adjudicate or to enforce, the focus of the article is almost exclusively on jurisdiction to prescribe.[3] It is to this aspect of the article's treatment of a state's jurisdiction that the following comments refer.

For its part, the 'principle of territoriality' is not defined at all in the article. It is generally used throughout to refer in substance to the twin doctrinal axioms, taken together, that a state may, as a prerogative inherent in its sovereignty over its territory, regulate conduct occurring in that territory and may not, 'without some specific basis in international law',[4] regulate conduct occurring outside its territory – that is, to

1 Krisch, 'Jurisdiction Unbound: (Extra)territorial Regulation as Global Governance', 33 *European Journal of International Law* (2022) 481, at 483.

2 The sense intended at any point is not always evident.

3 But *cf*. Krisch, *supra* note 1, at 483, 493–494, 509–510, referring to jurisdiction to adjudicate civil claims.

4 *Ibid.*, at 482, quoting J. Crawford, *Brownlie's Principles of Public International Law* (8th edn, 2012), at 456.

territoriality as both a source of authority under international law to prescribe national law and a limitation on that authority. The implicit emphasis is on the 'constraining aspects'[5] of territoriality. Where instead the term is used to refer to territoriality as a source of authority under international law to prescribe national law, which is to say as a basis of prescriptive jurisdiction, it is never actually stated, and it is unclear that it is fully appreciated, that regulation on the basis of territoriality is by definition regulation of conduct that occurs in whole or in part in the territory, including the territorial sea and superjacent airspace, of the regulating state. At various points the article relies implicitly on a vague, informal conception of territoriality that refers effectively to any connection whatsoever with the prescribing state's territory, a conception that as a formal legal matter does not correspond to territoriality as a basis of prescriptive jurisdiction.[6] More fundamentally, in its repeated identification of territoriality in the two preceding senses with the sovereign equality of states, the article connotes a third sense of territoriality, the obverse of and partial rationale for the second, namely the *prima facie* exclusivity of each state's authority under international law to regulate conduct occurring in its territory, an exclusivity into which each extraterritorial basis of terrestrial[7] jurisdiction permitted to other states by customary international law or permitted to or obliged of other states parties by any treaty to which that state is party represents a consensual inroad.[8] Unless otherwise indicated, the following comments refer to territoriality in the first two senses.

B *The Argument*

The article goes like this. Despite 'the ever greater interdependence of a globalizing world in which actors, markets and problems straddle boundaries to a far greater extent than before', the international law of jurisdiction has retained an essentially 'territorial orientation', with the consequence that '[l]egislators, regulators and courts … find difficult to tackle' the wide range of 'increasingly transboundary challenges' that they face.[9] '[B]elow the surface', however, of '[t]his dominance of the territorial principle', as illustrated through 'five vignettes of contemporary cases of business regulation', 'the law of jurisdiction has undergone a fundamental transformation' in which 'practice has largely "unbound" territoriality from its constraining aspects, opening the door to an exercise of jurisdiction on the basis of thin connections with the issue at hand and, thus, a normalization of regulation with few traditional territorial links'.[10]

5 *Ibid.*, at 482.

6 See, e.g., note 23 below.

7 The distinction is with those extraterritorial bases of prescriptive jurisdiction applicable in respect of maritime spaces beyond the territorial sea.

8 Each extraterritorial basis of prescriptive jurisdiction conceded embodies in formal legal terms what states generally or states parties agree to be a sufficiently compelling connection between the prescribing state and the conduct sought to be regulated. In this way, there is no substantive difference between an approach to extraterritorial prescriptive jurisdiction that proceeds by reference to specific bases or 'heads' of jurisdiction and one based on the 'legitimate interest' of states manifest in a 'connecting link', 'genuine connection' or 'contact'. In relation to the latter approach, see Krisch, *supra* note 1, at 485, 498–499.

9 *Ibid.*, at 482.

10 *Ibid.*, at 482, 483, 483, 482, 482 respectively.

'The result' is what is characterized as 'a jurisdictional assemblage … in which a multiplicity of states have valid jurisdictional claims, yet without established hierarchies or priorities between them', a situation that '[i]n practice … leaves especially major economies with few constraints on their use of extraterritorial economic regulation'.[11] Given the 'hierarchical character of extraterritoriality', this 'broad practice of jurisdiction in the economic realm … easily appears as a form of (global) governance'.[12] More specifically, since '[t]he capacity to exercise this form of global governance is very unevenly distributed', with 'the USA and the EU [being] by far the most active users of regulation with extraterritorial reach', jurisdiction 'appears as a structure of global governance through which some states govern transboundary markets – an often oligarchical structure in which a few powerful countries wield the capacity to set and implement rules', 'a new form of oligarchical governance in the international order' that 'undermines the sovereignty-protecting function often attributed to the law of jurisdiction'.[13] The article ultimately proposes that we take due account of 'the vertical, hierarchical elements in the exercise of unbound jurisdiction' and that 'we reconceive [jurisdiction] as a form of global governance, with significant implications for theorizing legitimacy questions and designing mechanisms to ensure accountability and self-government'.[14]

3 The Article's Account of the International Law of Prescriptive Jurisdiction

What follows focuses on the article's account of the current international law of prescriptive jurisdiction, rather than on the remedial measures to which the article gives thought. It concentrates on the law's alleged 'territorial orientation', on the 'jurisdictional assemblage' to which this law allegedly gives rise and on the characterization of the law's practical consequences as an 'oligarchical structure'.

A *'Territorial Orientation'*

The gist of the claim as to the 'territorial orientation' of the international law of prescriptive jurisdiction appears[15] to be as follows. The international law of jurisdiction to prescribe proceeds from the 'starting point'[16] of territoriality, with a small set of

[11] *Ibid.*, at 482.

[12] *Ibid.*, at 504.

[13] *Ibid.*, at 505, 505, 481–482, 505, 483 respectively.

[14] *Ibid.*, at 483.

[15] It is not clear to what extent the claim as to the continuing 'dominance' (*ibid.*, at 483) of territoriality refers to the international law of jurisdiction itself and to what extent it refers instead to academic treatment of the international law of jurisdiction. Nor is it clear to what extent the claim is that the continuing dominance of territoriality poses an obstacle to addressing contemporary transnational regulatory challenges and to what extent it is merely that this dominance no longer reflects the reality of extraterritorial assertions by states of prescriptive jurisdiction. On both counts the argument appears to change over the course of the article.

[16] *Ibid.*, at 481–482, 485.

extraterritorial bases of prescriptive jurisdiction being viewed as exceptional. Yet states 'find [it] difficult to tackle' today's 'transboundary [regulatory] challenges',[17] which is to say to achieve 'the solution of common problems and the protection of global interests', 'if limited to their own [territory]' by '[t]his dominance of the territorial principle'.[18] Indeed, not only do they have but they 'are bound to have difficulty coping with such challenges' of transnational regulation '[u]nder a regime of largely territorial jurisdiction'.[19] Given 'the ever greater interdependence of a globalizing world in which actors, markets and problems straddle boundaries to a far greater extent than before', '[w]e would … expect significant pressure for change in the law of jurisdiction – an expansion of jurisdictional boundaries in order to come to terms with the difficulty of localizing acts and regulating business actors operating on a global scale'.[20] Instead, the 'traditional' bases of jurisdiction to prescribe have remained 'largely stable', with 'limited adaptations in practice'.[21]

This portrait of the confounding 'dominance of the territorial principle' in the international law of jurisdiction to prescribe – which in any event is unnecessary in order to sustain the article's claim as to the 'unbound' character today of territoriality as a basis of jurisdiction to prescribe – is just not true to life.[22] It is simply not the case that national regulation to secure transnational public goods is stymied by the axioms that a state may regulate conduct occurring within its territory and may not, unless in reliance on some specific permissive rule of international law, regulate conduct occurring outside that territory. Indeed, the claim is contradicted by the article itself, which, *contra proferentem*, highlights examples – some of them grounded in extraterritorial

[17] Note that the term 'transboundary' is used throughout the article to mean in effect 'involving the territory of more than one state', rather than 'crossing the border between states'.

[18] Krisch, *supra* note 1, at 482, 482, 482, 483 respectively.

[19] *Ibid.*, at 484.

[20] *Ibid.*, at 482, 484–485. See also at 488.

[21] *Ibid.*, at 485.

[22] It is striking that the article makes so much of a work by F.A. Mann from as long ago as 1964, which is said to be 'cited as fundamental in virtually every modern text on the topic' (*ibid.*, at 484). See Mann, 'The Doctrine of Jurisdiction in International Law', 111 *Recueil des Cours de l'Académie de Droit International* (1964) 9. It is even more striking that jurisdiction to prescribe on the basis of nationality or, synonymously, 'active personality' is first given a territorial spin, then subsumed for all intents and purposes into territoriality. See, first, where it is said that 'most claims [to prescriptive jurisdiction] are formulated on the basis of territoriality and active personality – jurisdiction is exercised over acts that take place at least in part on one's own territory, or over persons who have the nationality … there' (Krisch, *supra* note 1, at 495), the rhetorical implication being that nationality is 'had' in territory. See next the suggestion that, as a basis of jurisdiction to prescribe, active personality has undergone an 'evolution' that sees corporations effectively treated as nationals of a state 'mainly through [their] presence' in a market in that state (at 496; see also note 30 below). (A corporation cannot, at least as a formal matter of international law, possess the nationality of a state other than the one in which it is incorporated. Even less could it possibly do so on the basis not of a grant of nationality by that other state but of mere presence in a market in that state.) Consider finally the fact that, although active personality is explicitly recognized as being, alongside territoriality, one of the two bases on which 'most claims [to prescriptive jurisdiction] are formulated' (at 495), this recognition is in a section headed 'Territorial Extensions' that focuses on territory, as does the following ('Territory in Flux'), while subsequent reference is to '[u]nbound territoriality' (at 501), without further mention of active personality.

bases allusively assimilated to territoriality[23] – that showcase the flexibility and dynamism of the international law of prescriptive jurisdiction, both extraterritorial and territorial, in the face of transboundary regulatory challenges. The article even goes so far as to observe that 'states use their regulatory and judicial institutions very effectively to govern activities of companies abroad' and that, '[w]hen it comes to the regulation of companies operating on increasingly borderless markets, states face few limitations today'.[24]

There is no doubt a rhetorical tendency in various contemporary accounts of the international law of prescriptive jurisdiction to overstate in some prefatory remark the normative significance of territory, which could be said in turn to obscure the pervasiveness of extraterritorial assertions of prescriptive jurisdiction. But, even on such accounts, territoriality is no more than the analytical starting point.[25] Extraterritorial assertions of jurisdiction to prescribe are stated and, more to the point, are well understood by states to be internationally lawful on the basis of specific permissive rules, rules to which others may be added consensually as a matter of customary international law, through a general practice accepted as law, and, among states parties, as a matter of treaty.

As it is, far from being hamstrung in the development of extraterritorial bases of prescriptive jurisdiction adequate to 'the solution of common problems and the protection of global interests', states – in part in response to the sorts of transnational regulatory challenges cited in the article, which in one form or another are not as new as suggested – have developed over the past 60 years or so, as a matter of both customary international law and especially treaty, a considerable array of extraterritorial bases of prescriptive jurisdiction in order to

[23] Jurisdiction to prescribe on the basis of territoriality does not extend to conduct performed extraterritorially solely on the ground that the natural or legal person that performed the conduct is subsequently present in the territory of the prescribing state. See, e.g., *The S.S. 'Lotus'*, 1927 PCIJ Series A, No. 10, at 35, Dissenting Opinion of Judge Loder; O'Keefe, 'Universal Jurisdiction: Clarifying the Basic Concept', 2 *Journal of International Criminal Justice* (2004) 735, especially at 755–756. In the absence of any other applicable extraterritorial basis of prescriptive jurisdiction, the enforcement of national law in respect of conduct performed extraterritorially, by way, for example, of penal or administrative proceedings against the person that performed the conduct, on the sole ground that the person is later present in the territory of the prescribing state is really an exercise of prescriptive jurisdiction on the extraterritorial basis of universality. In this light, contrary to the article's talk of 'territorializing' and a 'territorial nexus' (Krisch, *supra* note 1, at 491, 492; see also, more generally, 490–492, 497), port-state jurisdiction over acts occurring outside the internal waters, territorial sea or exclusive economic zone of the prescribing state is a manifestation of prescriptive jurisdiction on an extraterritorial basis, namely universality, not on the basis of territoriality. (See, e.g., the port-state jurisdiction formerly relied on by European Union (EU) member states to enforce Art. 6(1)(*b*) of Council Regulation 3094/86, OJ 1986 L 288/1, as alluded to in the article (at 491). See also, e.g., the port-state jurisdiction obliged among states parties by Art. 218(1) of the United Nations Convention on the Law of the Sea 1982, 1833 UNTS 3 (UNCLOS).) Similarly, jurisdiction to prescribe on the basis of territoriality does not extend to conduct performed extraterritorially solely on the ground that the conduct gives rise to effects in the territory of the prescribing state. Contrary to the rhetorical emphasis in the article (at 494–495), the 'effects doctrine' is an extraterritorial basis of jurisdiction to prescribe.

[24] Krisch, *supra* note 1, at 504, 512.

[25] Indeed, the term 'starting point' is used in the article (*ibid.*, at 481–482, 485).

regulate conduct occurring outside their territory.[26] Moreover, they have frequent regulatory recourse to these bases,[27] alongside more long-standing extraterritorial bases,[28] to secure a wide variety of transnational public goods.[29] Under many multilateral treaties, furthermore, such bases are usually mandatory, not merely permissive, in respect of the conduct

[26] For details, see, e.g., C. Ryngaert, *Jurisdiction in International Law* (2nd edn, 2015); R. O'Keefe, *International Criminal Law* (2015), at 6–29, paras 1.15–1.73, 319–329, paras 8.20–8.44.

[27] Criminalization of the extraterritorial conduct of non-nationals on the basis of passive personality, which is to say the nationality of the victim, is by now common and apparently permissible under customary international law in respect of at least serious acts of violence against persons. It is permitted under various treaties as well. Equally, the assertion and acquiescence in it of prescriptive jurisdiction over extraterritorial anti-competitive practices by foreign corporations on the basis of the effects doctrine is today surprisingly prevalent – being asserted not just by the USA and the EU but also by states as diverse as Japan, Turkey and Botswana – and is seemingly permissible under customary international law, at least where the harmful effects in the prescribing state's territory of the conduct are direct, intentional and of a certain gravity. Consider also the 'immediate and substantial effects' within the EU referred to by the Court of Justice of the European Union in C-507/17, *Google v. CNIL* (EU:C:2019:772), paras 57–58, as highlighted in Krisch, *supra* note 1, at 494. Treaty-based permissive versions of the effects doctrine, applicable in other factual contexts, are less onerous. Contrary to what the article suggests (*ibid.*, at 485), neither passive personality nor the effects doctrine, both 'for so long controversial' (*Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, 14 February 2002, ICJ Reports (2002) 3, at 76–77, para. 47, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, regarding passive personality), can rightly be characterized as 'traditional', at least in the meaningful sense of traditionally permitted under customary international law. The same goes, *mutatis mutandis*, for not only the permission under customary international law, in respect of those crimes provided for by customary international law, to assert universal prescriptive jurisdiction over the extraterritorial conduct of non-nationals but also the obligation to assert it in its various guises, including port-state jurisdiction (see note 23 above), provided for by a wide range of multilateral treaties. Next, extraterritorial prescriptive jurisdiction on the basis of the residence or domicile of a natural or legal person is also now widespread, including as variously permitted or obliged by treaty. The prescriptive jurisdiction over acts on board aircraft in flight provided for in Art. 3(1) of the Convention on Offences and Certain Other Acts Committed on Board Aircraft 1963, 704 UNTS 219, is today almost certainly permitted under customary international law as well. Grants of prescriptive jurisdiction over specific activities in the exclusive economic zone (EEZ) and on the continental shelf of the prescribing state are found in Arts 56 (cross-referenced with other provisions in Part V), 80, 81 of UNCLOS and very likely now in customary international law too. Added to these are the customary prescriptive jurisdiction permitted over the extraterritorial conduct of non-nationals serving in the armed forces of the prescribing state and treaty-based obligations in the context of terrorist acts to assert prescriptive jurisdiction over certain extraterritorial conduct of non-nationals directed against an aircraft registered in the prescribing state or against a ship flying its flag.

[28] Reliance on the nationality or 'active personality' of the natural or legal person performing the conduct – which, like territoriality, has long been a permissible customary basis of prescriptive jurisdiction in respect of any conduct – to regulate different sorts of extraterritorial acts is today widespread and, furthermore, commonly obliged by treaty in respect of specific acts. Similarly, although in respect of a much more limited range of conduct, reliance on the protective principle, according to which a state may regulate the extraterritorial conduct of non-nationals in order to protect certain fundamental national interests, is by no means vanishingly rare and is sometimes obliged by treaty. Additionally, the traditional jurisdiction of the flag state, which on the high seas is exclusive, over any conduct on board a ship is today invoked, as well as obliged by treaty, in respect of an array of maritime activities.

[29] Focusing only on the treaty context, and considering only treaties relevant to transnational business activities, such transnational public goods include the repression of transnational organized crime, including migrant smuggling and trafficking in people, of money laundering, of trafficking in human organs, of illicit traffic in drugs and psychotropic substances, of child pornography, of transnational bribery, of other forms of corruption, of mercenarism, of the financing of terrorism, of cybercrime, of illicit traffic in cultural property, of the manipulation of sports competitions, of counterfeiting medical products and of other transnational public harms. They further encompass the management of the resources of the EEZ and continental shelf, the conservation of the marine environment, the protection of the underwater cultural heritage and other positive transnational public goods.

the subject of the treaty. Not all of these customary and conventional bases necessarily lend themselves to the regulation specifically of transnational business activities, but even those that may not nonetheless attest to the realistic possibility, where political will and diplomatic agreement exist, of the creation and adaptation, via the usual customary and conventional law-making processes, of extraterritorial bases of prescriptive jurisdiction.

To these extraterritorial bases can be added the extraterritorial ends to which states adaptively put territoriality as a basis of prescriptive jurisdiction, as highlighted in part in the article itself.[30] Reliance on 'subjective' or 'objective' territoriality as a basis of regulation is by no means uncommon and is sometimes obliged by treaty. The prohibition and even criminalization of the territorial use of means of communication for purposes linked to particular extraterritorial activities is a routine feature of US federal law unchallenged in principle by other states.[31] Provision for territorial obligations, such as reporting obligations, in respect of extraterritorial activities is on the rise, especially in the context of business and human rights.[32] More eye-opening still are the various creative regulatory instantiations of the principle that a state may, in the exercise of its territorial sovereignty, impose such legal conditions on entry into its territory[33] and, by extension, on participation in markets in its territory[34] as it sees fit.[35]

[30] The article curiously characterizes unspecified examples of this use of territoriality as instantiations instead of extraterritorial jurisdiction on the basis of nationality. See Krisch, *supra* note 1, at 496, especially n. 99. Recall in this regard note 22 above. As regards the assertion that the EU's maritime regulations 'typically equate ships bound for an EU port with those flying the flag of a member state' (*ibid.*, at 491), see to the contrary, in a case highlighted in the article (at 491, n. 59), C-286/90, *Anklagemyndigheden v. Poulson and Diva Navigation Corp.* (EU:C:1992:453), paras 12–16, expressly rejecting the possibility.

[31] See, e.g., Racketeering Influenced and Corrupt Organizations Act, 18 USC §§ 1961–1968, one of the unnamed US laws alluded to in the article's football vignette (Krisch, *supra* note 1, at 488–489). The vignette notes that 'neither Switzerland nor the other countries seem to have protested against the US action in these cases, and many defendants have been extradited to the USA' (at 489). See also, e.g., §§ 78*dd*-1(*a*), 78*dd*-2(*a*), 78*dd*-3(*a*) (the last additionally requiring the presence of the person in the territory) of the Foreign Corrupt Practices Act, 15 USC §§ 78*dd*-1–78*dd*-3. Both statutes date from as long ago as the early 1970s.

[32] See, e.g., the obligation to prepare an annual 'slavery and human trafficking statement' provided for in s. 54(1) of the Modern Slavery Act 2015 (UK), 2015, c. 30, as flagged in Krisch, *supra* note 1, at 493. See also the obligations in draft Arts 6 and 8 of the current, third revised draft of the draft Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises, 17 August 2021 ('draft Legally Binding Instrument on Business and Human Rights'), being negotiated under the auspices of the United Nations Working Group on Transnational Corporations and Other Business Enterprises with respect to Human Rights, the latter provision cited in the article (at 493). Beyond the context of business and human rights, see, e.g., the obligations stipulated in Art. 4(1) of Regulation (EU) 2015/757, OJ 2015 L 123/55, as highlighted in the article (at 491).

[33] See, e.g., the obligations specified in Arts 4, 6, 13 of Directive 2002/59/EC, OJ 2002 L 208/10.

[34] See, e.g., the regulation of hedge funds by the EU, as highlighted in Krisch, *supra* note 1, at 490, as well as the more general discussion at 496–497.

[35] The conditioning on the performance of conduct abroad of a state's grant to a natural or legal person of permission to enter its territory or to participate in its territorial markets does not constitute the extraterritorial regulation of conduct. The persons remain free under the law of the prescribing state to act as they wish abroad, even if how they act may have consequences for their permission to enter that state's territory or territorial markets. It is for this reason that such conditionality 'does not seem to be seriously questioned in principle' (*ibid.*, at 490) but, to the contrary, is 'widely accepted' at least 'in many contexts' (at 497). The article mischaracterizes this 'price to be paid for access … to a territory or market' as 'submission to jurisdiction of a much wider scope' (at 497). To appreciate the inaccuracy, one need only consider the routine practice of a state's conditioning of its grant to a natural person of a visa to enter its territory on that person's lack of, for example, a criminal record, past involvement in persecutions by Nazi Germany or prior travel to specific states.

To the extent that 'the most well-established, traditional'[36] bases of prescriptive jurisdiction have remained 'stable', this stability attests to the lack of 'significant pressure for [their] change'. There evidently remains a consensus among states that, as far as they go, these long-standing bases remain fit for purpose. This is doubtless partly on account of what the article acknowledges to be 'their elasticity or capaciousness'.[37] As regards territoriality and nationality, it is also because they may be invoked in respect of any conduct, regardless of its character or effects. It is these two characteristics, rather than any inherent limitations of the international law of jurisdiction, that explain why, as noted in the article,[38] territoriality and nationality remain the bases of jurisdiction to prescribe on which states predominantly rely to regulate transnational business activities.

B *'Jurisdictional Assemblage'*

Having next proceeded, in what logically is an argument unconnected with the foregoing, to sketch a scene of supposedly '[u]nbound territoriality' with 'few clear limitations', the article argues that this phenomenon 'tends to produce a multiplicity of competing claims' to prescriptive jurisdiction, 'especially when it comes to corporations', and that there exist 'practically no legal rules on how [these] competing jurisdictional spheres relate to one another'.[39] This scenario, in which the international law of jurisdiction permits 'a multiplicity of states [to] have valid jurisdictional claims … without established hierarchies or priorities between them' and in which 'states' jurisdictional spheres are no longer placed next to each other, but are instead increasingly overlapping and interacting', is referred to repeatedly as a jurisdictional 'assemblage'.[40]

Leaving aside the questionable premise, more imagined than real, that the international rules of jurisdiction envisage 'states' jurisdictional spheres … placed side by side', not to mention the historical fact that concurrent prescriptive jurisdiction is nothing new, the assertion that there exist 'practically no legal rules on how competing jurisdictional spheres relate to one another' overlooks the customary rule long agreed on by states to regulate their concurrent claims to prescriptive jurisdiction, namely that there are no 'hierarchies or priorities' among the different bases of prescriptive jurisdiction, which is to say that the 'different grounds of jurisdiction' are to be treated 'on an equal footing'.[41] In other words, what the article treats as an absence of rules that gives rise to a contemporary jurisdictional 'assemblage' is in fact the customary rule long ago settled on by states,[42] via a general practice accepted as law, to order their

[36] *Ibid.*, at 495.
[37] *Ibid.*, at 496.
[38] *Ibid.*
[39] *Ibid.*, at 501, 502.
[40] *Ibid.*, at 482, 503.
[41] *Ibid.*, at 502.
[42] As long ago as 1935, the assertion of a hierarchy among the various international legal bases of prescriptive jurisdiction was described by Harvard Law School Research in International Law, 'Jurisdiction with Respect to Crime', 29 *American Journal of International Law Supplement* (1935) 435, at 583, as 'unwarranted by anything in international law and unsupported by the existing practice of States'.

prescriptive jurisdictional relations, a rule that provides precisely for overlapping jurisdictional competences. This rule, implicitly endorsed in the many multilateral treaties making usually mandatory provision, in respect of the conduct the subject of the treaty, for a slate of concurrent bases of prescriptive jurisdiction – from territoriality and nationality to universality, often via the protective principle, passive personality or the effects doctrine – without hierarchy or priority among them,[43] remains agreed on by states precisely in their respective and collective regulatory interests in the effective securing of public goods, including transnational ones. To the extent that coordination in the exercise of their concurrent prescriptive jurisdictions is desired by these states, this occurs at the point of enforcement, by means as diverse as[44] treaties for the avoidance of double taxation, cooperation between national competition authorities, treaty obligations of extradition and mutual legal assistance, treaties on the transfer of proceedings, ad hoc arrangements[45] and rules of private international law.

In short, the connotation from the word 'assemblage' of an unconsidered jumble of national regulatory competences is misrepresentative. Overlap and interaction, often cooperative, among respective national jurisdictions has long consciously informed the international rules on jurisdiction to prescribe, even if the limits of this overlap and interaction reflected in the specific extraterritorial bases of prescriptive jurisdiction respond to states' ongoing concern to safeguard their sovereign equality.

C *'Oligarchical Structure'*

As specifically regards the regulation of transnational economic activities, the article ultimately argues that, in the light of the 'hierarchical character of extraterritoriality' and the fact that 'extraterritoriality is a viable path only for those states that possess sufficient market power and regulatory and monitoring capacities',[46] jurisdiction 'appears as a structure of global governance through which some states govern transboundary markets – an often oligarchical structure in which a few powerful countries wield the capacity to set and implement rules'.[47]

Even in the limited context of the regulation of transnational economic activities, this view of prescriptive jurisdiction is doubtful, as is the reasoning on

[43] In this connection, see further O'Keefe, *supra* note 26, at 26–27, paras 1.69–1.70, 321, para. 8.24.

[44] In addition to the means cited in the text, see treaty provisions of the sort cited in *ibid.*, at 26, para. 1.69, n. 113, e.g., Art. 4(3) of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions 1997, UKTS no. 107 (2000), Cm. 4852 ('When more than one Party has jurisdiction over an alleged offence described in this Convention, the Parties involved shall, at the request of one of them, consult with a view to determining the most appropriate jurisdiction for prosecution').

[45] Consider, e.g., the participation in a Joint Investigation Team, in order to coordinate their investigations, of Australia, Belgium, Canada, the Netherlands and Ukraine, all of them states with prescriptive jurisdiction over the shooting down over Ukraine of Malaysia Airlines flight MH17 on 17 July 2014, and their eventual decision to concentrate the resulting prosecution in the Netherlands. See also, in this connection, Agreement between the Kingdom of the Netherlands and Ukraine on International Legal Cooperation regarding Crimes connected with the Downing of Malaysia Airlines Flight MH17 on 17 July 2014 2017, UN Reg. no. 55449.

[46] Krisch, *supra* note 1, at 504, 505.

[47] *Ibid.*, at 482–483. See also at 504–505.

which it is based. For a start, concurrent extraterritorial jurisdiction to prescribe – which, *pace* the article,[48] is a far cry from the exclusive extraterritoriality of jurisdiction to prescribe, to adjudicate and to enforce in respect of their nationals foisted by the European powers on non-European states via the system of capitulations – does not in any legal sense exhibit a 'hierarchical character'. Indeed, the very basis of the article's earlier characterization of the contemporary international practice of jurisdiction as an 'assemblage' is that the 'different grounds of jurisdiction' are treated by international law 'on an equal footing'.[49] Under customary international law, one state's extraterritorial regulation is without prejudice to, and on a par with, another's territorial regulation.[50] Next, and leaving aside that in this non-hierarchical schema one does not 'rule' the other, 'oligarchy',[51] 'oligarchical'[52] and 'oligopolistic'[53] are inapposite descriptions of an international jurisdictional scene in which even the USA, on the one side, and the European Union and its member states, on the other, are not only in open economic competition but also, more to the point, vigorously contest what at times each sees as the other's exorbitant claim to prescriptive jurisdiction, as the article itself recounts,[54] leading not uncommonly, directly or indirectly, to the scaling back of the other's jurisdictional ambitions. Such contestation, a constant feature of the decentralized international legal system highlighted throughout the article,[55] ensures a measure of at least interstate accountability in relation to states' jurisdictional claims. Finally, and most fundamentally, it is hard to see as a 'structure'[56] what at best is the factual reality in a few sectors of the reliance by economically powerful states on the international law of prescriptive jurisdiction to seek, with greater or lesser success, unilaterally to determine '[i] practice'[57] how transnational economic activities are conducted. No such reality is inherent in the international law of jurisdiction to prescribe. Any such reality is a contingent function of economic power.

A more accurate view is that the international law of prescriptive jurisdiction lends itself as much to cooperative national regulation to secure transnational public goods as it does to economically facilitated regulatory unilateralism. True for the customary bases of jurisdiction to prescribe, this is even truer for the collectively negotiated and agreed conventional bases, both permissive and especially mandatory, embodied in

[48] *Ibid.*, at 504.
[49] *Ibid.*, at 502.
[50] That is, for the purposes of the law of the first state there is one set of rules, for the purposes of the law of the second there is another, and neither trumps the other as a matter of customary international law.
[51] Krisch, *supra* note 1, at 504.
[52] *Ibid.*, at 482, 505.
[53] *Ibid.*, at 505.
[54] *Ibid.*, at 499–501, 504, 508.
[55] *Ibid.*, at 495, 498, 500–501, 504, 510.
[56] *Ibid.*, at 482.
[57] *Ibid.*, at 482.

the host of multilateral treaties drafted and concluded to such ends.[58] That the limits set by the customary and conventional extraterritorial bases of prescriptive jurisdiction reflect the abiding interest of states in safeguarding their sovereign equality,[59] an interest that seems also to inform the article's own concern for 'the protection of self-government',[60] in no way prevents those states from consensually, collectively and cooperatively deploying to transnational public ends, as they commonly do, the regulatory authority enjoyed by them severally under the international law of jurisdiction.

4 Conclusion

There is no doubt, as vividly highlighted in 'Jurisdiction Unbound: (Extra)territorial Regulation as Global Governance', that in certain sectors some economically weighty states seek to take advantage of the international rules on prescriptive jurisdiction with the aim of determining unilaterally how particular transnational economic activities are conducted. There is also no doubt that, as elsewhere in international law, territory continues to exert a stubborn normativity, even if this normativity is much more subtle in the field of jurisdiction than the article makes out. Rather, however, than a fundamental 'reorientation of [the international law of] jurisdiction towards the solution of common problems and the protection of global interests',[61] what is needed is political will and diplomatic agreement to use even further the existing law, especially the treaty-based possibilities that it offers, to such ends – ends that nothing in international law prevents from including the consensual, collective and cooperative regulation in the public interest of transnational economic activities.

[58] Recall section 3.A. Consider also the ongoing negotiations towards a draft Legally Binding Instrument on Business and Human Rights, highlighted in Krisch, *supra* note 1, at 483, 492, 509–510. Note that the reason why the regulatory obligations for states parties in draft Art. 6 of the current draft of the latter apply only with respect to business enterprises within the territory or jurisdiction or otherwise under the control of those states parties, 'including transnational corporations and other business enterprises that undertake activities of a transnational character', is that these obligations are intended to represent no more than an elaboration of the existing regulatory obligations for states parties to the extant universal conventions in the field of international human rights law. These regulatory obligations under international human rights law are themselves limited to a state party's territory, as emphasized in the commentary to Principle 2 of the Guiding Principles on Business and Human Rights, UN Doc. A/HRC/17/31, 21 March 2011, Annex, at 7.

[59] In this connection, see draft Art. 14(1) of the draft Legally Binding Instrument on Business and Human Rights ('States Parties shall carry out their obligations under this (Legally Binding Instrument) in a manner consistent with, and fully respecting, the principles of sovereign equality and territorial integrity of States').

[60] Krisch, *supra* note 1, at 509.

[61] *Ibid.*, at 482.