GLOBAL REACH, LOCAL GRASP: CONSTRUCTING EXTRATERRITORIAL JURISDICTION IN THE AGE OF GLOBALIZATION

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Executive Summary

The reach of national law is often greater than its grasp. Canada, like other nations, has effective legal power over its territory and all within it. However, one consequence of the current process of globalization is that Canadian interests are no longer confined exclusively within Canadian borders. Canada thus finds it increasingly necessary to consider asserting its legal jurisdiction beyond its frontiers. Such extraterritorial assertion of Canadian legal authority may run into strong opposition from other countries, who might view Canada as attempting to intervene in their own national territories and domestic affairs. Likewise, other states, under the same pressures of globalization, may try to exercise their legislative acts, government decrees and court orders in the territory of Canada, where they are likely to be rebuffed with equal indignation. Yet the rapidly growing volume and variety of transnational interactions between people, activities and events, which constitute the engine of globalization, ensure that the extraterritorial application of national legal powers cannot be avoided. Consequently the scope, means and effectiveness of extraterritorial action must be examined and evaluated.

This paper sets out an analytical framework to be applied in answering the set of complex and interlinked questions which arises when Canada is faced with the issue of whether to act extraterritorially. It does so taking into account the many different factual contexts in which issues of extraterritoriality arise.

The paper distinguishes between the questions of when Canada can act extraterritorially, and when it should choose extraterritorial action as a means of implementing a policy objective. These questions themselves raise further considerations, which include: i) the domestic legal question of when Canadian courts (or administrative bodies) will recognize and implement extraterritorial claims by Parliament or the legislatures; ii) the international law issue of when other states will recognize and support Canada's claims to act extraterritorially, and; iii) the purely practical consideration of whether any claim Canada might make to act extraterritorially will be enforceable.

The concept of "extraterritorial action" is itself is not free from ambiguity, and its meaning is explored in this paper. Some legislative or judicial action has an impact or influence outside Canada's geographical borders but nonetheless ought not to be considered truly "extraterritorial" because the impact is coincidental. Further, in this context even the word "act" requires clarification. Most obviously a government "acts" when it passes prohibitory legislation. However, many other alternatives are also open to governments when they attempt to affect the behaviour of actors domestically or abroad, and so the methods by which Canada might act extraterritorially also need to be discussed.

Parts II and III of this paper set out a series of distinctions, aimed at clarifying the analytical tools necessary to understand various inter-related extraterritoriality questions. Those parts consider issues of jurisdiction, distinguishing between territorial and extraterritorial jurisdiction, and defining and discussing legislative/prescriptive jurisdiction, executive/ enforcement jurisdiction, judicial/adjudicative jurisdiction, and investigative jurisdiction. The paper then discusses the mechanics of extraterritorial action, including the ability to affect the behaviour of individuals, corporations and other states, and the different abilities of the federal and provincial/territorial governments in this regard. This is followed by a discussion of the means by which extraterritorial action is taken, drawing the distinction between: i) extraterritorial impact without extraterritorial action; ii) unilateral extraterritoriality, and; iii) multilateral extraterritoriality, and looking at the question of Canadian responses to

extraterritorial claims by other nations. The paper then considers the policy justifications which have primarily motivated Canada to act extraterritorially in the past. This aspect of the paper focuses on criminal law, since that is where Canada has the strongest history of acting (or not acting) extraterritorially and therefore where the lessons of the past are written most clearly. That discussion identifies the extraterritorial motives of regulating extraterritorial conduct with a strong connection to Canada, of controlling the public face of Canada, of avoiding lawless territories, and of implementing international agreements regarding particular offences.

Parts IV and V of the paper consider whether and how these distinctions and the lessons of the past are applicable to the future. In Part IV, four “case studies” of areas of law which raise new and challenging issues, and which might raise different issues than the essentially prohibitory approach of criminal law, are considered. In particular there is discussion of the challenges posed by extraterritorial issues relating to i) the internet; ii) personal data protection, iii) human rights and iv) competition in the marketplace. Part V draws together all the aspects of extraterritoriality considered throughout the paper. In conclusion, it offers a practical analytical framework of questions and considerations, and the interconnections between them, that need to be taken into account in any circumstance in which the overarching question of whether and when Canada “should” act extraterritorially to achieve its desired policy objectives arises.

GLOBAL REACH, LOCAL GRASP: CONSTRUCTING EXTRATERRITORIAL JURISDICTION IN THE AGE OF GLOBALIZATION

I. INTRODUCTION

The reach of national law is often greater than its grasp. Canada, like other countries, has effective legal power over its territory and all within it. However, one consequence of the current process of globalization, for good or ill, is that Canadian interests are no longer contained exclusively within Canadian borders. Canada thus finds it increasingly necessary to consider asserting its legal jurisdiction beyond its frontiers. Such extraterritorial assertion of Canadian legal authority may well run into strong opposition from other countries, who might view Canada as attempting to intervene in their own national territory and domestic affairs. Likewise, other states, under the same pressures of globalization as Canada, may try to exercise their legislative powers, government decrees and court orders in the territory of Canada, where they are likely to be rebuffed with equal indignation. Yet the rapidly growing volume and variety of transnational interactions between people, activities and events, which constitute the engine of globalization, ensure that the extraterritorial application of national legal powers cannot be avoided. Consequently the scope, means and effectiveness of extraterritorial action must be examined and evaluated.

The issue of Canada acting extraterritorially is complex, and is not reducible to a single question. Rather, it involves a set of interlinked questions, each of which in turn raises several issues. Thus, this paper will not attempt to provide an answer to a single question, rather, it will

set out an analytical framework to be applied in answering the "extraterritoriality question" in the many different factual contexts in which it arises.

To start, it is worth distinguishing between the questions of when Canada can act extraterritorially, and when it should act extraterritorially. These questions themselves each need to be broken down further. To ask whether Canada "can" act extraterritorially raises at least the following issues: i) the domestic legal question of when Canadian courts (or administrative bodies) will recognize and implement extraterritorial claims by Parliament or the legislatures; ii) the international law issue of when other states will recognize and support Canada's claims to act extraterritorially, and; iii) the purely practical consideration of whether any claim Canada might make to act extraterritorially will be enforceable. Equally, the question of whether Canada "should" act extraterritorially raises various considerations, including: i) what domestic considerations will tempt Canada to legislate with extraterritorial effect; ii) what considerations regarding international relations should militate both for and against Canada acting extraterritorially, and; iii) related to ii) what attitude Canada should adopt towards other states acting extraterritorially in Canada's jurisdiction. In this paper, we will not approach the question of "should" in the sense of considering the desired policy outcomes that might motivate extraterritorial action – that is a question for domestic policy-makers. Rather, we will consider how to determine whether extraterritorial action "should" be used as a means of implementing policy choices, whatever they may be.

The questions above hinge on having a relatively clear understanding of what it means to "act extraterritorially", but that phrase itself is not free from ambiguity. Some legislative or judicial action has an impact or influence outside Canada's geographical borders but nonetheless ought not to be considered truly "extraterritorial" because the impact is coincidental. Further, in this context even the word "act" requires clarification. Most obviously a government "acts" when it passes prohibitory legislation. However, many other alternatives are also open to

governments when they attempt to affect the behaviour of actors domestically or abroad, and so the methods by which Canada might act extraterritorially also need to be discussed.

Broadly speaking, this paper will proceed in two stages. In the first stage (Parts II and III), we will set out a series of distinctions, aimed at clarifying the analytical tools necessary to understand the various inter-related extraterritoriality questions noted above. We will consider issues of jurisdiction, distinguishing between territorial and extraterritorial jurisdiction, and defining and discussing legislative/prescriptive jurisdiction, executive/enforcement jurisdiction, investigative jurisdiction and judicial/adjudicative jurisdiction. We will then discuss the mechanics of extraterritorial action, including the ability to affect the behaviour of individuals, corporations and other states, and the different abilities of the federal and provincial/territorial governments in this regard. We will then discuss the means by which extraterritorial action is taken, where we will draw the distinction between: i) extraterritorial impact without extraterritorial action; ii) unilateral extraterritoriality, and; iii) multilateral extraterritoriality. Within that discussion we will also look at the question of Canadian responses to extraterritorial claims by other nations. Finally within the first stage we will consider the policy justifications which have primarily motivated Canada to act extraterritorially in the past. This aspect of the paper will focus on criminal law, since that is where Canada has the strongest history of acting (or not acting) extraterritorially and therefore where the lessons of the past are written most clearly. In that discussion we will identify the extraterritorial motives of regulating extraterritorial conduct with a strong connection to Canada, of controlling the public face of Canada, of avoiding lawless territories, and of implementing international agreements regarding particular offences.

In the second stage of the paper (Parts IV and V), we will turn to see how (and whether) these distinctions and the lessons of the past are applicable to the future. Primarily we will do this by pursuing four “case studies” of areas of law which raise new and challenging issues, and which might raise different issues than the essentially prohibitory approach of criminal law. In particular we will consider the challenges posed by extraterritorial issues relating to i) the

internet; ii) personal data protection, iii) human rights and iv) competition in the marketplace. Finally we will attempt to draw conclusions. These will not be precise conclusions of the sort that Canada should or should not do this exact thing or that, because the questions are too complex for such ready answers. But we will provide conclusions in the form of an analytical framework of questions and considerations, and the interconnections between them, that should be taken into account in any circumstance in which the overarching question of whether Canada "should" act extraterritorially arises.

II. ANALYTICAL TOOLS AND CURRENT EXTRA-TERRITORIAL PRACTICES

A. Definitions, Distinctions and Dichotomies

1. Jurisdiction Defined

The term "jurisdiction" has multiple meanings and layers within meanings, all of which are driven by the context in which it is used. Generally the term "describes the limits of legal competence of a state or other regulatory authority …, to make, apply, and enforce rules of conduct upon persons."[1] Domestically speaking, jurisdiction is the ability of the state, whether via the legislature, the executive or the courts, to exert power over persons, places and things.

A discussion of extraterritoriality, however, necessarily engages the state's ability to exert its power in ways that involve and affect people, places and things that are beyond its borders. In the international legal system, the state is essentially a territorial entity and each state enjoys plenary jurisdiction within, and exclusive control over, its territory.[2] Any act that exerts power outside the state's territory necessarily implicates the interests of other states. This is manifestly so where the act in question affects another state's territory or citizens, as this

[1] V. Lowe, "Jurisdiction" in M. Evans, ed., *International Law* (Oxford: Oxford University Press, 2003), at 329.
[2] See generally Hugh M. Kindred and Phillip M. Saunders, eds., *International Law: Chiefly as Interpreted and Applied in Canada*, 7th ed. (Toronto: Emond Montgomery, 2006) ("Kindred"), Chapter 2.

quite directly engages the interests of the second state. It is equally true, however, even for areas such as the high seas or outer space. Because no state has plenary jurisdiction in these areas, all states have at least a conceptual interest in regulating the manner in which any state acts, so as to safeguard their own interests.

Accordingly, the focus here must be on jurisdiction in its international law meaning. This invokes a number of different concepts and relationships. Most importantly, jurisdiction at international law "reflects the basic principles of state sovereignty, equality of states and non-interference in domestic affairs."[3] As explored in the next section, it is an over-arching concept that provides a legal basis for states to sort out what each may do, and not do, in particular outside their borders.

2. Territoriality v. Extraterritoriality: Existence and Exercise of Jurisdiction at Domestic and International Law

A crucial step in examining the exception of extraterritorial jurisdiction is understanding its relationship to the rule of territorial jurisdiction. A state's plenary jurisdiction over its territory, and every person and thing upon it, is a function of state sovereignty. Thus, Canada's territory is the place where other states may not act in a sovereign manner, at least not without Canada's permission. As other states are equally sovereign, it follows that as soon as Canada exerts power in a way that has effects outside its borders it will face limitations.

The international law regarding the exercise of jurisdiction by states can be expressed simply: one state's exercise of sovereign power cannot infringe upon the sovereignty of another state or states. This is easy enough to assert, but nebulous and nuanced in application since judging where the line is crossed is a complex exercise. The centre point of conflict will be situations of *concurrent jurisdiction*, i.e. where two or more states have some legal claim to exercise jurisdiction over a particular matter.

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[3] M. Shaw, *International Law*, 6th ed. (Cambridge: Cambridge University Press, 2003), at 572.

Resolution is accomplished in two ways. First, states can agree on where primary jurisdiction should lie on a case-by-case basis. For example, if a French citizen commits murder in Canada, France may have a claim to jurisdiction over its national. However, it is likely to defer to Canada since Canada is the state where the act occurred and probably where all of the evidence is located, as well as being the more aggrieved state of the two. Simply because a state notionally has jurisdiction over a matter does not necessarily mean that it will have any interest in exercising it.

Second, various principles of jurisdiction have developed in international law to allow states to mitigate the conflict that may result from concurrent claims to jurisdiction. This system of "allocat[ing] competences"[4] is a direct outgrowth of the need to manage inter-state relations, and while it is normative in character it is functionalist in practice. As Professor Brownlie has written, "the sufficiency of grounds for jurisdiction is an issue normally considered relative to the rights of other states and not as a question of basic competence."[5]

The starting point, of course, is the *territorial principle*, which renders territorial sovereignty as discussed above one of the bedrock jurisdictional notions.[6] It is accepted that a state can assert jurisdiction over its territory, including the territorial sea, internal waters, airspace and certain maritime zones. In the context of criminal jurisdiction, two sub-classes of territoriality have been put into use: *subjective territoriality*, where a state has jurisdiction over a criminal act that occurs, or is at least begun, on its territory but has consequences in another state; and *objective territoriality*, where a state has jurisdiction over an act that is begun in another state but is completed in the first state.

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[4] R. Higgins, *Problems and Process: International Law and How We Use It* (Oxford: Clarendon Press, 1994), at 56, ("Higgins).

[5] Ian Brownlie, *Principles of Public International Law*, 6th ed. (Oxford: Oxford University Press, 2003) ("Brownlie"), at 297-98.

[6] This discussion of jurisdictional principles is drawn in part from Robert J. Currie & Steve Coughlan, "Extraterritorial Criminal Jurisdiction: Bigger Picture or Smaller Frame?" (2006) 10 Can. Crim. L. Rev. (forthcoming) ("Currie & Coughlan").

Since territoriality is the starting point, it follows that the other jurisdictional principles are extra-territorial. The four principles which have gained some acceptance in international law are as follows:

(a) *nationality principle*:

States may assert jurisdiction over the acts of their nationals, wherever the act might take place. This principle is employed more often by civil law than by common law countries, but has equal status with territoriality as a universally-accepted valid ground of jurisdiction.

(b) *protective principle:*

States may assert jurisdiction "over acts committed abroad that are prejudicial to its security, territorial integrity, and political independence."[7] Examples are treason, espionage and counterfeiting of state currency.

(c) *universal principle*:

States may assert jurisdiction over certain criminal acts which are deemed to be offensive to the international community at large and thus justify broad jurisdictional permissiveness. Some examples are genocide, crimes against humanity, war crimes, and piracy. Certain treaty regimes oblige member states which apprehend an individual accused of the relevant crime to prosecute the individual regardless of whether there is any connection between the crime and the apprehending state. If the state does not wish to prosecute, then it is obliged to extradite the individual to a treaty partner state which indicates a willingness to prosecute. This kind of mechanism is known as *aut dedare, aut judicare* ("extradite or prosecute"), and can be distinguished from the broader notion of universality both by its mandatory character and by the fact that it applies only as between the parties to the relevant treaty.

(d) passive personality principle:

Some states have, from time to time and controversially, asserted jurisdiction over acts which injured their nationals, regardless of territorial location.

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[7] Kindred, above note 2, at 559.

Exercising extraterritorial jurisdiction, then, is not necessarily illegal under international law: it depends upon whether in exercising jurisdiction a state can be said to infringe upon the sovereignty of another. Each of the jurisdictional principles above has the effect of legitimizing, to a greater or lesser extent, a state's claim to exercise jurisdiction over persons, places and things beyond its territory. They are the techniques which states use to broker conflicts, usually in situations of concurrent jurisdiction.

Recently, the principles described above have been employed as criteria within a more global test for the legality of an exercise of jurisdiction: whether there is "a substantial and bona fide connection between the subject-matter and the source of the jurisdiction."[8] Professor Brownlie, among others, has posited that state jurisdiction over an extraterritorial act will be lawful where this primary criterion is met.[9] The essence of this test, usually expressed in the phrase "real and substantial connection," has appeared in Supreme Court of Canada jurisprudence as the test Canadian courts will apply in deciding whether to take territorial jurisdiction over (i) criminal acts with both domestic and transnational aspects,[10] and (ii) civil cases, whether for adjudication or for enforcement of a foreign judgment.[11]

The essential point is that Canada's *ability* to legally exercise extraterritorial jurisdiction is driven by the amount and degree of connection between Canada and the subject matter in question, as balanced with the similar connections of other states to the same subject matter. The propriety and desirability of so doing is the larger question to which this study is dedicated.

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[8] Brownlie, above note 5, at 309.
[9] Also that in exercising jurisdiction, the state is not intervening in the domestic or territorial jurisdiction of another state, and that "elements of accommodation, mutuality, and proportionality" are applied; *ibid*.
[10] *Libman v. The Queen*, [1985] 2 S.C.R. 178 (*Libman*). Note that the test as framed by Brownlie relates to whether states may take jurisdiction over a particular subject matter at international law, while the "real and substantial connection" test as used by the Supreme Court of Canada relates to the separate but related question of whether Canadian courts can exercise territorial jurisdiction as a matter of domestic law.
[11] *Morguard Investments Ltd. v. DeSavoye*, [1990] 3 S.C.R. 1077 (*Morguard*), *Beals v. Saldanha*, [2003] 3 S.C.R. 416 (*Beals*). As explored below, the "real and substantial connection" test has also been mooted as the basis for asserting jurisdiction over copyright infringements.

3. Prescriptive, Judicial and Enforcement Jurisdiction

While the previous section explored the general legal basis for exercising extraterritorial jurisdiction, it is important to distinguish the ways in which this exercise manifests itself.[12] *Legislative* or *prescriptive* jurisdiction refers to the ability of the legislature to make and apply laws to subject matter outside the state's territory; *enforcement* or *executive* jurisdiction refers to the state's ability to act in such a manner as to give effect to its laws (including the ability of police or other government actors to investigate a matter, which might be referred to as *investigative jurisdiction*); and *judicial* or *adjudicative* jurisdiction concerns the ability of a state's courts to adjudicate cases with foreign elements.

The international law principles outlined above are designed to regulate prescriptive jurisdiction, i.e. they determine where and when a state is competent to make laws related to extraterritorial subject matter. Notionally, a state that legislates in excess of its competence at international law is intruding upon the sovereignty of other states. Practically, however, the potential for conflict will only arise where there is some chance for the legislating state to enforce its jurisdiction, e.g. where a state "acts in the territory of another state or at least initiates in its own territory measures that require compliance in a foreign state."[13] Enforcement may also occur by way of domestic courts exercising judicial jurisdiction to decide that they may seize themselves of a particular matter.

While it may be, as the saying goes, that Parliament is competent to outlaw smoking on the streets of Paris,[14] if Canada does not attempt to enforce such a law then it presents no practical problems. It is possible for a state to have prescriptive jurisdiction over an extraterritorial matter but lack the jurisdiction to enforce it. Certainly attempts by states to

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[12] For the classic exposition see Michael Akehurst, "Jurisdiction in International Law" (1972-73) 46 Brit. Yb. Int'l L. 145, at 145.

[13] Michal Gondek, "Extraterritorial Application of the European Convention on Human Rights: Territorial Focus in the Age of Globalization?" (2005) 52 Neth. Int'l L. Rev. 349 at 366, citing F.A. Mann, "The Doctrine of International Jurisdiction Revisited after Twenty Years," 186 *Recueil des Cours* (1984-III) p. 34.

[14] Peter W. Hogg, *Constitutional Law of Canada*, Student Ed. (Scarborough, Ont.: Thomson/Carswell, 2003), at p. 301, citing Jennings, *The Law and the Constitution* (5th ed., 1959), 170-71 and *B.C. Elec. Ry. v. The King*, [1946] A.C. 527, 541-42.

enforce their laws in the absence of clear entitlement to do so has produced international strife, a classic example being one state abducting individuals from the territory of another state.[15] Investigation is similarly circumscribed, and state officials such as police cannot exercise their executive powers on the territory of another state without that state's permission.[16]

This being so, Canada has tended to map its prescriptive jurisdiction onto its enforcement jurisdiction—that is, to legislate extraterritorially only where it is willing (and potentially able) to investigate and enforce.[17] This is quite true of the criminal law, where enforcement begins with the individual's presence in Canada or a request for extradition that a foreign state will recognize. It is also true, indirectly, of civil cases, where Canada enforces the judgments of foreign courts just as it generally expects its own will be enforced.

B. Mechanics of Extraterritorial Action

In this section we address the 'mechanics' of extraterritorial action. This involves a consideration of the purposes for which a state or province might wish to act extraterritorially. How a state should pursue these various purposes or objectives will be discussed in Part II(C), below. A second consideration is the capacity of the federal and provincial governments to act with extraterritorial effect.

1. Purposes for Extraterritorial Action

The broad purposes for extraterritorial action by governments can be said to fall under three general headings: 1) to control or affect the behaviour of individuals; 2) to control or affect the behaviour of corporations; or 3) to control or affect the behaviour of other states.

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[15] See, for example, *Attorney General of Israel v. Eichmann* (1961), 36 I.L.R. 5 (Dist. Ct. Jerusalem), aff'd (1961), 36 I.L.R. 277 (Israel S.C.); *United States v. Alvarez-Machain*, 112 S. Ct. 2188 (1992). Canadians are not immune from abduction; see Wade A. Buser, "The *Jaffe* Case and the Use of International Kidnapping as an Alternative to Extradition" (1984) 14 Ga. J. Int'l & Comp. L. 357.

[16] Higgins, above note 4, at 70; John Dugard, *International Law: A South African Perspective*, 2nd ed. (Kenwyn: Juta, 2000), at 173.

[17] See Currie & Coughlan, above note 6.

A great deal of extraterritorial activity takes place in the realm of criminal law. In this context, the purpose of extraterritorial action might be seen as primarily one of punishing Canadian wrongdoers, or wrongdoers who find themselves on Canadian territory, for acts they may have committed outside of Canada. Canada's recent child-sex tourism legislation is an example of this.[18] Other examples of punitive extraterritorial laws include Canada's *Crimes Against Humanity and War Crimes Act*,[19] and various terrorism related offences.[20] These examples are an illustration of extraterritorial action to control or affect the conduct of individuals. A non-punitive example is the imposition of taxes on non-residents.[21]

Individuals may not be the only target of extraterritorial action. The federal government may legislate with respect to the activities of Canadian corporations operating outside Canada's borders.[22] Pressure to do so has increased significantly in recent years. Such regulation can be in relation to human rights, environmental impacts or other facets of the entities' operations.[23] The lack of accountability of corporations operating in developing nations is a significant international problem; self-regulation has been, to date, the preferred means of addressing this behaviour, even though it has been widely criticized as being insufficient to address the problems. While national legislation with extraterritorial effect that establishes norms of conduct with punishment for transgressions has been called for in other jurisdictions,[24] this is only one possible policy option. Other suggestions have included international treaty-making to develop reciprocal obligations, independent complaints mechanisms,[25] and standards-setting

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[18] *Criminal Code*, R.S., 1985, c. C-46, s. 7(4.1).
[19] S.C. 2000, c. 24.
[20] *Criminal Code*, above note 18, s. 7(3.75) re "terrorist activity"; s. 83.02 re "financing terrorism";
[21] *B.C. Electric Railway Co. v. The King* [1946] A.C. 527, at paras 8-10.
[22] *Ibid*.
[23] For example, in a recent report focusing on the accountability of transnational corporations in conflict zones, the authors called upon countries like Canada to regulate the extraterritorial activities of its corporations. See: Georgette Gagnon, Audrey Macklin & Penelope Simons, Deconstructing Engagement: Corporate Self-Regulation in Conflict Zones – Implications for Human Rights and Canadian Public Policy, January 2003. Online: Law Commission of Canada: http://www.lcc.gc.ca/research_project/gr/gbb/rp/gagnon-en.asp.
[24] *Corporate Code of Conduct Bill,* 2000 Australia.
[25] Oxfam Community Aid Abroad, Submission to the Joint Parliamentary Committee on Securities and Corporations inquiry into the Corporate Code of Conduct Bill 2000, December 2000. Online: http://www.oxfam.org.au/campaigns/submissions/corpcodeconduct.pdf.

accompanied by rules for government contracting that favour companies that meet the standards.

In some cases, measures are designed to have extraterritorial reach by influencing the actions of other nations. For example, the *European Directive on Data Protection*[26] specifically provided that EU member states must legislate so that there could be no transborder movement of personal data for processing abroad unless the target country had enacted legislation establishing substantially equivalent data protection norms.[27] Although such legislation would have no overt extraterritorial reach, the threat of loss of trade as a result of the *Data Protection Directive* was a strong motivating factor behind the Canadian government's decision to enact the *Personal Information Protection and Electronic Documents Act* (*PIPEDA*).[28]

The United States has arguably been very effective in using multilateral trade treaty negotiations to achieve harmonization between its own domestic legislated norms and those of other countries. There have been numerous instances, for example, where Canadian courts have identified Canada's trade treaty obligations as a reason for choosing an interpretation of Canadian law that is consistent with that of comparable legislation in the United States.[29]

2. Competence to Act Extraterritorially

An aspect of state sovereignty includes the ability to legislate with extraterritorial effect. The enforceability of any such legislation is a separate issue. The Canadian government is not restrained by the *Constitution Act 1867* from enacting laws with extraterritorial effect,[30] and

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[26] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, Official Journal of the European Communities of 23 November 1995 No L. 281.
[27] *Ibid*., Article 25.
[28] S.C. 2000, c. 33. See Teresa Scassa and Michael Deturbide, *Electronic Commerce and Internet Law in Canada*, (Toronto: CCH Canadian, 2004), at 104.
[29] See, for example: *Tele-Direct (Publications) Inc. v. American Business Information Inc.* (1996), 74 C.P.R. (3d) 72 (F.C.T.D.) aff'd [1998] 2 F.C. 22; (1997), 76 C.P.R. (3d) 296 (F.C.A.), leave to appeal to S.C.C. denied, [1998] 1 S.C.R. xv; see also the dissenting reasons of Binnie J. in *Harvard College v. Commissioner of Patents*, [2002] 4 S.C.R. 45; 2002 SCC 76.
[30] *Croft v. Dunphy*, [1933] A.C. 156. See also *Statute of Westminster, 1931*, R.S.C. 1985, Appendix II, No. 27, s. 3.

indeed it has done so on a number of occasions.[31] Often legislation with extraterritorial effect is enacted to implement international treaty obligations, which are taken on as an exercise of the federal prerogative power over foreign affairs. In Canada, only the federal government is considered to have the ability to enter into treaties,[32] although there is no explicit constitutional provision that grants such power exclusively to the federal government. Nevertheless, this power does not give the federal government the ability to legislate within areas of provincial competence.[33]

Provincial powers on the international stage are limited, although they do exist. The provinces, for example, may, and frequently do, work cooperatively with the federal government on issues negotiated internationally. This is particularly important where the resultant treaty will impact on areas of provincial legislative competence. Provinces may also enter into agreements with other governments so long as these agreements are not intended to be binding in international law.[34] Such agreements can be in the form of contracts for goods or services, or agreements around issues such as reciprocal enforcement of orders or recognition of documents such as drivers' licences.[35]

The governments of the various Canadian provinces are only competent to legislate with respect to matters within their own provincial borders,[36] although extraterritorial effects that are merely incidental will be tolerated.[37] This has meant that provinces have little power to use legislation to alter behaviour in other provinces that is having an impact within their borders.[38]

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[31] Examples of such laws are provided throughout this text.
[32] Peter Hogg, *Constitutional Law of Canada*, 3rd Edition (Toronto: Carswell, 1992), at 283.
[33] *A.G. Canada v. A.G. Ontario (Labour Conventions),* [1937] A.C. 326. Lord Atkins ruled that while the federal government might enter into treaties, their implementation fell to the level of government having jurisdiction over the subject-matter of the treaty.
[34] Hogg, *supra* note 32, at 297. See also *A.G. Ontario v. Scott*, [1956] S.C.R. 137.
[35] Hogg, *ibid*.
[36] *Royal Bank of Canada v. The King* [1913] A.C. 283; *Ladore v. Bennett*, [1939] A.C. 468. S. 92 of the *Constitution Act* contains language explicitly limiting legislative competence to matters "in each province." See also Hogg, *supra* note 32, at 318.
[37] *Reference Re: Upper Churchill Water Rights Reversion Act 1980*, [1984] 1 S.C.R. 297 at 332.
[38] In *Interprovincial Co-Operatives Ltd. v. Dryden Chemicals Ltd*, [1976] 1 S.C.R. 477, Manitoba legislation was found invalid in part because it purported "to nullify the effect of permission duly granted by the regulatory authority of another jurisdiction." (Per Ritchie J., at 521).

The Supreme Court has noted that with respect to provincial competence to legislate with extraterritorial effect, the provinces are more constrained than is the federal government *vis à vis* other states. In the case of the provinces: "[t]here is a constitutional limitation on their legislative authority and there is a common forum to enforce it."[39]

C. Ways of Taking Extraterritorial Action

1. Introduction: Factors Affecting the Choice of Means

Extraterritorial jurisdiction may be asserted by any organ of government, legislative, executive or judicial. For example, extraterritorial power may be expressed by legislation to criminalize foreign behaviour, executive orders-in-council to impose trade embargoes on foreign ports, or judicial orders for the service of process abroad. It will therefore be convenient to discuss the means of exercising extraterritorial jurisdiction under the legislative, executive/administrative and judicial processes separately. As noted above, the ultimate authority for any branch of government to act extraterritorially depends on the Canadian constitution and its grants and limitations of power.

In addition to the unilateral assertion of extraterritorial authority, Canada may also exercise jurisdiction abroad through agreements with foreign states. Such agreements may take the form of bilateral agreements, multilateral treaties or United Nations obligations. Each will be described separately.

Just as Canada may assert extraterritorial jurisdiction, it must also expect that other states may try to exercise extraterritorial power which may, deliberately or coincidentally have a negative impact on Canada and its interests. This prospect should moderate Canada's own assertion of extraterritorial jurisdiction, which ought to be rational and measured so as not to

[39] *Ibid*. at 512 (per Pigeon J.). In the recent case *British Columbia v. Imperial Tobacco Canada Ltd*., [2005] 2 S.C.R. 473, the Supreme Court of Canada provided a three-part test to determine whether provincial legislation has an impermissible extraterritorial effect; the determination turns on whether, in pith and substance, the legislation relates to subject matter within provincial competence and "has a meaningful connection to the enacting province and pays respect to the legislative sovereignty of other territories" (at para. 36).

undercut Canadian diplomacy regarding excessive claims of extraterritorial jurisdiction by other states. In short, the probability of like, even reciprocal, assertion of extraterritorial authority by states demands a degree of comity.

At the same time, Canada has found it expedient and necessary to repulse foreign assertions of extraterritorial power by unilateral, domestic responses for the protection of Canadian interests. These measures will also be discussed at the end of this section.

2. Choice of Means to Extend Canadian Jurisdiction Extraterritorially

(a) Legislation

As discussed in Part II(A)(3), Parliament's extensive power to prescribe laws will only result in enforcement when Canada has both jurisdiction over the act and jurisdiction over the actor. Parliament, however, does not always address the issue of enforcement, but leaves statutes to be applied by the other organs of government, namely the executive and the courts. Hence extraterritorial legislation exists in three jurisdictional forms:

(i) Jurisdiction over extraterritorial subject matter only, e.g. the *Competition Act,*[40] section 46 which prohibits anti-competitive agreements made abroad by domestic Canadian corporations, and the child sex tourism provision of the *Criminal Code*.[41]

(ii) Jurisdiction over extraterritorial persons only, e.g. the *Criminal Code* section 477.1 which prescribes offences on board Canadian ships at sea by Canadians and foreigners.

(iii) Jurisdiction over extraterritorial acts by extraterritorial actors, e.g. the *Crimes Against Humanity and War Crimes Act*,[42] especially sections 6 & 8 on offences committed outside Canada and jurisdiction over the perpetrators.

Legislation is typically mandatory in its prescriptions; i.e., it acts directly to compel performance or to criminalize misbehaviour or non-compliance. Yet it may also be used as a

[40] R.S.C.1985, c. C-34.
[41] Above note 18.
[42] Above note 19.

persuasive tool by offering a choice of conduct to its addressees according to their particular circumstances and election. This is a particularly effective means to assert legislative influence extraterritorially over persons who reside or hold property within Canada. For instance, the taxing power of Parliament might be used to persuade Canadian corporations to adhere to Canadian standards of conduct in their commercial and financial dealings in foreign or developing countries.

In addition, although international law may express limits on a state's jurisdiction, as discussed in Part II(A)(2) above, constitutionally Parliament may enact legislation in contravention of international law. The particular circumstances of the occasion will determine how wise or unwise such a parliamentary course of action may be. A classic instance occurred in 1970 when Canada adopted regulatory and managerial powers over large areas of the Arctic seas by enactment of the *Arctic Waters Pollution Prevention Act*.[43] Many states, including the United States, objected to this assertion of authority as excessive, in contravention of the international law of the sea at the time. However, Canada asserted that the environmental fragility of the area demanded special protective laws and it successfully carried this argument in the UN Conference on the Law of the Sea which was then underway. As a result the UN Convention on the Law of the Sea[44] contains an article (234) that vindicates Canada's legislation.

This discussion of the extraterritorial legislative power of Parliament does not apply to the provincial legislatures, which are constitutionally limited to their own territories.[45] Thus a province that wishes to apply its legislation extraterritorially may do so only with the aid of the federal government. Not surprisingly, for political reasons associated with a province's concern for its plenary/sovereign authority, this has rarely occurred. It is also awkward legally to achieve.

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[43] R.S.C 1985, c. A-12.
[44] U.N. Doc. A/CONF.62/122 (1982).
[45] See Part II(B)(2) above.

One attempt may be seen in the *Oceans Act*,[46] sections 9 and 21 which permit the application of provincial laws outside the province in the coastal waters and other offshore areas within Canadian (i.e. federal) jurisdiction. The technique used is to allow the province to request the federal government to pass orders-in-council to extend application of the provincial statute in question to the offshore area adjacent to the province. In other words, the provincial legislation is asserted extraterritorially by fiat of the federal executive. To date, this power in the *Oceans Act* has been exercised only once, to apply Prince Edward Island laws in the area of the Confederation Bridge from Prince Edward Island to New Brunswick.

(b) Executive Action

While legislative and judicial organs of government hold inherent powers or direct authority from the Canadian constitution, executive acts of government are derivative assertions of power. To be valid, all executive and administrative decisions must be clothed with the authority of some enabling statute or Crown prerogative power. Nonetheless, the government of Canada is a principal source of extraterritorial action. The range of means of taking extraterritorial action is great. For convenience the techniques may be divided between unilateral measures and participatory acts, which may be either bilateral or multilateral in nature.

Unilateral measures are obviously within the exclusive force and control of the government. They are typically addressed to both natural and legal (i.e. corporate) persons abroad, whether they are Canadians or foreigners. For example, ministers may make discretionary orders about foreigners, such as decisions about migrants under the *Immigration and Refugee Protection Act* [47] on humanitarian and compassionate grounds. Or the government may promote codes of good conduct for Canadians abroad, such as corporate social responsibility and human rights standards for Canadian companies and their officers when investing and operating in developing countries.

[46] S.C 1996, c. 31.
[47] S.C. 2001, c. 27.

Unilateral acts may also be addressed to foreign states and their governments. Thus, the Canadian government may make demands or requests of a foreign government for its assistance in reaching persons extraterritorially, as it does when it asks for the extradition of fugitive offenders. It may also try to influence the actions and policies of foreign governments to respect Canada's rights and interests or to protect Canadians present in the foreign state. Thus the Canadian government may impose economic sanctions against a foreign state or its property under the *Special Economic Measures Act*[48] for grave breaches of international peace and security. Less forcefully, the government may pursue diplomatic avenues to influence a foreign state's policies or actions affecting Canada or to persuade it to desist from repressing Canadians on its territory. This was the choice of means of the Canadian government when it made representations to Syria regarding the mistreatment and release of Maher Arar.

When extraterritorial issues between Canada and foreign states are not confrontational, comity and cooperation may then be better ways to resolve them. Such participatory means to control extraterritorial jurisdiction may be bilateral or multilateral. For example, Canada has written a number of memoranda of understanding (MOUs), i.e. reciprocal non-binding statements of policy, with other states bilaterally for the better administration of practical, everyday matters amongst them. The arrangement between Canada and the United States by which the customs and immigration procedures of one state may be exercised in the ports of entry of the other is an example of this kind of cooperative, reciprocal solution which conveniences the cross-border travelers of both countries.[49]

Multilateral techniques are even better solutions to conflicting extraterritorial claims because they reflect a common interest among a broader range of contending states to resolve the claims. It has proved effective and efficient for Canada to promote negotiations with foreign

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[48] S.C 1992, c.17.

[49] As noted above, provinces, though they may not make laws with extraterritorial effect or conclude treaties with foreign states, may and do reach MOUs with foreign states or their political sub-divisions (e.g. individual states of the United States) for more convenient administration of matters within their plenary authority constitutionally (e.g. vehicle licensing and family maintenance orders).

states multilaterally to harmonize their national laws internationally in line with Canadian standards and interests. Canadian government initiatives of this kind within the International Maritime Organisation have produced uniformity of regulation of the international shipping industry in many ways to the mutual benefit of Canadian overseas traders and all other users of its services. Agreements on reciprocal enforcement of arbitral awards or adoption orders are other examples of multilateral solutions to conflicts of extraterritorial jurisdiction.

However, there is a risk to Canada in pursuing such multilateral paths—specifically, that other more powerful states, such as the United States and the European Union, may overpower Canadian influence and turn the negotiations away from Canadian interests and objectives. In addition, a spirit of cooperation and mutual benefit is an essential condition for the success of these participatory techniques of handling extraterritorial tensions. Proof is evident in the failure to date of nation states, Canada amongst them, to negotiate a treaty to criminalize terrorism generally. Only specific types of terrorism have been outlawed internationally because, as it is quipped, one state's terrorist is another state's freedom fighter.

(c) Judicial Process

Courts, as the interpreters of legislation and reviewers of administrative action, are frequently the arbiters of extraterritorial jurisdiction. However, to exercise their authority they must have effective control over both the acts and the actors involved. In other words, as discussed in Part II(A)(3) above, they require both prescriptive/subject matter and enforcement/personal jurisdiction. When one of these elements is absent, the courts themselves have to assert extraterritorial jurisdiction. This is not a problem when some statute grants such authority, as discussed under Part II(C)(2)(a) above. But in the absence of legislative authority, the courts have employed their inherent powers over their own process and their control over the application of common law to fashion judicial principles of extraterritorial jurisdiction.

Canadian courts have crafted tools which allow them to be seized of matters that, while they have extraterritorial aspects, are treated as exercises of territorial jurisdiction. In criminal and regulatory matters, the courts will assert subject-matter jurisdiction where enough of the offence occurred or impacted upon Canadian territory that Canada can be said to have a "real and substantial connection" to it.[50] This has allowed courts to assert jurisdiction over, e.g., breach of an Ontario probation order that took place in Cuba,[51] a Canadian answering machine message which referred callers to a hate message broadcast by way of an American phone number,[52] and even "international Internet transmissions."[53]

The Supreme Court of Canada has taken a cautious approach to the extraterritorial application of the *Charter* in criminal matters, and the general stance has been to confine the *Charter* to Canadian territory. In extradition cases, for example, the Court has drawn careful lines: while the *Charter* (especially section 7) applies to the domestic extradition process itself, the process and penalties to be imposed on the fugitive in the requesting state are not subject to *Charter* scrutiny, as this would be impermissible extraterritorial application.[54] The fate of the accused in the requesting state is nonetheless relevant to the section 7 inquiry in Canada, and the courts have blurred the lines slightly by finding that extradition to face process or punishment that would "shock the conscience" of Canadians constitutes a violation of section 7 by the Canadian state.[55]

In cases where evidence was gathered on foreign soil the Supreme Court has consistently held that the *Charter* will not be applied directly to the acts of foreign authorities—

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[50] *Libman*, above note 10, at 212-13.
[51] *R. v. Greco* (2001), 159 C.C.C. (3d) 146 (Ont. C.A.).
[52] *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626.
[53] *Society of Composers, Authors and Music Publishers of Canada v. Canadian Association of Internet Providers*, [2004] 2 S.C.R., 427, [2004] SCC 45 [*SOCAN*], at para. 60.
[54] *United States v. Burns*, [2001] 1 S.C.R. 283.
[55] It has been ventured that it is misplaced concern about extraterritorial application of the *Charter* that has caused this blurriness; see Robert J. Currie, "*Charter* Without Borders? The Supreme Court of Canada, Transnational Crime and Constitutional Rights and Freedoms" (2004) 27 Dal. L.J. 235.

even where those acts are being adjudicated upon at a Canadian trial.[56] In *R. v. Cook*[57] the Court was willing to apply the *Charter* to the acts of *Canadian* police who had questioned a suspect detained in the U.S., but only because the Canadian police had obtained the consent of American authorities to do the questioning and in those circumstances this would not interfere with the foreign state's exercise of its own territorial sovereignty.[58] In other kinds of police co-operation cases, the courts have sometimes strayed very near an extraterritorial application of the *Charter*. In *Purdy v. Canada (Attorney General)*,[59] for example, the British Columbia Court of Appeal ruled that an individual was entitled to a remedy for a breach by the R.C.M.P. of his section 7 right to full answer and defence—even though the trial was to be held in Florida.

In civil matters, when subject matter jurisdiction over extraterritorial events, places and acts is in issue—that is, the court is asserted to lack *seisin*—conflicts of law rules may be brought into operation. A Canadian court will decide for itself whether it has jurisdiction and is a *forum conveniens* or *non conveniens* for a dispute over foreign subject matter.[60] It may even issue an anti-suit injunction to prevent a hearing in a foreign court when it thinks it is the preferable forum for deciding the case.

When personal jurisdiction over foreign defendants is lacking, Canadian courts resort to their procedural powers for solutions. Rules of court are made by the judges themselves and therefore they vary from province to province and federally, yet all are sufficiently similar in design and function for present purposes of discussion. For instance, in the case of absent defendants, Canadian courts all have rules for the service of process abroad in some circumstances. They also have procedural means to force foreign defendants to come into their

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[56] *R. v. Terry*, [1996] 2 S.C.R. 207; *R. v. Harrer*, [1995] 3 S.C.R. 562; *Schreiber v. Canada (Attorney General)*, [1998] 1 S.C.R. 841.
[57] [1998] 2 S.C.R. 597 (*Cook*).
[58] The application of the *Charter* in this kind of case appears to turn on whether the Canadian police are conducting their own investigative activities with the consent of the foreign authorities to do so, or whether they are engaged in policing activities under the direction of the foreign police authority. A case on this very point is pending before the Supreme Court of Canada at the time of writing (*R. v. Hape* (2005), 201 O.A.C. 126 (Ont. C.A.), leave to appeal granted, S.C.C. Bulletin 2006, at 48) (*Hape*)).
[59] (2003), 15 C.R. (6th) 211 (B.C.C.A.).
[60] *Morguard*, above note 11.

territories and attorn to their jurisdiction. Attachment of the foreigner's property by *Mareva* injunctions, security bonds and arrest of ships are some of the ways judicial process may be exerted over extraterritorial defendants.

Even when a Canadian court has complete jurisdiction over the parties and the events in issue between them, it may face difficulties in proceeding with the hearing if the evidence is extraterritorial. If foreign witnesses do not appear voluntarily, a *subpoena* directed abroad may be issued but may also be ignored. An order for taking testimony abroad is also possible but it requires the cooperation of foreign parties for its fulfilment. Similarly orders for the production of information and documents abroad, and letters rogatory to foreign courts are also judicial assertions of extraterritorial authority that may readily be rebuffed. In criminal matters, these extraterritorial limitations on the judicial process are increasingly alleviated nowadays by inter-state agreements for mutual legal assistance, discussed below. In civil cases, no comparable cooperative arrangements are available to Canadian plaintiffs, who must seek to satisfy Canadian orders with the aid of foreign courts as best they can.

Personal status is another matter that presents transnational jurisdictional problems for the courts. International recognition of an individual's marriage, divorce, custody, adoption or legitimacy is crucial to him/her and thus demands the extraterritorial aid of Canadian courts. Fortunately national conflicts of law rules usually afford recognition of Canadian determinations in foreign jurisdictions and in some instances multilateral treaties explicitly provide for such extraterritorial recognition. Even so, disputing parties may seek to challenge the decision of a Canadian court beyond its reach in a foreign forum, when restraint and comity become the only safeguards against conflicting orders determinative of extraterritorial status.[61]

The power of Canadian courts is also subject to claims of immunity from their personal jurisdiction, both territorially and extraterritorially. Under international law a foreign state that is

[61] See e.g. *Thomson v. Thomson,* [1994] 3 S.C.R. 551 in which parents struggled over custody of their child in both Scottish and Canadian courts under the Convention on Civil Aspects of Child Abduction, Can. T.S. 1983 No. 35.

recognized by Canada is a sovereign equal and consequently it may not be subjected to the Canadian legal system. It follows that representatives of a foreign state acting in their official capacities are inviolable and immune from all Canadian judicial processes. The practice with regard to foreign diplomats is well known, of very long standing and now codified in a multilateral treaty—the *Vienna Convention on Diplomatic Relations*[62]—to which Canada is a subscribing party. Equally the President of a foreign state and the ministers of state are immune from suit in a Canadian court. These privileges are impressed by customary international law and most have also been enacted in detail in the *State Immunity Act*.[63] As a result, claims against such personages for wrongs committed extraterritorially may not be pursued when they happen to come within the Canadian court's territorial jurisdiction. Equally, a Canadian court may not issue any kind of process or order against such individuals either within Canada or without.

Even when a Canadian court has full jurisdictional control over a case**,** extraterritorial problems may still arise over fulfillment of its judgment. In civil actions, ordinarily the winner of a case against a foreign defendant must seek to enforce the Canadian judgment against the foreign loser in the foreigner's courts. However, on occasion it may be possible to gain a Canadian court order for execution of the sanction or remedy when it may be levied against some property of the foreigner found within Canada or may be enforced by compulsory transfer of title to movable property of the foreigner that is subject to Canadian control, such as the registration of ships. In criminal cases, judgments against property are unusual but, when made, are subject to the same kind of principles. Thus personal property used by convicted drug smugglers and seized by the police may be declared by the court to be forfeited to the Crown.

Judgments and court orders for penalties and remedies against an absconding defendant pose other extraterritorial problems. Fines for criminal convictions and damages in

[62] 1966 Can. T.S. 29.
[63] R.S.C. 1985, c. S-18.

civil suits may not be collectable if the individual leaves Canada, but court orders may be made to freeze or seize any local assets left behind. Similarly personal remedies of maintenance, specific performance, injunction and accounting when granted by Canadian courts against fugitive or foreign defendants may not be honoured unless the plaintiff can enlist the aid of a foreign court to enforce them.

(d) Bilateral Agreement

Rather than act unilaterally, Canada's extraterritorial objectives may be more readily achieved through cooperation and agreement with foreign states. Bilateral agreements may be *ad hoc* arrangements or permanent treaties. Seeking the *ad hoc* consent of foreign authorities is a quick and straightforward way to deal with particular extraterritorial incidents,[64] but the reverse is also possible: a foreign government might invite Canada to provide police or military aid in its territory. In either case, the permission of the foreign state allows Canadian authorities to act in a "sovereign" manner without infringing upon the sovereignty of the host.

Permanent treaties for the allocation of extraterritorial authority come in several forms, including:

(i) Standing agreements for mutual assistance and cooperation over extraterritorial matters. Classic examples are the Canada-US Agreement Regarding the Application of Their Competition and Deceptive Marketing Practices Laws[65] and the Canada-US Treaty on Mutual Legal Assistance in Criminal Matters.[66] Their titles explain their intended functions. The latter has been implemented by the *Mutual Legal Assistance in Criminal Matters Act*,[67] for reciprocal application in favour of US extraterritorial requests to Canada.

(ii) Standing agreements for reciprocal extraterritorial authority. These treaties differ from class (i) above in that they are mutual and cooperative and also have exactly reciprocal terms.

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[64] As in *Cook*, above note 57, and *Hape*, above note 58.
[65] (1996) 36 I.L.M. 311.
[66] Can T.S. 1990 No. 19.
[67] R.S.C. 1985, c. 30 (4th Supp.).

An example is the Exchange of Notes (i.e. treaty) between Canada and the United States regarding the application between them of the NATO Status of Forces Agreement[68] which is given effect in Canada by the *Visiting Forces Act*.[69]

(iii) Standing agreements for mutual extraterritorial authority. In other words the two states parties exercise a shared jurisdiction over a transnational activity. One example is the International Joint Commission over use and abuse of Canada-U.S. boundary waters pursuant to the 1909 Boundary Waters Treaty.[70] Another occurs under NAFTA when bi/trilateral panels hear claims between states parties, and when Canadian courts review arbitral awards of Chapter 11 claims by US or Mexican corporations of unlawful expropriation in each other's territories.[71]

(e) Multilateral Agreement.

Multilateral treaty making offers the greatest opportunity for the widest resolution of conflicting assertions of extraterritorial jurisdiction. They might be:

(i) Multi-party treaties for reciprocal extraterritorial authority. These are not yet common, though one example is the UN Fish Stocks Agreement.[72] Under article 21 on enforcement of regional fisheries rules, Canada may exercise boarding, inspection and detention powers against foreign fishing vessels on the high seas, as regulated under the *Coastal Fisheries Protection Act*.[73]

(ii) Multi-state organisations for mutual extraterritorial authority. These involve concerted action on identified and widespread extraterritorial problems affecting a certain area of law by member states of a standing body. An example is Canada's participation in a variety of intergovernmental organizations which maintain (i) bodies that have powers to prescribe and/or

[68] Can T. S. 1994 No. 34, with reference to Can T. S. 1953 No. 13.
[69] R.S.C. 1985, c. V-2.
[70] U.K.T.S. 1910 No. 23.
[71] *North American Free Trade Agreement*, Can. T.S. 1994 No.2, implemented in Canada by the *North American Free Trade Agreement Implementation Act*, S.C. 1993, c. 44. For a Chapter 11 example, see *Canada (Attorney General) v. S.D. Myers Inc. (F.C.)*, [2004] 3 F.C. 38.
[72] (1995) 34 I.L.M. 1542.
[73] R.S.C. 1985, c. C-33, as am. S.C. 1994, c.14 & regs.

implement standards/norms for states parties (e.g. the Conference of the Parties to the UN Framework Convention on Climate Change, which concluded the Kyoto Protocol), (ii) units for inspecting, monitoring, verifying and reporting compliance of states parties with the organisation's rules and standards (e.g. International Atomic Energy Agency oversight of nuclear facilities) and/or (iii) organs with supranational decision-making authority (e.g. the World Trade Organization Dispute Settlement Board).

A special form of intergovernmental organization is the United Nations Organization (UNO). Because of the universality of its functions and membership and the uniqueness of its supranational powers in some areas, UNO deserves special mention. Multilateral attention by UNO to extraterritorial concerns has become a very significant part of its work as the central world body in the current transition to globalism in so many fields of human interest and endeavour. As a member of UNO, Canada bears responsibility, along with all the other member states, to fulfill its duties under the UN Charter. From time to time, these may include collective measures of the organization or, in other words, extraterritorial action by Canada in association with other member states in the name of UNO. Under UNO authority, Canada may act extraterritorially when:

a. Canada implements UNO obligations incurred under a mandatory decision of the Security Council to sanction foreign states, for instance by orders made under the *United Nations Act*;[74]

b. Canada voluntarily participates in measures authorised by Security Council resolution under the United Nations Charter Chapter VII, i.e. peacekeeping missions to foreign states.

[74] R.S.C.1985, c. U-3.

3. Responses to Excessive Assertions of Extraterritorial Jurisdiction Against Canada

(a) Legislation

Canada may enact statutory reactions to foreign assertions of extraterritorial power, in order to protect and/or provide remedies to affected Canadians. These often take the form of "blocking" and "clawback" statutes. An example is the federal *Foreign Extraterritorial Measures Act*,[75] which permits the Attorney General, upon finding that Canadian trade and commercial interests are adversely affected by a foreign state's actions:

(i) to prohibit natural or legal persons in Canada from (a) following that state's executive directives and judicial orders, or (b) supplying any requested or required documents and information;

(ii) to prohibit the enforcement of any judgment of that state's courts in Canada;

(iii) where the judgment is executed against local assets of the Canadian defendant in the foreign state, to permit the Canadian defendant to sue the foreign plaintiff in the Canadian courts for recovery of an equal sum.

Similar legislation has been enacted by some provinces, e.g. Ontario's *Business Records Protection Act*[76] and Quebec's *Business Concerns Records Act*.[77]

Parliament may also enact legislative overrides of foreign choice of forum and/or choice of law clauses in transnational contracts. An example is the *Marine Liability Act*,[78] by which Canadian shippers/exporters and importers/consignees of goods by sea may be given (i) the choice of a Canadian court or arbitration regardless of the terms of any choice of forum clause, and (ii) the benefit of Canadian law irrespective of any contracted choice of foreign law.

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[75] R.S.C. 1985, c. F-29.
[76] R.S.O. 1990, c. B-19.
[77] R.S.Q., c. D-12.
[78] S.C. 2001, c. 6, s. 46 (plus Part 5 & schedule 3).

(b) Executive Action

Acting through its delegated powers, the executive can respond in several ways to jurisdictional overreach by foreign states. One mechanism is the discretionary ministerial order, available under many different types of legislation. A good example is the *Extradition Act*,[79] which empowers the Attorney General to refuse to extradite a person in Canada to a foreign state on several grounds—including where the requesting state is exercising extraterritorial jurisdiction over the offence that forms the basis of the request.[80]

In its exercise of the federal foreign affairs power, the executive may also make diplomatic responses to the foreign state's extraterritorial actions. These can be "soft" or conciliatory options (e.g. ambassadorial representations, state-to-state negotiations) or "hard" options (e.g. unilateral withdrawal of trade and aid). The executive can also make orders for countermeasures, i.e. temporary non-performance or suspension by Canada of treaty obligations to a foreign state commensurate with the injury suffered from its violative extraterritorial acts.

(c) Judicial Process

The judiciary has neither the range nor the scope of power enjoyed by the legislature and executive branches to respond to extraterritorial acts by foreign states, and tends to be leery of adjudicating with regard to foreign states or actors. As guardians of their own process and the ultimate arbiters of applicable law, however, the courts are empowered to dispose of foreign extraterritorial claims (usually involving private actors) that tread too far into Canadian jurisdiction, normally through the use of conflicts of law principles.

The courts may impose procedural restrictions upon parties; e.g. the rejection of foreign choice of forum and choice of law clauses in multi-national contracts. This power is not commonly exercised, given the common law's reluctance to interfere with contractual relations

[79] S.C. 1999, c. 18.
[80] *Ibid*., s. 47(e).

any more than necessary.[81] They may also impose remedial restrictions, e.g. refusal to recognise and/or enforce foreign court judgments and arbitral awards—though they do so subject to treaty obligations[82] which usually limit this power.

Further, conflicts of law principles ordain that Canadian courts, though they may acknowledge a decision of a foreign state's court, will not generally assist in the execution of the foreign state's penal, fiscal and confiscatory laws, nor any foreign law that contravenes a fundamental rule of Canadian public policy.[83]

(d) International Agreement

All of the bilateral and multilateral treaties mentioned in Part II(C)(2)(d) and (e), above, operate reciprocally, affording the same rights of extraterritorial actions by foreign treaty partners where Canada asserts extraterritorial jurisdiction against them. The treaties, however, also set limits on the exercise of extraterritorial authority, which provides reciprocal protection for Canadian interests. Should a foreign state breach a convention's negotiated standards by an excessive exercise of extraterritorial power, Canada may respond defensively by any of the techniques listed above in Parts II(C)(3)(a) and (b). It may also respond offensively with "equal and opposite" measures, i.e. by exercising similar extraterritorial jurisdiction against the foreign state.

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[81] See, e.g. *Dell Computer Corporation v. Union des consommateurs and Olivier Dumoulin*, 2005 ACCA 570, leave to appeal to S.C.C. granted, 2006 Can LII IIB (S.C.C.).

[82] E.g. the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), (1993) 330 U.N.T.S. 3, implemented in Canada by the *UN Foreign Arbitral Awards Act*, R.S.C. 1985, c.16 (2nd Supp.).

[83] See *Laane and Baltser v. The Estonian State Cargo and Passenger Steamship Line,* [1949] S.C.R. 530.

Table 1 – Means to Extend Canadian Jurisdiction Extraterritorially

ET = Extraterritorial

Type of Action	Type of Jurisdiction	Example	Comments
Legislation	Prescription 1) Over ET subject matter 2) Over ET persons 3) Over ET acts & actors	 Child sex tourism Offences on board Canadian ships Crimes against humanity	 Led internat'l initiative Avoids lawless territory Pursuant to universal jurisdiction
Executive Action	Prescription & Enforcement 1) Unilateral: - prescription - enforcement 2) Bilateral: prescription & enforcement 3) Multilateral : - prescription - enforcement	 Imposition of economic sanctions Discretionary immigration decision Can-US cross border customs procedures Harmonization of national laws Reciprocal enforcement of arbitral awards	 Usually pursuant to a decision of an IGO Int'l law respects national choices Mutual Administrative convenience Convenient and efficient multilateral solutions
Judicial Process	Prescription & Enforcement 1) Under legislation: prescription & enforcement 2) By inherent powers - prescription over ET subject matter - prescription over ET persons - enforcement over ET persons	 *Crimes against Humanity Act* *Forum non/conveniens* Service of process abroad Limited ET application of Canadian Charter Seizure of property in Canada	 Pursuant to universal jurisdiction Efficient court process Limited use Restraint in face of foreign sovereignty Limited means of enforcement abroad
Bilateral Agreement	Prescription & Enforcement 1) *Ad hoc* assistance 2) Standing Assistance 3) Reciprocal ET authority 4) Mutual ET authority	 Consent for RCMP to operate in US: *Cook* Can-US Treaty on Mutual Legal Assistance Can-US Status of Forces Agreement 1909 Boundary Waters Treaty	 Administrative convenience Administrative convenience Jurisdictional clarity Mutual solutions
Multilateral Agreement	Prescription & enforcement 1) Reciprocal ET authority: 2) Mutual ET authority: - prescription - compliance - adjudication	 UN Fish Stocks Agreement IGOs, e.g.: Kyoto Protocol by COP-3 of UN FCCC IAEA inspections WTO Dispute Settlement Board	Exceptional extension of jurisdiction } Mutual solutions

Table 2 – Canadian Responses to Excessive Foreign Assertions of Extraterritorial Jurisdiction

Type of Action	Type of Jurisdiction	Example	Comments
Legislation	Prescription 1) Blocking	*Foreign Extraterritorial Measures Act*	Exceptional
	2) Override	Arbitration choice under *Marine Liability Act*	Uncommon
Executive Action	Prescription 1) Requests	Diplomatic overtures	Frequent
	2) Orders	Countermeasures	Uncommon
	Enforcement 1) Decisions	Refusal to extradite	Discretionary
Judicial Process	Prescription 1) Procedural restrictions	Anti-suit injunctions	Uncommon
		Rejection of choice of law clauses	Infrequent
	Enforcement 1) Remedial restrictions	Non-enforcement of foreign judgments	Infrequent
International Agreement	Prescription & Enforcement	See treaties in Table 1 – all operate reciprocally to protect, as well as to extend, Canadian Jurisdiction	Mutual solutions

III. Policy Justifications for Extraterritorial Action

In Part II we explained the conceptual framework behind extraterritorial jurisdiction, set out its general mechanical operation and identified the governmental entities competent to exercise it. We also explored the means by which it is exercised—both proactively, in promotion of Canadian interests and policy objectives, and reactively, in response to what Canada views as excessive extraterritorial claims by foreign states.

In light of the foregoing, we submit that an essential distinction can be drawn between three choices of means: i) extraterritorial impact without extraterritoriality; ii) unilateral extraterritorial action, and iii) multilateral extraterritorial action. Here, we will examine the approach to each of these issues that Canada has taken in the criminal law sphere. This area is a useful one to examine because it is the area in which Canada has the longest history of

extraterritorial action. Although Canada is not necessarily bound to continue as it has proceeded in the past, a clear understanding of the motivations which have guided exercises in extraterritoriality until now will be useful.

We suggest that in criminal law there are four observable motivations for acting extraterritorially. They are: 1) to regulate extraterritorial conduct with a strong connection to Canada; 2) to control the "public face" of Canada; 3) to avoid lawless territory, and; 4) to implement international agreements regarding particular offences.

A. Regulating Extraterritorial Conduct With A Strong Connection To Canada

There are some *Criminal Code* provisions which make behaviour illegal even if some of the prohibited conduct takes place outside Canada. These offences fall into two different categories, and it is worth distinguishing between them.

In one category can be found offences which are not intended to have an extraterritorial impact at all, but which ignore the fact that certain aspects of the offence are not territorially based in Canada, because that fact is of no real consequence to the offence. The simplest example of this category is possession of stolen goods.

Section 354 of the *Code* makes it an offence to possess property which was obtained from a crime in Canada or from "an act or omission anywhere that, if it had occurred in Canada, would have constituted an offence punishable by indictment." This provision, and others like it, should not really be understood as extraterritorial provisions. They are not aimed at reducing thefts or other offences outside Canada: rather the point is that if an accused in Canada is in possession of stolen goods, it is irrelevant where the goods were stolen from. In many offences phrases like "whether in or out of Canada" serve the same function as the phrase "directly or indirectly" as a modifier of "apply force" in the assault provisions—not to add a consideration but to remove one. Falling into this category would be offences such as procuring illicit sexual

intercourse (section 212(a)), operating unseaworthy vessels (section 251), making a false document (section 366), gaming in stocks (section 383), brokers illegally reducing stock (section 384), money laundering (part XII.2) offences, and bigamy (section 290). We do not regard these offences as genuinely relevant to an extraterritorial discussion.

There are some specific offences, though, which actually aim at prosecuting behaviour which occurs outside Canada's borders: treason and high treason (section 46(3)), offences under the *Security of Information Act* (section 26),[84] passport and certificate of citizenship offences (sections 57 and 58), offences under the *Immigration and Refugee Protection Act*[85] (section 135), and offences in the *Citizenship Act* involving false representations concerning citizenship(section 30).[86]

These offences for the most part fall within our extraterritorial impact without extraterritoriality category. The real focus of these offences is the impact on the territory or integrity of Canada, but to achieve that goal there is an incidental need to extend the territorial scope of the offence.

B. Controlling the Public Face of Canada

A relatively small number of offences make behaviour by some Canadians illegal when it occurs overseas. Specifically, public servants while acting as employees in a place outside Canada are bound by the *Criminal Code* (section 7(4)) and services offences in the *National Defence Act*[87] or the RCMP Code of Conduct apply to offences committed outside Canada. Formerly those employed on Canadian ships overseas were bound by Canadian criminal law, but that provision has been repealed. Finally, section 269.1 of the *Criminal Code* makes torture by a Canadian "official" illegal wherever it occurs.

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[84] R.S.C. 1985, c. O-5.
[85] Above note 47.
[86] R.S.C. 1985, c. C-29.
[87] R.S.C. 1985, c. N-5.

C. Avoiding Lawless Territories

A significant policy justification for asserting extraterritorial jurisdiction is that there is no competing territorial claim by another state. Not only does Canada not interfere with any other state's sovereignty in such circumstances, but the danger of lawless territories is avoided. One of the oldest extraterritorial provisions in the *Criminal Code*, therefore, relates to piracy, an offence occurring on the high seas, and which is an offence whether committed in or out of Canada (section 74(2)). In more recent times outer space has raised the same issue of a jurisdictional gap, and Canada now also asserts (in some circumstances) jurisdiction over offences on the international space station (sections 7(2.3) - 7(2.34). Similar provisions cover some offences committed on aircraft and on ships or fixed platforms outside the continental shelf of any country (sections 7(1), (2), (2.1) and (2.2)). Finally, section 477.1(e) extends jurisdiction to offences committed "outside the territory of any state".

The nature of the jurisdictional claims is not identical in each case, however. In some instances, such as piracy or offences on aircraft, ships or fixed platforms, Canada will assert jurisdiction over anyone committing the offence. However, for certain hijacking and terrorist offences section 7(2) of the *Criminal Code* adds the additional condition that the accused later be present in Canada, while offences committed on fixed platforms can be prosecuted if the individual simply turns up in Canada, and the provisions regarding piracy and offences on aircraft do not speak to the presence of the accused at all. Hence, although Canada will prosecute anyone for these offences, in some circumstances it might not be able to seek anyone's extradition to face charges in Canada. In other cases, such as outer space (sections 7(2.3) and (2.31)) and section 477.1(e) of the *Criminal Code*, the claim is more limited. In the latter case Canada claims jurisdiction over the lawless territory for offences committed by Canadians: in the former, over offences by and against Canadians.

D. Implementing International Agreements Regarding Particular Offences

In the first 1892 *Criminal Code*, with the arguable exception of piracy, there were no extraterritorial provisions based on international agreement. By the 1982 Revised Statutes version there were a significant number, and today there are perhaps twice as many such provisions as in 1982. To the extent that Canada's extraterritorial criminal jurisdiction has grown, therefore, the growth has occurred entirely in this category of international agreement. Canada has signed agreements to prosecute in the case of particular types of crimes. As a result, the *Criminal Code* contains extraterritorial provisions dealing with offences on aircraft, offences committed in relation to an "air navigation facility used in international air navigation" and to civil airports outside Canada, and now also to civil airports outside Canada, personal offences against an "internationally protected person", hostage taking, offences involving nuclear material, explosives or other lethal devices, offences against United Nations or associated personnel, financing terrorism, child sex tourism, and torture by Canadian officials overseas. Provisions now in the *Crimes Against Humanity and War Crimes Act* which were formerly in the *Criminal Code* permit prosecutions for war crimes and crimes against humanity which occurred outside Canada.

While none of these policy categories is watertight, what they demonstrate in common is Canada's significant interest in regulating extraterritorial conduct where it is both in Canada's interest to do so, and either does not interfere with or in fact promotes certain regimes within the international legal order.

IV. Substantive Areas of Current Concern: Sample Case Studies

Having outlined in Part III the possible policy justifications for existing assertions of extraterritorial jurisdiction by Canada in the field of criminal law, it is appropriate now to consider some sample areas of law—specifically, the private, civil and regulatory areas—in which transnational issues are of growing public concern and attention. Discussion of these topics will be used to illuminate one or more features that are generally required for the efficacious exercise of extraterritorial jurisdiction, as well as to enquire how the extension of extraterritorial powers might be useful and effective in resolving each of them.

A. Extraterritoriality and the Internet

As an interconnected, global network of networks, the internet permits the transmission of data around the world at great speed. Unlike other conventional media, the internet is highly interactive and it is this interactivity that sets it apart. The internet can be used as a medium for commercial transactions at the business to business or business to consumer level. It can be used to transmit commodities in the form of digitized content, it is a vehicle for gaming activities, and it facilitates or serves as conduit for a wide variety of criminal conduct. All of this activity occurs by means of data being transmitted through a network that may traverse many national boundaries.

The internet has raised many difficult legislative and regulatory issues for national governments. These issues arise in diverse contexts because of the unique character of the internet as a medium.

(i) As a means of transacting business. In some cases, the internet is the vehicle by which sales are advertised and concluded, with conventional methods being used for the delivery of goods. The purchase of books or other products by Canadians from offshore

online vendors raises issues of taxation of offshore consumer spending and consumer protection. In some instances the subject matter of the transaction may be a commodity that is illegal, heavily regulated or subject to different regulatory or safety standards in Canada. Concerns over legality and regulation run both ways. Trans-border sales also raise issues about the infringement of foreign laws by Canadian-based businesses selling offshore. [88]

(ii) As a mode of delivery of goods, services or content. It is also possible for a transaction to be completed and the content or subject matter of the transaction to be delivered online. This is the case with the downloading of music, video, audiobook, and other such content. It is also the case where content is streamed over the internet as in webcasts, internet radio, and so on. Such transactions raise issues for copyright law, particularly where the exchange is not authorized (as is the case with peer to peer file sharing). Thorny issues of taxation are raised where imported goods never pass through customs, but rather are delivered as data over the Internet.

In some situations, where the content and the actual transaction occur over the internet, competing state interests are more directly engaged. This is the case with conduct that has been typically heavily regulated by governments, such as broadcasting, or which is illegal. Thus, internet gambling poses a challenge, as do things such as offering pornography for sale online (where different states may have different laws regarding obscenity), or communicating hate speech.[89] Issues may also arise where content is considered perfectly acceptable in many jurisdictions, but illegal in a few. For example, certain political speech is banned in some countries and accessing or contributing to such speech on the internet may actually be a criminal offence.

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[88] The online pharmaceutical industry provides an example. The importation of pharmaceuticals into the US without the appropriate licenses is an offence in that country. The size of the online pharma industry has led to complaints from the US to the Canadian government, with pressure on the Canadian government to act to limit this industry.

[89] *Citron v. Zundel* (2002), 41 C.H.R.R. D/274 (C.H.R.T.).

(iii) As a vehicle for criminal activity. Some internet activities, such as the distribution of child pornography, are simply illegal, and are generally illegal in most states. The internet has become a vehicle for a wide range of criminal activity, including fraud, conspiracy, terrorism, money laundering, or other organized crime activities.

It is clear that the challenges of the internet with respect to the extraterritorial application of laws will arise in a range of contexts. In many cases the situation does not require the development of new principles or rules, but rather requires the application of existing principles in a highly interconnected world. As Binnie J. noted in *SOCAN v. CAIP*, the issues "[play] out against the much larger conundrum of trying to apply national laws to a fast-evolving technology that in essence respects no territorial boundaries."[90] Many issues therefore involve coming to terms with the concept of "territory" in an age of digital networks.

1. Territoriality in the Internet Context

In *SOCAN*, the Supreme Court of Canada considered, *inter alia*, the issue of whether music transmitted to Canada over the internet from a server located outside of Canada was communicated to the public by telecommunication in Canada. The Copyright Board had come to the conclusion that a work was communicated to the public by telecommunication when it was accessed (in other words, when the transmission was initiated). The Court accepted this conclusion. However, the Copyright Board had then concluded that since the communication occurred at the point of access, a work was not communicated to the public by telecommunication in Canada unless the point of access (the server which hosted the content) was located in Canada.

Binnie J., writing for the majority of the Court rejected this latter position, ruling that it was "too rigid and mechanical a test."[91] He wrote: "An Internet communication that crosses one or more national boundaries "occurs" in more than one country, at a minimum the country of

[90] *SOCAN*, above note 53, at para. 41.
[91] *Ibid*., at para 44.

transmission and the country of reception."[92] Binnie J. argued that this more expansive approach to the "location" of internet acts was necessary because any other approach "would have serious consequences in other areas of law relevant to the Internet, including Canada's ability to deal with criminal and civil liability for objectionable communications entering the country from abroad."[93]

The Court framed its approach in terms of the extraterritorial application of laws. Binnie J. noted that the reach of Canada's laws was not limited to communications of content that take place within Canada's borders. He began his analysis by stating that the principle of territoriality should be generally respected in order to avoid chaos. Thus, Parliament must be assumed not to legislate with extraterritorial effect "in the absence of clear words or necessary implication to the contrary."[94] He noted as well that copyright law reflects "the implementation of a "web of interlinking international treaties" based on the principle of national treatment."[95] Thus, Binnie J. wrote:

> The applicability of our Copyright Act to communications that have international participants will depend on whether there is a sufficient connection between this country and the communication in question for Canada to apply its law consistent with the "principles of order and fairness…that ensure security of [cross-border] transactions with justice."[96]

Binnie J.'s opinion that a "telecommunication from a foreign state to Canada, or a telecommunication from Canada to a foreign state, 'is both here and there'"[97] is consistent with an approach that looks for a 'real and substantial connection' to Canada for determining whether a communication to the public by telecommunication has taken place in Canada. In his view, the 'real and substantial connection' test developed by the courts for determining when it is appropriate to take jurisdiction is relevant and useful, and "is sufficient to support the

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[92] *Ibid*.
[93] *Ibid*.
[94] *Ibid*. at para 54.
[95] *Ibid*. at para 56.
[96] *Ibid*. at para 57, citing *Morguard*, above note 11 at 1097.
[97] *Ibid*. at para 59.

application of our *Copyright Act* to international Internet transmissions in a way that will accord with international comity and be consistent with the objectives of order and fairness."[98]

The majority decision in *SOCAN* is confusing in that it refers to the extraterritorial application of the *Copyright Act*, suggesting that Canada has taken prescriptive jurisdiction over matters outside its borders. In fact, by applying the 'real and substantial connection' test formulated by the Court in *Libman*,[99] and articulated in subsequent decisions,[100] Binnie J. is actually determining, based on the territoriality principle, that the offence in question had sufficient connection to Canadian territory. This is the essence of *Libman*—defining the scope of the territoriality principle. As LaForest J. writes in *Libman*:

> I might summarize my approach to the limits of territoriality in this way. As I see it, all that is necessary to make an offence subject to the jurisdiction of our courts is that a significant portion of the activities constituting that offence took place in Canada. As it is put my modern academics, it is sufficient that there be a "real and substantial link" between an offence and this country, a test well-known in public and private international law.[101]

The internet requires a revisiting of the principle of territoriality, as many transactions or interactions over the internet are "both here and there". The search for a "real and substantial connection" to Canada's territory with an eye to international comity would suffice to deal with many situations that might arise. Thus, in *Citron v. Zundel*,[102] the Canadian Human Rights Tribunal applied the provisions of the *Canadian Human Rights Act*[103] where offensive content was hosted on a server located in California. In that case, the content provider and the complainants were both located in Canada. In *SOCAN*, the majority correctly notes that a finding of 'real and substantial connection' in any given case "will turn on the facts of a particular transmission".[104]

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[98] *SOCAN*, above note 53, at para 60.
[99] *Libman*, above note 10.
[100] See, for example: *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022; *Morguard*, above note 11; *Beals*, above note 11.
[101] *Libman*, above note 10, at para 74.
[102] *Citron v. Zundel*, above note 89.
[103] R.S., 1985, c. H-6.
[104] *SOCAN*, above note 53, at para 77.

It is clear that in *SOCAN*, the issue boiled down to coming up with a means of determining the limits of *territoriality* in the internet context. Indeed the issue in the case was not whether proceedings could be brought against offshore actors. Rather, the Court was more concerned with how to capture Canadian actors. As such, the case raised issues of objective territoriality.[105] If the act complained of occurred entirely outside Canada, then there is insufficient linkage to Canadian territory. But if the communication is "both here and there", then there is a hook to capture the conduct of Canadians who are involved in the communications, even if only as recipients.

It seems that in many cases the internet will not really change the basic principles of territorial jurisdiction or extraterritoriality. However, the increased use of the internet for a growing range of activities may demand that this assessment of the substantiality of links to Canada's territory occur more frequently. The result may be not so much an increase in extraterritoriality as an increase in the number of situations where there is a need to consider the limits of the concept of territoriality. While "cyberspace" has been conceptualized by some as a different or separate space, the reality is that most activities in "cyberspace" can be linked to a particular national territory or territories by the usual factors such as the physical location of the participants, their nationalities, the location of facilities or equipment, and the location of victims or recipients of content.

That being said, it is clear that certain kinds of acts or offences are ones that lend themselves more to challenging notions of territorial boundaries. In the "offline" world, criminal conspiracy has always raised the possibility that the plotting of an offence may occur in one jurisdiction with the actual offence carried out in another. The internet may simply (and significantly) increase the number of offences (civil or criminal) which cross borders or involve actors in multiple jurisdictions. Communicating a work to the public by telecommunication over the internet might involve a person who communicates in one jurisdiction, and members of the

[105] See discussion above Part II (A).

receiving public in a variety of jurisdictions. The same occurs with defamation, where publication on the internet may occur in one jurisdiction, while readers of the content (and thus the reputational harm) may be located in multiple other jurisdictions. It is not surprising that there has been a significant amount of litigation around internet defamation, with courts in many jurisdictions seeking to establish those criteria that will establish a 'real and substantial connection' to the court's home jurisdiction.[106] In the criminal context, the result in *R. v. Starnet Communications International Inc*.[107] strongly suggests that to avoid prosecution under Canada's *Criminal Code* for illegal gaming activity over the internet, it is necessary to sever links to Canada so as to avoid any 'real and substantial connection.'[108]

It should be noted that there are parallels in other jurisdictions to the Canadian approach to territoriality and the internet,[109] and Canadian courts have, in some cases accepted and enforced orders of foreign courts on the basis that there was a substantial connection to the foreign jurisdiction. Thus in *Somerset Pharmaceuticals Inc. v. Interpharm Inc*.,[110] an Ontario Court gave effect to letters rogatory issued by a Florida Court in a case involving the online sale of pharmaceuticals to the U.S. The Court accepted that the importation of pharmaceuticals was carried out in a manner that violated U.S. laws. While it acknowledged that a court should not enforce letters rogatory where it would be contrary to public policy in Canada, MacDonald J. found this to be an appropriate case to lend assistance to a foreign court.

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[106] See, for example: *Bangoura v. Washington Post*, 2005 CanLII 32906 (ON C.A.).
[107] (August 17, 2001), Vancouver 125795-1(B.C.S.C.)
[108] See C. Ian Kyer and Danielle Hough, "Is Internet Gaming Legal in Canada: A Look at Starnet", (2001) 1 Canadian Journal of Law and Technology; online: http://cjlt.dal.ca.
[109] In the United States, the courts have developed a "sliding scale" for internet web sites in considering issues of personal jurisdiction. This sliding scale is a way of conceptualizing the degree of connection between the originating jurisdiction and the receiving jurisdiction. On one end of the scale are situations where there are clear business contacts and repeated and deliberate interactions. At the other end of the scale are "passive" websites, which merely contain content that can be viewed by any internet user. More interactive sites are in the middle, with the degree, nature and frequency of interactivity being relevant to a determination of the substantiality of the connection. See: *Zippo Manufacturing Co. v. Zippo Dot Com, Inc*., 952 F.Supp. 1119 (W.D.Pa. 1997); *CompuServe, Inc. v. Patterson*, 89 F. 3d 1257 (6th Cir. 1996); *Maritz, Inc. v. Cybergold, Inc*., 947 F.Supp. 1328 (E.D. Mo. 1996); *Thompson v. Handa-Lopez, Inc*., 998 F.Supp. 738 (W.D. Tx. 1998).
[110] (1994), 52 C.P.R. (3d) 317.

The dispute over the activities of iCraveTV also provides an illustration of parallel approaches in other jurisdictions. In that case, a Canadian company picked up broadcast signals from the U.S. and retransmitted them over the internet. This retransmission activity was legal in Canada if the appropriate retransmission licence was acquired, and the company sought the appropriate licence. However, the internet based retransmission (unlike cable retransmission) had the capacity to penetrate the U.S. market, and major copyright holders in the United States sought to enjoin the company's activities. They were successful in obtaining an injunction in the U.S. to restrain the activities of iCraveTV on the basis that by effectively retransmitting their content to U.S. residents via the internet, its activities infringed their copyrights in the United States.[111] Although iCraveTV was prepared to argue that its activities were legal in Canada, the parties ultimately entered into a settlement agreement wherein iCraveTV agreed to cease its activities.

2. Legislative/Prescriptive Jurisdiction and the Internet

Not all issues raised by the internet turn on the location or locations of the offensive conduct. In some cases the issues raised are ones related to the limits on a state's power to regulate conduct outside of its borders, even where there is a territorial impact. Thus, for example, Quebec's Office de la langue française imposes French language requirements only on the web sites of businesses which sell products in Quebec and advertise them on the web site of *a business situated in Quebec*.[112] Legislation regulating the language of business in the province cannot have extraterritorial effect even when the internet allows offshore or out-of-province companies to sell merchandise to consumers in Quebec. This, again, is consistent with traditional principles regarding extraterritoriality. As between Canadian provinces, in *Earth*

[111] *Twentieth Century Fox Film Corp. v. ICRAVETV*, 2000 U.S. Dist. LEXIS 11670; 53 U.S.P.Q.2D (BNA) 1831; Copy L. Rep. (CCH) P28,030.
[112] Office de la langue française, online : http://www.oqlf.gouv.qc.ca/francisation/ti/index.html.

Future Lottery,[113] a group based in PEI obtained a licence in that province to operate a lottery, which it planned to establish online. The Supreme Court of Canada confirmed the decision of the PEI Court of Appeal that in order to be lawful, the lottery would have to be conducted in the licensing province. The Court found that there was a difference between conducting a lottery *in* a province and conducting one *from* a province. It ruled the internet lottery scheme to be illegal, noting: "The global market extends far beyond the boundaries of this province and is therefore outside the territorial limitation imposed by sub-section 207(1)(b)."[114] The provisions of the *Criminal Code* that permitted provinces "to conduct and manage a lottery scheme in that province" were designed "to ensure that the activities of lotteries exempted from criminality would be strictly confined territorially."[115]

In *Thorpe v. College of Pharmacists of British Columbia*,[116] a pharmacist who had been disciplined for preparing and exporting prescription drugs for persons in the United States, and therefore was not qualified to practice medicine in Canada, appealed the decision of the College of Pharmacists on the basis that the relevant section of the *Pharmacists Act* was *ultra vires* the province as it had impermissible extraprovincial effect. The Court of Appeal rejected this argument. Gibbs J.A. expressed the view that:

> I am satisfied that it is a reasonable and proper concern of a provincial legislature to ensure that professional persons under their regulatory authority so practice their profession as to ensure that the standards which apply within the province apply with equal force to conduct within the province which as extra-provincial reach.[117]

The bottom line, in this as in other cases involving internet-based activity, is that the same principles that govern extraterritorial action by the federal government and provincial governments in other contexts will apply. The challenge is both to adapt those principles to the internet context, and to come to terms with the increasing volume of such issues.

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[113] *Reference Re Earth Future Lottery*, 2002 PESCAD 8, (2002), 215 D.L.R. (4th) 656; (2002), 166 C.C.C. (3d) 373, aff'd [2003] 1 S.C.R. 123 (*Earth Future Lottery*).
[114] *Ibid*., at para 10.
[115] *Ibid.*, at para 11.
[116] 1992 CanLII 895 (BC C.A.); (1992), 97 D.L.R. (4th) 634 (*Thorpe*).
[117] *Ibid.*, at para 17.

A particular challenge when dealing with legislative or prescriptive extraterritoriality in the internet context is that the vast majority of statutes in Canada were first enacted at a time when the internet, or even the scope of internet-based activity, was never contemplated. This legislation was therefore enacted without having Parliament consider whether extraterritorial powers were necessary, or in what circumstances they should be exercised. A major challenge for courts faced with interpreting this legislation is the need to determine, as a matter of statutory interpretation, whether it is appropriate to read the legislation, or particular provisions, as conveying extraterritorial authority. This is perhaps the issue which caused the most confusion in the *SOCAN* decision. LeBel J., in dissent in that case on the issue of extraterritoriality, framed the issue to be decided as "whether Parliament did in fact intend that section 3(1)(*f*) of the Act apply extraterritorially".[118] As argued earlier, the real issue was how to interpret the concept of *territoriality* in the internet environment. Nevertheless, LeBel J.'s approach was to ask whether, as a matter of statutory interpretation, the *Copyright Act* was intended by Parliament to have effect outside Canada's borders. His answer was 'no'. He went on to consider the territorial question: ". . . when does a communication occur *within* Canada for the purpose of section 3(1)(*f*)."[119] His answer was a categorical "where it emanates from a host server located in Canada."[120] The reason for his choice loops back around to the issue of extraterritoriality: "The only question is whether Parliament intended the Act to have effect beyond Canada."[121] With respect, this conflates the principles of extraterritoriality with the enquiry into territoriality.

It would seem that LeBel J. made the right enquiry in the wrong context. Where the issue is whether a particular act has sufficient connection to Canada to give Canadian courts jurisdiction over the matter, the inquiry into Parliament's intent to legislate extraterritorially is not

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[118] *SOCAN*, above note 53, at para 143.
[119] *Ibid*. at para 144.
[120] *Ibid*. at para 146.
[121] *Ibid*. at para 148.

really relevant. However, where the issue is whether a law confers the power to assert jurisdiction over persons, actions or events clearly outside Canada's borders, the question does become one of interpreting the intent of Parliament as expressed in the legislation. As LeBel J. indicates, in such cases courts will look for clear evidence of an express or implied intent on the part of Parliament to act extraterritorially.[122] As noted earlier in this paper, such instances are rare, and have, in the past, tended to map onto one of the four principles governing extraterritorial action that have gained some acceptance in international law.[123]

3. Implementing Treaties, Other International Agreements, and International Cooperation

It is to be expected that some of the most difficult, significant or recurring trans-border internet issues will be dealt with through international cooperation of one kind or another. There are already a number of examples of international co-operation or collaboration with respect to trans-boundary internet issues. In some cases, international treaties have been signed which reflect new norms that will govern certain matters that arise on the internet. The *WIPO Copyright Treaty* (WCT),[124] and *WIPO Performers and Phonograms Treaty* (WPPT)[125] are examples of such instruments. In other contexts, the challenges of monitoring and regulating conduct on the internet have led to cooperation and collaboration in policing activities. For example, recent international action resulted in a crackdown on internet copyright piracy that involved cooperation between police forces in 11 countries.[126] In 2003, the Virtual Global Task Force was created by an international alliance of law enforcement agencies to tackle issues of the online abuse of children.[127] Similar cooperation may be available where the activity being

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[122] *Ibid*., at para 144.
[123] See discussion above Part II (A)(2).
[124] *WIPO Copyright Treaty*, December 20, 1996, WIPO Publication No. 226 (entered into force 6 March 2002).
[125] *WIPO Performances and Phonograms Treaty*, December 20, 1996, WIPO Publication No. 227 (entered into force 20 May 2002).
[126] See: International Internet Piracy Sweep: U.S. Department of Justice: http://www.justice.gov/criminal/cybercrime/OperationSiteDown.htm.
[127] See: Virtual Global Taskforce: http://www.virtualglobaltaskforce.com/.

carried out online is of a highly criminal nature, such as plotting terrorism, money laundering, or other organized crime activities.[128]

B. Personal Information Protection

Personal information protection is, in many ways, a new area of regulation which owes its genesis to the twin phenomena of digitization and the internet. The fairly recent enactment of personal information protection legislation in Europe and in Canada was prompted by the fact that technology enabled the collection, processing, mining and transmission of data at a speed and on a scale that was entirely unprecedented. As noted earlier in this paper, Europe acted first, and its *Data Protection Directive* had a direct impact on Canada's decision to enact its own data protection legislation.[129] Canada's own *Personal Information Protection and Electronic Documents Act* (*PIPEDA*)[130] established norms for the collection, use and disclosure of personal information in the course of commercial activity. It also gave the federal Privacy Commissioner powers of oversight, including the power to investigate complaints and conduct audits. The Act gives individuals the ability to bring a complaint to court only after receiving the Commissioner's report on the investigation of the complaint.

In 2004 a complaint was filed with the Privacy Commissioner against Abika.com, a company based in the United States. The company operates as an online data broker, providing clients with a variety of data services, including background checks or psychological profiles of individuals, unlisted phone numbers and cell phone numbers, details of incoming and outgoing phone calls from a given phone number, and so on. Although located in the U.S., the company offered this service to Canadian clients and in relation to Canadian subjects. In response to the complaint, an investigation was commenced by the Office of the Privacy

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[128] Interpol, the international police organization operates a number of programs targeting online crime, including money laundering, intellectual property crime, child pornography and information technology crime. See: Interpol: http://www.interpol.int/.

[129] See discussion above at Part II(B)(1).

[130] Above note 28.

Commissioner (OPC). The investigator contacted the company, which refused to provide information about the Canadian based sources for the data they provided on Canadian data subjects. The Commissioner's office then notified the complainant that they could not proceed with the complaint as they did not have "the requisite legislative authority to exercise our powers outside of Canada."[131] Assistant Privacy Commissioner Heather Black wrote:

> There is nothing explicit in *PIPEDA* to suggest that it was meant to apply outside of Canada or that the powers of the Commissioner would extend beyond Canada's borders. According to leading case law, where the language of a statute can be construed so as not to have extraterritorial effect, then that construction must be adopted. It seems clear that this Act should not be construed to have extraterritorial effect. In the absence of any express or implied legislative intent, I must conclude that *PIPEDA* has no direct application outside of Canada.[132]

Ms Black noted that the OPC was genuinely concerned about the operations of data-brokers such as Abika.com, and that they had sought advice from the federal government as to the protocols that would allow them to investigate cases of this nature. Ms Black also noted that the OPC was exploring mutual cooperation issues in various international fora, that they were seeking to obtain authority through a Memorandum of Understanding (MOU), a Mutual Legal Assistance Treaty (MLAT) or some other arrangement with the United States, and that they had raised the issue with the U.S. Federal Trade Commission.[133]

The complainant in the case has since sought judicial review of the decision of the OPC not to proceed with the complaint. In the application for judicial review the applicant argues that there is a real and substantial connection between the subject matter of the complaint and Canada. In particular, it is argued that the Commissioner erred by "[a]pplying a test of "extraterritorial effect" to determine her jurisdiction to investigate the complaint when the

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[131] Letter from Assistant Privacy Commissioner Heather Black, November 18, 2005. Online: Office of the Privacy Commissioner: http://www.privcom.gc.ca/legislation/let/let_051118_e.asp. (*OPC Letter*)
[132] *Ibid*.
[133] *Ibid*.

appropriate test to establish jurisdiction is the "real and substantial connection test"".[134] In the alternative it is argued that the 'real and substantial connection test' was wrongly applied.

The case is an extremely interesting one. It seems clear from the letter from the OPC that two separate threads of argument are interwoven in a justification for not taking jurisdiction in this case. On the one hand, concerns about the lack of investigative authority outside Canada's borders are reflected in the discussion of the various means by which cooperation can be sought to permit such investigations to proceed. Certainly, in the criminal law context, the fact that Canada might seek to exert substantive jurisdiction over an individual will not, in and of itself, give Canadian police forces the power to carry out an investigation in the United States, nor will it empower a court to issue search warrants for premises located in the United States. Jurisdiction over subject matter does not confer investigative jurisdiction. This is linked to the prescriptive jurisdiction/enforcement jurisdiction dichotomy discussed earlier.

At the same time, the OPC seems to also argue that it lacks substantive jurisdiction, although it ties this lack to its inability to investigate in the United States. The OPC stated that Abika.com had not responded to its request for information, and that therefore the OPC had no information as to the company's Canadian-based sources. In doing so, it was clearly tying its ability to exercise jurisdiction to some kind of Canadian presence for the target organization. The intertwining of 'real and substantial connection' issues with issues of investigative jurisdiction is plainly evident in the following statement by Ms. Black: "we have no means of identifying – let alone investigating – those who would represent a Canadian presence for this organization and further, have no ability to compel an American organization to respond."[135]

It is difficult to untangle the two threads. From a procedural point of view, the OPC is correct that it would have no powers to carry out its investigation in the United States absent some form of MOU or MLAT. Its investigative powers under *PIPEDA* are thus useless outside

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[134] Notice of Application, December 19, 2005. Online: Canadian Internet Policy and Public Interest Clinic: http://www.cippic.ca/.
[135] *OPC Letter*, above note 131.

of Canada's borders, and clearly Parliament cannot be presumed to have intended that they would have such application.

The issue of the intent of Parliament has been addressed earlier under the section on the internet. There the point was made that much Canadian legislation has been enacted in a context where Parliament could not have contemplated the effect of the internet on the issues governed by the legislation. Thus the inquiry into Parliamentary intent with respect to extraterritoriality is made more difficult. It is more difficult still to argue that, in the case of personal information protection, Parliament was unaware of the internet context. *PIPEDA* currently makes Canadian based organizations responsible for ensuring that third parties to whom data is transferred for processing comply with the stipulated privacy norms.[136] It is possible that it was assumed by Parliament that in cases where offshore data processors violate *PIPEDA* norms, the Canadian based organization which supplied the data to them for processing would be held accountable. Parliament may not have contemplated that offshore businesses operating in an unregulated environment would themselves be engaged in collecting data about Canadians and selling it back to them through an internet operated business. If this is the case, then the issue is one which would not have been in the contemplation of Parliament, and thus opens more room for argument about whether *PIPEDA* should be given some extraterritorial effect.

However, if the law were to be given extraterritorial application, the issue would quickly become whether there was any investigative or enforcement jurisdiction to support this extraterritorial application. Certainly without an MOU or MLAT, it is unlikely that effective action could be taken to either investigate the complaint or to enforce any order that might flow from a proceeding against the U.S. company in Canada. The case raises a further issue: given that the U.S. currently has no comparable personal information protection legislation, the U.S. based company is not violating any relevant U.S. norms. Absent mutuality of values between two

[136] See 4.1.3 of Schedule I to *PIPEDA*, above note 28.

jurisdictions, it is unlikely there will be the kind of reciprocity necessary to support any assertion by Canada of extraterritorial jurisdiction.

The issue here could also be approached as one of territoriality. In other words, the question would be whether there was sufficient connection to Canada's territory to support an assertion of jurisdiction over the complaint by the OPC. If a company in the U.S., in the course of commercial activity, has collected and disclosed the personal information of Canadians, without their consent, to other Canadians located in Canada, it has likely violated the normative provisions of *PIPEDA*. In this scenario, there is a possibility that a 'real and substantial connection' could be found, even absent a physical link between the offending company and Canada. The complainant whose rights were infringed is located in Canada; the personal information in question was disclosed in Canada without her consent. To the extent that the data flowed to and from Canada at different points in time may simply mean that the offence is "both here and there". Nevertheless, even if jurisdiction were asserted, it would have largely symbolic effect without either a Canadian presence against which a remedial order could be made, or some form of reciprocal enforcement agreement. Absent the ability to enforce the decision, any proceeding would have only symbolic value.

There are three broad options here. The first would be for the courts to make a determination about territoriality on the facts of the case. In other words, they would consider whether there is a sufficient connection to Canada, using a *Libman*-type approach adjusted to take into account the realities of the internet and trans-border data flows. The ability to properly investigate the matter or to enforce any decision could either be considered as extraneous to the 'real and substantial connection' test, or a practical consideration to be placed in the balance.

The second option would be to determine that *PIPEDA* was intended to have extraterritorial effect. Some evidence of this would be required, or, at the very least, an argument would have to be made that the issue of extraterritoriality was beyond the

contemplation of Parliament at the time the legislation was drafted, and that therefore it is an issue that the courts must resolve absent any clear indication. In either event, the courts must begin with the presumption that Parliament did not intend to act extraterritorially. Courts should be leery of interpreting legislation to have extraterritorial effect without considering the contexts generally accepted in international law as supporting some form of extraterritorial action. These, discussed earlier in Part II(A)(2), include the nationality principle, protective principle, universal principle and the passive personality principle. In instances such as this, where passive personality seems the best fit, courts must be particularly sensitive to issues of comity and the implications of opening the door to other countries asserting jurisdiction in the same manner.

The third option would be to pursue extraterritorial reach through a process of negotiation of bi- or multi-lateral agreements. In other words, the federal government could attempt to negotiate MOUs, MLATs or some other form of accord which would allow for the investigation and enforcement of *PIPEDA* actions outside Canada's territorial boundary where the actions of a foreign organization are injurious to Canadian individuals or interests. While it could be argued that the basis for action of this kind is a 'real and substantial connection' to Canada's territory, the fact is that there will be contexts where finding a 'real and substantial connection' will be meaningless without negotiated arrangements to permit Canadian authorities to reach inside another jurisdiction. In such circumstances the 'real and substantial connection' is not a justification for action based on the principle of territoriality. Rather, the 'real and substantial connection' is the motivation which underpins the decision of the federal government to seek a negotiated resolution to a problem that exceeds its territorial reach. The 'real and substantial connection' used in the context of territoriality should not be confused conceptually with the connection that prompts a government to pursue various extraterritorial measures.

C. Human Rights

Traditionally states have been much quicker to exercise public, especially criminal, law powers extraterritorially than they have been to involve themselves in private law matters abroad. For instance, the readiness to assert jurisdiction over international criminal acts and actors beyond the state's territory has not been matched by the same level of concern for the victims of such criminal activity. Canada is no exception to this practice. Even though such a criminal attack on the person will nearly always constitute a violation of human rights, remedies for individuals so injured extraterritorially are rarely accessible.

Nor did international law previously demand them. States were only required to treat foreigners within their borders with a minimum international standard of treatment, which in practice was very minimal indeed.[137] Part of this obligation was the provision of an adequate legal system for the resolution of any private claims for personal injury that an individual might have. Canadian court practice readily met this requirement for claims by persons, whether Canadian or foreign, for violations of their human rights suffered within Canada but paid, and still pays, scant attention to the claims of victims beyond its borders.

However, at least two of the justifications for exercising extraterritorial criminal law powers discussed in Part III above might also be used to assert civil court authority over extraterritorial abuses of human rights. To this extent, criminal and civil law concerns over extraterritorial application mirror each other. Put another way, the analytical model developed from the experience of extraterritorial assertions of criminal jurisdiction could also be used to justify the extraterritorial exercise of civil court powers. This important point will become evident from the following discussion, first, of the duty to implement obligatory international agreements and, second, of the right to regulate extraterritorial conduct with a strong connection to Canada, as each may be applied to the extraterritorial protection of human rights. Thereafter two impediments to projected extraterritorial action by Canada will also be addressed.

[137] See the *Neer Claim (United States v. Mexico)* (1926), 4 R.I.A.A. 60 at 61-62.

First, growth in the international protection of human rights since 1945 has arguably now attained a level of protection that obliges a state to ensure the protection of human rights for all. Certain, if not all, human rights are *erga omnes* rights.[138] The phrase "e*rga omnes*" simply signifies that the right is one which all states have a legal interest in protecting. Put conversely, the correlative obligation on the state directly responsible for the protection of such a right is an obligation owed to the international community as a whole. On this argument Canada has a duty to uphold *erga omnes* human rights for everyone and a legal interest in their protection everywhere.

The scope of this obligation has been elaborated in the International Covenant on Civil and Political Rights (ICCPR), to which Canada is a party.[139] Article 2(1) requires Canada "to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised" in the ICCPR. This duty includes the further obligations found in article 2(3) to provide competent adjudicative processes for claims of abuse and effective remedies for victims that are actually enforced. Thus the rights in the ICCPR, such as the rights to life, liberty and security of the person and freedom from arbitrary arrest, detention, slavery and torture (arts. 6-9), are owed to everyone under a reciprocally binding treaty between Canada and the other state parties. As a consequence, Canada must, and does, provide appropriate protections and remedies for abuses of human rights within its territory. One extraterritoriality question is whether Canada may hold to account other states which do not live up to their treaty obligations in their territories. But whether Canada does or does not pursue foreign states for their treaty violations, a second extraterritoriality question is whether it should ensure remedies also to victims of abuse extraterritorially who find their way to Canada. In other words, ought Canadian courts to be open to claims of human rights abuses that constitute violations of *erga omnes*

[138] See the *Barcelona Traction Case (Belgium v. Spain),* [1970] I.C.J. Rep. 3 at paras. 33-34.
[139] (1996) 999 U.N.T.S. 171, Can. T.S. 1976 No. 47.

obligations whether committed by Canadian citizens or foreigners, whether perpetrated against Canadians or foreigners and whether committed within Canada or elsewhere?

Secondly, if the argument for obligatory jurisdiction over extraterritorial violations of human rights is not sufficiently convincing by itself, there is still the additional proposition that Canada might act in this way because it has a real and substantial interest in the worldwide protection of human rights. At least two powerful legal arguments may call for affirmative action.

The first is an argument that parallels the assertion of criminal law jurisdiction over international offences and offenders. To the extent that gross violations of human rights are proscribed as genocide, torture, crimes against humanity and war crimes and their perpetrators are subject to the universal jurisdiction of states, so their victims ought to be able to access a remedy against their violators universally. Since Canada has accepted and implemented its international obligations to prosecute the perpetrators of international crimes simply on the basis of custodial jurisdiction (detention),[140] it arguably has every reason to afford similar access to Canadian courts for the victims of extraterritorial abuse in pursuit of the remedies and recompense legally due to them.

Secondly, as part of Canadian concern for an orderly international society, asserted above, Canada undoubtedly has an interest in upholding human rights worldwide. In particular, there is a real and substantial involvement of Canada in cases of abuse of human rights abroad which concern victims of Canadian origin and refugees or stateless persons who come to Canada. Moreover, Canada's promotion internationally of the principle of responsibility to protect populations at risk from genocide, war crimes, ethnic cleansing, and crimes against humanity[141] is grounds to argue that Canada has a real and substantial involvement in all violations of human rights everywhere. Hence, on this approach also, it could be argued that

[140] See e.g. the *Crimes Against Humanity and War Crimes Act,* above note 19.
[141] This was endorsed by the UN General Assembly at the World Summit of heads of states and governments in September 2005; see U.N. Doc. A/60/2005 paras. 138-139.

Canada might provide access to its courts for victims to pursue justice and enforceable remedies for extraterritorial violations of their human rights.

However, both arguments for opening Canadian courts to actions for extraterritorial human rights violations face at least two procedural inhibitions. One is the conflicts of law principle of *forum non conveniens.* This may be a valid limit to curial jurisdiction in an ordinary tort claim for, say, negligence by a German in running down an Italian in France, because Canada plainly has no connection at all with such an incident. However, the policy objectives behind the principle may have less force where the claim in tort (whether in negligence or, especially, trespass to person) is for a violation of an internationally respected human right since, as explained above, Canada does have a serious interest, if not an obligation, to assist such victims. Since the creation and application of this principle is a judge-made rule of conflicts of law (private international law), it may readily be amended or refined either by statute or by the judges themselves, if so minded.

A second impediment in many instances is likely to be a claim of immunity by the defendant. Human rights abuses are frequently authorized or carried out by state officials during the time of their active duties. Since international law, by reason of the sovereign equality of states, accords immunity to one state from the jurisdictional authority of another, representatives of the state in certain circumstances are also immune and inviolable in foreign countries and their courts. This is not the place to engage in the details of the international law of state immunities.[142] Suffice it to note that Canadian courts are inhibited from asserting jurisdiction over a foreign state's high officials for many acts while in office or, after leaving office, for past acts done in the capacity of their office. After leaving office, such a public figure is no longer immune from suit for any acts done previously in a private capacity.[143]

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[142] See the text above at notes 62-63 and the UN Convention on the Jurisdictional Immunities of States and Their Property, UN GA Res. 59/38 (2004) not yet in force, and the *State Immunity Act,* above note 63.
[143] See *Case Concerning the Arrest Warrant of 11 April 2000 (Yerodia Case), (Congo v. Belgium),* I.C.J. 14 Feb.2002, 41 I.L.M. 536.

The issue of puzzling concern in international law today is the scope of so-called private acts of public officials. Torture, for instance, when authorized by a public official is so far removed from the purposes of public office that, as the House of Lords has held, the official cannot claim immunity from prosecution after leaving office.[144] However, in *Bouzari v. Islamic Republic of Iran,*[145] the Ontario High Court and the Court of Appeal did not follow this lead of the House of Lords regarding criminal responsibility when faced with a civil liability claim. While they acknowledged the customary international law, even peremptory or *jus cogens,* status of the rule against torture, they decided that the defendant's claim to immunity was a separate matter regulated by the Canadian *State Immunity Act* which, though it allows exceptions, does not include one for torts involving human rights violations outside, as opposed to inside, Canada.[146] This reading of the Canadian law seems to overlook Canada's obligation under the ICCPR, discussed above, to afford remedies for abuses of protected human rights. Article 2(3) specifically requires Canada "to ensure … [to a victim] an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity."

In any event, if desired, an appropriately worded amendment of the *State Immunity Act* could easily overturn the impediment of immunity to private suits for the limited and justifiable purpose of providing access to justice and remedies for victims of violations of internationally respected human rights.

D. Competition in the Marketplace

The pursuit of freer trade amongst market economy countries internationally has always been paralleled by market regulation to maintain fair competition nationally. Unfortunately, from

[144] *R. v. Bow Street Magistrate, ex parte Pinochet (No. 3),* [2000] 1 A.C. 147.
[145] [2002] O.J. No. 1624, (2004), 243 D.L.R. (4th) 406 (Ont C.A.); leave to appeal to S.C.C. discussed January 27, 2005.
[146] See also *Jones v. Ministry of the Interior of the Kingdom of Saudi Arabia* [2006] UKHL 26 in which the House of Lords also affirmed civil immunity from suit for torture.

the early days of the first competition legislation—the U.S. *Sherman Anti-Trust Act*[147]—it has become apparent that competition in the domestic market can readily be subverted by combinations, cartels and price fixing agreements made extraterritorially. National desire to reach corporate colluders extraterritorially has therefore been a longstanding feature of competition law that remains unresolved to this day.

The favoured technique of national legislatures and courts is to assert an extended territorial jurisdiction on account of the impact of the extraterritorial anti-competitive act upon local markets. This is an application of so-called objective territorial jurisdiction, as discussed above in Part II(1)(b). This approach was the source of the notorious U.S. "effects doctrine" by which, in extreme cases, any commercial conspiracy, collusion or combination abroad that had however slight an effect on American trade was ground enough to assert the application of the *Sherman Anti-Trust Act* and to impose fines, orders and penalties on the foreign (corporate) defendants[148] in the expectation they would be honoured, if not enforced, in the foreign jurisdictions. When they were not, these sanctions have frequently been executed, as occasion permits, against any assets of the foreign defendants that can be found within the United States.

This practice is not peculiar to the United States. For instance, Canada, Germany,[149] and the European Union[150] all have competition laws which may be applied extraterritorially. The Canadian *Competition Act*[151] specifically proscribes corporate acts within Canada in furtherance of anti-competitive arrangements concluded outside Canada that would be illegal by Canadian

[147] *Sherman Anti-Trust Act,* 15 U.S.C. ss. 1-7.
[148] See e.g *United States v. Aluminum Co. of America,* 148 F.2d 416 (2d Cir. 1945).
[149] See G. Gerber, "The Extraterritorial Application of the German Antitrust Laws" (1983) 77 Am. J Int'l L. 756.
[150] See the Treaty Establishing the European Community, Rome, 25 March 1957 Official Journal C 325, 24 December 2002, arts. 85 & 86 and *Europemballage Corp. and Continental Can Co. Inc. v. E.C. Commission,* [1973] C.M.L. Rep. 199.
[151] Above note 40.

law if made within Canada. Similarly, the former *Foreign Investment Review Act*[152] was used against mergers of foreign corporations that affected control over Canadian companies.[153]

Attempts to defuse the resulting international tensions by lowering jurisdictional expectations through the application of more careful criteria that require substantial domestic impact from extraterritorial corporate conduct have not been successful. An American test of "direct, substantial and reasonably foreseeable effect" on U.S. commerce[154] did not inhibit the US Supreme Court from finding that several U.K. companies acted in violation of the U.S. anti-trust laws even though their actions were legal under the law where they were committed in the United Kingdom.[155]

National responses to foreign assertions of extraterritorial power over economic competition have been equally determined. Australia,[156] Canada, France,[157]and the United Kingdom[158] have all enacted statutes that, in varying ways, reject another state's extraterritorial acts and orders. In Canada, the *Foreign Extraterritorial Measures Act*[159] grants the Attorney-General of Canada powers to block the orders of a foreign court that adversely affect significant Canadian interests in international trade or infringe upon Canadian sovereignty. Further, where the Attorney-General has exercised these "blocking" powers, a Canadian company that has suffered the exaction of damages abroad may claw them back through suit in a Canadian court. Notably, such "clawback" actions are themselves extraterritorial acts against foreign defendants.

These tit-for-tat ripostes are not helpful. Indeed, they are: destructive of international trade and the commercial confidence on which transnational transactions depend; a negation of

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[152] S.C. 1973-74, c. 46, now replaced by the *Investment Canada Act* R.S.C. 1985. c.28 (1st Supp.)
[153] See *Dow Jones & Co. Inc. v. A.-G. of Canada* (1981), 122 D.L.R. (3d) 731 (F.C.A.) and *A.-G. of Canada v. Fallbridge Holdings Ltd.* (1986), 31 B.L.R. 57 (F.C.A.).
[154] Introduced by the *Foreign Trade Anti-Trust Improvement Act*, 96 Stat. 1246, 15 U.S.C. § 61 (1982).
[155] *Hartford Fire Insurance v. California,* 509 U.S. 764. (1993). And see a similar collision of laws and court orders between the United States and the Cayman Islands regarding the production of documents by a Canadian transnational corporation in *United States v. Bank of Nova Scotia,* 740 F. 2d 817 (C.A. 11th Cir. 1984).
[156] *Foreign Antitrust Judgments (Restriction of Enforcement) Act 1979*, reprinted in (1979) 18 I.L.M. 869.
[157] *Law Relating to the Communication of Economic, Commercial, Industrial, Financial and Technical Documents or Information to Foreign National or Legal Persons, Law No. 80-538, J.O. (1980) No. 1799.*
[158] *The Protection of Trading Interests Act,* (U.K.) 1980, c. 11.
[159] R.S.C. 1985, c. F-29.

international order amongst nation states; and a denial of the comity between governments that is so essential to the smooth functioning of international relations. Fortunately, realistic attitudes have prevailed and solutions through intergovernmental cooperation have been sought. One example is the Canada-United States Agreement Regarding the Application of Their Competition and Deceptive Marketing Practices Laws.[160] But a general solution to the problems of extraterritorial jurisdiction in economic affairs has not yet been discovered. These problems have become much more pressing since the GATT and now the WTO have reduced the authority of member states to erect trade barriers by national laws, thus opening the international marketplace to freer commercial competition but without supporting it with transnational constraints on anti-competitive behaviour. Given the institutional authority and legal powers over international trade that reside in the WTO, a multilateral solution would seem to be the obvious choice, if agreement can ever be reached.[161]

Fundamental to the continuance of these extraterritorial problems is the inescapable inequality of commercial power and the diversity of economic policies between trade partners. Fair competition in the international marketplace requires a regulatory regime that may be applied extraterritorially when necessary. The lack of an effective system, nationally or internationally, illustrates an important prerequisite to every exercise of extraterritorial power. An acceptable competition regime, either unilaterally asserted or multilaterally agreed, has not been achieved on account of the lack of mutuality of national interests and the absence of comity and reciprocity in legal perspectives.

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[160] Above note 65.

[161] The WTO set up a Working Group on the Interaction between Trade and competition policy at the Singapore Ministerial Conference in 1996. While the Doha Ministerial Declaration in 2001 "recognised the case for a multilateral framework to enhance the contribution of competition policy to international trade," the July 2004 decision of the WTO Council determined that competition policy would no longer form part of the Doha Round of trade negotiations. The working group is currently inactive. See online: <http:www.wto.org/english/tratop_e/comp_e/history_e.htm#julydec>.

V. Conclusion: Towards An Analytical Framework for Deciding Upon Extraterritorial Action

A. The Road Since Travelled

In Part II we drew a number of distinctions, and raised a number of considerations to which Canada must advert in considering how to act extraterritorially. To restate them briefly, those issues are:

(i) What jurisdiction Canada may claim to assert compared to the jurisdiction it does assert in practice—or put another way, what extraterritorial jurisdiction our domestic law claims compared to the extraterritorial jurisdiction international law will acknowledge and support;

(ii) By what mechanisms Canada can attempt to act extraterritorially—whether through punitive legislation, regulatory rules governing behaviour outside Canada's borders, licensing or other fees imposed on actors, lobbying with other governments to negotiate treaties or reach informal understandings, or agreeing on procedural rules which allow Canadian procedures or judgements to be carried out beyond Canadian territory;

(iii) Against whom or what Canada can effectively assert extraterritorial jurisdiction—whether against people, places, acts or events, or some combination of them.

We also addressed in Part III the situations where Canada asserts criminal extraterritorial jurisdiction and thus we developed a set of policy justifications for such Canadian actions. To these, we added in Part IV a cross-section of transnational activities evidently in need of legal regulation, but where extraterritorial issues arise.

In this concluding section, Part V, we will pursue more closely the connections between those various issues, policies and problem areas, through the lens of what we view as the key functional consideration that will underpin any inquiry regarding extraterritorial action: enforceability. We will then propose an analytical framework for such inquiries, in the form of a

template that can be used to help decide when it would be appropriate as a means of executing Canadian policy on future occasions for Canada to act extraterritorially. No single answer or correlation can be proposed, but the relevant considerations which might guide the choice of one means or another, or one subject matter or another, can be laid out.

B. Enforceability: The Key Criterion

As a general observation, one ought to expect a high degree of correlation between the actual enforceability of a law and whether it is worth prescribing the law. That said, "enforceability" is a malleable concept. For example, although prohibitory laws (such as criminal law) do have some purely symbolic value, as a general rule they are useful only to the extent that there is a real possibility of punishing those who do not comply with the law. Thus, although there is symbolic value in declaring that a racist motive will be an aggravating factor in sentencing an accused for a crime, that symbolism depends on the fact that the rule can actually be put into effect in individual sentencing decisions. When criminal laws have nothing but symbolic value, however, they are likely to erode rather than build confidence in the justice system, since they quickly come to be seen as paper tigers.

Where Canada's laws state that particular actors must refrain from doing particular things, it would be a rare instance for that law to be sensible if Canada did not also have the ability, in some fashion, to back up the prohibition. Whether Canada acts alone or acts in unison with others to enforce the law is of little consequence, but that it is enforceable does matter.

Much the same is true, though perhaps to a lesser extent, of regulatory laws which do not prohibit, but which require certain behaviour: the payment of licensing fees, taxes, or compliance with other requirements. In general Canada would shy away from purely symbolic but unenforceable laws. However, in this context "enforcement" might be seen more broadly. It might be reasonable to wait longer: in effect an obligation to pay licensing fees or something

similar can be “sat on” longer while waiting for an effective enforcement opportunity, such as the return of the obligee to Canada.

“Enforceability” becomes an even broader concept when one considers regulatory laws which demand certain standards, but where the focus is not necessarily on fees or taxes. The policy objective might be to have corporations in other countries comply with standards which Canada sees as acceptable in data protection, for example, or to require fair hiring and employment practices by overseas companies. Canada’s enforcement method in such cases might be through incentives: for example the negative incentive of closing Canadian markets to companies that do not comply or the positive incentive of offering government contracts to those that do.

Alternatively, Canada might also in such circumstances, or in other regulatory contexts (e.g. environmental regulation), lobby with other governments to try to produce an international consensus around the Canadian view of how matters ought to be arranged. Perceived broadly, this is a kind of extraterritoriality, in the sense that the Canadian legislative approach will have effect in other countries that also adopt the same approach.

It is worth observing the way in which these various concerns can be seen reflected in the exercise of extraterritorial criminal jurisdiction we have described earlier. In that context, the enforceability question can be understood as two questions: when can Canada effectively prosecute without international assistance, and when can Canada rely on other countries to recognize Canada’s jurisdictional claim over the crime and extradite an accused person.

We noted offences such as treason or passport offences which aim at conduct occurring outside Canada’s borders. These offences, though examples of unilateral extraterritoriality, all fairly obviously invoke national security interests, and at international law would be easily justified under the protective principle. That principle does not quite so obviously explain section465(4) of the *Criminal Code*, which deems conspiracies to commit an offence in Canada to have occurred in Canada even if the conspiring actually occurred outside the country. Even in

that case, though, international law is likely to support Canadian jurisdiction over the matter, since the conspiracy would be an injury to Canada, despite no real effects being felt, and would be of little impact on or interest to the state where the conspiracy occurred. In that event, although Canada might not have physical control over the accused in the sense that they are likely to be outside the country, most other nations would recognize as legitimate Canada's request for extradition.[162]

We also noted that a number of offences are aimed at controlling Canada's public face abroad. These provisions are also unilateral extensions of Canadian jurisdiction, but would, for the most part, be supported at international law by the nationality principle. One should not conclude, though, that the nationality principle is therefore a strong policy justification for extraterritoriality in Canadian law. In the vast majority of occasions where Canada could rely on the nationality principle, it has not done so. Further, in these offences the real justification is not that the offender was a Canadian national, but that the offender was acting in an official capacity. Note, for example, that a person employed outside Canada under the *Public Service Employment Act*[163] (and therefore captured by section 7(4) of the *Criminal Code*) need not be a Canadian citizen. The Law Reform Commission has noted that this provision therefore potentially exceeds Canada's jurisdiction recognized at international law: a request for extradition based on it might well be refused.[164] Somewhat oddly, Canada is likely to benefit in this context from a coincidental overlap between the "public face" policy Canada wishes to assert and the "nationality" jurisdiction international law will recognize. Where Canada seeks to

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[162] Extradition issues can arise in situations where the requested state criminalizes the substantive offence for which the fugitive is requested, but does not normally exert extraterritorial jurisdiction over this offence. So, if the requested state does not exert extraterritorial jurisdiction over conspiracy, it might decline to extradite on this basis. However, this approach to the "double criminality" rule in extradition matters is on the wane; see generally Geoff Gilbert, *Transnational Fugitive Offenders in International Law: Extradition and Other Mechanisms* (The Hague: Kluwer, 1998) at 112-116, as well as Currie & Coughlan, above note 6.

[163] S.C. 2003, c. 22.

[164] Law Reform Commission of Canada, Working Paper 37, *Extraterritorial Jurisdiction* (Ottawa: Ministry of Supply and Services, 1984), at 70. Though it has been noted that the nationality principle can extends to persons who are almost assimilated to nationality in terms of their link to the state, such as permanent residents and foreign citizens who are serving in the state's armed forces; see Robert Jennings and Arthur Watts, *Oppenheim's International Law*, 9th ed. (London: Longmans, 1992), at 1156-57.

have its own nationals extradited to face trial on torture charges, for example, it is more likely to succeed than if extradition is sought of a non-national who acted at the direction of a Canadian official, though the torture offence claims to capture both.[165]

The third motive for extraterritoriality we noted, avoiding lawless territories, is also likely to be enforceable, though the nature of Canada's claim is not identical in each case. In some instances, such as piracy or offences on aircraft, ships or fixed platforms, Canada will assert jurisdiction over anyone committing the offence—though for some the accused must later be present in Canada for jurisdiction to crystallize, while for others jurisdiction is immediate upon the offence but the offender is more likely to be prosecuted by a treaty partner with more connections to the event than to be extradited to Canada. Hence, although Canada will prosecute anyone for these offences, it will not always seek anyone's extradition to face charges in Canada. These provisions should therefore not be conceptualized as an extension of Canada's arm so much as a shouldering of a shared burden: all nations have jurisdiction over these offenders, and Canada will prosecute those of them who end up here. Piracy has long been recognized at customary international law as subject to universal jurisdiction, and in the case of the other offences, Canada is signatory to various treaties in which it has agreed with other nations to share the prosecutorial task in this way. These are therefore examples of multilateral extraterritorial legislation.

In other cases, such as outer space and section 477.1(e) of the *Criminal Code*,[166] the claim is more limited. In the latter case Canada claims jurisdiction over the lawless territory for offences committed by Canadians: in the former, over offences by and against Canadians. The claim regarding astronauts is again multilateral, in that it arises from international agreement, and Canada's claim under section 477.1(e) over Canadians outside the territory of any state,

[165] Which is not to say Canada would have no claim to jurisdiction, since Canada (like all countries) enjoys universal jurisdiction over torture as an international crime; but it would not necessarily have the best claim.
[166] As noted above, this subsection criminalizes any offence under federal law or regulation "that is committed outside the territory of any state by a Canadian citizen."

although unilateral, by definition affects no other state's sovereignty. Any state having such offenders is therefore likely to honour an extradition request, since it does not compete with their interests.

Finally, we noted the many particular offences which are now subject to claims of extraterritorial jurisdiction by Canada: hostage taking, offences involving nuclear materials, child sex tourism, and so on. The provisions implementing these agreements at first glance present a bewildering array of extraterritorial claims, variously asserting jurisdiction when the offence was on a Canadian ship or aircraft, by a Canadian, against a Canadian, by a person later present in Canada, against Canadian facilities, and others. Various international law principles, including the passive personality principle, the protective principle, or universal jurisdiction could justify the individual claims. The central point to recognize is that the reason the jurisdictional claims vary from offence to offence is that the *Criminal Code* provisions concerned implement different international agreements, and in each case Canada has exerted exactly the jurisdiction that it has agreed with other countries it will exert.

In other words, the area in which there has been growth in extraterritorial criminal jurisdiction not only over the last 20 years but over the last 100 years has been where advance international cooperation has resulted in a specific agreement to deal with a particular type of offence in a particular way. Virtually everything in this category, therefore, is an instance of multilateral extraterritorial legislation.

The one exception worth noting in this context is that the extraterritorial provisions in the *Criminal Code* dealing with terrorism offences encompass the specific treaty obligations Canada has taken on, but also unilaterally extend a claim of jurisdiction over "terrorist activity committed outside Canada" (section 7(3.75)) which is broader than those treaties. Perhaps given the exceptional nature of the response to terrorism by Western nations in the past few years this could still be presented as loosely by international agreement, but it is certainly not by the explicit terms of any treaty or protocol. That exception aside, reliance on multilateral cooperation

to buttress its extraterritorial criminal claims has stood Canada in good stead, and will likely continue to do so.

The prognosis for extraterritorially enforceable jurisdiction in the criminal field does not necessarily apply in the regulatory and private law context. Of obvious difference, there is little substantiated experience on which to rely or on which to found an analysis such as has been made in the criminal context. The template must inevitably be wholly predictive. Even so, a number of propositions may be ventured with relative confidence.

First, the prescriptive power of Canada over regulatory matters and civil law claims and remedies is readily sustainable, if not well understood, but, secondly, Canada's enforcement ability is limited. Since the issues over prescription and enforcement are different between regulating the internet or competition in the international marketplace and advancing protection of personal information and human rights, they will be discussed separately.

As can be seen from the discussion in Part IV, the ability to regulate use of the internet raises many of the same issues that have long been contested by states over their national competition laws. The internet offers a wholly new kind of international marketplace which, like commercial competition, requires a structural regime to ensure its efficient and legitimate use. Canada, like other states, has good grounds to extend internet and competition standards and laws against those who engage in misconduct outside Canada that has a substantial impact on others within Canada, or *vice versa.* The legal basis for prescribing controls is the territorial principle of jurisdiction, extended in either its objective or subjective modes, because the target transactions are, by their nature, both "here and there." However, although transnational use of the internet or anti-competitive activity may affect some interests in Canada, the first difficult question is whether the impact is substantial enough to claim jurisdiction. As seen in Part IV, the international community is not agreed on the degree of impact within a state's territorial jurisdiction that is necessary to legitimate an assertion of its laws extraterritorially. Further, the novelty of the internet is causing impacts in new and unanticipated ways. These difficulties

presage continuing uncertainty, if not outright disagreement, between states as to when the exercise of prescriptive powers are acceptable. As a result, extraterritorial authority in these fields of regulatory concern is unlikely to be enforceable without multi-state agreement, for instance through a multilateral convention, that either sets international standards or harmonizes national ones.

Extraterritorial efforts to protect personal information and human rights give rise to their own distinctive prescriptive and enforcement issues. To the extent that these efforts are directed extraterritorially against the conduct of Canadians—for instance the prospective imposition of human rights standards on Canadian corporations in both their Canadian and foreign operations—there can be no objection at international law to such prescription because Canada is entitled to expand the so far limited use of its authority over nationals. On the other hand, the fact that Canada's use of the nationality principle has been limited reflects some kind of policy choice, and departure from previous practice merits inquiry as to what this policy choice is and why it should change. Certainly, however, the protection of Canadians and others who are present in Canada but are not nationals from extraterritorial abuse may be expected to cause rather greater concern in foreign capitals.

At bottom, Canada's desire to protect members of the public amounts to an export of its public values. Many of these are expressed in law in the *Canadian Charter of Rights and Freedoms.* Indeed, the Canadian courts have already had some experience with the exportation of the *Charter* itself, as described in Part II(C)(2)(a). They have taken a measured approach, extending the application of the *Charter* abroad where Canadian officers were involved with the consent of foreign authorities, but not pressing *Charter* protections where similar, but not the same, standards of due process obtain in the foreign state.

Though this kind of guarded extraterritorial application by the courts may have been sufficient and wise in the particular circumstances, the asserted jurisdiction is also more generally supportable. The public values Canada exports by prescribing rules and procedures

for the protection of individuals within its legal system are entirely justifiable so long as they are encompassed, and therefore backed, by the network of customary and conventional international human rights obligations on all states. While there is room for argument around the interpretation of these rights in particular situations, there is no gainsaying their core protections. Hence Canada has a sound basis for promoting protection prescriptively.

However, the enforceability of Canadian regulation and protection of personal information and human rights is much less sure. In the criminal and quasi-criminal context, extradition offers a possible, even probable, route to enforcement against a fugitive abroad; but no such mechanism is available outside this context. Canadian courts may grant service of civil process, order the production of documents, or *subpoena* witnesses abroad, but their directives may be ignored and foreign courts are not bound or likely to execute them. The empty symbolism of such directives is more likely to dissuade Canadian courts from making them.

Typically, in the absence of the defendant abroad, enforcement is happenstance rather than reliable. The complainant or government officer, as the case may be, may have to wait quietly until the defendant shows up in Canada or, alternatively, find property of the defendant within Canada which a court is willing to attach in order to force the defendant to respond. In the end, the uncertainty of enforcement of these prescriptively laudable protections suggests that unilateral action by Canadian officials and courts in specific instances is not enough. It would be wise to buttress them, just as with the regulatory needs of the internet and market competition, with a multilateral agreement. In this case the objective would be to establish internationally accepted standards of remedial responsibilities and mutual legal assistance between states in the sphere of civil law, as has already begun in the transnational administration of criminal justice.

C. Constructing Extraterritoriality: An Analytical Framework

The major benefit to considering extraterritorial action on the macro level is the ability of such an analysis to promote a measured, restrained and judicious approach to any consideration of extending Canada's claim to jurisdiction. A major question must always be not merely how to act extraterritorially, but whether to do so at all. The template which follows is an attempt to give guidance in answering both of those questions.

However, no analytical framework can offer guidance on the wisdom of acting extraterritorially in a given case: that is a decision for policy-makers, based on their views of the desirable social policy stance for Canada. What follows, therefore, is an analytical tool that aims to set out the various considerations to take into account in deciding whether extraterritorial action is a practical and viable approach to whatever issue is perceived as a social problem. It does not attempt to say what such problems and their solutions would be.

Further, as emphasized above, no single answer can be offered to the question of when and whether Canada should act extraterritorially. What we present, therefore, is a set of general policy objectives that are particular to the exercise of extraterritorial jurisdiction and that will underpin decision-making, followed by a series of questions aimed at deciding whether extraterritorial action is advisable in any given situation, in the sense that it is a practical response to the issue. As part of that analysis, the question of what sort of extraterritorial action might be appropriate will be incorporated. Further, within each question we will point to a number of considerations which can help guide the analysis.

General Policy Objectives

Canada should support the exercise of extra-territorial jurisdiction in a manner that encourages and supports an international society that is ordered, fair, just and peaceable, rather than

chaotic and conflicted. Hence:

a) All exercises of extraterritorial jurisdiction should, to the greatest extent possible, be consistent with the larger interests of inter-state comity, and apply the principles of non-intervention, accommodation, mutuality and proportionality.
b) Canada should regulate extraterritorial conduct only if it has a *bona fide* and substantial connection to Canada.
c) International law agreements should be implemented and executed in good faith. This principle is particularly important in regard to human rights treaties in connection with jurisdiction over the person.
d) Canada should uphold the international rule of law by extending its jurisdiction in a manner that avoids having lawless territories.

Question 1: Can the desired goals be accomplished, or largely accomplished, or largely so, based on a real and substantial connection to Canada without any need to rely on genuinely extraterritorial measures?

Comments: The first question must always be whether extraterritorial action is genuinely required at all. This observation is not necessarily just a note of caution, but also an observation that much can be done that will be recognized by Canadian courts and others as based on a real and substantial connection to Canada. Anything which meets this criterion can be considered to be territorial action, not extraterritorial at all. This point is not always clearly recognized (see the discussion of the *SOCAN* decision in Part IV) and so is worth incorporating into any analysis.

Question 2: Will the proposed measures be recognized under jurisdictional principles at international law as legitimate steps for Canada to take?

Comments: Assuming that the desired goals actually require extraterritorial action, the first practical question to be asked is whether such action on Canada's part will be seen as acceptable by other States. Canada's goal ought not to be merely to symbolically assert jurisdiction over actions occurring outside Canada's territory. If extraterritorial action is worthwhile, it is because such action can have practical consequences, which as a general rule will require the support of other States. Accordingly Canada ought to look to the principles of jurisdiction recognized at international law as an initial guide. If Canada's claim to act extraterritorially will not be supported by other nations, Canada should show real hesitation.

Question 3: If the proposed measures are not recognized at international law as legitimate steps for Canada to take, is this one of the rare instances where it is worthwhile to act in the absence of international consensus? In particular, is the issue of such great significance that it is worth suffering whatever negative consequences might flow from such unilateralism. Further, is there a realistic prospect that the measures will achieve their ends (whether those are actually to enforce rules, to change international opinion, or some other goal) without the initial support of other nations?

Comments: If the answer to our second question is "no", then it would be surprising if it were still seen as worthwhile for extraterritorial measures to be introduced. However, that it would be surprising is not to say that it is utterly unimaginable. There could be rare instances where, due to the importance of the issue at stake and the lack of other options, Canada decides to act against the accepted international view. Our template can offer no guidance on <u>when</u> policy-makers should see an issue as being of such unusually pressing importance as to justify such unilateral action: only that this step should not be taken except when that decision has been made. Even then, or perhaps especially then, it is particularly relevant to consider the effectiveness of such action: by definition Canada could expect little if any assistance from other nations in enforcing the law. This might be satisfactory if the goal of the legislation was to lead

"international public opinion", or if it was sufficient to enforce the law only when Canada already had jurisdiction over the person.

Question 4: If the proposed measures are recognized at international law as legitimate steps for Canada to take, are they also measures which are consistent with the traditional Canadian approach to extraterritoriality? If they are not, can a departure from that tradition be justified because of the seriousness of the problem to be addressed or other factors?

Comments: Even if a proposed exertion of extraterritorial jurisdiction might be recognized at international law, it does not follow that the action is consistent with Canadian tradition in acting extraterritorially. We have noted frequently throughout this paper that the question of when Canada *should* act extraterritorially is quite distinct from the question of when it *can* do so. To date Canada has shown considerable restraint. As noted, Canada has very infrequently relied on the nationality principle, for example, though such a claim would be more frequently recognized at international law. Canada has a very few laws founded on the protective principle, and has only in extremely limited circumstances unilaterally asserted universal jurisdiction. In practice Canada has tended to act extraterritorially almost exclusively in the context of multilateral international agreements. Nothing has occurred which should change that general tendency. Again, however, that is not to say that a departure from this approach could never be justified: merely that it would <u>need</u> to be justified. The exact nature of that justification cannot really be defined or limited, other than to note that it would require particularly compelling circumstances to justify a departure from Canada's traditional "comfort zone". An increasingly relevant query will be whether, in appropriate circumstances, Canada should defer to an appropriate international forum that is or could become seized of the issue.

Question 5: If extraterritorial action is, in the circumstances, an approach Canada both can and should take, consideration must be given to the proper method of acting extraterritorially. Where the goal is enforcement of Canadian standards outside Canadian territory, this might be accomplished through mandatory legislation where the combination of legislative and judicial mechanisms make enforcement likely. In other circumstances executive action to enlist foreign assistance in enforcing Canadian penal or regulatory laws might be a better approach. Much will depend on the precise goal of the extraterritorial action.

Comments: Presuming that it has been determined that the problem to be addressed falls into circumstances where Canada both can and should act extraterritorially, the next question becomes the method by which Canada should act. The answer to this inquiry will be shaped by the target at whom the action is directed, i.e. whether Canada is seeking to extraterritorially affect the behaviour of individuals, corporations or other states.

Most obviously it is possible to act through legislation. The simplest manner in which this can be done is for the legislature to pass laws which are then left to the courts to enforce. More forceful and/or multi-layered approaches are also available. For example, the legislature may put legislation in place that provides for a directing role for the Crown to pursue extraterritorial objectives by executive action or before the courts or otherwise. Alternatively, the executive may put in place (with or without the participation of the legislature) sets of self-regulation guidelines, or economic incentives. However, as we have noted above, these will not always be the most effective or most appropriate methods.

In some cases, purely executive action might be a more appropriate approach. As discussed above, in Part II(C)(2), there can be problems to which economic sanctions are the appropriate response. Less confrontationally, negotiating a Memorandum of Understanding with another State or States might provide Canada with any solution it was looking for. The major potential drawback is the risk that Canada’s voice at the negotiating table might be drowned out by those of more powerful nations, with the result that executive action will not achieve the desired result.

Question 6: Does a cost-benefit analysis of the potential *international* impacts of this extraterritorial action indicate that it is the preferable route for Canada to take? In particular, do the potential responses by other states (if any) represent more in the way of costs than Canada is willing to bear in order to fulfil its extraterritorial objective?

Comments: Finally, even if based on all the considerations above it appears that the circumstances are such that extraterritorial action by Canada seems appropriate, any final decision should wait on first asking what the consequences might be of the action. If the action is taken in accordance with a multilateral agreement, few concerns should arise in this regard. However, States normally do not unilaterally act extraterritorially because of concerns about comity: if Canada chooses on some occasion to unilaterally act extraterritorially, it is important to consider whether other states might take action in response to Canada's decision, and what the nature and consequences of that action might be. Possibly any perceived gains to Canada from the extraterritorial action would be more than outweighed by the negative consequences which could flow.

Equally, even if there are no direct retaliatory impacts, or more subtly no impacts from diminished relations with other States, a further issue to be considered is the attitude which Canada would adopt to other nations asserting a similar extraterritorial claim—in particular, whether such claims would infringe unacceptably on Canada's territorial jurisdiction. In assessing any extraterritorial approach, particularly mandatory laws, Canada should consider their reciprocal application. From a purely national perspective gains might be perceived from asserting an extraterritorial claim: if that same claim were made by other states impinging on Canadian sovereignty, however, once again the result might be a net loss for Canadian interests. In such circumstances extraterritorial action would be ill-advised. Also, Canada should explicitly recognize that assertions of extraterritorial jurisdiction may contribute to a body of state practice that may develop into a new rule of customary international law, and should consider whether such a rule would be both in its own interests and beneficial to the international community as a whole.

D. The Way Ahead?

Given the kinds of uncertainty described above, it seems clear that Canada continues the march to globalization with tools that may not be completely up to the task. To be sure, the route thus travelled is safe; Canada can easily continue to conservatively exercise extraterritorial jurisdiction in situations where doing so does not offend international comity, and promote multilateral solutions for problems that might bring it into conflict with other states. These tools can also be refined to suit particular problems, by various means which have been proposed throughout this paper.

To combat the continuing evolution of transnational crime, Canada can expand its use of techniques which are legal, if not traditional (e.g. make greater use of the nationality principle), while continuing to push for greater elasticity of jurisdictional principles as between states. On the regulatory side, in the short term the courts can continue to develop the “real and substantial connection” test, making more nuanced and context-specific attempts than they have thus far to locate the point at which connectedness and inter-state comity may collide. The courts, however, have the resources to continue this jurisdictional “tweaking” only so far. In the longer term these efforts can be supported by the executive, which is better equipped to develop actual policy responses to the pressures and changes stemming from the globalization of both trade and communication. The executive can negotiate international agreements that either dispense with the need for extraterritorial jurisdiction or compel states to exercise it. The legislature can then implement these agreements, prescribing the exercise of extraterritorial jurisdiction clearly and in a manner which directly reflects the vagaries of the subject matter. Indeed, as has been shown here, this kind of synergy between the branches of government in formulating extraterritoriality has served Canada reasonably well thus far.

There is more, however, that can be done. Recalling the discussion above, the major lesson from extraterritorial criminal jurisdiction is that Canada has not acted unilaterally except

in circumstances where there was clear international law consensus supporting its ability to do so. Thus, most exercises of extraterritoriality are deliberately multilateral, and those which are not are supportable by general international consensus on when it is legitimate to claim such jurisdiction.

That is not universally true, however. It is open to Canada to act extraterritorially in advance of consensus having formed: in effect, to attempt to lead international opinion by example. We have noted earlier Canada's exertion of jurisdiction over Arctic waters, later approved by other countries. Similarly one might note that the child sex tourism provisions, though now perfectly in line with international treaties, actually preceded the signing of those treaties.[167] Perhaps the terrorism provisions not yet consequent on international treaties will eventually lead to the existence of such treaties, one more building block towards a consensus that expansive use of extraterritorial jurisdiction is a necessary tool.

That said, this is an option which should be used sparingly and cautiously. Canada, though not the smallest boat on the lake, most frequently sails with larger ones: the odds of it being caught in someone else's wake are far greater than of Canada changing the course of others. Canada's domestic privacy legislation, as we have noted, largely results from the economic influence of the European Union, which left Canada little practical alternative but to comply: the United States, though, being a larger market still, did not create the same kind of legislation Canada did, but has not lost access to European markets. Similarly, Canada could try unilaterally to impose its views on copyright law on the international community, taking the robust approach to "real and substantial connection" that the *SOCAN* case suggests. This carries a certain risk, however, if Canada "legitimizes" one state unilaterally imposing its standards on others by doing so itself, this helps to free up the dominant players to act likewise,

[167] While it would have been legal for Canada to exert this nationality-based jurisdiction extraterritorially even before the current treaty was struck, doing so in the absence of a treaty was not commensurate with Canadian practice. This fairly radical departure for Canada was taken alongside an effort by Canada to promote the treaty itself, thus "leading by example'; see Currie & Coughlan, above note 6

and in a way that might not accord with Canadian interests. With specific regard to copyright, the dominance of U.S. intellectual property interests internationally dictates that unilateral use of extraterritorial jurisdiction by that country could end up imposing American copyright law on Canada as well as others.

Even allowing that exceptional circumstances might exist where Canada could and should act unilaterally in the absence of international consensus, it must choose the occasions sparingly. While the edifice of territoriality is being slowly dismantled by globalization, this should compel Canada to be defensive and proactive in equal measures as it seeks both to protect and to promote its own interests in the new global order.

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