

## Unilateral Extraterritorial Sanctions: The Search for a Jurisdictional Justification under International Law

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### ABSTRACT

*The US and the EU, amongst other nations, responded to the Russian invasion of Ukraine in February 2022 with a coordinated series of unprecedented sanctions. Expanding upon previous practice, the US sanctions package in particular contained several restrictive measures with extraterritorial application. This article examines the legality of unilateral extraterritorial sanctions imposed by the US, both historically and currently, by reference to the customary international law on state jurisdiction. It is argued that unilateral extraterritorial sanctions exceed the scope of the traditional jurisdictional grounds of territory, nationality, and security. To legitimise the current sanctions regime against Russia, which requires at least limited extraterritoriality to be effective, anti-evasion is proposed as a novel basis of jurisdiction over transactions designed to circumvent otherwise lawful sanctions.*

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## INTRODUCTION

When Russian President Vladimir Putin first moved ‘peacekeeping’ troops into the Donetsk and Luhansk regions, and then launched a full-scale invasion of Ukraine in February 2022, the response of the international community was swift and coordinated. The United States (US) and the European Union (EU), amongst other nations, announced a series of unprecedented sanctions on Russia.<sup>1</sup> The proclaimed aim of these sanctions was to impose costs on Russia in an effort to induce the cessation of its unlawful military activities.<sup>2</sup> The sanctions packages have since been updated and expanded in response to new developments in the ongoing conflict, notably the purported annexations of four Ukrainian regions in October 2022.

The current sanctions against Russia are a striking illustration of the central importance of unilateral restrictive measures as a global foreign policy tool.<sup>3</sup> A key feature of contemporary sanctions practice has been the so-called ‘sanctions design’, which focuses on the art of tailoring sanctions so as to best achieve their objectives.<sup>4</sup> The adoption of extraterritorial sanctions is one

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<sup>1</sup> See generally Chad P. Bown, ‘Russia’s war on Ukraine: A sanctions timeline’ (*Peterson Institute for International Economics*, 27 February 2023)

<<https://www.piie.com/blogs/realtime-economics/russias-war-ukraine-sanctions-timeline>> accessed 7 March 2023.

<sup>2</sup> Joseph R. Biden, ‘Remarks by President Biden on Russia’s Unprovoked and Unjustified Attack on Ukraine’ (White House, Washington D.C., 24 February 2022)

<<https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/02/24/remarks-by-president-biden-on-russias-unprovoked-and-unjustified-attack-on-ukraine/>> accessed 7 March 2023; Directorate-General for Neighbourhood and Enlargement Negotiations, ‘Press statement by President von der Leyen on Russia’s aggression against Ukraine’ (24 February 2022)

<[https://neighbourhood-enlargement.ec.europa.eu/news/press-statement-president-von-der-leyen-russias-aggression-against-ukraine-2022-02-24\\_en](https://neighbourhood-enlargement.ec.europa.eu/news/press-statement-president-von-der-leyen-russias-aggression-against-ukraine-2022-02-24_en)> accessed 7 March 2023.

<sup>3</sup> See generally Felbermayr and others, ‘The Global Sanctions Data Base’ (2020) 129 *European Economic Review* 103561; updated in Kirikakha and others, ‘The Global Sanctions Data Base: An Update that Includes the Years of the Trump Presidency’ [2021] in Peter A.G. van Bergeijk (ed), *Research Handbook on Economic Sanctions* (Edward Elgar Publishing 2021).

<sup>4</sup> Charlotte Beaucillon, ‘An Introduction to Unilateral and Extraterritorial Sanctions: Definitions, State of Practice and Contemporary Challenges’ in Charlotte Beaucillon (ed),

particularly controversial method of modern sanctions design. Unilateral extraterritorial sanctions aim to regulate the conduct of persons located in and bearing the nationality of a third state, especially vis-à-vis sanctioned individuals, entities, or states. Such extraterritorial application of unilateral sanctions, which is particularly prevalent in US practice,<sup>5</sup> faces criticism from affected states,<sup>6</sup> practitioners,<sup>7</sup> and academic commentators.<sup>8</sup>

From a public international law perspective, unilateral extraterritorial sanctions may be criticised as contradicting the customary law on state jurisdiction.<sup>9</sup> To date, states – especially the US – have primarily defended their extraterritorial sanctions with reference to the established bases of jurisdiction.<sup>10</sup> The present article will examine these jurisdictional justifications for unilateral extraterritorial sanctions with regard especially to the current sanctions against Russia in response to the invasion of Ukraine. It will be argued that the traditional grounds cannot confer jurisdictional validity on unilateral extraterritorial sanctions without an impermissible extension of the underlying principles. To guarantee the international legality of secondary sanctions, a new base of jurisdiction will be submitted: anti-evasion. Anti-evasion should be recognised as a new ground of jurisdictional validity for a narrow category of secondary sanctions only, in order to increase the effectiveness of sanctions as instruments promoting the values of the international community.

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*Research Handbook on Unilateral and Extraterritorial Sanctions* (Edward Elgar Publishing 2021) 4.

<sup>5</sup> Iryna Bogdanova, 'Unilateral Sanctions in International Law and the Enforcement of Human Rights' (2022) 9 *World Trade Institute Advanced Studies* 89.

<sup>6</sup> Such as the EU: cf Stoll and others, 'Extraterritorial sanctions on trade and investments and European responses' (2020) European Parliament Think Tank, <[https://www.europarl.europa.eu/RegData/etudes/STUD/2020/653618/EXPO\\_STU\(2020\)653618\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/653618/EXPO_STU(2020)653618_EN.pdf)> accessed 7 March 2023.

<sup>7</sup> Rathbone, Jeydel and Lentz, 'Sanctions, Sanctions Everywhere: Forging a Path through Complex Transnational Sanctions Laws' (2013) 44 *Georgetown Journal of International Law* 1055.

<sup>8</sup> Susan Emmenegger, 'Extraterritorial Economic Sanctions and their Foundation in International Law' (2016) 33 *Arizona Journal of International and Comparative Law* 631.

<sup>9</sup> See generally Charlotte Beaucillon, 'Practice Makes Perfect, Eventually? Unilateral State Sanctions and the Extraterritorial Effects of National Legislation' in Natalino Ronzitti (ed), *Coercive Diplomacy, Sanctions and International Law* (Brill Nijhoff 2016).

<sup>10</sup> Yann Kerbrat, 'Unilateral/Extraterritorial Sanctions as a Challenge to the Theory of Jurisdiction' in Beaucillon (n 4).

In order to unpack the jurisdictional validity of unilateral extraterritorial sanctions, the next section will outline the terminology of key concepts used before an overview of the main extraterritorial sanctions contained in the current US sanctions regimes against Russia in section three. Section IV will assess these extraterritorial sanctions with reference to the traditional bases of jurisdiction in international law: territory, nationality, and security. This will be followed by a conceptual argument to recognise new grounds of jurisdiction in light of the purposes underlying the doctrine of jurisdiction. Sections VI and VII develop the proposal of anti-evasion as a novel ground of jurisdiction justifying extraterritorial sanctions. Section VIII concludes.

## II. DEFINITIONAL DELINEATION

In public international law, unilateral or autonomous sanctions are restrictive measures imposed by an individual state (or regional international organisations such as the EU, which for the purposes of this article, will be conceived of as a ‘state’) against another state outside the framework of Chapter VII of the United Nations (UN) Charter (i.e., without or beyond an existing sanctions regime pursuant to a resolution of the UN Security Council).<sup>11</sup> Contemporary sanctions packages encompass both primary and secondary sanctions. Primary sanctions impose restrictions or conditions on the targets’ ability to freely conduct economic relations and undertake other (non-economic) activities.<sup>12</sup> Secondary sanctions are designed to enhance the effectiveness of primary sanctions by imposing restrictions intended to deter third parties from entering into, or maintaining relations with, the targets of the primary sanctions.<sup>13</sup>

The concept of ‘jurisdiction’ denotes a state’s competence to regulate the conduct of natural and legal persons<sup>14</sup> and encompasses the legislative, judicial, and executive powers of the state (prescriptive, adjudicative, and

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<sup>11</sup> Alain Pellet and Alina Miron, ‘Sanctions’, *Max Planck Encyclopedia of Public International Law (MPEPIL)* (2013) para 62.

<sup>12</sup> cf Tom Ruys and Cedric Ryngaert, ‘Secondary Sanctions: A Weapon out of Control? The International Legality of, and European Responses to, US Secondary Sanctions’ [2020] *British Yearbook of International Law* 22.

<sup>13</sup> Rathbone, Jeydel and Lentz (n 7) 1070.

<sup>14</sup> James Crawford, *Brownlie’s Principles of Public International Law* (9<sup>th</sup> edn, OUP 2019) 440.

enforcement jurisdiction).<sup>15</sup> In the absence of some specific basis in international law, the starting point is the presumption that jurisdiction may not be exercised without a territorial or personal nexus to the state.<sup>16</sup> Primary sanctions may therefore be extraterritorial to the extent that the ‘designated persons’ whose conduct they purport to regulate are non-nationals located outside of the sanctioning state’s territory. In contrast, secondary sanctions are extraterritorial by definition because they purport to govern the activities of third parties that possess no territorial or personal connection to the sanctioning state.<sup>17</sup>

The dominant view in the current academic debate conceptualises both primary and secondary sanctions as an exercise of the jurisdiction to prescribe.<sup>18</sup> ‘Prescriptive jurisdiction’ refers to the authority of the legislative organs of the state to enact binding law; whereas ‘enforcement jurisdiction’ refers to the authority of the executive and juridical organs of the state to enforce such law.<sup>19</sup> The deterrent effect of sanctions enforces the extraterritorially-prescribed norm in a wider sense, but not under the traditional definition of enforcement jurisdiction.<sup>20</sup> In any case, the validity of an exercise of enforcement jurisdiction turns in part on the existence of valid prescriptive jurisdiction to regulate the underlying conduct.<sup>21</sup> This article will therefore analyse the jurisdictional validity of unilateral extraterritorial sanctions as exercises of the prescriptive jurisdiction of the sanctioning state.

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<sup>15</sup> Bernard H Oxman, ‘Jurisdiction of States’, *MPEPIL* (2007) para 3.

<sup>16</sup> Cedric Ryngaert, *Jurisdiction in International Law* (2nd edn, OUP 2015) 30. The broad prohibitive rule approach per the PCIJ in SS ‘Lotus’ (France v Turkey) (1927) PCIJ Series A, No 10, 19 has been rejected in state practice and therefore does not form part of customary law (and, in any case, has arguably been rejected by the ICJ in Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium), Judgment, ICJ Reports (2002) 3).

<sup>17</sup> Beaucillon (n 4) 6.

<sup>18</sup> See for example Jeffrey A. Meyer, ‘Second Thoughts on Secondary Sanctions’ (2009) 30 *University of Pennsylvania Journal of International Law* 905, 952-955, accepted in Julia Schmidt, ‘The Legality of Unilateral Extra-territorial Sanctions under International Law’ (2022) 27 *Journal of Conflict & Security Law* 53, 67.

<sup>19</sup> Malcolm N. Shaw, *International Law* (9th edn, CUP 2021) 559.

<sup>20</sup> On the relationship between the jurisdiction to enforce and the jurisdiction to prescribe more generally, see Ryngaert (n 16) 9-10.

<sup>21</sup> Meyer (n 18) 952.

### III. THE EXTRATERRITORIAL REACH OF CURRENT US UKRAINE-RELATED SANCTIONS AGAINST RUSSIA

The current Ukraine-related sanctions against Russia imposed by the US include both primary and secondary extraterritorial sanctions. The legal basis for US sanctions in response to the Russian invasion of Ukraine is a series of Executive Orders (EOs 14065,<sup>22</sup> 14066,<sup>23</sup> 14068,<sup>24</sup> 14071<sup>25</sup>) made pursuant to the International Emergency Economic Powers Act (IEEPA)<sup>26</sup> and the National Emergencies Act (NEA).<sup>27</sup> The EOs vest authority in the Secretary of the Treasury and the Secretary of State to employ all powers granted to the President by the IEEPA.<sup>28</sup> The majority of the restrictive measures currently adopted concern ‘US persons’ and property ‘within the US’.<sup>29</sup> These may be extraterritorial by virtue of the broad territorial and personal nexuses invoked in US sanctions practice, but not merely because they are intended to burden and deter certain extraterritorial conduct.<sup>30</sup>

Some US Ukraine/Russia sanctions are extraterritorial by virtue of their design. EOs 14068 and 14071 prohibit the re-export of, respectively, luxury (and other) goods and USD-denominated banknotes<sup>31</sup> and services<sup>32</sup> to persons located in Russia. Such re-export prohibitions necessarily purport to regulate the conduct of foreign-based entities by requiring them to refrain from engaging in the prohibited exports from the territory of a third state.<sup>33</sup> Other

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<sup>22</sup> 87 Fed. Reg. 10293 (21 February 2022).

<sup>23</sup> 87 Fed. Reg. 13625 (8 March 2022).

<sup>24</sup> 87 Fed. Reg. 14381 (11 March 2022).

<sup>25</sup> 87 Fed. Reg. 20999 (6 April 2022).

<sup>26</sup> International Emergency Economic Powers Act, 91 Stat. 1625, 50 U.S.C. § 1701 et seq (1977) (US).

<sup>27</sup> National Emergencies Act, 90 Stat. 1255, 50 U.S.C. § 1601 et seq (1976) (US).

<sup>28</sup> Blocking Property of Certain Persons and Prohibiting Certain Transactions With Respect to Continued Russian Efforts To Undermine the Sovereignty and Territorial Integrity of Ukraine Order 2022, EO 14065 (n 22) § 10.

<sup>29</sup> As generally authorised by International Emergency Economic Powers Act, 50 U.S.C. § 1702 (2011) (US). cf EO 14065 (n 22) §§ 1(a) and 2(a); EO 14066 (n 23) §§ 1(a)(ii) and (iii); EO 14068 (n 24) §§ 1(a)(ii)-(v); EO 14071 (n 25) §1(a).

<sup>30</sup> Meyer (n 18) 958.

<sup>31</sup> EO 14068 (n 24) § 1(a)(ii) and (iv).

<sup>32</sup> EO 14071 (n 25) § 1(a)(ii).

<sup>33</sup> Bogdanova (n 5) 104-105. See also Richard Gordon, Michael Smyth and Tom Cornell, *Sanctions Law* (Bloomsbury Publishing Plc 2019) 114.

export controls imposed by the Department of Commerce regulate US exports and exports from third countries that use US technology inputs such as equipment, software and blueprints.<sup>34</sup> These controls, known as foreign direct product rules (FDPR), are extraterritorial in their application to non-US exports.

The US EOs have also imposed extraterritorial secondary sanctions. For example, the asset freezes under EO 14065 extend to ‘any person’ (i.e. not limited to ‘US persons’) deemed to have ‘materially assisted, sponsored, or provided ... support for ... any person whose property and interests in property are blocked pursuant to this order’.<sup>35</sup> In light of the extremely expansive interpretations of similar provisions in previous sanctions regimes adopted by the Office of Foreign Assets Control (OFAC),<sup>36</sup> these sanctions will likely have a considerable extraterritorial reach. The US has previously threatened to expand the net of secondary sanctions within the Ukraine/Russia sanctions regime to ensure Russia’s financial isolation.<sup>37</sup>

Similarly, all EOs prohibit any transaction that ‘evades or avoids, has the purpose of evading or avoiding, causes a violation of, or attempts to violate’ any of the prohibitions, and prohibit conspiracies to violate any of the prohibitions.<sup>38</sup> These anti-evasion clauses partially reflect the definition of an ‘unlawful act’ under the IEEPA, which includes conspiring to violate or causing a violation of a sanctions measure.<sup>39</sup> The extraterritorial reach of US sanctions is thus achieved by prohibiting any conduct by non-US entities outside of the territory of the US which causes a violation in the US.<sup>40</sup>

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<sup>34</sup> Martin Chorzempa, ‘New technology restrictions against Russia could also target China’ (*PIIE*, 7 March 2022)

<<https://www.piie.com/blogs/realtime-economic-issues-watch/new-technology-restrictions-against-russia-could-also-target>> accessed 7 March 2023.

<sup>35</sup> EO 14065 (n 22) § 2(a)(iv).

<sup>36</sup> See for example the prohibition of ‘facilitation’: Rathbone, Jeydel and Lentz (n 7) 1102.

<sup>37</sup> James Politi, ‘US threatens to punish third parties helping Moscow evade sanctions’ (*Financial Times*, 25 March 2022).

<sup>38</sup> See for example EO 14065 (n 22) § 4(a)-(b).

<sup>39</sup> IEEPA (n 26) § 206.

<sup>40</sup> See generally Gordon, Smyth and Cornell (n 33) 114.

## IV. EXTRATERRITORIAL SANCTIONS AND THE TRADITIONAL GROUNDS OF JURISDICTION

### 4.1 The Territoriality Principle

The territoriality principle provides every state with the right to regulate activities on its territory.<sup>41</sup> Subjective territoriality creates jurisdiction over *conduct* taking place within the state's territory, whereas objective territoriality governs *consequences* of conduct which took place outside its territory.<sup>42</sup> Combined, the two principles permit the invocation of territorial jurisdiction whenever one of the constituent elements of a prohibited act takes place on the territory of the state claiming jurisdiction.<sup>43</sup>

The US has relied on different variations of the territoriality principle to justify the jurisdictional validity of its unilateral extraterritorial sanctions. The fines imposed by OFAC against the European banks BNP Paribas (BNPP)<sup>44</sup> and Crédit Agricole<sup>45</sup> for violating US sanctions provide an illustration of the US conception of a 'constituent element' for the purposes of territorial jurisdiction in the context of financial transactions. The US established the applicability of its sanctions law to the prohibited transaction (the financing of a transaction with a sanctions target) by BNPP, a non-US financial institution, by reference to, *inter alia*, its jurisdiction over the clearing transaction performed by a financial institution on US territory.<sup>46</sup> 'Clearing' refers to the preparatory steps undertaken before settlement (i.e., actual performance) of a contracted-for financial transaction, most often by a third-party clearinghouse.<sup>47</sup> To establish

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<sup>41</sup> Shaw (n 19) 561.

<sup>42</sup> Shaw (n 19) 563.

<sup>43</sup> Crawford (n 14) 442.

<sup>44</sup> See generally *US v BNP Paribas SA* (2014) 14 Cr 460 (SDNY), Statement of Facts and Department of the Treasury, Settlement Agreement between OFAC and BNPP (2014) Doc No COMPL-2013-193659 161, 21-26; as analysed in Bismuth: 'Pour une appréhension nuance de l'extraterritorialité du droit américain – Quelques réflexions autour des procédures et sanctions visant Alstom et BNP Paribas' (2015) *Annuaire français de droit international LXI* (CNRS Éditions) 785, 788-789, 796.

<sup>45</sup> See generally Department of the Treasury, Settlement Agreement between OFAC and CA-CIB (2014) Doc No COMPL-1000368.

<sup>46</sup> *US v BNPP* (n 44).

<sup>47</sup> cf ECB, 'Glossary of Terms Related to Payment, Clearing and Settlement Systems' (ECB, December 2009)



territorial jurisdiction, the clearing transaction was conceived of as a ‘constituent element’ of the prohibited transaction rather than as a distinct act. Such territorial ‘correspondent account-based jurisdiction’<sup>48</sup> has been upheld by US courts.<sup>49</sup>

It is likely that this justification will be employed to the current Ukraine-related sanctions against Russia. For example, EO 14068 prohibits ‘any approval, financing, facilitation, or guarantee by a United States person, wherever located, of a transaction by a foreign person where the transaction by that foreign person would be prohibited by this section if performed by a United States person or within the United States’.<sup>50</sup> Because the definition of a ‘US person’ includes ‘any person in the United States’,<sup>51</sup> the US could invoke territorial jurisdiction justified by its ‘constituent element’ reasoning, as above, to fine a non-US entity for financing a prohibited transaction under the Order if the clearing transaction was done by any financial institution on US territory.

It is highly doubtful whether such reasoning confers jurisdictional validity on US extraterritorial sanctions. The constituent element analysis of territorial jurisdiction in public international law derives from the model of criminal law, in which constituents of a crime must be definitionally essential to the commission of the crime.<sup>52</sup> Thus defined, a clearing transaction performed on US territory does not form a ‘constituent element’ of the prohibited financing transaction: it is a distinct and incidental act.<sup>53</sup> Therefore, grounding jurisdiction on the mere routing of financial messages via US servers without any other link with the US whatsoever cannot be compatible with territorial jurisdiction.<sup>54</sup>

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<<https://www.ecb.europa.eu/pub/pdf/other/glossaryrelatedtopaymentclearingandsettlementsystems.pdf>> accessed 9 March 2023, 5.

<sup>48</sup> Explicitly termed such in 87 Fed. Reg. 38939 (7 August 2018) § 2.

<sup>49</sup> See for example *US v Budovsky* (2015) SDNY 13 Cr 368 (DLC); *Licci v Lebanese Canadian Bank SAL* (2016) 732 F3d 161 (2<sup>nd</sup> Cir); and especially *US v Reza Zarrab* (2016) SDNY 15 Cr 867 (RMB).

<sup>50</sup> EO 14068 (n 24) § 1(a)(v).

<sup>51</sup> *ibid* § 4(d).

<sup>52</sup> Halsbury’s Laws (5<sup>th</sup> ed, 2018) Vol 61, para 213.

<sup>53</sup> See Bismuth (n 44) 796.

<sup>54</sup> See generally Ruys and Ryngaert (n 12) 22.

It must be noted, however, that such ‘incidental-act’ territorial jurisdiction is not limited to the sanctions context: for example, the Foreign Corrupt Practices Act (FCPA)<sup>55</sup> applies to all ‘issuers’ which register securities with the US Securities and Exchange Commission (SEC),<sup>56</sup> creating an ‘exchange-based jurisdictional system’<sup>57</sup> over *foreign persons’ foreign acts of bribery based on the mere fact of listing on a US stock exchange. Routing payments through US bank accounts or sending emails to US companies has been found sufficient to establish such jurisdiction.<sup>58</sup> This practice is in tension with the US Restatement (Third) of Foreign Relations Law which requires the conduct in question to take place ‘wholly or in *substantial part*’ within a state’s territory to establish its prescriptive jurisdiction<sup>59</sup> (which may be understood as an expression of *opinio juris*).*

The ‘effects doctrine’ is another variation of the objective territoriality principle<sup>60</sup> relied on by the US to justify the extraterritorial application of its unilateral sanctions. Originally developed in US antitrust law,<sup>61</sup> this doctrine creates jurisdiction over extraterritorial acts which cause some harmful effect in the territory of the prescribing state.<sup>62</sup> One of the most famous invocations of the ‘effects principle’ in US sanctions practice is the Helms-Burton Act,<sup>63</sup> Title III of which was activated in May 2019 by US President Trump after 22 years of

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<sup>55</sup> Pub. L. No. 95-213, 91 Stat 1494 (1977) (codified at 15 USC §§ 78a et seq).

<sup>56</sup> FCPA § 78dd-1(a), in conjunction with §§ 78I and 78o(d).

<sup>57</sup> Ryngaert (n 16) 87.

<sup>58</sup> See for example *US v Technip SA (Plea Agreement)* SD Tex, No 4:10-CR-00439 (2010). Technip had bribed Nigerian officials through UK and Japanese agents, routing payments through US banks. It settled with the DOJ and SEC for USD338 million.

<sup>59</sup> American Law Institute, ‘*Restatement of the Law Third, The Foreign Relations Law of the United States*’ (St Paul 1987) § 402(1)(a); not superseded by *Restatement Fourth* (2018).

<sup>60</sup> Simma and Müller, ‘Exercise and Limits of Jurisdiction’ in Crawford and Koskeniemi (eds), *The Cambridge Companion to International Law* (CUP 2012) 140; Kerbrat (n 10) 176 et seq. Note that some authors conceptualise the effects doctrine as an independent basis of jurisdiction: for example Crawford (n 14) 447.

<sup>61</sup> ‘It is settled law [...] that any State may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the State reprehends; and these liabilities other States will ordinarily recognise.’ in *US v Aluminium Co of America* 148 F2d 416 (1945) (2<sup>nd</sup> Cir). See generally Basedow, ‘Antitrust or Competition Law, International’, *MPEPIL* (2014).

<sup>62</sup> Crawford (n 14) 447.

<sup>63</sup> Cuban Liberty and Democratic Solidarity (LIBERTAD) Act (‘Helms-Burton Act’) Pub. L. No. 104-114, 110 Stat 785 (1996) (codified at 22 USC §§ 6021 et seq).

suspension.<sup>64</sup> Section 103 of the Act claims that ‘[i]nternational law recognizes that a nation has the ability to provide for rules of law with respect to conduct outside its territory that has or is intended to have substantial effect within its territory’. Accordingly, the adverse effects on US commerce and US policy<sup>65</sup> were the basis for the extraterritorial<sup>66</sup> application of the Section 302 prohibition on ‘trafficking’ in US property. The invocation of the ‘effects doctrine’ to establish the jurisdictional validity of unilateral extraterritorial sanctions has been upheld by US courts.<sup>67</sup>

The US has not explicitly relied on the ‘effects doctrine’ to justify the jurisdictional validity of its current Ukraine/Russia sanctions regime. However, the EOs prescribing the sanctions describe the national emergency caused by the Russian invasion as ‘an unusual and extraordinary threat to the national security and foreign policy of the United States’.<sup>68</sup> If, as will be explored below, the scope of the protective principle is properly limited to national security and the government functions of the state,<sup>69</sup> this reference to foreign policy may be interpreted as an implicit invocation of the ‘effects doctrine’, by partial analogy to the justification for extraterritoriality under the Helms-Burton Act. It is therefore possible that the US will seek to justify its current sanctions against Russia by relying on the doctrine.

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<sup>64</sup> The White House, ‘President Donald J Trump is Taking a Stand For Democracy and Human Rights in the Western Hemisphere’ (*The White House*, 17 April 2019) <<https://trumpwhitehouse.archives.gov/briefings-statements/president-donald-j-trump-taking-stand-democracy-human-rights-western-hemisphere/>> accessed 8 March 2023.

<sup>65</sup> In a letter addressed to Senator Kennedy in 1979, the Secretary of State explained that: ‘We have justified our actions [in applying an embargo extraterritorially] as needed to prevent adverse effects on US commerce or an evasion of important US policy’, reproduced in Nash, ‘Contemporary Practice of the United States Relating to International Law’ (1980) 74 AJIL 182. See generally IEEP (n 26) § 202 (codified at 50 USC § 1701).

<sup>66</sup> On the extraterritorial application of the Helms-Burton Act and its justification by reference to the effects doctrine, see Kerbrat (n 10) 176-177.

<sup>67</sup> See for example *US v Budovsky* (n 49) (‘[a] jurisdictional nexus exists “when the aim of that activity is to cause harm inside the United States or to US citizens or interests”’).

<sup>68</sup> See for example the preamble to EO 14066 (n 23).

<sup>69</sup> ‘Protective jurisdiction is proper if the activity threatens the security or government functions of the United States’: *US v Peterson* (1987) 812 F2d 486, 494 (9<sup>th</sup> Cir). See also *Arrest Warrant* (n 16) 92 (Judge Rezek) (‘... the principle of the defence of certain legal interests to which the State attaches particular value: the life and physical integrity of the sovereign, the national heritage, good governance’).

However, the ‘effects doctrine’ cannot justify the extraterritorial application of current US sanctions against Russia. Although the existence of the doctrine and its applicability to unilateral sanctions is generally accepted in both state practice<sup>70</sup> and international case law,<sup>71</sup> the limits of the doctrine under public international law are contested but undoubtedly narrower than claimed in US sanctions practice. In particular, effects jurisdiction is triggered only if the regulated conduct has ‘direct, foreseeable and substantial effects’ in the prescribing state’s territory.<sup>72</sup> It is difficult to see, however, how US-sanctioned economic activities by foreign persons outside of US territory could produce such effects in US territory.<sup>73</sup> While foreseeable, any adverse effect could only be indirect, i.e. resulting from continuing support for the Russian Government and its policy of aggression, which the sanctions seek to undermine. Moreover, while theoretically possible, it is highly unlikely that a sanctioned transaction would have a *substantial* indirect effect on *US territory* in the absence of any other link. In ordinary circumstances, a transaction between third parties affects neither the US economy nor the integrity of the US sanctions regime domestically.

Moreover, it is particularly controversial whether effects-based jurisdiction applies when the conduct in question complies with the laws of the state in which it was carried out.<sup>74</sup> As Emmenegger points out, this point distinguishes the sanctions context from the field of antitrust regulation,<sup>75</sup> in which the ‘effects doctrine’ was first developed: whereas antitrust law rests on similar shared premises in different states, this is not true for most sanctions regimes, given their political and polarising nature. However, because of the

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<sup>70</sup> Kerbrat (n 10) 177-178. For explicit EU acceptance in the sanctions context, see Stoll and others (n 6) 53.

<sup>71</sup> *France v Turkey* (n 16) 23; *Arrest Warrant* (n 16) 77 (Judges Higgins, Kooijmans, Buergenthal).

<sup>72</sup> As accepted in competition law: *Hartford Fire Ins Co v California* (1993) 509 US 764, 796 (SCOTUS) and Case C-413/14 *Intel Corporation Inc v European Commission* [2017] ECLI:EU:C:2017:632 paras 40ff; and invoked in relation to US unilateral sanctions in response to the Euro-Siberian pipeline crisis: *Campagne Européenne Des Petroles S.A. v Sensor Nederland BV* (1983) (Hague District Court) in (1983) 22 *International Legal Materials* 66, 72.

<sup>73</sup> cf Thilo Rensmann, ‘Völkerrechtliche Grenzen extraterritorialer Wirtschaftssanktionen’ in Dirk Ehlers and Hans-Michael Wolfgang (eds), *Recht der Exportkontrolle: Bestandsaufnahme und Perspektiven* (Deutscher Fachverlag 2015), 106; Emmenegger (n 8) 657 (assessing jurisdiction in the BNP Paribas case).

<sup>74</sup> Emmenegger (n 8) 656.

<sup>75</sup> *ibid* 656.

remarkable unity of international responses to Russian aggression, this objection may be less weighty in the particular context of Russia/Ukraine sanctions.

## 4.2 The Nationality Principle

By virtue of the nationality or ‘active personality’ principle, every state possesses jurisdiction over acts of its (natural or legal) nationals, wherever located.<sup>76</sup> The application of the principle may be extended through reliance on residence and other connections as evidence of allegiance to the state owed by non-nationals.<sup>77</sup> Although the conditions for the grant of nationality are prescribed at the domestic level, international law appears to require a ‘genuine connection’ with the state.<sup>78</sup>

The US has relied on several extensive interpretations of the nationality principle in its extraterritorial sanctions practice. Under certain sanctions programmes, compliance is required not only from ‘US persons’ strictly speaking, but also from foreign companies owned or controlled by US companies.<sup>79</sup> For example, under Section 218 of the Iran Threat Reduction and Syria Human Rights Act,<sup>80</sup> the civil penalties provided for by the IEEPA shall be imposed on US persons for sanctions violations committed by an entity ‘owned or controlled by the United States person and established or maintained outside the United States’. ‘Owned or controlled’ is broadly interpreted in the same section to mean holding more than 50 percent of the equity interest or a majority of the seats on the board of directors, or otherwise controlling the actions, policies and personnel decisions of the entity. This ‘control’ criterion for personal jurisdiction was reiterated in relation to sanctions reimposed against Iran after US withdrawal from the Joint Comprehensive Plan of Action (JCPOA).<sup>81</sup>

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<sup>76</sup> *SS ‘Lotus’* (n 16) 92 (Judge Moore); See generally Crawford (n 14) 443-444.

<sup>77</sup> Crawford (n 14) 443.

<sup>78</sup> *Nottebohm Case (Liechtenstein v Guatemala)* (Second Phase), Judgment, ICJ Reports (1955) 4, 23. This requirement is now generally accepted: Oxman (n 15).

<sup>79</sup> US Department of the Treasury, OFAC Consolidated Frequently Asked Questions, ‘Who must comply with OFAC regulations?’ (*US Department of the Treasury*, 15 January 2015), <<https://home.treasury.gov/policy-issues/financial-sanctions/faqs/11>> accessed 9 March 2023.

<sup>80</sup> Pub. L. No. 112-158, 126 Stat. 1214 (2012) (codified at 22 USC § 8701 et seq) .

<sup>81</sup> EO 13846 (n 48) § 8.

The US Ukraine/Russia sanctions package does not currently extend to foreign subsidiaries and therefore does not require the invocation of the control criterion. A juridical ‘US person’ is defined in the EOs prescribing the sanctions as an ‘entity organized under the laws of the United States or any jurisdiction within the United States (including foreign branches)’.<sup>82</sup> The Directives 1A and 2 under EO 14024 make explicit that the sanctions apply to ‘US subsidiaries’ only, which includes ‘those branches, offices, and agencies of foreign financial institutions that are located in the United States, but not such institutions’ foreign branches, offices, or agencies’.<sup>83</sup> The core personal nexus is maintained because a branch, unlike a subsidiary, is not a separate legal entity but rather an extension of the parent company (and therefore not independently incorporated under a non-US jurisdiction). The sanctions therefore cannot be considered extraterritorial by reference to the nationality of the corporations regulated.

In light of previous US practice, for example concerning Iran,<sup>84</sup> it is however possible that the Ukraine-related sanctions against Russia will be extended to controlled foreign subsidiaries. Such an extension would not be justified under the international law of jurisdiction. The control criterion for personal jurisdiction is employed exclusively by the US and is therefore not generally accepted in state practice.<sup>85</sup> The lack of international protest<sup>86</sup> is likely a consequence of the overlap in the sanctions regimes of the US and other states, which puts non-US subsidiaries in a similar position under both extraterritorial US sanctions law and other sanctions regimes. Moreover, control-based jurisdiction contradicts the method of identification of corporate nationality laid down by the ICJ in *Barcelona Traction* and *Abmadou Sadio Diallo*, which rests on

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<sup>82</sup> See EO 14065 (n 22) § 8(c).

<sup>83</sup> OFAC, Directive 1A under Executive Order 14024 (22 February 2022), ‘Prohibitions Related to Certain Sovereign Debt of the Russian Federation’ and Directive 2 under Executive Order 14024 (24 February 2022), ‘Prohibitions Related to Correspondent or Payable-Through Accounts and Processing of Transactions Involving Certain Foreign Financial Institutions’.

<sup>84</sup> The Iran Threat Reduction and Syria Human Rights Act strengthened already existing sanctions against Iran.

<sup>85</sup> See generally Kerbrat (n 10) 171-175.

<sup>86</sup> cf for example the absence of any criticism in Stoll and others (n 6).

the place of incorporation rather than the nationality of the shareholders.<sup>87</sup> In any case, it is difficult to see how the control criterion satisfies the requirement of a 'genuine connection' between the foreign controlled entity and the sanctioning state. A subsidiary incorporated under, and wholly operating in, a different jurisdiction does not evidence a 'social fact of attachment' to the sanctioning state, and does not possess reciprocal rights and duties in relation to the sanctioning state,<sup>88</sup> as evidence of such a 'genuine link'.

Implicitly, the US has also relied on the nationality principle to justify its unilateral extraterritorial sanctions consisting of export and re-export prohibitions. Since the 1982 Euro-Siberian pipeline controversy,<sup>89</sup> the US has asserted that its jurisdiction 'runs with'<sup>90</sup> exported US goods or technology at all times after these leave US territory. This reasoning has been expanded to cover certain foreign-origin items which incorporate US goods or technology.<sup>91</sup> The US now purports to prescribe to '(a) wholly non-US parties, (b) who are located outside the United States and who possess lawfully obtained US origin items, lawfully produced foreign-origin items with non-*de minimis* US content, or certain wholly non-US origin items, (c) not only where and to whom they may provide these items, but also (d) what may not be done with these items in-country, and (e) to do so in perpetuity'.<sup>92</sup> This assertion of jurisdiction over re-exports is considered to invoke the nationality principle with respect to exported goods and technology.<sup>93</sup>

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<sup>87</sup> *Barcelona Traction, Light and Power Company, Limited* (Belgium v Spain) (Judgment) [1970] ICJ Rep 3, 28-47; *Ahmadou Sadio Diallo* (Republic of Guinea v Democratic Republic of the Congo) (Preliminary Objections, Judgment) [2007] ICJ Rep 582 paras 89-94. See generally Ruys and Ryngaert (n 12) 18.

<sup>88</sup> *Nottebohm* (n 78) 23 ('[N]ationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred ... is in fact more closely connected with the population of the State conferring nationality than with that of any other State').

<sup>89</sup> See generally Bowman, 'A Prescription for Curing US Export Controls' (2014) 97 *Marquette Law Review* 599, 630-639.

<sup>90</sup> Douglas Rosenthal and William M. Knighton, *National Laws and International Commerce: The Problem of Extraterritoriality* (Routledge 1982) 54.

<sup>91</sup> Commerce and Foreign Trade, 15 C.F.R. § 734.3.

<sup>92</sup> Bowman (n 89) 644.

<sup>93</sup> See for example Patrick C.R. Terry, 'Enforcing US Foreign Policy by Imposing Unilateral Secondary Sanctions: Is Might Right in Public International Law?' (2020) 30

The US has imposed extraterritorial export and re-export prohibitions as part of the current Ukraine/Russia sanctions regime and thereby implicitly relied on the nationality principle as the basis for its jurisdiction. For example, EO 14065 prohibits the ‘exportation, re-exportation, sale, or supply, directly or indirectly, from the United States, or by a United States person ... of any goods, services or technology’ to the Donetsk and Luhansk regions of Ukraine.<sup>94</sup> The US Department of Commerce, acting through the Industry and Security Bureau, established two new foreign direct product rules (FDPR) which restrict exports of foreign-origin products that use US technology to Russia and Russian ‘military end users’ in particular.<sup>95</sup> Other export and re-export restrictions have been imposed on luxury goods and USD-banknotes.<sup>96</sup>

By extension, both primary and secondary<sup>97</sup> US sanctions restricting the export of services may also be considered to invoke the nationality principle. In the context of financial transactions, ‘correspondent account-based jurisdiction’ has been further justified by conceptualising the ‘execution on behalf of others of money transfers’ as an ‘exportation of a service’ from the US, and therefore falling within the scope of extraterritorially applicable sanctions law.<sup>98</sup> The US implicitly invoked this reasoning against BNPP when it relied on a generalised *lex monetae*, i.e. the use of US currency,<sup>99</sup> as one of the grounds of jurisdiction justifying the applicability of its sanctions law to a European financial institution. The same reasoning might be applied in the current Ukraine/Russia context in relation to EO 14071, which *inter alia* prohibits the ‘exportation, re-exportation, sale, or supply, directly or indirectly, from the United States, or by a United State person ... of any category of

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Washington International Law Journal 1, 15; Laurent Hoff, *Transaktionen in US-Dollar und Sekundäre Sanktionen: Ist die US-amerikanische Sanktionspraxis mit dem Völkerrecht vereinbar?* (Nomos 2019) 147.

<sup>94</sup> EO 14065 (n 22) § 1(a)(iii).

<sup>95</sup> 15 C.F.R. §§ 734, 738, 740, 742, 744, 746, 772. See Bureau of Industry and Security, Final Rule, Federal Register, Vol 87, No 42 (3 March 2022).

<sup>96</sup> EO 14068 (n 24) § 1(a)(ii).

<sup>97</sup> Mark Jaeger, ‘Circumventing Sovereignty: Extraterritorial Sanctions Leveraging the Technologies of the Financial System’ (2021) 27 Swiss Political Science Review 180, 183.

<sup>98</sup> *US v Banki* (2012) 2d Cir 685 F3d 99; *US v Homa International Trading Corp* (2004) 2d Cir 387 F3d 144 as cited in *US v Reza Zarrab* (n 49) 17.

<sup>99</sup> *US v BNPP* (n 44) paras 5, 8, 16 et seq; as analysed in Bismuth (n 44).



services as may be determined ... to any person located in the Russian Federation'.<sup>100</sup>

The nationality principle cannot create jurisdiction over extraterritorial prohibitions on exports and re-exports of US origin or foreign goods and services. Item origin-based nationality jurisdiction has generally been rejected as a basis for prescriptive jurisdiction.<sup>101</sup> The limited exceptions for marine vessels, aircraft and spacecraft<sup>102</sup>, and certain cultural property<sup>103</sup> are best viewed as *sui generis* rules rather than instances of the nationality principle.<sup>104</sup> This conclusion is reinforced by the characterisation of personal jurisdiction as based on citizens' allegiance<sup>105</sup> and 'interests and sentiments'<sup>106</sup> towards the state: it is therefore logically inconsistent to apply the nationality principle to non-sentient exports. Similarly, goods and services cannot possess rights against, and duties towards, the state.<sup>107</sup> In any case, the concept of permanent nationality of exported items is not applied in other areas of international trade law, including by the US: there is no general acceptance of the concept in state practice, regardless of the paucity of strong objections to US export and re-export sanctions.<sup>108</sup>

### 4.3 The Protective Principle

The protective or security principle, as a corollary of state sovereignty and independence,<sup>109</sup> permits the assumption of jurisdiction over extraterritorial acts which affect the internal or external security or other key interests of the state.<sup>110</sup> Although the existence of the doctrine is well-established, its boundaries

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<sup>100</sup> EO 14071 (n 25) § 1(a)(ii).

<sup>101</sup> Bowman (n 89) 654. In the sanctions context, see Ruys and Ryngaert (n 12) 20.

<sup>102</sup> Oxman (n 15); Crawford (n 14) 448-450.

<sup>103</sup> Francesco Francioni, 'Cultural Heritage' (2020) *MPEPIL* para 2.

<sup>104</sup> See for example the classification in Crawford (n 14) Ch 21.

<sup>105</sup> Crawford (n 14) 443.

<sup>106</sup> *Nottebohm* (n 78).

<sup>107</sup> *ibid.*

<sup>108</sup> See Sarah H. Cleveland, 'Norm Internalization and US Economic Sanctions' (2001) 26 *Yale Journal of International Law* 1, 6-7.

<sup>109</sup> Ryngaert (n 16) 115.

<sup>110</sup> Crawford (n 14) 446.

remain unclear<sup>111</sup> and malleable.<sup>112</sup> State practice explicitly invoking protective jurisdiction is restricted to ‘acts that severely jeopardise a state’s government functions’<sup>113</sup> such as treason, though jurisdiction over currency, immigration and economic offences in US and UK practice may implicitly rely on the principle.<sup>114</sup>

The US has previously relied on the protective principle to justify the imposition of extraterritorial secondary sanctions on nationals of third states. For example, concerning Russia, the Countering America’s Adversaries Through Sanctions Act (CAATSA)<sup>115</sup> required the US President to impose sanctions on, *inter alia*, any person who ‘knowingly ... engages in a significant transaction with a person that is part of, or operates for or on behalf of, the defense or intelligence sectors of the Government of the Russian Federation’<sup>116</sup> and any person who ‘knowingly ... makes [such] an investment [into], or sells, leases, or provides to the Russian Federation, for the construction of Russian energy export pipelines, [such] goods, services, technology, information, or support’<sup>117</sup> as specified. These secondary sanctions have been partially justified as a response to ‘cyber intrusions and attacks’<sup>118</sup> by Russia, with President Trump explicitly invoking Russian ‘interference in [US] democratic process’ and its ‘subversion and destabilization’ of the international community.<sup>119</sup> US courts have confirmed that the extraterritorial application of the CAATSA sanction is

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<sup>111</sup> Shaw (n 19) 573.

<sup>112</sup> Crawford (n 14) 446 (‘The categories of what may be considered a vital interest for the purposes of protective jurisdiction are not closed, and no criteria exist for determining such interests beyond a vague sense of gravity.’)

<sup>113</sup> Simma and Müller (n 60) 144.

<sup>114</sup> Crawford (n 14) 446.

<sup>115</sup> Pub. L. No. 115-44 (2017) (codified at 22 USC § 9401 et seq); especially the Countering Russian Influence in Europe and Eurasia Act (CRIEEA) (22 USC § 9501 et seq).

<sup>116</sup> CAATSA § 231(a) (22 USC § 9525).

<sup>117</sup> CAATSA § 232(a) (22 USC § 9526).

<sup>118</sup> CAATSA § 212(3) (22 USC § 9502).

<sup>119</sup> The White House, ‘Statement by President Donald J Trump on Signing the “Countering America’s Adversaries Through Sanctions Act”’ (*The White House*, 2 August 2017), <<https://trumpwhitehouse.archives.gov/briefings-statements/statement-president-donald-j-trump-signing-countering-americas-adversaries-sanctions-act/>> accessed 9 March 2023.

motivated by national security concerns and is therefore justified under the protective principle of jurisdiction.<sup>120</sup>

The current extraterritorial sanctions against Russia in response to the invasion of Ukraine similarly invoke the protective principle. The EOs prescribing the sanctions maintain that Russia's purported recognition of the Donetsk People's Republic (DNR) and Luhansk People's Republic (LNR) and its war against Ukraine threaten the 'peace, stability, sovereignty, and territorial integrity of Ukraine', and thereby 'constitute an unusual and extraordinary threat to the national security and foreign policy of the United States'.<sup>121</sup> Under the framework of the IEEPA and NEA, this national emergency authorises the President to impose sanctions. Notably however, the press statements accompanying the new sanctions did not reference domestic security, rather emphasising the threat to 'global peace and stability'<sup>122</sup> caused by the Russian invasion.

The protective principle cannot justify unilateral extraterritorial sanctions beyond a very narrow set of circumstances. The legitimate exercise of protective jurisdiction is limited to conduct which threatens 'security or essential government functions'<sup>123</sup> and cannot therefore be based on indirect threats to the prescribing state through challenges to its foreign policy. The doctrine is further limited to the protection of *national* (i.e. domestic) rather than *international* security.<sup>124</sup> Thus, only the cybersecurity sanctions against Russia under CAATSA are jurisdictionally valid under the protective principle because they are

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<sup>120</sup> See for example *US v Reza Zarrab* (n 49) in relation to CAATSA sanctions against Iran; as analysed in Susan Emmenegger and Thirza Döbeli, 'The Extraterritorial Application of US Sanctions Law' in Andrea Bonomi and Krista K. Schefer (eds), *US Litigation Today: Still a Threat For European Businesses or Just a Paper Tiger?* (Schulthess Éditions Romandes 2018).

<sup>121</sup> cf preamble to EO 14065 (n 22) and preamble to EO 14066 (n 23).

<sup>122</sup> See for example The White House, 'Remarks by President Biden Announcing US Ban on Imports of Russian Oil, Liquefied Natural Gas, and Coal' (*The White House*, 8 March 2022)

<<https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/03/08/remarks-by-president-biden-announcing-u-s-ban-on-imports-of-russian-oil-liquefied-natural-gas-and-coal/>> accessed 9 March 2023.

<sup>123</sup> Meyer (n 18) 938.

<sup>124</sup> Shaw (n 19) 573 ('The [protective] principle provides that states may exercise jurisdiction over aliens who have committed an act abroad which is deemed prejudicial to the security of the particular state concerned').

responses to electoral interference, which threatens an ‘essential government function’. The invocation of threats to the peace and security of the international community cannot create protective jurisdiction over other CAATSA sanctions or the current sanctions in response to the invasion of the Ukraine.<sup>125</sup> Moreover, it is difficult to see how a localised armed conflict on the territory of a foreign state, as the war in Ukraine may currently be described, can constitute a threat to the national security of the US as a non-party to the conflict.

## V. TRADITIONAL AND NEW GROUNDS OF JURISDICTION: A CONCEPTUAL FRAMEWORK

The discussion above shows the relative usefulness<sup>126</sup> of the traditional bases of jurisdiction in assessing the jurisdictional validity of unilateral extraterritorial sanctions: although it has been concluded that, on balance, the traditional grounds cannot justify extraterritorial sanctions as implemented by the US, uncertainty remains about the precise limits of the doctrines invoked, particularly in light of conflicting state practice. Similarly, scholars have put forward conflicting views about the extent to which US sanctions (prior to the Russo-Ukrainian conflict) were justified under the traditional principles of jurisdiction. Ruys and Ryngaert conclude that sanctions restricting access to the sanctioning state’s economic and financial systems are justified by the territoriality principle, whereas measures imposing penalties are more problematic.<sup>127</sup> Meyer argues, more expansively, that a combined ‘territorial’ ground of jurisdiction justifies restrictions on economic relations with third-country nationals which do business with the sanctions target.<sup>128</sup> Emmenegger contends that most extraterritorial sanctions are justified by the traditional grounds of jurisdiction, but criticises ‘correspondent account-based jurisdiction’ as extending beyond such grounds.<sup>129</sup>

Especially in light of such uncertainty, the delineation of the appropriate scope of jurisdiction must be informed by the underlying purpose of the doctrine of jurisdiction under international law. Jurisdiction, as noted

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<sup>125</sup> As explicitly recognised by the EU: Stoll and others (n 6) 53-54.

<sup>126</sup> cf Kerbrat (n 10) 168.

<sup>127</sup> Ruys and Ryngaert (n 12) 9-29.

<sup>128</sup> Meyer (n 18).

<sup>129</sup> Emmenegger (n 8).

above, denotes state regulatory competence. By delineating the respective (often conflicting) spheres of competence of individual states, the principles of jurisdiction serve the dual purpose of facilitating effective international governance while simultaneously protecting and giving expression to state sovereignty (and its corollary of sovereign equality).<sup>130</sup> Sovereignty may be defined as the power and authority states have at any given moment in the development of the international legal system.<sup>131</sup> To exercise sovereignty, a state must be a subject of international law. Under Article 1 of the Montevideo Convention on Rights and Duties of States 1933,<sup>132</sup> a state as a person (and therefore subject) of international law should possess the following: a) a permanent population, b) a defined territory, c) a government, and d) the capacity to enter into relations with other states. Accordingly, the traditional bases of jurisdiction examined above may be conceptualised as instantiations of the Montevideo criteria of statehood: the territoriality principle reflecting territory, the nationality principle reflecting population, and the protective principle reflecting the existence of a government and its capacity to effectively enter into relations with other states.

A focus on the dual purpose of jurisdiction explains the evolutive nature of the concept of jurisdiction, and suggests that new grounds of jurisdiction may be legitimately recognised. The principle of sovereignty is not absolute. Its content and implications shift in accordance with historical developments, which condition the function of sovereignty in the international legal order at any given time and space.<sup>133</sup> It is therefore possible to recognise new grounds of jurisdiction which are not reflective of the core elements of statehood (and indeed *prima facie* restrict sovereignty) if such grounds increase the effectiveness of international governance. For example, the development of the universality principle as conferring jurisdiction over the prosecution of certain international crimes (such as crimes against humanity and war crimes),<sup>134</sup> arguably served the governance purpose of strengthening the enforcement of

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<sup>130</sup> cf Ryngaert (n 16) 5.

<sup>131</sup> cf Samantha Besson, 'Sovereignty', (2011) *MPEPIL* paras 1, 56-58.

<sup>132</sup> Which is generally accepted as the most authoritative formulation of the criteria of statehood: Shaw (n 19) 182. cf Opinion No 1 (1991) Yugoslavia Peace Conference Arbitration Commission 1991.

<sup>133</sup> Besson (n 131) paras 5, 8-9, 59-84.

<sup>134</sup> Oxman (n 15).

international human rights law and thereby protecting the rights of individuals. This purpose justified a potential encroachment on the concept of sovereignty.

## VI. ANTI-EVASION AS NOVEL JURISDICTIONAL GROUND

A potential new development in the principles of jurisdiction under international law is the recognition of anti-evasion as a jurisdictional ground. This trigger has been recently invoked in the extraterritorial application of EU legislation and upheld judicially in conjunction with other traditional bases of jurisdiction.<sup>135</sup> The doctrine is ‘intended to catch artificial behaviour designed to evade obligations laid down in EU law’<sup>136</sup> by requiring third-country entities to comply with EU law where this is ‘necessary or appropriate to prevent the evasion of any provision’<sup>137</sup> in the relevant regulations.

The US has not sought to justify its imposition of extraterritorial secondary sanctions by reference to anti-evasion as a basis of jurisdiction. Nevertheless, the prescriptive frameworks under which sanctions are currently imposed clearly pursue anti-evasion as a rationale, in order to achieve a broad and therefore effective<sup>138</sup> application of the respective sanctions regimes. For example, section 228 of CAATSA explicitly provides for sanctions against ‘foreign sanctions evaders’ by amending the Support for the Sovereignty, Integrity, Democracy and Economic Stability of Ukraine Act (SSIDESAs)<sup>139</sup> to sanction any foreign person who ‘facilitates a significant transaction or transactions, *including deceptive or structured transactions*’<sup>140</sup> for or on behalf of Russian sanctions targets.

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<sup>135</sup> *L’Oréal SA and Other v eBay International AG and Others* (2011) Case C-324/09 (CJEU) as interpreted in Lena Hornkohl, ‘The Extraterritorial Application of Statutes and Regulations in EU Law’ (2022) 1 MPILux Research Paper Series 1, 22-23.

<sup>136</sup> Joanne Scott, ‘The New EU “Extraterritoriality”’ (2014) 51 *Common Market Law Review* 1343, 1359. See also Hornkohl (n 135).

<sup>137</sup> See for example Regulation (EU) No 648/2012 of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories (4 July 2012), Art. 11(12); Regulation (EU) No 600/2014 of the European Parliament and of the Council on markets in financial instruments (15 May 2014), Art. 28(2).

<sup>138</sup> Beaucillon (n 4) 5.

<sup>139</sup> Pub. L. No. 113-95, codified at 22 USC § 8901 et seq (2014).

<sup>140</sup> SSIDESAs § 10(a)(2) (as amended by CAATSA § 228) (emphasis added).

As highlighted above, the current sanctions regime against Russia in response to the invasion of Ukraine also contains explicit anti-evasion clauses. The relevant EOs prohibit, *inter alia*, any transaction that ‘evades or avoids’ or ‘has the purpose of evading or avoiding’<sup>141</sup> any of the sanctions prescribed by the Orders. OFAC has stated that it is prepared to use this anti-evasion provision in EO 14024, codified in the Russian Harmful Foreign Activities Sanctions Regulations (RuHSR),<sup>142</sup> to impose sanctions on ‘supporters of Russian sanctions evasion’, such as non-US financial institutions contracting with NSPK, the operator of Russia’s MIR National Payment System.<sup>143</sup>

As a free-standing basis of jurisdiction, anti-evasion may confer jurisdictional validity on a narrow set of unilateral extraterritorial sanctions implemented to prevent the circumvention of the sanctions regime. The rationale of anti-evasion is not contested by other states. In particular, the EU Guidelines on the Implementation and Evaluation of Restrictive Measures (Sanctions) prohibit an EU-incorporated entity from using a company that it controls ‘as a tool to circumvent a prohibition’ and the giving of instructions to the controlled foreign company to such effect.<sup>144</sup> The recognition of anti-evasion as a legal basis for jurisdiction would represent only a limited extension of the current law, since it would apply only to arrangements *designed* to evade sanctions, i.e. deliberately set up with the purpose of circumvention (whether or not in addition to a commercial purpose). In light of this restrictive definition, sanctions targeting ‘innocent’ commercial transactions with a legitimate counterparty would not fall within the scope of anti-evasion jurisdiction.

This limited extension is justified as a tool to increase the effectiveness of unilateral sanctions in promoting the values and interests of the international community, such as the fight against wars of aggression, human rights violations

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<sup>141</sup> See for example EO 14065 (n 22) § 4.

<sup>142</sup> 31 C.F.R Part 587.

<sup>143</sup> US Department of the Treasury, OFAC Consolidated Frequently Asked Questions, ‘Do non-US financial institutions risk exposure to sanctions for contracting or otherwise dealing with NSPK?’ (*US Department of the Treasury*, 15 September 2022) <<https://home.treasury.gov/policy-issues/financial-sanctions/faqs/1082>> accessed 9 March 2023.

<sup>144</sup> Council of the EU, ‘Guidelines on Implementation and Evaluation of Restrictive Measures (Sanctions) in the Framework of the EU Common Foreign and Security Policy’ (4 May 2018) Annex to Doc No 5664/18, para 54.

or cyberattacks, without imposing a disproportionate burden on innocent third parties. The need for such an extension of jurisdiction for the purpose of increasing effectiveness of sanctions has already been recognised. For example, in rejecting the effects doctrine as a valid jurisdictional ground in the BNP Paribas case, Emmenegger noted that '[w]hat is affected is the sanctions' global effectiveness, because firms outside the US can engage in the conduct prohibited by US law'.<sup>145</sup> Perhaps paradoxically, the recognition of a narrow anti-evasion principle may decrease the extraterritorial extension of sanctions regimes by preventing gaps and thus generating a comprehensive response to the initial wrongdoing the sanctions seek to deter. In the context of Ukraine-related sanctions against Russia, evasion has been identified as an obstacle to their effectiveness as a method for inducing the Kremlin to fully reverse its actions and end aggression in Ukraine.<sup>146</sup> It is therefore imperative to legitimate sanctioning states' anti-evasion efforts in order to ensure the successful operation of the current sanctions regime. The recognition of anti-evasion as a basis for extraterritorial jurisdiction provides such legitimisation in the context of the international law on state jurisdiction.

Ruys and Ryngaert, in the only existing examination of anti-evasion as a jurisdictional ground in the sanctions context (to the present author's knowledge), conclude that anti-evasion does not jurisdictionally justify the imposition of (secondary) extraterritorial sanctions.<sup>147</sup> Three objections may be discerned from the analysis, all of which can be met. First, it is contended that the anti-evasion jurisdictional ground is specific to the field of financial regulation. However, there is nothing intrinsic in the anti-evasion principle which would prevent its recognition in the sanctions context, independently of developments in financial regulation (and competition law more generally).

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<sup>145</sup> Emmenegger (n 8) 657.

<sup>146</sup> International Institute for Strategic Studies, 'Russia and Sanctions Evasion' (2022) 28, Strategic Comment 15  
<<https://www.iiss.org/publications/strategic-comments/2022/russia-and-sanctions-evasion>> accessed 9 March 2023. See also Åslund and Snegovaya, 'The Impact of Western Sanctions on Russia and How They Can Be Made Even More Effective' (*Atlantic Council*, 2021),  
<<https://www.atlanticcouncil.org/wp-content/uploads/2021/05/The-impact-of-Western-sanctions-on-Russia-and-how-they-can-be-made-even-more-effective-5.2.pdf>>  
accessed 9 March 2023.

<sup>147</sup> Ruys and Ryngaert (n 12) 27-28.



Second, it is objected that the principle is too restrictive to be of any value, arguably capturing only transactions with deliberately set up artificial legal vehicles. It is correct that anti-evasion jurisdiction as currently recognised in EU law is limited to *artificial* arrangements *designed* to evade legal obligations, i.e. arrangements which ‘intrinsically lack business rationale, commercial substance or relevant economic justification’<sup>148</sup> beyond this purpose. However, the EU employs the same understanding of jurisdictions in relation to its sanctions,<sup>149</sup> without considering this to be an extension of the current international law on jurisdiction.<sup>150</sup> Accordingly, anti-evasion as a *novel* ground of jurisdiction may be defined less restrictively, thereby giving it practical effect. For example, this author has suggested a definition which captures all transactions *designed* to evade sanctions, whether or not these transactions are deliberately artificial or otherwise lack commercial viability.

Third, the comment that the recognition of anti-evasion as a jurisdictional ground ‘would upgrade the *political rationale* for the imposition of secondary sanctions ... to an independent *jurisdictional ground*’<sup>151</sup> may be understood as a principled objection. However, as examined above, the recognition of new jurisdictional grounds for the purpose of advancing political rationales of international governance is in accord with the underlying purposes of the doctrine of jurisdiction. It is therefore not illegitimate to recognise anti-evasion as a jurisdictional ground for the purpose of promoting the effectiveness of sanctions as tools of global governance and measures of enforcement of international law.

## VII. RECOGNISING ANTI-EVASION AS A JURISDICTIONAL GROUND

So far, this article has examined the jurisdictional validity of unilateral extraterritorial sanctions by reference to historical and current US practice. It has been argued that US sanctions regimes, including the sanctions against Russia in response to its unlawful aggression in Ukraine, stretch the traditional

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<sup>148</sup> Commission Delegated Regulation 285/2014 (13 February 2014) supplementing Regulation (EU) No 648/2012, Art. 3(2).

<sup>149</sup> cf Council of the EU (n 144).

<sup>150</sup> *ibid* para 52 (‘The EU will refrain from adopting legislative instruments having extra-territorial application in breach of international law’).

<sup>151</sup> Ruys and Ryngaert (n 12) 27.

bases of jurisdiction beyond their proper limits under customary international law. Thus, the territoriality principle cannot justify so-called ‘correspondent account-based jurisdiction’, nor can it confer, under the ‘effects doctrine’, jurisdictional validity on sanctions against foreign persons who purportedly cause harm to the US within its territory. Personal jurisdiction pursuant to the nationality principle cannot be extended to controlled foreign companies and similarly cannot provide a jurisdictional basis applicable to export and re-export prohibitions against third-country nationals and entities. As a result, the characterisation of the US financial and monetary system as an ‘exported service’ alternatively justifying ‘correspondent account-based jurisdiction’ must be deemed impermissible. Finally, most extraterritorial sanctions imposed by the US do not fall within the proper scope of protective jurisdiction. In particular, unilateral extraterritorial sanctions responding to threats to international peace and security exceed the prescriptive competence of individual states under the protective principle. In short, contrary to US assertions, its model of unilateral extraterritorial sanctions does not conform to the international law of state jurisdiction.

What is the significance of this conclusion? *Prima facie*, the continued prescription (but especially the enforcement) of unilateral extraterritorial sanctions contrary to the principles of jurisdiction amounts to the commission of an international wrong by the US,<sup>152</sup> particularly in light of the considerable adverse impact of US extraterritorial sanctions on third states<sup>153</sup> (which satisfies the additional requirement of an actualized injury).<sup>154</sup> The characterisation of the extra-jurisdictional sanctions against third parties as countermeasures does not preclude wrongfulness because lawful countermeasures may only be directed against the state which has committed the prior wrong.<sup>155</sup> States affected by US extraterritorial sanctions may therefore invoke the international responsibility of the US on behalf of their targeted nationals. This illegality of US unilateral extraterritorial sanctions under international law, and the consequent possibility

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<sup>152</sup> Crawford (n 14) 461.

<sup>153</sup> See generally Emmanuel Breen, ‘Corporations and US Economic Sanctions: The Dangers of Overcompliance’ in Beaucillon (n 4) 256.

<sup>154</sup> Kimberly Trapp, ‘Jurisdiction and State Responsibility’ in Stephen Allen and others (eds), *The Oxford Handbook of Jurisdiction in International Law* (OUP 2019) 356, 360.

<sup>155</sup> International Law Commission, ‘Draft Articles on the Responsibility of States for Internationally Wrongful Acts’ (2001) Yearbook of the International Law Commission Vol II Part Two, Art. 49(1)-(2).

of an invocation of responsibility, is particularly problematic in the context of Russian aggression against Ukraine because the success of the coordinated action in response at least partially depends on the perceived legitimacy of the measures taken. Otherwise, the political strength of the current sanctions against Russia is vulnerable to an accusation of hypocrisy by Russia and its allies.<sup>156</sup>

Accordingly, this article has examined anti-evasion as an alternative novel basis of jurisdiction justifying the imposition of unilateral extraterritorial sanctions. It has been argued that anti-evasion is a viable jurisdictional principle when confined to sanctions explicitly adopted for the purpose of preventing circumvention of the sanctions regime to the state. The limited extension of the current international law of jurisdiction that the recognition of this principle would demand is justified as a way of increasing the effectiveness of sanctions in promoting the values and interests of the international community. In an effort to limit the impact on third parties, the anti-evasion ground of jurisdiction should be confined to conduct designed to circumvent otherwise lawful sanctions.

In practice, the recognition of anti-evasion as a basis of prescriptive jurisdiction in the sanctions context must result from an evolution of the customary international law on jurisdiction. At present, the lack of strong protest by other states against the extraterritoriality of the Ukraine/Russia sanctions imposed by the US is conducive to such a development<sup>157</sup> (though it is insufficient in and of itself to conclusively establish a new customary rule of international law). However, as emphasised by the ICJ in *Nicaragua*, '[i]f a State acts in a way *prima facie* incompatible with a recognised rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than weaken the rule'.<sup>158</sup> In order to implement anti-evasion as a ground of jurisdiction, the US and other states must therefore explicitly rely on it to justify their unilateral extraterritorial

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<sup>156</sup> On symbolic significance, see Meyer (n 18) 934-935.

<sup>157</sup> cf for example responses to US sanctions against Iran: Ruys and Ryngaert (n 12) 81-116; Nathaniel Tilahun, 'Resisting (US) Sanctions: A Comparison of Special Purpose Vehicles, Blocking Statutes and Countermeasures' (2022) 17 *Global Trade and Customs Journal*.

<sup>158</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US) (Merits)* [1986] ICJ Rep. 4, para 186.

sanctions, rather than continuing to appeal to various extensions of the traditional jurisdictional principles. Having regard to the crucial necessity of strengthening the effectiveness and legitimacy of sanctions against Russia as a means of inducing it to comply with its international obligations vis-à-vis Ukraine, the time for such an explicit reliance has now come.

## CONCLUSION

Against the background of the response of the international legal community to the Russian invasion of Ukraine in February 2022, this article has sought to examine the jurisdictional validity of extraterritorial sanctions (as imposed primarily by the US). The traditional bases of jurisdiction – territory, nationality, security – cannot justify the imposition of extraterritorial sanctions to third parties. Therefore, anti-evasion should be recognised as a new ground of jurisdiction to confer validity on a limited number of measures targeting transactions designed to circumvent lawful sanctions. This would provide the necessary legitimisation to many sanctions measures currently imposed against Russia in connection with its aggression against Ukraine. Given the dual purposes of governance and sovereignty underlying the doctrine of jurisdiction, the recognition of anti-evasion as a jurisdictional ground would not be an impermissible extension of the rules of jurisdiction.