Extraterritorial Jurisdiction over Dual Use Nuclear Commodity Smuggling and International Law

Recommended Citation

Anthony J. Colangelo, "Extraterritorial Jurisdiction over Dual Use Nuclear Commodity Smuggling and International Law", NAPSNet Special Reports, November 15, 2011, https://nautilus.org/napsnet/napsnet-special-reports/extraterritori-l-jurisdiction-over-dual-use-nuclear-commodity-smuggling-and-international-law/

By Anthony J. Colangelo
November 15, 2011

This is a report from the Nautilus Institute workshop "Cooperation to Control Non-State Nuclear Proliferation: Extra-Territorial Jurisdiction and UN Resolutions 1540 and 1373" held on April 4th and 5th in Washington DC with the Stanley Foundation and the Carnegie Endowment for International Peace. This workshop explored the theoretical options and practical pathways to extend states' control over non-state actor nuclear proliferation through the use of extra-territorial jurisdiction and international legal cooperation.

Other papers and presentations from the workshop are available here.

Nautilus invites your contributions to this forum, including any responses to this report.

CONTENTS

I. Introduction

Anthony J. Colangelo, Assistant Professor of Law, SMU Dedman School of Law, states that in light of United Nations Security Council Resolution 1540, the main legal obstacles to establishing extraterritorial and, ultimately, "universal" jurisdiction over dual use nuclear

commodities smuggling boil down to a problem of legality. Colangelo shows that the concept of geographic legality offers a useful lens through which to examine the potential for extraterritorial jurisdiction over smuggling of dual use nuclear items. This report frames the major legal obstacles to establishing such jurisdiction, and, as a result, also reveals mechanisms for surmounting or breaking down those obstacles. Specifically, it clarifies the roles of national law, positive international law (treaties), and customary international law, along with key sovereignty and individual rights components, to establishing expansive and ultimately universal jurisdiction over dual use nuclear commodities smuggling anywhere in the world.

The views expressed in this report are those of the author and do not necessarily reflect the official policy or position of the Nautilus Institute. Readers should note that Nautilus seeks a diversity of views and opinions on significant topics in order to identify common ground.

II. Report by Anthony J. Colangelo

-"Extraterritorial Jurisdiction over Dual Use Nuclear Commodity Smuggling and International Law"

By Anthony J. Colangelo [*]

The principle of legality, "nullum crimen sine lege, nulla poena sine lege," or "no crime without law, nor punishment without law" [1] holds that conduct cannot be subjected to a legal rule without adequate notice that the rule applies at the time of the conduct. [2] Legality is a building block of any sophisticated legal system because without it, law tends to be arbitrary and illegitimate. [3] This Essay suggests that the main legal obstacles to establishing extraterritorial and, ultimately, what is called "universal jurisdiction" over dual use nuclear commodities smuggling in light of United Nations Security Council Resolution 1540 boils down to a problem of legality—though it may come dressed in a somewhat different guise than usual.

Lawyers typically think of legality along temporal dimensions. [4] For instance, it would violate the principle of legality if today State A passed a law prohibiting activity X, and that law purported to reach back in time to apply to X committed by State A persons yesterday and to punish them for it. Such an application of the law would be plainly *ex post facto*. [5] Yet legality may also operate along geographic dimensions. [6] Suppose State A gains custody of an individual and purports to extend State A law to conduct he committed in State B. If State A did not have jurisdiction to regulate his conduct at the time it occurred—even if State A's law was on the books—there is a legality problem. That is to say, application of State A law to conduct State A could not regulate at the time it occurred would also be ex post facto. Conceptually speaking, geographic legality focuses on law's reach or application in space rather than its existence in time, but the problem is essentially the same: someone is being subjected to a law he could not reasonably have expected would govern his behavior when he engaged in it. [7]

In what follows, I show that the concept of geographic legality offers a useful lens through which to examine the potential for extraterritorial jurisdiction over smuggling dual use nuclear items in light of U.N. Security Council Resolution 1540. [8] It frames the major legal obstacles to establishing such jurisdiction, and, as a result, also reveals mechanisms for surmounting or breaking down those obstacles. Specifically, it clarifies the roles of national law, positive international law (treaties), and customary international law, along with key sovereignty and individual rights components, to establishing expansive and ultimately universal jurisdiction over this activity anywhere in the world.

Part I elaborates the concept of geographic legality. It emphasizes a critical difference between exercises of adjudicative versus prescriptive jurisdiction by states in multistate systems. This

difference is especially noteworthy given reliance by supporters of expansive jurisdiction over smuggling activity on laws granting states jurisdiction over persons found or present in their territories, as well as the controversial but enduring maxim *male captus bene detentus*, which translates roughly as "a person improperly seized may nevertheless properly be detained (and brought to trial)." [9] Such presence or seizure establishes personal jurisdiction—a form of adjudicative jurisdiction, or jurisdiction to subject the defendant to the state's judicial process. [10] Yet just because a state gains adjudicative jurisdiction over a defendant does not necessarily mean the state has prescriptive jurisdiction, or the ability to apply its laws to the defendant's conduct. [11] In particular, if the state had no prescriptive jurisdiction over the conduct *when the defendant engaged in it*, there would be a geographic legality problem. Adjudicative jurisdiction to subject a defendant to judicial process cannot be used to bootstrap prescriptive jurisdiction over everything that defendant has ever done—specifically, activity the state had no jurisdiction to apply law to when it occurred.

Part II connects geographic legality to "sovereignty," an international legal construct describing the bundle of entitlements that basically define the state as a state, chief among them the power to regulate or prescribe law within a certain geographic territory. [12] International law also authorizes extraterritorial prescriptive jurisdiction by a state over activity abroad based on connecting links to the state's entitlements over territory and persons—for example, where the foreign activity has a substantial effect in the state's territory or involves the state's nationals abroad. [13] This creates the possibility of overlapping national laws governing the same activity. Finally, international law may authorize application of international legal norms by states absent any national connecting link. This is called universal jurisdiction. [14]

The scope of a sovereign's prescriptive jurisdiction is crucial to the legality analysis. The question of whether legality limits sovereignty typically focuses on the sovereign's power in time, i.e., the power to create law prohibiting an activity after it occurs. But because geographic legality operates in space, it limits sovereignty not only as an abstract principle of justice, but also as a matter of the sovereignties of other states. To return to our two-state hypothetical, absent a basis for prescribing law over a defendant's activity when it occurs, State A may not apply its law to conduct in State B even if State A gains adjudicative (personal) jurisdiction over the defendant at some later point. This is a matter not only of the rights of the defendant, but also of the sovereignty of State B. By applying State A law to the defendant's past State B conduct, State A retroactively projects its law into State B territory in a way that exceeds State A's prescriptive jurisdiction under international law, thereby infringing State B's sovereignty.

Part III shows how these problems can be overcome. It traces the mutually reinforcing roles of national law, treaties, and custom in establishing extraterritorial and universal jurisdiction. It is important to recognize the relationships among these types of law and to resist temptations to place each into its own hermetically sealed box for purposes of artificial analytical cleanliness. That is not the way international law works, and doing so threatens to stunt the development of the law prohibiting dual use smuggling. This Part also flags potential legality problems with the definition of the crime of dual use smuggling: namely, that an overly broad definition may provide inadequate notice and cast too wide a net by catching innocent and even socially desirable activities. I suggest a way around this problem can be found in an intent requirement accompanying the activity—a requirement already employed in both domestic and international law.

Part IV briefly explores the appropriateness of universal jurisdiction over dual use smuggling. It does so through use of analogy to established universal jurisdiction offenses. An important point of clarification here: the use of analogy is not meant as a matter of actual lawmaking potential. International law cannot be "made" this way; either the law exists or it doesn't. But analogies are

helpful heuristics in that if nuclear smuggling looks like other things over which international law authorizes universal jurisdiction, perhaps it too is an appropriate subject of universal jurisdiction. I conclude that it is.

I. Geographic Legality

Legality is generally thought of in terms of time. The natural reading of "no crime without law" implies that unless there is a law in existence prohibiting an activity at the time it occurs, the activity cannot be illegal. If we were to plot the principle in a purely temporal way, it might look something like Figure 1 below:

Fig. 1

	State A *then*----------|	State A *now*
Does not violate legality:	law	activity
Violates legality:	activity	law

If the law precedes the activity in time (top line), there is no problem. But if the activity precedes the law (bottom line), there was no law in existence prohibiting the activity when it took place, creating a legality problem.

The concept of geographic legality works much the same way, but its focus is on the reach of the law in space as opposed to its existence in time. Instead of just one state, State A, where State A law indubitably applies, the international system comprises multiple states and limits the spatial reach of their laws. To plot it, we therefore must posit more than one state. We can start with State A and State B. As long as State A law does not apply to every activity everywhere in the world, geographic legality comes into play.

Consider the situation where State A law prohibits X but does not reach X inside State B—perhaps because X involves only State B persons acting in State B. Under international law, State A has no basis to apply State A law to this activity, just as, for example, Germany has no basis to apply German hate speech laws to U.S. nationals speaking to other U.S. nationals in the United States. We therefore have the following situation, represented by Figure 2, when X takes place:

Fig. 2

State A	State B
Law prohibiting X ----→|no basis to apply law|	X

A geographic legality problem arises where State A gains custody of someone who engaged in X outside of State A and seeks to prosecute; for present purposes, let's say the activity occurred in State B. This might be represented by Figure 3:

Fig. 3

State A		State B
then:	Law prohibiting X-----→| no basis to apply law|	X
now:	Custody of person who engaged in X (in State B)	

Under international law, State A can claim adjudicative jurisdiction, or jurisdiction to subject to judicial process, over persons in State A territory. [16] State A might do so, for instance, in order to extradite a person back to State B. [17] International law does not render State A's courts powerless to resolve such issues. Of course, State A may also employ its adjudicative jurisdiction to apply State A law to the individual—but only for activity over which State A had prescriptive jurisdiction to begin with. Thus if a State B national committed X in State A, State A courts clearly could apply State A law prohibiting X to that person, the same way a German court could apply German hate speech laws to a U.S. national speaking in Germany. But absent the initial authority to regulate activity as a matter of prescriptive jurisdiction, the existence of adjudicative jurisdiction at some later point does not retroactively bring within the compass of State A's laws everything ever done by an individual in State A custody, including acts in State B over which State A lacked prescriptive jurisdiction when they occurred. In terms of Figure 3 then, the addition of the line giving State A adjudicative jurisdiction now over the individual who committed X then does not alter the lack of State A prescriptive jurisdiction in the line above to apply State A law to X in the first instance.

This may all seem a little abstract, but we can easily translate it to concrete issues of extraterritorial jurisdiction over dual use smuggling by substituting X with that activity. Thus if a state criminalizes dual use smuggling pursuant to Resolution 1540 and gains custody of a suspected smuggler found or present in its territory, the state has jurisdiction to subject the individual to its judicial process. However, if the conduct occurred outside the state, and the state did not have prescriptive jurisdiction to apply its law to the smuggling*when it occurred*, the existence of adjudicative jurisdiction at some later point cannot authorize retroactive application of the state's law to the prior extraterritorial conduct.

The next questions are how to authorize extraterritorial and ultimately universal jurisdiction over dual use smuggling under international law. To do so, a quick primer on the law of jurisdiction and its relationship to state sovereignty helps to frame the relevant legal and policy stakes. I then show how national, treaty, and customary international law can, and to some extent already are, working in this direction, as well as point the way for future developments.

II. Extraterritorial Jurisdiction and Sovereignty

The most frequently heard objection to a state's exercise of extraterritorial jurisdiction is the potential impact on other states' "sovereignty." Thus if State A asserts jurisdiction inside State B, the commonly voiced worry is that such an assertion might infringe State B's sovereignty. But what does this mean? Unless we know what sovereignty is, it is impossible to discern whether it has been infringed. The word itself does no independent work. Standing alone it reduces to a tautology. It cannot tell us on its own whether a given entity is truly a sovereign or what that status entails. Rather, sovereignty is a label signifying the result of an allocation of power, not the reason for that allocation of power. [18]

In the international system, sovereignty basically describes the aggregate bundle of powers or entitlements recognized by international law that states enjoy vis-à-vis one another, as well as the interface between the state and international law. [19] For instance, every state enjoys the power or entitlement to make, apply and enforce its laws inside its own borders. These entitlements tend to define the state in relation to other states and to international law. Yet these relations are constantly morphing. A state's entitlement to exercise power inside its borders used to be far more absolute. Before World War II, how a state treated its own inhabitants was not a subject of international law. [20] But now, while international law recognizes and indeed guarantees a state's extensive powers within its borders, they are less absolute. The state cannot, for example, legitimately claim power to perpetrate serious human rights abuses upon its inhabitants. International law has developed to alter and curtail this power. Sovereignty offers no analytically independent reason why

states have or don't have power; it simply describes the power states do have at any given moment of development of the international legal system.

Yet one might argue that sovereignty at its purest describes absolute power, and therefore any outside interference with a state's regulatory powers inside its borders is an erosion of sovereignty. The apparent stability of this definition is also a mirage, however, as illustrated by states' powers vis-à-vis each other as coequal "sovereigns" in the international system. Entitlements to make, apply and enforce law used to be strongly territorial in relation to other states, such that any exercise of extraterritorial jurisdiction in another state constituted an infringement of that state's sovereignty. The absolute power argument underwriting these jurisdictional rules comes though acutely in U.S. Supreme Court Chief Justice John Marshall's eloquent restatement of the law as it existed in 1812:

> The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty . . . .
>
> . . . .
>
> . . . [Consequently] [t]his full and absolute territorial jurisdiction being alike the attribute of every sovereign . . . [is] incapable of conferring extra-territorial power . . . . [21]

Yet here too, international law has changed. And in turn, so have the meanings and incidents of sovereignty. International law now authorizes states to exercise extraterritorial jurisdiction inside other states in a variety of situations. For example, states may exercise jurisdiction not only over acts that occur in their territories, but also over acts abroad that have, or are intended to have, effects within their territories—or what is called objective territoriality. [22] States may also assert jurisdiction over acts by their national persons abroad—or active personality jurisdiction, as well as over acts against their nationals in some circumstances—or passive personality jurisdiction. [23] Further, states may claim jurisdiction over acts abroad that threaten "the security of the state or other offenses threatening the integrity of governmental functions," like espionage or counterfeiting the state's currency [24]—or what is referred to as the protective principle. [25]

Significantly, just as the rigid territoriality of the nineteenth century was cast in terms of sovereignty, all of these current bases of extraterritorial jurisdiction are also cast in terms of sovereignty: that is, they all vindicate some ostensibly "sovereign" entitlement of the state, whether over territory (objective territoriality), persons (active and passive personality), or the state's existence and official functions (protective principle). In an increasingly interconnected world with an ever-growing amount of transnational activity, states' entitlements have expanded, and now may overlap. Thus while sovereignty previously was invoked to limit a state's jurisdiction to its territory, it now justifies jurisdiction outside a state's territory and inside the territory of other states. In sum, the term is really just a popular but protean shorthand for a state's powers recognized by international law, and these powers tend to shift over time.

Currently, these powers authorize the projection of a state's law into the territory of other states where a recognized basis of jurisdiction exists touching upon the state's "sovereign" entitlements over its own territory, persons, or official state functions. Because international law gives all states power to exercise such jurisdiction, states are coequal sovereigns as a legal matter. [26] Just as rigid rules of territorial jurisdiction maintained coequal status in the nineteenth century, these rules of extraterritorial jurisdiction maintain coequal status now. It follows that if a state has a basis to

regulate extraterritorially under international law, there is no violation of the other state's sovereignty; but if a state extends law into another state absent a recognized basis to do so under international law, it has exceeded its power under international law and infringed the sovereignty of the other state.

The aim so far has been to add precision and analytical content to objections that exercises of extraterritorial jurisdiction interfere with sovereignty. Now that we know sovereignty is basically a description of the recognized powers of states under international law, we can discern when it has been infringed by the exercise of extraterritorial jurisdiction.

To return once again to our two-state hypothetical, if someone in State A fires a gun into State B and causes harm there, State B has jurisdiction, even though the conduct—the firing of the gun—technically took place in State A. Or if a State A national commits an act in State B contrary to State A law, for example sex tourism, State A may exercise jurisdiction under international law over its national's conduct abroad (State B of course also may exercise jurisdiction over acts committed in State B territory). None of these situations implies an infringement of the other state's sovereignty since international law authorizes all states with these same jurisdictional competences. However, if there is no basis in international law for the exercise of extraterritorial jurisdiction—say State A claims to regulate conduct by State B nationals entirely in State B with purely State B effects—there *would* be a violation of State B sovereignty. One possible way around the violation would be if the conduct constitutes a universal crime under international law, [27] a doctrine I will return to shortly. To avoid sneaking in too many ideas now without adequately explaining them, I want to put universal jurisdiction aside for a moment. The important takeaway here is that if a state has a basis to regulate extraterritorially under international law, there is no violation of the other state's sovereignty; but if a state does not have a basis to regulate extraterritorially, the regulation infringes the other state's sovereignty.

The point should now start to emerge in sharper relief that if a state violates the principle of geographic legality it risks violating other states' sovereignties. This point ties directly back to the discussion above regarding the difference between adjudicative and prescriptive jurisdiction. Under a geographic legality analysis, absent a basis for prescribing law over defendant's conduct X in State B when it occurs, State A may not apply its law to X even if State A gains custody (and hence adjudicative jurisdiction) over the defendant at some later point. This is a matter not only of the rights of the defendant, but also of the sovereignty of State B. By applying its law to defendant's conduct X in State B, State A is retroactively projecting its law into State B territory in a way that exceeds State A's prescriptive jurisdiction under international law, thereby infringing State B's sovereignty.

A final basis of jurisdiction under international law is universal jurisdiction. As I have argued elsewhere at more length, universal jurisdiction is different from all other bases of jurisdiction in international law. [28] We have seen already that other bases derive from a state's distinct national entitlements to make and apply law, such as entitlements over national territory or persons. These bases of national jurisdiction grant states great freedom to regulate whatever conduct they deem deserving of regulation in essentially whatever regulatory terms they choose. International law circumscribes the geographic range of situations to which states may apply their laws, but without much restricting the content of the law a state seeks to apply once a situation falls within the state's recognized prescriptive range.

In contrast, universal jurisdiction derives from a state's shared entitlement—with all other states in the international legal system—to apply and enforce the international law against universal crimes. That is to say, universal jurisdiction derives from the commission of the crime itself under international law. It is the international nature of the crime—its very substance and definition under

international law—that gives rise to jurisdiction for all states. As a result, a state cannot unilaterally decide what conduct falls within its universal jurisdiction and cannot regulate that conduct in any terms it chooses (unlike when exercising jurisdiction on other bases). Rather, the state exercising universal jurisdiction acts as a decentralized enforcer of international law on behalf of the international legal system. This is, in a sense, the opposite of the way a state's national jurisdiction works: the geographic range is limitless, but international law places restrictions on the content of the law being applied. States exercising universal jurisdiction are therefore constrained to apply substantive international law since the only thing authorizing jurisdiction is the substantive offense under international law. Put in strong but conceptually straightforward terms, the prescriptive reach of universal jurisdiction is not really extraterritorial; rather, it comprises a comprehensive territorial jurisdiction, originating in a universally applicable international law that covers the globe. Individual states may apply and enforce that law in domestic courts, to be sure, but its prescriptive scope encompasses all territory subject to international law, i.e., the entire world. [29]

Universal jurisdiction by its nature erases geographic legality concerns. Let us return to the situation where a defendant commits conduct X entirely in State B, and at some later point State A gains custody of him. We know that if State A had no basis to apply its law to X at the time X occurred, gaining custody over the defendant at some later point and purporting to prosecute for X creates problems. It subjects the defendant to a rule that did not apply to his conduct when it took place and infringes State B's sovereignty by retroactively projecting State A law into State B territory absent a recognized basis to do so under international law. But if X is a universal crime under international law, both of these problems vanish. State A is not applying only its national law, but also the international law against X. And that law applies everywhere, including inside State B. The defendant therefore is on notice of the rule when the conduct occurs (assuming the international law against X is in existence at the time he engages in the conduct), and there is no infringement of State B sovereignty since State A is not projecting uniquely national law inside State B, but enforcing an international law shared by all states and operative everywhere.

Clearly then, universal jurisdiction holds powerful potential for an all-encompassing jurisdiction capable of exercise by every state in the world over dual use smuggling activities anywhere in the world. To achieve it, however, the activities must constitute universal crimes under international law. It is to that question I now turn.

III. Erasing the Problem of Geographic Legality: Universal Jurisdiction

The first characteristic of universal jurisdiction to appreciate for purposes of establishing it over dual use smuggling is that it is a customary, not treaty-based, international law. Treaties are positive legal agreements entered into by states that formally bind only states parties. [30] Custom evolves organically out of the general practice of states accompanied by what is referred to as *opinio juris*, or the intent or belief that the practice has legal significance, [31] and applies universally to all states. [32]

Thus if the United States and Germany were parties to a treaty prohibiting dual use smuggling and authorizing jurisdiction by states parties, and the United States gains custody of a smuggler who had operated in Germany, the United States could exercise jurisdiction and apply the treaty-based norm applicable inside states parties to him, even if he had no connection to the United States. This is clear as a matter of the positive law of the treaty. (From a domestic perspective, all Congress would need to do is enact domestic legislation implementing the treaty. [33])

Yet while some might argue in favor of treaties over custom as a general matter, unless there is a treaty ratified by every state in the world—something that has yet to happen [34] —a treaty could never provide for truly universal jurisdiction because treaties do not extend by their own force to

non-party states. [35]Accordingly, as a matter of positive international law treaties pull up short where the smuggling occurs in a non-party state. For example, suppose Somalia is not a party to the anti-smuggling treaty posited above. Could the United States, or Germany, or any other state, exercise jurisdiction over the smuggling activities in Somalia as a matter of the law of the treaty? The answer is no, [36] and it should be clear by now that applying treaty law inside a non-party state could trigger potential legality and sovereignty problems.

Custom, on the other hand, applies to all states. It also informs treaty law and vice versa. Key for present purposes is the role treaties play in generating customary norms: in particular, norms of universal jurisdiction. In this sense, the choice between treaties and custom is a false one for the current project. Of course there are differences between the two types of law (as noted in the previous paragraph) but these differences do not force the choice of one over the other; indeed, the two types of law are mutually reinforcing. In fact, it is a longstanding principle of international lawmaking that treaties may generate customary norms. As the International Court of Justice put it, treaties are "indeed one of the recognized methods by which new rules of customary international law may be formed." [37] In order for a treaty to generate customary law, the norms embodied in the treaty must be intended by states parties to be generalizable to non-party states; that is, the treaty must be what the U.S. Court of Appeals for the Second Circuit recently called a "law-making" treaty,[38] or treaty of customary "norm-creating character." [39] The point is subtle but well established: if enough states enter into and implement the treaty, that practice contributes to the general state practice and *opinio juris* necessary to form customary law. The treaty itself does not extend to non-parties; rather it contributes to custom, which, in turn, applies universally.

So, what kinds of treaty provisions establish universal jurisdiction? In my view, precisely the provisions that supply jurisdiction where the offender is present or found in a state's territory even if the state has no other connection to the offense. Antiterrorism treaties offer good examples. Widely-ratified treaties prohibiting acts like bombing public places, [40] infrastructure, [41] transportation systems, [42] airports [43] and aircraft, [44]as well as hijacking aircraft, [45] hostage taking, [46] and even financing terrorist organizations [47] give states parties jurisdiction where, to use as examples provisions from the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, "the alleged offender is present in its territory and it does not extradite him." [48] The Montreal Convention goes even further, commanding states parties to exercise jurisdiction where the offender is found in their territories and they do not extradite, irrespective of any other jurisdictional link. [49] This obligation applies regardless of whether the crime occurred in the territory of a state party or a non-party state. [50] Through these jurisdictional provisions, this widely ratified treaty [51] effectively generalized its prohibitions to every state in the world. It could not do so purely through the positive law of the treaty since treaties do not extend to non-party states. Rather, the better view is that the overwhelming majority of states created, not only as a matter of positive law, but also through widespread acceptance and implementation of the treaty's generalizable rules, a customary norm against plane bombing. And perpetrators of this crime can be prosecuted by any state that gains custody over them.

While treaties may accomplish this customary international law formation, national laws also may do so if widespread enough, because such laws also may constitute state practice and *opinio juris*. However, until the customary international law both prohibiting smuggling and permitting universal jurisdiction over it is formed through the practice of states enacting and prosecuting under such national laws, problems of geographic legality and sovereign interference persist. One way customary international law forms is through breaches that gain momentum and blossom into new rules. [52] But until the new rule has formed, the state practice precipitating it remains a breach of international law; and here, the breach could trigger legality and sovereignty objections. Thus while national laws certainly hold potential, the safer and more legal route toward establishing universal

jurisdiction over dual use smuggling is likely a multilateral treaty.

At this point, one may be tempted to reason by analogy given the dire threat posed by dual use nuclear materials smuggling. The argument would run something like this: dual use smuggling can lead to devastating catastrophes and massive loss of life. In this respect, it resembles other universal jurisdiction offenses, like genocide, crimes against humanity, or acts of terrorism. It follows that, like these other offenses, dual use smuggling also should be subject to universal jurisdiction. The problem with this argument is that international law is an empirical matter all the way down the line, in terms of (a) prohibition, (b) liability, and (c) jurisdiction. In order to have an international offense subject to universal jurisdiction, it is not enough for international law merely to prohibit something. We can think of the international law here on three levels. At the broadest level are norms relating to states. Probably the largest number of international legal rules still relate to states; these rules provide liability only for states. This is important because, as noted, one way international law evolves is states break it and those breaches gain momentum and develop into new rules. If international law imposed individual (as opposed to state) liability for all breaches of its rules, state actors (and hence states) would be far less willing to break international law in order to move it. It is one thing to incur repercussions as a government from other governments, and quite another to be potentially subject to individual criminal prosecution. Individual criminal liability may be viewed as a second, narrower level—and here Nuremberg was the key progenitor. The final, narrowest category of international law offense provides both individual criminal liability and jurisdiction capable of exercise by all states, i.e., universal jurisdiction. Thus for something to be a universal jurisdiction crime, there must be a purposefully international (a) prohibition, (b) providing individual (not just state) liability, and (c) authorizing jurisdiction by all states. We need evidence of all three of these things.

How can we tell if international law has gotten to this point with respect to dual use nuclear material smuggling? Again, a treaty meeting all three criteria would be the quickest and most effective route. To rely on state practice and *opinio juris* absent a treaty, the practice must be consistent and widespread, and also project *opinio juris*. The empirical work suggests that state practice here—even just in terms of national laws on the books, forget about actual prosecutions—is still desultory and resists firm conclusions. But that's precisely what's needed. Custom can precede treaties, but it must build up the norm through the actual practice of states articulating the norm. Absent a treaty, the best route for establishing universal jurisdiction likely would be for states to enact national laws that clearly prohibit dual use smuggling as a matter of international legal obligation and, in those laws, to provide for jurisdiction over the activity anywhere in the world, and then to prosecute individuals pursuant to those laws. States are starting to do this. But whether the norm is sufficiently established can only be answered by hard data in the form of anti-smuggling laws and prosecutions based on universal jurisdiction.

A desire for international law prospectively to get out ahead of the problem of dual use smuggling, instead of retrospectively reacting after some disaster has occurred, is eminently understandable. International law tends to be reactive (take for example the explosion of human rights norms after the atrocities of WWII). And jurisprudentially, it does not easily admit of reasoning by analogy. For instance, the United States Court of Appeals for the Second Circuit has rejected unambiguously and in strong terms the "conclusion that universal jurisdiction may be expanded by judicial analogy to the crimes that currently are subject to jurisdiction under the universality principle," [53] observing that "[t]he strictly limited set of crimes subject to universal jurisdiction cannot be expanded by drawing an analogy between some new crime . . . and universal jurisdiction's traditional subjects." [54] I've argued against the Second Circuit's conclusion as to the specific crime in that case—plane bombing—but my argument relied on the multilateral treaty covering this act, namely the Montreal Convention discussed above. [55] Where there is no treaty, the argument in favor of

universal jurisdiction becomes more difficult.

A final, related question to establishing universal jurisdiction over dual use smuggling concerns the definition of the crime itself. Legality problems also arise where a law is too vague to provide adequate notice of what is prohibited. [56] In the case of dual use smuggling, this problem could surface because of the nature of the items transferred. As the label “dual use” indicates, the items may be used for purely peaceful, socially beneficial ends. Thus the activity of transferring such items may be innocuous, i.e., engaging in a standard and beneficial business transaction. It would be unfair to retroactively punish otherwise legally permissible and perhaps even desirable activity just because at some point downstream it leads to the acquisition of dual use items by non-state actors intent on producing weapons of mass destruction. To cast the net of the criminal law so wide both would be unfair to individuals and could chill otherwise potentially beneficial activity.

This dilemma is not new for either domestic or international law. Both systems contain rules that prohibit otherwise permissible behavior—when done with the intent to perpetrate criminal activity down the line. For example, U.S. domestic law enacted under the Commerce Clause routinely prohibits traveling in interstate or foreign commerce with the intent to engage in criminal activity. [57] And international law prohibits engaging in transactions with regimes that violate human rights norms with the purpose of aiding and abetting the violations. [58] Absent the intent requirement, the conduct is otherwise innocent and, in some cases, may be desirable. An intent requirement could be used to address fair notice concerns regarding dual use smuggling. Indeed, the United States and other countries already have started down this path. [59] It makes prosecution more difficult, to be sure, because intent would need to be proved. But that is a worthwhile tradeoff given the countervailing ramifications of subjecting entire distribution chains to criminal liability if the items distributed end up being procured by actors with evil motives remotely down the line and most of the links in the chain did not intend or anticipate that the items would be used for such ends.

IV. Conclusion: The Appropriateness of Universal Jurisdiction over Dual Use Smuggling

Having set out a methodological way forward, I conclude by briefly addressing the appropriateness of universal jurisdiction over dual use commodities smuggling. Just because there is a way to establish universal jurisdiction over such activity does not mean the international system should establish such jurisdiction. It appears that the two new moves the non-proliferation strategy makes by seeking to prohibit transfers of dual use items are: (i) to extend regulation to non-state actors; (ii) over something—transfer of dual use materials and technology—traditionally regulated, and sometimes permitted, by a state accountability paradigm. [60]

Here an analogy may be appropriate, though not as a matter of lawmaking potential. International law is an empirical phenomenon [61]: either the law exists or it doesn’t. But analogies are helpful heuristics in that if nuclear smuggling looks like other things over which international law authorizes universal jurisdiction perhaps it too is an appropriate subject of universal jurisdiction. It is. To take a foundational example, the original universal jurisdiction offense was piracy, a crime committed by non-state actors outside the traditional state accountability paradigm. Because of these features, it threatened all states and indeed the system at large. Piracy itself wasn’t particularly egregious, and was, in fact, permitted—when done by states (privateers, after all, were state-sponsored pirates). [62] Rather, it was the danger piracy posed indiscriminately to all—without an international accountability mechanism—that made it the subject of jurisdiction for all. In this respect, dual use nuclear commodities smuggling seems like a direct heir.

In conclusion, the international system has mechanisms available to establish extraterritorial and ultimately universal jurisdiction over dual use smuggling. This Essay used the concept of geographic legality to identify the main legal obstacles to such jurisdiction and to show how they can be

overcome. In doing so, it also explicated the often complex and subtle relationships among treaty, customary, and national law, specifically with respect to jurisdiction. Finally, it suggested that dual use smuggling is an appropriate candidate for universal jurisdiction going forward because of its massive potential both to destabilize the international system and to metastasize unchecked by traditional state accountability paradigms.

III. References

[*] I thank Kenneth Gallant, Daniel Joyner and Meghan Ryan for helpful comments. Claire James provided excellent research assistance.

[1] Paul H. Robinson, *Fair Notice and Fair Adjudication: Two Kinds of Legality,* 154 U. PA. L. REV. 335, 336 (2005).

[2] The principle is about adequate notice of an applicable law and not merely the existence of a law. Imagine a legislature passed a secret law. The law would exist, but its application would violate the principle of legality in the same way and for the same reasons as if there were no law at the time of the conduct. See KENNETH S. GALLANT, THE PRINCIPLE OF LEGALITY IN INTERNATIONAL AND COMPARATIVE LAW 20 (Cambridge Univ. Press 2009) ("Notice requires not only that a law has been in existence but also that it has been applicable to the actor at the time of the act. If the law was not applicable to the actor, then the actor had no notice of the requirement to conform his or her behavior to the standard set out in the law. The law must also be accessible to those who are bound by it.").

[3] *Id*. See also Beth Van Schaak, *Crimen Sin Lege: Judicial Lawmaking at the Intersection of Law and Morals*, 97 GEO. L.J. 119, 145 (2008).

[4] *See, e.g*. Neil Boister, *The Application of Collective and Comprehensive Criminal Responsibility for Aggression at the Toyko International Military Tribunal,* 8 J. INT'L CRIM. JUST. 425, 449 (2010); Sheldon Glueck, The Nuerenberg Trial and Aggressive War, 59 HARV. L. REV. 396, 455-56 (1946)).

[5] *Ex post facto* translates to "from a thing done afterward," or "[a]fter the fact; retroactively." BLACK'S LAW DICTIONARY (7th ed. 1999); *see, e.g*., Calder v. Bull, 3 U.S. 386, 390-92 (1798).

[6] *See* Anthony J. Colangelo, *Universal Jurisdiction as an International "False Conflict" of Laws*, 30 MICH. J. INT'L L. 881, 909-916 (2009) (discussing legality issues arising with the exercise of extraterritorial jurisdiction and exploring implications); Anthony J. Colangelo, *The New Universal Jurisdiction: In Absentia Signaling over Clearly Defined Crimes*, 36 GEO. J. INT'L L. 537, 582-583 (2005) (discussing *Eichmann* case); GALLANT, THE PRINCIPLE OF LEGALITY, *supra* note 2 at 407-408 ("Attempts to exercise criminal adjudicative jurisdiction where there has not been prescription of criminal law applicable at the time and place of the act in question violates the principle of legality, and at the very least calls into question the legitimacy of the exercise of jurisdiction.").

[7] *Id*.

[8] S.C. Res. 1540, U.N. Doc. S/RES/1540 (Apr. 28, 2004). I also should say that the Essay addresses legality issues in prosecutions by national, not international, courts. Some have suggested that it may operate differently in the latter. *See* Van Schaak, *supra* note 3 (observing that "[international] tribunals occasionally articulate the notion that . . . the application of [the legality principle] is different in international courts than it is in domestic courts."). For a good discussion of legality issues relating to the International Criminal Court, see Kenneth S. Gallant, Jurisdiction to Adjudicate and Jurisdiction to Prescribe in International Criminal Courts, 48 VILL. L. REV. 763 (2003).

[9] Louis Henkin, *International Law: Politics, Values and Functions*, 216 RECUEIL DES COURS 9, 305 (1989 IV); Malvina Halberstam, *International Kidnapping: In Defense of the Supreme Court Decision in Alvarez-Machain*, 86 AM. J. INT'L. L. 736, 738 (1992) (observing that "[t]his rule has been applied by the courts of a number of states, including Canada, France, Germany, England and Israel. A treaty provision that would have prohibited the exercise of jurisdiction over a person illegally seized, proposed in 1935 by the Harvard Research in International Law, was never adopted. Nor has the rule been modified since then by the emergence of a new customary rule based on state practice. Although scholars are critical of the rule and have urged that it be reexamined and rejected, they acknowledge that it remains in effect.") (internal citation omitted); see also Andrew J. Calica, *Self-Help is the Best Kind: The Efficient Breach Justification for Forcible Abduction of Terrorists*, 37 CORNELL INT'L L.J. 389 (2004).

[10] Restatement (Third) Foreign Relations Law § 421(2)(a) (1987).

[11] *Id*. at §431.

[12] Anthony D'Amato, *The Concept of Human Rights in International Law*, 82 COLUM. L. REV 1110, 1113-14 (1982).

[13] Restatement (Third) Foreign Relations Law of the United States § 402 (1987).

[14] For in-depth discussion of universal jurisdiction, see Colangelo, *Universal Jurisdiction as an International "False Conflict," supra* note 6; Anthony J. Colangelo, *The Legal Limits of Universal Jurisdiction*, 47 VA. J. INT'L L. 149 (2006).

[15] *See infra* notes 22-25 and accompanying text (outlining principles of jurisdiction in international law).

[16] Restatement (Third) Foreign Relations Law of the United States § 421 (1987).

[17] This would occur, for example, if State A and State B were parties to an extradition treaty. *See id*. at § 475.

[18] Anthony J. Colangelo, *Double Jeopardy and Multiple Sovereigns: A Jurisdictional Theory*, 86 WASH. U. L. REV. 769, 779 (2009).

[19] D'Amato, *The Concept of Human Rights, supra* note 12, at 1113-14.

[20] Louis Henkin, *That "S" Word: Sovereignty, and Globalization, and Human Rights, Etc.*, 69 FORDHAM L. REV. 1, 3-4 (1999).

[21] The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 136–37 (1812).

[22] Restatement (Third) of Foreign Relations Law of the United States § 402(1)(c) (1987).

[23] *Id*. § 402(3), cmt. g.

[24] *Id*. § 402(3), cmt. f.

[25] *Id*.

[26] Put aside the obvious political, military, and economic power differences.

[27] *See infra*, Part III. Another possible way might be through so-called "representation jurisdiction," a type of jurisdiction used by some civil law countries. See GALLANT, THE PRINCIPLE OF LEGALITY, *supra* note 2 at 282; *see also* Jurgen Meyer, *The Vicarious Administration of Justice: An Overlooked Basis of Jurisdiction,* 31 HARV. INT'L. L.J. 108, 116 (1990). This type of jurisdiction is preconditioned upon "a request from another state to take over criminal proceedings, or either the refusal of an extradition request from another state and its willingness to prosecute or confirmation from another state that it will not request extradition." EXTRATERRITORIAL CRIMINAL JURISDICTION, IN COUNCIL OF EUROPE, EUROPEAN COMMITTEE ON CRIME PROBLEMS 14 (1990). Unlike universal jurisdiction, this basis fits comfortably within a traditional state sovereignty model tied to national territory and persons because it "requires some form of agreement or consent between the custodial/prosecuting state and the territorial state" through which "the territorial state permits the custodial state's application of prescriptive jurisdiction, which of course the territorial state has a sovereign prerogative to delegate"; the principle "is decidedly subordinate to other principles of jurisdiction, which take priority"; and "the substantive crime must be virtually indistinguishable as between the custodial and territorial states; the custodial state literally acts as a surrogate for the territorial state. . . . In contrast, universal jurisdiction can be exercised irrespective of the permission and despite the prescriptive legislation of the territorial state." Colangelo, *Legal Limits*, *supra* note 14 at 158 n.27.

[28] This explanation of universal jurisdiction is taken principally from my 2009 essay, *Universal Jurisdiction as an International "False Conflict," supra* note 6 at 882.

[29] *Id*.

[30] See Vienna Convention on the Law of Treaties art. 34, 35, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter*Vienna Convention*].

[31] The U.S. Restatement of Foreign Relations Law formulates this test as follows: "[c]ustomary international law results from a general and consistent practice of states followed by them from a sense of legal obligation." Restatement (Third) of Foreign Relations Law of the United States § 102(2) (1987).

[32] One exception might be where a state persistently objects to the customary norm at the time of its formation. *Id*. at § 102, cmt. d. Thus a state intent upon permitting non-state transfer of dual use technology might seek to except its territory from a customary law against such activity by objecting to the norm during its formation. But if the state fails to object persistently during formation, it will be bound by the customary norm.

[33] U.S. Const., art I, § 8, cl. 18.

[34] Although the Convention on the Rights of the Child comes close. See United Nations Treaty Collection, Status of Treaties, Chapter IV, *available* at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en

(last visited June 18, 2011).

[35] As to this point generally, see Vienna Convention supra note 30; as to universal jurisdiction specifically, see Paul Arnell, *International Criminal Law and Universal Jurisdiction*, 11 INT'L LEGAL PERSP. 53, 57 (1999).

[36] See *Vienna Convention, supra* note 30.

[37] North Sea Continental Shelf (F.R.G. v. Den., F.R.G. v. Neth.), 1969 I.C.J. 3, 41 (Feb. 20); *see also*Restatement (Third) of Foreign Relations Law of the United States § 102(3) (1987) ("International agreements create law for the states parties thereto and may lead to the creation of customary international law when such agreements are intended for adherence by states generally and are in fact widely accepted."). To the extent favoritism toward treaties over custom relies upon the perceived propensity of states to breach customary rather than treaty law and uses as examples customary norms against genocide, torture, and piracy, the argument makes no sense on its own terms, since all those norms are also prohibited as a matter of treaty law, and have been for some time now. Unless one is willing to throw *all* international law out the window (and presumably most readers of this paper would not be willing to do so since it is precisely international law that would authorize universal jurisdiction over dual use nuclear smuggling), that line of argument ought to be abandoned.

[38] Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 138 (2d Cir. 2010).

[39] *Id.* at 139.

[40] International Convention for the Suppression of Terrorist Bombings, G.A. Res. 164, U.N. GAOR, 52d Sess., Supp. No. 37, U.N. Doc. A/52/653 (1998), art. 2.

[41] *Id.*

[42] *Id*.

[43] Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation (Supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation), 24 Feb. 24, 1988, U.N. Stat. 1990:440, art. 2.

[44] Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 974 U.N.T.S. 178, art. 1 [hereinafter *Montreal Convention*].

[45] Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, art. 1.

[46] International Convention Against the Taking of Hostages, adopted by the General Assembly of the United Nations on Dec. 17, 1979, 1136 U.N.T.S 205, art. 1.

[47] International Convention for the Suppression of the Financing of Terrorism, G.A. Res. 54, U.N. GAOR, 54th Sess., Supp. No. 49, at 408, U.N. Doc. A/54/49 (1999), art. 2.

[48] *Montreal Convention, supra* note 44 at art. 5.

[49] *Id.* at art. 7.

[50] *Id.*

[51] At the time of this writing, the Convention has 189 states parties, and therefore has been ratified by almost every nation in the world. See Office of the Legal Adviser, U.S. Dep't of State, Treaties in Force 324–25, *available* at http://www.state.gov/documents/organization/81120.pdf (last visited June 19, 2011).

[52] For the classic articulation of this phenomenon, *see* Anthony A. D'Amato, *The Concept of Custom in International Law*, 63 AM. J. INT'L L. 211 (1969).

[53] United States v. Yousef, 327 F.3d 56, 99 (2d Cir. 2003).

[54] *Id.* at 103-104.

[55] *See* Anthony J. Colangelo, *A Unified Approach to Extraterritoriality,* 97 VA. L. REV. __ (2011) (forthcoming).

[56] *Robinson*, *supra* note 1 at 356.

[57] *See*, e.g., PROTECT Act of 2003, Pub.L. 108-21, 117 Stat. 650 (2003); Hobbs Act 18 U.S.C. § 1952 (2002); White Slave Traffic Act, 18 U.S.C. § 2421 (1998) (Mann Act).

[58] Presbyterian Church of Sudan v. Talisman Energy, 582 F.3d 244, 258-59 (2d Cir. 2009).

[59] *See* Daniel H. Joyner, *The Enhanced Proliferation Control Initiative: National Security Necessity or Unconstitutionally Vague?*, 32 GA. J. INT'L & COMP. L. 107 (2004) (discussing requirements and potential notice problems, under U.S. law).

[60] *See* DANIEL H. JOYNER, INTERNATIONAL LAW AND THE PROLIFERATION OF WEAPONS OF MASS DESTRUCTION 179-181 (Oxford University Press)(2009).

[61] *See* Michael D. Ramsey, *International Law Limits on Investor Liability in Human Rights Litigation*, 50 HARV. INT'L L.J. 271, 313-14 (2009).

[62] Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation*, 45 HARV. INT'L L.J. 184, 210 (2004).

IV. Nautilus invites your responses

The Northeast Asia Peace and Security Network invites your responses to this report. Please send responses to: bscott@nautilus.org. Responses will be considered for redistribution to the network only if they include the author's name, affiliation, and explicit consent.
