E. Conclusion

This study was set out to explore the concept of extraterritorial jurisdiction in international law and has sought to answer whether the territoriality-based system of jurisdiction is capable of providing order in international relations by delimiting regulatory competences between States. Is it possible to define normatively consistent boundaries of territoriality to be respected by States? Or are States, in their pursuit of political goals, able to exploit and disregard the system? It was expected that the formal principles of the territoriality-based system would indeed fail to deliver on their promise of order. Therefore, the study also sought to answer how, in light of the necessary progressive development of the law, extraterritorial jurisdiction can be adequately reconceptualised so that it also accounts for essential interests apart from State sovereignty, such as individual rights and the interests of the international community at large.

There is much at stake. Globalization not only entails *de facto* developments such as the creation of powerful and interconnected economic operators and the ubiquity of modern communication technologies, but also a *de jure* process, by which powerful States advance particular domestic policies into the global arena through the use of unilateral regulation. Extraterritorial jurisdiction provides 'a procedural apparatus through which the future of transnationalism can be distilled'.[1160] It is a phenomenon that is not only going to stay, but is likely going to expand to other areas of law and to increasingly affect natural persons as bearers of rights and obligations. On the one hand, there has been a sharp decrease in the appetite of States to solve challenges through multilateralism, in particular, through the formalized procedures of international organizations. On the other hand, global interconnectedness is going to stay both as an economic and as a social reality. Currently however, the transnational regulatory space is akin to a lawless Wild West. Whether and how extraterritorial jurisdiction is regulated under international law will thus increasingly determine the development of international relations.

In answering the first of the two research questions, this study has found that the territoriality-based system does not adequately constrain States in their pursuit of particular political objectives through extraterritorial juris-

1160 Ireland-Piper, *Accountability in Extraterritoriality* (n 113), 1.

diction. If ever the boundaries of territoriality could have been determined in a normatively consistent way, it is not possible anymore. Part B of this study set out the rules of the currently dominant territoriality-based system of jurisdiction under international law. Assessed against these rules, this study found in part C that States resorted to a host of complex regulatory techniques to exploit and circumvent the formality of the system. In part C, it was observed that these regulatory techniques included (1), conditioning market access and other domestic benefits on circumstances abroad, (2), leveraging parent-based regulation of multinational corporations and (3), regulating essentially foreign conduct based on only fleeting territorial or other factual connections. Although all of these forms of regulations could nominally advance a territorial basis, they allowed States to unilaterally set regulations with a global reach contrary to the ordering purpose of the territoriality-based system of jurisdiction.

Moreover, States disregard the system: They promote or contest such measures not based on considerations of territoriality, but take into account other political and legal objectives and limits. This was demonstrated particularly by the stark differences in treatment of extraterritorial jurisdiction across and even within the examined subject areas, the regulation of economic sanctions and export control, transnational corporate bribery and the prevention of and redress for corporate violations of human rights: On the one hand, States accepted even exorbitant exercises of extraterritorial jurisdiction in the regulation of transnational corporate bribery, because the fight against this specific form of corruption was an objective almost universally accepted by all States. On the other hand, whether States contested the 'extraterritorial' extension of economic sanctions depended particularly on the content of the underlying substantive rules and the interests that were being 'enforced' through the sanctions. Finally, within the regulation of corporate violations of human rights, it was particularly the existence of rights and interests of the private victims that complicated the picture and led to inconsistent responses.

In answering the second of the two research questions, it was found that a more adequate conceptualisation of extraterritorial jurisdiction had to acknowledge its hybrid nature, in that it both concerns the sovereignty of States while at the same time also directly affects the rights and interests of individuals. The role of individual natural and juridical persons was particularly demonstrated through the analysis of the mechanism of private submissions in the area of extraterritorial export control regulation. It was found that the traditional principles of jurisdiction could not adequately include considerations beyond State sovereignty. This is lamentable, be-

cause extraterritorial jurisdiction also functions as an exercise of public authority. The legitimation and limitation of extraterritorial jurisdiction may thus be inspired by principles of domestic public law. Part D of the study identified (1), the proximity between the regulating State and the addressee or the conduct in question, (2), the realization of community interests and (3), the protection of individuals against State overreach as the cardinal aspects legitimizing and limiting extraterritorial jurisdiction. In a final step, this study translated these theoretical considerations into a practically applicable new framework based on the interaction between three concrete variables, the proximity between the State and the subject matter in question, the regulatory interest or concern pursued and the intrusiveness of the measure *vis-à-vis* the affected States and individuals.

In current scholarship, it is often implicitly assumed that there are clearly established limits to 'extraterritorial jurisdiction'. Thus, it is argued either that these limits should be upheld in order to constrain 'extraterritorial jurisdiction' as an antithesis to territorial sovereignty,[1161] or that these limits should be disregarded in order to endorse extraterritorial jurisdiction for the achievement of some higher objective, such as the protection of human rights.[1162] However, this research has noted that this premise may have to be rethought: It has found through a conclusive inquiry into the practice of States and the EU in four reference areas that the traditional system of jurisdiction is frequently unable to provide such consistent limits. Territoriality in particular is often like a checkbox, which formally needs to be ticked, but which says very little about the actual content of the claim. Certainly, this checkbox-mentality also somewhat reflects the practice of actual State decision-makers. In deciding whether or how to regulate an 'extraterritorial' situation, only the formal satisfaction of one of the bases of prescription is frequently considered.

1161 See to this end, in particular, the extensive argumentation by Parrish, 'Reclaiming International Law from Extraterritoriality' (n 10).

1162 Surya Deva, 'Corporate Human Rights Violations: A Case for Extraterritorial Regulation' in Christoph Luetge (ed), *Handbook of the Philosophical Foundations of Business Ethics* (Springer Netherlands 2013), 1087: 'It is high time that new legal principles are developed and invoked to respond to the modern forms of human rights abuses by companies that operate in disregard to geographical boundaries. In the area of extraterritoriality, such new principles should provide clearer and stronger basis for states to adopt extraterritorial measures in appropriate cases to promote a better realization of human rights.'.

This study, in part D, has offered an applicable three-part framework to mitigate this shortcoming of the territoriality-based system of jurisdiction in international law. It is the hope here that this framework may serve as a compass guiding future academic debate as well as actual State decisions. In this regard, there is also particular need for future research: the usefulness of the framework is somewhat limited by its high-level abstractness. It is therefore necessary to develop more concrete, subject-area specific solutions clarifying the precise contours of the principles both through academic discourse and case-law.[1163]

Perhaps even more radical however, this research advocates for a change in perspective. So far, international law scholars, addressing the topic of extraterritorial jurisdiction, have spent much energy on the 'extraterritorial' part. Marko Milanovic made the shrewd observation that '[i]ndeed, practically the entirety of the law of (prescriptive) jurisdiction is about the exceptions to territoriality'.[1164] This focus may have been misplaced. Despite the tremendous effort, the normative boundaries between 'extraterritorial' and 'territorial' are still muddied. Much less effort has gone into studying the second element of the concept, that of 'jurisdiction'. However, as this study has demonstrated, extraterritorial jurisdiction has a hybrid nature and paying more attention to this second part of 'extraterritorial jurisdiction' may indeed be a more promising route to innovation.

Writing on the history of (extra-)territorial jurisdiction, Richard Thompson Ford once came to this bleak conclusion:

> 'We may be doomed to reproduce the same tensions in different form, over and over again. The meaning of history may not be the heroic story of progress and perfection, nor the epic of decline, rebirth and redemption, but the blank tragedy of meaningless repetition.
>
> It is this realization that demands constant vigilance, with no guarantee of safety, that demands we make the effort and take the risk to find and nurture that which may be more noble than it is familiar.'[1165]

It is safe to say that the upheaval in the real world through processes such as globalization and the advent of the internet have not proven him wrong. Rather, we just seem to be producing the same tensions at a faster rate than ever. Indeed, this study has described how the territoriality-based

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1163 This approach is also advocated by Svantesson (n 13), 59 – 62.
1164 Milanovic (n 27), 421.
1165 Ford (n 119), 930.

system of jurisdiction has, across different regulatory subject areas, repeatedly failed to satisfyingly balance the complex and deep interests at stake. It is neither a guarantor for State sovereignty and international order, nor is it an advocate for the marginalized voices of the individuals, nor is it the stern expert reminding us all of the common good.

I would, however, like to end on a more positive note. This study has taken the risk to find something that may be more noble than it is familiar: Extraterritorial jurisdiction is not only a technical inquiry relating legal acts to coordinates on a geographic map, but also an act driven by an actual purpose and having an effect on real persons. Extraterritorial jurisdiction, how could it be differently, concerns the exercise of public authority.