

Jurisdiction Over the Internet: A Canadian Perspective

Canadian law recognizes that states have sovereign power to determine the rules of conduct that must be followed in their territory by both their citizens and foreigners. Such a rule has generally offered the benefits of stability and certainty. Yet such advantages seem less obvious when this rule is applied to electronic environments. Cyberspace scorns national boundaries and complicates recognition of the jurisdiction of laws and courts over certain situations. Because everyone is simultaneously here and elsewhere in cyberspace,¹ conflicts between laws and between jurisdictions arise.² The traditional legal system is also challenged by the emergence of new powers attempting to establish their authority in electronic spaces.³

Many countries fear they will see their sovereignty erode due to difficulties controlling transnational electronic environments. Some states worry about at-

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1. As underlined by Viktor Mayer-Schönberger and Teree E. Foster in *Regulating Free Speech and the Global Aspects of Information Infrastructure, Symposium on Information, National Policies, and International Infrastructure*, Harvard, Jan.28-30 1996, <<http://ksgwww.harvard.edu/iip/conf/mayschoe.html>>, this is as much to the disadvantage of those who call for strict state control as it is to those who oppose state intervention. Like a double-edged sword, the global nature of international computer networks has the potential to reduce the regulatory power of states just as it can increase it. The authors point out a little further on:

The net is not an anarchic, unregulated dominion above and beyond individual state control, but rather a terrain over-populated by many, not infrequently outright contradictory national laws . . . In this respect, the global dimension of the net could develop more into a liability, than a speech protecting asset, for this state of affairs generates 'silent silencing,' rather than clear-cut regulations.

2. Joel R. Reidenberg, *Governing Networks and Cyberspace Rule-Making*, 45 EMORY L.J. 911 (1996) (from Symposium on Information, National Policies, and International Infrastructure, Harvard, 28-30 January 1996, <<http://ksgwww.harvard.edu/iip/gifconf/reid.html>>).

3. *Id.*

tacks on their cultural identity, while others are more apprehensive about loss of control over their economic future. In contrast, pressure in favor of the development of an integrated world economy remains strong, and most states are restructuring their telecommunications infrastructures to adapt to an increasingly competitive international environment. The development of electronic environments, in spite of the challenges to which they give rise, seems irresistible.⁴

Cyberspace is defined with no regard to borders. The Internet is an open network, a network of networks, which is characterized by the coexistence of many control centers that ensure local management. This choice provides users the possibility of having access to information from sites located in foreign countries and subject to different legal regimes. Such a transnational nature also supposes that there is a certain deterritorialization of activities. In this respect, Pierre Lévy writes that while digitalization potentializes text, hypertext virtualizes and deterritorializes it.⁵

Individuals have always tried to circumvent state jurisdiction in order to avoid the application of national laws they find too restrictive. As means of transportation and communication have developed, the movement of goods and persons has accelerated, producing economic and social advantages, but at the same time introducing problems with respect to legal sanctions. These developments have made it more difficult for courts to establish their jurisdiction over such activities that increasingly seem to escape the sanctions of state law.

The transnational nature of computer networks⁶ lends a supranational dimension to activities that, until now, were generally governed only by the legal regime of the territory in which they occurred. Factors such as distance, border controls, and the need for the physical presence of individuals are becoming less and less relevant. Thus, on the national level states must rework their legislative policies, while on the international level they must establish cooperation mechanisms. It is in criminal matters, where new types of crimes and new ways to commit traditional crimes have appeared, that problems of jurisdiction seem to be felt most acutely.⁷

4. See Anne Branscomb, *Jurisdictional Quandaries for Global Networks*, in GLOBAL NETWORKS: COMPUTERS AND INTERNATIONAL COMMUNICATION 103 (Linda Harasim, ed. 1995).

5. See Pierre Lévy, *Qu'est-ce que le virtual?*, in COLLECTION SCIENCES ET SOCIÉTÉ 37ff (1995).

6. David Post asserts in this respect that the Internet "is not merely multi-jurisdictional, it is almost 'a-jurisdictional': physical location, and physical boundaries, are irrelevant in this networked environment in a way that has, I believe, no parallel elsewhere." David Post, *Anarchy, State, and the Internet: An Essay on Law-Making in Cyberspace* 1995 J. ONLINE L. art. 3, para. 36 <<http://www.warhog.cc.wm.edu/law/publications/jol/post.html>>. A little further along he explains: "This independence from geographical constraints results from both the electronic nature of the message transmission, which largely de-couples the physical distance between communicating machines from message travel times and, more significantly, from the decentralized design of the Internet." *Id.*

7. There are a number of problems related to the issue of jurisdiction. In every computer crime, the determination of the locus delicti (the location of the offense) will affect the ability of a particular country to sanction the crime. Will the sanction arise by virtue of territorial jurisdiction and domestic law, or must extraterritorial principles apply?

On the level of public policy, Canadian authorities recognize that the direction of trends marking cyberspace development cannot be changed. Thus, the Final Report of the Information Highway Advisory Council presented the globalization produced by the Internet in the following way:

Whatever name applies, the defining features of this new era are always the same. Physical distance will disappear as a factor in human relations, and consequently the world will become a much smaller place. The creation, manipulation and sharing of information and knowledge will become an overriding human imperative. The promise of these changes is readily apparent.

(1) No longer will distance pose an obstacle to economic development, social intercourse, learning, voluntary action, adequate health care, business success, or full participation in society and Canada's national cultural dialogue.

(2) Knowledge will become increasingly available to everyone, allowing us all to make wiser decisions in all aspects of our lives from business to government to health care to education to work to our everyday existence.

(3) Everyone will be not only a consumer of knowledge and content, but also a creator. Canada's national cultural dialogue and political discussion will take on a liveliness and depth that will strengthen national, regional, and local communities.

The list of possibilities is long, and the promise is real provided that everyone can respond wisely and quickly to the new realities. The social, economic, and cultural transformation to be faced is fundamental. And if its promise is dramatic, so too are the challenges it creates. Some must be met at the international level through governments working cooperatively. Others must be confronted here at home through people joining together.⁸

Nonetheless, it is important to note the weak interest authorities express with respect to a large number of legal issues related to cyberspace, including those concerning jurisdiction. Still it is possible to discern a real will on the part of most Canadian decisionmakers to play an active role in the international discussions that have occurred in various forums on the issue of law regulating the Internet.

I. Principles of Assignment and Exercise of Jurisdiction

In order to evaluate the effect of electronic environments on issues pertaining to the jurisdiction of branches of the law and before seeing how the law views such phenomena, we must understand how such issues are treated presently. Jurisdiction is understood, on one hand, as a legislature's power over a specific matter and, on the other hand, as a tribunal's authority to hear a case. The legal system of a given territory is generally made up of the decisions of various authorities in accordance with the separation of powers established within the state organization. In Canada, Parliament and the provincial legislatures have

U.N. CENTER FOR SOC. DEV. & HUMANITARIAN AFFAIRS, U.N. MANUAL ON THE PREVENTION AND CONTROL OF COMPUTER-RELATED CRIME ¶ 245, U.N. Doc. ST/ESA/SER.M/43-44, U.N. Sales No. E.94IV.5 (1994) [hereinafter U.N. Manual] (this document may also be located on-line at <<http://www.ifs.univie.ac.at/~pr2qq1/rev4344.html>>).

8. Information Highway Advisory Council, *Preparing Canada for a Digital World* (1997) (visited Oct. 15, 1998) <<http://www.strategis.ic.gc.ca/SSG/ih01650e.html>> (Final Report).

the power to adopt laws; the courts have the power to render binding decisions; and the Executive has the power to carry legislation into effect and to execute judgments as well as to adopt normative measures in specific domains of activity. The respective jurisdiction of these different branches of power is in turn determined according to territories and subject categories.⁹

Thus, laws cover the territory that is under the jurisdiction of the legislature that adopted them. Some laws, however, assign legal consequences to activities that take place outside the country, while others entail that judgments rendered in Canada could have consequences abroad.

When the facts of a case are located in more than one state, mechanisms come into play to determine, on one hand, the basic legal rules that should apply and, on the other hand, the jurisdiction of the courts competent to hear the case. On this level, private law is different from public law. The choice of laws and the jurisdiction of the tribunal can rarely be determined by the will of the parties in public law, though this possibility is much greater in private law. This is why these two branches of law should be analyzed separately.¹⁰

Generally, the jurisdiction of a court depends mainly on its ability to hear the evidence relevant to a case and, above all, to bind the parties. This is why certain mechanisms of mutual assistance, cooperation, and harmonization have been adopted by states in order to facilitate respect for local standards in cases with foreign elements. These mechanisms, which are meant to make up for limits on the geographical reach of laws and on the jurisdiction of courts, are nonetheless important.¹¹ We will study their role in traditional contexts as well as the kinds of solutions they can provide in the context of electronic environments.

9. When jurisdiction over a matter is described as competent, while such a description also applies to a lesser degree to the courts, the body in question is essentially the legislatures. In Canada, the categories covered by legislation are divided between the federal Parliament and the provincial legislatures in accordance with the classification established by Sections 91 and 92 of the Constitution Act 1867. Can. Const. (Constitution Act, 1867) §§ 91, 92. It must be noted that this classification is also placed in a difficult position by electronic environments, in particular due to the convergence of categories which used to be covered separately—certain situations are becoming more difficult to describe in terms of legal regime:

Digital signals do not differentiate between video, sound, image, text and data. All the bits traveling through electronic networks are similar electronic messages. Established laws governing communications transport apply specifically to mail, telephones, newspapers, cable, and radio and television broadcasting. In an electronic bitstream it may be impossible to distinguish into which of these legal categories they fall. Indeed, there may be categories of services such as computer bulletin boards or computer conferences that do not resemble any of the established legal regimes.

Branscomb, *supra* note 4, at 95.

10. It should be noted, however, that this classification is not entirely watertight. Certain problems, such as offences concerning defamation, intellectual property and protection of privacy can be covered by private and public law simultaneously. Likewise, most acts subject to the regime of criminal responsibility can be the object of recourse under civil responsibility, but not vice versa.

11. See *Post*, *supra* note 6.

A. JURISDICTION IN PUBLIC LAW

In public law, legislative competence and court jurisdiction are generally inter-related: a court cannot apply a law of another state. Thus, when a case has a foreign element, it is generally the applicable legislation that determines which court has jurisdiction.¹² It should be noted that while legislative competence and court jurisdiction are intimately related, their connection must be recognized explicitly: for a court to be able to hear cases over which it normally has no jurisdiction (particularly regarding offenses committed abroad), the law must contain explicit provisions to that effect.¹³

Thus, in many categories laws grant the competent authorities extraterritorial jurisdiction or, at least, the power to adopt or apply standards that assign consequences to activities occurring outside the territory or that will have, when rendered, an effect abroad. These standards include the powers provided for in the legislation related to immigration,¹⁴ fisheries,¹⁵ pollution,¹⁶ taxation and customs,¹⁷ competition,¹⁸ investments,¹⁹ securities,²⁰ and accidents in the workplace.²¹ Nonetheless, it is in the penal provisions of such legislation, or at least in the provisions that assign consequences to wrongful conduct, that the notion of extraterritoriality is most often found.

The purpose of criminal law is to ensure the protection of the Canadian public. This is a goal, as Justice La Forest has pointed out, that another state would have difficulty claiming is contrary to the demands of courtesy.²² This dimension

12. See LAW REFORM COMMISSION OF CANADA, EXTRATERRITORIAL JURISDICTION 3 (Working Paper No. 37, 1984) [hereinafter LAW REFORM]. The Commission defined the term "jurisdiction" as "the power of a court to try a person for a criminal offense." *Id.*

13. Paragraph 6(2) of the Criminal Code states that "[s]ubject to this Act or any other Act of Parliament, no person shall be convicted or discharged under section 736 of an offense committed outside Canada." Criminal Code, R.S.C., ch. C-46, § 6(2) (1985) (Can.). In *Libman v. The Queen*, [1985] 2 S.C.R. 178, 209, Justice La Forest notes the interesting fact that the provision does not state that criminal law is limited to Canadian territory. The Law Reform Commission of Canada points out, however, that there is no provision explicitly granting competence to Canadian courts to rule on specific crimes occurring abroad. LAW REFORM, *supra* note 12, at 82.

14. See Immigration Act, R.S.C., ch. I-2e, §§ 27(1), 32(2) (1985) (Can.).

15. See Territorial Sea and Fishing Zones Act, R.S.C., ch. T-8, § 4(4) (1985) (Can.) with respect to the application of Canadian legislation regarding fishing and the exploitation of the sea's biological resources in the fishing zone, which extends 200 miles from the coast.

16. See Arctic Waters Pollution Prevention Act, R.S.C., ch. A-12 (1985) (Can.).

17. See Customs and Excise Offshore Application Act, R.S.C., ch. C-53 (1985) (Can.).

18. Competition Act, R.S.C., ch. C-34 (1985) (Can.).

19. See Investment Canada Act, R.S.C., ch. I-21.8, § 14 (1985) (Can.).

20. See *Shulman v. The King* [1946] 2 C.R. 153 (C.A. Qué.); *In re Chapman* [1970] 11 C.R.N.S. 1 [Ont. C.A.]; *R. v. W. McKenzie Securities Ltd.* [1966] 4 C.C.C. 29. Provincial legislation complements federal legislation on securities. See *Gregory & Co. v. Québec Securities Commission* [1961] S.C.R. 584. A British company claimed it wanted to establish a stock-trading service on the Internet. See Richard Hudson, *British Start-Up to Trade Stocks on the Internet*, WALL ST. J., Feb. 3, 1995, at A7.

21. Workmen's Compensation Act, R.S.Q., ch. A-3 (1985) (Can.).

22. *Libman v. The Queen* [1985] 2 S.C.R. 178, 209.

could justify actions against infractions that take place partially outside Canada. Moreover, criminal law also aims to emphasize the fundamental values of Canadian society by reinforcing citizens' respect for the law. Thus, this dimension could justify action against individuals who commit an offense in Canada, the repercussions of which could very well be felt outside the country.²³ National boundaries should not allow criminals to escape justice solely because their operations have taken on international proportions.²⁴

Generally, Canadian courts have jurisdiction over only those illicit activities that are committed on Canadian territory.²⁵ An offense is any activity explicitly targeted by the Criminal Code or by any other federal legislation.²⁶ In this respect, while the Canadian Charter of Rights and Freedoms (Charter) does not specify the application of laws with respect to location, it is explicit regarding the application of the Criminal Code over time: retroactivity of offences is prohibited.²⁷ In contrast, it should be noted that there can be no prescription in criminal matters;²⁸ any period that may exist between the act in question and the time charges are laid is not an infringement on the right of the accused to be tried within a reasonable time²⁹ and does not necessarily infringe on the principles of fundamental justice.³⁰

23. Justice La Forest indicated in *Libman*, 2 S.C.R. 178, 214, that "[w]e should not be indifferent to the protection of the public in other countries. In a shrinking world, we are all our brother's keepers. In the criminal arena this is underlined by the international cooperative schemes that have been developed among national law enforcement bodies".

24. *Libman*, 2 S.C.R. 178, 212.

25. Criminal Code, R.S.C., ch. C-46, § 8(1) (1985) (Can.). However the Code does not apply in the Northern territories of the country to the extent it is incompatible with the Yukon Act and the Northwest Territories Act. Moreover, it should be noted that the expression "every one", frequently employed in criminal legislation, includes in particular public bodies, legal persons, enterprises and companies. Criminal Code, R.S.C., ch. C-46, § 2 (1985) (Can.).

26. Neither common law, nor the criminal law of England can establish offences. Criminal Code, R.S.C., ch. C-46, § 9 (1985) (Can.). English criminal law, which was in effect in one province until April 1, 1955, remains however in effect in that province if it has not been changed, modified or attacked by the Code of another federal law. Criminal Code, R.S.C., ch. C-46, § 8(2) (1985) (Can.). The principles of common law remain means of justification or defense if they have not been modified and are not incompatible with the Code or another federal law. Criminal Code, R.S.C., ch. C-46, § 8(3) (1985) (Can.).

27. See subparagraph 11(g) of the Charter, which states that "[a]ny person charged with an offense has the right . . . not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offense under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations." Can. Const. (Constitution Act, 1982) pt. 1, schedule B (Canadian Charter of Rights and freedoms) [hereinafter Charter]. Due to the terms used in it, this guarantee does not cover war crimes or crimes against humanity. See *R. v. Finta* [1994] 1 S.C.R. 701.

28. Offences punishable by summary conviction (see Part XXVII of the Criminal Code) are not subject to the institution of proceedings more than six months after the subject-matter of the proceeding arose. Criminal Code, R.S.C., ch. C-46, § 786(2) (1985) (Can.).

29. According to the terms of subsection 11(b) of the Charter, the time does not begin until charges are laid; see *R. v. Kalanj* [1989] 1 S.C.R. 1594.

30. According to the terms of section 7 of the Charter, see *R. v. L. (W.K.)* [1991] 1 S.C.R. 1091.

At present, various situations can open the way for criminal prosecution in Canada. They may be offenses committed entirely in Canada, certain offenses committed abroad or, finally, offenses committed partially in Canada and partially in another country. Offenses with a foreign element are those committed in an aircraft or with respect to an aircraft; offenses regarding a fixed platform or a ship;³¹ offenses against an internationally protected person;³² offenses committed abroad by public service employees;³³ or offenses involving nuclear materials,³⁴ hostage taking,³⁵ torture,³⁶ war crimes or crimes against humanity,³⁷ high treason,³⁸ forgery of or use of a forged passport,³⁹ fraudulent use of a certificate of citizenship,⁴⁰ piracy or acts of piracy,⁴¹ procuring,⁴² bigamy,⁴³ possession,⁴⁴ or conspiracy.⁴⁵ Moreover, certain legal mechanisms can be applied in Canada, even if Canada has no jurisdiction over the substance of the case: the will to ensure that crimes do not remain unpunished due to the territorial location of the offenders is precisely what has led the international community to establish mutual assistance and extradition mechanisms.

In spite of the complexity some situations can attain, public international law has adopted certain principles meant to determine the national criminal law that must be applied and consequently, the tribunals with jurisdiction to hear such cases. In practice, states systematically apply the principle of territoriality of

31. See Criminal Code, R.S.C., ch. C-46, §§ 7(1)-7(2.2), 76, 77 (1985) (Can.).

32. See Criminal Code, R.S.C., ch. C-46, § 7(3) (1985) (Can.) for a description of the various circumstances covered by this provision.

33. Criminal Code, R.S.C., ch. C-46, § 7(4) (1985) (Can.). For military personnel, see the National Defence Act, R.S.C., ch. N-5 (1985) (Can.).

34. Criminal Code, R.S.C., ch. C-46, § 7(3.2) (1985) (Can.).

35. Criminal Code, R.S.C., ch. C-46, § 7(3.1) (1985) (Can.).

36. Criminal Code, R.S.C., ch. C-46, § 7(3.7) (1985) (Can.).

37. Criminal Code, R.S.C., ch. C-46, § 7(3.71) (1985) (Can.).

38. Criminal Code, R.S.C., ch. C-46, § 46(3) (1985) (Can.). See also Official Secrets Act, R.S.C., ch. O-5, §§ 13, 14 (1985) (Can.); Foreign Enlistment Act, R.S.C., ch. F-28, §§ 3, 16 (1985) (Can.).

39. Criminal Code, R.S.C., ch. C-46, § 57 (1985) (Can.).

40. Criminal Code, R.S.C., ch. C-46, § 58 (1985) (Can.).

41. See Criminal Code, R.S.C., ch. C-46, §§ 74, 75 (1985) (Can.). Acts of piracy are enumerated by the Criminal Code while piracy is defined by the law of nations.

42. Criminal Code, R.S.C., ch. C-46, §§ 212(a), (d) & (g) (1985) (Can.).

43. Criminal Code, R.S.C., ch. C-46, § 290 (1985) (Can.).

44. Criminal Code, R.S.C., ch. C-46, § 354(1)(b) (1985) (Can.). The same applies to the possession of stolen credit cards which the accused knows have been obtained by "an act or omission anywhere that, if it had occurred in Canada, would have constituted an offense punishable by indictment." Criminal Code, R.S.C., ch. C-46, § 342(1)(c)(ii) (1985) (Can.).

45. Subsection 465(3) of the Criminal Code provides: "Every one who, while in Canada, conspires with any one to do anything referred to in subsection (1) in a place outside Canada that is an offense under the laws of that place shall be deemed to have conspired to do that thing in Canada." Criminal Code, R.S.C., ch. C-46, § 465(3) (1985) (Can.). Subsection (4) indicates moreover: "Every one who, while in a place outside Canada, conspires with any one to do anything referred to in subsection (1) in Canada shall be deemed to have conspired in Canada to do that thing." Criminal Code, R.S.C., ch. C-46, § 465(4) (1985) (Can.).

laws and only occasionally have recourse to the other principles that, it must be understood, essentially aim only to complete the former. While the principle of territoriality has primacy, other principles of international law such as courtesy, non-intervention, and predictability, require that regulations be recognizable by those they govern. These principles also determine the legislative jurisdiction of states in criminal matters. Indeed, the location of the accused will also be a major factor in the determination of competent jurisdiction. A court must have jurisdiction over both the offense and the accused to be able to hear a charge against the latter.⁴⁶

Moreover, the establishment of extraterritorial jurisdiction by states should be in conformity with the practice followed by the majority of the international community.⁴⁷ Risks of jurisdictional overlap and conflict are thus lower than might have been expected. Although the principles of territoriality and nationality are necessarily concurrent, states will try to avoid placing wrongdoers in situations in which they could be convicted twice.⁴⁸ Furthermore, a practice seems to have emerged whereby states try to resolve their conflicting interests by referring to the principle of the reasonable nature of equitable justice. Jurisdiction would thus be determined in accordance with the "centre of gravity" of a given situation.⁴⁹

In administrative matters, jurisdiction is strictly territorial, but here too it is possible to assign consequences to activities occurring abroad or to apply regulations that will have consequences outside the country. In particular, this is the case regarding taxation, where the state can tax its nationals abroad. Yet aside from such cases, jurisdiction in tax matters is strictly territorial. This seems to be challenged by the emergence of electronic environments.⁵⁰ Regarding telecom-

46. See Criminal Code, R.S.C., ch. C-46, § 470 (1985) (Can.). Moreover, under section 650, the accused must be present in the court during the trial if it concerns a criminal act. This rule obviously does not apply if the accused is a legal person. In summary cases, section 800 of the Criminal Code provides that the accused may appear through the agency of a lawyer. Criminal Code, R.S.C., ch. C-46, § 800 (1985) (Can.).

47. The Council of Europe called this criterion the "shared values approach." COUNCIL OF EUROPE, EXTRATERRITORIAL CRIMINAL JURISDICTION 30 (1990) [hereinafter COUNCIL OF EUROPE]. The United Nations noted that on this level this could present certain problems in the application of extradition treaties. See U.N. Manual, *supra* note 7, at 55.

48. See Criminal Code, R.S.C., ch. C-46, § 7(6) (1985) (Can.) (regarding offences committed outside Canada). With respect to offences committed in Canada, it does not seem that wrongdoers can invoke subsection 11(h) of the Charter when it comes to acquittals or convictions handed down in a state with jurisdiction over the wrongdoer by virtue of the principle of nationality. The rule of double jeopardy is sometimes invoked at the international level, as is the corresponding civil law maxim: *non bis in idem*.

49. See LAW REFORM, *supra* note 12, at 10.

50. Michel Masse, *La Délinquance Informatique: Aspects de Droit Pénal International*, in LE DROIT CRIMINEL FACE AUX TECHNOLOGIES NOUVELLES DE LA COMMUNICATION 289 (Actes du VIII^e Congrès de l'Association Française de Droit Pénal, Nov. 28-30, 1985, Université de Grenoble) (1986): "Already electronic transfers of funds and the facility with which accounting data can circulate from one country to another thus making profits appear here or there, raise very serious challenges to the principal of fiscal territoriality." (author's translation.) Michael Frommkin, who considers threats to the fiscal sovereignty of states to be more apparent than real, claims that states retain,

munications, the sovereign right of states is declared in the Preamble to the Constitution of the International Telecommunication Union. Such sovereignty would authorize states to limit, in certain cases, telecommunications transmissions⁵¹ or to permit competent authorities to render decisions affecting persons located outside the country.⁵² However, it remains that national authorities are also faced with the challenge of regulating international computer networks and enterprises operating outside their territory.⁵³

B. THE PRINCIPLE OF TERRITORIALITY OF LAWS AND TERRITORIAL JURISDICTION

The principle of territoriality of laws is that any activity taking place on the territory of a state is targeted by the law of that state and is justiciable. The territory of a state includes the territorial waters, the space below ground, and the airspace over the territory.⁵⁴ Moreover, the nationality of the parties is of little importance. This principle, which follows from state sovereignty, is recognized

over the medium term, tools allowing them to trace commercial transactions. See Michael Froomkin, *The Internet as a Source of Regulatory Arbitrage* (visited Oct. 15, 1998) <<http://www.law.miami.edu/~froomkin/articles/arbitr.htm>> (from the *Symposium on Information, National Policies, and International Infrastructure*, held at Harvard on January 28-30, 1996).

51. Article 34 of the Constitution of the International Telecommunication Union authorizes Union members to "... cut off any other private telecommunications [in addition to telegrams] which may appear dangerous to the security of the State or contrary to its laws, to public order or to decency." *Constitution of the International Telecommunication Union* (Geneva, 1992) (visited Oct. 28, 1998) <<http://www.itu.int/publications/cchtm/const/art34.htm>>. Article 37 states that Members commit themselves to taking all possible measures to ensure the secrecy of international correspondence and that "they reserve the right to communicate such correspondence to the competent authorities in order to ensure the application of their national laws or the execution of international conventions to which they are parties." *Constitution of the International Telecommunication Union* (Geneva, 1992) (visited Oct. 28, 1998) <<http://www.itu.int/publications/cchtm/const/art37.htm>>.

52. The assignment of frequencies by the local authority can cause radio-electric scrambling affecting signals transmitted abroad. Many regional agreements have however been concluded in this respect and the ITU is the forum where policies and regulation in this domain are developed at the international level. Moreover, aside from the issue of payment of royalties, radiobroadcasters can have their advertising messages substituted abroad. It should be noted that, in this respect, under section 9(2) of the Broadcasting Act, the Canadian Radio-Television and Telecommunications Commission (CRTC) can no longer oblige its licensees to replace all advertising material carried by broadcasting signals they receive. See Broadcasting Act, R.S.C., ch. B-9.01, § 9(2) (1991) (Can.).

53. See Walter Baer, *Will the Global Information Infrastructure Need Transnational (or Any) Governance?* (visited Oct. 15, 1998) <<http://ksgwww.harvard.edu/~itbsp/baerpap.html>> (from the *Symposium on Information, National Policies, and International Infrastructure*, held at Harvard January 28-30, 1996). In Canada, the competent authorities do not presently consider they are required to regulate the Internet. In their eyes, the network is not broadcasting or, at least, does not provide a significant contribution to Canadian broadcasting policy. See Information Highway Advisory Council, *Contact, Community, Content: The Challenge of the Information Highway* 32 (Ottawa, 1995) (final report); and CRTC, *Competition and Culture on Canada's Information Highway: Managing the Realities of Transition* 34 (Ottawa, 1995).

54. See SHARON WILLIAMS & JEAN-GABRIEL CASTEL, *CANADIAN CRIMINAL LAW, INTERNATIONAL AND TRANSNATIONAL ASPECTS* 10-28 (1981).

throughout the world.⁵⁵ Canadian legislation also recognizes this principle⁵⁶ and the exceptions providing extraterritorial scope to its provisions are stated explicitly. Such exceptions, which mainly concern criminal matters, follow from the observation that Canadian criminal law clearly must apply to certain acts committed outside the country by certain persons; the emphasis is sometimes placed on the nature of the act and sometimes on the identity of its author. Such exceptions confirm the rule that states do not take interest in acts wrongdoers commit abroad, and that they do not wish to usurp the sovereignty of other states by trying to resolve cases that occur on the territory of such states.⁵⁷

It can prove complicated to determine the territory where a situation regulated by public law occurred. The identification of where an offense is committed is one of the best illustrations of this problem. In this respect, the notion of territory has been broadened to include the principles of subjective territoriality and objective territoriality.⁵⁸ These legal constructions allow states to determine whether they have jurisdiction by taking as distinguishing criteria, acts and effects (in other words, by differentiating between whether the crime was commenced or came to fruition on its territory). The principle of subjective territoriality⁵⁹ aims to assign jurisdiction to the courts of a state with respect to offenses with a constituting element that occurred in that state's territory.⁶⁰ The principle of

55. See LAW REFORM, *supra* note 12, at 8-9. The beginning of paragraph 2(1) of the *International Covenant on Civil and Political Rights* provides that "Each State Party to the present covenant undertakes to respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present covenant." *International Covenant on Civil and Political Rights*, G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (1976). Extra-atmospheric space is the subject of few considerations on the criminal level. If it became relevant to criminal law, the applicable legal regime would probably be that concerning passive personal jurisdiction since the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other Celestial Bodies, 1967, U.S.-U.S.S.R.-U.K. 610 U.N.T.S. 205, eliminates all notions of sovereignty.

56. See Interpretation Act, R.S.C., ch. I-21, §§ 8 (1985) (Can.); Criminal Code, R.S.C., ch. C-46, §§ 6(2), 8(1) (1985) (Can.). However, the latter provision seems more to announce exceptions to the applications of provisions in the Criminal Code than it does to restrict application to Canadian territory as opposed to other states. See LAW REFORM, *supra* note 12, n.22. Moreover the Commission recommended the Code be amended to include the principles of international law which are the basis for Canadian criminal law and the jurisdiction of Canadian courts, as well as a definition of Canada which would include the Canadian Arctic, interior waters in Canada and the territorial waters of Canada.

57. *Libman*, 2 S.C.R. 178, 184.

58. Calling them legal fictions, the Council of Europe indicated that "a wide application of the ubiquity and effects doctrines may in fact be tantamount to an extraterritorial application of criminal laws under the guise of the principle of territoriality;" See COUNCIL OF EUROPE, *supra* note 47, at 24.

59. Sometimes allusion is made to the doctrine of ubiquity.

60. See *Draft Convention on Jurisdiction with Respect to Crime*, 29 AM. J. INT'L L. 435 (1935). There the principles of subjective and objective territoriality are distinguished. The former "establishes the jurisdiction of the State to prosecute and punish for a crime commenced within the State but completed and consummated abroad," while the latter "establishes the jurisdiction of the State to prosecute and punish for a crime commenced without the State but consummated within its territory." *Id.* at 484, 487. This principle would also apply to notions of conspiracy and attempt.

objective territoriality⁶¹ targets the assignment of jurisdiction to the courts of a state with respect to offenses that are in no way committed within that state's borders, but that have consequences that are harmful to persons or property in that state and are directly experienced there.⁶² Here again, certain states make a distinction between offenders who did, and those who did not, intend the effects to be produced in the territory of the state claiming jurisdiction.⁶³ In any case, the application of such a principle requires a certain degree of pragmatism, in particular with respect to the chances of achieving a result: the state claiming jurisdiction should be able to exercise binding power on the person accused.

Another territorial fiction is that of the law of flag. It entails that a state has jurisdiction over offenses committed aboard ships and aircraft flying its flag. Canada has adopted this principle with respect to airplanes,⁶⁴ but jurisdiction remains less clear with respect to ships: the Law Reform Commission of Canada recommended the Criminal Code be amended to make it applicable to offenses committed aboard Canadian ships outside Canadian territory.⁶⁵

While the courts rarely use the terms objective and subjective territoriality, which sometimes complicates comprehension of the scope of these principles, they have nonetheless interpreted the concept of territoriality using the elements underlying these principles. In a case of transnational fraud, the Supreme Court of Canada examined the principle of subjective territoriality without calling it by that name. After performing an exhaustive summary of British and Canadian jurisprudence, Justice La Forest recognized in *Libman v. The Queen*⁶⁶ that it was legal for Canada to prosecute offenses committed partly abroad:

For in considering that question we must, in my view, take into account all relevant facts that take place in Canada that may legitimately give this country an interest in prosecuting the offense. One must consider whether there is anything in those facts that offends international comity . . .

61. Allusion is sometimes made to the doctrine of effects.

62. In the case of subsidiaries and multinational companies, reference is also made to the doctrine of the unity of the group. See *Imperial Chemical Industries, Ltd. v. E.E.C. Commission* [1972] E.C.R. 619.

63. On this subject, Jean-Gabriel Castel indicated: "Knowledge of effects abroad or objective ability to anticipate such effects should be present in order to attract penal liability." JEAN-GABRIEL CASTEL, *EXTRATERRITORIALITY IN INTERNATIONAL TRADE* 15 (1988) [hereinafter CASTEL, *EXTRATERRITORIALITY*]. He adds a little later that while an activity can have effects in another state, it is very likely that it will have effects in other states also. In this respect it is pointed out that the state which claims jurisdiction should establish that such effects occur mainly within its jurisdiction. It is clear that the increasingly frequent recourse to the theory of effects could, over time, lead to a move from the principle of territoriality to that of universal jurisdiction.

64. See Criminal Code, R.S.C., ch. C-46, § 7(1) (1985) (Can.).

65. See LAW REFORM, *supra* note 12, at 44. See also, Canada Shipping Act, R.S.C., ch. 5-9, § 683 (1985) (Can.); Criminal Code, R.S.C., ch. C-46, §§ 7(2.1), 7(2.2) (1985) (Can.).

66. *Libman*, 2 S.C.R. 178. Murray Libman asked his staff in Toronto to telephone United States residents to encourage them to buy shares in a gold mine in Costa Rica. According to the evidence, the staff misrepresented its identity, the location from which it was telephoning, and the nature and the worth of the shares it was selling. The fraud victims sent their money to associates of the accused in Panama and Costa Rica.

As I see it, all that is necessary to make an offense subject to the jurisdiction of our courts is that a significant portion of the activities constituting that offense took place in Canada. As it is put by modern academics, it is sufficient that there be a "real and substantial link" between an offense and this country, a test well-known in public and private international law.⁶⁷

The legitimacy of the principle of objective territoriality is expressed in *Lotus*.⁶⁸ In that case an accident in international waters between a French ship and the *Boz Kourt*, which was flying the Turkish flag, led to the death of eight sailors, all of whom were Turkish. Turkey claimed jurisdiction, and France challenged. The Permanent Court of International Justice ruled in favour of Turkey in the end, thus recognizing the legitimacy of the principle of objective territoriality:

[I]t is certain that the courts of many countries, even of countries which have given their criminal legislation a strictly territorial character, interpret criminal law in the sense that offences, the authors of which at the moment of commission are in the territory of another State, are, nevertheless, to be regarded as having been committed in the national territory, if one of the constituent elements of the offense, and more especially its effects, have taken place there. . . . If, therefore, a guilty act committed on the high seas produces its effects on a vessel flying another flag or in foreign territory, the same principles must be applied as if the territories of two different States were concerned, and the conclusion must therefore be drawn that there is no rule of international law prohibiting the State to which the ship on which the effects of the offense have taken place belongs from regarding the offense as having been committed in its territory and prosecuting the delinquent.⁶⁹

The Law Reform Commission of Canada recommended that the principles of subjective and objective territoriality be employed, indicating that an offense is partially committed in Canada if:

- i) some of its constituent elements occurred outside Canada and at least one of them occurred in Canada, and a constituent element that occurred in Canada established a real and substantial link between the offense and Canada, or
- ii) all of its constituent elements occurred outside Canada, but direct substantial harmful effects were intentionally or knowingly caused in Canada.⁷⁰

The Commission then listed a series of offenses committed wholly or partially abroad that could legally be prosecuted in Canada. Moreover, it emphasized that "[W]e also have in mind the fact that various fraudulent schemes of international dimensions are facilitated by modern technology such as computers and space satellite means of communication."⁷¹ Aware of the principle of reciprocity of criminality, the Commission recommended proceedings should not be instituted against persons who committed offenses in Canada when such "conduct did not amount to an offense under the criminal law of the state in which the harmful

67. *Id.* at 211-13.

68. The Case of the *S.S. Lotus*, Fr. v. Turk., 1927 P.C.I.J. (ser. A) No. 10, at 4 (Decision No. 9).

69. *Id.* at 23.

70. LAW REFORM, *supra* note 12, at 106.

71. *Id.*

effects were designed to occur, or were likely to occur, or did in fact occur.”⁷² Such is the case when acts are committed abroad that were not an offense under the law of that state and that had “harmful consequences [that] are felt or occur in Canada, unless that person intentionally or knowingly caused the harmful consequences to occur or to be felt in Canada.”⁷³

Other principles complement the principle of territoriality of laws or abstract from the territorial dimension of offenses. These are the principle of nationality, the principle of universal jurisdiction, and the protective principle. Such principles target different offenses that escape the jurisdiction of the state owning the territory in question, either because that state is limited by immunities or because its criminal law does not cover such issues.

C. EXTRATERRITORIAL JURISDICTION

Public law has extraterritorial scope only if the legislator intends to assign legal consequences to situations that occur entirely outside the state, or if the state authorizes its tribunals to hear such cases. Here there is no question of establishing any link between a given situation and the territory of a jurisdiction. It should be noted that the Constitution of Canada imposes no territorial limits on federal legislative jurisdiction. Section three of the Statute of Westminster⁷⁴ grants Dominion Parliaments the power to adopt legislation with extraterritorial scope. Regarding the provinces, the Constitution Act of 1867 states that provincial legislative power applies to the province or in the province and the same applies to purely local or private matters: provinces are denied any extraterritorial jurisdiction.⁷⁵ Nonetheless, provincial legislation can entail legal consequences for events occurring elsewhere. In such cases, laws with only territorial scope have extraterritorial effects.

The foundation of extraterritorial jurisdiction probably lies in the need to sanction certain situations that normal procedures would likely be unable to resolve. Indeed, the Council of Europe observed that public international law has identified the expression of international solidarity in the fight against crime and the need for states to protect their interests and those of their citizens as grounds for the establishment of extraterritorial jurisdiction over criminal matters.⁷⁶ While this implies that a state wishing to exercise its extraterritorial jurisdiction would have to encroach on the jurisdiction of another state, the legitimacy of extraterritorial

72. *Id.* at 109.

73. *Id.*

74. Statute of Westminster, 1931, 22 Geo. 5, ch. 4, § 3 (Eng.) states: “It is hereby declared and enacted that the Parliament of a Dominion has full power to make laws having extra-territorial operation.”

75. See *Interprovincial Cooperatives Ltd and Dryden Chemicals v. The Crown* [1976] 1 S.C.R. 477. The same goes for municipal administrations, the jurisdiction of which is limited to the territory of the municipality; see *Vennes v. Cité de Grand-Mère* [1968] C.S. 118.

76. COUNCIL OF EUROPE, *supra* note 47, at 26.

jurisdiction in certain specific circumstances is recognized by all states.⁷⁷ Moreover, the Law Reform Commission of Canada, which studied extraterritorial jurisdiction in criminal matters, did not challenge the legitimacy of such measures. Its work in this area targeted the promotion of simplicity, clarity, precision, and uniformity by identifying ambiguities and incoherencies in Canadian law. It concluded, as a general policy:

[A] state does not have a right under international law to enforce its criminal law in the territory of other states either by means of its police power or by means of conducting criminal trials in the other states. In fact, in the absence of a permissive treaty or agreement it would be an infringement of sovereignty and contrary to international law to do so.⁷⁸

The principles of extraterritorial jurisdiction, which have been identified by international law, are the principle of (active and passive) nationality, the principle of universal jurisdiction, and the protective principle. The exercise of extraterritorial jurisdiction does not authorize a state or its courts to intervene in another state, whether to gather elements of evidence or to force individuals to submit themselves to the authority of its legal system. The extraterritorial jurisdiction of the courts is exercised within the territorial boundaries of the state and in conformity with usual procedures. Measures of mutual assistance and cooperation between the states concerned facilitate, when necessary, the exercise of the extraterritorial jurisdiction of laws and courts.

Principally, extraterritorial jurisdiction is recognized only in criminal law. It is, however, also applied in matters concerning competition (in the economic and criminal dimension of such law), though the occasional extraterritorial application of competition legislation can rest partially on the principle of objective territoriality. Indeed, states have given a broad interpretation to the classical criteria of connection developed in international criminal law. Evelyne Friedel-Souchu points out:

In the domain of competition, there can be no doubt that the effects alone of an offense are indeed a constitutive element of that act, since legislation stating general prohibitions on certain restrictive practices define such practices through reference to their economic effects.⁷⁹

However, certain extraterritorial principles, such as that of active personality, have been invoked by states in competition matters. According to this principle, a state could apply its competition legislation to its national enterprises even if the trade restraints occurred outside the country.⁸⁰ However, specific criteria

77. See *United States v. Vasquez-Velasco*, 15 F.3d 833 (9th Cir. 1994).

78. LAW REFORM, *supra* note 12, at 24.

79. Evelyne Friedel-Souchu, *Extraterritorialité du Droit de la Concurrence aux États-Unis et dans la Communauté Européenne* (Bibliothèque de Droit International et Communautaire, vol. 109) (1994) at 29 (author's translation).

80. See *Pacific Seafarers, Inc. v. Pacific Far East Line, Inc.*, 404 F.2d 804 (D.C. Cir. 1968). As is pointed out by Evelyne Friedel-Souchu,

This hypothesis is limited in practice. It is possible and accepted by the international community for a state to apply its law to its national enterprises really only if there

have been developed, in particular by the United States and the European Community, to justify the extraterritorial application of competition legislation. First, it is a question of the criterion of effects and, second, that of the criterion of economic control. According to the criterion of effects, there must be a connection between the effects and the state for the state's claim to jurisdiction to be just and reasonable.⁸¹ Moreover, the practice in question must produce substantial, direct, and foreseeable effects in the national territory. By virtue of the criterion of economic control and unity of enterprise, a state could regulate the activity of foreign subsidiaries of U.S. companies or foreign parent companies of subsidiaries established on their national territory.⁸² In practice it must be recognized that the range of extraterritorial laws concerning competition depends on the ability of the courts to exercise their jurisdiction over the bodies in question. On this level, while issues concerning the gathering of evidence from foreign sources and those concerning the execution of judgments are generally subject to bilateral mutual assistance treaties, certain exceptions to such regimes have been worked out in competition matters.⁸³

1. *Nationality and Personal Jurisdiction*

The principle of nationality recognizes the right of a sovereign state to apply its criminal law with respect to the nationality (or personality) of the persons involved in a criminal act abroad. The principle is said to be active when the law extends its jurisdiction to citizens of the state, its nationals, and other persons who owe it allegiance with respect to any act committed outside its territory. Certain countries apply this principle without restriction.⁸⁴ In contrast, the principle is called passive when the law aims to extend the jurisdiction of state tribunals

is first a general consensus on the notion of enterprise nationality. When a foreign subsidiary is the source of anticompetition conduct, it is sometimes difficult to have recourse to the principle of active personality.

Friedel-Souchu, *supra* note 79, at 29.

81. See *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945); *Ahlström Osakeyhtiö et autres v. Commission des Communautés européennes*, 27 September 1988, *Recueil C.J.C.E.* 1988 at 5193.

82. See Friedel-Souchu, *supra* note 79, at 32-33. She indicates however that the application of such criteria in the governing of activities of foreign subsidiaries of domestic companies, in that it rests on an extension of the principle of nationality, is not recognized in international law.

83. See generally *Foreign Extraterritorial Measures Act*, R.S.C., ch. F-29 (1985) (Can.). This act authorizes the Attorney General of Canada to prohibit, by order, the production of documents and the supply of information in the context of cases before foreign courts, as well as the recognition and execution in Canada of certain foreign antitrust decisions.

84. This would be the case, in particular, for Germany, France, Greece, Japan, and Poland. In Germany this principle would also cover computer crime. See Manfred Möhrensclager, *Computer Crimes and Other Crimes against Information Technology in Germany*, 64 R.I.D.P. 319, 355 (1993). The Council of Europe observed that "Member states which are not part of the Anglo-Saxon legal tradition have in general extensive extraterritorial criminal jurisdiction based on the nationality of the offender . . .," in COUNCIL OF EUROPE, *supra* note 47, at 10. When this principle is applied without restriction, it will often be subordinated to the condition that the crime be punishable in both states: this does not hold if the principle applies only to certain specific crimes.

to individuals, no matter what their nationality, who commit offenses abroad against citizens of the state.

There are various arguments for the principle of active personal jurisdiction. Its purpose is to counterbalance the immunity granted to certain nationals abroad. It is also meant to reduce the risk of impunity in countries that do not extradite their nationals, which would result in an offender finding refuge in his or her country after having committed a wrongful act.⁸⁵ Using this principle, other states would like to protect themselves against attacks made abroad by their own nationals. Its object can also be to allow an offender to choose the jurisdiction of the state of which he or she is a national, because it is more familiar.⁸⁶ Finally, few states apply this principle to corporations, though a number recognize corporations' criminal responsibility. According to a widespread view, corporations have the nationality of the state in which they are incorporated.⁸⁷

In Canada, the principle of personal jurisdiction is applied in very specific situations. On one hand, the law extends the jurisdiction of Canadian criminal law to persons considered to be representing Canada, such as federal civil servants, military personnel, and members of the Royal Canadian Mounted Police.⁸⁸ In such circumstances, the application of the principle of nationality can be explained as compensating for the immunity such individuals have abroad. Canadian criminal law also covers certain offenses committed abroad by Canadians. Such offenses are those concerning persons under international protection,⁸⁹ treason,⁹⁰ bigamy,⁹¹ foreign enlistment,⁹² and the Official Secrets Act.⁹³ Some writers suggest this principle could be applied to serious crimes, such as murder.⁹⁴ Indeed, extradition treaties could present obstacles to returning the offender to the *lex delicti*, if only because of the political nature of the act. Moreover, on April 18, 1996, the Minister of Justice tabled a bill to modify the Criminal Code to prohibit

85. See COUNCIL OF EUROPE, *supra* note 47, at 10: "Solidarity is the principal motivating force in such cases." See also *Public Prosecutor v. Antoni*, 32 I.L.R. 140 (1960). It must be noted that the principle of active personal jurisdiction does not extend state jurisdiction to foreign accomplices.

86. See ANDRÉ HUET & RENÉE KOERING-JOULIN, *DROIT PÉNAL INTERNATIONAL* 223 (1994).

87. JEAN-GABRIEL CASTEL, *CANADIAN CONFLICT OF LAWS* 509 (2d ed. 1986) [hereinafter CASTEL, *CONFLICT*].

88. See Criminal Code, R.S.C., ch. C-46, § 7(4) (1985) (Can.); National Defence Act, R.S.C., ch. N-5, § 67 (1985) (Can.); Federal Court Act, R.S.C., ch. F-7, para. 18(2); Royal Canadian Mounted Police Act, R.S.C., ch. R-10, § 39 (1989) (Can.). Inversely, Parliament recognizes the jurisdiction of foreign states with respect to offences committed by certain agents of such states in Canada; see generally Visiting Forces Act, R.S.C., ch. V-2.

89. See Criminal Code, R.S.C., ch. C-46, § 7(3)(c) (1985) (Can.).

90. See Criminal Code, R.S.C., ch. C-46, § 46(3) (1985) (Can.).

91. See Criminal Code, R.S.C., ch. C-46, § 290(1)(b) (1985) (Can.).

92. See Foreign Enlistment Act, R.S.C., ch. F-28, § 3 (1985) (Can.).

93. See Official Secrets Act, R.S.C., ch. O-5, § 13 (1985) (Can.).

94. See WILLIAMS & CASTEL, *supra* note 54, at 129-30. These authors specify that in order to render an alternative verdict, the crime of involuntary culpable homicide should also be covered. It should be noted that British law contains such a provision in the Offences Against the Person Act 1961, 24 & 25 Vict., ch. 100 (Eng.).

sex tourism, or in other words to prosecute Canadians who take part in activities related to child prostitution when they are visiting foreign countries.⁹⁵

The principle of active personal jurisdiction also has an application in taxation matters. A sovereign state can determine the level of taxation that it intends to apply to its nationals who reside abroad or who receive income there. While it can execute its fiscal laws on its territory, the state can neither do so in an extraterritorial manner, nor ask a foreign state to do so in its stead. Moreover, a state can also tax revenue received on its territory by foreigners; the risks of double taxation are then regulated through international treaties on this issue.

The principle of passive personal jurisdiction targets the application of the criminal law of a state and the granting of jurisdiction to its courts with respect to offenses committed abroad against a national of that state, in particular when no other foreign criminal law could be applied.⁹⁶ This principle, which is very rarely applied,⁹⁷ would seem to be limited to the crime of terrorism, especially when the acts seem to target the nationality of the victims. Indeed, extraterritorial jurisdiction over this sort of crime could be connected to the principle of universal jurisdiction.⁹⁸ Moreover, this principle has been the object of much criticism. In particular, critics argue first, that it encroaches on the sovereignty of other states that could have more solid jurisdictional foundations, second, that it makes the accused subject to foreign rules of law with which he or she may have little familiarity (all the more so if his or her conduct is not prohibited in the state where he or she is located), and finally that it would simply be impracticable (due to the absence of extradition treaties and insufficient evidence in the victim's country). Still, this principle should be retained, if only to use it in circumstances in which the state with the main basis for jurisdiction refuses to take action; the principle of sovereignty should not justify impunity for certain crimes.⁹⁹ The

95. See *Amendments Tabled on Child Prostitution, Child Sex Tourism, Criminal Harassment and Female Genital Mutilation* (Ottawa, Apr. 18, 1996) (visited Sept. 11, 1998) <http://www.canada.justice.gc.ca/News/Communiqués/1996/sex_en.html>.

96. See *LAW REFORM*, *supra* note 12, at 10. This principle is sometimes called objective personal jurisdiction, or the principle of passive nationality. It does not seem to require a foundation in reciprocity of criminality. CASTEL, *EXTRATERRITORIALITY*, *supra* note 63, at 20.

97. Compare Criminal Code, R.S.C., ch. C-46, § 7(3)(d) (1985) (Can.), which targets crimes against internationally protected persons, and Canadian Human Rights Act, R.S.C., ch. H-6, § 40(5)(c) (1985) (Can.), which extends the jurisdiction of the Canadian Human Rights Commission to discriminatory acts committed abroad against Canadian citizens. See also Criminal Code, R.S.C., ch. C-46, § 273.3 (1985) (Can.) which deals with the transportation of Canadian children abroad with the intention of permitting certain prohibited sexual acts to be committed there.

98. See *United States v. Yunis*, 681 F. Supp. 896 (D.D.C. 1988), *aff'd*, 924 F.2d 1086 (D.C. Cir. 1991) (Yunis, a Lebanese, was accused of having participated in the hijacking of a plane carrying three American citizens). See also *United States v. Felix-Guierrez*, 940 F.2d 1200 (9th Cir. 1991) (jurisdiction over foreigners having committed a crime against an agent of the Drug Enforcement Agency). In *United States v. Columba-Colella*, 604 F.2d 356 (5th Cir. 1979), the Fifth Circuit Court of Appeals refused to apply this principle with respect to a Mexican accused of possessing a car stolen from an American.

99. See Geoffrey Watson, *The Passive Personality Principle*, 28 TEXAS INT'L L.J. 1 (1993). The author proposes that the international community establish explicit rules with respect to jurisdiction.

question of whether this principle can be applied in cases where the victim is a legal person, which is not without import in the case of computer crime, leads to controversy, in particular when it comes to determining whether the legal person can be reputed to have the nationality of the state claiming jurisdiction.¹⁰⁰

The Council of Europe indicated that this principle could express open mistrust with respect to the level and quality of the law and criminal justice system of other states, and suggested the following basic conditions for its application: that the principle apply uniquely to offenses committed with intent or consciousness of causing prejudice to a national of the state claiming jurisdiction, that it apply only to serious offenses, that the accused be present throughout the proceedings in the territory of the state that claims jurisdiction, and that the offense be such under the law of the state of the *locus delicti*.¹⁰¹

2. *Universal Jurisdiction*

The principle of universal jurisdiction concerns certain infractions with an international nature. In this respect, the distinction between international crime and transnational crime takes on its whole meaning: the former targets truly international crimes, while the latter targets crimes falling under national laws but having elements that involve other states.¹⁰² The principle of universal jurisdiction aims to grant jurisdiction to the courts of any state with respect to offenses such as piracy and war crimes, independent of the location where they were committed and the nationality of their author.¹⁰³ Canada, which does not want to become a haven for certain criminals, has extended the application of its criminal laws with respect to offenses involving piracy, hostage taking, nuclear matter, torture, war crimes, and crimes against humanity.¹⁰⁴ Most such provisions follow from international treaties Canada has signed. Such treaties complement the Criminal Code with respect to rights (or even obligations) that Canada has regarding such offenses committed outside its territory.

While prosecution of such offenses has raised certain constitutional problems in Canadian law,¹⁰⁵ the jurisdiction issue does not seem to be among them. The courts will have jurisdiction over the crimes attributed to the accused, no matter where or when they were committed. Only an acquittal or a previous conviction could withdraw such jurisdiction from Canadian tribunals.¹⁰⁶

100. COUNCIL OF EUROPE, *supra* note 47, at 13.

101. *Id.* at 29.

102. See WILLIAMS & CASTEL, *supra* note 54, at 137.

103. LAW REFORM, *supra* note 12, at 9.

104. See Criminal Code, R.S.C., ch. C-46, § 7 (1985) (Can.).

105. See *R. v. Finta* [1994] 1 R.S.C. 701. In the *Eichmann* case, the State of Israel had no other jurisdictional basis on which it could rest its proceedings; see WILLIAMS & CASTEL, *supra* note 54, at 138-39.

106. See Criminal Code, R.S.C., ch. C-46, paras. 7(6), 607(6) (1985) (Can.).

Of course, crimes that could be subject to the principle of universal jurisdiction can be added to the list of international offenses mentioned above, in so far as such crimes demonstrate conduct hostile to humanity and the international community agrees to prohibit them. It remains to be determined whether computer crime, which is still far from being recognized as a universally prohibited form of behavior, will be placed in this category. In its *Manual on the Prevention and Control of Computer-Related Crime*, the United Nations indicated:

Where there is strong international solidarity by way of customary or conventional international law, jurisdiction over important offences may be decided by the principle of universality, in addition to the applicability of other grounds of jurisdiction. No such conventions exist yet in relation to computer crime. Eventually, however, as has been the case in other major international crimes, international conventions will regulate this area.¹⁰⁷

3. *The Protective Principle*

The purpose of the protective principle is to make the criminal law of a state applicable to, and to give its courts jurisdiction over, certain offenses that are considered to affect the vital interests of that state,¹⁰⁸ and that are committed by anyone outside the country. Such offenses concern, for example, state security, currency, seals, stamps, passports, and other similar documents belonging to a state.¹⁰⁹ Conscious of the inappropriateness of enumerating the offenses that could be covered by this principle, the Council of Europe limited itself to recommending it be applied only to offenses affecting interests considered vital to the existence of the state, its institutions, and its constitutional and social order.¹¹⁰ It was also suggested that for this principle to be considered legitimate, infringement on protected interests should be considered a crime by the entire international community.¹¹¹

The establishment of extraterritorial jurisdiction on this level follows from the idea that other states cannot be left responsible for the safeguard of fundamental national interests or for the defense of interests other states might not consider to merit the protection of their criminal law.¹¹² Thus, it is not required that the offense be punishable in both countries or that it produce effects in the state claiming jurisdiction. Since this principle is sometimes invoked with other principles, including the principle of effects, the Council of Europe noted that in a

107. U.N. Manual, *supra* note 7, at 52.

108. See COUNCIL OF EUROPE, *supra* note 47, at 13-14. The Committee notes that there does not seem to be any consensus on which interests should be defined as essential. In general, national security and issues affecting national finances will be recognized as essential interests. Some states extend such recognition to the protection of the public service, diplomatic and consular missions, the public trust, capital markets, national ships and aircraft, the environment and certain industrial and commercial interests.

109. LAW REFORM, *supra* note 12, at 9.

110. COUNCIL OF EUROPE, *supra* note 47, at 29.

111. *Id.* at 30. If it is not possible to apply the principle of reciprocity of criminality, the Council suggests the shared-values approach.

112. *Id.* at 13.

number of states there is no clear distinction between cases in which extraterritorial criminal jurisdiction should be governed by this principle and those in which another principle should apply.¹¹³

It is noted that this principle can easily open the way to abuses, in so far as states could apply it to any context,¹¹⁴ and so extend the framework of their fundamental national interests. This could be the case, for example, when an individual openly criticizes the political system of a foreign country of which he or she is not a national. The sentence pronounced by the Ayatollah Khomeini against the author of *The Satanic Verses*, Salman Rushdie, is a good illustration of this. The protection of economic interests is another illustration of a questionable extension of this principle.¹¹⁵

Presently, Canada does not use the protective principle to extend its laws abroad, except with respect to offenses concerning passports and certificates of citizenship.¹¹⁶ Indeed, the Criminal Code does not prohibit the production and circulation of counterfeit Canadian currency abroad.¹¹⁷ However, to these provisions, the crime of treason can be added,¹¹⁸ as can certain offenses regarding official secrets¹¹⁹ and the prevention of the pollution of arctic waters.¹²⁰

Regarding activities taking place on computer networks, the United Nations observed the following in its Manual on the prevention and control of computer-related crime:

The protective principle may be relevant for certain types of computer offences because it grants jurisdiction to a State over offences committed outside its territory, in the defense of fundamental (vital) interests . . . There exists very little consensus on what

113. *Id.*

114. Moreover, the Americans would have invoked the principle of protection against drug trafficking in the case which lead to the arrest of General Noriega in Panama. See Frances Ma, *Noriega's Abduction from Panama: Is Military Invasion an Appropriate Substitute for International Extradition?*, 13 LOY. L.A. INT'L & COMP. L.J. 925 (1991).

115. COUNCIL OF EUROPE, *supra* note 47, at 29-30. In this respect, the Committee indicates: "Economic interests, which are essentially the interests of trade and industry, are thus in principle not covered. Perhaps only when economic interests transcend private concerns and are of national public importance (for example, preventing the circulation of counterfeit currencies, or protecting national health) is it justifiable to resort to claims of jurisdiction on the basis of this principle under public international law." See *Compagnie Européenne des Pétroles S.A. v. Sensor Nederland B.V.*, 22 I.L.M. 66 (1983), in which the District Court of The Hague decided that American foreign policy interests were not covered by this principle.

116. See Criminal Code, R.S.C., ch. C-46, §§ 57, 58 (1985) (Can.). See also Immigration Act, R.S.C., ch. I-2, §§ 100, 101 (1985) (Can.); Citizenship Act, R.S.C., ch. C-29, § 30 (1985) (Can.).

117. See LAW REFORM, *supra* note 12, at 79, which proposed this be prohibited.

118. Criminal Code, R.S.C., ch. C-46 § 3 (1985) (Can.). It should be noted that this offense applies only to Canadian citizens abroad. The requirement of obligatory allegiance was debated in the case of Lord Haw-Haw, an American who lived in England for eighteen months and obtained an English passport (without ever having the nationality). Later, during the Second World War, he participated in Nazi radio propaganda in Berlin, which was intended for listeners in Great Britain. See *Joyce v. D.P.P.* [1946] A.C. 347.

119. See Official Secrets Act, R.S.C., ch. O-5 (1985) (Can.).

120. See Arctic Waters Pollution Prevention Act, R.S.C., ch. A-12 (1985) (Can.).

constitutes vital interests. No doubt a sovereign State might consider attacks on data or telecommunication infrastructures, when related to basic government activities (police data, military data, state security systems etc.), to fall within its purview. However, a tendency may arise to consider certain economic interests, naturally involving a significant amount of transborder data flow, as a vital concern of the State. Nevertheless, caution is needed in regard to such extensions, since they can affect adversely the legitimate flow of information and data, as well as other economic and social interests. Therefore, the State concerned should be expected to take due account of the principles of cooperation, comity and reasonableness, which should govern State action in exercising extraterritorial jurisdiction.¹²¹

D. MECHANISMS OF COOPERATION AND MUTUAL ASSISTANCE

International public law prohibits the exercise of executive jurisdiction on the territory of another state, unless the latter gives its consent.¹²² States cannot exercise their executory jurisdiction on the territory of other states, such would be contrary to the principle of non-intervention¹²³ and would violate the sovereignty of the states concerned.¹²⁴ The executive jurisdiction of states, which is expressed notably by arrests, searches, orders to pay sums of money, and orders to perform or to refrain from performing certain actions, is strictly territorial. There can be no extraterritorial application of the repressive measures used by powers charged with fighting crime. As Lombois has indicated, "[t]he law may very well decide to cast its shadow beyond its borders; the judge may well have a voice so loud that, speaking in his house, his condemnations are heard outside; the reach of the police officer is only as long as his arm . . . he is a constable only at home."¹²⁵

Cooperation and mutual assistance mechanisms are intended to compensate for the problems that can accompany the repression of an offense with foreign elements. In criminal matters for example, a state wishing to exercise its jurisdiction will want, depending on the case, to obtain pieces of evidence located in another state or to ensure the presence of the accused on its territory. The court's

121. U.N. Manual, *supra* note 7, at 52. Frances Ma considers that this principle could apply in the case of proceedings related to international software pirating rings. Ma, *supra* note 114.

122. COUNCIL OF EUROPE, *supra* note 47, at 18.

123. The United Nations Charter states that "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations". U.N. CHARTER art. 2, para. 4.

124. The United Nations Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States asserts that:

No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are in violation of international law.

G.A. Res. 2625, 25th Sess. (1970).

125. CLAUDE LOMBOIS, *DRIT PÉNAL INTERNATIONAL* 536 (2nd ed. 1979) (author's translation).

exercise of its jurisdiction indeed depends on the presence of the accused¹²⁶ and the availability of pieces of evidence. The mechanisms that have been developed to these ends are extradition, mutual legal assistance in criminal matters, and administrative cooperation between the forces of order.

Extradition is an official procedure by which a person is arrested and then surrendered to the authorities of another state.¹²⁷ In Canada, two different extradition mechanisms are used depending on the state with which Canada is involved. If the state is a member of the Commonwealth, the case falls under the Fugitive Offenders Act.¹²⁸ This law, which is not subject to a treaty, targets the return of persons convicted by a tribunal in one of the territories of the Commonwealth. All that is required is that the crime with which the person is accused was committed in a Commonwealth territory and that it be punishable in that territory by a minimum prison term of twelve months with forced labor. The offense in question need not be punishable under Canadian law.¹²⁹

The extradition of individuals between Canada and countries not belonging to the Commonwealth falls under the Extradition Act,¹³⁰ in so far as the two countries are linked by an extradition treaty.¹³¹ Canada is a party to about forty such treaties, some of which were concluded by Great Britain after 1870 and have been extended to Canada. Extradition treaties have specific provisions concerning crimes for which extradition can be required and indicate the procedure to be followed when the extradition is to be from Canada or when it is at the request of Canada.¹³² The crimes covered are listed in Appendix I of the Extradition Act and include counterfeiting, theft, misappropriation of funds, fraud, extortion threats, unauthorized use of computers, and destruction of data.¹³³

126. In Canadian law, the accused must be present during the proceedings. *See* Criminal Code, R.S.C., ch. C-46, § 650 (1985) (Can.). This right is also guaranteed in the International Covenant on Civil and Political Rights by the states which have signed it. In exceptional cases, the proceedings may take place in the absence of the accused, but only when the latter escapes during the proceedings or under other circumstances in which the court will nonetheless retain binding authority over the accused. Criminal Code, R.S.C., ch. C-46, § 475 (1985) (Can.). Moreover, in Canadian constitutional law, there is no guarantee granting the accused, as in the United States Constitution, "a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed." U.S. CONST. amend. VI.

127. "Return" is spoken of when the procedure involves Commonwealth countries. The applicable legal framework is that provided for in the Fugitive Offenders Act, R.S.C., ch. F-32 (1985) (Can.).

128. Fugitive Offenders Act, R.S.C., ch. F-32 (1985) (Can.).

129. Fugitive Offenders Act, R.S.C., ch. F-32, § 4 (1985) (Can.).

130. Extradition Act, R.S.C., ch. E-21 (1985) (Can.).

131. This act applies only in cases in which the foreign state is party to an extradition treaty with Canada. In such a case, it simply complements the provisions of such a treaty. *See* Extradition Act, R.S.C., ch. E-21, § 3 (1985) (Can.). Moreover, extradition is not an absolute right recognized by international law as belonging to states. Such a right may be granted only on the basis of bilateral agreements between the two states concerned.

132. The procedure essentially targets exchanges of information and the court's determination of the jurisdiction of the applicant state over the fugitive (such jurisdiction could be based on territorial or extraterritorial competence).

133. *See* Extradition Act, R.S.C., ch. E-21, app. I (1985) (Can.). This list does not include interception of communications, gaming and betting, or obscenity.

Surrender and extradition are generally obligatory; the requested state, and even less the individual, cannot oppose it on the basis of an exception that is not explicitly formulated in the treaty or relevant law. In contrast, the individual can consent to extradition and give up the accompanying formal procedures. With respect only to extradition, there must be reciprocity of criminality between the applicant state and the requested state.¹³⁴ Moreover, the requested state is sometimes not required to extradite its nationals.¹³⁵ And it must, depending on what is stated in the treaty, refuse extradition if the request concerns a political offense or discriminatory motives, if granting it would, under such circumstances, contravene the principles of fundamental justice or if the person has received a definitive acquittal or guilty sentence for the offense by the requested party. Extradition may be optional if the person is the object of proceedings instituted by the requested party or if, under the circumstances and given the state of health of the person, extradition would put his or her health or life in danger. Arrest and extradition procedures are governed by the law of the requested state, which means in Canada that the individual has a right to appeal and to invoke the benefit of the provisions of the Canadian Charter of Rights and Freedoms.

The presence of an individual on the territory of a state claiming jurisdiction over an offense of which he or she is accused can, in the end, be ensured by other, much less formal, means. First, the accused can surrender voluntarily to the authorities of the other country. Next, under the Immigration Act it is possible to apply a deportation measure to a permanent resident who has committed or been declared guilty of an offense abroad, which would have been punishable by ten years in prison if it had been committed in Canada.¹³⁶ Finally, agents or bounty hunters of the country claiming jurisdiction could also forcibly abduct the individual. While such abductions may be offences under the law of the country where the individual is found,¹³⁷ and infringements on the sovereignty

134. If the procedure is prescribed or hindered for any other reason recognized by the party under obligation, that party should refuse extradition. The severity of the sanctions should not be a factor except when capital punishment is concerned. In that case, a state under obligation which does not apply that sanction could require the applicant state to refrain from executing such a punishment.

135. Depending on the circumstances, the applicant state could ask the state under obligation to submit the case to its competent authorities in order to begin proceedings with respect to the offense. See, e.g., Treaty of Extradition between the Government of Canada and the Government of the United Mexican States, 1990 Can. T.S. No. 35, art. 3. On February 27, 1996, the Canadian government granted the extradition of Dennis Hurley, a Canadian, to Mexico to undergo a trial for murder accusations, though any sentence decided by the court would be executed in Canada. On that occasion, the Canadian government made the unprecedented move of requiring Mexico to commit itself in writing to respecting the four conditions formulated by the judge. See News Release, *Minister of Justice Orders Surrender of Dennis Hurley to Mexico* (Feb. 27, 1996) (visited Oct. 16, 1998) <http://canada.justice.ca/News/Communiques/1996/hurley_en.html>.

136. See Immigration Act, R.S.C., ch. I-2, §§ 27(1), 32(2) (1985) (Can.). The Act does not, however, specify that the place to which the individual will be deported will necessarily correspond to the place in which that person was the object of legal action or a conviction.

137. Sometimes bounty hunters are even extradited in the state where they performed the abduction. See *Ex parte Lopez*, 6 F. Supp. 342 (S.D. Tex. 1934); *Villareal v. Hammond*, 74 F.2d 503 (5th Cir. 1934); *Kear v. Hilton*, 699 F.2d 181 (4th Cir. 1983).

of that state under international law, it seems that the proceedings that take place later are legal and not impaired by such procedures, which should be described as extraordinary, at least.¹³⁸ Generally, however, states do not prosecute abducted individuals if the state where they were abducted demands their return.¹³⁹

The purpose of the Mutual Legal Assistance in Criminal Matters Act¹⁴⁰ is to permit a foreign state to engage, in Canada, in procedures related to criminal offenses when such offenses fall under the jurisdiction of that state. Such procedures are regulated by the existence of a treaty¹⁴¹ between Canada and that state or, if there is no such treaty, by an administrative agreement providing for juridical assistance in the context of a specific inquiry. This Act states the forms of legal assistance a foreign state can request from Canada, as well as the ways such assistance may be provided. Such measures target the payment of fines imposed by a court of the applicant state,¹⁴² the execution of search warrants,¹⁴³ the gather-

138. The underlying principle is *mala captatus bene detentus*, or bad capture, good detention. See, in Canadian law, *King v. Walton* (1905) 10 C.C.C. 269 (C.A. Ont.), in English law, *Ex parte Scott*, 109 E.R. 166 (B.R.) and in U.S. law, *United States v. Alvarez-Machin*, 504 U.S. 655 (1992).

139. See, e.g., *France v. Germany* (1909) Hague Cr. Rep. (Scott) 110. The Jacob case in 1935 in Preuss, *Kidnaping of Fugitives from Justice on Foreign Territory*, 29 AM. J. INT'L L. 502 (1935). But see *A.G. v. Eichmann*, 36 INT'L L. REP. 18 (1961), in which the Eichmann trial took place because Argentina and Israel had concluded an agreement not requiring that Eichmann be returned to Argentina.

140. See Mutual Legal Assistance in Criminal Matters Act, R.S.C., ch. M-13.6, § 6 (1985) (Can.).

141. Paragraph 2(2) of the Act imposes certain conditions for the validity of treaties concluded in these matters. Such treaties must reserve Canada's right to refuse to grant legal assistance for reasons of sovereignty, security, or public order; they must restrict mutual assistance to only those acts which, if they were committed in Canada, would be criminal acts; they must require the confidentiality of information transmitted by Canada to a foreign country; and they must contain a description of the means of legal mutual assistance which can be requested as well as the information which must be included in the request for assistance. At present, Canada has signed mutual legal assistance treaties with, among others, Australia (1990 Can.T.S. No. 2), the Bahamas (1990 Can.T.S. No. 16), the United Kingdom (1990 Can.T.S. No. 16), the United States (1990 Can.T.S. No. 19), Mexico (1990 Can.T.S. No. 34), Italy (1995 Can.T.S. No. 16), France (1991 Can.T.S. No. 34), and Holland (1992 Can.T.S. No. 9).

142. Mutual Legal Assistance in Criminal Matters Act, R.S.C., ch. M-13.6, § 9 (1985) (Can.). The Canada-U.S. treaty also provides for the confiscation of illicit gains and restitution to victims of the crime.

143. See Mutual Legal Assistance in Criminal Matters Act, R.S.C., ch. M-13.6, §§ 10-16 (1985) (Can.). A foreign state can request that a search warrant be executed in Canada in order to discover pieces of evidence or information likely to reveal the location of a person suspected of having committed a crime falling under the jurisdiction of the foreign state. The state must first obtain authorization from the Minister and then present, after having obtained the appropriate information, an *ex parte* application for the issuance of the warrant. The warrant shall be executed by an agent specified in the warrant and in conformity with Canadian law. The agent sends the Minister a copy of his or her execution report, and the Minister presents his or her observations to the judge who ordered the warrant or to another judge in the same court. (In particular, the Minister must be persuaded that the state will comply with the transmission order rendered by the judge.) If he or she is satisfied by the execution of the warrant and if he or she considers it appropriate, the judge may then decide to order that the seized objects or documents be transmitted to the foreign state, under the conditions he or she assigns.

ing of pieces of evidence to be sent abroad,¹⁴⁴ the transfer of persons in custody,¹⁴⁵ and the lending of exhibits.¹⁴⁶ Likewise, the Mutual Legal Assistance in Criminal Matters Act identifies, among other things, the admissibility in Canada of pieces of evidence obtained outside the country by virtue of such a treaty¹⁴⁷ and the protection of foreign documents until they are presented before a tribunal.¹⁴⁸

The Treaty on Mutual Legal Assistance in Criminal Matters between Canada and the United States specifies, for example, that the parties can provide mutual assistance in conformity with other agreements, arrangements, and practices,¹⁴⁹ though such mutual assistance must be requested in virtue of the Treaty if one of the parties wishes to obtain documents, files, or other objects that to its knowledge are to be found on the territory of the other party. However, when a request is refused or a delay in its execution could compromise the success of an inquiry, the parties must consult each other promptly in order to examine other measures of mutual assistance.¹⁵⁰ Harmonization of standards in criminal matters, which in particular makes reciprocity of criminality a prior condition for extradition, is more or less required in mutual legal assistance. Indeed, while the Mutual Legal Assistance in Criminal Matters Act presupposes that reciprocity of criminality is the basis for requests for mutual assistance,¹⁵¹ certain treaties emphasize that cooperation between two states must also apply regarding offenses that are exclusive to one of them.¹⁵²

144. See Mutual Legal Assistance in Criminal Matters, R.S.C., ch. M-13.6, §§ 17-23 (1985) (Can.). Regarding data accessible through international telecommunications networks, it has been noted that these provisions do not permit one to know if they authorize Canada, for example, to require its citizens to gather evidence in foreign countries. See U.N. Manual, *supra* note 7, at 32.

145. See Mutual Legal Assistance in Criminal Matters Act, R.S.C., ch. M-13.6, §§ 24-29 (1985) (Can.).

146. See Mutual Legal Assistance in Criminal Matters Act, R.S.C., ch. M-13.6, §§ 30-34 (1985) (Can.). Section 8 of the Act specifies, however, that assistance cannot be granted unless the Treaty provides for mutual legal assistance with respect to the object of the request. Article II(2) of the Treaty between Canada and the United States thus provides that mutual assistance shall apply to the examination of objects and locations, the exchange of information and objects, the search for and identification of persons, the service of documents, the taking of affidavits, the transmission of documents and files, the transfer of detained persons, and the execution of warrants for examination, search, and seizure. Treaty Between the Government of the United States and the Government of Canada on Mutual Legal Assistance in Criminal Matters, March 18, 1985, 24 I.L.M. 1092 [hereinafter Mutual Legal Assistance Treaty].

147. See Mutual Legal Assistance in Criminal Matters Act, R.S.C., ch. M-13.6, §§ 36-39 (1985) (Can.).

148. See Mutual Legal Assistance in Criminal Matters Act, R.S.C., ch. M-13.6, § 44 (1985) (Can.).

149. See Mutual Legal Assistance Treaty, *supra* note 146.

150. See Mutual Legal Assistance in Criminal Matters Act, R.S.C., ch. M-13.6, art. IV (1985) (Can.).

151. See Mutual Legal Assistance in Criminal Matters Act, R.S.C., ch. M-13.6, § 2(2)(b) (1985) (Can.).

152. See Mutual Legal Assistance Treaty, *supra* note 146, art. II(3): "Assistance shall be provided without regard to whether the conduct under investigation or prosecution in the Requesting State constitutes an offense or may be prosecuted by the Requested State."

Finally, among cooperation mechanisms in criminal matters, the various administrative agreements existing between police forces of different states should be mentioned. Such agreements, which aim to facilitate police operations that could take place in more than one country, are made up largely of ways to facilitate the exchange of information on criminals and the results of crime. The International Criminal Police Organization (Interpol) is probably the major framework of cooperation on this level.

E. JURISDICTION IN PRIVATE LAW

Private law covers many situations. It affects the life of all individuals, from their birth to their death,¹⁵³ and governs all relations they have with each other. In Canada, the effective competence in this matter falls to the provinces.¹⁵⁴ In the English-speaking provinces, the principles of Common Law are applied, while in Québec, with a French-speaking majority, the Civil Code codifies the rules of private law based on the French model. With increasing circulation of property, persons, and information, the legal description of situations concerning private law can prove complicated due to the different legal regimes that could be applied. With greater or lesser degrees of harmony, states have developed special rules in private international law,¹⁵⁵ targeting the clarification of such situations.

Private international law is not supranational law. It is made up of local rules that require a court to examine, systematically, whether it has jurisdiction over the matters submitted to it and, if required, what legal order it should apply.¹⁵⁶ Competent jurisdiction and applicable law are determined in accordance with a series of categories and factors of connection. This allows the personal status, the real status, the status of the obligations, and the status of the procedure to be identified. Factors of connection have to do with parties to, or the object of, a dispute.¹⁵⁷

153. See MINISTÈRE DE LA JUSTICE, *LE CODE CIVIL DU QUÉBEC, COMMENTAIRES DU MINISTRE DE LA JUSTICE*, vol. 2 (Québec, 1993).

154. See Constitution Act, 1867, ch. 3, § 92(3). It should be noted however that jurisdiction concerning bills of exchange and promissory notes, as well as that relating to marriage and divorce, belongs to the Federal Parliament. See Constitution Act, 1867, §§ 91(18) & (26).

155. The rules of private international law of various states are relatively coherent. The purpose of such rules is to prevent inconsistent results, to dissuade parties from shopping for jurisdictions, and to increase the predictability of law, which in turn stimulates initiatives.

156. In Québec, such rules are found in the tenth book of the Civil Code of Québec, which concerns private international law. Within Québec, issues pertaining to jurisdiction are determined by the Code of Civil Procedure. See Code of Civil Procedure, arts. 68-75 (with respect to the place of instituting action). See also Code of Civil Procedure, arts. 22-23 (this code also specifies which tribunals have jurisdiction over civil matters, and what is the territory over which such jurisdiction is exercised).

157. See ETHEL GROFFIER, *PRÉCIS DE DROIT INTERNATIONAL PRIVÉ QUÉBÉCOIS* 22 (4th ed., 1990).

In civil matters, the applicable law and the competent jurisdiction are not as closely related as they are in public law. Conflicts of jurisdiction and conflicts of legislation are two distinct mechanisms and their results do not always point to the same legal order. The first step to take is to determine which rules on conflict should apply. In this respect, the Civil Code provides that the nature of the problem shall be described, and thus which legal system has jurisdiction shall be determined, in accordance with the legal system of the court to which the conflict is submitted, the *lex fori*.¹⁵⁸ Reference to rules governing conflict in another state is prohibited.¹⁵⁹ In exceptional cases, the designated law will not be applicable if the situation has only a remote connection with that law and is much more closely connected with the law of another state.¹⁶⁰

A civil case may be submitted to Québec courts if their jurisdiction can be established under the criteria set out in the Civil Code.¹⁶¹ Generally, the courts have jurisdiction if the defendant is a resident of Québec.¹⁶² The court may, by virtue of the notion of *forum non conveniens*, refuse jurisdiction if it considers that the legal authorities of another state are in a better position to rule on the dispute.¹⁶³ The jurisdiction of Québec courts is established in personal actions of an extrapatrimonial or family nature when one of the persons concerned is domiciled in Québec.¹⁶⁴ The same applies to actions based on employment and consumer contracts, if the worker or consumer has his or her residence in Québec,¹⁶⁵ and for real action matters when the property in dispute is located in

158. See Civil Code of Québec, art. 3078. Characterization of movable and immovable property is however connected to the law of the place they are located. In special cases, a mandatory regulation may apply if there are legitimate and preponderant interests in having it do so, unless such application contradicts the public interest. See also Civil Code of Québec, arts. 3079 & 3081.

159. See Civil Code of Québec, art. 3080. It should be noted that under article 2809 of the Code, foreign law must be pleaded by one of the parties, after which judicial notice may officially be taken of it or the judge may require that evidence of it be given.

160. See Civil Code of Québec, art. 3082. This provision does not apply when the law is designated in a contract, for example.

161. The Code of Civil Procedure also describes the courts' competence to hear certain cases. It is *ratione materiae* if it assigns the judge jurisdiction to hear the case because of the subject in dispute. See Code of Civil Procedure, arts. 22-37. Such competence is of a public order and lack of it may be declared at any time. See Code of Civil Procedure, art. 164. Competence is *ratione personae* when it depends on the geographical connection of the reasons to a legal circumscription. A tribunal which does not have *ratione personae* may, if notice of such an impairment has been given within the limits set, request the application be sent before the competent tribunal or, if there is none, that the application be dismissed. See Code of Civil Procedure, art. 163.

162. See Civil Code of Québec, art. 3134. Regarding the plaintiff, the fact that he or she submits a claim to a Québec court indicates that he or she recognizes its competence. Thus the plaintiff's place of domicile or residence is not relevant. However, if the plaintiff does not reside in Québec, he or she will have to provide security for the costs which could result from the suit. See Code of Civil Procedure, art. 65.

163. See Civil Code of Québec, art. 3135.

164. See Civil Code of Québec, art. 3141.

165. See Civil Code of Québec, art. 3149. The same applies to an insurance policy when the holder, the insured person, or the beneficiary is domiciled or resides in Québec and the contract concerns an insurable interest which is located there, or the loss or damage occurred there. See Civil Code of Québec, art. 3150.

Québec.¹⁶⁶ Regarding personal actions of a patrimonial nature, Article 3148 of the Civil Code of Québec provides that:

In personal actions of a patrimonial nature, a Québec authority has jurisdiction where:

- (1) the defendant has his domicile or his residence in Québec;
- (2) the defendant is a legal person, is not domiciled in Québec but has an establishment in Québec, and the dispute relates to its activities in Québec;
- (3) a fault was committed in Québec, damage was suffered in Québec, an injurious act occurred in Québec or one of the obligations arising from a contract was to be performed in Québec;
- (4) the parties have by agreement submitted to it all existing or future disputes between themselves arising out of a specified legal relationship;
- (5) the defendant submits to its jurisdiction.¹⁶⁷

However, Québec authorities do not have jurisdiction when the parties have chosen, by agreement, to submit their present or future disputes regarding a specified legal relationship to a foreign authority or to an arbitrator, unless the defendant has recognized the competence of Québec authorities.

The rules covering determination of the competence of a court to hear a case can be called upon to play a major role in electronic environments. While historically the competence of the courts was established only with respect to situations occurring on the territory within their jurisdiction, this rule has become increasingly flexible to allow courts to extend their jurisdiction to defendants who, by establishing themselves abroad, compromised the application of the law. Thus, under U.S. law, long-arm statutes recognize the jurisdiction of courts over defendants who have neither domicile nor residence in the court's jurisdiction, so long as such defendants have established minimum contacts with the forum so that institution of the action will not be contrary to the traditional notions of equity and substantial justice.¹⁶⁸

Nonetheless, the fact of wanting to categorize the activities of individuals in electronic environments according to their physical location will probably not always be appropriate. Sometimes it could even prove impossible. There are a number of situations in which participants are not able to identify the physical location of certain activities taking place in electronic environments. This phenomenon of delocalization is accentuated by the suggestion, proposed by a number of authors, that electronic environments be considered a distinct, autonomous geopolitical space. The problem of identifying a forum with jurisdiction in private law matters, however, is attenuated by the ability individuals have in their contractual relations to determine it ahead of time in a choice of forum clause. As is shown

166. See Civil Code of Québec, art. 3152.

167. Civil Code of Québec, art. 3148.

168. See HENRY H. PERRITT JR., *LAW AND THE INFORMATION SUPERHIGHWAY* 513-14 (1996); *Int'l Shoe Co. v. Wash.*, 326 U.S. 310 (1945).

below, such clauses could become one of the principal solutions to jurisdiction problems encountered in electronic environments.

When the jurisdiction of a court is established, that court does not necessarily apply the substantive rules of the Civil Code.¹⁶⁹ Court competency is not necessarily established in accordance with the same criteria of connection as those applying to the substance of litigation; a tribunal duly hearing a case could very well apply the substantive rules of law of another state. In this respect, the Civil Code states the law applicable to situations with foreign aspects. Here again the criteria of connection are essentially spatial; the applicable law will be that of the location of a person, a specific property, a juridical act, or an event.

First, the status and capacity of a person are governed by the law of that person's domicile.¹⁷⁰ The Civil Code also specifies the law governing situations involving incapacity,¹⁷¹ marriage,¹⁷² separation from bed and board,¹⁷³ filiation,¹⁷⁴ and obligation of support.¹⁷⁵ Real rights and their publication are governed by the law of the place the property in question is located.¹⁷⁶ The Civil Code also states the criteria of connection that determine the law applicable to successions,¹⁷⁷ movable securities,¹⁷⁸ and trusts.¹⁷⁹ The status of obligations is the object of detailed provisions. While the form of a juridical act is generally governed by the law of the place it is concluded,¹⁸⁰ its content is governed by the law explicitly designated in the act or by that which is designated as a clear result of provisions of that act.¹⁸¹ If no law is designated or if the designated law renders the juridical act invalid, the court shall apply the law of the state that has the closest relations to that act. In other words, the law of the state of the party's domicile that must provide the service or, if such an act is concluded in the course of the activities of an enterprise, the law of the state where it is established applies.¹⁸²

If what is sold is movable property, then the sale, in the absence of designation by the parties, is governed by the law of the state where the seller had his or

169. The procedure is nonetheless regulated by the law of the court to which the matter has been submitted. Civil Code of Québec, art. 3132.

170. See Civil Code of Québec, art. 3083. The same applies to legal persons, subject to where they undertake their activities.

171. See Civil Code of Québec, arts. 3085-3087. The law is that of the domicile of the protected persons.

172. See Civil Code of Québec, arts. 3088-3089.

173. See Civil Code of Québec, art. 3090.

174. See Civil Code of Québec, arts. 3091-3093.

175. See Civil Code of Québec, arts. 3094-3096.

176. See Civil Code of Québec, art. 3097.

177. See Civil Code of Québec, arts. 3098-3101.

178. See Civil Code of Québec, arts. 3102-3106.

179. See Civil Code of Québec, arts. 3107-3108.

180. See Civil Code of Québec, art. 3109. However, this rule is subject to certain terms.

181. See Civil Code of Québec, art. 3111. If the act has no foreign element, it will remain subject to the imperative rules of the state which would apply if no other law were designated.

182. Civil Code of Québec, arts. 3111-3112.

her residence or, if the sale is concluded in the course of the activities of an enterprise, by that of the place where the enterprise was located at the time the contract was concluded.¹⁸³ Nonetheless, the sale will be governed by the law of the state where the buyer had its residence or establishment at the time the contract was concluded. This is true if negotiations were carried out and the contract concluded in that state, if the contract contains explicit provisions that the obligation to deliver must be executed in that state, or if the contract is concluded under conditions set mainly by the buyer in response to an invitation to tender.¹⁸⁴ Likewise, a consumer contract is regulated, if necessary, by the law chosen by the parties.¹⁸⁵ However, this choice may not result in depriving the consumer of the protection of the imperative provisions of the law of the state where he or she resides if, first, the conclusion of the contract was preceded in this case by a special offer or advertising¹⁸⁶ and the actions necessary to its conclusion were performed by the consumer or, second, if the latter's order was received.¹⁸⁷

Regarding civil liability, the obligation to provide compensation for prejudice to another is governed by the law of the state where the event causing the prejudice occurred. But if the prejudice occurred in another state, the law of that state

183. The sale of an immovable will be governed, in the absence of designation by the parties, by the law of the state where it is located.

184. Civil Code of Québec, art. 3114.

185. It should be noted that section 19 of the Consumer Protection Act, R.S.Q., ch. P-40.1 (1977) (Can.) prohibits the selection of a law other than that of the Federal Parliament or of Québec in a consumer contract. However, this provision contradicts article 3117 of the Civil Code of Québec and given the difficulty in reconciling these two provisions, Gérald Goldstein proposed the first be abrogated, in Gérald Goldstein, *La Protection du Consommateur: Nouvelles Perspectives de Droit International Privé Dans le Code Civil du Québec*, in SERVICE DE LA FORMATION PERMANENTE, BARREAU DU QUÉBEC, DÉVELOPPEMENTS RÉCENTS EN DROIT DE LA CONSOMMATION 170 (1994).

186. In relation to this, Gérald Goldstein pointed out:

Generally what is meant by this is any form of advertising in newspapers, by the post, by business representatives, by any other form of communication (perhaps by computerized communications, but a problem of localizing the information arises in the absence of a material medium). Who must suffer the effects of the surprise due to the application of the law of another? The solution will have to take into account the respective efforts of each party to enter into the legal order of the other. On this view, a consumer in Québec who answers a tele-shopping offer which arrives by satellite from California, or an offer found while exploring the Internet, will not be in the same position as the consumer who answers an offer in a Canadian edition of a magazine published in the United States.

Goldstein, *supra* note 185, at 168-69 (author's translation).

187. Civil Code of Québec, art. 3117. The same applies if the consumer has been led by his or her co-contractor to go to a foreign country to conclude the contract. If the parties fail to designate a law, the law of the consumer's residence is, under the same circumstances, applicable to the contract. A consumer contract is defined in article 1384 of the Civil Code of Québec. It should be noted that the Consumer Protection Act has no application with respect to the interpretation of its territorial range. Gérald Goldstein states, "such legislation is not intended to define its own physical field of application (protection concerning past contracts with artisans or others, etc.), in accordance with Québec conceptions of local needs for protection." Goldstein, *supra* note 185, at 157 (author's translation).

applies if the wrongdoer should have predicted that the prejudice would occur. In every case, if the wrongdoer and the victim have their domicile or residence in the same state, the law of that state will apply.¹⁸⁸ If the obligation follows from failure to execute a contractual obligation, claims based on such failure are governed by the law applicable to the contract.¹⁸⁹ In all matters concerning law of obligations, evidence will be governed by the law that applies to the substance of the dispute, subject to the rules of the competent court most favorable to the establishment of such evidence.¹⁹⁰ Prescription is governed by the law applicable to the substance of the dispute.¹⁹¹

Other than the rules concerning conflict of law and conflict of jurisdiction, cooperation between states is a tool that allows states to govern transnational private law situations. On one hand, such cooperation is established to permit, within the required jurisdiction, steps useful for the proper functioning of a procedure abroad. Notification of proceedings, questioning of witnesses, and gathering of elements of evidence are among the measures that can be executed abroad or locally at the request of a foreign state. The methods assigned to such measures are formulated in treaties and in procedural laws.¹⁹² Thus, France and Québec have signed a mutual legal assistance agreement that specifies the measures to be taken under such circumstances.¹⁹³ The Conventions of the Conference of The Hague should also be mentioned. They facilitate, on the international level, legal mutual assistance in civil matters between the countries that have signed the various adopted agreements. Among these are: the 1965 Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, the 1970 Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, and the 1971 Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters.

Foreign recognition and execution of court decisions made elsewhere is the ultimate instrument developed by private international law. Such measures allow states to reciprocally ensure the sanction of court decisions so that tribunals are

188. Civil Code of Québec, art. 3126.

189. Civil Code of Québec, art. 3127.

190. Civil Code of Québec, art. 3130.

191. Civil Code of Québec, art. 3131.

192. Canada has signed a number of bilateral treaties on mutual legal assistance in civil and commercial matters. With respect to the service of proceedings originating abroad, *see* article 136 of the Code of Civil Procedure and, with respect to commissions for the examination of witnesses, articles 426 and 427 of the Code of Civil Procedure. *See also* Canada Evidence Act, R.S.C., ch. C-5, art. 46 (1985) (Can.) (with respect to the questioning of witnesses in Canada.). When mutual assistance must take place abroad, it occurs in accordance with the provisions of the treaties concluded by Canada (and in such cases the Department of External Affairs takes responsibility for the request) or else in accordance with the foreign procedural laws.

193. Act of Sept. 9, 1977, ch. 20, 1978 S.Q. 363 (to secure the carrying out of the Entente between France and Québec regarding mutual aid in judicial matters).

not confined to the territory and persons under their jurisdiction. The Civil Code of Québec provides:

A Québec authority recognizes and, where applicable, declares enforceable any decision rendered outside Québec except in the following cases:

- (1) the authority of the country where the decision was rendered had no jurisdiction under the provisions of this Title;
- (2) the decision is subject to ordinary remedy or is not final or enforceable at the place where it was rendered;
- (3) the decision was rendered in contravention of the fundamental principles of procedure;
- (4) a dispute between the same parties, based on the same facts and having the same object, has given rise to a decision rendered in Québec, whether it has acquired the authority of a final judgment (*res judicata*) or not, or is pending before a Québec authority, in first instance, or has been decided in a third country and the decision meets the necessary conditions for recognition in Québec;
- (5) the outcome of a foreign decision is manifestly inconsistent with public order as understood in international relations;
- (6) the decision enforces obligations arising from the taxation laws of a foreign country.¹⁹⁴

Québec jurisdiction is limited to the examination of whether the conditions for recognition of the decision are fulfilled. It does not extend to the substance of the decision.¹⁹⁵ Aside from provisions regarding the conversion of sums of money expressed in foreign currency,¹⁹⁶ the Civil Code does not specify the property that could be the object of execution of the judgment. This could prove problematic in the case of electronic environments.¹⁹⁷

II. Jurisdiction Problems Posed by Electronic Environments

Jurisdiction problems posed by electronic environments could find a partial solution in a refinement of the norms assigning responsibility with respect to access providers, content suppliers, employees of multinational companies,¹⁹⁸ and users.¹⁹⁹ Yet whatever the effectiveness of such reworking, jurisdiction prob-

194. Civil Code of Québec, art. 3155. However, it should be noted that with respect to taxation, article 3162 specifies that Québec authorities shall recognize and enforce the obligations entailed by the taxation laws of a state which recognizes and enforces the obligations following from the taxation laws of Québec.

195. Civil Code of Québec, art. 3158.

196. Civil Code of Québec, art. 3161.

197. See PERRITT, *supra* note 168, at 522. "Clearly, hardware and computer programs are subject to execution. But what about software as to which the judgment debtor has only a license? And what about obligations owing to the judgment creditor. How feasible is garnishment when these obligations run from persons all over the world?"

198. While not proposing a specific solution in this respect, the United Nations observed that the problem of computer crime appeared largely at the level of existing relations within enterprises. See U.N. Manual, *supra* note 7, at 9.

199. In the case of information crimes, such as obscenity, bomb manufacturing instructions, and hate propaganda, Marc Caden and Stephanie Lucas suggest that those who download such information exercise a form of participation. "Moreover, the person who received the obscene material from the Thomas' bulletin board sought it out and downloaded it for safe keeping. Shouldn't individuals

lems will probably resurface. Such problems, which will require original solutions, are of two orders. First, a connection must be established between the activities in question and a competent jurisdiction. This implies the development of an effective process of identification and assignment of jurisdiction, as well as an equally effective means of employing the powers of such jurisdiction. Indeed, activities must be assigned to the order of jurisdiction most concerned by them, and it must be possible to execute the legal sanctions applicable to such activities. A second jurisdiction problem is conflicts in jurisdiction. This problem occurs when various states concerned by a given activity all want to claim jurisdiction over it.

A. IDENTIFICATION OF COMPETENT JURISDICTION AND PROBLEMS OF EXECUTION

The structure of electronic environments, which cannot be described using geopolitical terms,²⁰⁰ sometimes makes it difficult for an individual to recognize a specific legal regime. For example, even a prudent and diligent individual may find it impossible to determine the legal regime applicable to a discussion group in which he or she wishes to participate,²⁰¹ and thus he or she will be left with no clear guide to conduct. Likewise, difficulties in identifying the competent legal regime are not limited only to the international dimension of computer networks. The unconventional nature of activities in electronic spaces tends to challenge the compartmentalization of concepts that could fall under different regulatory entities within a single legal order.²⁰²

While it is sometimes possible to have no idea of the destination or source of information distributed over international computer networks, electronic transactions will provide implicit knowledge of their geographical location when they entail the transfer of tangible property (even into mail boxes, which can guarantee a certain degree of anonymity).²⁰³ Thus, the problem of identi-

assume the risk of the material they seek out?" Marc L. Caden & Stephanie E. Lucas, Comment, *Accidents on the Information Superhighway: On-line Liability and Regulation*, 2 RICH. J.L. & TECH. 3 (1996) <http://www.urich.edu/~jolt/v2i1/caden_lucas.html>.

200. On certain Internet sites, the last-level domain refers to the country where the site is located (.ca for Canada). This rule is not universal: the domains of many sites contain not a geographical reference, but a thematic one (.edu for teaching institution, for example).

201. See PERRITT, *supra* note 168, at 514.

202. Joel Reidenberg claims that standardization organisations, which have never concentrated on the distinctions between the various activities, could play an increasingly important role as creators of standards. See Reidenberg, *supra* note 2. As examples, the author cites the Canadian Standards Association draft code with respect to protection of privacy, and the document by the Information Infrastructure Standards Panel, *Framework for Identifying Requirements for Standards for the National Information Infrastructure* (Apr. 11, 1995) <<http://web.ansi.org/public/iisp/doc/fram4nii.html>>.

203. See Henry H. Perritt Jr., *Jurisdiction in Cyberspace: The Role of Intermediaries*, Symposium on Information, National Policies, and International Infrastructure, Harvard, Jan. 28-30, 1996 <<http://www.law.vill.edu/harvard/article/harv96k.htm>>.

fyng the competent jurisdiction is real, but not likely to arise except in a few specific circumstances.

Whatever the difficulties the courts will face in this respect, they must ensure that the individuals they intend to make subject to a given legal regime do not pay the price of the uncertainty that reigns in this domain. The criteria of recognition should not have unreasonable or inequitable effects on individuals. The Council of Europe states:

It is not suggested that the doctrines of ubiquity and effects are intrinsically unreasonable, in particular in cases where it is very difficult to locate the place of the actual offense, for instance because it involves the use of communications. Yet it seems that these doctrines, in so far as they allow the use of legal fictions regarding acts that have taken place outside the territory as acts that have taken place within it, should be subject to the predictability requirement under public international law.²⁰⁴

Moreover, we must refrain from importing civil law notions into criminal law to determine where certain acts with legal consequences occur. This type of analogy is not useful and can even be counter-productive, as Justice La Forest pointed out in *Libman*:

But that situation must rank as a classic instance of the fallacy of transplanting a category to an inappropriate area. The fact that the parties decide that the posting of a letter shall mark the beginning of the contract has nothing to do with the policies that should guide a court in exercising criminal jurisdiction over a transnational transaction.²⁰⁵

It could be claimed that if states find it difficult to define their jurisdiction over electronic environments, it is probable that they will be less attached to their jurisdiction and that we will see a certain liberalization of the criteria of recognition will occur. Such pragmatism was evoked by Justice La Forest in *Libman*, where he pointed out that English courts:

have decisively begun to move away from definitional obsessions and technical formulations aimed at finding a single situs of a crime by locating where the gist of the crime occurred or where it was completed. Rather, they now appear to seek by an examination of relevant policies to apply the English criminal law where a substantial measure of the activities constituting a crime take place in England, and restrict its application.²⁰⁶

A little further on, Justice La Forest indicates that the development of means of communication seems to have placed less importance on the principle of courtesy, a principle that entails that states exercise a degree of restraint in claiming extraterritorial jurisdiction:

204. COUNCIL OF EUROPE, *supra* note 47, at 24. Predictability rests on conditions of precision, publication and non-retroactivity. Furthermore, as the Committee points out, “. . . the accused cannot invoke a defence based on ignorance of the law. He is deemed to know the law, irrespective of his nationality, status or the place where the offense has been committed.” *Id.* at 22-23.

205. *Libman*, 2 S.C.R. 178, 193.

206. *Id.* at 198-99.

However, even as early as the late 19th century, following the invention and development of modern means of communication, they began to exercise criminal jurisdiction over transnational transactions as long as a significant part of the chain of action occurred in England. Since then means of communications have proliferated at an accelerating pace and the common interests of states have grown proportionately. Under these circumstances, the notion of comity, which means no more nor less than "kindly and considerate behaviour towards others", has also evolved.²⁰⁷

Along other lines, a phenomenon that complicates the application of laws within a jurisdiction is the ability of content suppliers and users of international computer networks, such as the Internet, to remove themselves from a given jurisdiction in order to place their illegal behavior outside the reach of the territorial jurisdiction of a state.²⁰⁸ Just as information can circumvent obstacles raised to its circulation, individuals can escape state jurisdiction by performing their illegal activities in territories that authorize such conduct or that do not punish it. In *C.B.C. v. Dagenais*, concerning Internet publication of information about the trial of Karla Homolka,²⁰⁹ Chief Justice Lamer observed the relative impotence of the rule of law in the new media environment:

It should also be noted that recent technological progress has brought in its wake considerable difficulties for those attempting to apply publication bans. The effectiveness of such bans has been reduced in proportion to the increase in the number of television and radio programs accessible on the interprovincial and international level, through cable television, adjustable satellite dishes and short-wave radio. Such effectiveness has also suffered from the advent of information exchanges made possible by computer networks. In this era of global electronics, restricting the circulation of information in a significant manner is becoming increasingly difficult. In consequence, the real effect of publication bans on the impartiality of juries is diminishing considerably.²¹⁰

While in certain circumstances the authorities admit their impotence, other actors try desperately to enforce their laws by attempting to control information entry points. Certain Asian states, such as China and Singapore, have decided to control access to the Internet in order to indirectly establish their jurisdiction over the information traveling on such networks. Unless closed proprietary networks with a few rigorously controlled links are established, such measures

207. *Id.* at 213-14.

208. David Post indicates, "[it] pertains to exit by withdrawal from jurisdictional control, the relocation of rule-violative behaviour so that it is outside the jurisdiction of any physically-based sovereign." Post, *supra* note 6, art. 3, para. 40.

209. The information in question was the object of a nonpublication order, with which the traditional media complied. Nevertheless, the USENET group *alt.fan.karla-homolka* allowed Canadians to obtain information about Karla Homolka's trial, which was under strict nonpublication orders. The list, which was apparently maintained by Canadians, came from an anonymous remailer located in Finland, which made it impossible to identify the persons involved.

210. Canadian Broad. Corp. v. Dagenais [1994] 3 S.C.R. 835, available at <http://www.droit.umontreal.ca/doc/csc-scc/en/pub/1994/vol3/texte/1994scr3_0835.txt>.

cannot affect the source of content that such authorities wish to filter. Western states seem, in contrast, to rely on mutual assistance and cooperation measures to make up for the impossibility of establishing their jurisdiction over activities outside their direct control. In any case, the application of principles of recognition in electronic environments seems destined more to result in the appearance of a degree of competition between claims to jurisdiction, rather than in the elimination of this claim mechanism.

B. CONFLICT OF JURISDICTION

The new electronic environments allow individuals belonging to many distinct communities²¹¹ to communicate with each other. According to Douglas Barnes, the impact of this reality will be felt first in matters concerning the transmission of sexual images, with respect to which standards of acceptability vary. For example, in Saudi Arabia, the distribution of *Sports Illustrated Online* would probably justify the accused undergoing involuntary, unanesthetized amputation, while in Amsterdam almost everything is permitted, including what the rest of the world considers to be child pornography. In Japan, the display of genital organs poses no problem in itself, but the exposure of pubic hair is grounds for imprisonment. In the United States, even the most conservative magazines show pubic hair, but with specific censorship of genital organs, depending on the community standard in question.²¹² As Trotter Hardy was very right to point out, this situation is amplified by the fact that users of international computer networks, who sometimes claim to be a distinct community, are also residents of different physical communities; such dual citizenship is clearly the source of numerous difficulties.²¹³ He notes:

211. It should be noted that electronic environments can give rise to conflicts in jurisdiction within a single state. Moreover, the compatibility of laws providing the framework for such environments was questioned, even recently, only on a strictly national scale. See Lance Rose, *Cyberspace and the Legal Matrix: Laws or Confusion?* (visited Oct. 17, 1998) <http://www.eff.org/pub/Legal/cyberspace_legal_matrix.article>:

[c]onflicts can arise in networks between different laws on the same subject. These include conflicts between federal and state laws, as in the areas of criminal laws and the right to privacy; conflicts between the laws of two or more states, which will inevitably arise for networks whose user base crosses state lines; and even conflicts between laws from the same governmental authority where two or more different laws overlap. The last is very common, especially in laws relating to networks and computer law.

212. Douglas Barnes, *The Coming Jurisdictional Swamp of Global Internetworking (or, How I Learned to Stop Worrying and Love Anonymity)* (Nov. 16, 1994) (visited Oct. 17, 1998) <http://www.eff.org/pub/global/USA/Legal/anon_juris.article>. With respect to community standards varying within the United States, see *Thomas v. United States*, 1996 FED. APP. 0032P (6th Cir.), available at <<http://www.law.emory.edu/6circuit/jan96/96a0032p.06.html>>.

213. Trotter Hardy, *The Proper Legal Regime for "Cyberspace,"* 55 U. PITT. L. REV. 993, 1012 (1994).

For that matter, it makes little sense even today, and surely will make no sense tomorrow, to speak of one "cyberspace community." There are differing interest groups all across cyberspace. The problem of "dual citizenship" is therefore likely to be played out on an even larger scale, as cyberspace users become multiple-citizens of a bewildering number of electronic—and at least one physical—communities.²¹⁴

Conflicts could appear when certain states attempt to attract access or content suppliers by offering them the advantage of a legal regime that would assign them minimum responsibility. Matthew Burnstein points out:

Offshore havens might arise that have favorable laws for Internet access providers. Professor Burk notes that some information-poor countries have "moved towards becoming" data havens. The laws of these havens might eliminate liability for contributory infringement of intellectual property or make "cyber-defamation" nonactionable. Given the above discussion, however, it is not certain that other nations would honor the providers' flags of convenience.²¹⁵

There are a number of mechanisms intended to regulate conflicts of jurisdiction. A state itself may limit its claims to the exercise of its jurisdiction and limit the jurisdiction claims of other states if it considers them excessive.²¹⁶ Whether or not they have a legislative framework, unilateral measures often consist of balancing the opportunity to exercise jurisdiction against that of allowing the foreign state to exercise its own. If necessary, legislative provisions will cover the aspects relating to reciprocity of criminality. However, there is no international legal rule governing situations resulting from jurisdictional competition between two or more legal regimes.

The fundamental problem of repressing computer crime is its transnational nature. Application of principles of jurisdiction can thus give rise to conflicts, as the Organization for Economic Cooperation and Development (OECD) has pointed out:

For most Member countries, the territorial principle has been the most usual determinant of jurisdiction; in other words, the applicable law is that of the country in which the offense, or one of its elements is alleged to have taken place. But extraterritorial jurisdiction, because of the personality and protective principles, can also be invoked. Thus the "non bis in idem" principle is sometimes invoked because of the concurrence of jurisdiction based on the territoriality and extraterritoriality principles. There may also be concurrent claims of jurisdiction when two States claim territorial jurisdiction because the offense is transnational in character. The analysis of the offense, from a jurisdictional perspective, is even more difficult in the case of "continuing" offense.²¹⁷

214. *Id.* at 1013.

215. Matthew Burnstein, *Conflicts on the Net: Choice of Law in Transnational Cyberspace*, 29 VAND. J. TRANSNAT'L L. 75, 107-08 (1996).

216. COUNCIL OF EUROPE, *supra* note 47, at 30.

217. COMPUTER-RELATED CRIME: ANALYSIS OF LEGAL POLICY, ICCP No. 10, ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT 66.

At present, there are still few cases of jurisdictional conflict in criminal matters because states that recognize certain forms of extraterritorial jurisdiction exercise them very rarely.²¹⁸ Michel Masse has observed that concurrent jurisdiction in international criminal law is not really a concern, but rather it is a luxury.²¹⁹ He notes that an increase in jurisdiction authorities would require only the most elementary coordination. Its effectiveness would be measured by the fact that since they would be prosecuted where they had not anticipated, wrongdoers would no longer know where to hide.

Moreover, the rules against double jeopardy and self-incrimination, the principle of reciprocity of criminality,²²⁰ and also the principle of the most favorable law (*lex mitior*) can have an effect on which jurisdiction is determined to be competent, particularly when there is a conflict. Furthermore, certain states limit the circulation of information in order to protect personal information. The United Nations has observed the general refusal, particularly in Roman law systems, to apply the rule of double jeopardy. This refusal explains the plurality of proceedings instituted against an accused for the same crime.²²¹ It was therefore recommended that states try to negotiate agreements with respect to positive conflicts and deal with the following issues:

1. An explicit priority of jurisdictional criteria: for example, of location of act over location of effect, of the place of physical detainment of the suspect over in absentia proceedings or extradition;
2. A mechanism for consultation between the States concerned in order to agree upon either the priority of jurisdiction over the offense or the division of the offense into separate acts;
3. Cooperation in the investigation, prosecution and punishment of international computer offences, including the admissibility of evidence lawfully gathered in other countries, and the recognition of punishment effectively served in other jurisdictions. This would prevent unreasonable hardship to the accused, otherwise possible by an inflexible interpretation of the territoriality principle.²²²

A pragmatic attitude should guide states when they are involved in a conflict of laws. In *Lotus*, the Permanent Court of International Justice asserted "[i]n these circumstances, all that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction; within these limits,

218. COUNCIL OF EUROPE, *supra* note 47, at 10: "... the fact that many member states have established in some cases far-reaching forms of extraterritorial jurisdiction does not necessarily imply that they are widely used. In view of their limited use in practice, one might even doubt whether these forms of extraterritorial jurisdiction are always based on real practical needs." *Id.*

219. Masse, *supra* note 50, at 305.

220. In this respect, we should remember section 15 of the Criminal Code, R.S.C., ch. C-46 (1985) (Can.), which provides that "No person shall be convicted of an offense in respect of an act or omission in obedience to the laws for the time being made and enforced by persons in *de facto* possession of the sovereign power in and over the place where the act or omission occurs."

221. U.N. Manual, *supra* note 7, at 51.

222. *Id.*

its title to exercise jurisdiction rests in its sovereignty.’’²²³ Moreover, this reveals a custom of international law that declares it to be illegitimate, if not illegal, to exercise extraterritorial jurisdiction if it proves to be unjust, arbitrary, or unreasonable.

III. Conclusion—Toward a Refinement of the Area of State Jurisdiction?

Electronic environments require the domain of state jurisdiction to undergo a degree of reworking. States will have to specify how and to what degree they will establish their jurisdiction over activities taking place in these new spaces. While it is presently difficult to evaluate the strategies adopted by the various states, it is clear that there is a relatively limited number of options open to them. Yet there are certain means for states and their courts to solve jurisdiction problems in order to regulate a communications network such as the Internet. The following solutions are not exclusive and seem, respectively, to be able to cover certain specific activities in an adequate manner.

One solution would be to allow the parties to choose the jurisdiction that would hear any disputes they might have. This means, which is already in use, would eliminate all jurisdiction problems. It could govern all contractual relations that emerge in electronic environments, though it would be inapplicable to all other relations that could develop there. Another solution would be for states to broaden the framework of their jurisdiction to cover new transnational activities they consider to be in their interest and in their power to cover. Risks of conflict would certainly be increased, but since such measures would target the authors of wrongful behavior, such actors would no longer be able to find refuge in more accommodating jurisdictions.

Another solution, which would be testimony to the will and ability of states to solve jurisdictional problems in a collective rather than an individual manner, would be to harmonize legislations and cooperate in order to allow jurisdiction to be exercised by a single competent forum. Obviously, this method would be conceivable only with respect to issues on which there is widespread consensus. While such a solution would demonstrate greater respect for the jurisdiction of the court best situated to hear a given case, it would oblige legislators to raise the values of the international community to a status higher than that of the values of their own citizens. Another fairly similar solution would be to develop universal standards and to assign their application to an international adjudicative authority. However, this solution, which has the advantage of circumventing the processes of cooperation and mutual assistance, could cover only a relatively restricted number of activities. Finally, a last possibility available to states would be to exercise measures of retort against states that

223. *S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (Ser. A) No. 9, at 19.

tolerate harmful activities, rather than attempting to have direct recourse against the authors of such prejudice.

Of course, it is possible that a new legal order will appear and infringe on the jurisdiction of traditional authorities. However, since persons will always be found in a specific jurisdiction, as will be their systems, software, and financial holdings,²²⁴ the intervention of traditional authorities will always remain relevant, and it is unlikely that they will give up exercising their jurisdiction. However, it is possible that state measures will come to rely more heavily on self-regulation in electronic environments.²²⁵

224. Mayer-Schönberger & Foster, *supra* note 1.

Communicative acts on the Internet are within national speech restrictions, as the Net is neither extraterritorial nor its users otherwise exempted from existing national speech regulations. In fact many nations have begun the process of constricting the content of speech deemed permissible for dispatch on the Internet. *Id.*

225. Joel Reidenberg indicates:

The overlap of interests between the physical world and the virtual world suggests a governance model that contains distinct rules for the separation of powers. Territorial borders will retain an important role in structuring overlaps between network boundaries and state jurisdictions. Principles of federalism offer a valuable lesson for the relationship between territorial and cyberspace. Just as *Lex Mercatoria* did not displace the law of the situs of trade fairs, a new *Lex Infomatica* suggests that sovereign states should only act within particular spheres of influence.

Reidenberg, *supra* note 2.