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Annex E. Extraterritorial Jurisdiction

<<http://untreaty.un.org/ilc/reports/2006/2006report.htm>>

A. Background Context

1. Traditionally the exercise of jurisdiction by a State was primarily limited to persons, property and acts within its territory and to relatively exceptional situations in which its nationals traveled beyond its borders. Today the exercise of extraterritorial jurisdiction by a State with respect to persons, property or acts outside its territory has become an increasingly common phenomenon largely as a consequence of: (a) the increase in the movement of persons beyond national borders;¹ (b) the growing number of multinational corporations; (c) the globalization of the world economy,² including international banking and international stock exchanges; (d) the increase in transnational criminal activities, including drug trafficking, money laundering, securities fraud and international terrorism; (e) the increase in illegal migration;³ and (f) the increasing use of the internet across national borders for legal or illegal purposes, such as electronic contracts, e-commerce and cyber crimes.

2. The assertion of extraterritorial jurisdiction by a State is an attempt to regulate by means of national legislation, adjudication or enforcement the conduct of persons, property or acts beyond its borders which affect the interests of the State in the absence of such regulation under international law. The exercise of extraterritorial jurisdiction by a State tends to be more common with respect to particular fields of national law in view of the persons, property or acts outside its territory which are more *likely to affect its interests*, notably criminal law and commercial law [italics added].

3. The topic “Extraterritorial jurisdiction” is in an advanced stage in terms of State practice, and is concrete. Although there appears to be a strong need for codification in this field, some may question whether the [State] practice is sufficiently uniform or widespread to support a codification effort at this time. ...

B. Brief Survey of Existing Norms and Rules

1. *The Notion of Extraterritorial Jurisdiction*

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5. The jurisdiction of a State may be understood as generally referring to the sovereign power or authority of a State. ...

6. The notion of extraterritoriality may be understood in relation to a State as encompassing the area beyond its territory, including its land, internal waters, territorial sea as well as the adjacent airspace. The area beyond the territory of a State may fall within the territory of another State [textbook §6.2.A.] or may be outside the territorial jurisdiction of any State, namely the high seas [textbook §6.3.C.] and adjacent airspaces as well as outer space [textbook §6.4]. From a practical as well as a legal perspective, the organs of a State generally perform legislative, judicial or enforcement functions only within the territory of a State. ... Certain special situations in which the authorities of a

State are physically present and exercise jurisdiction in the territory of another State, for example, in the case of diplomatic premises, consular premises and military bases located in the territory of another State are governed by specific rules of international law rather than by international law concerning extraterritorial jurisdiction.

2. Principles of Extraterritorial Jurisdiction

8. The exercise of the jurisdiction or sovereign authority of a State is often provided for in the national law of a State. However, the lawfulness of the exercise of this jurisdiction or authority—including extraterritorial jurisdiction—is determined by international law.

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10. There have been a number of significant developments with respect to the extraterritorial jurisdiction of a State.... In particular, there are a number of principles of jurisdiction which may be asserted under contemporary international law in order to justify the extraterritorial jurisdiction of a State, including: (a) the “objective” territoriality principle; (b) the “effects doctrine;” (c) the protective principle; (d) the nationality principle; and (e) the passive personality principle. The common element underlying the various principles for the extraterritorial exercise of jurisdiction by a State under international law is the valid interest of the State in asserting its jurisdiction in such a case on the basis of a sufficient connection to the persons, property or acts concerned.

11. The *objective territoriality principle* may be understood as referring to the jurisdiction that a State may exercise with respect to persons, property or acts outside its territory when a constitutive element of the conduct sought to be regulated occurred in the territory of the State.

12. The *effects doctrine* may be understood as referring to jurisdiction asserted with regard to the conduct of a foreign national occurring outside the territory a State which has a substantial effect within that territory. This basis, while closely related to the objective territoriality principle, does not require that an element of the conduct take place in the territory of the regulating State.

13. The *protective principle* may be understood as referring to the jurisdiction that a State may exercise with respect to persons, property or acts abroad which constitute a threat to the fundamental national interests of a State, such as a foreign threat to the national security of a State. This principle of jurisdiction may be viewed as a specific application of the objective territoriality principle or the effects doctrine.

14. The *nationality principle* may be understood as referring to the jurisdiction that a State may exercise with respect to the activities of its nationals abroad, including natural persons as well as corporations, aircraft or ships. This well-established principle of jurisdiction is based on the sovereign authority of a State with respect to its nationals.

15. The *passive personality principle* may be understood as referring to the jurisdiction that a State may exercise with respect to conduct abroad which injures one or more of its nationals. This principle of jurisdiction, which was contested by some States in the past, has gained greater acceptance in recent years [especially when one of the other bases for extraterritorial jurisdiction is also applicable to the particular situation].

16. The *universality principle* may be understood as referring to the jurisdiction that any State may exercise with respect to certain crimes under international law in the

interest of the international community. A State may exercise such jurisdiction even in situations where it has no particular connection to the perpetrator, the victim or the *locus situs* of the crime. Thus, a State may exercise such jurisdiction with respect to a crime committed by a foreign national against another foreign national outside its territory. However, a State exercises such jurisdiction in the interest of the international community rather than exclusively in its own national interest.

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