EGGS, JURISDICTION, AND THE INTERNET

UTA KOHL*

I. THE EGG STORY[1]

A long time ago hens did not lay white or brown eggs but eggs in primary colours: red, yellow and blue. Since, depending on the colour of the eggs, their taste and quality varied, the farming industry split into red, yellow and blue industries catering for different markets. Those industries that dealt with the respective eggs became over the years highly competitive. And what was initially no more than a common understanding, namely, that hens laying red eggs belonged to the red industry, while hens laying blue and yellow eggs belonged to the blue and yellow industries, turned over the years into customary egg law, with each industry having its clearly demarcated area of competence. As it happened, due to interbreeding, some hens normally laying, for example, red eggs would very occasionally lay purple eggs or orange eggs. Also on occasion, some hens would stop altogether from laying eggs of a primary colour, but would lay orange, purple, brown or green eggs. These eggs and hens presented a problem, albeit not a severe one, as they remained very much the exception. Hens laying blue eggs were kept apart from hens laying red eggs and from those laying yellow eggs. Nevertheless, solutions to these problematic eggs and hens had to be found. On occasions the red, blue or yellow industries would unilaterally declare, but only after close analysis and in accordance with their own complex rules about subtle colour variations, known as conflicts-of-egg law, that the hen or egg in question belonged to its industry or to one of the other industries. These decisions were generally but not always accepted by the other industries. In respect to particularly big hens and eggs there was a consensus at the higher farming level about the rules of who had a right to the hens and eggs. Again, these rules were equally complex and occasionally gave rise to arguments, but all in all the hen industry lived in peace and harmony for a long time. And then something happened, what can only be called a miracle of nature. Hens could suddenly be fertilised through the air. While this was in itself not a problem and indeed made breeding hens so much easier and produced stronger, healthier hens with better, bigger and tastier eggs, the hen industry was in deep shock. Sure enough, the number of

* Lecturer in Law, University of Wales, Aberystwyth, utakohl@hotmail.com. I am grateful for the comments by Professor Ryszard Piotrowicz, University of Wales, Aberystwyth.

[1] This story was inspired by the article by Tony Bradney, 'Law Schools and the Egg Marketing Board' (2001) 22 *SPTL Reporter* 1.

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discoloured eggs increased drastically and, with it, the burden on the industries to work out which hen or egg belonged to whom. But not only that, the frequent interbreeding produced totally new colour variations, meaning that the traditional rules had to be further and further refined, leading to what must have seemed totally arbitrary results. The teams of colour experts increased. Universities taught whole degrees on hens and eggs and colours. Research on how to optimise and improve the solutions to questions of which industry could have which hen or egg, was booming. Meetings between the red, blue and yellow industries took place frequently and yes, they did agree on further common rules, even in relation to the small eggs, for working out which one belongs to whom. Of course, every industry was very concerned about its own interest, none wanting to surrender too many eggs or hens to the others. In an attempt to mitigate the uncontrolled and uncontrollable interbreeding they built high walls around their hen farms, but to no avail. They also resorted to keeping eggs and hens that they knew belonged to one of the other industries, which then caused more arguments and even reprisals. But one fact stubbornly remained: there was a constant unstoppable increase of non-primary coloured eggs and their relative proportion to primary coloured eggs rose and rose. And these eggs were hardly distinguishable from one another in terms of quality or taste. It took the farming industry a long time to acknowledge that their system of dividing the non-primary coloured eggs had broken down. Then some even questioned whether it made still sense to divide eggs according to colour at all. But they were laughed at. The industries, though, finally and grudgingly admitted to themselves that they were wasting time, effort and money to try and distinguish between eggs that could not really be distinguished. They had to find a new and more efficient way of distributing control over these difficult eggs. Some suggested a new industry dedicated entirely to these eggs. Unfortunately, what happened between then and the time when all eggs became brown or white remains a mystery.

History repeats itself. Today it is no longer the issue which non-primary coloured egg belongs to which hen industry; the issue is which transnational event or activity belongs to, or should be regulated by, which State.[2] Today it is not customary egg law or conflicts of egg law but the jurisdictional rules under international law and the conflicts of law rules which determine whether it is France or Japan or Australia which has an entitlement to regulate a particular transnational event which is not quite French, Japanese or Australian but a bit of each. And today it is not a miracle of nature that has thrown the traditional rules into disarray and questions their viability, but a miracle of science, the Internet. The number of transnational events is not only skyrocketing but

[2] The terminology of 'belonging' has been used by some in the jurisdictional context, eg, Frederick A Mann 'The Doctrine of Jurisdiction in International Law' (1964) 111 *Recueil des Cours* 1, 44 f, where he argues that public international lawyers should, just like their private counterparts, 'ask whether the legally relevant facts are such that they "*belong*" to this or that jurisdiction'.

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gives rise to colour variations not known before. Finally, today there have been calls for a new legal regime entirely dedicated to these 'difficult' events:

> Cyberlaw will evolve to the extent that it is easier to develop this separate law than to work out endless conflicts that the cross-border existences here will generate . . . The alternative is a revival of conflicts of law; but conflicts of law is dead—killed by a realism intended to save. And without a usable body of law to deploy against it, a law of cyberspace will emerge as the simpler way to resolve the inevitable, and repeated, conflicts that cyberspace will raise.[3]

In this paper it is argued that conflicts of law is not dead yet, but is on its deathbed. The online phenomenon gradually undermines the viability of dividing events between States; we are reaching a point where such division is as nonsensical as dividing non-primary coloured eggs between primary coloured industries.[4] It is argued that jurisdictional rules in the context of private matters, as illustrated by their evolution in the US, have become so sophisticated, relying on such fine factual differences, that they can neither provide consistent and thus just outcomes nor efficient solutions to the ever increasing number of transnational events; and this is despite the fact that, on the face of it, the Internet and online events have been accommodated relatively successfully by adjusted legal doctrines.[5] This is then compared to the evolution of the jurisdictional rules in respect of criminal matters, as illustrated by the territoriality principle. While this evolution displays a similar trend towards a more refined, substance-over-form analysis, this is strongly tempered by the notion of 'might is right'.

II. JURISDICTION, THE INTERNET, AND FORMAL JUSTICE

The jurisdictional rules under international law and the national rules of conflict of laws are the rules which determine which State has the right to prescribe its law, adjudicate a dispute and enforce its law in respect of which transnational event. The international rules deal with public matters such as criminal, administrative and revenue matters (the big eggs), while the conflict of law rules determine the outcomes in private or civil matters (the small

[3] Lawrence Lessig, 'The Zones of Cyberspace' (1996) 48 *Stanford Law Review* 1403, 1407.

[4] The Internet has challenged many other traditional bases of division or categories, with a prominent example being the traditional distinction between goods and services, relied upon in contract and intellectual property law. The arguments advanced in this paper to some extent also apply to these other traditional divisions.

[5] This paper to some extent builds on my discussion in a previous article, Uta Kohl, 'Legal Reasoning and Legal Change in the Age of the Internet—Why the Ground Rules are still Valid' (1999) 7 *International Journal of law and Information Technology* 123, in which I argue for the value and necessity of incremental legal change even in view of a drastically changed reality. It is shown in this paper that this very imperative of legal continuity at times shapes legal rules which are too sophisticated to provide a solution to the very problem which inspired them, therefore paradoxically creating a need for a more radical legal reform.

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eggs).[6] These regimes turn a blind eye to the facts that the events are transnational and ideally make one State (or at least a limited number of States) rather than all those affected, legally responsible for it.[7] Prima facie, it is generally a reflection of their shortcomings when two or more States simultaneously assume the right to regulate the person or activity in question, which is not infrequently the case.[8] And although the international rules of jurisdiction in particular deal poorly with concurrent and conflicting claims of jurisdiction[9] (which are often resolved by the strict territorial limits of enforcement jurisdiction),[10] it is beyond doubt that their ultimate purpose is the same as that of private international law, namely to provide effective regulation while avoiding conflicts and interference as well as protecting individuals from being exposed to multiple and conflicting obligations.[11]

Bearing this objective in mind, the question is why the Internet has changed anything at all and what its effect is on the current jurisdictional regimes. As indicated above, one of the profound effects of the Internet in relation to the issue of jurisdiction is that many online transnational events are much more

[6] International law also applies to private law even if only to the extent that it does not impose any limitations upon States on how to deal with these matters. There is disagreement on the extent to which international law does impose substantive limitations: see eg. Ivan Shearer, 'Jurisdiction', in Sam Blay, Ryszard Piotrowicz, and Martin Tsamenyi (eds), *Public International Law: An Australian Perspective* (Melbourne: OUP, 1997) 165; Mann, above n 2, 291; Michael Akehurst, 'Jurisdiction in International Law' (1972–3) 46 *British Year Book of International Law* 145, 177.

[7] This assertion does not entail exclusive jurisdiction. In private matters, there is generally a choice of fora available to the plaintiff. But once proceedings are started in one forum, doctrines such as *lis alibi pendens* (civil law countries) or *forum non conveniens* (common law countries) or the availability of anti-suit injunctions have developed to ultimately prevent concurrent jurisdiction.

[8] See, eg, Mann, above n 2, 50 f: 'It would no doubt be desirable if the principle of exclusivity would come to be accepted for the purpose of jurisdiction, if, in other words, by common consent jurisdiction in respect of a given set of acts were exercised by one State only.' Akehurst, above n 6, 192, where he comments in the context of global restrictive business practices that the number of States claiming jurisdiction should be as small as possible. For a defence of concurrent regulation in respect of public matters see: William S Dodge, 'Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism' (1998) 39 *Harvard International Law Journal* 101.

[9] Bernand H Oxman, 'Jurisdiction of States' in Rudolf Bernhardt (ed), *Encyclopaedia of Public International Law* (1987) vol 10, 277, 282.

[10] David J Harris, *Cases and Materials on International Law*, 5th edn (London: Sweet & Maxwell, 1998) 265, stating that custody of a person tends to be decisive in resolving conflicting claims. The same sentiment is echoed in G Fitzmaurice, 'The General Principles of International Law considered from the Standpoint of the Rule of Law' (1957) 92 *Recueil des Cours* 209; but see also Sir Robert Jennings and Sir Arthur Watts (eds), *Oppenheim's International Law* 9th edn (London: Longman, 1992), vol 1, 457: 'Usually the coexistence of overlapping jurisdiction is acceptable and convenient; forbearance by states in the exercise of their jurisdictional powers avoids conflict in all but a small (although important) minority of cases' and Mann, above n 2, 48: '[I]nternational lawyers know that the remedy again lies in a policy of tolerance, reasonableness and good faith.'

[11] Oxman, above n 9, 278. This is also to some extent reflected in the emerging *non bis in idem* principle at the EU level: Christine Van Den Wyngaert, Guy Stessens 'The International *Non Bis In Idem* Principle: Resolving Some of the Unanswered Questions' (1999) 48 *ICLQ* 779.

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multicoloured than transnational events previously.[12] The fact that every website can be accessed anywhere means that many websites affect a high number of States to such a degree as would give them a prima facie stake or interest in them and certainly an interest in regulating them. In that sense many online events are often not merely transnational but multinational. This is illustrated by the recent case of *LICRA & UEJF v Yahoo!Inc & Yahoo France*[13] where the Tribunal de Grande Instance de Paris ordered Yahoo!Inc to prevent surfers in France from accessing Nazi artefacts via its website, yahoo.com. The court was unimpressed by Yahoo!Inc's argument that the site was located on a server in California and intended for an American audience; nor was it persuaded by the fact that Yahoo!Inc, through its French subsidiary, provided a site tailored to French surfers. It simply held that the harm caused by yahoo.com, regardless of which jurisdiction was targeted, was suffered on the territory of France. And, of course, in saying this the court was factually perfectly right, that is, yahoo.com did and does affect France. However, that is not to say that the French Court was or should be legally entitled to order what it did. On the basis of where the harm was suffered, many other States might have asserted the right to regulate yahoo.com, which would be the equivalent to every hen industry grabbing the multicoloured egg. This would compromise the very objectives of the jurisdictional rules as much as it would break the egg.

So to accommodate these new multinational events within the existing jurisdictional framework, the rules allocating regulatory competence have to be fine-tuned to be effective vehicles for choosing the worthiest amongst all the potential claimants. And indeed, the evolution of jurisdictional rules, both in respect of private and public matters, has been a process of refinement. The problem arising out of this is that ever-refined jurisdictional rules make it increasingly difficult to make valid or rationally defensible distinctions between transnational events. The more decisions, as to whether a particular transnational event belongs to this State or that, rely on subtle differences the more likely it is that they become arbitrary. This is inconsistent with what would universally be regarded as a fundamental principle of justice, namely overall consistency or the requirement to treat like cases alike, and different cases differently. Briefly, one may distinguish:

> between specific conceptions of justice and the concept of justice. The difference is that the concept of justice is abstract and formal; the requirement of formal justice is that we treat like cases alike, and different cases differently, and give to everyone his due; what various conceptions of justice supply is different sets

[12] Of course, certain online interactions between two persons in different States, such as a contractual relationship, do not generally involve more jurisdictions than their offline equivalents.

[13] 20 Nov 2000, at <http://www.juriscom.net/txt/jurisfr/cti/tgiparis20001120.pdf> (an unofficial English translation is available at <http://www.gigalaw.com/library/france-yahoo-2000-11-20-lapres.html>). The judgment affirmed the court order of 22 May 2000 (an unofficial English translation is available at <http://www.gyoza.com/lapres/html/yahen.html>).

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> of principles and/or rules in light of which to determine when cases are materially similar and when they are materially different; what is each person's due.[14]

What is illustrated below is that the desire to provide fair and just results is, at least in the context of private transnational events, increasingly producing principles and doctrines which are so subtle and complex that formal justice or consistency cannot be retained. Or to put it another way, it is often difficult to explain and defend why cases which seem and are *in fact* very similar are *in law* treated as materially different. The jurisdictional rules and principles increasingly rely on minor factual differences to justify a materially different treatment in law. As consistency goes, arbitrariness comes, which is problematic beyond the practical problems to which it gives rise, such as the inability of individuals to order their affairs in accordance with the law. It seems beyond argument, as MacCormick puts it, that it is:

> a fundamental principle that human beings ought to be rational rather than arbitrary in the conduct of their public and social affairs (spontaneity and a kind of arbitrariness have a welcome part to play in private activities and relations…) To somebody who disputes that principle with me, I can indeed resort only to a Humean argument: our society is either organized according to that value of rationality or it is not, and I cannot contemplate without revulsion the uncertainty and insecurity of an arbitrarily run society, in which decisions of all kinds are settled on somebody's whim or caprice of the moment…[15]

Before turning to examples of jurisdictional rules to see to what extent this concern about formal justice is justified, two matters need to be mentioned. First, the arguments below are not intended to assert that the decisions by individual judges or new legislative measures are based on unsound reasons or irrationality; generally judges have paid conscious regard to the requirement of overall consistency. The argument advanced is that the rules are such that they cannot possibly yield to certain and consistent results. In illustrating this the focus shall not be on decisions which have in retrospect been regarded as wrong (which of course will always occur). It is argued that even when judges get it right and apply the right rules to the right cases, the case law as a whole often proves them wrong. Secondly, it should also be mentioned that the process of refining rules and principles to allow the law to respond to new circumstances occurs all the time. Sometimes this refinement may be minor and sometimes it may be more radical. While generally the refined rules are

[14] Neil MacCormick, *Legal Reasoning and Legal Theory* (Oxford: OUP, first published 1978, 1994), 73 (footnotes omitted).

[15] Ibid, at 76 f. See also Hans Kelsen, *General Theory of Law and States*(Cambridge, Mass: Harvard UP, 1946) 14, where he states '"Justice" in this sense means legality; it is "just" for a general rule to be actually applied in all cases where, according to its content, this rule should be applied. It is "unjust" for it to be applied in one case and not in another similar case. And this seems "unjust" without regard to the value of the general rule, the application of which is under consideration.'

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functioning well, there are innumerable examples in legal history when the refined product, although born out of a desire to accommodate the modern reality, in fact cannot do that. The evolution of the negligence action and its inadequacy in relation to car accidents is a prime example of a modernised legal doctrine which proved to inefficient to deal with the very scenario out of which it was born: 'Truly, if the highway created the negligence law of the 19th century, the highway of the 20th has doomed it to eventual oblivion.'[16] Is this what is happening to jurisdictional doctrines?

III. THE EVOLUTION OF JURISDICTIONAL RULES IN PRIVATE CASES

A. Pre-Internet Refinements

The refinement process of jurisdictional rules in the private sphere is best illustrated by the legal developments in the US in respect of adjudicative jurisdiction.[17] There, the question of whether a court can assume personal jurisdiction over a defendant and adjudicate a dispute has moved from a simple inquiry, relying on relatively clear cut objective facts, into a much more elaborate balancing approach often depending on subjective value judgments. While most of these developments were in response to the increase of transnational interactivity long before the Internet era, the online phenomenon has added yet another layer of subtleties.

The turning point in the US came in 1945 when the US Supreme Court in *International Shoe Co v* Washington,[18] in recognition of the increased mobility of society, replaced the requirement that the defendant must be physically present in the jurisdiction for the court to assume jurisdiction in personam[19] with the requirement that the defendant must have certain 'minimum contacts' with the forum, so much so that the maintenance of suit would not offend

[16] John G Fleming, *The Law of Torts* 9th edn (North Ryde, NSW: LBC Information Services, 1998), 25. In the context of jurisdiction, for example, the technique of statutory interpretation which dominated conflicts law for five centuries was ultimately abandoned because it 'had become so complicated with divergent scholastic distinctions . . . that confused masters left their readers more confused.': Hessel E Yntema, 'The Historic Bases of Private International Law' (1953) 2 *American Journal of Comparative Law* 297, 304.

[17] While most of the case law has developed in response to disputes arising between residents of states within the US rather than truly transnational disputes, and while they are preoccupied by the 14th Amendment of the US Constitution requiring 'due process', neither of these two aspects detracts from the fact that these decisions constitute a response to the ever increasing cross-border activity with which this paper is concerned. Also, of course, the requirement of due process or procedural fairness is nothing peculiar to the US.

[18] 326 US 310 (1945). For a comprehensive summary of the cases since then with special focus on online cases, see American Bar Association (ABA), *'Achieving Legal and Business Order in Cyberspace: A Report on Global Jurisdiction Issues Created by the Internet'* (2000) at <http://www.abanet.org/buslaw/cyber/initiatives/jurisdiction.html>.

[19] *Pennoyer v Neff*, 95 US 714 (1887) where it was held that a State could not subject non-residents to the jurisdictions of its courts unless they were served with process within its boundaries. The court also listed other bases of jurisdiction such as the defendant's voluntary appearance or the existence of his or her property within the jurisdiction.

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'traditional notions of fair play and substantial justice'.[20] It built upon the 'presence' requirement by saying that the term merely symbolises the activities of a corporation in the forum,[21] which in turn meant that whether there were sufficient minimum contacts depended on 'the quality and nature of the activity in relation to the fair and orderly administration of the laws…'.[22] The rejection of the traditional criterion of actual presence allowed personal jurisdiction to be imposed by courts upon defendants who, although having substantial contact with the forum jurisdiction, were formerly beyond the court's reach simply because they were not physically present in the forum at the time of the suit.[23] While it seems that the court abandoned the 'territoriality test', under the motto '[g]eography is not the touchstone of fairness',[24] in fact the territoriality test, albeit a more intangible version, remained:

> [I]ncreased physical mobility due to automobiles and other modern transportation placed this jurisdictional basis under severe strain, as did disputes over 'virtual' entities such as corporations that have no physical situs… As a response to the imminent collapse of jurisdiction based on physical presence, the Supreme Court configured new rules based upon a kind of 'virtual' presence.[25]

As the new 'minimum contacts' test was very broad, not to say vague, it is not surprising that it was further refined in 1958 in *Hanson v Denckla*,[26] when it was held that an act is required 'by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws'.[27] So the former test, looking at the presence of the defendant, had now become a test focusing on the objective intentions of the defendant, which requires, unlike the presence test, an interpretation and evaluation of the defendant's action by the judge hearing the case. This seems to be echoed in the comment by Warren CJ in *Hanson*, that 'the requirements for personal jurisdiction over nonresidents have evolved from the rigid rule . . . to the flexible standard'.[28] But while both *International Shoe* and *Hanson* 'assumed that a defendant had at some time been physically present in the forum state… [and attempted] to overcome the traditional perceived lack of authority to insist a defendant not "caught" within the state

[20] *International Shoe Co v Washington*, 326 US 310, 316 (1945). In *Shaffer v Heitner*, (1977) 433 US 186 it was held that all assertions of jurisdiction, whether specific or general, had to meet the 'minimum contacts' tests. The focus in this discussion is only on specific jurisdiction, that is where the facts of the dispute arise out of the defendant's contacts with the forum. 'General jurisdiction' describes assertions which are valid regardless of the claim because of the substantial contacts of the defendant with the forum. See ABA, above n 18, 66.

[21] *International Shoe Co v Washington*, 326 US 310, 316f (1945). [22] Ibid, 319 (1945).

[23] But for a few exceptional cases, see above n 19.

[24] *Green v Mason*, 996 F Supp 394, 396 (1998).

[25] Dan L Burk, 'Jurisdiction in a World Without Borders' (Spring 1997) 1 *Virginia Journal of Law and Technology*, at <http://vjolt.student.virginia.edu>, para 25 f.

[26] 357 US 235 (1958).

[27] *Hanson v Denckla*, 357 US 235, 253 (1958). [28] Ibid, 251 (1958).

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return to it to defend a lawsuit…',[29] the ever increasing reality was that defendants had never been physically present in the forum despite substantive interaction with it.

So again the 'purposeful availment test' was refined by a holding that it should not be taken too literally.[30] It became sufficient that the defendant in some way through his actions connects or affiliates himself with the forum and thereby invokes the benefits of the forum's law, or targets it.[31] As the jurisdictional breath became ever more expansive, the safeguards against excessive jurisdiction became also more elaborate. So in *World-Wide Volkswagen Corp v Woodson*[32] the Supreme Court decided that even if minimum contacts were present, the court may decline to exercise personal jurisdiction if it would not be reasonable, taking into account considerations such as the burden on the defendant, the forum State's interest in adjudicating the disputes, the plaintiff's interest in obtaining convenient and effective relief, the shared interest of the several States in furthering fundamental substantive social policies. So the jurisdictional inquiry was now a two-stage inquiry, with both parts requiring a substantial balancing act by judges. And to the extent that, for example, the latter test depends on an evaluation of vague notions, such as 'convenient or effective relief', a 'State's interest' or 'fundamental substantive social policies', the peculiar predicaments and views of the judge hearing the case must come into play. Commenting on these US developments, FA Mann stated in 1964:

> A perusal of American decisions indicates a tendency to abandon a purely territorial test and to substitute for it a flexible and largely discretionary notion based upon the degree of connection.[33]

Yet, this tendency of swapping rigidity and certainty for flexibility and vagueness, fuelled by the desire to let substance rather than form be determinative (at a time substance and form no longer coincided), had far from reached its climax.

B. Post-Internet Refinements

Against this legal background the online revolution occurred; it seemed to make the 'targeting' analysis nonsensical as every website seems to target every jurisdiction.[34] Thus further refinement of the test was imperative if jurisdictional

[29] ABA, above n 18, 41 f.
[30] Ibid, 43.
[31] Ibid, 43 ff.
[32] 444 US 286 (1980).
[33] Mann, above n 2, 46.
[34] This explains some early 'wrong' decisions which have applied the targeting approach without making allowance for the fact that every website prima facie targets every jurisdiction. See, eg, *Inset Systems Inc v Instruction Set Inc*, 937 F Supp 161 (D Conn 1996), *Halean Products Inc v Beso Biological* ,43 USPQ (BNA) 1672 (1997) and *Maritz Inc v Cybergold Inc*, 947 F Supp 1328 (ED Mo 1996). For academic or judicial criticism see inter alia : ABA, above n 18, at 58 f; Peter Brown, 'US Courts Use Internet to Assert Jurisdiction Over Foreign Defendants' (1997) *Law Journal Extra*, at <http://www.ljx.com/internet/p6courts.html>; *Hasbro Inc v Clue Computing Inc*, 994 F Supp 34 (D Mass 1997); *Hearst Corp v Goldberger*, 1997 WL 97097 (SDNY 1997).

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rules were to be meaningful. This refinement has come in the form of 'a sliding scale', or 'spectrum', where the likelihood that personal jurisdiction will be exercised depends on the level of interactivity and the commercial nature of the online exchange of information.[35] The greater the level of interactivity that actually occurs with the forum or as the site allows for, the more likely it is that personal jurisdiction over the defendant behind the site will be assumed.

From an outsider's perspective these jurisdictional refinements seem like a Chinese whisper with the final test bearing little, if any, resemblance to what was said at the start; or how does the test of interactivity of a site relate to the tests of 'presence' or 'purposeful availment' or even the latest 'targeting' tests? This has very cautiously been acknowledged even by US commentators:

> Courts clearly are convinced that the nature of a defendant's web site is relevant to the jurisdictional issue, but a failure to articulate why it is relevant makes it difficult to determine where the jurisdictional line should be drawn in cases that fall between the *Zippo*'s two extremes [ie actual and repeated interaction with the forum and a passive site merely posting information].[36]

Going even further, one may question why the interactive nature of a site should at all be relevant to whether a court has or has not jurisdiction over a defendant. Assuming its validity, a site that is highly interactive in its design would appear to subject its provider to the personal jurisdiction of every court. But US judges have not defied rationality when finding that the interactivity of a site is relevant to the jurisdictional inquiry. The decisions, but for a few,[37] are sound in themselves. The analysis, starting from the premise that the defendant is subject to the adjudicative jurisdiction of a forum which he or she chose or objectively intended to have contacts with, means that:

> The sponsor of a passive website has no way to control which fora she is 'connected to' by the site. On the other hand, the site sponsor who does business electronically knows or can take reasonable steps to discover the location of the party with whom she is interacting.[38]

The problem though remains that there is vast room for disagreement on the precise amount and nature of interactivity required, whether it must be actual interactivity or merely potential interactivity (ie, interactivity of the site per se), whether the interactivity must be encouraged or can be presumed to be encouraged in the absence of contrary evidence and what the effect, if any, is on discouraging the interactivity, and how an evaluation of these matters varies depending on the content of the site and the dispute in question. And judges have disagreed and disagreed strongly, [39] with the result that the 'current

[35] ABA, above n 18, 60 f.
[36] Ibid, 63.
[37] See above n 34.
[38] ABA, above n 18, 64.
[39] For an excellent review of the case law and its many inconsistencies see *Millennium Enterprises Inc v Millennium Music LP*, 33 F Supp 2d 907 (D Or 1999).

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hodgepodge of case law is inconsistent, irrational and irreconcilable'.[40] Some have explained this hodgepodge on the basis of a lack of clarity of the law:

> [T]he lack of clarity in lower court opinions in the U.S. simply reflects the lack of clarity in a doctrine that is highly fact specific…[41]

This seems to imply that, provided the doctrine is clarified, the problem is resolved. But is it not rather the highly fact-specific nature of the doctrine (as opposed to its lack of clarity), its make-up of innumerable variables[42] and its dependence on judges juggling and evaluating innumerable facts, that makes it highly likely that different judges will come to different conclusions in respect of similar cases? Even if the interactivity test was further refined, by for example asserting that only actual interaction with the forum was relevant, a suggestion made in some recent cases,[43] this would only resolve a limited number of inconsistent cases. This would still leave the question how much actual interaction is needed and how this may vary according to the content of the site, its commercial nature, the dispute in question or the extent of other contacts. So again there is plenty of room for different evaluations and again it would be difficult to consistently 'determine where the jurisdictional line should be drawn in cases that fall between the *Zippo's* two extremes'. The real problem lies not in the lack of clarity of the test per se, but in its highly fact-specific nature and its reliance upon an evaluation of fine factual differences, so much so that ultimately and unavoidably decisions depend on the judge hearing the case. Thus decisions are arbitrary, as arbitrary as deciding whether a dark brown egg is a tint more red or yellow or blue. Consistency on an overall level is not easily or at all attainable; final results cannot be predicted with any certainty, which may incidentally also explain why so many more online jurisdictional cases have reached courts in the US than in other jurisdictions with more clear cut tests.

But given that the US developments are born out of a desire to move the law along with an increasingly transnational environment, it is not surprising that it has not been alone in adopting the interactivity test as part of the targeting approach in response to the online phenomenon.[44] For example, the recently adopted *EC Regulation on Jurisdiction and the Recognition of*

[40] *Millennium Enterprises Inc v Millennium Music LP*, 33 F Supp 2d 907, 916 (1999) citing Howard B Stravitz, 'Personal Jurisdiction in Cyberspace: Something More is Required on the Electronic Stream of Commerce' (1998) 49 *SCL Review* 925, 939.

[41] ABA, above n 18, 57.

[42] A holistic substance approach, taking into account various variables, has frequently been advocated. See, eg, Edward Brodsky, 'Solicitation Via the Internet; Jurisdiction Over Claims' (1997) *New York Law Journal*, at <http://www.ljextra.com/internet/0611irsolic.html>; Uta Kohl, 'Defamation on the Internet—A Duty Free Zone After All? *Macquarie Bank Ltd & Anor v Berg*' (2000) 22 *Sydney Law Review* 119.

[43] *Millennium Enterprises Inc v Millennium Music LP*, 33 F Supp 2d 907, 922 f; *GTE New Media Services Inc v Bellsouth Corp* ,199 F 3d 1343,1350.

[44] Contrast the claim made in ABA, above n 18, 65.

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Judgments in Civil and Commercial Matters[45] introduces this test in the European Community. It substitutes Art 13(3) of the *Brussels Convention*:[46]

In proceedings concerning a contract concluded by a …consumer, jurisdiction shall be determined by this Section … if it is:

(3) any other contract for the supply of goods or… services, and (a) in the State of the consumer's domicile the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising and (b) the consumer took in that State the steps necessary for the conclusion of the contract.

with the new Art 15 (3):

In matters relating to a contract concluded by a… consumer.. jurisdiction shall be determined by this Section… if:

(3) …the contract has been concluded with a person who pursues commercial or professional activities in the Member State of the consumer's domicile *or, by any means, directs such activities to that Member State* or to several countries including that Member States, and the contract falls within the scope of such activities.[47]

The effect of this new section is that a consumer can bring an action at home, namely in the jurisdiction of the place where he is domiciled,[48] provided the online activity by the foreign content provider was directed or targeted at the consumer's jurisdiction. Although the new test does not refer to the interactivity of a site, the Explanatory Memorandum to the Regulation states:

> The concept of activities pursued in or directed towards a Member State is designed to make clear that point (3) applies to consumer contracts concluded via an interactive website accessible in the State of the consumer's domicile. The fact that a consumer simply had knowledge of a service or possibility of buying goods via a passive website accessible in his country will not trigger the protective jurisdiction.[49]

While there are as yet no Internet-related cases exploring the ambit of the new Article, the European Community clearly follows the same route as the US. Even the *Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters* is heading in the same

[45] *Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters* (Document 301R0044).

[46] *Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (1968, Brussels).*

[47] Emphasis added.

[48] See Art 16 (formerly Art 14): 'A consumer may bring proceedings against the other party to a contract either in the courts of the Member State in which that party is domiciled *or in the courts of the place where the consumer is domiciled.* Proceedings may be brought against a consumer by the other party to the contract only in the courts of the Member State in which the consumer is domiciled …' (emphasis added).

[49] Explanatory Memorandum to the *Proposal for a Council Regulation (EC) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*, COM (1999) 348final (28 Dec1999) OJ C376E, 16, available at <http://europa.eu.int/eur-lex/en>. It was adopted by the Commission of the European Communities on 14 July 1999.

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direction[50] and thus likely to experience similar problems in respect of consistency as are prevalent in the US. In stark contrast, the general rule in both instruments, namely that the defendant shall (or may) be sued in his place of domicile (or residence),[51] is a clear-cut, easily applied principle, comparable to the traditional rule before the *International Shoe* case in the US. And it is at least questionable whether the 'consumer' exception is indeed helpful.

In summary, the desire by US courts to provide substantively just outcomes has translated into the need to pursue an increasingly meticulous, highly fact-specific, case-by-case analysis which threatens certainty and predictability of the law and, with it, the requirement of formal justice. Curiously, the harder States try to accommodate the online phenomenon by refining the law, the more self-defeating the task becomes: the more refined the rules are, the harder it is to ensure overall consistency.

B. Efficiency

An added complication is the rising number of transnational events and the decrease in their commercial value. This in itself makes it an imperative to have a more, and not less, efficient legal framework in place. Unfortunately, efficiency is not something that goes hand in hand with highly refined legal doctrines, however fair and just they may be. Efficiency would demand simple legal rules that can be applied with ease so that outcomes can be predicted with certainty and disputes can be avoided or resolved quickly. Consumers or businesses should not as a rule be better off to bear the loss arising, for example, from a breach of contract or copyright by a foreign online party than to invoke jurisdictional rules in order to enforce their legal rights and obligations. Yet this may not be far from the truth. For example, the Australian Competition & Consumer Commission, in its early report on the viability of traditional consumer protection laws in a global market place, concluded that the traditional legal remedies for the global marketplace are inadequate as they do not provide consumers with quick, effective, inexpensive and easily accessed remedies.[52]

[50] See Art 7 'Contracts concluded by consumers'; adopted by the Special Commission of the Hague Conference on Private International Law on 30 Oct 1999, at <http://www.hcch.net/e/conventions/draft36e.html>. See also Comments by the Rapporteur in Catherine Kessedjian, *Preliminary Document No 12— Electronic Commerce and International Jurisdiction* (2000, Ottawa) at <http://www.hcch.net/e/workprog/jdgm.html>, 6f.

[51] See Art 2 of *EC Regulation on Jurisdiction and the Recognition of Judgments in Civil and Commercial Matters:* 'persons domiciled in a Member State shall … be sued in the courts of that Member State'; Art 3 of *Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters*: 'a defendant may be sued in the courts of the State where that defendant is habitually resident.' On the difference between these two articles see Peter Nygh and Fausto Pocar, *Preliminary Document No 11—Report of the Special Commission of the Hague Conference of Private International Law*, at <http://www.hcch.net/e/workprog/jdgm.html>, 38 f.

[52] Australian Competition & Consumer Commission, *Enforcement Challenge: Enforcement of Consumer Protection Laws in a Global Market Place* (1997), at <http://www.accc.gov.au/docs/global/front.htm>, 29.

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The impact of this efficiency imperative on the viability of a legal doctrine is well illustrated by the above noted rise and fall of the negligence action in relation to car accidents. This incident in legal history also shows that the sophistication of a doctrine can become problematic when the number of cases which attracts its operation increases drastically. So the very virtues of the negligence action, namely its all encompassing broadness and its fairness, reflecting subtle fault variations, contributed to its partial downfall:

> In retrospect, the wisdom of discarding strict liability for highway accidents seems less obvious today since the advent of the motor car than it was in the days of more tranquil traffic a century ago… Subsequent experience… far surpassing the wildest fears, has seriously challenged the claim of fault liability as an adequate solution.[53]

While the negligence action generally is still alive and kicking, the vast and increasing number of motor accidents has meant that, at least in relation to this area, it had to be abandoned or supplemented by compulsory third party car insurance and no-fault compensation:[54]

> without liability insurance the tort system would long ago have collapsed under the weight of the demands put on it and been replaced by an alternative, and perhaps more efficient, system of accident compensation.[55]

The question in relation to the Internet is not whether, but when, the number of transnational events will tip the scale in favour of a fresh approach to deciding on regulatory competence. At the moment, although there has no doubt been an increase in transnational interactivity, there are still certain factors that limit the number of transnational interactions, especially those which are legally significant. One reason for the potentially limited geographical reach of online communications is that state territories remain not only co-extensive with legal systems but also, albeit much more loosely, with language, cultural, social, political and religious communities, which make overseas sites or products less relevant or interesting, or even intelligible, than home-grown ones. Of course the legal uncertainties of transacting with someone beyond one's home territory are also discouraging. The risk of entering unknown legal territory inherent in going global may be too great to justify the contact, with the result that it may be avoided.[56] Online traders who do not make any deliberate attempt to territorially restrict their sites may achieve such restriction indirectly from territorially restricted offline advertising of their sites. Given the enormous number of sites, mere web presence and reliance on search engines and links on other sites is generally insufficient to bring a site to the attention of an audience or a substantial audience. Thus many online businesses have to

[53] Fleming, above n 16, 25. [54] Ibid, 12–16. [55] Ibid, 13.

[56] There is certainly evidence that consumers are discouraged from engaging in online transactions by legal uncertainties. See, eg, James Catchole, 'The Balance between Technology and the Law' (March 2001) *Computer & Law* 32, 32.

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invest significantly in offline advertising to ensure that their site is visited and most do this not globally but nationally or even only locally:

> A World Wide Web advertisement does an advertiser little good unless consumers can find the advertisement… Many advertisers submit descriptions of their site to …search engine and indexes…incorporate their site's address in their company letterhead or product packaging… include the site's address in print, radio, and television advertising… [and] many advertisers refine their promotion by targeting specific markets.[57]

Also, individuals look up sites of businesses or institutions they have come across in their offline existence, which is often the most effective indirect advertising of websites and which explains why brick and mortar businesses have frequently been more successful online than pure online businesses.[58] This also means that online communications are often no more international than offline conduct. Restricting sites territorially may not just be a matter of limited resources but also a deliberate policy of restricting the reach of the business in view of a limited distribution network for goods. As the Internet is no more than a medium for communicating information and information only (however potent or valuable that may be), many legally significant transactions are more conveniently effected locally, especially if they relate to the sale of physical or perishable goods. The tyranny of distance in relation to physical goods and services cannot be eradicated by the Internet.

Having said that, it seems inevitable that transnational interaction will further increase and with it the pressure on finding more efficient solutions to deciding which event belongs to whom. While the harmonisation of jurisdictional rules would be a step forward from the current plethora of national regimes, it will only be small, even insignificant, progress if the harmonised rules themselves provide for a broad, highly fact specific test reliant upon vague notions, for example, of reasonableness. A perfect discouraging example is the *EC Convention on the Law Applicable to Contractual Obligations* (1980, Rome) which provides in Article 4 for a 'vague and open-ended test'[59], namely that a contract shall be governed by the law of the country with which it is *most closely connected*.

IV. THE EVOLUTION OF JURISDICTIONAL RULES IN CRIMINAL CASES

The refinement process has also occurred in respect of the jurisdictional rules

[57] Christopher W Meyer, 'World Wide Web Advertising: Personal Jurisdiction Around the Whole Wide World?' (1997) 54 *Washington and Lee Law Review* 1269, 1282 (footnotes omitted), at <http://www.wlu/edu/~lawrev/text/543/Meyer.htm>, para II.B.1. See also Tony Dawe, 'Trust the postman to deliver e-results', *The Times* (UK), E-Business Briefing, 12 June 2001, 4.

[58] Clive Mathieson, 'Seeing off the dot-coms', *The Times* (UK), IT Plus/Law, 8 Mar 2000, 44.

[59] Bradford L Smith, 'The Third Industrial Revolution: Law and Policy for the Internet' (2000) 282, *Recueil des Cours* 229, 329.

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under international law, as applicable to criminal matters.[60] This is most apparent in the evolution of the territoriality principle. Given the intended comparison to the above analysis, two matters are worth mentioning to start with. First of all, in respect of criminal matters, adjudicative and legislative jurisdiction coincide. So '[i]f the court has jurisdiction, it applies its own law; if the lex fori applies, then the court has jurisdiction.'[61] Thus any inquiry into the adjudicative jurisdiction of a State court assumes greater significance in criminal matters, as it will also of necessity determine whether the domestic law is applicable to the accused.[62] This, in addition to the criminal nature of the action, makes consistency and predictability even more imperative. This issue of certainty of legal rights and obligations relates to the second point. Given the nature of international law, in particular customary international law, which largely relies on State practice, ascertaining clearly defined rules has notoriously been difficult in many areas, not the least in relation to jurisdiction:

> Much of the law relating to jurisdiction has develop through the decisions of national courts applying the laws of their own states. Since in many states the courts have to apply national laws irrespective of their incompatibility with international law, and since courts naturally tend to see the problems which arise primarily from the point of view of the interests of their own state, the influence of national judicial decisions has contributed to the uncertainty which surrounds many matters of jurisdiction and has made more difficult the development of a coherent body of jurisdictional principles.[63]

Bearing these almost conflicting considerations in mind, the following discussion can do no more than show a trend (rather than clearly reformulated rules)—a trend away from rigidity and relative certainty towards flexibility and greater uncertainty. This trend will be illustrated mainly by reference to instances of State practice, which in themselves of course do not necessarily reflect customary international law, but which go far to show that jurisdictional rules under international law have been under the same pressures and driven towards similar refinements as the rules in respect of private matters. The marked difference is in respect of recent online developments, which seem to have brought the refinement process of the rules in respect of criminal matters to a halt.

[60] The phrase 'criminal matters' is used to refer not just to matters which are criminal in the technical sense, but to all those matters in relation to which state authorities take coercive actions to achieve compliance with the law.

[61] Akehurst, above n 6, 179. In domestic law this is, *inter alia*, reflected in the universal principle that the courts of one country will not enforce the penal laws of another country.

[62] This overlap of the two categories has meant that the jurisdictional rules are discussed sometimes as part of prescriptive/legislative jurisdiction (see, eg, Mann, above 23; s 402 US Restatement (Third) of Foreign Relations Law) and sometimes as part of adjudicative/judicial jurisdiction (see, eg, Akehurst, above n 6).

[63] Jennings and Watts, above n 10, 457.

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A. Pre-Internet Refinements

The territorial principle, the primary basis of jurisdiction under international law,[64] means that a state has the right to regulate persons, matters and events within its territory.[65] While this statement seems to provide a fairly clear cut test, its simplicity is deceptive. It begs the questions as to what exactly can be said to occur or to be within the territory of a State so much so as to give a State territorial jurisdiction over it. The answers have become more expansive over time so as to 'catch' matters that have a less and less physical, and more and more intangible, nexus with the territory in question. Again this refinement process started long before the Internet, in response to greater transnational interactivity.

The critical decision in respect of the territoriality principle came in 1927 with the *Lotus* case[66] when the Permanent Court of International Justice decided that a State may try and punish a person whose acts abroad cause injury within its territory. Interestingly, the terminology used by Judge Moore in that case is reminiscent of the term 'symbolic' presence used in the *International Shoe* case:

> it appears to be now universally admitted that, where a crime is committed in the territorial jurisdiction of one State as the direct result of the act of a person at the time corporeally present in another State, international law, by reason of the principle of *constructive presence* of the offender at the place where his act took effect, does not forbid the prosecution of the offender by the former State, should he come within its territorial jurisdiction.[67]

The fiction of the constructive presence of the offender or constructive location of the crime within the territory is based upon the injurious effects of the conduct originating abroad within the territory. This has become known as the objective territoriality principle.[68] Its counterpart is the subjective territoriality principle according to which a crime occurs in a State when it is commenced within the State but completed or consummated abroad.[69] The Permanent Court clearly redefined the territoriality principle by abandoning the requirement that the offender must be physically in the territory or that the causative act must have occurred there, for there to be a valid territorial claim, in favour of a nexus, which merely required the offender's act to affect the territory.[70] This, no doubt, was more attuned to modern conditions which

[64] Ibid, 458.

[65] This maxim dates back at least to Ulricus Huber, *De conflictu legum diversarum in diversis imperiis* (1684), reiterated by Justice Story in *The Apollon* 9 Wheat 362, at 370 (1824). See Mann, above n 2, 24 ff.

[66] *France v Turkey*, (1927) PCIJ Reports, Series A, No 10.

[67] Ibid, 73 (emphasis added).

[68] Harris, above n 10, 278.

[69] Ibid, 278.

[70] Strictly speaking, the *Lotus* case concerns only the constructive location of conduct, rather than the constructive location of the offender, within the territory. The offender has been deemed to be within the territory of a State when, eg, he owns property there, conducts business there or when there is an agent or employee within the territory. See Jennings and Watts, above n 10, 458 f.

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exposed States frequently and substantially to the effects of conduct by absent actors. Yet, while the holding appears to adopt a very broad test, the circumstances of the case significantly circumscribed its ambit. First, the case concerned the *physical* effects on the territory of conduct originating abroad: the French steamer *Lotus* collided with a Turkish steamer (ie Turkish 'territory'), killing eight Turkish sailors and passengers.[71] And secondly, the effect of the misconduct was a constituent element of the offence: the death of the sailors occurring on Turkish territory was a necessary ingredient or 'constituent element' of the charge of manslaughter under Turkish law. While the Permanent Court seemed at times to use the terms 'effects' and 'constituent element' interchangeably, it also stated:

> [O]ffences, 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 offence, and more especially its effects, have taken place there.[72]

It then went on to say

> that the effect is a factor of outstanding importance in offences such as manslaughter, which are punished precisely in consideration of their effect . . .[73]

So while in this case the effect of the conduct was a constituent element of the crime, the court also seemed to require that this must be the case for there to be territorial jurisdiction.[74] Due to the globalisation of commercial activity, especially after the Second World War, both the requirement of a physical effect and of the effect constituting an element of the criminal offence, came under pressure.

The attempted expansion of what could validly be considered to be within the territorial boundaries of a State so as to satisfy a territorial claim over the event came in the form of the US anti-trust cases, which caused a lot of controversy, particularly in the 1970s and early 1980s.[75] The controversy arose mainly because US courts enforced US antitrust law[76] against foreign companies in relation to activities which took place in foreign States on the basis that the effects of those activities were felt in the US. There was a storm of protest by many States against the excessive extra-territorial exercise of criminal jurisdiction by the US and its attempt to impose its economic policy on other States. This was followed by various blocking and claw-back legislation

[71] The example, most often referred to, is when one shoots across the border, injuring or killing another person in that State.

[72] *France v Turkey*, (1927) PCIJ Reports, Series A, No 10, 23.

[73] Ibid, 24.

[74] See also discussion in Mann, above n 2, 85 ff.

[75] The most influential case, in which the effects doctrine received its classic formulation, is *US v Aluminium Company of America*, 148 F 2d 416 (1945) (the *Alcoa* case).

[76] Mainly based on the *Sherman Antitrust Act 1890* (US).

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designed to defeat the outcome of the decisions.[77] Of relevance to this discussion is that the 'effects' upon which US courts relied to claim jurisdiction over acts occurring abroad were certainly not physical effects: they were economic effects, particularly the effects on US foreign commerce. Also, it has been argued that, as in some of these cases the relevant offending agreement was reached outside the US,[78] jurisdiction could not be justified on the basis that 'a constituent element of an act forbidden by antitrust law has occurred on that State's territory . . .'[79] While there is room for arguing that the effect is in fact a constituent element of the charge of anti-competitive behaviour,[80] it seems that once the requirement that the effect must be physical is abandoned (regardless of whether the effect is also a 'constituent element' of the crime), the number of States potentially entitled to claim jurisdiction on the basis that the foreign activities had an economic or other intangible effect spirals. In a world where the actions of large companies in one jurisdiction regularly have an effect across the globe,[81] limitations on the kind of effect required to assert jurisdiction are necessary to prevent innumerable overlapping and conflicting claims by all those States affected. So support for the 'effects' doctrine has, both inside as well as outside the US, gone hand in hand with support for certain limitations. The disagreement has been on the kind of limitations, on whether the effects must be 'substantial' or 'direct' or 'intended' or all of these.[82] What all these limitations have in common is firstly, their relative vagueness, requiring an evaluation of facts and events, and secondly, their objective, namely to prevent an unreasonable exercise of jurisdiction or an '*undue* encroachment of a jurisdiction more properly appertaining to … another State'.[83] This notion of reasonableness is captured in s 403(1) of the US Restatement (Third) of Foreign Relations Law (1986):

> a state may not exercise jurisdiction… with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable.

But what is unreasonable? To some extent what is reasonable must be in the eye of the beholder. And although s 403(2) expressly defines the factors which must be evaluated to decide whether the assumption of jurisdiction would be reasonable, many of these factors are as broad and dependant on value judg-

[77] A V Lowe (ed), *Extraterritorial Jurisdiction: An Annotated Collection of Legal Materials* (Cambridge: Grotius Publications Ltd, 1983), 79 ff.

[78] See, eg, *US v General Electric Co*, 82 F Supp 753 (1949).

[79] Akehurst, above n 6, 195, commenting on Mann, above n 2, 103.

[80] Akehurst, above n 6, 195 f, where he convincingly argues that the economic effects of restrictive business practices are in fact a constituent element of the offence.

[81] A most obvious recent example is Microsoft and its world-wide dominance in the field of operating systems.

[82] Akehurst, above n 6, 199 ff. See also s 402(1)(c) US Restatement (Third) of Foreign Relations Law (1986) and Comment d.

[83] *Case Concerning the Barcelona Traction, Light and Power Company Limited (Belgium v Spain) (Judgment*), [1970] ICJ Reports 3, 105 (emphasis added).

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ments as the term they seek to define: the extent to which the activity has a *substantial, direct or foreseeable effect* upon the territory, the *character* of the activity and the degree to which the *desirability* of regulation is *generally accepted*, the existence of *justified expectations*, the *importance* of regulating the activity and the *consistency* with *traditions of the international system* and the *interests of other States* in regulating the activity, and finally the *likelihood* of conflicting regulations.[84] Indeed Lowenfeld who wrote these provisions noted that 'our aim is reasonableness, not certainty'.[85] As an attempt to provide for a fair and balanced division of regulatory power this approach is praiseworthy. Certainly, there has been high-profile academic, governmental and judicial support for such a flexible holistic analysis and balancing act.[86] Mann, for example, argued:

> Perhaps public international lawyers should now discard the question whether the nature of territorial jurisdiction allows facts to be made subject to a State's legislation. Rather should they ask whether the legally relevant facts are such that they *"belong"* to this or that jurisdiction.[87]

And after initial hesitation whether the territorial principle in its simplicity is perhaps after all 'preferable to a more elaborate and refined but also more hazardous, version'[88] he goes on to pre-empt critics of the flexible test:

> It may be said that the test would substitute vagueness for certainty. This would be formidable criticism if the principles of jurisdiction in fact were at present defined with certainty. But the simplicity of Huber-Storyan teaching is deceptive. The question, for instance, where a crime or tort is committed is subject to so much doubt that no certain answer can be suggested in any but the clearest cases; nor has the territorial test led to much certainty in the field of trade practices or taxation.[89]

But the fact remains that a more elaborate refined version of the territoriality principle is a yet more hazardous and uncertain basis of jurisdiction (albeit rationally more satisfactory) than its cruder predecessor. This increased uncertainty is illustrated by the protests against the US anti-trust approach, which were not based on the substantive unfairness of the effects doctrine but rather on what the US regarded as falling within it, that is on the interpretation of

[84] This echoes the balancing test advocated by Judge Choy in *Timberlane Lumber Co v Bank of America*, 549 F2d 597 (1976), 611–12.

[85] Andreas F Lowenfeld, 'Public Law in the International Arena: Conflict of Laws, International Law and Some Suggestions for their Interaction' (1979) II 163 *Recueil Des Cours* 311, 329. See also Dodge, above n 8, 137

[86] In the *Nottebohm Case (Liechtenstein v Guatemala)* , [1955] ICJ Reports 4, the International Court of Justice applied the principle of a 'genuine link' in the nationality context. See also Lowe, above n 77, 94 (Australian support of the balancing of interest test, provided it is not applied by the judiciary), 108 f (Canadian approval of a balancing of interests approach), 207 ff (European Community commenting on the balancing of interests approach, arguing that it should also be applied at the rule-making stage).

[87] Mann, above n 2, 45.

[88] Ibid, 43.

[89] Ibid, 50.

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what is a 'reasonable' exercise of jurisdiction. Some States expressly rejected the effects doctrine because of its inherent uncertainty.[90]

The validity of this argument seems to be confirmed by the relatively recent US anti-trust judgment of *Hartford Fire Ins Co v California*[91] where the US Supreme Court held that international comity, or in other words the test of reasonableness and the notion of 'comparative interest balancing', should only come into play if there is a 'true conflict between domestic and foreign law'.[92] The judgment, which is generally viewed as the return to a more expansive, less refined effects doctrine has been applauded on a number of grounds,[93] one of which is its positive effect on legal certainty:

> The task of identifying, explaining, and weighing the comparative regulatory interests of different nations in any given international transaction is virtually impossible for courts and private litigants… [T]he assumption that… [these] rules enhance the predictability of international transactions by identifying a single national regulatory regime… seems completely belied by the ex post and inexact nature of the various interest balancing rules for selecting a single applicable law. It typically would be far more predictable and less burdensome for an international transaction to comply with the regulatory regimes of multiple nations so long as that prospect is known beforehand and accounted for when the transaction is structured.[94]

The question now addressed is how, if at all, the effects doctrine has been adjusted to the online phenomenon.

B. Post-Internet Halt

Although it is too early to finally conclude on the Internet's impact on jurisdictional doctrines under international law, it is already apparent that the effects doctrine has assumed a new prominence and is gaining greater acceptance. Its revived prominence is not surprising given that it seems tailor-made for the online environment where the effects of any conduct are prima facie territorially unlimited and, consequently and more importantly, where the effects are often the only nexus of a foreign actor or act with the territory seeking to regulate it. What is to some extent surprising, albeit broadly in line with the *Hartford* case, is the readiness of States to assert jurisdiction on its basis, with little or even no reference to limiting factors, and the lack of protests by other States.

[90] Eg, the United Kingdom, see Submission of the British Attorney General to the House of Lords in *In re Westinghouse Electric Corporation Uranium Contracts Litigation* in Lowe, above n 77, 170. But cf Akehurst, above 6, at 208 (on the UK attitude to the effects doctrine).

[91] 509 US 764 (1993).

[92] *Hartford Fire Ins Co v California*, 509 US 764, 798 (1993).

[93] eg, Dodge, above n 8. See also Hannah L Buxbaum, 'The Private Attorney General in a Global Age: Public Interests in Private International Antitrust Litigation' (2001) 26 *Yale Journal of International Law* 219.

[94] Philip J McConnaughay, 'Reviving the "Public Law Taboo" In International Conflict of Laws' (1999) 35 *Stanford Journal of International Law* 255, 257.

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In the US, the champion of the effects doctrine, it has been applied on a number of occasions, often involving online gambling or banking. For example, in a Statement on Internet Jurisdiction the Attorney General of Minnesota declares:

> Persons outside Minnesota who transmit information via the Internet knowing that information will be disseminated in Minnesota are subject to jurisdiction in Minnesota Courts for violations of state criminal and civil laws.[95]

So the effect upon which jurisdiction is based here is the foreseeable or intended dissemination of information in Minnesota, such as the provision of online gambling services abroad to Minnesota residents. The same approach was adopted in *People v World Interactive Gambling* Corp,[96] in which a New York judge held that the court could enjoin an Antiguan corporation, legally licensed to operate a casino in Antigua, from offering gambling opportunities to Internet users in the state of New York. The court held that the activities of the New York customer of the Antiguan corporation were sufficient to hold that its actions were within the territory: 'the act of entering the bet and transmitting information from New York via the Internet is adequate to constitute gambling activity within the New York state.'[97] So the court relied upon the fact that a constituent element of the offence ie. the actual gambling, occurred in New York. But this, of course, might have been true for any other State, thus giving New York prima facie no stronger regulatory claim than anyone else. The court barely acknowledged this concern, holding that in this case the effects on New York state territory were both intended and substantial:

> A computer server cannot be permitted to function as a shield against liability, particularly in this case where respondents *actively targeted* New York as the location where they conducted *many* of their allegedly illegal activities.[98]

But while the application of the effects doctrine to online events by US courts is in line with their traditional approach, other States that tended to reject it, or were at least ambivalent about it, seem now to warm to it. For example, the Australian Securities and Investments Commission has stated in its policy statements on 'Offers of Securities on the Internet' and 'Electronic prospectuses' that it does not intend to regulate a foreign online offer, invitation or advertisement of securities if it is not targeted at persons in Australia, contains a meaningful jurisdictional disclaimers, has little or no impact on investors in Australian *and* if there is no misconduct.[99] Clearly, the assumption of jurisdiction is perceived

[95] Minnesota Attorney General, *Statement of Minnesota Attorney General on Internet Jurisdiction*, at <http://www.jmls.edu/cyber/docs/minn-ag.htm>.

[96] 714 NYS 2d 844.

[97] *People v World Interactive Gambling Corp*, 714 NYS 2d 844, 860 f.

[98] Ibid (emphasis added).

[99] Australian Securities and Investments Commission, *Offers of Securities on the Internet*, Policy Statement 141 (10 Feb 1999, reissued 2 Mar 2000), PS 141.5–141.20; see also *Electronic Prospectuses*, Policy Statement 107 (18 Sept 1996, updated 10 Feb 2000), PS 107.102, available at <http://www.cpd.com.au/asic/ps>.

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as legitimate if the effects of particular online activity on the Australian market are either intended or substantial.[100]

An example of the application of a more unrestricted effects doctrine is the recent French Yahoo decision where no attempt was made to justify why the relevant activity 'belonged' to France anymore so than to every other State. The Tribunal de Grande Instance de Paris in *LICRA & UEJF v Yahoo!Inc & Yahoo France* held that Yahoo!Inc, a company incorporated in the US, with its principal place of business in California, must take all necessary measures to dissuade and render impossible any access from French territory via yahoo.com to a Nazi artefact auction service or any other site or service that constitutes an apology of nazism or a contesting of Nazi crimes.[101] The case was in form civil as it was based on Art 808 and Art 809 of the French New Code of Civil Procedure, which allows a French court to issue an injunction to stop a manifestly illegal disturbance. Nevertheless, the actual illegality consisted of a violation of the French Criminal Code, which makes the distribution of the nazi material illegal. This, in addition to the onerous injunctive as well monetary relief granted,[102] creates room for arguing that the judgment was in fact a penal judgment[103] and thus should have been informed by jurisdictional limitations under international law.[104] The Paris court, although acknowledging that the wrong committed by Yahoo!Inc in France was unintentional, simply based its assertion of jurisdiction on the fact that by

> permitting the visualisation in France of these objects and eventual participation of a surfer established in France in such an exposition/sale, Yahoo! Inc… committed a wrong on the territory of France.[105]

This, of course, by itself does not give France in any way a stronger claim to regulate Yahoo!Inc's activities than any other States which could rely on precisely the same effect on their territory.

In December 2000, the German High Court (Bundesgerichtshof) decided that foreigners may be prosecuted in respect of their online activities, even if

[100] Although it may be argued that the wording of the policy statement leaves open the possibility that jurisdiction may be assumed on the basis of mere misconduct regardless of whether or not its effects on Australia were either intended or substantial.

[101] 20 Nov 2000, at <http://www.juriscom.net/txt/jurisfr/cti/tgiparis20001120.pdf> (an unofficial English translation is available at <http://www.gigalaw.com/library/france-yahoo-2000-11-20-lapres.html>).

[102] Yahoo!Inc was ordered to comply with the injunction within three months, after which time it would incur a penalty of 100,000 Francs for every day of delay.

[103] This was, amongst other things, argued by Yahoo!Inc in its complaint which it filed on 21 Dec 2000 in the US District Court, Northern District of California (complaint No C00-21275, at <http://pub.bna.com/eclr/21275.htm>) and in which it sought declaratory relief that the French orders were neither recognisable nor enforceable in the United States.

[104] ABA, above n 18, 83.

[105] See first decision of 22 May 2000 in which Judge Gomez heard the case in an emergency hearing (an unofficial English translation is available at <http://www.gyoza.com/lapres/html/yahen.html>).

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they originate abroad.[106] This case concerned the Australian citizen, German-born Fredrick Toben who had published in Australia anti-Semitic material on his homepage entitled 'Adelaide Institute'.[107] In his publications mass murder committed by Germans during the Second World War is denied and presented as a Jewish myth and backed by alleged research and scientific proof, in violation of German criminal law. Unlike the Paris court, the German court addressed the question of whether and why Germany may have a stronger claim than other jurisdictions to apply its criminal laws to Toben's publication. It argued that, given Germany's history, there is objectively a special link between the material in question and German territory, which justifies assertion of jurisdiction.[108] It also reasoned that, given the focus of the site on Germans and German history, German surfers, in particular, belonged to the intended and actual addressees of the site.[109] Although these arguments have some persuasive power, the holding does not sit easily with the fact that the topic of the site, namely the Second World War, is of almost universal interest and that the online publication was in English. Also there was in fact no evidence that, apart from the investigating police officers, anyone in Germany had actually accessed the site.[110] So what was the actual effect? This German ruling is in marked contrast to the reasoning of the New York court that focused on the actual actions of local online customers which were then imputed to the foreign provider to bring him within territorial boundaries.

C. The Common Denominators

What are in all three decisions conspicuous by their absence are references to the laws of other States and to the potential of conflicting regulation. Certainly there is nothing even resembling the balancing approach advocated in the US Restatement (Third) of Foreign Relations Law. Indeed, the US court is the only one which at least acknowledges the existence of the issue when it stated that '[i]t is irrelevant that Internet gambling is legal in Antigua.'[111] The question is why there has been this apparent indifference to the laws of other States, with courts treating the cases as almost purely domestic matters.

The answer may be found in the online case which did spark some real controversy, namely the CompuServe incident in Germany in 1995 when

[106] BGH, Urt. v. 12.12.2000—1 StR 184/00 (LG Mannheim), reproduced in (2001) 8 *Neue Juristische Wochenschrift (NJW)* 624.

[107] Incidentally, Toben had already been ordered to remove the relevant material by the Australian Human Rights and Equal Opportunities Commission on the basis that it is contrary to the Racial Discrimination Act 1975 (Cth): *Jeremy Jones and Member of the Committee of Management of the Executive Council of Australian Jewry v Federick Toben* (5 Oct 2000), available <http://www.hreoc.gov.au>.

[108] BGH, Urt. v 12.12.2000—1 StR 184/00 (LG Mannheim), reproduced in (2001) 8 *NJW* 624, 628.

[109] Ibid, 626f.

[110] Ibid, 625.

[111] *People v World Interactive Gambling Corp*, 714 NYS 2d 844, 859.

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> CompuServe blocked access to 200 chat groups for fear of prosecution under Bavaria's obscenity laws. Because CompuServe did not have the technology to ban the groups only to its 220,000 customers in Germany, it had to ban the groups worldwide, suspending access to four million subscribers in 147 countries.[112]

The outrage was based upon the fact that here Germany indirectly imposed its moral standards across the globe. And this is precisely the reason why the latest decisions are much more acceptable. Neither the New York, French, nor German court required an end to the provision of gambling services or nazi items or propaganda anywhere, but just in New York, France, or Germany. And the courts decided this and could decide this, because content providers are in practice able to territorially restrict their sites. Indeed, the French court went to some trouble to verify the practical feasibility of its order.[113] And although the New York court rejected the respondent's argument that it unknowingly accepted bets from New York residents, it seems likely that it would have accepted it if the casino's software, intended to filter out New York residents, had been less prone to circumvention by New York gamblers.[114] Thus, the judgment is in line with the French judgment in requiring the providers of certain content to make their sites territorially sensitive.

Provided that each State only claims jurisdiction over a site as far as it affects the State's territory and not more, conflicting claims cannot arise and therefore there is no need to consider the laws of other States. This also explains why other States have not voiced protest against such assumption of jurisdiction. That is not to say that concurrent jurisdictional claims cannot arise and indeed the German CompuServe judgment was controversial because it effectively precluded concurrent regulation, unlike the more recent decisions that clearly leave that possibility open. For example, when the New York court asserted that the gambling activity was legal in Antigua, it implied that Antiguan law was in fact also applicable to the activity. The problem with concurrent, even if non-conflicting, jurisdictional claims is the potentially unbearable burden they impose on individuals, which in the Internet context may be the obligation to comply with the laws of every State.

Yet, this concern, although often voiced, has not been realised: States have not assumed a right to regulate foreign online activity as readily as might have been expected. Given the vast amount of online activity, the number of cases,

[112] John F McGuire, 'When Speech is Heard Around the World: Internet Content Regulation in the United States and Germany' (1999) 74 *New York University Law Review* 750, 769 (footnotes omitted). The Chief Executive of CompuServe was on appeal acquitted of the indictment of distributing child pornographic material: Oliver Zander, 'Recent Developments in German Internet Law' (2000) Oct/Nov *Computer & Law* 36, 36.

[113] In its judgment of 11 Aug 2000 (an unofficial English translation is available at <http://www.gyoza.com/lapres/html/yahen8.html>) the Paris court ordered the set-up of a three-member panel of experts to comment on the feasibility of ordering Yahoo!Inc to prevent French surfers from accessing neo-nazi material. The finding of the panel formed the basis of its November judgment.

[114] *People v World Interactive Gambling Corp*, 714 NYS 2d 844, 861.

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at least reported cases, in which States have actually assumed jurisdiction over foreign online activities is astonishingly small. And there are two further aspects the above cases have in common which may explain their relative rarity. First, in all cases there seems to have been a very strong public interest in regulating the activity, so much so as to outweigh the burden imposed on the foreign provider. The activities in question, such as unlicensed gambling or the publication of nazi propaganda, tend to be controversial activities even in States which tolerate them,[115] apart from regulatory havens such as Antigua. Secondly and more importantly, in all cases, the regulating State had some actual power over the foreign provider. In *People v World Interactive Gaming Corp*, the Antiguan company was a wholly owned and controlled subsidiary of World Interactive Gaming Corp, a Delaware company with corporate offices in New York. In the French Yahoo case, Yahoo!Inc, a Delaware company, had a French subsidiary, Yahoo France.[116] And finally the German judgment arose out of a case in which, following his arrest in Germany, Toben had been sentenced to ten months' imprisonment for distributing revisionist leaflets in Germany.[117] So in all three cases, the regulatory right asserted was backed by might. The insistence on enforcement power in the criminal context can be explained by the facts, first, that States will not generally enter a default judgment against an absent accused and, secondly, that criminal laws and judgments are never enforced abroad.[118] The frequent lack of enforcement jurisdiction in respect of online conduct has no doubt played a significant role in keeping a lid on the number of cases where States could and would otherwise have asserted jurisdiction. This may also explain why States, on those fairly rare occasions, when in possession of enforcement power, have not been too concerned about the limits of their legislative/adjudicative jurisdiction under international law. It is telling that of all the

[115] Eg, the fact that the advocacy of racist theories is protected under the First Amendment of the US Constitution (*Brandenburg v Ohio* 395 US 444 (1969)) does not show that the ideas themselves received judicial approval but rather that it was perceived that market-forces can more effectively deal with them. See David Feldman, *Civil Liberties and Human Rights in England and Wales* (Oxford: Clarendon Press, 1993), 549.

[116] Although the Paris court (like the courts in the other examples) never expressly acknowledged that this was the trigger for its assumption of jurisdiction, it would explain why other foreign online culprits have not been sued or prosecuted. See Lyombe Eko, 'Many Spiders, One Worldwide Web: Towards a Typology of Internet Regulation' (2001) 6 *Communication Law and Policy* 445, 472 f: 'Though other online auction sites, such as e-Bay, display and auction memorabilia from Hitler's Third Reich, Yahoo! was sued because it had a French subsidiary…'. It may though be noted that the Paris court did not allow for the orders against Yahoo!Inc to be enforced against its French subsidiary and it even acknowledged the enforcement difficulties arising out of this. See judgment of 20 Nov 2000, at <http://www.juriscom.net/txt/jurisfr/cti/ tgiparis20001120.pdf>.

[117] BGH, Urt. v 12.12.2000—1 StR 184/00 (LG Mannheim), reproduced in (2001) 8 *NJW* 624, 625; although it seems that at the time of the ruling, Mr Toben had returned to Australia. See 'Holocaust Denier Not Impressed by Ruling', *Frankfurter Allgemeine Zeitung* (English edition) 13 Dec 2000, at <http://www.faz.com>.

[118] Akehurst, above n 6, 235.

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instances of State practice mentioned above, the only reference to requirements of international law is made in the German judgment.[119]

So how do these instances compare to the US approach taken to adjudicate jurisdiction in private matters, especially in terms of their propensity to provide certain and predictable outcomes? Ironically, it could be argued that there is greater consistency and predictability in the context of criminal jurisdiction simply because without enforcement power, jurisdiction is unlikely to be asserted. Furthermore it seems certain, that when there is enforcement jurisdiction, States may claim legislative jurisdiction upon a most tenuous basis, such as in the Yahoo case. The likelihood of being subject to the criminal laws of a State seems to increase if the effects on the territory are intended or substantial, as illustrated by the German, Australian, and US instances. The fact that there is concurrent jurisdiction, provided it is not conflicting, is not a factor weighing against the assumption of jurisdiction. So, to some extent, the blanket application of the effects doctrine, tempered by the strict limits of enforcement jurisdiction, seems more conducive to providing formal justice and therefore justice overall than the highly sensitised approach, driven by concerns of substantive justice, favoured in the private matters.

V. CONCLUSION

As the Internet is relatively new and as its innumerable legal challenges are often just emerging, undermining traditional legal rights and interests, with heated discussions for various solutions taking place on all levels, it is difficult, if not impossible, to stand back and review the problem at hand with some detachment. This paper makes an attempt to do that in relation to jurisdictional developments.

The conclusions arrived at are at least partly disappointing; disappointing in that no magic solution to the jurisdictional conundrum to which the Internet gives rise has emerged. Contemplating the egg story, one cannot help but wonder whether a fairly radical overhaul of allocating regulatory competence is not the only sensible solution to deal with the innumerable multi-coloured events. The traditional solutions to these events arose *because* they were exceptional; if non-primary coloured eggs had been as common as primary coloured eggs right from the start it seems inevitable that an industry dedicated to them would have developed alongside the other industries. Furthermore the traditional solutions to these 'difficult' events also build upon and reflect that exceptional nature, simply by subjecting them to a special analysis. So it may be argued that once transnational events are commonplace, possibly as common as territorially limited events (which is not to say that this *is* the case) squeezing them into a system designed to handle the one-off occurrence is highly inefficient. Yet, however inefficient the current jurisdictional regimes

[119] BGH, Urt. v. 12.12.2000—1 StR 184/00 (LG Mannheim), reproduced in (2001) 8 *NJW* 624, 628.

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may be, given the resistance of law to anything but incremental change,[120] a radical overhaul of jurisdictional rules is likely to be a long-term process.

Of more immediate relevance are the insights gained from comparing and contrasting the two approaches to the new jurisdictional challenges. The first approach, as exemplified by the US decisions on adjudicative jurisdiction, seeks to provide fair and just results and therefore involves a meticulous analysis, evaluation and balancing of facts and interests. The pitfall of this approach is that the decision-making process becomes more and more refined as colour variations become subtler, which makes it harder, if not impossible, to ensure consistency and thus fairness and justice. The second approach, as exemplified by recent jurisdictional claims in respect of criminal matters, is less concerned about fair and just results but more about protecting existing public interests and thus involves a readiness to find a basis for asserting jurisdiction when its exercise is likely to be effective; in other words holding on to the eggs in one's possession. [121] The problem with an approach that is not first and foremost dictated by substantive fairness, is that it disadvantages States with a smaller online presence. It also encourages online content providers to minimize regulatory compliance cost by avoiding a presence, for example through a subsidiary, in targeted jurisdictions,[122] opting instead for regulatory havens analogous to tax havens and flag ship States. Last but not least, there is something decidedly regressive about 'a legal doctrine which sanctions the test of physical power … [It is] retrograde and parochial in character and should be firmly rejected.'[123]

If this paper offers any future-oriented insight, it is that better rules are not necessarily to be found in the most refined and all embracing, well-balanced rules and that at times legal principles which are not overtly sensitive to all the various interests at stake, but clear cut and thus capable of providing certainty and predictability, may in the final analysis be more just and desirable. It seems likely that with the steady rise in transnational activity highly refined jurisdictional rules will be sidelined in favour of, and become fall-back options to, more easily administered mainstream solutions. Yet, what exactly will happen between now and the time when all events are of one colour, only time can tell.

[120] See above n 5.

[121] These two approaches are not mutually exclusive and indeed inform the assumption of jurisdiction both in respect of private and public matters, albeit to varying degrees. As considerations of enforcement jurisdiction have influenced the outcome in private matters (see, for example, Australian case of *Macquarie Bank Limited & Anor v Berg*, [1999] NSWSC 526, available at http://austlii.edu.au) so is, of course, the very existence of, for example, the effects doctrine in international law evidence that jurisdiction may be asserted even in the absence of enforcement power and that fairness demands that States can regulate activity by which they are substantially affected.

[122] See above n 116, on the more favourable position of companies like e-bay in comparison to the more conscientious Yahoo!Inc.

[123] Frederick A Mann, 'Conflicts of Laws and Public Law' (1971) 132 *Receuil des Cours* 107, 121.

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