5

Why and What (State) Jurisdiction

Legal Plurality, Individual Equality and Territorial Legitimacy

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1 INTRODUCTION

In their invitation to contribute, the editors of this book have asked me to address two questions: first, 'Does inter-legality affect our concept of jurisdiction?' Second, and more specifically: 'What does it mean to speak of jurisdiction when several rules emanating from several legal orders can claim that they must be applied at the same time?'

The scope of this chapter precludes addressing what 'inter-legality'[2] amounts to, both sociologically and normatively.[3] There will be no discussion, as a result, of how one should relate inter-legality to current debates about 'legal pluralism'[4]

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[2] The term was first coined by legal anthropologists: see e.g., B. de Sousa Santos, *Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition* (London: Routledge, 1995), at 473; J. Eckert, 'What is the Context of "Law in Context"?' in S. P. Dolan and L. Heckendorn Urscheler (eds.), *Concepts of Law: Comparative, Jurisprudential, and Social Science Perspectives* (London: Routledge, 2014), 225.

[3] On the implications of 'inter-legality' for the concept of law itself, see Chapter 4 in this volume.

[4] See, e.g., S. Besson, 'The Authority of International Law – Lifting the State Veil', (2009) 31 *Sydney Law Review* 343; S. Besson, 'European Legal Pluralism after Kadi', (2009) 5 *European Constitutional Law Review* 237; S. Besson, 'The Truth about Legal Pluralism, Review of Nico Krisch's Beyond Constitutionalism: The Pluralist Structure of Postnational Law', (2012) 8 *European Constitutional Law Review* 354; S. Besson, 'International Law's Relative Authority, Review of Nicole Roughan's Authorities. Conflicts, Cooperation and Transnational Legal Theory', (2015) 6 *Jurisprudence* 169.

in legal theory[5] and of whether analytical legal positivism can or cannot accommodate it.[6] The chapter assumes, instead, and for the sake of the argument, that inter-legality means what the second question refers to (i.e., some form of 'legal plurality').[7] In short, legal plurality is taken to describe and characterize the coexistence of several distinct legal systems or orders,[8] or perhaps legal subsystems or orders, within a single independent political community, like that of a state, albeit not exclusively, and, although it is not a necessary consequence, the potential risk of normative conflict this legal concurrence may give rise to.

The legal orders whose norms may be overlapping in the domestic legal order[9] may range from infranational orders (e.g., the law of federated

[5] See e.g., S. E. Merry, 'Legal Pluralism', (1988) 22 *Law and Society Review* 869; S. Roberts, 'After Government? On Representing Law without the State', (2005) 68 *Modern Law Review* 1; P. S. Berman, 'Global Legal Pluralism', (2007) 80 *Southern California Law Review* 1155; W. Twining, *Globalisation and Legal Scholarship* (Nijmegen: Wolf Legal Publishers, 2009); K. Culver and M. Giudice, *Legality's Borders – An Essay in General Jurisprudence* (Oxford: Oxford University Press, 2010); N. Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford: Oxford University Press, 2010); N. Roughan, *Authorities: Conflict, Cooperation, and Transnational Legal Theory* (Oxford: Oxford University Press, 2013), chapter 7; T. Schultz, *Transnational Legality: Stateless Law and International Arbitration* (Oxford: Oxford University Press, 2014); J. Griffiths, 'Legal Pluralism', in J. D. Wright (ed.), *International Encyclopedia of the Social & Behavioral Sciences*, 2nd edn, vol. 13 (Amsterdam: Elsevier, 2015), 757; R. Cotterell, 'Does Global Legal Pluralism Need a Concept of Law?' in U. Baxi, C. McCrudden and A. Paliwala (eds.), *Law's Ethical, Global and Theoretical Contexts. Essays in Honour of William Twining* (Cambridge: Cambridge University Press, 2015), 303; N. Roughan, 'Mind the Gaps: Authority and Legality in International Law', (2016) 27 *European Journal of International Law* 329; R. Michaels, 'Law and Recognition – Towards a Relational Concept of Law', in N. Roughan and A. Halpin (eds.), *In Pursuit of Pluralist Jurisprudence* (Cambridge: Cambridge University Press, 2017), 90.

[6] See e.g., J. Dickson, 'Towards a Theory of European Union Legal Systems', in J. Dickson and P. Eleftheriadis (eds.), *Philosophical Foundations of European Union Law* (Oxford: Oxford University Press, 2012), 25; J. Waldron, 'Legal Pluralism and the Contrast between Hart's Jurisprudence and Fuller's', in P. Cane (ed.), *The Hart–Fuller Debate in the Twenty-First Century* (Oxford: Oxford University Press, 2010), 135; Schultz, *Transnational Legality*, chapter 4; Michaels, 'Law and Recognition'.

[7] Of course, part of this chapter's argument about jurisdiction could also be made with respect to the other side of the question, i.e., the theoretical and normative qualifications of legal plurality (qua legal pluralism; see Besson, 'Review of Krisch', and Besson, 'Relative Authority'). Among the other meanings of inter-legality, besides the descriptive one based on legal plurality endorsed as a starting point in this chapter, one may also think, for example, of the reactive self-regulation *process* among legal orders on the one hand, or of one or many non–system-dependent moral or legal *principles* like the rule of law, legality itself or justice that may be invoked in every legal order to manage conflicts with other legal orders (see Chapter 1) on the other.

[8] I am not distinguishing between legal 'systems' and 'orders' in this chapter. I am also assuming that all those legal orders are 'legal' in the relevant sense.

[9] This mode of exposition (by reference to state or domestic law) has been questioned to the extent that it assumes that state law remains the legal order of reference and that the other legal

entities, indigenous law or religious law) to transnational orders (e.g., *lex mercatoria* or *lex electronica*), international orders (e.g., international criminal law, international trade law or United Nations [UN] law), supranational orders (e.g., European Union [EU] law) or even other foreign domestic orders (e.g., foreign tax, competition or environmental law). Each of those legal orders may also be considered more or less pluralistic in itself (e.g., due to the fragmentation of international law into self-contained or autonomous regimes or to the plurality of international courts),[10] thereby making each layer of legal plurality multilayered.

What has led to this overlap between norms stemming from various legal orders is the development of what one may refer to as the 'global' or 'transnational' circumstances of contemporary social and political life, be they related to the increasing mobility of state agents, people and/or things[11] or to the rise of shared or even common interests. Besides the usual tandem of domestic and international law,[12] the regulation of those new circumstances and interests has taken different non-territorialized forms following a plurality of other relations between the regulator and the people or the

orders should be conceived against that background. See e.g., Michaels, 'Law and Recognition'. The fact is – as I will explain and then argue in this chapter – that state law remains the legal order of reference in practice, for it is not only the most comprehensive legal order (see J. Raz, 'Why the State', [2014] 38 *King's College London Dickson Poon School of Law Legal Studies Research Paper Series*), but also the one in which most of the legal norms stemming from all other legal orders are adjudicated and enforced, and even, in some cases, developed further. See also Roberts, 'After Government?' at 17–18; S. Sassen, 'The State and Globalization', in R. B. Hall and T. J. Biersteker (eds.), *The Emergence of Private Authority in Global Governance* (Cambridge: Cambridge University Press, 2002), 91, 107; G. Handl, 'Extra-Territoriality and Transnational Legal Authority', in G. Handl, J. Zekoll and P. Zumbansen (eds.), *Beyond Territoriality – Transnational Legal Authority in an Age of Globalization* (Leiden: Brill, 2012), 3, 6; P. Zumbansen, 'The Regulatory Landscape of Global Governance and Transnational Legal Authority', in ibid., 551, 556–557. As a matter of fact, those legal orders are not usually concerned with (excluding or pre-empting) the law from other legal orders, and hence with the issue of legal plurality.

[10] See e.g., J. E. Alvarez, 'Beware: Boundary Crossings', in T. Kahana and A. Scolnicov (eds.), *Boundaries of State, Boundaries of Rights: Human Rights, Private Actors, and Positive Obligations* (Cambridge: Cambridge University Press, 2016), 43.

[11] On those transnational circumstances, see e.g., S. Besson, 'Human Rights as Transnational Constitutional Law', in A. Lang and A. Wiener (eds.), *Handbook on Global Constitutionalism* (Cheltenham: Edward Elgar, 2017), 234.

[12] On the notion of 'common interests' in international law, see e.g., S. Besson, 'Community Interests in the Identification of International Law – With a Special Emphasis on Treaty Interpretation and Customary Law Identification', in E. Benvenisti and G. Nolte (eds.), *Community Obligations Across International Law* (Oxford: Oxford University Press, 2018), at 50; S. Besson, 'Community Interests in International Law – Whose Interests are They and How does One Identify Them?', in ibid., 36.

matters regulated.[13] This contemporary process of 'deterritorialization' of law[14] is actually dual: it has grown bottom-up with infranational law, but also top-down with transnational law.[15] It is accompanied by a third process that one may term the 'overterritorialization' of law across borders,[16] which takes place either laterally through the extraterritorial exercise of domestic jurisdiction or top-down through the development of larger legal ensembles like the EU.

Against this pluralistic legal background, it is common to identify a tension between legal plurality and the concept of jurisdiction, understood for now to mean the right or power to enact, enforce or adjudicate law. More specifically, the legal order whose jurisdiction can be questioned by legal plurality is presumably one that is comprehensive in scope or, at least, exclusive in its power to rule. If it were limited in its material scope, indeed, concurrence with other legal orders would not matter that much, but it would matter even less should that legal order not also claim to rule free from external legal constraints.[17] What this means is that the jurisdiction at stake in this alleged opposition to legal plurality, and in this chapter as a result, is state law's jurisdiction, and not the 'jurisdiction' of other legal orders, be they

[13] On the tension between territorial legal regulation and other forms of international, transnational or infranational legal regulation, see e.g., G. Teubner, *Global Law without a State* (Aldershot: Dartmouth, 1997); R. Michaels, 'Territorial Jurisdiction after Territoriality', in P. J. Slot and M. Bultermann (eds.), *Globalisation and Jurisdiction* (Leiden: Kluwer, 2004), pp. 105–130; N. Walker, 'Beyond Boundary Disputes and Basic Grids: Mapping the Global Disorder of Normative Orders', (2006) 8 *International Journal of Constitutional Law* 373; S. Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages* (Princeton, NJ: Princeton University Press, 2006); Handl, 'Extra-Territoriality'; G. Shaffer, 'International Law and Global Public Goods in a Legal Pluralist World', (2012) 12 *European Journal of International Law* 669; Krisch, 'Beyond Constitutionalism'; D. Bethlehem, 'The End of Geography: The Changing Nature of the International System and the Challenge to International Law', (2014) 25 *European Journal of International Law* 9, 15–17.

[14] On deterritorialization in international law, see e.g., C. Brölmann, 'Deterritorializing International Law: Moving Away from the Divide between National and International Law', in A. Nollkaemper and A. Nijman (eds.), *New Perspectives on the Divide between National and International Law* (Oxford: Oxford University Press, 2007), 84; T. Schultz, 'Carving Up the Internet: Jurisdiction, Legal Orders, and the Private/Public International Law Interface', (2008) 19 *European Journal of International Law* 799, 800–803; Shaffer, 'Global Public Goods'; A. Colangelo, 'Spatial Legality', (2012) 107 *Northwestern University Law Review* 69.

[15] On different similar moves away from and towards territoriality across legal history, see A. Supiot, 'L'inscription territoriale des lois', (2008) 11 *Esprit* 151, 160.

[16] See also Supiot, 'L'inscription territoriale', 153; K. Raustiala, 'Empire and Extraterritoriality in Twentieth Century America', (2011) 40 *Southwestern Law Review* 605.

[17] I am assuming therefore that 'inter-jurisdiction' or 'jurisdictional plurality' would be a contradiction in terms. In any case, it would make the question of this chapter entirely moot and boil down to a discussion of 'legal plurality'.

infranational, international or transnational or those of domestic or international courts.[18] This focus on state (law) jurisdiction is actually confirmed by the use of the term 'jurisdiction' in ordinary language or, more precisely, the absence thereof in other contexts than state law[19] – the only exception being its use in the context of a supranational and hence statelike organization: the EU.[20]

In response to what may be termed 'the challenge of legal plurality to (state law) jurisdiction', the aim of the present chapter is double: first, it purports to explain why jurisdiction has become a central institution in (domestic and international) law and, by extension, in domestic and international legal theory, and actually still is in the pervasive and persistent circumstances of legal plurality (why jurisdiction?); and, second, it aims to show how jurisdiction should best be conceived in its relation to infranational law, transnational law, foreign domestic law and international law whose norms apply concurrently to domestic ones, but whose respective impact on and relationship to domestic law should be approached differently in each case (what jurisdiction?). The proposed argument is both descriptive, when it assesses the sociological relevance of the legal rules on jurisdiction and the social reality underlying them, and normative, when it interprets the law so as to fit and justify the corresponding rules. It approaches law as a normative social

[18] Of course, one sometimes refers to infranational, transnational, international or supranational courts having 'jurisdiction'. This may be considered as a semantic extension from the vocabulary of state law and national courts' adjudicative jurisdiction, however, because international courts' (*ratione personae*, *materiae*, *temporis* or *loci*) jurisdiction amounts to an extension of the states that constitute them and give them jurisdiction. In any case, not all courts necessarily correspond to the legal orders they are speaking the law for, and especially not international ones, and should not therefore be considered as having 'jurisdiction' stricto sensu. For a discussion of international courts' jurisdiction and inter-legality, see Chapter 14. For a different take, see P. S. Berman, 'The Globalization of Jurisdiction', (2002) 151 *University of Pennsylvania Law Review* 311.

[19] Scope precludes developing a full jurisprudential argument about why and what state in international law: see Raz, 'Why the State'.

[20] On the 'competences' or 'functions' as opposed to the 'jurisdiction' and 'sovereignty' of other international organizations (IOs), see J. Klabbers, *International Law* (Cambridge: Cambridge University Press, 2013), at 90, 98–100. The justification for this difference, I will argue, has to do with the territorial and political dimension of state and domestic law (and, by extension, maybe of the EU and EU law) being the law of a people or political community on a given territory, but also with the characteristics of territorial jurisdiction (i.e., its comprehensiveness, exclusiveness and pre-emptiveness). When an IO exercises what may look like 'jurisdiction' (e.g., in the territories administered by the UN), it is merely because it functions by delegation of the jurisdiction of the state whose territory it is (and the same may also be argued, of course, of the EU).

practice that can change our social environment (provided it pertains to things that may be changed, and not all of them may be[21]), but is also responsive to it.[22]

Interestingly, (state law) jurisdiction has not yet attracted much attention in either domestic or international legal theory. In domestic legal theory, of course, related issues have been addressed by legal philosophers, albeit from the distinct perspective of other normative concepts like (legitimate) authority or sovereignty. Discussions of the latter only very tangentially mention the concept of jurisdiction, presumably due to the blind spot of self-legislation since domestic law constitutes and constrains its own jurisdiction.[23] Moreover, when jurisdiction is discussed, albeit indirectly, by those authors, it is usually in relation to international law only or, more generally, by reference to legal plurality as a whole, but then in a non-distinctive and un-nuanced fashion that assumes that legal plurality implies legal equality.[24] Filling this gap and providing a more refined account of both jurisdiction and the circumstances of legal plurality is therefore one of the contributions of this chapter to domestic jurisprudence.

At first, one may expect to find more advanced discussions in international legal theory to the extent that jurisdiction corresponds to a pivotal set of rules in international law. After all, international law constitutes each state's jurisdiction by making it equal to that of others and independent from them on the one hand, and constrains it both externally in its relation to others (e.g., in terms of delineation of borders or of the non-intervention principle) and internally in its domestic exercise (e.g., in terms of human rights or criminal law, and even arguably in terms of democratic standards) on the other. Again, however, among international lawyers and legal theorists, theoretical as opposed to doctrinal discussions of jurisdiction in circumstances of legal plurality not only tend to be quite rare and dated, but also have a limited

[21] On the resistance of territoriality despite the multiple regimes of legal relation to territory across legal history, see e.g., Supiot, 'L'inscription Territoriale', 154; Bethlehem, 'End of Geography', 15. Contra: D. S. Koller, 'The End of Geography: The Changing Nature of the International System and the Challenge to International Law: A Reply to Daniel Bethlehem', (2014) 25 *European Journal of International Law* 25.

[22] See also Raz, 'Why the State'.

[23] See e.g., Roughan, 'Mind the Gaps', 333–334.

[24] As I will argue, legal plurality does not imply legal equality: the kind of claims to authority made by those different kinds of law should not too quickly be identified with one another, and this in turn affects their different relationships, including their different relationships to each state of jurisdiction's legal order. Contra: Roughan, 'Authorities', chapters 7 and 8; Raz, 'Why the State'; Roughan, 'Mind the Gaps'. See, however, the ambitious introduction by Handl, 'Extra-Territoriality', at 8. See also Besson, 'Relative Authority', at 172–173.

regime-specific focus.[25] Most discussions have mapped the reasons for the current transnational and hence 'extraterritorial' circumstances of states' jurisdiction and for the increase or decrease of cases of concurrent or conflicting jurisdiction on the one hand, and discussed, albeit inconclusively, the different principles envisaged so far for their resolution on the other.[26] Curiously, however, very little has been written about the concept of jurisdiction itself, and especially its nature and scope.[27] Jurisdiction is still conceived as 'exclusive' and 'unlimited' by reference to the early 1930s case law of the Permanent Court of International Justice (PCIJ) or arbitral tribunals,[28] and referred to solely as a right or power of the state.

[25] See the critique by A. Bianchi, 'Reply to Professor Maier', in K. M. Meessen (ed.), *Extraterritorial Jurisdiction in Theory and Practice* (The Hague: Kluwer Law International, 1996), 74, at 89, 100.

[26] See e.g., C. Ryngaert, *Jurisdiction in International Law*, 2nd edn (Oxford: Oxford University Press, 2015); C. Staker, 'Jurisdiction', in M. D. Evans (ed.), *International Law*, 4th edn (Oxford: Oxford University Press, 2014), 309–335; R. Liivoja, 'Book Review of Jurisdiction in International Law by Cedric Ryngaert', (2008) 19 *Finnish Yearbook of International Law* 397; Berman, 'Globalization of Jurisdiction'; H. G. Maier, 'Jurisdictional Rules in Customary International Law', in Meessen (ed.), *Extraterritorial Jurisdiction*, 64; Bianchi, 'Reply'; M. Bos, 'Preliminary Report on the Extraterritorial Jurisdiction of States', (1993) 65 *Yearbook of the International Law Institute* 14; F. A. Mann, 'The Doctrine of International Jurisdiction Revisited after Twenty Years', (1984) 186 *Recueil des Cours* 1–116; M. Akehurst, 'Jurisdiction in International Law', (1972–1973) 46 *British Yearbook of International Law* 145; F. A. Mann, 'The Doctrine of Jurisdiction in International Law', (1964) 111 *Recueil des Cours* 1.

[27] Interestingly, private international law is an exception in this respect. This should not come as a surprise as it focuses solely on individuals, independently from their respective political communities and relevant territories, and resolving conflict of law in private matters has been its main concern from the beginning. See e.g., H. G. Maier, 'Extraterritorial Jurisdiction at a Crossroads: An Intersection between Public and Private International Law', (1982) 76 *American journal of International Law* 280; A. F. Lowenfeld, 'International Litigation and the Quest for Reasonableness: General Course on Private International Law', (1994) 245 *Recueil des Cours* 1; International Bar Association (IBA), *Report of the Task Force on Extraterritorial Jurisdiction* (2009); Michaels, 'Law and Recognition'. This almost exclusive focus on private international law in the literature on jurisdiction has had consequences for debates about jurisdiction in public international law given that questions of conflicts of law are essentially questions pertaining to private law on the one hand, and have been regarded as domestic ones and discussed almost exclusively in domestic fora, and especially domestic courts, on the other. For a discussion of this issue, see Bianchi, 'Reply', at 80–81; H. Buxbaum, 'Territory, Territoriality and the Resolution of Jurisdictional Conflict', (2009) 57 *American Journal of Comparative Law* 631; Ryngaert, *Jurisdiction in International Law*, at 16–22. For integrative efforts, however, see C. Joerges, P. F. Kjaer and T. Ralli, 'A New Type of Conflicts – Law as Constitutional Form in the Postnational Constellation', (2011) 2 *Transnational Legal Theory* 153; R. Rödl, 'Democratic Juridification without Statisation: Law of Conflict of Laws Instead of a World State', (2011) 2 *Transnational Legal Theory* 193.

[28] See e.g., *Island of Palmas (Netherlands v. USA)*, Arbitral Award of 4 April 1928, 2 *Reports of International Arbitral Awards* 829, at 838. See also *The Case of the S.S. 'Lotus' (France v. Turkey)*, [1927] Publ. PCIJ, Series A, No. 10.

This conceptual and theoretical neglect of jurisdiction in international legal theory is both surprising and unsurprising. On the one hand, it may seem surprising, as I have just explained, because the principle of states' jurisdiction is a structural principle of the international legal order and its customary law underpinnings have even been captured by some authors as the international 'law on laws'.[29] One may therefore expect that any lack of fit between the practice of states and those customary rules of jurisdiction would lead to their amendment or even extinction, and hence to lively discussions among international lawyers and legal theorists. As a matter of fact, this puzzlement about the resilience of state jurisdiction in circumstances of legal plurality (that would seem to have made it irrelevant in practice) is probably what lies behind the contemporary scholarly challenge to the comprehensive and exclusive conception of state authority and jurisdiction.[30] However, on the other hand, this theoretical neglect of jurisdiction could also be expected when one knows how most international legal principles pertaining to the main international lawmaker (i.e., the state, and its personhood, territory or sovereignty) belong to the blind spots of international law and lawyers and are difficult to question or change from within the practice and the theory of international law itself.

The claim of the chapter is that revisiting the concept of jurisdiction is key to reconciling domestic and international lawyers with what is sometimes regarded, at least under some conception of jurisdiction, as a problematic gap between domestic and international facts and norms. It is only by explaining the sociological and normative resilience of the concept and revisiting some of our current conceptions that we can change our level of expectation of what jurisdiction implies normatively. This way, jurisdiction can remain the significant principle it once was and, arguably, still is and should be in the contemporary transnational circumstances of domestic and international law, and not the anomalous Westphalian leftover some may consider it to be.[31] What is also at stake, beyond conceptual clarity, is, as I will argue, the protection of individual equality and political legitimacy, which underpin the justification of state jurisdiction, against the risks of imperialism, parochialism and individualism that come with legal plurality.[32]

[29] See the editors' preface in Ryngaert, *Jurisdiction in International Law*; Maier, 'Customary International Law'.

[30] See e.g., Roughan, 'Mind the Gaps', at 334, 338.

[31] See e.g., Bethlehem, 'End of Geography', 17–18.

[32] On the recent disenchantment regarding legal plurality, see e.g., Roberts, 'After Government?' at 17–18; Zumbansen, 'Global Governance', at 556–557.

In a nutshell, the chapter's argument is the following: it starts by observing that the state legal order remains the main source of legal rules in our political communities and argues that, as a result, its laws should be such that they can claim legitimate authority over a people in a given territory and in particular respect to our individual equality before the law. This can still best be achieved, the chapter argues, by reinforcing three features of state jurisdiction qua territorial jurisdiction: its comprehensive (or unlimited) material scope, exclusivity (or independence) and pre-emptiveness (or primacy). Thus, state jurisdiction does and should remain a central feature of law today despite and, actually, because of the plurality of laws overlapping the same people in a territory and the potential threat this constitutes to their equality before the law and the generality of law. Of course, and this is the first contribution of the chapter, jurisdiction is both a domestic and international legal construct and, as a result, is legally constrained from both sides. Those constraints, and especially the international ones, should not be conflated with external limits excluded by the concept of jurisdiction, but are the mark of an advanced form of legal ordering and relational legitimation in the increasingly transnational circumstances of human and social life. Secondly, jurisdiction amounts not only to a right, but also to a duty, and is therefore best captured arguably as a responsibility of state law. This is particularly important in the transnational circumstances that increasingly characterize our social and legal life today and the common interests they give rise to, because it accounts for why states should exercise their jurisdiction in order to address global problems together and through international law institutions and procedures, but also for why states should resist jurisdictionally certain moves of infranational, transnational or foreign displacement of their domestic law.

Accordingly, the structure of the argument proposed in this chapter is three-pronged. The chapter starts by presenting what 'jurisdiction' means, distinguishing different aspects or dimensions of jurisdiction and delineating that concept from related ones in domestic and international legal theory and especially authority, legitimacy and sovereignty (Section 2). The next section explores the continuing sociological relevance of state jurisdiction in domestic and international law despite legal plurality, and explains, from the perspective of domestic and international legal theory, why jurisdiction should actually matter precisely because of legal plurality (Section 3). In Section 4, the chapter turns to how jurisdiction should be reconceived in circumstances of legal plurality, and especially in its relationship to infranational law, transnational law and foreign domestic law.

Finally, a caveat about the scope of the chapter is in order. Its scope precludes addressing some issues that are related to state jurisdiction in

circumstances of legal plurality but should not be conflated with it, and in particular the following three: the relations between different norms or regimes within international law itself;[33] the relations between different international courts;[34] and the relations between EU and international law or between EU law and the domestic law of non-member states, even though the latter are regularly framed as a case of concurrent and conflicting jurisdiction.[35] Moreover, in the interest of inclusion and universality in the conclusions reached about international law in the chapter, the region-specific question of the relationship of integration between the domestic law of EU member states and EU law and its implications in terms of state (and EU) (law) jurisdiction are not broached here either.[36]

2 JURISDICTION

Jurisdiction is a polysemic concept and has come to mean very different things both in domestic and in international law, whose construction it is – not to mention the conceptual diversity and contradictions that come with the many languages and cultures of domestic and international law.[37] The complexity of the concept of jurisdiction should not come as a surprise since it encapsulates the normative concept of law itself (literally *juris*-dictio). It actually works, furthermore, as a condition to or, at least, in close relationship with many other normative concepts related to law and legality, such as 'validity', 'authority', 'legitimacy' or 'sovereignty'. The law enacted, applied and adjudicated over by authorities that have jurisdiction is indeed valid law. It also has de facto authority, once jurisdiction is exercised, and that authority claims, as a result, to be justified or legitimate. Finally, jurisdiction amounts to a dimension of sovereignty to the extent that it is a condition of the independence of the state.

In short, jurisdiction may be defined as the right or power/competence of each state, under domestic and international law, to enact, enforce and adjudicate over valid domestic law. By extension, and although this is not

[33] See e.g., Alvarez, 'Boundary Crossings'.

[34] See e.g., Chapter 14.

[35] See e.g., S. Francq, 'The Scope of Secondary Community Law in the Light of the Methods of Private International Law – Or the Other Way Around?' (2006) 8 *Yearbook of Private International Law* 333; J. Scott, 'The New EU "Extraterritoriality"', (2014) 51 *Common Market Law Review* 1343.

[36] See Chapters 6 and 9. See also Besson, 'After Kadi'; Dickson, 'European Union Legal Systems' on the specificities of European legal pluralism.

[37] In French, for instance, '*juridiction*' is only used to refer to the power or competence to adjudicate of a court, and by extension to the court itself. In German, '*Zuständigkeit*' (i.e., competence) is used for jurisdiction, but has no normative implications whatsoever.

how jurisdiction will be used in this chapter, it is sometimes also used with three further meanings. Thus, it is used to also refer to: when it is exercised, the de facto authority or effective *power* that jurisdiction grants to the law and, by extension, to the state whose jurisdiction it is[38]; the *legitimacy* or legitimate authority that jurisdiction can give rise to provided it is justified, to the extent that the exercise of jurisdiction and hence de facto authority implies a claim to legitimate authority[39]; and even the *territory* of the state or law whose jurisdiction it is, given that jurisdiction is primarily territorial.[40] Those extensions of the concept of jurisdiction qua normative power draw attention to the dual descriptive cum normative nature of the concept of jurisdiction: when it is exercised, it is both a power and a claim to have a right to exercise that power. This echoes similar features of the concepts of authority[41] and sovereignty.[42]

A few key dimensions of the concept of jurisdiction have to be emphasized, and in particular the nature, the subjects, the object, the content, the basis and the constraints of jurisdiction. Those common traits are reconstructed from the current general practice of state jurisdiction in domestic and international law.[43]

First of all, the *nature* of jurisdiction – it flows from the definition just given that jurisdiction is legally constituted and amounts therefore to a set of legal rules.[44] Those rules are both domestic and international. Domestically, rules of jurisdiction are usually of a constitutional nature. Importantly, the

[38] On this conception of 'jurisdiction' in international human rights law qua effective control, see e.g., M. Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (Oxford: Oxford University Press, 2011), 30 ff.; S. Besson, 'The Extraterritoriality of the European Convention on Human Rights. Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts To', (2012) 25 *Leiden Journal of International Law* 857, 862–866.

[39] See e.g., Milanovic, *Extraterritorial Human Rights*, p. 23; V. Lowe, 'Jurisdiction', in M. D. Evans (ed.), *International Law*, 2nd edn (Oxford: Oxford University Press, 2006), 335. Because 'authority' itself may be used to mean legitimate authority as much as de facto power (see e.g., J. Raz, 'The Problem of Authority: Revisiting the Service Conception', [2006] 90 *Minnesota Law Review* 1003, 1005; Roughan, 'Mind the Gaps', 331–334), it is best, in order to avoid confusion, not to refer to jurisdiction qua authority.

[40] On the ambivalence of the term 'jurisdiction', see Milanovic, *Extraterritorial Human Rights*, 39. Of course, as I explained before, 'jurisdiction' may also refer to the power or competence to adjudicate of a court, and by extension to the court itself, as it does in French.

[41] Raz, 'Authority', 1005.

[42] S. Besson, 'Sovereignty', in R. Wolfrum et al. (eds.), *Max Planck Encyclopedia of Public International Law*, Vol. 9 (Oxford: Oxford University Press, 2012), 366.

[43] This chapter focuses on the general international law regime of jurisdiction and not on specific regimes thereof. Some comparisons are drawn with state jurisdiction under international human rights law, however (see Besson, 'Extraterritoriality').

[44] On institutions and the corresponding interrelated set of rules, see Raz, 'Why the State'.

modern state's jurisdiction is not only set up by domestic rules, but also by international ones. There are two sets of rules stemming from two legal orders for one single jurisdiction. International law rules constitute each state's jurisdiction from the outside, as it were, by making it both equal to that of others and independent from them.[45] It would be wrong, therefore, to see international law as only setting constraints on state jurisdiction: it also constitutes it in the first place. Those rules of international law are mostly of a customary origin for they arise from state practice and have been referred to as the 'law on laws'.[46]

What one may conceive, in other words, as the 'dual legality' of jurisdiction is an important feature for understanding how state jurisdiction relates to international law.[47] To mention just one of its implications, changes in one set of rules of jurisdiction necessarily affect the other, but they are not identical and have distinct validity.[48] What this means is that jurisdiction is constructed legally so as to resist, and its international cum domestic dimension explains how resilient it has been over time.

Second, the *subjects* of jurisdiction – jurisdiction belongs to the state, but also by extension to its domestic law. Importantly, however, broadly speaking, jurisdiction is political and need not be reduced to its legal aspects. It is exercised actively by all political authorities, ranging from the legislature and the judiciary to the executive.

Moving to the passive side of jurisdiction, law binds people (or institutions constituted of people), and jurisdiction is exercised over people, therefore, and not over things,[49] activities or territory. Of course, the latter does provide, for the reasons that will be discussed, a basis for relating those people to the state and to the legal order of jurisdiction. It is indeed people's presence on a territory that relates them to the state whose jurisdiction may therefore be

[45] For an indication of this mutuality, see the *Lotus* case, at 18.

[46] See the editors' preface in Ryngaert, *Jurisdiction in International Law*; Maier, 'Customary International Law'. See also H. Kelsen, *Principles of International Law* (New York: Rinehart & Company Inc., 1952), at 94, on the limitation of the spheres of validity of domestic law as an essential function of international law.

[47] On this duality of domestic and international law jurisdiction in the human rights context, see Besson, 'Extraterritoriality', at 862–866.

[48] Bianchi, 'Reply', at 100.

[49] There is a clear tendency in the practice and some of the literature, however, to elude this fact and its normative implications for the concept of jurisdiction. For instance, as we will see, the bases of jurisdiction are often reified and what is sought after is the strongest and hence 'reasonable' link or nexus to an object or an activity, and not to people (see e.g., Schultz, 'Carving Up the Internet', 816–819; Colangelo, 'Spatial Legality'; Bethlehem, 'End of Geography', 22–24; P. Stephan, 'Competing Sovereignty and Laws' Domains', [2018] 45 *Pepperdine Law Review* 239.

described as (primarily, albeit not only) territorial.[50] Interestingly, the passive subject of state jurisdiction is a group of people (i.e., a community[51] of people on a territory), and not distinct individuals as is the case under the international human rights law's concept of jurisdiction.[52] This is at least the case for its main basis (i.e., territory) and for the main kind of jurisdiction (i.e., territorial jurisdiction). The other bases of jurisdiction, as we will see, may extend state jurisdiction to regulate people and activities in a more individualized fashion. Jurisdiction amounts, in other words, to a normative relationship between the state's lawmaking institutions and people subjected to it.[53]

Third, the *objects* of jurisdiction – all state institutions may exercise jurisdiction and this, in turn, accounts for the breadth of the objects of jurisdiction.

[50] Territorial jurisdiction may also match personal jurisdiction (i.e., jurisdiction over people who are related to a state by their nationality), to the extent that the acquisition of nationality often depends on being born or being present on the state's territory (see also Supiot, 'L'Inscription Territoriale', 156; for a critique of nationality's growing disconnection from the state's territory through its marketization, however, see K. Surak, 'Global Citizenship 2.0. The Growth of Citizenship by Investment Programs', (2016) 3 *Investment Migration Working Paper*). However, both kinds of jurisdiction need not match one another strictly: territorial jurisdiction is more inclusive and may apply to non-nationals, and personal jurisdiction extends to nationals outside the state territory.

[51] As we will see, that community of people on a territory may also be described as a 'political community' or as a 'people', but at this stage of the presentation, the political dimension of that community is irrelevant. In any case, the question of the (territorial) boundaries of a political community, and by extension of democracy, is famously moot: see e.g., F. G. Whelan, 'Prologue: Democratic Theory and the Boundary Problem', in R. Pennock and J. Chapman (eds.), *Nomos XXV: Liberal Democracy* (1983), 13.

[52] In short, state jurisdiction in international human rights law may be distinguished from state jurisdiction in general international law in at least four respects: (i) it is about control or de facto authority only, and not necessarily also about prescribing, enforcing or adjudicating law; (ii) it need not be legal or de jure and abide by the internal constraints of jurisdiction that stem from international law; (iii) it is primarily personal, and only occasionally spatial/territorial as well (by presumption on official state territory or on grounds of evidence of effective control outside of the territory); and (iv) it is individual, and not general or collective, to the extent that what matters is that it is exercised over a given right-holder in particular. Of course, both kinds of state jurisdiction are related: (i) if a state exercises jurisdiction under general international law, it is presumed to have jurisdiction under international human rights law, at least on its territory, and this could also be established in case there is evidence of effective control in the context of its exercise of extraterritorial jurisdiction within the constraints of international law; (ii) there is a general positive duty for states under international human rights law to exercise their jurisdiction under general international law, at least on their territory, and hence to regain it in case it is no longer effective. See Besson, 'Extraterritoriality'; S. Besson, 'Shared Responsibilities under the ECHR – Concurrent Jurisdictions, Duties and Responsibilities', in J. Motoc et al. (eds.), *The ECHR and General International Law* (Oxford: Oxford University Press, 2018), 155.

[53] Besson, 'Extraterritoriality', 864–866.

Jurisdiction pertains indeed to the enactment (legislative authorities, prescriptive jurisdiction), the enforcement (executive authorities, executive jurisdiction) or the adjudication (judicial authorities, adjudicative jurisdiction) of domestic law, and by extension, as we will see, of international law (e.g., the domestic development of customary international law or general principles, or the domestic enforcement or adjudication of any other norm of international law).

The distinction between those objects of jurisdiction is of particular relevance in circumstances of extraterritorial jurisdiction, for it is used to set limits on the kind of jurisdiction that may be exercised by a state outside of its territory. However, it is largely moot in practice. It is often very difficult to know whether a domestic court exercises prescriptive or adjudicative jurisdiction. It is complex, for instance, to assess whether the universal criminal (adjudicative, and even executive) jurisdiction exercised by a domestic court does not also contribute to the development of international and domestic criminal law in the area.

Fourth, the *content* of jurisdiction – jurisdiction amounts to a right (to enact, enforce or adjudicate law), or, as it is also sometimes phrased, as a power or competence to do so.[54] This explains why jurisdiction is sometimes described as a corollary of sovereignty that amounts to the state's ensemble of rights or competences (of jurisdiction),[55] and is often referred to as 'independence'.[56]

Importantly, although it is not usually presented as such, jurisdiction also amounts to a duty to the extent that it sometimes has to be exercised. It may actually be best to refer to it, in a more encompassing and non-allocated and non-directed way, as a responsibility. It is the case under the domestic rules of jurisdiction as much as under those of international law. Thus, one may mention duties to exercise territorial jurisdiction under domestic and international human rights law,[57] for instance, but another example consists of states' duties under domestic and international criminal law. The latter

[54] See e.g., J. Crawford, *Brownlie's Principles of International Law*, 8th edn (Oxford: Oxford University Press, 2012), at 457 on 'jurisdictional competence'.

[55] Besson, 'Sovereignty'.

[56] *Island of Palmas*, at 838.

[57] See e.g., ECtHR, Grand Chamber, *Catan and Others v Moldova and Russia*, Application Nos. 43370/04, 8252/05 and 18454/06, Judgement of 19 October 2012; *Chiragov and Others v Armenia*, Application No. 13216/05, Judgement of 16 June 2015. See S. Besson, 'L'extra-territorialité des droits de l'homme internationaux: Juridictions concurrentes, obligations conjointes et responsabilités partagées', in P. d'Argent (ed.), *Droit des frontières internationales* (Paris: Pedone, 2016), 245.

explains in turn why universal jurisdiction in international human rights law or criminal law (e.g., under the international principle of prohibition of torture) may be considered a duty of states, and not just a right.[58] This right/responsibility duality of jurisdiction echoes the regime of sovereignty under international law that is increasingly approached both as an ensemble of rights and as a set of responsibilities.[59]

Fifth, the *bases*, grounds or titles of jurisdiction – as I explained before, jurisdiction is always personal to the extent that it amounts to a normative relationship between a state('s law) and the people subjected to those laws. The question is how to determine what relates a group of people to a given state and legal order in advance and in a collective or general fashion.[60] The bases or titles of jurisdiction do precisely that: they determine the personal relationship of jurisdiction between a state and its legal order on the one hand, and a group of people subject to its laws on the other. They do so by reference to a salient type of general connection or nexus between such a group of people and its institutions.

There are usually four types of basis of jurisdiction and, by extension, of jurisdiction. Jurisdiction applies primarily to people situated on a state's (official) territory ('territorial jurisdiction'; and not, by extension, on a territory the state controls effectively and regularly like a state would, but that is not its official territory) (i), but also outside of its territory,[61] and by extension of its territorial basis, jurisdiction also covers the enactment of law that pertains to its nationals ('personal jurisdiction') (ii), law that protects its (vital) interests ('protective jurisdiction') (iii) and, more universally, law that protects certain fundamental community interests or goods ('universal jurisdiction') (iv).[62] Those four bases of jurisdiction are equal and cannot be ranked in any given order. They may even overlap in certain cases. Importantly, the latter three depend on territorial jurisdiction, which they complement: not only did they

[58] Klabbers, *International Law*, at 94–96. For a similar 'duty to exercise effective jurisdiction' in the law of the sea, see Chapter 8.

[59] Besson, 'Sovereignty'.

[60] To that extent, state jurisdiction in domestic and general international law is different from 'jurisdiction' in international (and domestic) human rights law that is individual (over the individual right-holder) and not collective or, at least, not necessarily. See Besson, 'Extraterritoriality', 868–870.

[61] That kind of 'extraterritorial' albeit territorial or spatial jurisdiction, qua effective and regular normative control exercised (over people outside the official territory) may trigger human rights duties under international human rights law, however: see Besson, 'Extraterritoriality'.

[62] Note that there is a difference between the 'extraterritorial' bases of jurisdiction that give the state a right to enact domestic laws that applies to subjects situated outside of its territory and the mere impact of those laws outside of its territory.

grow from it historically, but also they cannot exist without it. The three extraterritorial bases are best considered along a continuum of connection to states' interests, ranging from individual personal ones (e.g., nationality), over collective national ones (e.g., security) and all the way to collective universal ones (e.g., peace, life). Arguably, universal jurisdiction differs from the other three to the extent that states exercise it in the name of the international community of states, and not in their own.[63] This may explain why its contours remain contested and it is rarely applied in practice. In turn, the lack of general practice may affect its ability to be considered customary.[64]

Importantly, and as noted, the three bases of extraterritorial jurisdiction are defined by reference to territorial jurisdiction that amounts to the main connection between a state, or legal order, and its people. After all, people have always lived on a territory, and it is on that basis that the law organizes their lives and that lawmaking and politics work.[65] In turn, because many people live on earth and not one, to quote Arendt, those people inhabit different territories and different legal orders organize their lives.[66] This does not prevent those people from different territories, of course, from 'forming a world together',[67] to quote Arendt again. This is done through international law and the interstate regulation of common problems and of interjurisdictional issues that would otherwise fall into the interstices of many juxtaposed state jurisdictions.[68] Examples of such international lawmaking abound, and one may mention international criminal law, international immunities law or international environmental law as means of regulating matters of common interests and settling the jurisdictional issues that would arise otherwise.

Of course, it is precisely because borders are porous that 'extraterritorial' bases of (state) jurisdiction were identified from the very beginning alongside territorial jurisdiction in international law.[69] International law could not possibly cover all those transnational circumstances. No general international

[63] To that extent, Klabbers, *International Law*, at 106, is right to claim that, in some cases, "the extraterritorial reach of State jurisdiction serves as the functional equivalent of global governance."

[64] S. Yee, 'A Call for a More Rigorous Assessment of Universal Jurisdiction', (2013) 107 *Proceedings of the American Society of International Law* 242.

[65] Supiot, 'L'inscription territoriale', at 160.

[66] See Arendt, *On Revolution* (London: Penguin, 1963), at 175; Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (London: Penguin, 2006), at 21.

[67] Arendt, *On Revolution*, at 175.

[68] Klabbers, *International Law*, at 92.

[69] C. Schmitt, *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum* (Köln: Greven, 1950), on the 'Nomos der Erde' and the inherent limitations of the idea of states' territorial jurisdiction from the very beginning. See also Handl, 'Extra-Territoriality', at 4.

treaty could indeed be sufficiently encompassing to settle those issues. Of course, specific jurisdictional treaties could be negotiated ad hoc, but those would then tend to be unfair.[70] However, because those extraterritorial bases of jurisdiction necessarily lead to overlaps of jurisdiction between states and their respective legal orders, various general principles have developed in international law to manage that concurrence and the potential conflicts it may give rise to. One principle seems to be that extraterritorial jurisdiction may only be prescriptive, at the exclusion of executive and adjudicative jurisdiction that are primarily and exclusively territorial.[71] Of course, even prescriptive jurisdiction may be submitted to prohibitions (i.e., constraints) under international law.[72] When it is not, each state retains discretion about how best to use it.[73] Over time, that discretion has led states to adopt common practices on the matter and customary principles have arisen from domestic and/or public or private international law, such as comity, equity or reciprocity.[74] The fact is, however, that the distinction between the legal and illegal exercises of extraterritorial jurisdiction remains moot, and these exercises vary hugely from legal regime to legal regime and domestic jurisdiction to domestic jurisdiction. The tendency, however, is to privilege the bases of extraterritorial jurisdiction that come the closest to territory on the continuum presented before. This may be illustrated by the success of the 'effects doctrine', especially in Europe. Generally, consent is regarded as a circumstance precluding unlawfulness, and peaceful dispute settlement is required in case of open conflicts of jurisdiction. Other principles have been suggested by domestic legislatures[75] and courts and within doctrinal discussions,[76] but

[70] Bianchi, 'Reply', at 81–82. See also Ryngaert, *Jurisdiction in International Law*, at 197–208. As I will argue in Section 3.2, however, this should not prevent states from negotiating general treaties regulating those issues ex ante.

[71] Crawford, *Brownlie's Principles*, at 486.

[72] When it considers the extraterritorial application of foreign domestic law, this chapter focuses mostly on prescriptive jurisdiction to the extent that it focuses on the circumstances of legal plurality, and hence on uses of extraterritorial jurisdiction that are considered legal under international law.

[73] This corresponds to the regime set up by the PCIJ in *Lotus*, at 18–19. For extensive interpretations, see Ryngaert, *Jurisdiction in International Law*, chapter 2; Bianchi, 'Reply', at 83–85.

[74] For detailed discussions, see Ryngaert, *Jurisdiction in International Law*, chapter 6; Bianchi, 'Reply', at 85–89.

[75] See e.g., US Restatement (Third) of Foreign Relations Law, para. 403 (1987). For a discussion, see Ryngaert, *Jurisdiction in International Law*, chapter 5 and at 208–215.

[76] See e.g., Ryngaert, *Jurisdiction in International Law*, chapter 6; Bianchi, 'Reply', at 88–89 and 92–99.

without much echo in practice so far and certainly not enough generality and coherence to become customary as a result.

Finally, the *constraints* of jurisdiction – jurisdiction is inherently constrained. Jurisdiction is both rule-based and rule-constrained as a result. Domestic and international law both constitute (state) jurisdiction and constrain it at the same time. International law constraints work both externally in a state's jurisdiction's relation to others (e.g., through the non-intervention principle) and internally with respect to its domestic scope and exercise (e.g., through international human rights law). It is important to stress again how international rules of constraint, as much as international constitutive rules, pertain both to the internal functions of jurisdiction and to its external relations.[77] Thus, the idea of *domaine reservé* (i.e., the part of domestic jurisdiction that may not be limited by international law[78]) is itself determined by international law as a constraint of state jurisdiction. Those constraints should not be conflated with external limits, however (i.e., those limits that arise from other legal orders). As we will see, such limits are in principle excluded by jurisdiction: it is the point of jurisdiction indeed that it may be exercised independently and freely of external limits. Internal legal constraints are not considered contrary to that feature, however, because they may always be amended or lifted by the state and legal order of jurisdiction itself. This is true of domestic law, of course, but also of international law constraints that states contribute to establishing together through common international lawmaking and that impose themselves validly and with primacy over domestic law.

3 WHY JURISDICTION?

The concept of jurisdiction defined, it is time to turn to our first question: why jurisdiction? This section first determines, in a descriptive fashion, how (state) jurisdiction has become a central institution in (domestic and international) law and, by extension, in domestic and international legal theory (Section 3.1) and, second, whether it still is in the current pervasive and persistent circumstances of legal plurality (Section 3.2). In a third and more normative step, the next section identifies instrumental moral reasons that justify the centrality

[77] This is why it is wrong to oppose jurisdiction qua system of power to a system of justification: like 'authority', 'jurisdiction' combines both dimensions, as I explained above.

[78] On Article 2(7) of the UN Charter, see e.g., K. Ahmed, 'The Domestic Jurisdiction Clause in the UN Charter: A Historical View', (2006) 10 *Singapore Yearbook of International Law* 175.

of jurisdiction and argues for it not only despite, but because of legal plurality (Section 3.3).

A few remarks are in order about the test of centrality or relevance used here. What matters for the present discussion is that state jurisdiction may be considered important for the modern social and political organization of human life. Of course, qua legal institution and set of rules, jurisdiction is necessarily considered important by domestic and international law and by domestic and international lawyers themselves. However, it is not this internal legal perspective that matters for our purpose, but the social reality underlying those legal phenomena and one that may be subjected to an external empirical and sociological assessment, although this is a difficult distinction to draw in practice and to implement theoretically, not the least because large parts of the material are still in flux and the related developments speculative.

3.1 *The Original Relevance of Jurisdiction*

There are, I would like to claim, three characteristics of state jurisdiction in its current regime of domestic and international law that explain why it has gained central relevance in the social and political organization of human life: comprehensiveness, exclusiveness and pre-emptiveness. Interestingly, and unsurprisingly, those features match the internal perspective of state jurisdiction and the perception reflected in its rules under domestic and international law.[79] What makes them important for our purpose here, however, is not their legal underpinnings, for those may always be changed so as to make this true and are self-fulfilling to that extent, but their social and political relevance. Of course, some of those characteristics could be shared in part by other (non-state) legal orders and their respective set of competences or powers (as opposed to 'jurisdiction' sensu stricto). However, as will become clear in the course of the chapter, no other legal order, most probably for lack of a territorial basis, has come close to sharing all of them and to the same degree.[80] So, state jurisdiction has also been comparatively more significant in all three aspects.

Importantly, one should emphasize that none of those socially and politically relevant features are sufficient for a legal order to be considered a state's legal order.[81] Nor, conversely, are they necessary conditions for an order to be considered legal in the first place, or even for it to be conceived

[79] See e.g., *Island of Palmas*, at 838.
[80] See even Schultz, 'Transnational Legality', chapter 4.
[81] See also Raz, 'Why the State'.

in legal positivist terms.[82] In other words, the point of this section is not to question, in a comparative way, the legality of other legal orders in a context of legal plurality.

The first socially and politically significant feature of state jurisdiction is its *comprehensiveness* of scope. What matters is not the extent or size of the material scope of jurisdiction in itself, but how comprehensive jurisdiction is within that scope. In principle, the scope of state jurisdiction is open or unlimited.[83] What this means is that it is able to address any of the stakes shared by people on a given territory, whether it does so effectively or not.

What one may observe, at least in European and Western states, is that this has tended to be supported socially and politically ever since the seventeenth century and most clearly in the twentieth century, both internally in each state and externally in their international relations to other states. It is a feature that has also gone by the name of 'unlimited' or 'plenary' jurisdiction in international law.[84] Of course, there have been drawbacks and the process has been multi-speed. However, international law developments in the second part of the twentieth century such as positive duties of states under international human rights law to protect human rights in all dimensions of their jurisdiction in their territory[85] have heightened the social visibility and relevance of the comprehensiveness of their jurisdiction, and even of states' responsibility for it. As a result, social and political evidence supports this feature of state jurisdiction and the idea that it is or at least could be comprehensive or unlimited.

The second socially and politically significant feature of state jurisdiction is its *exclusiveness* in the matters it regulates. What this means is that domestic legal orders are not only comprehensive in their material scope, but also exclude the authority or right to rule of other legal orders in the matters regulated within this scope. No other legal order may set limits on domestic jurisdiction, unless those limits are internalized, of course, and become domestic or international law constraints, as I explained in Section 1. Examples of the latter would be infranational norms stemming from the legal orders of federated entities or UN Security Council resolutions.[86]

[82] Contra: Schultz, 'Transnational Legality', chapter 4. On alternative accounts of (non-state) jurisdiction to be considered in international law, see e.g., S. Pahuja, 'Laws of Encounter: A Jurisdictional Account of International Law', (2013) 1 *London Review of International Law* 63.

[83] Raz, 'Why the State'.

[84] See e.g., *Island of Palmas*, at 838; *Lotus*, at 18–19.

[85] Besson, 'Extraterritoriality'; Besson, 'Juridictions Concurrentes'.

[86] See e.g., C. Warbrick, 'The Jurisdiction of the Security Council: Original Intention and New World Order(s)', in P. Capps, M. Evans and S. Konstadinidis (eds.), *Asserting Jurisdiction: International and European Perspectives* (Oxford: Hart, 2003), 127.

What one may observe, at least in European and Western states, is that the exclusiveness of jurisdiction has tended to be supported socially and politically ever since the seventeenth century and most clearly in the twentieth century, both internally in each state and externally in their international relations to other states. It is a feature that has gone by the name of 'independence' or freedom from external constraints in international law.[87] Of course, as I explained in Section 1, domestic jurisdiction was, from the very beginning, concurrent in the same territory for people, and things have always tended to move around, and those transnational or global dimensions of social life have only increased since. What matters, however, is that the extraterritorial jurisdiction of other states and other external limits induced by other transnational or infranational legal orders have mostly been considered as the exception to the rule and therefore as something to be resisted against. They have also actually been governed from within by domestic or international law principles, as I explained in Section 1. One may mention, for instance, other titles of jurisdiction under international law or residual principles of international law like consent or peaceful dispute settlement. What this means, then, is that social and political evidence supports the salience of this second feature of state jurisdiction as well.

The third and final socially and politically significant feature of state jurisdiction is its *pre-emptiveness* over conflicting legal norms stemming from other legal orders in its comprehensive scope of exclusive regulation. What this means is that, in cases where its norms are to encounter those of another legal order within its jurisdiction, the state's legal order's norms claim to pre-empt or exclude them and to provide exclusionary reasons for action. Indeed, it is the point of authority and, by extension, of legal authority to relate to other competing authorities over the same subjects and, in the absence of organized deference or coordination between them, to claim to exclude them.[88] To that extent, the authority of domestic law is necessarily relational. It is even more the case of the authority of international law that binds states that are themselves authorities or officials for their own subjects: international law necessarily relates in the very structure of its authority to that of domestic law over those same individual subjects.[89] Of course, pre-emptiveness is compatible with the possibility of conflicts of norms stemming

[87] *Customs Régime between Germany and Austria (Protocol of March 19th, 1931)*, [1931] Publ. PCIJ, Series A./B. No. 41, at 37–54, para. 12. See also Article 2(7) of the UN Charter.

[88] Raz, 'Authority', 1020–1021.

[89] See Besson, 'Relative Authority', 174–176; Besson, 'State Veil'. Contra: Roughan, 'Mind the Gaps', 336.

from the same legal order or from other legal orders in case those external norms have been internalized. Such conflicts between equally pre-emptive norms are usually solved by reference to internal rules of conflict (whether those are material or procedural as in adjudication) and, in their absence, by recourse to practical rationality and the maximization of reasons.[90]

What one may observe, at least in European and Western states, is that this feature of state jurisdiction has tended to be supported socially and politically ever since the seventeenth century and most clearly in the twentieth century, both internally in each state and externally in their international relations to other states. It is a feature that has gone by the name of 'supremacy' of jurisdiction in international law. Of course, because authority is relational, supremacy is usually claimed in circumstances where it is questioned by other authorities and where the exclusiveness of jurisdiction is potentially limited. The regular questioning of supremacy in practice should not be taken as evidence of its lack of social relevance, however. What matters, indeed, is that pre-emptiveness amounts to a claim that can be made: it need not be effective to matter socially. In conclusion, then, social and political evidence supports the salience of this third feature of state jurisdiction as well.

3.2 *The Resilience of Jurisdiction in the Face of Legal Plurality*

Not only has state jurisdiction been sociologically significant in practice, but, as I would like to claim in this section, it still is despite and, arguably, because of legal plurality. To make this argument, it is important to distinguish between the sociological evidence one may gather for the current significance of state jurisdiction from three distinct constellations of legal plurality (i.e., that of infranational law, transnational law and foreign domestic law) and their respective impacts on state jurisdiction (i.e., from below, from above and from aside).

International law is precluded from this section's discussion of those constellations of legal plurality because, as I explained in Section 1, its rules are constitutive of state jurisdiction and amount to internal constraints to jurisdiction. Jurisdiction only exists as equal and independent jurisdiction juxtaposed to that of other states by virtue of international law. The inherent legal duality of jurisdiction therefore prevents one from considering the concurrent application of international law norms within the domestic legal order as an external threat and limitation to that order's jurisdiction and its

[90] Raz, 'Authority', 1023–1025.

comprehensiveness, exclusiveness and pre-emptiveness.[91] On the contrary, state jurisdiction is more comprehensive, exclusive and pre-emptive as a result of the international legal constraints that enhance it socially,[92] and even turn it, in some cases, into a social responsibility. In other words, and contrary to what one may read, the concurrent application of international law in domestic law does not lead to legal plurality.

That conclusion is actually confirmed from the perspective of international lawmaking itself: if state jurisdiction is inherently constituted and constrained by international law, the reverse is also true. The duality of domestic and international law in constituting jurisdiction also works inside-out, as it were.

In terms of sources, first of all, international law is still mostly made by states and for states qua authors and (direct) subjects of its legal norms.[93] Of course, the sources of international law have become more complex institutionally, and states' implication is, as a result, sometimes only indirect, as exemplified by international lawmaking through and by international organizations (IOs) and their respective institutions. However, the usual counterexamples from contemporary international law invoked to sideline states' implication and control over international lawmaking either belong to the peripheral realm of soft law (e.g., OECD standards) or imply some indirect form of state consent (e.g., IOs' and international courts' law).[94] Of course, as is the case in domestic law, the equality of states and the fairness of international lawmaking procedures are not always respected, but this does not support the argument that states are no longer the collective makers of international law and no longer have the jurisdiction to do so. Finally, one should add that the domestic legal order is the legal order in which most international law norms are adjudicated and enforced, and even, in some cases, developed further (e.g., qua customary norms or general principles).

With respect to its subjects, secondly, international law remains states' law. On the one hand, individuals, of course, qua subjects to state

[91] Contra: Raz, 'Why the State'; Roughan, 'Mind the Gaps', 334, 338.

[92] See also T. Endicott, 'The Logic of Freedom and Power', in S. Besson and J. Tasioulas (eds.), *The Philosophy of International Law* (Oxford: Oxford University Press, 2010), 245, on an analogy between individual freedom under domestic law and state sovereignty under international law.

[93] Besson, 'State Veil'.

[94] S. Besson, 'State Consent and Disagreement in International Law-Making – Dissolving the Paradox', (2016) 29 *Leiden Journal of International Law* 289; S. Besson, 'Law Beyond the State: A Reply to Liam Murphy', (2017) *European Journal of International Law* 233, on state consent as an exception to the legitimate authority of international law and its persistence in international lawmaking. Contra: N. Krisch, 'The Decay of Consent: International Law in an Age of Global Public Goods', (2014) 108 *American Journal of International Law* 1.

jurisdiction, have always been the subjects of international law.[95] This has long occurred only indirectly through their own authorities and representatives (i.e., states) that are direct subjects of international law. They have gradually also become direct subjects in some areas of international law, albeit more as beneficiaries of rights than as bearers of duties. This confirms the importance of their jurisdictional relationship to their respective states when their duties under international law are in question, for those individual duties usually rely on domestic law to arise. There is a difference, therefore, between individuals being subjects to and hence of international law and the latter exercising jurisdiction over them. IOs, on the other hand, have also become subjects of international law since the end of the Second World War. In practice, however, and even if this may be regrettable,[96] they have largely remained institutional constructs of their member states, and their legal personalities amount to institutional extensions of those states' personalities, at least in the latter's own institutional relationships to their individual subjects. Evidence for this is that states remain the main duty-bearers and responsibility-bearers under international law, even in domains where IOs have been delegated some of their member states' powers and rights that form part of the latter's jurisdiction. The main international law duties of IOs are internal only and owed to their member states. An explanation for this state of affairs is that IOs lack, for the most part, a political community that would tie them directly to a people and a territory[97] and grant them the kind of jurisdiction such a political relationship would give rise to. State jurisdiction remains the rule in international law, in other words, and so do its comprehensiveness, exclusiveness and pre-emptiveness. Even when an IO comes close to being considered as a political community with statelike territorial jurisdiction over a people, like the EU may be said to,[98] states may always exit, thereby confirming their institutional control over the IOs they have constituted.

To that extent, it is wrong to look at international law in isolation, and especially to conceive of its right to rule as a form of independent 'jurisdiction'

[95] Besson, 'State Veil'.

[96] For a critique of functionalism, see J. Klabbers, 'The EJIL Foreword: The Transformation of International Organizations Law', (2015) 26 *European Journal of International Law* 9.

[97] S. Besson, 'Individual and State Liability for an International Organization's Responsibility – The Challenge of Fairness Unveiled', (2017) 6 *Rivista di filosofia del diritto-Journal of Legal Philosophy* 51.

[98] For a critique of the EU's political quality, however, see D. Kochenov, 'Neo-Mediaeval Permutations of Personhood in the European Union', (2016) 13 *European University Institute Working Paper*.

and authority that could be approached as an external limit to state jurisdiction and authority.[99] Domestic and international law share the same subjects and mould the same authority and jurisdiction: that of the state over its people. It would be a categorical mistake, therefore, to place the relationship between domestic and international law into the same bag as relations between domestic law and other legal orders in discussions of legal plurality.[100]

The time has come to turn to the discussion of the three constellations of legal plurality that have been regarded as a threat to state jurisdiction in recent times, and to the demonstration that they have not made state jurisdiction redundant socially and politically – quite the contrary.

First of all, state jurisdiction in the face of *infranational* law – the first kind of legal order whose scope of application competes increasingly with that of domestic law is infranational law. Examples thereof may be religious law or indigenous populations' law. I am not including the law of federated entities to the extent that their respective jurisdiction is an internal matter of state jurisdiction, as I explained before, and one whose constraints on state jurisdiction are regulated internally.[101]

There is no doubt that those forms of infranational law have developed steadily in the last few years, thereby confirming the social reality of legal plurality. However, the fact is that this has not diminished the social importance of state jurisdiction. While infranational law does affect the comprehensiveness of the scope of jurisdiction and its exclusiveness, it has also given rise to strong reassertions of supremacy in important domains of exclusive jurisdiction. This may be exemplified in the field of human rights protection, and especially of equality between men and women or child protection and their opposability to religious law or, at least, to religious autonomy.[102]

Secondly, state jurisdiction in the face of *transnational* law – the second kind of legal order whose scope of application competes increasingly with that

[99] Contra: Roughan, 'Mind the Gaps', 340, 347–348. See also Besson, 'State Veil'; Besson, 'Relative Authority', 174–176.

[100] Contra: Roughan, *Authorities*, chapters 7 and 8; Roughan, 'Mind the Gaps'. See also Besson, 'Relative Authority', 172–173.

[101] Federated entities' law may, however, raise similar questions to the former in some constellations of federalism, especially when neither the central nor the local jurisdictional agendas are open or comprehensive. For discussions, see R. A. Dahl, 'Federalism and the Democratic Process', in J. R. Pennock and J. W. Chapman (eds.), *Nomos XXV: Liberal Democracy* (1983) 95; S. Besson, 'Fédéralisme et Droits de l'Homme: Une Introduction Thématique', in S. Besson and E. M. Belser (eds.), *La Convention européenne des droits de l'homme et les cantons* (Zurich: Schulthess, 2014), 7.

[102] ECtHR, Grand Chamber, *SAS v France*, Application No. 43835/11, Judgement of 1 July 2014.

of domestic law is transnational law. Transnational law is difficult to define except by reference to the straddling of categories, and in particular of the distinctions between private/public law, national/international law and practice/theory of law.[103] Examples thereof may be the private or 'negotiated'[104] law developed by transnational corporations (with or without states) and around commercial exchanges (*lex mercatoria*[105]) or the private law developed by private actors (with or without states) to regulate the Internet (*lex electronica*[106]).

There is no doubt that those forms of transnational law have developed at a fast rate in the last few years, thereby confirming the social reality of legal plurality. However, the fact is that this has not diminished the social importance of state jurisdiction. While transnational law does affect the comprehensiveness of the scope of jurisdiction and its exclusiveness, it has also given rise to strong reassertions of supremacy in important domains of exclusive jurisdiction. This may be exemplified in the context of cyber-regulation where, on the one hand, state's jurisdiction has been reaffirmed in all matters of external regulation of the Internet pertaining to privacy, security or crime,[107] and where, on the other, the internal regulation of the Internet itself has actually been largely dominated by one or few states (and their respective jurisdictions) from the very beginning and despite structural changes over time.[108] Another example may be given in the context of transnational commercial law: state jurisdiction has been reaffirmed recently, especially by China and, to a lesser extent, by India and Turkey, in the global regulation of markets. In Western and European countries, domestic jurisdiction has also been exercised anew to regulate transnational business exchanges that had temporarily escaped state regulation due to the latter's territorial ambit. One may mention, for instance, the introduction into domestic private law of the principle of corporate groups' liability for violation of human rights' due diligence by their dependent companies abroad.

[103] On the many meanings of 'transnational law' and their lack of commonality but for the idea that it straddles other characterizations and that it is actually becoming more and more encompassing of any form of legality, see Besson, 'Transnational Constitutional Law'.

[104] For this term, see Roberts, 'After Government?' at 18.

[105] O. Toth, *The Lex Mercatoria in Theory and Practice* (Oxford: Oxford University Press, 2017).

[106] Schultz, 'Carving Up the Internet', at 802–803 and 828–837; J. Zekoll, 'Jurisdiction in Cyberspace', in G. Handl et al. (eds.), *Beyond Territoriality*, 341.

[107] See Schultz, 'Carving Up the Internet', 801.

[108] J. Goldsmith and T. Wu, *Who Controls the Internet? Illusions of a Borderless World* (Oxford: Oxford University Press, 2006); K. Raustiala, 'Governing the Internet', (2016) 110 *American Journal of International Law* 491.

Finally, state jurisdiction in the face of *foreign domestic law* – the third kind of legal order whose scope of application increasingly competes with that of domestic law is foreign domestic law. The domestic law of other states may indeed apply within the domestic legal order when its jurisdiction relies on an extraterritorial basis, such as personal, protective or universal titles of jurisdiction. Examples abound in the fields of environmental, competition, financial or tax law, and the main states and entities implicated are the United States and the EU.

There is no doubt that those forms of extraterritorial domestic law have developed quickly in the last few years, thereby confirming the social reality of legal plurality. However, the fact is that this has not diminished the social importance of state jurisdiction. Importantly, none of the domestic institutions involved have suggested dispensing altogether with territorial jurisdiction, and all of them try hard to justify their jurisdiction's extraterritorial extension by reference to it. Even those who have suggested new bases of jurisdiction that fit its extraterritorial scope have only rarely suggested giving up on territorial jurisdiction: the latter remains a negative reference point for the diverse proposals for 'deemed', 'functional' or 'reasonable' jurisdiction, emphasizing the strongest link or nexus to the regulated object.[109] Moreover, while the extraterritorial jurisdiction of foreign domestic law does affect the comprehensiveness of the scope of jurisdiction and its exclusiveness, it has also given rise to strong reassertions of supremacy in important domains of exclusive jurisdiction. This may be exemplified by the backlash experienced by universal jurisdiction in criminal law and the recentring of domestic criminal jurisdiction onto cases where there is a territorial nexus to the accused.[110] Another example is the reinvigoration of the presumption against extraterritoriality in recent US constitutional law.[111]

In short, while it is correct to say that state jurisdiction is changing through its reactions to legal plurality, it has not been displaced. It certainly has not been replaced in the important social functions fulfilled by its

[109] R. Mallay, J. Manax and C. Nix, 'Constructing the State Extraterritorially: Jurisdictional Discourse, the National Interest, and Transnational Norms', (1990) 103 *Harvard Law Review* 1273; Bianchi, 'Reply', at 92–99; Michaels, 'Territorial Jurisdiction'; Schultz, 'Carving Up the Internet', at 816–819; Zumbansen, 'Global Governance'; Bethlehem, 'End of Geography', 22.

[110] Yee, 'Universal Jurisdiction'.

[111] Ryngaert, *Jurisdiction in International Law*, at ix; J. H. Knox, 'A Presumption against Extrajurisdictionality', (2010) 104 *American Journal of International Law* 351. On the Alien Tort Claim Act in the US Supreme Court's case law, see e.g., *Kiobel v Royal Dutch Petroleum Co.*, 133 US 1659 (2013); *Morrison v National Australia Bank*, 561 US 247 (2010); *RJR Nabisco, Inc. v The European Community*, 579 US __ (2016).

comprehensiveness, exclusiveness and pre-emptiveness.[112] One may actually even emphasize its resilience in the face of legal plurality and the renewed importance it has gained in the circumstances of persistent and pervasive legal plurality. Even if jurisdiction has not been displaced, however, some of the changes it is experiencing should affect the way we approach it in practice. I will return to the impacts of those three constellations of legal plurality on our future conception of state jurisdiction in Section 4.

3.3 *The Justification of Jurisdiction for Political Legitimacy*

Not only has state jurisdiction been sociologically relevant and arguably still is, but it may also be considered as justified from a normative perspective. Of course, as I explained in Section 1, jurisdiction amounts to a set of legal rules. As such, therefore, it does not require a moral justification besides a justification for the authority of the valid law issued. Curiously, however, the legitimacy of jurisdiction is rarely discussed in the literature or, at least, not as such.[113] An explanation for this gap in the literature may be that jurisdiction has increasingly been reified to the extent that instead of being approached as a relationship between a state and people, it is considered as pertaining to things (e.g., cyber data,[114] taxable assets) or activities (e.g., business transactions, financial activities) entirely separate from people and then projected back onto them. Once jurisdiction and the law it enacts are cut off from the individual subjects they apply to, moral justification and, more generally, legitimacy no longer seem like relevant questions. Such a reifying approach misses the point of jurisdiction, however, which, as I explained in Section 1, amounts to a relationship between the state and people. It also ignores, more generally, what law itself amounts to, to the extent that law guides the action of people and should be justified morally to them. Jurisdiction should therefore be structured legally in such a way that the authority exercised over people on its basis is actually able to have the legitimacy it

[112] See also Raz, 'Why the State'.

[113] They do indeed come back in through the backdoor, as exemplified by the discussion of 'reasonableness' or 'subsidiarity' in Bianchi, 'Reply', at 74 (who conflates legality and legitimacy), or Ryngaert, *Jurisdiction in International Law*, chapter 6 (who focuses on the democratic legitimacy of extraterritorial jurisdiction, but without concern for its legality in the first place). Neither of them discusses the identity of the subjects to extraterritorial state jurisdiction and their link to that state, however.

[114] On the disconnection of data from people in the cyberspace, see e.g., M.-A. Frison-Roche, 'Penser le monde à partir de la notion de "donnée",' in M.-A. Frison-Roche (ed.), *Internet, espace d'interrégulation (Paris: Dalloz, 2016), at 7–16.*

claims on the one hand, and that the sovereignty it is a facet of can be exercised responsibly on the other. In other words, it is the connection between jurisdiction and legitimacy – but also between jurisdiction and sovereignty – that gives jurisdiction a normative dimension and requires that it be such that the authority and sovereignty it underpins be morally justifiable. In turn, this implies some form of instrumental moral justifiability of jurisdiction itself by reference to its contribution to political legitimacy.[115]

There are at least two ways of providing an instrumental justification of jurisdiction over a people in a given territory by reference to political legitimacy. Importantly, this justification should also extend to the three features of jurisdiction (i.e., its comprehensiveness, exclusiveness and pre-emptiveness). Based on the concept of jurisdiction presented in Section 1 and its territorial dimension, this implies primarily justifying territorial jurisdiction.

The first way to approach the instrumental justification of jurisdiction would be to establish – on the basis of an *anthropological* argument – that human beings are rooted territorially, especially as social and political groups, and that this has implications for their political and legal organization.[116] What seems clear, indeed, is that the territorial ties of human laws have only rarely been disrupted in human history, and that this applies all around the globe.[117] Those territorial ties have varied greatly, of course, and no one connection between the law and territory has been the same across culture and history, before and after the emergence of the state and its globalization through international law.[118] However, that link has remained a constant dimension of legality even when new threats to it have arisen every now and then and have had to be solved anew through a different kind of legal connection to that territory.[119]

[115] Of course, as we will see, political legitimacy or the justification of political authority is itself instrumental and relies on content-independent reasons. See also Raz, 'Authority'; Besson, 'State Veil'.

[116] See, for instance, Arendt's argument for what she calls the 'territorial principle': Arendt, *On Revolution*, at 175; Arendt, *Eichmann in Jerusalem*, at 21.

[117] For such an argument, see e.g., Supiot, 'L'inscription territoriale', at 154–156, referring to Montesquieu's '*esprit des lois*'. See also D. Liberski-Bagnoud, *Les Dieux du territoire – Penser autrement la généalogie* (Paris: Centre National de la Recherche Scientifique/Édition de la Maison des Sciences de l'Homme, 2002); P. Legendre, *Leçons X, Dogma: Instituer l'animal humain* (Paris: Fayard, 2017), at 35–36.

[118] P. J. Taylor, 'The State As Container: Territoriality in the Modern World-System', (1994) 18 *Progress in Human Geography* 151.

[119] A. Supiot, *Homo Juridicus – Essai sur la fonction anthropologique du Droit* (Paris: Points, 2005), at 163. For the resilience of territoriality in international law, see Bethlehem, 'End of Geography', 13–14.

What this means, therefore, is that the link between law and territory amounts clearly to more than a merely contingent marker of the relationship between the state (and its laws) and a given people, and hence between those people. It cannot simply be replaced by other (contingent) markers of sociability. The problem with the latter proposition, indeed, is that human life is not 'virtual', including in its social and political dimensions, and social bonds cannot be reduced to relations of communication as a result.[120] Such virtual ties may benefit or, in some cases, detract from physical and hence territorial social bonds, but it is difficult to see how they could replace them altogether. Of course, other social communities of interest or goals may develop beside, below or above political communities in each territory, but they should not be mistaken for the latter and regarded as interchangeable. What makes the social relationship between people on a given territory different is what those people do together on and with that territory, and not merely the fact that they live together (like cattle would) and have social ties of mere proximity.[121]

Importantly, nothing in this anthropological discussion of the territoriality of law implies any form of territorial property or ownership rights over portions of the territory,[122] whether individual (territorial property) or collective (territorial sovereignty) on the one hand, and whether alone or in conjunction with other individuals on the other. To that extent, it is distinct from Lockean or, more generally, liberal understandings of the territorial jurisdiction of states in domestic and international law.[123] The latter is just one of many examples in a long line of accounts of how state jurisdiction is intimately related to territory.

A second approach to the justification of state jurisdiction, and the one developed at length in this section, relies on a *moral* argument. It considers territorial jurisdiction as a necessary (albeit insufficient) requirement of political legitimacy. Of course, there may be other grounds for the legitimacy of law than grounds of political legitimacy. Thus, one may mention volitional, epistemic or coordinative grounds.[124] What I am interested in in this chapter,

[120] Contra: Schultz, 'Transnational Legality', chapter 4; Bethlehem, 'End of Geography', 22; Taylor, 'The State as Container'.

[121] Contra: Schultz, 'Transnational Legality', chapter 4.

[122] On the novelty and unicity in legal history of the recognition of individual and collective territorial rights in the seventeenth century, see Supiot, 'L'inscription territoriale', 157; J. G. Ruggie, 'Territoriality and Beyond: Problematizing Modernity in International Relations', (1993) 47 *International Organization* 139.

[123] D. Miller, 'Territorial Rights: Concept and Justification', (2012) 60 *Political Studies* 252.

[124] See e.g., Raz, 'Authority', 1012–1020; Besson, 'State Veil'.

however, is state jurisdiction qua political jurisdiction and its relationship to political legitimacy as a result, and more precisely to democratic legitimacy. True, there may be other kinds of political legitimacy than democratic legitimacy and other grounds thereof than equality, but this is the one I am interested in pursuing here.

The argument I propose goes as follows: territorial jurisdiction is instrumentally justified by reference to its contribution to democratic legitimacy, because the territoriality of law, and by extension its comprehensiveness, exclusiveness and pre-emptiveness on the territory, ensures the generality or general applicability of law to all members of the political community and hence enables the latter to respect individual equality before the law.[125] One of the conditions of public or political equality, and hence of democracy, is indeed that people share equal and interdependent stakes.[126] The decision-making process over those stakes and their legal regulation as a result should be such that it can respect that equality of stakes and their interdependence. This is what territorial jurisdiction contributes to securing, to the extent that people living on the same territory, and doing things together on that territory, are the most likely to share not only roughly equal, but also interdependent stakes across a broad range of issues in life.[127]

More specifically, the three characteristics of jurisdiction that have made it resilient over time in practice are also those that contribute to its instrumental justification by reference to political equality. The comprehensiveness of jurisdiction, first of all, ensures that the set of issues regulated over is sufficiently broad to reflect the interdependence of stakes underpinning them. Second, the exclusiveness of jurisdiction guarantees that those included in the lawmaking process are self-determining and deciding independently. Finally, the pre-emptiveness of jurisdiction ensures the equality between stakeholders by preventing other stakes than those that are shared equally from taking priority over the decision reached in respect of that public equality.

Of course, one may object to this argument by pushing it one step further and by arguing for *universal territoriality*. Arguably, indeed, the most justified kind of territorial jurisdiction from the perspective of public equality and democratic legitimacy would be universal. This is even more true today than it was in the past, especially in the light of the development of global common

[125] See also Waldron, 'Legal Pluralism'.

[126] T. Christiano, 'Democratic Legitimacy and International Institutions', in S. Besson and J. Tasioulas (eds.), *The Philosophy of International Law* (Oxford: Oxford University Press, 2010), 119, 130 ff; Dahl, 'Federalism'.

[127] See also T. Christiano, 'A Democratic Theory of Territory and Some Puzzles about Global Democracy', (2006) 37 *Journal of Social Philosophy* 81, 85–87, 98.

interests that require universal regulation and, more generally, of the development of interdependent stakes shared by people all over the globe.

The difficulty, however, was well flagged by Arendt when she referred to 'not man, but men' inhabiting the earth[128] and to the many peoples inhabiting different territories and having different laws[129] as a result. While we may share some stakes on a global plane and while some of them may be sufficiently interdependent, it is difficult to consider them equal. One may add – in line with the argument made in the previous sections – that it is only because there is more than one state's jurisdiction on earth that international law is needed, and even possible. Without international law, the legal duality of state jurisdiction would be lost. This would actually be problematic for political equality and democratic legitimacy themselves. International law amounts indeed to the source of the main constraints bearing on domestic jurisdiction, such as international human rights law and other international law rules that encapsulate and entrench the rules and principles constitutive of (domestic) democracy.[130]

At this stage, one may object that international law itself is not made democratically, and that it may be self-defeating to provide an instrumental justification of state jurisdiction based on democracy if state jurisdiction is itself constituted and internally constrained by international rules that are not democratic. As I have argued elsewhere, however, although there is no global political community and no universal territorial democracy backing the claim to authority of international law, there are ways to secure its democratic legitimacy.[131] One of those ways is democratic state consent.[132]

Conversely, another type of rejoinder may be to turn the proposed instrumental moral justification of state jurisdiction on its head and argue for *deterritorialized democracy*. Some authors, including myself in the past, have argued indeed that political legitimacy, and especially democracy, could themselves be (at least partly) deterritorialized following the main characteristic of transnational or global law,[133] thereby rendering this section's moral–political argument for territorial jurisdiction moot. This could happen, for instance,

[128] Arendt, *On Revolution*, at 175.

[129] Arendt, *Eichmann in Jerusalem*, at 21.

[130] See S. Besson, 'Human Rights and Democracy in a Global Context – Decoupling and Recoupling', (2011) 4 *Ethics and Global Politics* 19, on the 'decoupling' and 'recoupling' of human rights and democracy through international law.

[131] Besson, 'Lifting the State Veil'.

[132] Besson, 'Dissolving the Paradox'; Besson, 'Reply to Liam Murphy'.

[133] See e.g., S. Besson, 'Deliberative Demoi-cracy in the European Union. Towards the Deterritorialization of Democracy', in S. Besson and J. L. Marti (eds.), *Deliberative Democracy and Its Discontents* (Aldershot: Ashgate, 2006), 181; Brölmann, 'Deterritorializing'.

through the constitution of epistemic communities of deliberation that would include all those subjected to a given law into the deliberative process.

The difficulties with those arguments are immense, however, and it suffices to mention only a few here. One is that deliberation does not replace actual decision-making, and the latter remains largely territorial to date. Decision-making that does not include all those subjected to law and does not give them equal participation or representation may hardly be considered democratic as a result. Another difficulty is that such a deterritorialized political community, were it to stretch all the way to provide an effective inclusive decision-making procedure, would become dangerously diffuse and amorphous depending on the stakes, thereby giving rise to an egalitarian counter-critique. The sharing of equal and not only of interdependent stakes constitutes indeed one of the conditions of the right to political equality, and hence of democracy, and it would go amiss in this scenario. It is unlikely indeed that such a bundle of interdependent stakes could be shared equally by all people on earth.

A final remark is in order: nothing in the present argument should be read as reactionary. It is not the point of the argument, on the one hand, to hold on to a Westphalian order that has evolved gradually over time.[134] As I explained in Section 3.2, jurisdiction is resilient and has not been displaced, but this does not mean that it has not changed (precisely in order to remain so resilient) and that our conceptions should not be adapted. It will be the aim of the Section 4 to explain how.

Nor, on the other hand, is this argument about denying that, once upon a time in history, and a long time ago actually, laws were personal and the relationship between law and territory was organized differently. As I have argued, however, there is much to say in favour of the kind of political communities we have developed since, and especially in favour of the generality of law, individual equality and democratic legitimacy, all of them being principles protected and entrenched under the current system of international law. Reverting to a neo-medieval[135] personal status and hence to what was the rule in the pre-democratic age[136] is too high a price to pay for legal plurality.[137] This is true even if contemporary propositions for the return of the personal status are actually made, and quite paradoxically so, in the name of individual

[134] Contra: Bethlehem, 'End of Geography', 18; Koller, 'End of Geography', 28–29.

[135] On this term, see Kochenov, 'Personhood'.

[136] A. Wijffels, 'Bringing Peripheries into Focus', in d'Argent (ed.), *Droit des Frontières Internationales* 43.

[137] See also Roberts, 'After Government?' at 17–18, on the risk of legal representation without the state. For a discussion of inter-legality from the perspective of citizenship, see Chapter 6.

autonomy and sometimes even of cultural identity, and hence of domestic and international human rights law.[138] This is not to say that we may not do better than the current regime of territoriality of law and state jurisdiction to enhance the political and especially the democratic legitimacy of our laws, but it is important to understand what we have to lose in giving them up. As a matter of fact, we are not only entitled to compare options, but actually have a responsibility do so.

4 WHAT JURISDICTION?

Jurisdiction is a resilient concept despite and, I have also argued, because of legal plurality. This has been assessed from a sociological perspective, but its centrality was also justified instrumentally by reference to its contribution to the protection of political equality and hence to democratic legitimacy. Even if jurisdiction has not been displaced, its resilience has come as a reaction to legal plurality, and this should affect the way we approach it in practice.[139] Such a reconceptualization is even more important as territorial jurisdiction is morally justified and should work in such a way as to be able to resist the challenges of legal plurality.

It is from that perspective that the present section assesses the impact that the three constellations of legal plurality should have on our conceptions of state jurisdiction. Legal plurality does not necessarily imply legal equality between the different legal orders whose norms overlap within state jurisdiction.[140] It should not therefore be taken to mean that their relations should be the same across the board and they should all affect the concept of jurisdiction in the same way. The assessment will therefore distinguish between each of the three types of legal orders whose norms interact with domestic law and challenge its territorial jurisdiction in three different ways: from below (infranational law), from above (transnational law) or from aside (foreign domestic law).

[138] For a positive assessment of this 'personal empowerment' through deterritorialized international law, see Bethlehem, 'End of Geography', 19. For a counter-critique of those forms of 'global narcissism', see Supiot, 'L'Inscription Territoriale', 163.

[139] See also Bethlehem, 'End of Geography', 17.

[140] The equalization of all legal orders in circumstances of legal plurality may be explained by the anthropological origins of the discussion of legal plurality (and inter-legality) and (legal as well as other) anthropologists' tendency to reduce all forms of normativity, including legal normativity, into a single one. See D. Liberski-Bagnoud, 'Règne de la Loi, Régime des Interdits', in G. Longo (ed.), *Loi des Dieux, des hommes et de la nature* (Paris: Fayard, 2017), 39.

What infranational, transnational and foreign domestic law have in common is the threat they generate for the territoriality of law. They do so differently, however, and this affects their relationship to state jurisdiction and domestic law as a result. While infranational and transnational law imply some form of either personalized or even reified deterritorialization (Section 4.1), foreign domestic law brings in its wake a neo-imperialistic[141] project of overterritorialization (Section 4.2).[142]

4.1 *Reinforcing Jurisdiction in the Face of Legal Deterritorialization*

Whereas the deterritorialization through infranational law erodes territorial jurisdiction from within domestic law and bottom-up, the deterritorializing effect of transnational law is exercised from the outside and top-down.[143] Infranational and transnational law threaten to displace the territoriality of law by (re)personalizing jurisdiction or, worse, by depersonalizing it entirely. On the one hand, infranational law aims at replacing territoriality with new forms of personality of law and a neo-medieval personal status according to which each person is to be regulated differently by reference to personal characteristics (e.g., religion or culture). On the other hand, transnational law has gone further in deterritorializing and depersonalizing law, and has severed the law's claim to bind from any link to its individual subjects by referring only to objects or activities (e.g., data, business transactions, financial products) and then projecting those reified connections back onto individuals.[144]

This deterritorialization project common to infranational and transnational law, when the law stemming from those legal orders applies concurrently with domestic law in a given state's jurisdiction, is usually, albeit not exclusively,[145] justified by reference to the existence of universal, and hence by definition non-territorial, 'laws' in the broader sense of the term.[146] Those universal laws

[141] Raustalia, 'Empire and Extraterritoriality'. For a historical discussion of such imperialist exercises of extraterritorial jurisdiction in the nineteenth century, see T. Kayaoglu, 'The Extension of Westphalian Sovereignty: State Building and the Abolition of Extraterritoriality', (2007) 51 *International Studies Quarterly* 649.

[142] See also Supiot, 'L'inscription territoriale', at 154, 160.

[143] See, indirectly, ibid., at 160.

[144] This is actually a key tenet of most economic ideologies: projecting relations between things and people onto relationships between people. See e.g., L. Dumont, *Homo Aequalis I. Genèse et épanouissement de l'idéologie économique*, 2nd edn (Paris: Gallimard, 1985).

[145] This is not the case, for instance, with indigenous laws.

[146] On the common origins of the 'laws' of men, nature and religion in Western intellectual history, see Supiot, *Homo Juridicus*, chapter 2.

may be divine laws (e.g., in the case of infranational religious law) or the laws of economy and the market (e.g., in the case of transnational law like *lex mercatoria*), the laws of science and technology (e.g., in the case of transnational law like *lex electronica*) or even the laws of nature such as the laws of biology.[147] Famously, those laws know of no territory. Instead, they apply to 'space'[148] or 'domains',[149] terms that were once used only to refer to the sea, the air, the atmosphere or even the universe (i.e., spaces without territories and borders,[150] but also without people because they were deemed inhabitable). The increasing recourse to that terminology in the context of the recent discussions of infranational or transnational law and of their relationship to state jurisdiction should not come as a surprise, therefore. In the context of the extraterritorial exercise of state jurisdiction in particular, those terms come together with new 'technical', 'functional', 'rational' or 'scientific' jurisdictional nexi or ties[151] that are not only deterritorialized and depersonalized as a result, but also claim to be universal by reference to those other laws.

Such universal approaches to deterritorialization are not new in legal history,[152] but what is unprecedented in this case is their combination in current circumstances of legal plurality and the overlap of different deterritorialized legal orders at the same time. This overlap threatens to reduce the world to a 'flatland'[153] in which religious movements, powerful private actors, bureaucratic agents, governments and many others play indistinct parts. What this does, however, is take the law away from its many territories and hence from the many people that inhabit the earth, and deprive the relationship of jurisdiction from its egalitarian justification. Somehow, the innocent and

[147] Supiot, 'L'Inscription Territoriale', at 153.

[148] See e.g., Colangelo, 'Spatial Legality'; Zumbansen, 'Global Governance', at 551–553; Schultz, 'Transnational Legality', at 78; Mallay et al. 'State Extraterritoriality', at 1304. For a discussion of cyber 'space', see A. Zimmermann, 'International Law and "Cyber Space"', (2014) 3 *ESIL Reflections*.

[149] See e.g., Stephan, 'Competing Sovereignty'.

[150] Curiously, those are captured by the more encompassing notion of 'geography' in recent discussions among international lawyers: e.g., Bethlehem, 'End of Geography'; Koller, 'End of Geography'.

[151] See e.g., Mallay et al., 'Constructing the State Extraterritorially'; Bianchi, 'Reply', at 92–99; Michaels, 'Territorial Jurisdiction'; Schultz, 'Carving Up the Internet', 816–819; Zumbansen, 'Global Governance'; Bethlehem, 'End of Geography', 22.

[152] It suffices to think of the Catholic Church's roman-canonical laws that famously had no territory, but universal jurisdiction. See also Legendre, 'Dogma: Instituer l'Animal Humain', at 33–34.

[153] E. A. Abbott, *Flatland. A Romance of Many Dimensions* (London: Seeley and Co., 1884); T. L. Friedman, *The World Is Flat – The Globalized World in the Twenty-First Century* (New York: Penguin, 2006).

multicultural phenomena imagined by the early legal pluralists and anthropologists[154] do not appear very seductive anymore: they should be observed through the lenses of the kind of cultural exceptionalism or private imperialism they have engendered.[155]

What this means for the conception of state jurisdiction in the face of legal plurality is that the concurrence of infranational and transnational law should simply be rejected on grounds of individual equality[156] and democratic legitimacy. No conceptual adaptations of jurisdiction are required as a result of this kind of legal plurality.

Importantly, and despite an attractive prima facie correspondence between the jurisdictional invocation of those (non-human) universal laws and the universal scope of international law, deterritorialized legal universality should not be conflated with the universality of international law norms,[157] as exemplified by international human rights law or international criminal law.[158] Qua international law, the latter are part of the instruments developed to do what Arendt referred to aptly as 'forming a world' between the many people on earth and their many territorial laws. Those international legal norms rely on the keystone of state (territorial) jurisdiction for their development and implementation and should not be considered as competing with or threatening the former, as I explained in Section 1. Respect for universal standards in international law does not and should not have individual equality before the law and democracy as its price: they are meant to protect it from the outside.[159]

4.2 *Reconceiving Jurisdiction in the Face of Foreign Domestic Law*

Foreign domestic law applying extraterritorially, by contrast, displaces the territoriality of law but not completely: it adds a new layer of jurisdiction

[154] Merry, 'Legal Pluralism'; Griffiths, 'Legal Pluralism'; Cotterell, 'Global Legal Pluralism'.

[155] See also Roberts, 'After Government?' at 17–18.

[156] See also Waldron, 'Legal Pluralism', arguing against infranational law on grounds of equality before the law.

[157] This contrast is reminiscent of the one between universal justice and local legitimacy. See e.g., J. Waldron, 'Special Ties and Natural Justice', (1993) 22 *Philosophy and Public Affairs* 3. See also B. Pascal, *Thoughts*, Vol. 48 (New York: P.F. Collier and Son Company, 1909), at 294: "A strange *justice* that is bounded by a *river*! Truth on this side of the Pyrenees, error on the other side."

[158] Contra: Koller, 'End of Geography'.

[159] See Besson, 'Human Rights and Democracy' on democracy and international (human rights) law. For a critique of globalization from the perspective of democracy, see D. Rodrik, *The Globalization Paradox: Democracy and the Future of the World Economy* (New York: W.W. Norton, 2011).

that is not territorial from aside, while relying on another state's territorial jurisdiction to do so. To that extent, the states (e.g., the United States or the EU) whose extraterritorial jurisdiction is exercised overterritorialize in a neo-imperialistic way, but do so by reference to a non-territorial or deterritorialized nexus and again either by reference to shared personal characteristics or to reified ones.

The overlap between states' concurrent jurisdictions is more difficult to resist than deterritorialization through infranational or transnational law to the extent that it was part and parcel of the 'law on laws' or the domestic and international law of jurisdiction from the very beginning. There should be a way, therefore, for jurisdiction to be conceived in circumstances of legal plurality when that plurality stems from the overlap of distinct states' jurisdictions.

Different conceptions of state jurisdiction in circumstances of extraterritorial jurisdiction have been proposed in theory and practice. One should exclude from the outset conceptions inspired by the universal and hence deterritorialized laws of the economy or of science disparaged before (i.e., conceptions of jurisdiction reconceived as non-territorial domains or spaces and based on purely functional or technical nexi[160] on the one hand, and conceptions based on self-proclaimed rationalizations of a dominant state's interests based on the same types of nexi[161] on the other). This leaves us with one serious proposal for a new conception of jurisdiction to discuss, and that is Ryngaert's.[162]

In a nutshell, Ryngaert's reconceptualization of state jurisdiction is based on the principle of subsidiarity. It relies on the observation that each state bears a responsibility under international law to protect certain *common interests* (e.g., universal human rights or environmental law standards) and argues that when the state with *the most effective connection* to the activity regulated is *unable or unwilling to act*, other states are entitled to do so instead, provided the state of territorial jurisdiction does not explicitly oppose a veto.[163]

There are many difficulties with this argument, and only a few of them are mentioned here. The first one is that the proposed account relies on the principle of subsidiarity. Surprisingly, however, given how controversial that principle is, Ryngaert does not specify which ones of the many conceptions of

[160] See e.g., Colangelo, 'Spatial Legality'; Bethlehem, 'End of Geography', 22; Stephan, 'Competing Sovereignty'.
[161] See e.g., Bianchi, 'Reply', at 92–99; Lowenfeld, 'International Litigation'.
[162] Ryngaert, *Jurisdiction in International Law*, chapter 6.
[163] Ibid., 215 ff.

subsidiarity we know of it is based on, and especially what the justification for the latter could be.[164] This is important because it affects in turn the kind of subsidiarity test one should apply and the limits that bear on subsidiarity. We do not know, for instance, how the 'inability' is measured, and this merely begs the question of the standard of subsidiarity, just as we remain unsure about why the 'unwillingness' does not equate with the 'veto' that is mentioned as a limit to subsidiarity. What is clear, in any case, is that the egalitarian and democratic justification(s) of subsidiarity that apply in international human rights law[165] would not be applicable here in the absence of an encompassing global political community. As a matter of fact, most instances of the principle of subsidiarity we know of in contemporary law require a broader and encompassing unit or entity, and usually a political one, and both are absent in contemporary international law. Importantly, moreover, subsidiarity cannot itself work as ground for the attribution of competences rather than for their allocation or exercise. In most contexts in which the principle of subsidiarity is used, indeed, it allocates pre-existing competences or their exercise. The problem is that Ryngaert's argument is precisely meant to provide a ground for jurisdiction or competence and, instead of doing so, it passes the buck by invoking subsidiarity.

Second, the argument relies on an understanding of the basis of extraterritorial jurisdiction that comes dangerously close to the functional and technical ones disparaged before. In doing so, it endorses the return of the universal laws of economy, science or nature. There is no clear link made to people, for instance, in the proposed account of jurisdiction, and it is difficult to see how jurisdiction over people could be determined on the basis of the proposed notion of most effective 'connection' to an activity. As a matter of fact, meeting such an invocation of subsidiarity in combination with such jurisdiction grounds does not really come as a surprise when one knows how the principle of subsidiarity has been used to maximize efficiency by liberal economic doctrines in the past, including in EU and international law.[166]

Finally, the absence of a common procedure for deciding on the inability or unwillingness of a state to act and on the ability or willingness of one (or many) other state(s) to intervene makes it difficult to see how the proposed test in this revised conception of jurisdiction is so different from the reasonableness test used by other conceptions of extraterritorial protective

[164] Besson, 'Subsidiarity in International Human Rights'.
[165] Ibid.
[166] J. Barroche, *Etat, Libéralisme et Christianisme – Critique de la Subsidiarité Européenne* (Paris: Dalloz, 2012), at 563.

jurisdiction and their self-proclaimed justification. States are bound to disagree reasonably about those issues and an institutionalized procedure would therefore be needed to decide fairly. It is not because common interests are at stake that states will necessarily behave in a less self-interested fashion – the reverse is also true in any case.[167] There is no global political community yet, and the mere invocation of a 'global human community' by Ryngaert is not enough to justify the decisions that are unilaterally made in its name.[168] In short, the proposed conception looks like a compromise between many of the other conceptions put forward in the literature, but one that faces, as a result, all the problems the latter bring with them.[169]

Where does this leave us with respect to our revised conception of state jurisdiction in circumstances of extraterritorial jurisdiction? As I explained before, the tendency in state practice is to ground jurisdiction back into territory as much as possible, including when the aim is to protect vital interests by resorting to the 'effects doctrine' and identifying some territorial connection. Based on the instrumental egalitarian justification provided for territorial jurisdiction in Section 3.3, this recentring on territorial jurisdiction is justified. What this means for personal jurisdiction, then, is that it too should be exercised as closely as possible to a territorial nexus. It should also be used whenever possible to grant individual rights, and not to generate duties. Finally, universal jurisdiction, provided it is exercised outside of any territorial nexus – and this has become quite rare in recent practice – should be reserved for the enforcement and adjudication of international law, and hence to cases where states act in the name of international law in the absence of international institutions.

Of course, states have certain responsibilities to act under international law that may lead them to enact and enforce law outside of their territorial jurisdiction in some cases, such as in cases where there are common interests to protect. Examples may be drawn from international environmental law, international criminal law or international human rights law. As I explained in Section 1, indeed, state jurisdiction does not only amount to a right to regulate, but also a responsibility to do so. It follows from the social resilience of state jurisdiction and from its moral justification in terms of democratic legitimacy, however, that states should privilege joint action under

[167] See Besson, 'Community Interests – Special Emphasis'; Besson, 'Community Interests – Whose Interests?' for a critique of the idea that states are unable to defend common interests and necessarily behave in a self-interested fashion.

[168] Contra: Koller, 'End of Geography', 29.

[169] See also Liivoja, 'Book Review'.

international law to unilateral extensions of jurisdiction and, when needed, work at the creation of international institutions. The responsibility side of jurisdiction also requires states to resist more actively against foreign law's application within the scope of their territorial jurisdiction.

The idea that states may take international law into their own hands cannot be justified by the mere absence of global institutions.[170] What they should take into their own hands instead is the building of international institutions able to address those issues in the respect of individual and state equality.

5 CONCLUSION

Prima facie, state jurisdiction, as it stems from domestic and international law, and especially its comprehensiveness, exclusiveness and pre-emptiveness, would seems to be challenged by legal plurality. As this chapter has established, however, territorial jurisdiction has not only become a central institution in social and political practice since the seventeenth century, but it has proven resilient to the circumstances of pervasive and persistent legal plurality. It has not been displaced and is not about to be either, despite legal plurality, and actually, as I have argued, because of it. There are anthropological explanations to be found in the territoriality of law for the resilience of state jurisdiction, but this chapter has also advanced instrumental moral reasons such as the protection of individual equality and democratic legitimacy.

Those sociological and normative conclusions provide grounds to resist some of the deterritorializing dimensions of legal plurality, and in particular the development of infranational and transnational law and the erosion of territorial jurisdiction those new legalities have instilled from below and from above. The third constellation of legal plurality, however (i.e., the increasing extraterritoriality of other states' jurisdiction), amounts to the most challenging of the three: it takes the appearance of an overterritorialization of law, but contributes in fact to the erosion of territorial jurisdiction from aside. It calls for a reconceptualization of state jurisdiction, this chapter has argued, but not one that trades it for self-proclaimed assessments of what is in the common interest or, worse, universal scientific or economic rationalizations thereof.

What is needed instead of such forms of globalized law are international law and institutions in which state and, by extension, individual equality are respected in deciding on those controversial issues and forming a world together. As the chapter made clear, indeed, international law itself should

[170] Contra: Klabbers, *International Law*, at 103; Bianchi, 'Reply', at 84–85.

not be considered as an external limitation to state jurisdiction, but is, on the contrary, a constitutive part of the latter's dual legality with domestic law. It does not contribute, as a result, to the phenomenon of legal plurality, and strengthens rather than threatens state jurisdiction and, in return, is itself largely strengthened by state jurisdiction. As a matter of fact, exercising jurisdiction together is also an international responsibility of states. *Pace* Friedman, the world is far from being flat. The problems of humanity may be global, but our political communities are not. The question facing us now, however, is whether most individuals still remember what the latter are.