THE DEFENCE OF THE RULE OF LAW IN THE 21ST CENTURY

An Address to:

THE INTERNATIONAL ACADEMY OF FINANCIAL LITIGATORS

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The domestic rule of law is under attack everywhere – whether in the Philippines, China, Central America or Russia. One of the contributors to that attack is that over the last twenty years the international rule of law has been undermined by the abandonment of the twin principles underpinning that rule: respect for national sovereignty and recognition of the fundamental equality of nation states. Unfortunately the United States of America is the primary contributor to that erosion through its multifaceted failure to respect the basic principles and the limits of the customary international law ("CIL") of criminal law enforcement jurisdiction. I will explain the basis for these views today and conclude my remarks with a prescription for a way forward.

I. OVERVIEW

States can only exercise criminal jurisdiction if they can rely on a specific principle permitting such jurisdiction.[1] In relation to allegations of fraud, CIL does not permit a state to assert criminal jurisdiction over the conduct of a non-national, outside that state, for representations made to another non-national, where there is no substantial and genuine connection to that state.

Take the case of a Spanish, German, French or Chinese national who gives a presentation, outside of the United States, to a non-US bank at a meeting in Madrid, Munich, Paris or Beijing.

[1] Cedric Ryngaert, *Jurisdiction in International Law*, 2nd ed. (New York: Oxford University Press, 2015) at pp. 29-30, 35-38; [Ryngaert, *Jurisdiction in International Law*] *Restatement (Fourth) of the Foreign Relations Law of the United States* (2018), at §407, reporter's note 1 [Fourth Restatement] ("… rather than treating all exercises of prescriptive jurisdiction as permitted absent a prohibition, states typically justify and critique exercises of prescriptive jurisdiction based on whether an accepted basis for such jurisdiction exists."); *United States v. Meng*, Supreme Court of British Columbia, File No. 27761, Affidavit of Cedric Ryngaert, sworn December 12, 2020, Exhibit A, at p. 5, para. 8 [Ryngaert Affidavit] ("If States cannot justify their assertion of jurisdiction according to recognized permissive principles – in other words where no genuine connection between the State and the subject of regulation exists – such jurisdiction is unlawful under customary international law.")

Assume that US law enforcements comes to believe that the non-US national made a material misrepresentation to that non-US financial institution. Assume further that in consequence the non-US financial institution provides near instantaneous corresponding banking services through the US dollar CHAT clearing system rather than through the Honk Kong CHIP US dollar clearing channel.

The question that I will address today is whether the US can lawfully assume criminal fraud enforcement jurisdiction under CIL in these assumed circumstances.

It will be my thesis that, even if misrepresentation by the presenter can be proven, the facts described do not support a substantial and genuine connection between the presenter and the United States sufficient to ground US jurisdiction to prosecute.

I will elaborate and emphasize that potential charges against the presenter for fraud may also give extraterritorial effect to unilaterally imposed US sanctions, measures that have long faced strenuous international objection as being contrary to international law.

II. CUSTOMARY INTERNATIONAL LAW

To elaborate our view we must start at foundational principles. CIL "results from a general and consistent practice of states followed out of a sense of international legal right or obligation."[2] To determine the existence and content of a rule of CIL, it is necessary to ascertain whether there is a general practice that is accepted as law (*opinio juris*).[3]

The genesis of the power to criminalize conduct is the exercise of sovereignty. Jurisdiction is closely related to the concept of sovereignty. Because a state is sovereign, it can exercise its authority (jurisdiction). Each time a state exercises its jurisdiction, it affirms its sovereignty. Under CIL, the lawful exercise of sovereignty is limited and prescribed. If the law were otherwise, it

[2] Fourth Restatement, at §401, comment a. See also *Nevsun*, 2020 SCC 5, at paras. 74-82. [*Nevsun*]
[3] *Nevsun*, at para. 77.

would imperil the peace and sovereignty of nations.[4] For this reason, states cannot seek to punish those who are not subject to their laws, those who fall outside their jurisdiction.

The common law has always reflected that starting point.[5] Coke expressed the principle in the *extra territorium maxim* (the pronouncement of one who passes a law beyond his jurisdiction can be disobeyed with impunity).[6]

States are limited in their assertion of criminal jurisdiction, in part, so that individuals acting outside a state's territory are not deprived of fair notice that their conduct is covered by a particular state's criminal law.[7] There must be notice of the law's foreign application, "not only that a law has been in existence but also that it has been applicable to the actor at the time of the act."[8] Put another way, the law must be ascertainable by those affected by it.[9]

This requirement flows from the principle of legality,[10] which has long been a common law concept and also informs, for example, the interpretation of the Canadian *Charter of Rights and Freedoms.*[11] As the Supreme Court of Canada has recognized:

> [T]here can be no crime or punishment unless it is in accordance with law that is certain, unambiguous and not retroactive. The rationale underlying this principle is clear. It is essential in a free and democratic society that citizens are able, as far as

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[4] See generally Robert J. Currie & Joseph Rikhof, *International & Transnational Criminal Law*, 3d ed. (Toronto: Irwin Law, 2020) at pp. 53-4. [Currie & Rikhof] See also Ryngaert Affidavit, at p. 5, paras. 6-7.

[5] In 1854, Baron Parke observed: "[T]he legislature has no power over any persons except its own subjects [i.e. nationals and those within the territory] … The Legislature can impose no duties except on them …": *Jeffreys v. Boosey* (1854), 4 H.L. Cas. 815, at p. 926, adopted in *Macleod v. AG of New South Wales*, [1891] A.C. 455, at p. 458.

[6] 10 Co. Rep. 77. The maxim was cited by Lord Halsbury in *Cooke v. Charles Vogeler*, [1901] A.C. 102, at p. 108.

[7] Julie R. O'Sullivan, "The Extraterritorial Application of Federal Criminal Statutes: Analytical Roadmap, Normative Conclusions and a Plea to Congress for Direction" [2018] 106 Georgetown Law Journal 1021 at p. 1034, n. 57.

[8] Kenneth Gallant, *The Principle of Legality in International and Comparative Criminal Law* (Cambridge: Cambridge University Press, 2009) at p. 20.

[9] *R. v. Furtney*, [1991] 3 S.C.R. 89.

[10] The principle provides that "a person may only be held criminally liable and punished if at the moment when he performed a certain act the act was regarded as a criminal offence by the relevant legal order or, in other words, under the applicable law": Antonio Cassese, *International Criminal Law*, 2d ed. (Oxford: Oxford University Press, 2008) at p. 37.

[11] See: *R. v. Lohnes*, [1992] 1 S.C.R. 167; *R. v. Levkovic*, 2013 SCC 25, at paras. 1–3; *Tran v. Canada (Public Safety and Emergency Preparedness)*, 2017 SCC 50, at paras. 41, 44; *R. v. Poulin*, 2019 SCC 47, at para. 59.

> is possible, to foresee the consequences of their conduct in order that persons be given fair notice of what to avoid …[12]

There are limits on a state's exercise of criminal jurisdiction, in part, because legality demands that "individuals should not be subject to domestic criminal processes that they could not have foreseen."[13] It has been said that a prosecuting state can be accused of acting in abuse of its right to claim territorial jurisdiction in relation to largely extraterritorial conduct when its criminal law is not ascertainable by those governed by it.[14]

Consistent with the sovereign equality of nations and the requirements of notice, CIL rules exist to control attempts by states to exercise authority over conduct occurring in other states. Under CIL, states may only assert criminal jurisdiction over conduct that has a substantial and genuine connection to the state asserting jurisdiction.

The limitations on criminal jurisdiction over extraterritorial conduct established by CIL are widely recognized. The International Law Commission, the body of international experts appointed by the United Nations to identify and codify international law, refers to this jurisdictional limitation as requiring "a sufficient connection to the persons, property or acts concerned".[15] Robert Jennings and Arthur Watts, in the authoritative text *Oppenheim's International Law*, state: "[T]he right to exercise jurisdiction depends on there being between the subject matter and the state exercising jurisdiction a sufficiently close connection to justify that state in regulating the matter".[16] James Crawford, in *Brownlie's Principles of Public International Law*, refers to it as "a genuine connection between the subject matter of jurisdiction and the territorial base or reasonable interests of the state in question."[17] Crawford notes: "There should be a real and not colourable

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[12] *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123, at p. 1152.

[13] Kimberley N. Trapp, "Jurisdiction and State Responsibility" in Stephen Allen et. al., eds., *The Oxford Handbook of Jurisdiction in International Law* (Oxford: Oxford University Press, 2019) at p. 358.

[14] Council of Europe, European Committee on Crime Problems, "Extraterritorial Criminal Jurisdiction", reprinted at (1992) 3 Criminal Law Forum 441, at p. 462. ("If [predictability of the law under the principle of legality] was not taken into account, it might be argued that the prosecuting state was acting in abuse of its right to claim territorial jurisdiction.")

[15] International Law Commission, Report to the General Assembly, Annex E, U.N. Doc. A/61/10 (2006), at para. 10. [ILC Report]

[16] Robert Jennings & Arthur Watts, *Oppenheim's International Law*, 9th ed. (Oxford: Oxford University Press, 2003) at pp. 457-458.

[17] James Crawford, *Brownlie's Principles of Public International Law*, 9th ed. (Oxford: Oxford University Press, 2019) at p. 441. [*Brownlie's*]

connection".[18] The *Restatement (Fourth) of the Foreign Relations Law of the United States* (2018), the seminal and widely referenced work reflecting US views on jurisdiction, states that CIL requires a "genuine connection between the subject of the regulation and the state seeking to regulate."[19] The Government of Canada recognized this same rule of CIL in an *amicus* brief filed with the US Supreme Court in the famous Hoffman-LaRoche case concerning the broad extraterritorial application of the *Sherman Act*, noting "the need for a 'substantial and genuine' connection to the nation asserting jurisdiction."[20]

CIL recognizes six bases upon which a substantial and genuine connection can be asserted to proscribe criminal conduct. These are: (1) territorial jurisdiction; (2) effects jurisdiction; (3) active nationality jurisdiction; (4) passive nationality jurisdiction; (5) protective jurisdiction; and (6) universal jurisdiction.[21] While the specific terms used to describe these categories differ slightly between sources,[22] these categories are universally accepted as the recognized bases under CIL by which a state can assert criminal jurisdiction. In each case, a substantial and genuine connection must be established between the state asserting jurisdiction and the underlying conduct.[23] Without such a connection, the assertion of jurisdiction is unlawful.[24]

(a) Territorial Jurisdiction

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[18] *Brownlie's*, at p. 469.

[19] Fourth Restatement, at §407.

[20] Brief for the Government of Canada as Amicus Curiae Supporting Reversal at p. 7, *F. Hoffman-La Roche Ltd. v. Empagran*, S.A., 542 U.S. 155 (2004), citing Ian Brownlie, *Brownlie's Principles of Public International Law*, 6th ed. (Oxford: Oxford University Press, 2003) at p. 297.

[21] Each of these categories is explained in turn below. For further discussion, see Ryngaert Affidavit, at p. 7, para. 13 – p. 10, para. 22; *United States v. Meng*, Supreme Court of British Columbia, File No. 27761, Affidavit of William Dodge, sworn December 8, 2020, Exhibit A, at p. 8, para. 15 – p. 14, para. 24; [Dodge Affidavit] *United States v. Meng*, Supreme Court of British Columbia, File No. 27761, Affidavit of Philippe Sands, sworn December 10, 2020, Exhibit A, at p. 5, para. 4 – p. 7, para. 11. [Sands Affidavit]

[22] For example, some commentators describe protective jurisdiction as "security" jurisdiction, some include effects jurisdiction within the territoriality principle, and some refer interchangeably to the territorial/territoriality principle.

[23] Ryngaert Affidavit, at p. 7, para. 12; Fourth Restatement, at §407, at reporter's note 2. ("Although often treated independently, the specific bases of jurisdiction … reflect a broader principle requiring a genuine or sufficiently close connection to justify or make reasonable the exercise of preceptive jurisdiction.")

[24] Ryngaert Affidavit, at p. 5, para. 8 ("If States cannot justify their assertion of jurisdiction according to recognized permissive principles – in other words where no genuine connection between the State and the subject of regulation exists – such jurisdiction is unlawful under customary international law."); Dodge Affidavit, at p. 8, para. 14. ("Absent such a genuine connection, a state's assertion of jurisdiction is unlawful under customary international law.") See also Ryngaert, *Jurisdiction in International Law*, at pp. 29-30, 35-38; Fourth Restatement, at §407, reporter's note 1.

Territorial jurisdiction is the most fundamental and basic form of jurisdiction over criminal acts; it relates to criminal acts occurring on a state's territory.[25] Territorial jurisdiction is the oldest, most common, and least controversial basis for exercising jurisdiction to proscribe conduct as criminal. The Permanent Court of International Justice observed in the *Lotus* case: "[I]n all systems of law the principle of the territorial character of criminal law is fundamental".[26] Territorial jurisdiction derives from the principle of state sovereignty, by which states have the power to regulate and prescribe conduct that takes place within its borders.

In cases of transnational crime, states may assert jurisdiction based on a "constituent elements" approach.[27] This means that a state may assert jurisdiction when a constituent element of the crime takes place within its territory. The constituent element under domestic law must also evince a genuine connection to the state, otherwise it is insufficient under international law as a basis for jurisdiction.[28] A constituent element could be the initiation of the crime, when conduct begins within the prescribing state's territory but has consequences in another state (sometimes described as subjective territoriality). It could also be the completion of the crime, when conduct commences outside a state but such conduct is completed, or a constituent element of the regulated conduct takes place, within the prescribing state (sometimes described as objective territoriality).[29]

Conduct occurring entirely outside a state's territory may also be prescribed if it falls within one of the other categories of prescriptive jurisdiction. As the International Court of Justice has observed: "Ordinarily, States are without jurisdiction over crimes committed abroad as between foreigners."[30] Accordingly, each of the other bases of jurisdiction provides for a limited circumstance in which a state may be entitled to exercise jurisdiction where a substantial and genuine connection with the state is established. However, none apply to our assumed facts.

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[25] See generally *R. v. Hape,* 2007 SCC 26, at para. 59. [*Hape*]

[26] *The Case of the S.S. "Lotus"* (1927), P.C.I.J. Ser. A, No. 10, at p. 20.

[27] See Ryngaert Affidavit, at p. 7, para. 14; Ryngaert, *Jurisdiction in International Law*, at pp. 77-79.

[28] Ryngaert Affidavit, at p. 7, para. 14. ("International law gives States a margin of appreciation in this respect, but draws the line where a relevant constituent element does not qualify as a genuine connection. Conduct on the other side of the line without a genuine connection is unlawful under customary international law.")

[29] See *Hape*, at para. 59; Fourth Restatement, at §408, comment c.

[30] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, I.C.J. Rep. 2002, Separate Opinion of President Guillaume, at p. 37.

(b) Effects Jurisdiction

Effects jurisdiction provides a state with jurisdiction to try crimes the effects of which are felt in the state's territory: "The *effects doctrine* may be understood as referring to jurisdiction asserted with regard to the conduct of a foreign national occurring outside the territory [of] a State which has a substantial effect within that territory."[31] Unlike territorial jurisdiction, no constituent element of the regulated conduct of the offender need take place in the prescribing state's territory.[32]

The circumstances in which states apply the effects doctrine are subject to a range of different approaches, and are not without controversy as a basis for asserting extraterritorial jurisdiction.[33] The US's application of effects jurisdiction in general is highly controversial.[34] Effects jurisdiction may be understood as an extension of territorial jurisdiction, encompassing impacts that are felt in the territory, so long as there is a substantial and genuine connection between the extraterritorial conduct and the state.[35] Effects must be direct, reasonably foreseeable, and substantial for effects jurisdiction to apply.[36]

(c) Active Nationality

Under the active nationality or personality principle, states can exercise jurisdiction over crimes committed by their own nationals abroad. It is clearly not engaged by the facts that are assumed in this presentation.

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[31] ILC Report, at para. 12.

[32] Fourth Restatement, at §409, comment a.

[33] Fourth Restatement, at §409, reporter's note 1.

[34] Currie & Rikhof, at p. 67.

[35] Fourth Restatement, at §409, comment a.

[36] Ryngaert Affidavit, at p. 8, para. 15, and the authorities cited therein; Ryngaert, *Jurisdiction in International Law*, at pp. 163-164; *United States v. Meng*, Supreme Court of British Columbia, File No. 27761, Affidavit of Régis Bismuth, Exhibit A, sworn December 10, 2020, at p. 19, para. 52. [Bismuth Affidavit]

(d) Passive Nationality

Under the passive nationality or personality principle, states can exercise jurisdiction over crimes committed against their nationals abroad. It too is clearly not engaged by our assumed facts.[37]

(e) Protective Jurisdiction

Protective jurisdiction refers to "the jurisdiction that a State may exercise with respect to persons, property or acts abroad which constitute a threat to the fundamental national interests of a State, such as a foreign threat to the national security of a State." Obviously there would be no recognized basis for invoking protective jurisdiction on our assumed facts.

(f) Universal Jurisdiction

Universal jurisdiction refers to "the jurisdiction that any State may exercise with respect to certain crimes under international law in the interest of the international community."[38] It permits a state to prosecute an offender for the core crimes under CIL (war crimes, crimes against humanity, genocide). Universal jurisdiction is not remotely engaged by our assumed facts.

In summary, of the six bases under CIL upon which a substantial and genuine connection can be asserted to proscribe criminal conduct, only territorial jurisdiction and effects jurisdiction have any potential application to our assumed facts. As will be outlined below there is no connection between our presenter's impugned conduct and the US that could be sufficient to satisfy any jurisdictional ground.

III. WHAT ARE THE JURISDICTIONAL LIMITS OF US CURRENCY SANCTIONS LAWS?

The state practice of Canada, the United Kingdom, France, and the European Union, as well as international consensus demonstrated by the United Nations, establishes that the CIL limits on prescriptive jurisdiction apply with equal (if not greater) force to US currency clearing related to sanctions laws. In this regard, the US's unilateral assertion of jurisdiction over extraterritorial

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[38] ILC Report, at para. 16.

conduct on the basis of US currency related sanctions laws is widely condemned as being contrary to international law, even in circumstances where the US jurisdictional connection to the underlying conduct is far less attenuated than on our assumed facts.

The United Nations Security Council has repeatedly expressed its concerns over the international unlawfulness of unilateral, extraterritorial sanctions. In contrast, lawful sanctions are imposed by the UN Security Council as contemplated by the UN Charter. These sanctions are founded on multilateralism, as they issue from no single state but rather from the UN Security Council. When states implement UN sanctions, they are acting consistent with international law and broader global consensus. In practice, UN sanctions are limited to the territorial or nationality principle, and only require states to implement sanctions accordingly.

In relation to sanctions that are not required or authorized by the UN and which exceed the jurisdictional limits of UN sanctions the UN General Assembly's long-held criticism has been expressed in this way:

> unilateral coercive measures and legislation "are contrary to international law, international humanitarian law, the Charter of the United Nations and the norms and principles governing peaceful relations among States." UN resolutions (for example Resolution 74/154, December 18, 2019) express concern about the negative impact of such measures on international relations, trade, investment and cooperation, and affirm that they are a major obstacle to development. They also contain operative paragraphs that urge all States to cease adopting or implementing such measures not in accordance with international law and to refrain from promulgating and applying any unilateral economic, financial or trade measures not in accordance with international law, and object to the extraterritorial nature of those measures which, the resolutions universally provide, can threaten the sovereignty of States.[39]

These consistent resolutions adopted by the General Assembly reflect the existence of underlying rules of international law condemning unilateral sanctions.

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[39] *United States v. Meng*, Supreme Court of British Columbia, File No. 27761, Affidavit of Todd Buchwald, sworn December 10, 2020, Exhibit A, at p. 13, para. 31. [Citation omitted. Emphasis added.]

The UN Human Rights Council and the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights have also condemned unilateral, extraterritorial sanctions.

EU sanctions expressly apply only "in accordance with international law." In addition, by legislation, the EU has undertaken to "refrain from adopting legislative instruments having extra-territorial application in breach of international law."

Like Canadian sanctions, EU sanctions apply either territorially or based on nationality. Territorial jurisdiction includes jurisdiction with respect to conduct done outside the territory of the EU only if (1) that conduct is an integral part of conduct that is performed by the same legal person, entity, or body within the territory of the EU; (2) the impugned conduct has a substantial link to the EU; and (3) the impugned conduct within EU territory is a central element of the business at issue. They do not otherwise apply to foreign conduct. In particular, in relation to currency clearing, EU sanctions apply to correspondent banks located in the EU but cannot serve as a basis to assert jurisdiction over non-EU banks involved — and *a fortiori*, the customers of such banks.

The US, on the other hand, has asserted its sanctions jurisdiction over foreign conduct with more attenuated grounds, thus interfering which the sovereignty of other states and their nationals.

As a result, the EU has established "blocking" legislation to counteract the extraterritorial effect of US sanctions on non-US nationals abroad, consistent with the EU's position that sanctions enacted by third party states having extraterritorial application or effect violate the international law principles of sovereign equality and of non-intervention with the domestic affairs of other states.

To similar effect, Canada has implemented "blocking" legislation to counteract the extraterritorial effect on Canadian citizens of US sanctions related to Cuba.[40] At the first instance of such

[40] *Foreign Extraterritorial Measures Act*, R.S.C. 1985, c. F-29. [*FEMA*] In response to US extraterritorial sanctions against Cuba, and pursuant to *FEMA*, the Attorney General issued the *Foreign Extraterritorial Measures (United States) Order, 1992*, S.O.R./92-584. In 1997, amendments were made to *FEMA* to respond to the implementation of certain extraterritorial elements of the US *Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996* ("Helms-Burton").

measures, the then Minister of Foreign Affairs, set out the Government of Canada's position on the paramountcy of the international rule of law:

> The rule of law is also important in governing the relationships between nations if we want to develop an open international economy for trade, investment, telecommunications, commerce and culture. We have learned our lessons over the last 40 or 50 years that the best way to do that is to come to an agreement on basic laws that we agree to, basic principles that we adhere to. If there are to be changes to those, nations come together to negotiate and discuss them and arrive at some consensus.
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> ... The whole premise is that there have to be rules by which countries abide. If one country, especially an extremely powerful country, perhaps the most powerful country in the world, begins to adopt a unilateral approach that it can declare on its own, without any consideration for the rights of other individuals or states, then it begins to break down the international system that we have laboured so diligently in the last half century to build.[41]

G7 countries have opposed US unilateralism in turn. In the UK, there has been a consistent position taken not to recognize and to legislate against the effects of the US's extraterritorial sanctions regime, which has been viewed as "usurping the rights of foreign states".

In France, there are several congressional reports expressing concern about the extraterritoriality of US sanctions and their illegality under international law. Also, French courts have noted that US extraterritorial sanctions should not receive any form of recognition under French law.

IV. CONCLUSIONS ON CIL

I conclude my abbreviated overview of CIL by asserting that CIL confines the exercise of criminal jurisdiction by a state to those cases where there is a substantial and genuine link between that state and the underlying conduct, within the established categories of prescriptive jurisdiction. The assertion of jurisdiction where there is no substantial and genuine connection is unlawful under CIL. This rule applies to sanctions laws as much as to general criminal offences such as fraud. The extraterritorial reach of US sanctions is controversial and has been condemned by the UN. The

[41] Canada, Parliament, *House of Commons Debates*, 35th Parl, 2d Session, Vol 134 (September 20, 1996) at p. 4485.

international community has opposed the US's historical and present application of domestic sanctions to foreign conduct as being in violation of state sovereignty and thus contrary to international law.

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Importantly, the mere fact that the US may, within its own borders, criminalizes certain dollar clearing in no way strengthens the connection between our subject, acting outside the US, and the US. As a leading US international law expert, Professor William Dodge, has recently opined: "The fact that clearing certain transactions is prohibited under U.S. law does not make the effects more substantial for purposes of customary international law. A nation may not confer upon itself jurisdiction to prescribe that which it would not otherwise have jurisdiction to do simply by prohibiting certain transactions and then claiming substantial effects based on the prohibition."[42]

Whether viewed as fraud or as indirect enforcement of sanctions violations, leading global expert on jurisdiction in international law, Professor Cedric Ryngaert, has also recently set out why the transitional and incidental occurrence of US dollar clearing is an insufficient basis under CIL for the US to assert prescriptive jurisdiction over our assumed facts. He states:

> The US appears to consider that its exercise of jurisdiction over the routing of US dollar payments through US correspondent bank accounts is justified on the grounds that the financial institutions holding these accounts *export services* from the US, regardless of the extraterritorial nature of the underlying transaction and the persons involved. … However, such a view is contrary to the genuine connection requirement under international law. The territorial connection cited to ground US jurisdiction under the territoriality principle over transactions routed through US correspondent bank accounts is tenuous. In fact, it is merely incidental to the essentially foreign character of the underlying economic transaction between two or more non-US persons. It just happens that international transactions are often conducted in US dollars, for the clearing of which US correspondent banks are typically used, through US dollar SWIFT payment messages sent to US financial institutions. These transactions bear otherwise no significant relationship to the US. Accordingly, merely using the US financial system for an otherwise non-US business transaction is not a sufficiently strong connection under the international law of jurisdiction. Even under the effects doctrine – probably the most liberal doctrine in the law of jurisdiction – such exercise of jurisdiction is contrary to international law and therefore unlawful. While the mere passing of US dollar

[42] Dodge Affidavit, at p. 11, para. 20. See also Ryngaert Affidavit, at pp. 20-21, para. 46.

> clearing through US-based banks may perhaps have certain effects in the United States, such effects cannot be considered as grounding a genuine connection with the US, as they are not direct, reasonably foreseeable, and substantial. …[43]

After referring to several international legal scholars who have found that the exercise of jurisdiction based on US dollar clearing through US correspondent banks violates international law, Prof. Ryngaert has concluded:

> [I]t is clear that the mere routing of (financial) messages via US correspondent banks is an insufficient territorial connection with the US to justify the exercise of jurisdiction under the territoriality principle or the related effects doctrine. That such jurisdiction may be valid under US law is of no moment in this respect, as the US cannot invoke its domestic law to excuse non-compliance with international law.[44]

A fortiori, CIL does not allow the exercise of US jurisdiction over a foreign customer of a foreign financial institution, particularly where there is no indication that the customer opted to route a payment through a US correspondent bank, and the customer has no link to the US. Again, in Prof. Ryngaert's words:

> [I]nternational law does not allow the exercise of US jurisdiction over a mere customer of such an institution, where there is no indication that the customer opted to route a payment through a US correspondent bank, and the customer has no other link to the US. Such assertion of jurisdiction is unlawful under customary international law.[45]

Nor does the role of the customer's bank in routing a payment through a US correspondent bank establish a connection between the customer and the US. As Prof. Ryngaert has stated:

> Insofar as the exercise of jurisdiction over foreign financial institutions using US correspondent bank accounts is internationally unlawful …, a finding of international unlawfulness applies with even greater force in respect of 'derived' jurisdiction over foreign *customers* of such institutions.
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> Assuming that banks rather than their customers have discretion to route payments to a US correspondent bank, there is no direct territorial connection between the US and the foreign customer. This renders reliance on territoriality as the jurisdictional linchpin entirely unconvincing. The connection is particularly incidental and

[43] Ryngaert Affidavit, at pp. 12-13, para. 27. [Citations omitted. Emphasis added.]

[44] Ryngaert Affidavit, at p. 16, para. 32.

[45] Ryngaert Affidavit, at p. 20, para. 46.

> unforeseeable where the foreign bank has alternatives at its disposal to settle international payments in US dollars without going through US financial institutions. …
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> …
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> Accordingly, for a bank to route payments through US correspondent banks is a discretionary business decision, which cannot be attributed to a passive customer. The customer's attitude is a particularly relevant factor when determining whether she has a sufficiently strong connection to the US to ground US jurisdiction. Insofar as the customer has not consciously or intentionally opted to use the US banking system in relation to her business transactions, that customer's bank's discretionary decision to eventually route a payment through a US correspondent bank does not suffice to establish a sufficiently strong connection with the US. Even if the bank somehow relied on representations by the customer, unrelated to the clearing of US dollars or use of the banking system, the relevant connection is too indirect and insubstantial to ground jurisdiction, as the customer did not cause the bank to clear US dollars or violate US sanctions law. Such results would also be unforeseeable.[46]

As the renowned EU international law expert, Professor Régis Bismuth, has also recently opined:

> [U]sing correspondent account jurisdiction to extend the application of economic sanctions to persons not under US territorial or personal jurisdiction amounts, for the US, to an exercise of jurisdiction over transactions denominated in its currency and carried out abroad. International monetary law principles, however, do not allow States to use their currency as a basis of jurisdiction in such circumstances.
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> The Permanent Court of International Justice (PCIJ) noted that it is "a generally accepted principle that a State is entitled to regulate its own currency". Monetary sovereignty entails the right for the State to exercise a range of sovereign competencies: the right to define the monetary system and the monetary policy, the right to authorize or prohibit the use of foreign currencies on its territory, the right to devalue the currency, and the right to impose a system of exchange control. The exercise of such competencies (for instance devaluation) may affect the money in circulation abroad and therefore have extraterritorial effects. However, monetary sovereignty does not encompass the competence of the State to regulate the concrete use of its currency abroad. As the leading international monetary law treatise points out: "monetary sovereignty does not entitle a State to exercise any degree of direct control over transactions which involve its currency but which occur abroad and are governed by a foreign system of law" and this remains true "even though any payment made in respect of that transaction would ultimately

[46] Ryngaert Affidavit, at p. 17, para. 36.

> have to be reflected by account movements on the clearing system which is operated within that State".[47]

V. CONCLUSION

In sum, the tendency of the US to assert unilateral extraterritorial criminal enforcement jurisdiction contrary to CIL is unlawful. For the reasons given, its utilization of the dominance of the US dollar in international commerce as triggering alleged sanctions violations based upon dollar clearing through the CHATS system is equally unlawful.

How can the rule of law be defended in the 21st Century?

A first and major step would be for the United States of America to abide by, rather than undermine, the international rule of law.

Will that occur? Hopefully the lessons of both Vietnam and Afghanistan will counsel future restraint. More likely, and hopefully, a recognition will evolve in the US that it is in its long-term interests to exercise restraint in its law enforcement activities for the reasons so prophetically expressed by Thomas Paine, one of America's greatest founding fathers:

> He who wishes his own liberty secure must guard even his enemy from oppression, for if he violates this duty he establishes a precedent that will reach to himself.

[47] Bismuth Affidavit, at p. 20, paras. 53-54. [Citations omitted.]