

Stigall on U.S. Extraterritorial Jurisdiction

Dan Stigall, who works at the U.S. Department of Justice, has posted *International Law and Limitations on the Exercise of Extraterritorial Jurisdiction in U.S. Domestic Law* on SSRN.

With the dramatic rise in the frequency and scope of transnational criminal activity and the modern phenomenon of globalization, the interrelationship between international law and U.S. domestic law has come into sharper focus. From issues relating to international terrorism to more banal matters with distinct international dimensions, national courts in the modern era find themselves deciding cases with significant international elements and which have the potential to impact relations between sovereigns on the international plane. One area which is implicated across a broad range of legal topics and which has a natural propensity to affect international relations is the assertion of extraterritorial jurisdiction. This is due to the inherently conflict-generative nature of extraterritoriality.

In grappling with the need to address transnational issues in the context of a national legal system, domestic courts have increasingly looked to international legal principles, resulting in a level of penetration of international law in the national legal order. This Article explores the degree to which international law has permeated U.S. jurisprudence governing the exercise of extraterritorial jurisdiction over transnational criminal activity and the degree to which international law has been used by U.S. courts to limit or empower extraterritorial jurisdiction. Specific focus is given to the interrelationship between the limits imposed by international law, such as the “rule of reasonableness,” and due process limitations imposed by U.S. courts.

In reviewing a broad spectrum of U.S. judicial decisions, this Article demonstrates that the justifications for and against the exercise of extraterritorial jurisdiction in U.S. jurisprudence are multifarious, revealing distinct analytical strata that are dependent upon the nature of the law being applied extraterritorially and the conduct regulated. For instance, regulatory laws impacting commercial markets have been made the subject of an analysis

that is distinct from analysis applied to other forms of transnational criminal activity. Moreover, due to a split in U.S. jurisprudence, the analysis applied to that latter group of transnational crimes (those that do not impact international commercial markets), will further depend upon the judicial district.

This Article posits that the different approaches to these different sorts of legislation are entirely justifiable (and even logically necessary) due to the very obvious differences between civil actions involving U.S. antitrust law and criminal statutes that take on a transnational focus. Moreover, by understanding the role international law plays in each of these analyses, the similarities of the undergirding rationales, as well as the differences and potential dangers, policymakers and legal actors can work to clarify this otherwise discordant and fractured legal landscape and articulate a unified view of international law and limitations on the exercise of extraterritorial jurisdiction in U.S. domestic law.

The paper is forthcoming in the *Hastings International and Comparative Law Review*.