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## Rightful Relations with Distant Strangers

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# Summary of Thesis

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This thesis sets out a normative critique in the light of the legal and political philosophy of Immanuel Kant, of the law of the European Union (EU) in the wider world. Specifically, it examines the legal relations between the EU and ‘distant strangers’ – that is, persons neither residing in the EU nor citizens of its Member States. The germ of the study lies in a number of other articles scattered about in the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU), which purport to commit the EU to advancing certain objectives in all its ‘relations with the wider world.’ The most prominent of these are Article 3(5) TEU, Article 21 TEU, which broadly call for the advancement (1) of human rights, democracy, and the rule of international law, and (2) the provision of a range of policy goals, often grouped under the rubric of ‘global public goods.’ While initially expected to be merely aspirational, these provisions have been pressed into service to consolidate and ground anew the EU’s long tradition of asserting jurisdiction ‘extraterritorially’ in many policy areas such as competition, aviation, marine safety, and the environment.

The argument begins with the claim that in its relations with the wider world, the EU often creates not just factual effects upon distant strangers, but legal effects. In other words, it does not just ‘affect’ distant strangers, but *governs* them. This is demonstrated, firstly, by comparing the structure of extraterritorial measures enacted by the EU – paradigmatically the Emissions Trading Directive<sup>1</sup> – with other comparable measures widely considered extraterritorial – paradigmatically ‘Process and Production Method’ (PPM) measures, whereby one state prevents or restricts the sale of foreign goods in its markets on the basis of how they were produced. Secondly, the thesis closely examines the theories of extraterritorial jurisdiction espoused in the jurisprudence of the Court of Justice of the European Union (CJEU) and contrasts them with comparable theories found in other jurisdictions, paradigmatically the ‘effects doctrine’ in US antitrust law.<sup>2</sup> From this exercise, two things emerge. First, whereas PPMs and other like measures merely influence or manipulate foreign conduct by threatening exclusion from the domestic market, the Emissions Trading Directive and other EU measures treat foreign conduct as if it took place within the domestic market, and on that basis regulate it directly. Secondly, while the ‘effects doctrine’ relies, if only pretextually, on some reprehended effect occurring within the territory, the

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<sup>1</sup> Parliament and Council Directive 2008/101/EC of 19 November 2008 amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community [2009] OJ L8/3.

<sup>2</sup> See *United States v Aluminum Co of America* 148 F2d 416, 444 (2d Cir, 1945).

CJEU's 'territorial extension'<sup>3</sup> theory of jurisdiction envisages the EU enjoying an authority to prescribe laws that is practically geographically boundless, so long as enforcement of them is limited to the territory of its Member States.

This gives rise to the first of the three critical questions addressed in this thesis: *are such unilateral assertions of authority over distant strangers defensible?* To this end the thesis examines the international legal scholarship on the topic of 'global public goods,' a term which is commonly taken to include many if not all of the policy areas in which the EU regularly enacts extraterritorial measures. In language borrowed from the economic sciences, this body of literature generally defines global public goods as utility-enhancing things that are desired or needed by everyone, but which tend to be 'undersupplied' by states or other political communities acting on their own, due to certain attributes such as being non-rivalrous in consumption and non-excludable in terms of benefits. On this basis, a number of scholars have argued that within certain limits, the assertion of extraterritorial jurisdiction for the provision of global public goods is both normatively defensible as well as increasingly accepted at positive international law. In this regard, particular attention is given to Eyal Benvenisti's rich and compelling concept of the 'Sovereign Trusteeship of Humanity', which draws upon Grotius, Locke and Mill to argue that sovereignty should be redefined as a form of trusteeship held for the purpose of advancing the welfare of humanity in general.<sup>4</sup> Such an outlook finds echoes in the EU treaty provisions at the heart of this study, which have been described as expressing a 'missionary principle' exhorting the EU to advance certain universal values in its relations with the wider world.<sup>5</sup>

Although Benvenisti's conviction that sovereigns are fiduciaries is correct and valuable, it is argued that it fails for two main reasons. The first is that it conflates harms with wrongs: the fact that a globalized world presents us with incomparably more opportunities to affect each other's welfare does not necessarily mean that we acquire legal obligations towards each other. The opposite is also true: the mere fact that measures may advance global interests or values does not in and of itself justify extraterritorial assertions of authority over distant strangers. This is the second flaw: imperialism. In contrast to Benvenisti, it is demonstrated that the question of *how* a political community goes about advancing those values is crucial in determining whether it is permissible, or whether it amounts to imperial overreach. In this regard, the chapter discusses (1) the impotence of the Article 21(3) TEU

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<sup>3</sup> See Joanne Scott, 'Extraterritoriality and Territorial Extension in EU Law' (2014) 62 AmJCompL 87.

<sup>4</sup> Eyal Benvenisti, 'Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders' (2013) 107 AJIL 295.

<sup>5</sup> See Ester Herlin-Karnell, 'EU Values and the Shaping of the International Legal Order' in Dimitry Kochenov and Fabian Amtenbrink (eds), *The European Union's Shaping of the International Legal Order* (CUP 2014) 90–92; Morten P Broberg, 'Don't Mess with the Missionary Man! On the Principle of Coherence, the Missionary Principle and the European Union's Development Policy' in Paul James Cardwell (ed), *EU External Relations Law and Policy in the Post-Lisbon Era* (T M C Asser Press 2011).

language of policy coherence and consistency on the basis of values in terms of generating enforceable rights and obligations; and (2) the relationship between ‘messianism’ and certain deeply imperial tendencies found in EU jurisprudence.

In contrast to Benvenisti’s and other similar approaches to the question of unilateral jurisdiction, the thesis then sets out an alternative based upon Kant’s legal and political philosophy, as expressed in the *Perpetual Peace* and more extensively in the *Doctrine of Right*. For Kant, the basic premise is that ‘dignity’ lies not in the satisfaction of interests, needs, or other aspects of welfare, but in *independence*, which is the simple idea that no person is subject to the will of another. Thus conceived, dignity gives rise to three possible ‘legal’ relations: tortious, contractual, and fiduciary. These *private* rights are unrealizable without a particular configuration of political institutions invested with authority, ideally the state. States are themselves persons, and are constituted to have no purpose other than to assure subjects of their freedom, which makes them essentially ‘public’ fiduciaries of their subjects. Relations between states and their subjects fall under the rubric of *constitutional* law. Relations between states constitute *international* law. Finally, relations between states and non-subject private persons come under *cosmopolitan* law. Underlying all three categories of *public* right are the three forms of private right.

Drawing thus from the core elements of Kant’s legal and political philosophy, as well as from the categories of the Roman private law from which he himself took inspiration, the thesis formulates a defence of unilateral jurisdiction to provide global public goods that differs fundamentally from mainstream approaches. The first major difference is that public goods are defined not in terms of capacity to produce utility or welfare, but as things that have to be provided and held *publicly* in a political community in order to ensure that its members are not left in a condition of systemic and systematic domination with respect to each other. Following Arthur Ripstein, the thesis demonstrates how a community of ostensibly free persons would actually be a system of systemic and systematic domination, if there was no system of public roads for the members to pass and repass upon.<sup>6</sup> Thus, political authorities – paradigmatically ‘states’ – have an obligation to provide public roads. This in turn gives rise to rights against community members not just to contribute to maintaining the system of roads, but also to refrain from interfering with the roads or with the state’s ability to provide them. Crucially, it is demonstrated that these state rights in ‘public nuisance’ are not contingent upon harm: people who block roads are liable even if no traffic is disrupted. However, the state’s competence to provide public goods are limited by two criteria: public purpose, and necessity. The first is due to the fact that as a public person, the state is not allowed to act upon private purposes. The second limitation arises out of the first: acts that are not strictly necessary and proportionate for the provision of a public good exceed the requirements of public purpose, and must therefore be seen as being for private purposes.

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<sup>6</sup> Arthur Ripstein, *Force and Freedom: Kant’s Legal and Political Philosophy* (Harvard UP 2009) ch 8.

These same ideas – of public goods being constitutive of independence, political authorities being obligated to provide them, interference with public goods being wrongful against political authorities regardless of damage, and limitations of public purpose and necessity – are demonstrated in the context of other public goods, most importantly, the environment. Moreover, it is argued that these principles operate not just ‘domestically’ between states and subjects, but internationally as well. Nothing a state does to provide a system of equal freedom – a ‘rightful condition’ – for its subjects ever constitutes a wrong against any other person, state or non-state. Moreover, no state is to be frustrated by the arbitrary choice of any other person in the fulfilment of its sole purpose of providing a rightful condition. The limitations of proper public purpose and necessity also apply at the international level. Importantly, violations of these rights – international wrongs – are not predicated upon harms or losses. They are structurally akin not to *damnum iniuria datum* or damage-based wrongs like negligence or private nuisance, but to injury-based wrongs like battery, trespass, and defamation. As such, the thesis claims that prominent harm-based justifications of extraterritorial jurisdiction – paradigmatically, the ‘no-harm’ principle of environmental law and the ‘effects doctrine’ found in antitrust law – are incoherent. Furthermore, emerging international legal practice demonstrates a dawning appreciation of this incoherence. Finally, the fact that the EU is not a Kantian democratic republic – indeed it is in many respects the very antithesis of one – does not mean that it is excluded from exercising the rights of a democratic republican state in its external relations.

As such, the thesis finds that both extraterritorial measures such as the Emissions Trading Directive are to a significant extent normatively defensible, as is the CJEU’s steadfast refusal to uphold the legality of the EU’s extraterritorial jurisdictional assertions upon a harm-based theory such as the effects doctrine. Instead, the main obstacle to the legitimacy of these extraterritorial measures is *institutional*. Just as private persons must leave the state of nature and join a rightful condition, states as public persons must similarly leave the international state of nature and enter an international rightful condition where they may settle ‘their disputes in a civil way, as if by lawsuit, rather than in a barbaric way (the way of savages), namely by war.’<sup>7</sup> In this regard, however both the EU’s *sui generis* nature as a non-state entity as well as several doctrines of its internal constitution have allowed the CJEU to fashion a jurisprudence adamantly opposed to external judicial scrutiny, thus allowing the EU to evade valid legal challenges as to whether its extraterritorial measures are no more than necessary and proportionate in the pursuit of proper public purposes. As such, the short answer to the first critical inquiry is ‘Yes’ as regards the broad substance and methods, but ‘No’ as institutional structure.

This leads to the second critical question: if the EU regularly asserts authority over distant strangers, *does it perhaps owe obligations towards them in return?* If the fact that the EU is not a Kantian

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<sup>7</sup> DR 6:351, 488.

democratic republic does not exclude it from exercising the rights of a state in its external relations, then neither can it be exempted from the obligations a state ordinarily owes to those over whom it claims authority. This study posits that in the same way private law contains a set of legal principles to prevent trustee-beneficiary relations from degenerating into exploitation, public law contains a set of legal principles preventing relations between political authorities and subjects from degenerating into domination. These rights, it is argued, correspond to the legal claims going under the name of ‘human rights’ in the practice arising under the European Convention on Human Rights (ECHR), which happens to be the human rights practice with the greatest precedential and intellectual influence upon EU lawyers. Within this practice, human rights are legal rights (not moral rights), claimed by individuals as a matter of constitutional law (not international law), primarily against those public persons (not private persons) in a relation of authority (not mere power or influence) over them. Drawing from the jurisprudence on the concept of ‘human rights jurisdiction’ under Article 1 ECHR, it is shown that extraterritorial human rights obligations under the ECHR arise not from an ability to bring about factual changes in a distant stranger’s state of material welfare, but track assertions of authority over those distant strangers; that is, when a state party holds itself out as entitled to alter their normative position. However, if the assertion of authority is the threshold that must be crossed before a claim of human rights can be made, it follows that human rights arise only in relationships of authority and obedience. Mere factual effects – no matter how devastating – do not give rise to human rights obligations. This too is demonstrated in the Strasbourg jurisprudence. As such, positive legal practice confirms Kantian theoretical claim that legal rights are possible only in a rightful condition possessed of political institutions invested with the entitlement to use force. In the state of nature, no one has any rights at all.

To this end, the thesis criticizes prominent theories of human rights jurisdiction put forward by Yuval Shany<sup>8</sup> and Marko Milanovic,<sup>9</sup> and instead draws closer to Samantha Besson’s account.<sup>10</sup> In this connection, the thesis argues that according to the logic of current, and controlling ECHR jurisprudence, the technique of ‘territorial extension’ regularly employed by the EU in its extraterritorial measures must give rise to extraterritorial human rights jurisdiction. Moreover, the human rights obligations that arise in this way are not limited to so-called ‘negative’ obligations of respect—that is, to refrain from actively violating rights; but also extend to ‘positive’ obligations to ‘protect’ and ‘fulfil’—that is, to prevent third parties from causing human rights violations, and to establish mechanisms for the vindication of those

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<sup>8</sup> Yuval Shany, ‘Taking Universality Seriously: A Functional Approach to Extraterritoriality in International Human Rights Law’ (2013) 7 *Law & Ethics of Human Rights* 49.

<sup>9</sup> Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (OUP Oxford 2011).

<sup>10</sup> Samantha Besson, ‘The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts To’ (2012) 25 *LJIL* 857.

rights. So, the answer to the second question is ‘yes’; the EU does have obligations towards the distant strangers over whom it asserts authority – in human rights.

This leads to the third and final question: *does the EU live up to these obligations?* For this matter, the thesis returns to matters internal to EU law. This study argues firstly, that the CJEU interprets rules of procedure concerning access to EU courts in a manner effectively insulating the EU from its obligations of fiduciary accountability towards the distant strangers over whom it asserts authority. Second, and worse, it employs Article 3(5) TEU and specifically the rhetoric about fidelity to international law to foreclose any and all imputations of international wrongfulness. Thus, the very same provision that is invoked to justify the EU’s assertions of extraterritorial jurisdiction is also raised to evade accountability for them. These claims are demonstrated in the context of recent litigation over the Western Sahara, which involved a number of different challenges interposed by an indigenous Sahrawi liberation movement and an UK-based NGO against EU measures adopting international agreements between the EU and Morocco – the occupying power in the Western Sahara – which would have produced legal effects upon that territory. To this end, the chapter analyses the various stages of the relevant case law, to conclude that there are severe problems with the standard claim that the EU is a constitutional order. The upshot of these cases, is that distant strangers are treated not as dignity-bearing *subjects*, but as *objects* that may neither claim rights nor be owed obligations. Thus, the concern is not simply that the EU pursues its foreign policy in a manner that is inconsistent, incoherent, or otherwise imprudent; it is about whether it possesses a proper constitutional order.