# INTRODUCTION TO SYMPOSIUM: RETHINKING STATE JURISDICITON IN THE INTERNET ERA

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Early debates about jurisdiction and the Internet turned on the problem of identifying where online activities take place. However, the greater problem of territorial jurisdiction may now be that online activities often touch a number of states that can all claim jurisdiction, leading to conflicts. In an ongoing search warrant case between the U.S. government and Microsoft Corporation, the U.S. government asserts the right to demand the e-mails of anyone in the world from any e-mail provider headquartered within U.S. borders, whereas Microsoft counters that its server with the e-mails in question is located in Ireland where the emails are protected by Irish and European privacy laws. The Department of Justice, which is seeking the e-mails as part of a drug-trafficking investigation, argues that there is no issue of extraterritoriality because Microsoft has control over the data from the United States.[1]

In the view of Internet scholar Dan Svantesson, these sorts of problems should not be dealt with by tinkering with the concept of territory. Instead, they should spur international lawyers to revisit the basics of jurisdiction. AJIL Unbound presents an essay by Svantesson proposing a new jurisprudential framework for jurisdiction, going "Beyond the Harvard Draft" as he puts it.[2] This reference to the venerable *Harvard Research Draft Convention on Jurisdiction with Respect to Crime,* published in AJIL in 1935, illustrates his ambition in proposing to move definitively away from territoriality as the dominant principle in jurisdiction. Svantesson argues for a new framework focused on three core principles—asking whether the potential regulator has a substantial connection to the transaction, has a legitimate state interest, and whether the exercise is reasonable when balanced against other interests. He asserts that these principles extend the policy interest underlying the traditional approach, in which territoriality was simply a proxy for such core concerns.

As pointed out in comments by Cedric Ryngaert and Horatia Muir Watt, the proposal may be less novel than it first appears. Writing from the "other side of the fence", as she puts it, Muir Watt notes that these balancing concerns have long been at the center of debates in private international law.[3] She considers what a true reconceptualization of jurisdiction might look like. Similarly, Ryngaert also notes that the proposal has the character

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[1] In re A Warrant to Search a Certain E-mail Account Controlled and Maintained by Microsoft Corporation, 15 F. Supp. 3d 466 (S.D.N.Y. 2014); *see* Brief for Appellant, Microsoft Corporation v. United States (2d Cir. ); and Brief for the United States of America, Microsoft v. United States (2d Cir.). *See also* Sam Thielman, *Decision in Microsoft Case Could Set Dangerous Global Precedent, Experts Say*, GUARDIAN, Sept. 9, 2015.

[2] Dan Jerker B. Svantesson, *A New Jurisprudential Framework for Jurisdiction: Beyond the Harvard Draft*, 109 AJIL UNBOUND 69 (2015).

[3] Horatia Muir Watt, *A Private (International) Law Perspective: Comment on "A New Jurisprudential Framework for Jurisdiction"*, 109 AJIL UNBOUND 75 (2015).





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of "old wine in new bottles," with many of the same debates having occurred around extraterritorial enforcement of antitrust law in previous decades.[4] But Ryngaert also observes that Svantesson has done something new by elevating his criteria to first-order principles, instead of being supplementary concerns. In this sense, Svantesson may be calling jurisdiction by its true name, to use a Confucian phrase.

My own comment on his piece considers the general issue of when legal tests ought to change, in light of the old debate on rules and standards.[5] Svantesson's approach is one in which we move away from an increasingly anachronistic rule, which may be producing more errors than it used to, toward a looser standard that requires careful balancing of interests. Standards require application of general principles to particular cases, and so require more skill in the adjudicator. I consider whether the international judiciary has the necessary skill to improve upon the current state of affairs.

As the Second Circuit looks to decide the Microsoft case, the Symposium reminds us of the stakes involved and the continuing need to bring conceptual clarity to issues of jurisdiction in a global world.

[4] Cedric Ryngaert, *An Urgent Suggestion to Pour Old Wine into New Bottles: Comment on "A New Jurisprudential Framework for Jurisdiction"*, 109 AJIL UNBOUND 81 (2015).

[5] Tom Ginsburg, *Comment on "A New Jurisprudential Framework for Jurisdiction: Beyond the Harvard Draft"*, 109 AJIL UNBOUND 86 (2015).