

Extraterritoriality

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Extraterritoriality

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A. Notion

1 The terms ‘extraterritoriality’ and ‘extraterritorial jurisdiction’ refer to the competence of a → *State* to make, apply and enforce rules of conduct in respect of persons, property or events beyond its territory. Such competence may be exercised by way of → *prescription*, adjudication or enforcement. Prescriptive jurisdiction refers to a State’s authority to lay down legal norms. Adjudicative jurisdiction refers to a State’s authority to decide competing claims. Enforcement jurisdiction refers to a State’s authority to ensure → *compliance* with its laws. As will be seen below, these distinctions are important because some methods of exercising extraterritorial → *jurisdiction of States* are more likely to conflict with the competence of other States and therefore more likely to raise questions as to their compatibility with → *international law*.

2 In the absence of a universally accepted definition, extraterritoriality is an elusive concept that may include a wide variety of practices. Depending on the definition chosen it may encompass, for example, the adoption and adjudication of anti-trust legislation (see also → *Antitrust or Competition Law, International*), the regulation of the export of toxic waste, the bringing to justice of terrorists and drug-traffickers, and the implementation of → *economic sanctions*. The wide variety of matters covered by the concept makes it difficult to draw general conclusions about its status under international law.

B. History and Context

3 The traditional view is that the exercise of extraterritorial jurisdiction is permissible in exceptional circumstances only. States enjoy full sovereign powers within their territories and any exercise of jurisdiction on another State’s territory obviously risks infringing that State’s → *sovereignty*. In the *Island of Palmas Case (Netherlands v United States of America)* (→ *Palmas Island Arbitration*), arbitrator Max Huber famously identified the ‘principle of the exclusive competence of the State in regard to its own territory’ as the ‘point of departure in settling most questions that concern international relations’ (at 838).

4 However, in the age of → *globalization* Huber’s presumption against extraterritoriality has become less self-evident. As Judges Higgins, Kooijmans, and Buerghenthal pointed out in their joint individual opinion in the → *Arrest Warrant Case (Democratic Republic of the Congo v Belgium)*: ‘The movement is towards bases of jurisdiction other than territoriality’ (at 76). States increasingly perceive the need to protect both their own interests and the interests of the → *international community* in respect of conduct occurring beyond their borders. Developments driving this trend include increases in *a*) international travel and → *migration* of persons; *b*) international trade and investment by multinational enterprises (see also → *Investments, International Protection*); *c*) → *peacekeeping*, peacemaking and other military enforcement action; *d*) environmental degradation and climate change (see also → *Environment, International Protection*; → *Climate, International Protection*); *e*) → *transnational organized crime* and international → *terrorism*; and *f*) legal and illegal uses of the → *internet*. In the past the exercise of extraterritorial jurisdiction raised questions especially under → *international economic law* and → *international criminal law*. As a result of globalization it increasingly raises questions under other branches of international law as well, including international → *human rights* law and international environmental law.

5 States differ considerably in their general approach towards extraterritorial jurisdiction. For example, although they share a common legal tradition, the United Kingdom (‘UK’) and the United States of America (‘US’) have often found themselves at different ends of the spectrum. The UK has long been a committed supporter of Huber’s restrictive attitude. The

US, on the other hand, has particularly since World War II frequently seen fit to exercise extraterritorial jurisdiction by way both of prescription, adjudication and enforcement.

C. Lawfulness

6 A State's attempt to make, apply and enforce rules of conduct in respect of events outside its own territory may bring it into direct conflict with the territorial State's attempt to do the same. The exercise of extraterritorial jurisdiction may therefore clash with the prohibition of interference in another State's internal affairs or violate its right to → *territorial integrity and political independence*. Due to the scarcity of relevant international case law, the general principles governing the conflict are still derived from the 1927 judgment of the → *Permanent Court of International Justice (PCIJ)* in *The Case of the SS 'Lotus' (France v Turkey)* (→ *Lotus, The*). The *Lotus Case* revolved around the question whether a Turkish court could try a French national for criminal responsibility for a collision on the → *high seas* between a French and a Turkish vessel resulting in the deaths of Turkish nationals on board the Turkish vessel. The *Lotus Case* is rather peculiar because of its subject-matter (a maritime accident on the high seas), the narrow majority by which it was adopted (casting vote of the President of the PCIJ) and the long time which has passed since it was adopted. Nevertheless, the judgment produced three principles that still govern the lawfulness of the exercise of extraterritorial jurisdiction (*Lotus Case* 18–19).

7 The first principle is that whether a State may lawfully exercise extraterritorial jurisdiction is a matter of international law. This is not controversial. It makes sense that States cannot unilaterally decide the limits of their own competence to exercise jurisdiction beyond their territories.

8 The second principle is that, as a general rule, international law prohibits the exercise of extraterritorial enforcement jurisdiction unless this is specifically permitted:

[T]he first and foremost restriction...upon a State is that—failing the existence of a permissive rule to the contrary—it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention (*Lotus Case* 18–19).

Note that this principle refers specifically to the exercise of enforcement jurisdiction and not to prescriptive or adjudicative jurisdiction. The principle is again not controversial and reflects the law as it stands.

9 The third principle is that the exercise of extraterritorial prescriptive and adjudicative jurisdictions is permitted only if there is a sufficient connection between the State exercising it and the extraterritorial event. Unfortunately the PCIJ states this principle in more ambiguous terms:

Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, [international law] leaves them in this respect a wide measure of discretion which is only limited in certain areas by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable (*Lotus Case* 19).

While it is perfectly understandable that the PCIJ wished to point out that the exercise of extraterritorial jurisdiction by way of prescription and adjudication is less objectionable than by way of enforcement, → *State practice* does not support the view that the exercise of any form of prescriptive and adjudicative jurisdiction beyond a State's borders is permitted as long as there is no specific rule of international law prohibiting it.

10 What is a 'sufficient connection' may be established initially with reference to certain general principles of jurisdiction (see also → *Criminal Jurisdiction of States under International Law*). However, it should immediately be pointed out that these principles must be employed with great caution. The suggestion sometimes made is that any exercise of extraterritorial jurisdiction that is in conformity with one of these principles is automatically lawful under international law. This would be far too simplistic. The principles differ considerably in the extent to which they offer a legitimate basis for exercising jurisdiction.

11 The 'active nationality principle' refers to the (criminal) jurisdiction a State may exercise in respect of its own nationals abroad, including not only natural persons but also companies, ships and aircraft that have its → *nationality*. This principle dates back to pre-Westphalian times and is therefore well-established. Examples of the modern application of the active nationality principle in multilateral treaties may be found in Art. 5 (1) (b) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984 ([adopted 10 December 1984, entered into force 26 June 1987] 1465 UNTS 112; 'CAT') and Art. 7 (1) (a) International Convention for the Suppression of the Financing of Terrorism ([signed 9 December 1999, entered into force 10 April 2002] 2178 UNTS 197). The principle is also increasingly being employed by States to criminalize certain serious offences such as acts of paedophilia and → *human trafficking* when committed by their own nationals abroad.

12 The 'passive personality principle' refers to the (criminal) jurisdiction a State may exercise in respect of conduct abroad which injures its own nationals. This basis for jurisdiction has long been considered controversial. However, in their joint separate opinion in the *Arrest Warrant Case* Judges Higgins, Kooijmans, and Buergenthal asserted that the principle 'today meets with relatively little opposition, at least so far as a particular category of offences is concerned' (at 77). What the three judges apparently had in mind is that the passive personality principle is increasingly being included in treaties intended to combat crimes under international law. Examples are Art. 5 (1) (b) CAT and Art. 6 (2) (a) International Convention for the Suppression of Terrorist Bombings ([signed 15 December 1997, entered into force 23 May 2001] (2149 UNTS 256). Interestingly, these provisions also provide a legal basis for the exercise of jurisdiction in respect of nationals of non-States Parties to the treaties in question. This indicates that the provisions are regarded as codifications of → *customary international law*.

13 The 'protective principle' refers to the (criminal) jurisdiction a State may exercise in respect of persons, property or events abroad that may constitute a threat to its essential interests, including acts against national security, such as coups d'état, terrorist acts, counterfeiting currency and forging → *passports* (→ *International Criminal Jurisdiction, Protective Principle*). Although the validity of this principle is not contested it provides a rather uncertain basis for the exercise of extraterritorial jurisdiction because the conditions under which it may be relied upon are ill-defined.

14 The 'universality principle' refers to the (criminal) jurisdiction a State may or is required to exercise in respect of certain serious crimes irrespective of the location of the crime and irrespective of the nationality of the perpetrator or the victim. The → *universality* principle is applicable only to certain crimes under international law that have been made subject to universal jurisdiction either by a multilateral treaty or under customary international law, such as → *genocide*, → *war crimes*, → *crimes against humanity*, and torture (→ *Torture, Prohibition of*). Unlike the protective principle the interests protected are not those of the prosecuting State but those of the international community as a whole. Perhaps for this reason the universality principle long remained a theoretical concept only. It was contained in widely ratified treaties—with respect to war crimes, for example, in Art.

49 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 1949 (75 UNTS 31), Art. 50 Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 1949 (75 UNTS 85), Art. 129 Geneva Convention relative to the Treatment of Prisoners of War of 1949 (75 UNTS 135) and Art. 146 Geneva Convention relative to the Protection of Civilian Persons in Time of War of 1949 (75 UNTS 287)—but not applied in practice. The emergence of international criminal tribunals, demonstrating that war crimes could be successfully prosecuted, and sustained campaigning by human rights groups has changed this state of affairs.

15 The ‘effects principle’ refers to the (civil) jurisdiction a State may exercise when foreign conduct produces substantial effects on its territory. In the *United States v Aluminum Co of America* (148 F 2d 416 [2nd Cir 1945]) the US Federal Court observed: ‘it is settled law... that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends’ (at 443). Unlike the principles referred to above, the effects principle tends to be invoked in support of the exercise of extraterritorial jurisdiction in commercial rather than criminal cases. In spite of its US origin, the effects principle has also been relied upon by European States, such as Germany and France, and by the European Union (‘EU’) as a justification for their exercise of extraterritorial jurisdiction in anti-trust cases, for example with regard to Amazon, Apple, Facebook, and Google. There is, however, no universal agreement on the precise contents of the effects principle.

16 In other words, these five principles do not provide a coherent and straightforward model by which it can be authoritatively determined whether in a given situation the exercise of extraterritorial jurisdiction by way of prescription or adjudication is lawful or not. There is also considerable overlap between them. In practice States pick and choose from the principles in order to justify the policies they wish to adopt. The US, for example, favours application of the effects principle, because this generally supports its commercial policies. But it is very critical of the universality principle, because it may be relied upon as a legal basis for bringing US officials and members of its → *armed forces* to justice before foreign courts. For the same reason, some African States have also adopted a critical attitude towards the universality principle.

D. Prescriptive and Adjudicative Jurisdiction

1. Economic Law

17 As a result of economic globalization States may perceive the need to protect themselves against harmful conduct by multinational enterprises incorporated in other States. Or they may wish to protect other States against abuses committed by companies incorporated within their own territories. Because of the financial interests involved, questions arising from the exercise of extraterritorial jurisdiction in this area have generated a great deal of State practice, a large amount of case law, and plenty of academic writing. Most notably, there have been several long-standing disputes between the US and the EU regarding the exercise of extraterritorial jurisdiction in the context of their economic and commercial policies. Pursuant to the effects doctrine, the US has taken the view that it is entitled to give its laws extraterritorial reach in response to foreign conduct which produces substantial effects within the US. In the field of competition law, the US government and US courts have relied on this doctrine in numerous anti-trust decisions against non-US companies. But the doctrine has also been applied, for example, in anti-fraud cases when foreign transactions are considered to have substantial effects within the US. In 2002, the US Congress adopted a law declaring new accountancy standards, laid down in the wake of the Enron scandal, applicable also to non-US firms (Public Company Accounting Reform and Investor Protection Act of 2002, Pub L No 107-204, 116 Statutes at

Large 745 (2002)). An example from the environmental field is the US Marine Mammals Protection Act, which bans the import of fish caught with technology resulting in accidental death or injury of ocean mammals in excess of US standards (Section 101 (a) (2) US Marine Mammals Protection Act [1972]). It is not yet clear whether the extraterritorial scope of this provision is incompatible with → *World Trade Organization (WTO)* rules.

18 Legislation or judicial enforcement with extraterritorial effect may also be used to punish or to put pressure on third States or foreign companies to change their conduct. While such economic sanctions may be unproblematic if adopted pursuant to enforcement action taken by the United Nations Security Council they may be controversial if imposed unilaterally (see also → *Unilateral Acts of States in International Law*; → *United Nations, Security Council*). In 1982, in order to induce the Union of Soviet Socialist Republics to improve the human rights situation in Poland, the US proclaimed an embargo on the export to the USSR by non-US firms of equipment relating to oil and gas exploration and exploitation (Export of Oil and Gas Equipment to the Soviet Union [22 June 1982] (1982) 21 ILM 864). In 1996, the US Congress adopted the Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996 ([12 March 1996] (1996) 35 ILM 357) to penalize non-US firms for 'trafficking' in property expropriated by → *Cuba*. The enforcement of these laws was eventually suspended after strong diplomatic protests and the adoption of countermeasures by way of 'blocking statutes' by affected States (Demarches Protesting the Cuban Liberty and Democratic Solidarity [Libertad] Act (1996) 35 ILM 397). Similar disputes are currently occurring as a result of the US withdrawal from the nuclear agreement with Iran and its unilateral imposition of sanctions on companies (including foreign companies) doing business with Iran.

19 Although the US has been the main proponent of extraterritorial measures of this nature, it has not been the only one. Executive organs of the EU have increasingly adopted extraterritorial anti-trust measures against US companies and its courts have followed suit. This tendency is also reflected in fields other than competition law. In 2011 the EU Court of Justice (→ *European Union, Court of Justice and General Court*) rejected a challenge by US aviation companies against the extraterritorial reach of Directive 2008/101/EC on the inclusion of aviation activities in the greenhouse emissions trading scheme (Case C-366/10 *Air Transport Association of America v Secretary of State for Energy and Climate Change* [2011] ECR I-13755). On the other hand, in 2019 the same Court concluded that 'the right to be forgotten' pursuant to the relevant EU data protection directives had no extraterritorial application. Accordingly, search engines outside the EU were not required to carry out de-referencing (Case C-507/17 *Territorial Scope of the Right to De-Referencing* [24 September 2019] ECLI:EU:C:2019:772).

2. Criminal Law

20 As observed by the PCIJ in the *Lotus Case* it is well established that courts of law may not sit on the territory of another State. But such extraterritorial conduct may be perfectly legal if carried out pursuant to an agreement between the States concerned. → *Status of Armed Forces on Foreign Territory Agreements (SOFA)* provide for exclusive jurisdiction by the home State in respect of the adjudication and enforcement of criminal offences committed by members of its armed forces that are based in another State. This type of instrument has long been used to facilitate the stationing of US forces in Europe but is now also being used to ensure criminal immunity for troops engaged in → *United Nations (UN)* peacekeeping. A rare example of actual adjudication on the territory of another State was the establishment—pursuant to the Agreement between the Government of the Kingdom of the Netherlands and the Government of the United Kingdom and Northern Ireland concerning a Scottish Trial in the Netherlands ([signed 18 September 1998, entered into force 8 January 1999] 2062 UNTS 82)—of a Scottish court in the Netherlands to try two

Libyans charged with being responsible for the bombing of a passenger aircraft above the Scottish town of Lockerbie (→ *Lockerbie Trial*).

21 A successful prosecution based on the universality principle contained in the → *Geneva Conventions I-IV (1949)* was first carried out in Denmark in 1994 against a Bosnian Serb (*Director of Public Prosecutions v T* [Eastern High Ct (3rd Div)] [22 November 1994] 1 YIntlHL 431 [English summary]). Subsequently, proceedings based on the principle as contained in the Geneva Conventions and the CAT were successfully conducted in an increasing number of States, including Austria, Belgium, Canada, France, Italy, the Netherlands, Norway, Senegal, Spain, Sweden, Switzerland, the UK, and the US. These were prosecutions not on the basis of the active or passive nationality principle but on the basis of the universality principle, in the interest of the international community as a whole, the only nexus with the prosecuting State being the presence of the defendant in the prosecuting State. In → *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, the → *International Court of Justice (ICJ)* found that, by failing to prosecute former Chadian President Hissène Habré, Senegal had breached its obligations under the CAT.

22 But criminal proceedings based on universal jurisdiction against sitting officials have also resulted in strong objections. The Democratic Republic of the Congo (→ *Congo, Democratic Republic of the*) took the Kingdom of Belgium to the ICJ because one of its investigating magistrates had issued an arrest warrant against Congo's Foreign Minister for having made a speech advocating genocide. In its judgment in the *Arrest Warrant Case* the ICJ concluded that as long as they are in office, Foreign Ministers (→ *Heads of Governments and Other Senior Officials*) and → *Heads of State* enjoy immunity from prosecution before foreign courts, even with respect to crimes against humanity (see also → *Immunities*). Prosecutions based on universal jurisdiction brought in Belgium and Spain against senior US and Israeli officials elicited strong diplomatic protests from these States. Under this pressure, Belgium and Spain considerably restricted the scope of their universal jurisdiction provisions.

E. Enforcement Jurisdiction

23 Extraterritorial enforcement may range from conduct on the territory of another State authorized by that State (such as police investigations, the serving of court papers, discovery and the enforcement of judgments), to conduct without such authorization (such as abductions and assassinations; see also → *Abduction, Transboundary*). Unlike the international legal regime applicable to extraterritorial prescription and adjudication, the legal regime applicable to extraterritorial enforcement is quite straightforward. Without the → *consent* of the host State such conduct is absolutely unlawful because it violates that State's right to respect for its territorial integrity.

24 Consent to extraterritorial enforcement may be granted through bilateral agreements or through multilateral instruments, such as the 1984 Inter-American Convention on Jurisdiction in the International Sphere for Extraterritorial Validity of Foreign Judgments ([done 24 May 1984, entered into force 24 December 2004] (1985) 24 ILM 468) or EU Council Regulation (EC) No 44/2001 of 22 December 2000 on the Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters ([2001] OJ L12/1, 23). In practice, on-the-spot extraterritorial police investigations are often conducted without a formal agreement between the States involved on the basis of informal contacts

between the police forces (see also → *Transboundary Cooperation between Local or Regional Authorities*).

25 An example of extraterritorial enforcement without consent of the host State is the abduction from foreign territory of persons suspected of having committed criminal offences with the purpose of bringing them to justice in the abductors' own State. Thus, Adolf Eichmann was abducted by Israeli agents from the Argentine Republic in 1960 (→ *Eichmann Case*); Israeli nuclear technician Mordechai Vanunu was abducted by Israeli agents from the Italian Republic in 1986; Panamanian General Manuel Noriega was abducted by US armed forces from the Republic of Panama in 1989; and Mexican doctor Humberto Alvarez-Machain was abducted by US agents from the United Mexican States in 1990. Such transfrontier kidnappings without the consent of the territorial State raise the question whether the violation of its territorial integrity and the violation of the human rights of the victim should not present an obstacle to his trial. However, in each of the above cases the domestic courts rejected defence arguments along these lines and relied on the doctrine *male captus bene detentus*. This doctrine has been discredited in most States, but in the US—where it is referred to as the Ker-Frisbie doctrine—the courts still adhere to it.

26 Another example of extraterritorial enforcement action without consent of the host State is the cross-border assassination of non-combatants suspected of having committed criminal offences (see also → *Combatants*). Such targeted killings (→ *Targeted Killing*) may be carried out through precision weapons launched from the air including from drones. This technique was first practised by Israel in the Occupied Territories and by the US in various places around the world but has since also been adopted by other States and armed groups (see also → *Israel, Occupied Territories*). The first reported case occurred in 2002. The New York Times reported that six suspected terrorists driving a Jeep in a remote area in → *Yemen* had been killed by a missile launched from an unmanned Predator drone operated by the US Central Intelligence Agency (J Risen and J Miller 'Threats and Responses: Hunt for Suspects; CIA is Reported to Kill a Leader of Qaeda in Yemen' New York Times [5 November 2002]). In 1985, French secret agents sunk the Greenpeace vessel *Rainbow Warrior* in New Zealand killing one of the people on board (→ *Rainbow Warrior, The*). But unlike the US and Israel, the French government subsequently apologized for the action and agreed to pay compensation to both New Zealand and Greenpeace, thus acknowledging that it had acted contrary to international law.

F. Countermeasures

27 The exercise of extraterritorial jurisdiction contrary to international law will not be recognized by other States. It may also give rise to → *State responsibility* and countermeasures by injured States. A peculiar type of countermeasure against the unlawful exercise of extraterritorial jurisdiction consists of so called 'blocking statutes'. Blocking statutes attempt to prevent the implementation of extraterritorial measures by prohibiting compliance with them. They may prohibit the → *recognition and enforcement of foreign judgments*, prohibit cooperation with foreign court proceedings or provide for the recovery of damages suffered as a result of extraterritorial enforcement measures. Examples of such statutes are the UK's Protection of Trading Interests Act 1980 ([20 March 1980] (1982) 21 ILM 834) and the EU's Council Regulation (EC) 2271/96 of 22 November 1996 on the Protection against the Effects of the Extra-Territorial Application of Legislation Adopted by a Third Country, and Actions Based thereon or Resulting therefrom ([1996] OJ L309/1, 6), both adopted in response to legislation with a contested extraterritorial reach by the US.

G. Evaluation

28 Extraterritorial enforcement action without the consent of the host State clearly remains prohibited under international law. However, the exercise of extraterritorial jurisdiction by way of prescription and adjudication is on the rise. This may cause difficulties if, for example, a merger between two companies is approved in one State and refused in another. Problems of conflicting jurisdiction may be resolved through international cooperation and harmonization of standards. There appears to be a certain amount of convergence of State practice, at least between the US and the EU, in the important area of economic and commercial policies. Representatives of the US and the EU now occasionally consult on the approval of mergers, for example. This should contribute to the prevention of conflicts and the development of a → *consensus* on what is and what is not permitted. At the same time, an increasing number of treaties in the field of international criminal law have codified the principles of extraterritorial jurisdiction in accordance with which perpetrators of crimes under international law—such as human rights violators, terrorists and drug-traffickers—may be brought to justice outside the countries in which they committed their offences. As these treaty provisions are increasingly being relied upon as a legal basis for bringing offenders to trial, this generates a steady flow of judgments further legitimizing the exercise of jurisdiction in respect of crimes committed abroad.

29 According to some observers, the time may therefore now be ripe for a codification of the general rules and principles applicable to the exercise of extraterritorial jurisdiction. This codification might provide, for example, that in order validly to exercise jurisdiction extraterritorially over a person, property, or event, a State must have a sufficient degree of connection to this person, property or event. A valid *prima facie* connection could be asserted with reference to one or more of the principles of jurisdiction listed above. The codification might also distinguish between types of extraterritorial jurisdiction which are less intrusive and therefore less likely to conflict with other States' conduct such as prescription, on the one hand, and more problematic forms such as enforcement, on the other. The codification might furthermore provide that the exercise of extraterritorial jurisdiction is subject to certain limitations. Accordingly, it may not be incompatible with the prohibition of interference with the territorial integrity of other States and the prohibition of intervention in their internal affairs. Following the approach adopted in the Restatement (Third) of Foreign Relations Law of the United States, the codification might also provide that the exercise of jurisdiction should be 'reasonable' and not contrary to the principles of → *comity*.

30 It is doubtful, however, whether the time is really ripe for such an ambitious general codification of the entire field of extraterritorial jurisdiction. Indeed, it is doubtful whether meaningful rules can be conjured up at all. The topic extraterritorial jurisdiction has been on the long-term programme of work of the → *International Law Commission (ILC)* since 2006 but no work has been done on it so far except for a note by the Secretariat (UN ILC 'Extraterritorial Jurisdiction'; see also → *Codification and Progressive Development of International Law*). Therefore, it may be necessary for some time to come to attempt to pursue accommodation on a sectoral basis and to formulate rules and principles applicable to certain regimes of international law only.

Select Bibliography

AV Lowe 'Blocking Extraterritorial Jurisdiction: The British Protection of Trading Interests Act, 1980' (1981) 75 AJIL 257-82.

AV Lowe *Extraterritorial Jurisdiction: An Annotated Collection of Legal Materials* (Grotius Cambridge 1983).

PJ Kuyper 'European Community Law and Extraterritoriality: Some Trends and New Developments' (1984) 33 ICLQ 1013-21.

FA Mann 'The Doctrine of International Jurisdiction Revisited after Twenty Years' (1984) 186 RdC 9-116.

KM Meessen 'Antitrust Jurisdiction under Customary International Law' (1984) 78 AJIL 783-810.

AV Lowe 'The Problems of Extraterritorial Jurisdiction: Economic Sovereignty and the Search for a Solution' (1985) 34 ICLQ 724-46.

KC Randall 'Universal Jurisdiction under International Law' (1988) 66 Texas Law Review 785-841.

FA Mann 'The Extremism of American Extraterritorial Jurisdiction' (1990) 39 ICLQ 410-12.

ALC de Mestral and T Gruchalla-Wesierski *Extraterritorial Application of Export Control Legislation: Canada and the USA* (Nijhoff Dordrecht 1990).

A Bianchi 'Extraterritoriality and Export Controls: Some Remarks on the Alleged Antinomy between European and US Approaches' (1992) 35 GYIL 366-434.

KM Meessen (ed) *International Law of Export Control: Jurisdictional Issues* (Graham & Trotman London 1992).

M Bos 'The Extraterritorial Jurisdiction of States: Preliminary Report' (1993) 65(1) AnnIDI 14-44.

Y Dinstein 'The Extra-Territorial Jurisdiction of States: The Protective Principle' (1994) 65(2) AnnIDI 305-15.

R Maison 'Les premiers cas d'application des dispositions pénales des Conventions de Genève par les juridictions internes' (1995) 6 EJIL 260-73.

AF Lowenfeld 'The Cuban Liberty and Democratic Solidarity (Libertad) Act: Congress and Cuba: The Helms-Burton Act' (1996) 90 AJIL 419-34.

KM Meessen (ed) *Extraterritorial Jurisdiction in Theory and Practice* (Kluwer Law International London 1996).

AV Lowe 'US Extraterritorial Jurisdiction: The Helms-Burton and D'Amato Acts' (1997) 46 ICLQ 378-90.

S Wilske *Die völkerrechtswidrige Entführung und ihre Rechtsfolgen* (Duncker & Humblot Berlin 2000).

L Reydam's *Universal Jurisdiction: International and Municipal Legal Perspectives* (OUP Oxford 2003).

DF Vagts 'Extraterritoriality and the Corporate Governance Law' (2003) 97 AJIL 289-94.

S Macedo (ed) *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law* (University of Pennsylvania Press Philadelphia 2004).

JH Knox 'A Presumption Against Extrajurisdictionality' (2010) 104 AJIL 351-96.

M Langer 'The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes' (2011) 105 AJIL 1-49.

C Ryngaert *Jurisdiction in International Law* (2nd edn OUP Oxford 2015).

C Staker 'Jurisdiction' in MD Evans (ed) *International Law* (5th edn OUP Oxford 2018) 289-315.

M Cremona and J Scott *EU Law Beyond EU Borders: The Extraterritorial Reach of EU Law* (OUP Oxford 2019).

Select Documents

American Law Institute *Restatement (Third) of Foreign Relations Law of the United States* (American Law Institute Publishers St Paul 1987).

Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium) [2002] ICJ Rep 3.

Harvard Law Review Association (ed) 'Developments in the Law: Extraterritoriality' (2011) 124 HarvLRev 1226-1304.

International Bar Association (ed) 'Report of the Task Force on Extraterritorial Jurisdiction' (2009) <<https://www.ibanet.org/>> (15 September 2020).

Island of Palmas (Netherlands v United States of America) (1928) 2 RIAA 829.

The 'Lotus' (France v Turkey) PCIJ Series A No 10.

Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal) (Merits) [2012] ICJ Rep 422.

UN ILC 'Extraterritorial Jurisdiction' in 'Report of the International Law Commission: 58th Session' (1 May-9 June and 3 July-11 August 2006) UN Doc A/61/10 (Annex E).