

## Regulations of National Extraterritorial Jurisdictions through Treaties and Principles of Customary International Law

 Usman Hameed<sup>1</sup>

 Kashif Imran Zadi\*<sup>2</sup>

 Muhammad Waqas Gujjar<sup>3</sup>

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### Abstract

Extraterritorial jurisdiction over international crimes remains one of the most contentious areas of public international law. This controversy has resulted from international scholars' unwillingness to distinguish between core international crimes, i.e., atrocity crimes and treaty crimes. While the primary mode of establishing jurisdiction as regards the former remains territorial, the latter, on the other hand, essentially involves extraterritorial jurisdiction. Whereas the current scholarly debate remains focused on the legality and illegality of extraterritorial jurisdiction, scant attention has been given to the crystallization of rules of jurisdiction, keeping in view the unavailability of extraterritorial jurisdiction for certain types of crimes. The perils involved in the ambiguity of regulations include an excess of jurisdiction or no jurisdiction at all, threatening to cause the failure of the international legal regime and impunity for perpetrators. As most treaty crimes imply border crossing as an essential element of criminal activity, the major problem in their prosecution relates to competing and conflicting jurisdictional claims. Needless to state, the intricate jurisdictional issues raised by treaty crimes would only be resolved through the proper application of international law. Although most transnational crimes have been subjected to comprehensive regimes of various multilateral Conventions, state parties to such Conventions remain free to interpret treaty provisions largely following their national preferences. Moreover, no consensus exists among states regarding applying various national and international law principles in interpreting treaties.

**Keywords:** Atrocity crimes, extraterritorial jurisdictions, international law, treaty crimes, multilateral Conventions

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<sup>1</sup>Professor, Bahria University, Islamabad Pakistan

<sup>2</sup>Associate Professor, School of Law and Policy, University of Management and Technology, Lahore, Punjab, Pakistan

**Corresponding Author:** [kashif.zadi@umt.edu.pk](mailto:kashif.zadi@umt.edu.pk)

<sup>3</sup>Lecturer, School of Law and Policy, University of Management and Technology, Lahore, Punjab, Pakistan



## 1 Background of the Study

### 1.1 Application of Domestic Penal Law Abroad

Traditionally, states were at liberty to legislate domestic laws with an extraterritorial application (Kamminga, 2020), yet the enforcement of such laws remains confined to the state territory. However, in recent times, the rule has undergone a shift, permitting various exceptions to the territorial principle (Shaw, 2008). For instance, many states now regulate the conduct of their nationals abroad. Similarly, several conditions apply their domestic laws abroad on the grounds of the universality principle and, more recently, protective and passive personality principles (Iacob, 2020; Ryngaert, 2023). Therefore, many states have justified their extraterritorial enforcement operations based on domestic laws (Ryngaert, 2023; Schmidt, 2022). Those domestic laws are often founded on multilateral conventions dealing with international crimes (Rose, 2022). While the Conventions obligate the state parties to enact domestic laws establishing jurisdiction over the crimes, they rarely determine the scope of such domestic legislation (Shao, 2021). Consequently, this silence of treaties concerning the reach of domestic laws allows the states to infinitely expand the ambit of their domestic laws, giving to concurrent jurisdictional claims.

Hence, the critical issues raised by the transformation of the territorial principle (Glasze et al., 2023) include whether there are any limits to such expansion of state laws, at what point a domestic law could be considered to have constituted a violation of state sovereignty, how the conflicts of jurisdictions between states can be resolved, and most importantly, whether it has become a rule of international law that domestic laws having extraterritorial range can give a justification for extraterritorial enforcement (Kamminga, 2020). If so, what are the grounds on which such extraterritorial jurisdictions can be claimed in domestic law?

The earliest court case recognizing the reach of domestic penal law abroad is the PCIJ's judgment in the famous *Lotus* case (Ntahiraja, 2022). It was held that Turkish penal law could extend to the high seas. It was further observed in the same case that states have broad discretion in extending their laws abroad, and any prohibitive rule of international law only qualifies this discretion (Ryngaert, 2023; Schmidt, 2022). As a consequence of this judgment, several states expanded the scope of their national laws to cover extraterritorial situations (Gevurtz, 2022). While the *Lotus* judgment accepted the extraterritorial expansion of Turkish domestic law based on objective territorial principle only (Goodman, 2022), the accumulations of domestic jurisdictions after *Lotus* also relied on several other regulations such as effects of a crime abroad, threats to national security, injury to national and seriousness of the crimes. Various court cases subsequently upheld many of these domestic laws expansions. For instance, in *Eichman and Demjanjuk v. Petrovsky* the extension of penal law abroad was accepted for the seriousness of the crime. However, this contention was challenged by the ICTY in *Tadic* the point, which observed that extraterritorial expansions of domestic law based on universality could defeat the very purpose of international criminal justice (Garrod, 2023b; Paust, 2000). Apart from Universality, the US Supreme Court in *US V. Yunis* accepted the extraterritorial scope of US law abroad on injuring its nationals (Mygatt-Tauber, 2023). Nevertheless, it cannot be said that other states will follow the approach as the US move to extend the scope of its security law abroad was met with strong resistance from the international community.

Because of the above analysis, it can be argued that the principle established by the *Lotus* case concerning broad state discretion still holds (Anil et al., 2021). There are no restrictions on expanding state jurisdiction except diplomatic pressure and voluntary restraint. However, it can be argued that the expansion of national laws cannot be taken to such an extent that it interferes with the domestic affairs of another state. However, in response to this argument, it has been suggested that domestic law can cross the non-intervention barrier, provided such expansion is permissible under the rule of self-defense (Cardiel et al., 2017; Colangelo, 2007). An extensive analysis of state practice is required to ascertain the legality of the self-defense argument.

## 1.2 Treaties Regulating Transnational Crimes

The study's basic premise is to recognize that the solution to all problems associated with the extraterritorial expansion of national laws lies in clarifying their scope in multilateral conventions governing the crimes (Ntahiraja, [2022](#)). Hence, the paper suggests that if the provisions of treaties relating to domestic laws are elaborated in more detail, jurisdictional conflicts could be minimized to a great extent. For instance, treaties can define the limits of domestic laws. They can declare a domestic law that purports to usurp individual freedom, such as freedom from arbitrary arrest and freedom of expression.

While treaty law provides the basic framework for concerted international efforts to suppress transnational crimes, the absence of clarity in various provisions of treaties remains a constant source of friction among states (Ryngaert, [2023](#)). For example, some treaties relating to international crimes oblige the state parties to provide the 'broadest possible bases of jurisdiction' (Cormier, [2020](#)). In their domestic law, many states interpret this provision as a duty upon state parties to create domestic jurisdiction over the crime and exercise it when the offender is present within the territory. On the contrary, some states understand this provision as an entitlement to punish the crimes regardless of any territorial or nationality link with the offender or event (Paust, [2000](#)). Similarly, treaties providing multiple bases of jurisdiction do not usually explain whether a state party could exercise extraterritorial jurisdiction without any domestic enabling law (Garrod, [2023b](#); Gevurtz, [2022](#)). Consequently, this ambiguity deprives the accused of the domestic fair trial procedure and encourages the states to take unilateral action, which negates the consensual nature of international law. Likewise, treaties do not generally require state parties to provide a uniform definition of crime in their domestic law (Leider, [2021](#)). This results in vaguely defined crimes, making it possible for states to incorporate many more activities into their domestic law than the treaty's drafters initially intended. Taking benefit of various ambiguities in treaties regulating international crimes, several states have started claiming "unrestrained." Extraterritorial jurisdiction threatening the fundamental rules of international law relating to non-intervention and sovereign equality of states.

## 2 Different Models of States' Approaches to Extraterritorial Jurisdiction

To explain different state approaches concerning the expansion of national laws abroad, three models, vertical, moderate, and horizontal, have been presented in this study (Falk, [1958](#)). The three models represent different schools of thought concerning extraterritorial jurisdiction over transnational crimes. A brief description of the three approaches is given as follows;

### 2.1 Vertical Model

The vertical model implies that the authority to prosecute arises directly from the rules of international law. Each state can apply domestic laws to the crime in issue, provided the offense has some effects on its territory (Rose, [2022](#); Shao, [2021](#)). They claim further that a crime's political and economic impacts can trigger the application of their laws. Hence, their domestic laws provide for extraterritorial operation on various grounds, including continuity of offense, negligence, or reasonable foreseeability (Goodman, [2022](#); Kamminga, [2020](#)). In short, the adherents of the vertical model recognize no limit on their authority. In their view, their jurisdiction is based on the seriousness of the crime; hence, it must be unrestrained. Similarly, they also claim unlimited jurisdiction over nationals abroad.

### 2.2 Moderates

This group maintains that while states are entitled to act unilaterally, their authority is restricted by various principles of international law, such as genuine and effective link, custody of the accused, and domestic enabling law (Chimni, [2022](#); Lautensach, [2020](#)). Moreover, they contend that the effects of a crime abroad can only give jurisdiction if one of the constituent elements of

the crime occurred within the territory of the state claiming jurisdiction (Ntahiraja, [2022](#); Schmidt, [2022](#)). Furthermore, they contend that jurisdiction can only be exercised against a national living abroad if the offense is serious.

### 2.3 Horizontal Model

The exponents of the horizontal model categorically reject the above two models of jurisdiction by declaring them legal fictions and allowing extraterritorial jurisdiction where it does not interfere with the domestic concern of the host state (Roberts, [2001](#)). They do not even recognize the universality of a crime as grounds for interference abroad, suggesting that it is enforceable only among the parties to a treaty and that only their nationals can be subjected to such jurisdiction (Müllerson, [2021](#)). Regarding prosecutions of residents abroad, they contend it could only be permissible when it is just and proper. In their view, a jurisdiction could be considered just and appropriate solely where it does not interfere with the social, political, and cultural development of another state and must not require the other form to do what the forum state itself is not prepared to do.

## 3 Identifying Customary Law Rules of Jurisdiction

### 3.1 Domestic Law

As there is no universal Convention on the law of jurisdiction, the present study investigates customary law norms relating to extraterritorial jurisdiction over transnational crimes.

One way of identifying customary rules of jurisdiction is to look into states' domestic laws. While domestic law plays a central role in prosecuting transnational crimes, no uniformity is visible in the judgments of domestic courts concerning the application of rules of international law (Macdonald & Johnston, [1986](#)). There can be two reasons for this outcome (Akehurst, [1972](#); Orakhelashvili, [2022](#)). Firstly, as all municipal systems derive their competence from domestic laws and constitutions, their laws correspond more to their national ideologies than to the rules of international law. Secondly, national self-interest plays a more decisive role in municipal courts than global management (Reydam, [2004](#)). Law. Consequently, some states confine the reach of their national laws to state territory, whereas others infinitely expand them beyond their borders (Jaya & Anditya, [2020](#)). Hence it can be argued that national systems provide an unreliable basis for determining appropriate rules for exercising jurisdiction over transnational crimes. However, this study assumes that those principles of municipal law which are non-controversial or which have been accepted by most states can prove extremely useful in evolving a cohesive system of jurisdiction over transnational crimes.

### 3.2 Traditional Principles of Jurisdiction

Another way of identifying rules of customary law is to analyze the traditional principles of jurisdiction (Roberts, [2001](#)). As regards the relevance of these principles, some argue that their significance lies in the fact that states acknowledge them as rules reflecting international law (Müllerson, [2021](#)). Since most of them tend to justify their jurisdictional claims based on these principles. On the other hand, a few maintain that they are undependable in determining the reasonableness of a jurisdictional claim, as it is impossible to weigh the interest of one state relative to the welfare of another. However, this study presumes that apart from the passive personality principle the dispute concerning the application of these principles does not so much relate to their usefulness or legality but more to their scope of application. Indeed, the controversy surrounding them mainly revolves around only one question: whether states are free to exercise extraterritorial jurisdiction based on these principles alone or, in addition to them, any other connection between the forum state and the crime is required.

#### 4 Scope

While the analysis of issues in this paper is focused on extraterritorial jurisdiction over transnational crimes, it is essentially based on the same general principles of law and reasoning advanced by scholars that apply to prevalent international crimes. Although multilateral conventions primarily regulate transnational crimes, this study, in addition to explaining various treaty provisions, also considers the degree to which preexisting principles of general and customary international law apply to transnational crimes (Evans & Wickremasinghe, [2003](#)). Moreover, the study examines basic rules, concepts, and norms of criminal justice common to all domestic systems or accepted by most of them and then considers their applicability to transnational crimes (Garrod, [2023a](#)). Furthermore, the study also considers how far new jurisdictional principles are required to prosecute international crimes effectively (Jaya & Anditya, [2020](#)). Consideration is also given to assessing the quality of some of the emerging principles. Of jurisdiction, as provided in domestic and international law; these, for example, include the requirement of notice to the accused, due process requirement, and doctrine of male captus bene détentés (Fellmeth & Horwitz, [2021](#)).

As regards the nature of crimes, the study is confined to transnational crimes, including terrorism, money laundering, drug trafficking and human smuggling, corruption, arms smuggling, and sex slavery (Lautensach, [2020](#); Saul, [2020](#)). Therefore, general international crimes such as war crimes, torture, genocide, and crimes against peace and humanity are excluded from the scope of this study.

Much of the state practice discussed in this paper relates to European Countries and USA, as most of the international conventions dealing with transnational crimes have originated in these countries. However, to expand this study's focus on the current issues relating to terrorism. South Asian Countries have also been considered.

Another point requiring clarification concerning the scope of study relates to the kind of jurisdiction. As it may be clear by now, it refers only to the law of legislative jurisdiction and not the law of enforcement jurisdiction. However, if required for analysis, specific issues of enforcement jurisdiction will also be touched upon. For the present study term, legislative jurisdiction includes all administrative, legislative and judicial acts relating to applying state laws on transnational crimes (Chimni, [2022](#)). Moreover, considering the nature of international crimes, the study primarily concerns extraterritorial criminal jurisdiction (Arnell & Faturoti, [2023](#)).

The extraterritorial jurisdiction over international crimes is best regulated through treaty law (Garrod, [2023a](#))—however, multiple jurisdictional grounds in various treaties (Chimni, [2022](#); Evans & Wickremasinghe, [2003](#)). Give rise to their diverse interpretations resulting in weakening the multilateral system and reinforcing unilateralism. Hence jurisdictional provisions in treaties ought to be defined with precision and interpreted in the light of established principles of national and international law (Shao, [2021](#)).

#### 5 Conclusion

In conclusion, it is submitted that treaties provide the best way to minimize uncertainties in domestic laws having an extraterritorial scope. This can be done by clarifying treaty provisions relating to domestic law. For instance, jurisdiction under objective territoriality can be made conditional upon occurrence of a part of crime within state territory. Similarly, effects doctrine can be restricted by requiring a direct and substantial impact (Akehurst, [1972](#); Orakhelashvili, [2022](#)) of the effects within the territory of the state claiming jurisdiction. Moreover, the protective principle can be associated with a genuine and effective link with the crime, and the universality principle can be curtailed by requiring custody of the accused. Furthermore, state parties to the treaties can also be obligated to provide due process standards in their domestic laws. By requiring

state parties to fulfil these obligations, treaties can rule out the unnecessary expansions of state laws on fictional grounds such as continuing offence theory, negligence to prevent harm, and the male captures bene détentes principle. Finally, proscribed acts can be defined with more precision to make the treaty regimes more effective, and judicare requirement can be made a non-derogatory principle of international law. An approach of interest balancing and willful restraint may also be adopted in treaties to avoid jurisdiction conflict.

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