1. Introduction

1. INTRODUCING EXTRATERRITORIALITY

Assertions of extraterritorial jurisdiction provide a procedural apparatus through which the future of transnationalism can be distilled. The adjudication on exercises of extraterritoriality by domestic constitutional courts, for example, sets the stage for a broader debate as to the appropriate place of national courts in global governance and transnational crime regulation. It also calls into question the place of international law in national courts. For this reason, the regulation of extraterritorial jurisdiction has significant implications for human rights, the rule of law and international relations. It also is fertile ground for the transmogrification of traditionally private law doctrines, such as the abuse of rights doctrine, into the public law space. This is because mechanisms by which to resolve jurisdictional conflicts and jurisdictional restraints are generally more developed in the private than in the public law space. Further, the demarcation between notions of ‘public’ and ‘private’ law doctrine is generally overstated. Both are capable of informing the other, in the same way that domestic and international law frameworks are also capable of symbiosis.

The term ‘extraterritoriality’ is a broad concept. It is a term used differently by different authors. For example, some commentators are concerned with the extraterritorial operation of human rights law, or extraterritorial enforcement through military action. Some describe assertions of legislation that apply extraterritorially, but that have a territorial nexus, to be ‘territorial’ in nature. Others have considered the potential of unilateral assertions of extraterritorial jurisdiction to realise global values.\(^1\) There is also commentary expressing a number of concerns about the unilateral exercise of extraterritorial jurisdiction, including that it is undemocratic, that it undermines meaningful multilateralism, and leads to piecemeal approaches to shared problems and the fragmentation

of international law. Competing claims to jurisdiction can also contribute to tensions between States. The research that led to the writing of this book was undertaken in the context of, but separate to, this broad spectrum of commentary. The particular focus of this work is on criminal offences in domestic legislation that apply to conduct occurring, or partially occurring, outside the geographical boundaries of that State. In essence, the premise underlying the work is that the principles of law restraining extraterritoriality have not kept pace with its exercise.

2. WHAT IS EXTRATERRITORIAL JURISDICTION AND WHY DOES IT MATTER?

The term ‘extraterritorial jurisdiction’ describes an exercise by a State of prescriptive, adjudicative or enforcement authority over conduct outside that State’s physical territory. The assertion of jurisdiction by States outside their territory can be a source of controversy and legal uncertainty. This is because the principles of jurisdiction under international law do not adequately resolve competing claims to jurisdiction and are primarily concerned with the relationship between States and not as between the State and the individual.

Under customary international law, States are entitled to exercise jurisdiction on three main bases: territoriality, nationality and universality. Put simply, the nationality principle can provide a State with grounds for jurisdiction where a victim (passive nationality) or a perpetrator (active nationality) is a national of that State. The territoriality principle may be invoked where conduct either takes place within a nation’s borders (subjective territoriality), or the effects of the conduct are felt within the borders (objective territoriality). The universality principle is reserved for conduct recognised as a crime under international law, such as piracy, genocide and crimes against humanity. International law also

---


See, eg, the tension in relations between India and Italy as a result of competing assertions of jurisdiction in the Italian Marines Case, including as reported on by Devirup Mitra, ‘India, Italy Spar Over Marines Issue Again as Ad-hoc Tribunal Reviews Enrica Lexie Case’, The Wire, 30 March 2016 <http://thewire.in/2016/03/30/india-italy-spar-over-marines-issue-again-as-ad-hoc-tribunal-reviews-enrica-lexie-case-26752/>.

Danielle Ireland-Piper - 9781786431783
Downloaded from Elgar Online at 08/18/2019 12:37:13AM via free access
recognises a ‘protective principle’, wherein a State can assert jurisdiction over foreign conduct that threatens national security. There is also some support for an ‘effects principle’, which gives jurisdiction over extraterritorial conduct, the effects of which are felt by a State.

While the topic of extraterritorial criminal jurisdiction has ‘attracted considerable interest in recent years, largely because of concerns raised by international terrorism, fraud, and other forms of high-profile transnational crime’, it has, nonetheless, ‘suffered from many years of neglect, and remains largely misunderstood by the majority of criminal lawyers’. This may be because, since the emergence of the sovereign nation State, jurisdiction has generally been understood by reference to geographical borders. Assertions by States of jurisdiction over crimes occurring outside their territory, such as piracy or treason, occurred as an exception to the rule. This is particularly the case in common-law jurisdictions. The late twentieth and early twenty-first century saw an increase in transnational organised crime. States became interested in criminal activity occurring in other parts of the world, either because of the unwillingness or inability of another State to prosecute serious crime, or because it served some sort of domestic or foreign policy agenda.

In response to the increased sophistication of transnational crimes, the international community developed treaties that either called for, or permitted, extraterritorial application of some types of domestic criminal offences. For example, the 1989 Convention on the Rights of the Child (CRC) and the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography together require State Parties to criminalise child prostitution whether or not the acts occur domestically or transnationally. All countries of the world but two are party to the CRC, making it one of the most universally ratified of all United Nations Conventions. Other examples include international anti-corruption frameworks: the major international treaties on anti-corruption either

---

5 Ibid.
6 Assertions of extraterritoriality in the common law world tend to be *ad hoc*. By contrast, criminal codes in European jurisdictions such as Switzerland, France, Spain and Belgium often have a generic extraterritorial reach over nationals. This is discussed in further detail in Chapter 2.

\begin{quote}
a gradual movement towards bases of jurisdiction other than territoriality can be discerned. This slow but steady shifting to a more extensive application of extraterritorial jurisdiction by States … has led to … the recognition of other, non-territorially based grounds of national jurisdiction.\footnote{Joint separate opinion of Judges Higgins, Kooijmans and Buergenthal in \textit{Democratic Republic of the Congo v Belgium (Arrest Warrant)} [2002] ICJ Rep 3, 73.}
\end{quote}

In essence, assertions of extraterritorial jurisdiction have become more common. While there have been several well-known and widely examined international decisions relating to extraterritoriality under international law, the reality is – in the administration of ‘everyday’ justice – it is domestic courts who are called upon to adjudicate on such exercises. More often than not, this adjudication occurs in cases, the significance of which is often overlooked by scholars and practitioners alike. Among other things, this book seeks to engage with some of those decisions.

\section*{3. THE PURPOSE OF THIS BOOK}

Assertions of extraterritorial criminal jurisdiction do not often fit neatly in either the international law or domestic law regulatory ‘space’.
Although influenced by both, such assertions nonetheless exist in a hybrid ‘third space’. For example, international criminal law frameworks exist for international crimes. Domestic law frameworks exist for territorial crimes. By contrast, domestic laws with extraterritorial scope do not fit neatly in either domestic or international law frameworks and raise issues under both. In this way, there is a third space, the regulation of which lacks clarity. In short, the preparedness of States to use extraterritorial criminal jurisdiction has outstripped the legal restraint of its exercise. This is problematic because, ‘[t]here is no more important way to avoid conflict than by providing clear norms as to which State can exercise authority over whom, and in what circumstances. Without that allocation of competences, all is rancour and chaos’.12

There is, however, little scholarly examination of the relationship between individual rights and extraterritorial jurisdiction. Research on extraterritorial procedural rights is a ‘vastly underdeveloped field’.13 This is unfortunate because, ‘by their nature extraterritorial activities take place in circumstances where individuals are extremely vulnerable’.14

In that context, while this book considers principles of jurisdiction in detail, its essential purpose is to investigate principles of jurisdictional restraint that can apply to the relationship between the State and the individual. Specifically, the means by which assertions of extraterritorial criminal jurisdiction are regulated in Australia, India and the United States are considered. These countries were chosen for comparison because each is a common-law jurisdiction with a federal system of government and a written constitution. The different approaches adopted by each are instructive of the confusion and inconsistencies that can reign in the regulation of extraterritoriality. Each points to a need to identify common themes and solutions to the problems that arise at the crossroads where international law and domestic law meet. As will be discussed in further detail in Chapter 3, a particular conception of the rule of law is adopted so as to provide criteria by which to measure the regulation of extraterritorial criminal jurisdiction in Australia, India and the United States. In this way, the analysis proceeds on the assumption that while the rule of law is a contested concept, at a bare minimum it requires:

---

1) that the law must be both readily knowable, and certain and clear;
2) that the law should be applied to all people equally, and operate uniformly in circumstances which are not materially different; and
3) that there must be some capacity for judicial review of executive action.

The potential utility of the ‘abuse of rights’ doctrine as a regulator of extraterritorial criminal jurisdiction is also considered.

As stated at the outset, this book is concerned with the regulation of extraterritorial jurisdiction by municipal courts rather than international courts and tribunals. This is not to say that the issue of the relationship between individual rights and jurisdiction is not also relevant to international tribunals. It is. For example, Susan Lamb has considered the arrest preceding the decision of the International Criminal Tribunal for the former Yugoslavia (ICTY), in Prosecutor v Dokmanovic. The arrest had allegedly ‘been effected by an elaborate ruse on the part of the Office of the Prosecutor and a peace-keeping force, whereby Dokmanovic had been enticed to enter a UN vehicle on the Serbian side of the border with Eastern Slovenia, driven to a military base and there detained’. Lamb also suggests that an example of an ‘alleged clash between ICTY arrest powers and fundamental human rights norms is provided by the arrest of Stevan Todorovic’. During the pre-trial proceedings, it was alleged that the accused had been abducted by ICTY agents. These cases all concerned violations of international humanitarian law and so Lamb takes the view that where the crime is serious, ‘the presumption in favour of trying (the accused) is strengthened’. Lamb concedes though,
that ‘all bodies have an inherent jurisdiction to guard against abuses of their own process’.  

In any event, this book is concerned with the way in which municipal courts regulate extraterritorial criminal jurisdiction and the relationship between that regulation, the abuse of rights doctrine and the chosen conception of the rule of law. Such an approach is still capable of adding to the dialogue on international law because ‘the rule of law at the international and domestic levels is not a normative ideal or a requirement of separate legal orders, but is intimately connected and mutually reinforcing’.  

Further, national courts can exert a ‘normative influence on interpretation of international law itself’. As Nollekaemper has suggested, national institutions can protect the rule of law against weaknesses of international law itself … national courts can provide the missing link by assessing international acts against fundamental rights, whether as “international norms” or in the form of domestic constitutional rights’.  

Therefore, this book seeks not only to understand how extraterritorial jurisdiction is regulated in the courts of Australia, India and the United States and in so doing, shed light on a number of neglected domestic decisions on extraterritorial jurisdiction, but also to contribute in some way to the broader debate on extraterritoriality. The historical context against which this contribution sits is now considered.

4. HISTORICAL CONTEXT

A. Pre-twentieth Century: Early Developments

Traditionally, the geographical boundaries of a nation state provided the foundation for jurisdictional queries. Territoriality was considered a defining pillar of international law. For example, in the seventeenth century, the treaties of Westphalia conceptualised a nation’s power as ending at its territorial borders. In this way, regardless of economic or military disparities, each State possessed exclusive jurisdiction within its

---

21 Ibid.  
23 Ibid, 304.  
24 Ibid, 303.  
own territory.\footnote{Austen Parrish, ‘The Effects Test: Extraterritoriality’s Fifth Business’ (2008) 61 Vanderbilt Law Review 1455.} However, the concept of extraterritorial jurisdiction was not unknown. For example, it existed in medieval Italy, sixteenth-century Brittany and seventeenth-century Germany.\footnote{Michael Akehurst, ‘Jurisdiction in International Law’ (1972–73) 46 British Yearbook of International Law 145, 163.} Further, during the nineteenth century some European jurisdictions began to claim jurisdiction over extraterritorial acts committed by non-citizens that threatened the security of the State.\footnote{Ibid, 157–8.} Nonetheless, extraterritorial jurisdiction occurred as an exception, rather than as a rule.

**B. Twentieth Century**

In 1927, the Permanent Court of International Justice (PCIJ) delivered judgment in the *Lotus* case.\footnote{The S.S. *Lotus* (France v Turkey) (Judgment) [1927] PCIJ (ser A) No. 10.} This decision was a turning point in jurisdictional jurisprudence. The PCIJ considered whether Turkey, in instituting criminal proceedings against a French national over a collision on the high seas between a Turkish ship and a French ship resulting in the death of Turkish nationals, acted in conflict with international law.\footnote{Ibid.} The French government submitted that the Turkish courts, in order to have jurisdiction, must be able to identify a specific title to jurisdiction given to Turkey in international law.\footnote{Ibid, 18.} Conversely, the Turkish government took the view that it inherently had jurisdiction, provided such jurisdiction did not come into conflict with a principle of international law.\footnote{Ibid.} The PCIJ stated:

> International law governs relations between independent States. The rules of law binding upon states therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of states cannot therefore be presumed.\footnote{Ibid.}
And, while observing that ‘jurisdiction is certainly territorial’, the PCIJ found:

It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law. Such a view would only be tenable if international law contained a general prohibition.

The Court concluded as follows:

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, it leaves them in this respect a wide measure of discretion which is only limited to certain cases by prohibitive rules [emphasis added]; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable.

This passage is frequently used to describe what is referred to as the ‘Lotus principle’. In short, the PCIJ established a presumption in favour of a nation’s extraterritorial jurisdiction, in the absence of a prohibitive rule. Some commentators attribute the development of the ‘effects test’ to the decision in the Lotus case having undermined ‘territoriality as a limiting constraint on legislative jurisdiction’. Going a step further, Cedric Ryngaert has said that the judgment is ‘nowadays often considered as obsolete’, and Francis (F A) Mann argued the decision ‘cannot claim to be good law’. Customary international law based on actual state practice would point towards extraterritorial jurisdiction being prohibited unless specifically permitted, rather than the permissive approach in Lotus. Ian Brownlie described the sufficiency of a base of jurisdiction as being ‘relative to the rights of other States and not as a

34 Ibid.
36 The S.S. Lotus (France v Turkey) (Judgment) [1927] PCIJ (ser A) No. 10, 19.
40 Ryngaert, above n 38, 27.
question of basic competence’.41 Similarly, James Crawford has said that the ‘sufficiency of grounds for jurisdiction is normally considered relative to the rights of other States’.42

In any event, following the decision in *Lotus*, domestic courts began to grapple with the consequences of assertions of extraterritorial jurisdiction. Although Austen Parrish argues that jurisdiction based solely on territoriality well ‘served the goals of “predictability and efficiency”’,43 by the mid-1900s the ‘heyday’ of territorial jurisdiction had begun its demise.44 As economies became increasingly interconnected there was an increased interest in regulating cross-border activities, such as transnational crime and the activities of multinational corporations.45 In some cases, the interest in extraterritoriality became associated with attempts to enforce human rights.46

The prosecution of war crimes after World War II was also pivotal in the development of extraterritorial jurisdiction. The adjudication of war crimes in the Nuremberg trials ‘transformed our understanding of jurisdiction’.47 The trials are often described as an exercise of extraterritorial jurisdiction that sought to bring ‘accused war criminals to account on behalf of the entire world community of civilized nations’.48 Although it has been argued by some commentators that the allied forces were in fact exercising territorial jurisdiction as sovereigns over occupied territory,49 it is widely accepted that the Nuremberg trials were an exercise of extraterritorial jurisdiction based on the universality principle. Following the Nuremberg trials, in *Attorney General of the Government of Israel v*  

---

43 Parrish, above n 26, 1467.
44 Ibid.
45 Parrish, above n 26, 1469.
46 Ibid, 1470.
Eichmann\textsuperscript{50} Israel prosecuted a member of the Gestapo\textsuperscript{51} for his involvement in administering the so-called ‘final solution’ against members of the Jewish community in World War II.\textsuperscript{52} That decision is also widely cited as an example of extraterritorial jurisdiction. Nonetheless, as late as 1990, F A Mann observed:

Normally no State is allowed to apply its legislation to foreigners in respect of acts done by them outside the dominions of the sovereign power enacting. That is a rule based on international law, by which one sovereign power is bound to respect the subjects and the rights of all over sovereign powers outside its own territory.\textsuperscript{53}

He was also of the view that ‘the nationality of the defendant is now probably an insufficient link to provide the courts of his home state with jurisdiction over him’.\textsuperscript{54} By the end of the twentieth and beginning of the twenty-first centuries, a number of treaties called on States to assert extraterritorial jurisdiction. For example, the CRC and the \textit{Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography} together require parties to criminalise child prostitution whether or not the acts occur domestically or extraterritorially.\textsuperscript{55} All but two countries of the world are now party to the CRC, making it one of the most universally ratified of all United Nations conventions.\textsuperscript{56} Other examples include the international anti-corruption frameworks. The major international treaties on anti-corruption all either require or permit a degree of extraterritorial jurisdiction.\textsuperscript{57} Similarly, international treaties

\textsuperscript{50} (1961) 36 \textit{International Law Reports} 5.

\textsuperscript{51} The term ‘Gestapo’ refers to the ‘Geheime Staatspolizei’, which is German for \textit{Secret State Police}, and was abbreviated ‘Gestapo’. The Gestapo was the secret police of Nazi Germany.

\textsuperscript{52} The term ‘final solution’ was used by the Nazi regime to describe a policy of genocide against Jewish people.


\textsuperscript{54} Ibid.


\textsuperscript{56} David, above n 8.

relating to terrorism and torture also permit some assertions of extraterritorial jurisdiction. For example, the *International Convention for the Suppression of Terrorist Bombings* calls upon parties to assert jurisdiction on the basis of both passive and active nationality, and the *International Convention for the Suppression of the Financing of Terrorism* calls upon parties to assert active nationality jurisdiction. The *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* also permits states to exercise active nationality jurisdiction, and passive nationality, where a State deems it to be ‘appropriate’.

C. Twenty-first-century Developments

Many States now have domestic legislation with extraterritorial reach. By way of example, States as diverse as Singapore, Indonesia, Zimbabwe, Iraq, Russia, France, the United Kingdom, Mexico, American States (entered into force 6 March 1997); *Criminal Law Convention on Corruption and Additional Protocol*, opened for signature 27 January 1999, ETS No 173 (entered into force 1 July 2002).


60 *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987), art 5.


67 See, eg, *Bribery Act* 2010 (UK) c 23, s 12.

Canada, the United States, Japan, Israel and Thailand have at least some legislative provisions extending extraterritorially. Geographical conceptions of territory are ‘becoming a less salient feature of the international legal landscape’. States are acting on treaty obligations, reacting to world events or seeking to achieve political objectives. Undoubtedly, high-profile terrorist attacks such as the events in the United States in September 2001, and Internet leaks such as those by the organisation ‘Wikileaks’, have resulted in increased efforts by States to regulate extraterritorial conduct. These particular efforts will be further discussed in Chapter 6.

The Internet poses particular challenges for jurisdictional frameworks. This is ‘because anyone can view information on the Internet, every nation has an interest in regulating it … and determining which nation has jurisdiction over a particular issue can have a significant impact on the outcome’. For example, in *UEJF & LICRA v Yahoo! Inc. & Yahoo! France, Yahoo! Inc* (Yahoo), Yahoo, an Internet service provider, was prosecuted for breaching the French Penal Code, under which it is an offence to sell, exchange or display Nazi-related materials or Third Reich memorabilia. The prosecution followed complaints from two French

---

78 *French Penal Code* (France) sec R645-1, cited in Okoniewski, above n 76.
non-profit organisations about Yahoo’s auction site, which allowed the posting of Nazi and Third Reich memorabilia.\textsuperscript{79} Yahoo was incorporated under the laws of Delaware and operated principally in California in the United States. The Tribunal in France found that since French citizens have access to Nazi and Third Reich material on Yahoo’s Internet site, Yahoo had breached the relevant provisions of the French Penal Code.\textsuperscript{80} Subsequently, Yahoo successfully sought a declaration in the United States, its place of incorporation, that the orders made in France were not enforceable in the laws of the United States on the basis that the orders would breach the constitutional guarantees of free speech.\textsuperscript{81}

Given the increased interest in regulating extraterritorially, States now need clear frameworks by which to do so. Dan Svantesson has also considered this issue in the specific context of jurisdiction and the Internet. In his view, the complexity of jurisdictional competence could be resolved by reference to a rule that jurisdiction may only be exercised in three circumstances: 1) there is a substantial connection between the matter and the State seeking to exercise jurisdiction; 2) the State seeking to exercise jurisdiction has a legitimate interest in the matter; and 3) the exercise of jurisdiction is reasonable given the proportionality between the State’s legitimate interests and other competing interests.\textsuperscript{82} This raises questions as to what will constitute a ‘legitimate interest’ and how the interests of individual persons are to be accommodated against any contradictory interests of the State. In that context, the abuse of rights doctrine may assist Courts in applying such principles, or, at the very least, in restraining excessive assertions of extraterritoriality.

5. WHY DO STATES EXERCISE EXTRATERRITORIAL JURISDICTION?

This book is largely a critique of the exercise and regulation of extraterritorial jurisdiction. Extraterritorial criminal jurisdiction can, however, in some circumstances, be a useful and legitimate response to transnational crime. Criminal activity is not always confined to territorial

\textsuperscript{79} Okoniewski, above n 76, 313.
\textsuperscript{80} Ibid, 314.
\textsuperscript{81} Ibid, 316.
borders, and so the law may seek to follow the crime on its extraterritorial journey so as to prevent an offender from enjoying impunity is a natural corollary. In some cases, international law even obliges states to exercise extraterritorial criminal jurisdiction. For example:

The development of extraterritorial jurisdiction may be attributed, first, to the spectacular progress of international criminal law. In order to comply with the requirements of international humanitarian law or with those of the Convention against Torture, or – more recently – in the acts they have adopted in order to implement the Rome Statute of the International Criminal Court, a number of states have included in their criminal legislation provisions allowing for the investigation and prosecution of international crimes, even when such crimes are committed outside their national territory, and whether or not the perpetrators or the victims are nationals of the State concerned.

The need to address transnational crimes such as terrorism, trafficking of human beings or sexual abuse of children overseas (‘sexual tourism’), also explains the use of extraterritorial jurisdiction in a growing number of instances. For instance, in the tradition of a large number of instruments related to the combating of terrorism, our modern equivalent to piracy which all states have not only an interest in combating, but also an obligation to do so.

Similarly, Neil Boister observes that:

International society’s concern with the upsurge in certain kinds of criminal activities within a [S]tate is considered legitimate because of the fear that these activities will have a knock-on effect in other [S]tates. At its simplest, then, transnational crime describes conduct that has actual or potential trans-boundary effects of national and international concern.

There are also political and economic arguments in favour of criminal offences, such as child sex offences, having extraterritorial reach. This is because the economic divide between developed nations such as Australia and poorer destination countries such as Thailand and Cambodia is obvious. There is a sort of moral-political pressure on countries like Australia to regulate the behaviour of their citizens overseas for the

---


84 Ibid, 3.

simple reason that the country in which they are in cannot or will not do so. This line of reasoning is supported by what one commentator terms the ‘mechanics of substitution’. In his 2005 discussion, Patrick Keenan argues ‘substitution’ can occur where effective regulation of criminal activity in one venue (such as Australia) leads those engaged in such activity merely substituting one venue for another (such as Cambodia or Thailand). Keenan argues increased accessibility to cheap international travel and wealth disparities between the developing and developed world, have facilitated the displacement or substitution of child sex offences to destinations less willing or able to prosecute. This means, ironically, that law enforcement successes in some countries can morph into ‘social disasters’ for others. For example, although Cambodia has laws that would permit the prosecution of child sex offences, it is still reeling from the aftermath of the Khmer Rouge regime, during which it lost its trained attorneys and judges. Further, law enforcement officials in poorer countries are often paid very little, and this can make them more susceptible to bribery from perpetrators.

Further, for crimes such as terrorism, the prosecution of extraterritorial activity may actually be a better alternative to military action. In the context of prosecutions before federal courts in the United States, it is suggested that:

The government’s decision to use the Article III court system [federal courts] in its effort to contain global terrorism is to be celebrated. The resort to legal process rather than to the use or force vis-à-vis terrorists ensures that alleged perpetrators are truly guilty of terrorism before they are retaliated against or subjected to punishment. The resort to process also prevents the infliction of collateral damage on innocent bystanders that might otherwise occur when the United States responds to terrorism with counterattacks.

Notwithstanding the usefulness of extraterritorial jurisdiction, however, most principles of jurisdictional restraint are concerned with the rights of

---

87 Ibid.
88 Ibid.
States vis-à-vis each other, rather than with the individual accused. Further, broad assertions of extraterritoriality can give rise to multiple, and possibly competing, claims to jurisdiction. Consequently, while assertions of extraterritorial criminal jurisdiction can be useful, they are nonetheless controversial.

6. EXTRATERRITORIALITY AS A SOURCE OF CONTROVERSY

As noted at the outset, the boundaries and, indeed, even the inherent legitimacy of some grounds of jurisdiction are still the subject of debate. One reason for this is that States may have competing claims to jurisdiction, and there is no clear hierarchy of jurisdictional claims. A well-known example is the ‘Lockerbie’ case, which was the subject of on-off negotiations on competing jurisdictional claims for more than 20 years. This case concerned a commercial PanAm flight from Frankfurt to Detroit via London and New York City. The plane exploded over Scotland in 1988, killing all passengers and crew aboard the plane as well as persons on the ground in the small town of Lockerbie. The victims were of 21 different nationalities, but predominantly from the United States and the United Kingdom. The two persons later accused of planting the bomb on board the plane were Libyan nationals. Further complicating jurisdictional matters was the fact that the plane was registered in the United States, crashed in Scotland and that the two accused had returned to Libya. Only after protracted negotiations and legal proceedings was it agreed that a trial would be held in the Netherlands, in a court deemed to be a Scottish Court.92

A more recent example occurred in 2012, when India and Italy disputed their competing claims of jurisdiction in relation to the killing of two Indian fishermen by Italian naval officers near the coast of Kerala, India. Both Italy and India claimed the right to hear the matter on the basis that both have relevant laws applying extraterritorially.93 The

dispute over jurisdiction has led to diplomatic tensions and protracted legal disputes. These two cases illustrate the complexity and tensions that can arise in resolving competing claims to jurisdiction.

In addition to causing tensions between States, assertions of extraterritorial jurisdiction also pose significant risks for individuals. By way of example, in Canada, some constitutional guarantees have been excluded from applying to investigations and prosecutions of extraterritorial conduct.\textsuperscript{94} In \textit{R v Hape},\textsuperscript{95} and \textit{R v Klassen},\textsuperscript{96} the Supreme Court of Canada held the \textit{Charter of Rights and Freedoms} is limited to Canadian provinces and territories, and does not apply extraterritorially to searches and seizures outside of Canada. Further, in the United States, the ‘Ker-Frisbie’ doctrine provides that illegalities in the extradition process will not bar prosecution in United States’ Courts. In \textit{Ker v Illinois},\textsuperscript{97} the US Supreme Court held that forcible abduction presents no valid objection to a criminal trial. In that case, the accused was forcibly kidnapped from Peru and brought to the United States for trial. Although the Australian High Court has rejected any equivalent of the Ker-Frisbie doctrine, government officials have openly admitted to pursuing the prosecution of an individual in order to influence the affairs of a foreign nation.\textsuperscript{98} In the case of \textit{Moti v The Queen},\textsuperscript{99} the Commonwealth conceded that, ‘the motivation [for the prosecution] was largely to prevent the applicant from becoming the Attorney-General in the Solomon Islands’.\textsuperscript{100}

These types of assertions undermine the rule of law and public confidence in the criminal justice system by creating uncertainty and inequality. An accused will not necessarily know the forum in which they are to be tried, or be able to anticipate which rights and protections will apply, and which will not. A person tried for extraterritorial conduct may be treated differently from a person accused of territorial conduct. For example, there is no protection against double jeopardy at a transnational jurisdiction.

level. Even the protection against double jeopardy in *The International Covenant on Civil and Political Rights*,101 is limited to prosecutions within a State, and not as between them.102 James Crawford has observed, ‘[t]here is no assumption (even in criminal cases) that individuals or corporations will be regulated only once, and situations of multiple jurisdictional competence occur frequently. In such situations there is no ‘natural’ regulator’.103 This means a person could be subject to multiple trials across multiple jurisdictions. These issues risk undermining the legitimacy of what may be otherwise justified prosecutions. As Royal J Stark asserted: ‘Justice is rooted in respect for the law, and respect is commanded only when the tribunal meting out justice is seen as transcendent of the impulse for vengeance and protective of the defendant in the face of accusation and prosecution by the organised forces of society’.104

Extraterritorial jurisdiction can also be used as a backdoor means of implementing foreign policy, or achieving unrelated political ends. Some scholars suggest that the legitimacy of assertions of extraterritorial criminal jurisdiction should be guided by ‘comity’ or the international law doctrine of ‘non-interference’. However, these doctrines are concerned with the interest of States, not individuals, and, ‘those with the most leverage to demand and enforce accountability may be those with the least interest in doing so’.105 Further, comity is ‘a political, not a legal solution’,106 and consists of ‘little more than an exhortation to neighborliness’.107 To argue that to allow, let alone compel, a judge to make that political decision, is inappropriate.108 This is because courts do not have

---

102 See Article 14(7) of the *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976); *AP v Italy* (Communication No. 204/1986) and *AR J v Australia* (Communication No. 692/1996), [6.4].
103 Crawford, above n 42.
106 Gerber, above n 37, 204.
107 Ibid.
108 Ibid, 205.
independent access to foreign intelligence and therefore, 'may not understand the far-reaching implications of their decisions'. Therefore, while assertions of extraterritorial jurisdiction are regulated by principles of jurisdictional restraint, such as comity and non-interference, such limitations focus on the rights of States and not the rights of individuals. There is, then, a need to identify, develop and articulate the obligations owed by a State to an individual accused of an extraterritorial criminal offence.

109 Ibid.