Danielle Ireland-Piper

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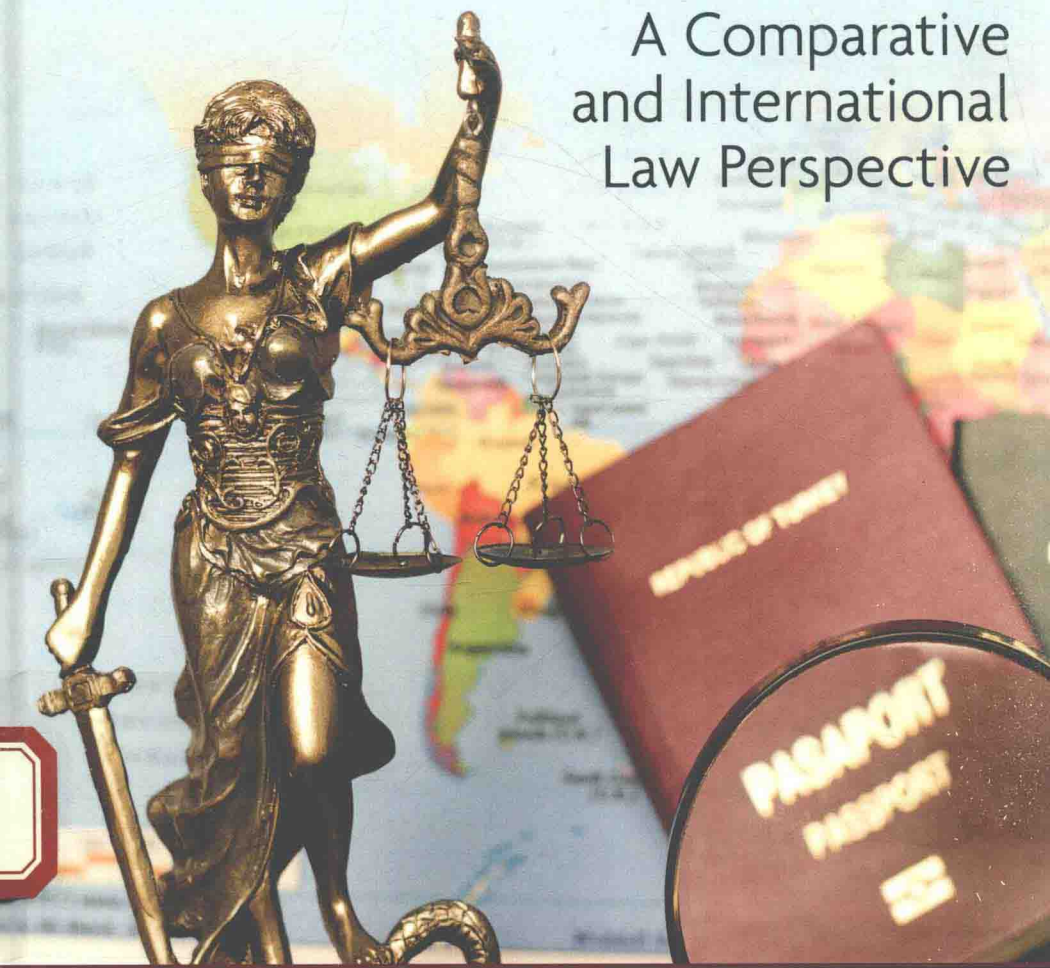
Accountability in Extraterritoriality

A Comparative and International Law Perspective



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A Comparative and International Law Perspective

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Any faults are, of course, entirely my own.

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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

[1] Cedric Ryngaert, *Unilateral Jurisdiction and Global Values* (Eleven Publishing, 2015).

of international law.[2] Competing claims to jurisdiction can also contribute to tensions between States.[3] 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

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[2] See, eg, the body of work on this subject by Austen Parrish, including: Austen Parrish, 'Reclaiming International Law from Extraterritoriality' (2009) 93 *Minnesota Law Review* 815; Austen Parrish, 'The Effects Test: Extraterritoriality's Fifth Business' (2008) 61 *Vanderbilt Law Review* 1455.

[3] 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/>.

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 extra-territorial 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 trans-national crime',[4] it has, nonetheless, 'suffered from many years of neglect, and remains largely misunderstood by the majority of criminal lawyers'.[5] 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.[6] 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.[7] 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.[8] Other examples include international anti-corruption frameworks: the major international treaties on anti-corruption either

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[4] Michael Hirst, *Jurisdiction and the Ambit of the Criminal Law* (Oxford University Press, 2003) 1.

[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.

[7] *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, UNGA A/RES/54/263, art 1, 3.

[8] Fiona David, 'Child Sex Tourism' (Australian Institute of Criminology No 156, *Trends and Issues in Crime and Criminal Justice*, 2000).

require or permit a degree of extraterritorial jurisdiction.[9] Treaties relating to terrorism and torture also permit some assertions of extraterritorial jurisdiction.[10] Consequently, more States now have domestic offences with extraterritorial reach. As noted by the International Court of Justice in 2000:

> 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.[11]

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.

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'.

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[9] See, eg, *Convention on Combating the Bribery of Foreign Public Officials in International Business Transactions*, OECD (21 November 1997); *United Nations Convention Against Corruption*, opened for signature 9 December 2003, 2349 UNTS 41 (entered into force 31 October 2003); *Inter-American Convention Against Corruption*, opened for signature 29 March 1996, Organization of 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).

[10] See *International Convention for the Suppression of Terrorist Bombings*, opened for signature 12 January 1988, 2149 UTS 256 (entered into force 15 December 1997), art 6; *International Convention for the Suppression of the Financing of Terrorism*, opened for signature 10 January 2000, 2178 UTS 197 (entered into force 9 December 1999), art 7(1); *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.

[11] Joint separate opinion of Judges Higgins, Kooijmans and Buergenthal in *Democratic Republic of the Congo v Belgium (Arrest Warrant)* [2002] ICJ Rep 3, 73.

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:

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[12] Roslyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford University Press, 1994) 56.

[13] Larry May, *Global Justice and Due Process* (Cambridge University Press, 2011) 2.

[14] Ralph Wilde, 'Legal "Black Hole"? Extraterritorial State Action and International Treaty Law on Civil and Political Rights' (2005) 26 *Michigan Journal of International Law* 739, 754.