

SYMPOSIUM ON EXPLORING EXTRATERRITORIALITY'S EMPIRE

EXTRATERRITORIALITY IN TRANSNATIONAL CRIMINAL LAW:
THE SOVEREIGNTY PARADOX

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Introduction

It is perhaps no exaggeration to suggest that the field of transnational criminal law (TCL) is one in which extraterritoriality rules. Most states interpret their jurisdiction over offenses occurring within their territory (referred to here, as it is in TCL literature, as “territorial jurisdiction”) as having an extraterritorial aspect.¹ Further, treaties developed to facilitate cooperation in addressing certain serious transnational offenses (the “suppression conventions”) often require that states assert some forms of jurisdiction over offenses occurring outside their territories (referred to here, as it is in TCL literature, as “extraterritorial jurisdiction”), and permit assertions on additional bases.² While these jurisdictional provisions provide a means for relatively weaker states to reinforce their sovereignty,³ they have also been a means through which more powerful states extend their power, giving new effect to the imperialist roots of extraterritoriality.⁴ Alongside this treaty-based expansion of state jurisdiction, there have also been proposals over the years to create international or regional courts to supplement domestic enforcement. Unsurprisingly, a consistent reason for which states advocate in favor of international courts to aid in suppressing transnational crimes is their lack of capacity.⁵ Another reason, however, has been that such a court would provide a means for relatively less powerful states to reinforce their sovereignty against intrusions by more powerful states. In this contribution, I resurface some of the reasons states gave in the 1930s for supporting the creation of an international anti-terrorism court and draw parallels with more recent efforts to create international or regional courts for the suppression of transnational crimes. My goal is to highlight how an international court can help resolve the sovereignty paradox created by TCL’s resort to extraterritorial jurisdiction.

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¹ Discussed in text at footnotes 19–22 *infra*. Péter D. Szigeti, *In the Middle of Nowhere: The Futile Quest to Distinguish Territoriality from Extraterritoriality*, in *THE EXTRATERRITORIALITY OF LAW: HISTORY, THEORY, POLITICS* 30 (Daniel S. Margolies et al. eds., 2019); KENNETH S. GALLANT, *INTERNATIONAL CRIMINAL JURISDICTION: WHOSE LAW MUST WE OBEY?*, Ch. 4 (2022).

² See, e.g., *International Convention for the Suppression of the Financing of Terrorism*, Art. 7, Dec. 9, 1999, 2178 UNTS 197 (hereinafter *Terrorist Financing Convention*).

³ Neil Boister, *Treaty Crimes: International Criminal Court?*, 12 *NEW CRIM. L. REV.* 341, 342 (2009).

⁴ Evan J. Criddle, *Extraterritoriality’s Empire: How Self-Determination Limits Extraterritorial Lawmaking*, 188 *AJIL* 607 (2024).

⁵ Delia Chatoor, *The Role of Small States in International Diplomacy: CARICOM’s Experience in the Negotiations on the Rome Statute of the International Criminal Court*, 7 *INT’L. PEACEKEEPING* 295, 298 (2001); Robert J. Currie & Jacob Leon, *COPLA: A Transnational Criminal Tribunal for Latin America and the Caribbean*, 88 *NORDIC J. INT’L. L.* 587, 588 (2019); Boister, *supra* note 3, at 343.

My focus will be on the use of extraterritorial prescriptive jurisdiction as it relates to TCL, a field which is narrower than cross-border crimes generally. Accordingly, a necessary starting point for the general reader is to first explain TCL. The scope of this body of law remains contested.⁶ Normatively, Neil Boister has suggested that TCL is a body of international law which is Vattellic in nature: the interests of individual states predominate, but states cooperate to secure international order.⁷ Descriptively, TCL is that body of law that uses the suppression conventions to require states to criminalize certain serious conduct which has actual or potential transboundary impacts; cooperate through mutual legal assistance and extradition; and assert jurisdiction over the proscribed activities. A key goal of the system is to ensure that domestic legal regimes include the elements that will facilitate effective cooperation.⁸ A key weakness of TCL is that development of the suppression conventions has been largely driven by powerful states and the treaties reflect their interests.⁹ I return to the significance of this point below.

Central to TCL are provisions in the suppression conventions that require states to assert jurisdiction on certain mandatory bases and generally permit broad assertions of extraterritorial jurisdiction. In a contribution of this length, it is not possible to canvass the jurisdictional provisions of all the suppression conventions;¹⁰ rather, I draw examples from specific conventions to illustrate. The jurisdictional provisions in some of the early modern suppression conventions were limited. The Tokyo Convention¹¹ simply required the state of registration to assert jurisdiction over offenses committed on board an aircraft.¹² However, consistent with provisions in the later suppression conventions, the Tokyo Convention did not exclude assertions of jurisdiction that accorded with domestic law.¹³ This provision was included as an alternative to the United States' proposal to have landing state jurisdiction as the primary jurisdictional basis. Its inclusion allowed the United States to assert landing state jurisdiction under its domestic law.¹⁴ More recent suppression conventions always require states to assert territorial jurisdiction. Some provide for additional mandatory grounds of jurisdiction. For example, the Terrorist Financing Convention¹⁵ also requires the establishment of flag state jurisdiction, registration jurisdiction (for offenses committed aboard aircraft), and nationality jurisdiction. The suppression conventions generally have provisions permitting liberal assertions of extraterritorial jurisdiction. The Terrorist Financing Convention permits states to assert jurisdiction over stateless persons ordinarily resident in the state; for some offenses, protective jurisdiction is allowed, as are assertions of jurisdiction over offenses committed aboard a government

⁶ Roger S. Clark, *The Concept of International Criminal Law and Its Relationship with Transnational Criminal Law and Conflict of Laws*, 11 TRANSNAT'L CRIM. L. REV. 100 (2022).

⁷ Neil Boister, *Transnational Criminal Law?*, 14 EUR. J. INT'L L. 953, 968–74 (2003).

⁸ *Id.* at 967.

⁹ *Id.* at 959; Ethan A. Nadelmann, *Global Prohibition Regimes: The Evolution of Norms in International Society*, 44 INT'L ORG. 479 (1990); Currie & Leon, *supra* note 5, at 609.

¹⁰ A database maintained by the UN Office on Drugs and Crime shows thirty international instruments: not all are full conventions; some are amendments or protocols to existing suppression treaties. The database is not comprehensive: it includes only modern regional and international instruments. I have excluded regional instruments from the count in this footnote.

¹¹ *Convention on Offences and Certain Other Acts Committed on Board Aircraft*, Sept. 14, 1963, 704 UNTS 219 [hereinafter Tokyo Convention].

¹² *Id.* Art. 3.1–3.2.

¹³ *Id.* Art. 3.3.

¹⁴ Roger S. Clark, *Jurisdiction over Transnational Crime*, in ROUTLEDGE HANDBOOK OF TRANSNATIONAL CRIMINAL LAW 91, 99 (Neil Boister & Robert J. Currie eds., 2015).

¹⁵ *Terrorist Financing Convention*, *supra* note 2.

aircraft.¹⁶ Finally, it permits assertions of jurisdiction in accordance with domestic law.¹⁷ States must also ensure they have jurisdiction over an individual in their territory who is alleged to have committed a relevant offense, when the state does not extradite that person.¹⁸ Provisions of the latter two varieties have become common in the suppression conventions.

In addition to the broadly permissive rules related to assertions of extraterritorial jurisdiction, many states interpret their territorial jurisdiction in a manner that involves a significant extraterritorial element.¹⁹ The ways in which states give effect to territorial jurisdiction vary widely.²⁰ Despite the variations, states generally accept that they can assert territorial jurisdiction if any part of an offense (including its result, where that is legally relevant) occurs within their territory. Some states extend the assertion of territorial jurisdiction to co-perpetrators, co-conspirators, instigators, and accomplices even if those individuals have never been physically present within the state's territory.²¹ States may also use different legal devices to deem that certain offenses committed outside their territories are to be treated by their domestic organs as having taken place within the territory.²² The suppression conventions do not contain definitions of territorial jurisdiction, leaving the scope of a state's territorial jurisdiction to be interpreted in accordance with each state's laws. The result is that, in respect of transnational offenses generally, an individual may be subject to the territorial jurisdiction of multiple states, as well as assertions of extraterritorial jurisdiction. For those offenses governed by the suppression conventions, individuals will be subject to territorial and extraterritorial assertions of jurisdiction as required (or permitted) by those treaties. This is a deliberate feature of these regimes: "The expectation is that prosecution will be possible in at least one of [the states having jurisdiction], with conditional universal jurisdiction as the ultimate backup."²³

Nonetheless, the use of extraterritorial laws (whether genuinely extraterritorial or based on a broad interpretation of territoriality) has been subject to justified criticism. Broad assertions of jurisdiction give rise to concerns about notice since an individual may not be aware that an activity in which they are engaged is illegal under a foreign statute having extraterritorial reach.²⁴ In the context of the suppression conventions, this may not be of particular concern since a number of the conventions are widely ratified.²⁵ Of greater concern is that when many states have laws with extraterritorial reach, an individual may be subject to prosecution and punishment in more than one jurisdiction, for the same act.²⁶ Finally, and more importantly for the current discussion, the application of laws extraterritorially was a central feature of imperialism, and a device of neo-imperialism.²⁷ Evan Criddle has explained how extraterritorial laws were "[a] cornerstone of colonial governance" which "enable[d] powerful states to dominate weaker states."²⁸ This imperial resort to extraterritorial laws provided part of the

¹⁶ *Id.* Art. 7.

¹⁷ *Id.* Art. 7.6.

¹⁸ *Id.* Art. 7.4 (usually referred to as conditional universal jurisdiction).

¹⁹ Szigeti, *supra* note 1; GALLANT, *supra* note 1.

²⁰ GALLANT, *supra* note 1, Ch. 4.

²¹ *Id.* at 191.

²² *Id.* at 200, 202–03.

²³ Clark, *supra* note 14, at 103.

²⁴ GALLANT, *supra* note 1, at 297–300.

²⁵ Though not all ratifying states have necessarily enacted domesticating legislation, see for example Mark Shaw et al., *Is the UNTOC Working?*, 4 TRANSNAT'L CRIM. L. REV. 4, 6 (2025).

²⁶ GALLANT, *supra* note 1, at 312.

²⁷ Criddle, *supra* note 4.

²⁸ *Id.* at 608.

motivation for some states to support the proposed creation of an international anti-terrorism court in the 1930s. It is to that effort I now turn.

The background to the Convention for the Prevention and Punishment of Terrorism²⁹ and the Convention for the Creation of an International Criminal Court³⁰ has been detailed before³¹ and will not be repeated here. For my purposes, the important aspect of the effort to create the 1937 international criminal court (1937 court) was that two states supported the proposal because they viewed such a court as a means of regaining part of their lost sovereignty.

China and Egypt were subject to the operation of consular courts and concessions.³² The effect was that these states were prevented from fully enforcing their domestic laws within their own territories. Both responded to the League of Nations' consultations regarding the proposed creation of the 1937 court. The response by China suggested that non-nationals who benefited from the regime of consular courts should lose that benefit and become amenable to local jurisdiction for terrorist offenses. It further suggested that in states in which there were "concessions, settlements or leased territories" where the state was unable to fully exercise its jurisdiction, "every facility should be afforded to the authorities of such countries with a view to the repression, in the above-mentioned territories which are removed from their administration, of crimes committed for the purpose of terrorism."³³ The effect of the Chinese proposal would have been a partial restoration of its right to enforce its criminal law domestically.

The Egyptian communication went further:

In view of the existence in its territory of the consular courts of the Capitulation Powers, [the Government] considers that recourse to the International Criminal Court should be compulsory whenever any offence, which in the Egyptian Government's opinion constitutes an act of political terrorism, is committed in Egyptian territory by a national of any of the Capitulation Powers. In such cases, it would be for the Egyptian Government, the public peace of whose territory and the harmony of whose international relations having been disturbed by the said offence, to send the guilty person for trial before the International Criminal Court.³⁴

If accepted, the effect of the Egyptian proposal would have resulted in a considerable return of its sovereignty. This is because if a case were submitted to the 1937 court, the law to be applied would be the law either of the surrendering state or the territorial state (whichever was the more lenient).³⁵ Either alternative would have resulted in the application of Egyptian law because Egypt was both the surrendering and territorial state.

²⁹ Conference for the International Suppression of Terrorism, *Final Act of the Conference*, at 9, League of Nations Doc S582-Nº-11-37-38 (Nov. 16, 1937).

³⁰ *Id.* at 26.

³¹ Ben Saul, *The Legal Response of the League of Nations to Terrorism*, 4 J. INT'L CRIM. JUST. 78 (2006); Elizabeth Chadwick, *A Tale of Two Courts: The "Creation" of a Jurisdiction*, 9 J. CONFLICT & SEC. L. 71 (2004); Geoffrey Marston, *Early Attempts to Suppress Terrorism: The Terrorism and International Court Conventions*, 73 BRIT. Y.B. INT'L L. 293 (2003); H. E. Mégalos Caloyanni, *The Proposals of M. Laval to the League of Nations for the Establishment of an International Permanent Tribunal in Criminal Matters*, 21 TRANSACTIONS GROTIUS SOC'Y 77 (1935).

³² James B. Angell, *The Turkish Capitulations*, 6 AM. HIST. REV. 254 (1901); Mehdi Hoseini, *Field Theory and Colonialism: Indirect Colonial Situation as a Social Field in Egypt (1882–1922)*, SOCIOLOGY LENS 1 (2026).

³³ See Response by China, Committee for the International Repression of Terrorism, *Report to the Council on the First Session of the Committee*, at 20, League of Nations Doc 3A.18045.15244 (Dec. 10, 1934).

³⁴ Committee for the International Repression of Terrorism, *Synopsis of the Proposals and Suggestions Contained in the Replies from Governments*, at 16, League of Nations Doc 3A.17702.15237 (May 1, 1935).

³⁵ *Final Act*, *supra* note 29, Art. 21.

Prosecution would be done by the authorities of the surrendering state, unless the state against whom the acts were directed or the territorial state preferred to conduct the prosecutions.³⁶ Again, under the Egyptian proposal, these alternatives would have resulted in prosecution by Egyptian authorities.

The idea of conferring jurisdiction over transnational crimes to an international court arose again in the 1980s at the instance of Caribbean states.³⁷ The impetus was the inability of these states to address serious transnational crimes taking place, in part, in their territories.³⁸ The states were motivated by the view that enabling an international criminal court to try offenders would help to reinforce their sovereignty: a sovereignty threatened both by the offenders,³⁹ and by more powerful states acting under the suppression conventions.⁴⁰ I do not suggest that the suppression conventions have revived the concessions system. However, as noted above, it has long been recognized that TCL has been a means used by dominant states to extend the reach of their criminal laws, and to influence the criminal laws of less powerful states.⁴¹ The regimes have also been used by powerful states to demand that relatively weaker states extradite offenders for prosecution abroad, or to simply take effective control of prosecutions.⁴² Again, the creation of an international court to aid in the suppression of transnational crimes was seen as a way for relatively weaker states to reassert at least some of their lost sovereignty.⁴³ Little surprise that the inclusion of transnational crimes in the Rome Statute was opposed by powerful states due, in part, to concerns that such an inclusion would erode the control these states had to address treaty crimes domestically.⁴⁴

More recently, there have been proposals to create a Latin American and Caribbean Criminal Court Against Transnational Organized Crime (COPLA);⁴⁵ in 2014, the African Union finalized the Malabo Protocol which, if it entered into force, would vest the African Court of Justice and Human and Peoples' Rights with jurisdiction over certain crimes;⁴⁶ and there is increasing support for a proposed International Anti-Corruption Court (IACC).⁴⁷ It appears that one of the reasons states have supported the creation of the COPLA, and finalized the Malabo Protocol, is because of the view that those regional bodies would be a means of reinforcing the sovereignty of participating states.⁴⁸ Similarly, among the reasons Wolf, Goldstone, and Rotberg have given in advocating for an IACC is that it could help strengthen states' capacity to investigate and try complex cases, and to recover stolen assets whose loss undermines human rights, the fight against climate change, and the peace and stability of states.⁴⁹

³⁶ *Id.* Art. 25.3.

³⁷ Boister, *supra* note 3.

³⁸ In part the concerns were financial: see Clark, *supra* note 6, at 120.

³⁹ Boister, *supra* note 3, at 343.

⁴⁰ *Id.*

⁴¹ See the sources cited in note 9 *supra*.

⁴² Boister, *supra* note 3, at 343.

⁴³ Sara Wharton & Robert J. Currie, *Transnational Criminal Courts: A Partially Realized Idea*, in *HISTORIES OF TRANSNATIONAL CRIMINAL LAW* 101, 109 (Neil Boister, Sabine Gless & Florian Jeßberger eds., 2021).

⁴⁴ Neil Boister, *International Tribunals for Transnational Crimes: Towards a Transnational Criminal Court?*, 23 CRIM. L. F. 295, 298 (2012); Clark, *supra* note 6, at 120.

⁴⁵ Currie & Leon, *supra* note 5.

⁴⁶ Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights.

⁴⁷ Integrity Initiatives.

⁴⁸ Currie & Leon, *supra* note 5, at 597–98; Wharton & Currie, *supra* note 43, at 113.

⁴⁹ Mark L. Wolf, Richard Goldstone & Robert I. Rotberg, *The Progressing Proposal for an Anti-Corruption Court*, AM. ACAD. ARTS & SCI. (2022).

This discussion suggests it is ironic that TCL is considered a body of law in which state sovereignty is the predominant value.⁵⁰ The current regime reflects the interests of dominant states and has provided a vehicle through which those states have been able to limit the sovereignty of relatively weaker states. While not imposing concessions or the operation of consular courts as had been the case historically, the suppression conventions have created a legal framework within which dominant states export the substance of their laws and lawfully assert extensive extraterritorial jurisdiction to directly enforce their laws. While this does not precisely correspond to Criddle's description of the "new imperialism," since these assertions are made pursuant to treaty rather than unilaterally,⁵¹ the elaboration and operation of the suppression conventions, and state reactions to them, imply a much closer connection between these treaties and our imperial past than we might want to acknowledge. In both cases, states whose sovereignty was weakened looked to the creation of an international court as something that could offer a corrective. This, I submit, provides an important lens for analyzing current and future proposals for the creation of international or regional courts. In the meantime, the suppression of transnational crime will remain firmly within extraterritoriality's empire.

⁵⁰ Boister, *supra* note 7.

⁵¹ Criddle, *supra* note 4, at 620–21.