doi:10.1017/aju.2026.10084

SYMPOSIUM ON EXPLORING EXTRATERRITORIALITY'S EMPIRE

EXTRATERRITORIALITY AND THE THIRD WORLD: ALWAYS A RECIPIENT?

*Md. Rizwanul Islam**

Introduction

During the era of colonial expansion, the European colonizers, backed by the military power of their imperial forces, carried their law to the colonized world. They even set up extraterritorial courts in the non-European colonial territories or in formally independent (but de facto not so) countries to exercise jurisdiction over European subjects.[1] This was a form of "legal imperialism" as defined by Turan Kayaoğlu: "the extension of a state's legal authority into another state and limitation of legal authority of the target state over issues that may affect people, commercial interest, and security of the imperial state."[2] In the contemporary era, powerful countries need not carry guns or set up extraterritorial courts in overseas territories; their laws often have reach well beyond their territories. Thus, smaller states have tended to perceive broad assertions of extraterritorial jurisdiction by the Global North as a form of regulation not only of the activities of individual or corporate actors but of the states of the Global South themselves.[3]

The premise of this essay is that in a power-driven world, small developing states should remember that sticking to legitimacy through consistency is in their best interest. As Thomas Franck has written, "the higher the degree of . . . legitimacy, the more likely it is that states will act in obedience to the rules and institutional commands even when it is not in their short-term interest to do so."[4] Purely extraterritorial action, in the absence of any nexus to the lawmaking state, has historically been seen as illegitimate—yet there is hardly any assertion of jurisdiction that lacks *some* connection to the territory of the lawmaking state. Nevertheless, the more tenuous the nexus between the territory and the exercise of jurisdiction, the greater the possibility of illegitimacy. This position is based on the observation of Judge Fitzmaurice in *Barcelona Traction* that international law "involve[s] for every State an obligation to exercise moderation and restraint as to the extent of the jurisdiction assumed by its courts in cases having a foreign element, and to avoid undue encroachment on a jurisdiction more properly appertaining to . . . another State."[5] Thus, this essay argues that extraterritorial jurisdiction should remain an exception, not the norm, and developing states should not contribute to the wave of extraterrritoriality.

* *Professor of Law and Dean, School of Humanities and Social Sciences, North South University, Bangladesh.*

[1] Cedric Ryngaert, Jurisdiction in International Law 61 (2d ed. 2015).

[2] Turan Kayaoğlu, Legal Imperialism: Sovereignty and Extraterritoriality in Japan, the Ottoman Empire, and China 6 (2010).

[3] Sara L. Seck, *Unilateral Home State Regulation: Imperialism or Tool for Subaltern Resistance?*, 46 Osgoode Hall L.J. 565 (2008).

[4] Thomas M. Franck, *Why a Quest for Legitimacy*, 21 U.C. Davis L. Rev. 535, 547 (1988).

[5] Case Concerning the Barcelona Traction, Light and Power Co., Ltd., Judgment, 1970 ICJ Rep. 3, 105 (sep. op., Fitzmaurice, J.).

© The Author(s), 2026. Published by Cambridge University Press on behalf of American Society of International Law. This is an Open Access article, distributed under the terms of the Creative Commons Attribution licence (https://creativecommons.org/licenses/by/4.0/), which permits unrestricted re-use, distribution and reproduction, provided the original article is properly cited.

https://doi.org/10.1017/aju.2026.10084 Published online by Cambridge University Press

Third World States Joining the Fray of Extraterritorial Lawmaking

As extraterritorial lawmaking and enforcement have a direct nexus to geopolitical power, there is little surprise that emerging powers such as Brazil, China, and India are all jumping on the extraterritoriality bandwagon.[6] Indeed, the shifting position of these states from objector to participant arguably reflects an unambiguous nexus between raw power and the invocation of extraterritorial jurisdiction. However, relatively smaller states like Cambodia, Eritrea, the Philippines, Uzbekistan, and Vietnam have also enacted laws with extraterritorial reach.[7] This is true particularly in the context of competition law, where legislation with extraterritorial reach has been enacted in countries including Botswana, Colombia, Costa Rica, the Dominican Republic, Eswatini, Honduras, Kenya, Malaysia, Namibia, Nicaragua, Nigeria, Papua New Guinea, Philippines, Tanzania, Vietnam, Zambia, and Zimbabwe.[8] But it is seen in other contexts as well, including criminal law. According to the penal law in Eritrea, for example, *any* person committing a serious offence overseas can be prosecuted in Eritrea provided that person is present in Eritrea subsequent to the commission of the crime.[9] And Indonesia has passed a law on anti-corruption and money laundering with extraterritorial effect in that individuals living outside the territory of Indonesia may be held liable for corruption if they provide any assistance, opportunity, infrastructure or information for a transnational criminal act of corruption in Indonesia which leads to a violation of Indonesia's Anti-Corruption Law.[10]

In some cases, the approach of small states in the Global South is somewhat modest in that they enact extraterritorial laws that permit prosecution only when the accused is physically present in their territory, or the alleged conduct is criminal both in the place where it was committed and in the country that wants to prosecute it.[11] Still, often, they seem to follow the refrain, "if you can't beat them, join them."[12] The practice among developing countries does not seem to imply any coherent effort at transnational regulatory harmonization. With some exceptions, such as in the case of compliance with treaty obligations, it also does not appear to reflect any international consensus on substantive regulatory norms or a desire to promote international cooperation in enforcing international legal norms.

The Why Question

Since the middle of the last century, in general, globalization has challenged the ability of states to fully control conditions within their territorial boundaries. Thus, one possible explanation for the expanding practice of extraterritorial lawmaking is the abandonment of strict insistence on the territorial exclusivity of states.[13]

[6] Evan J. Criddle, *Extraterritoriality's Empire: How Self-Determination Limits Extraterritorial Lawmaking*, 118 AJIL 607, 619 (2024).

[7] Mari Takeuchi, *Asian Experience with Extraterritoriality*, *in* RESEARCH HANDBOOK ON EXTRATERRITORIALITY IN INTERNATIONAL LAW 165 (Austen Parrish & Cedric Ryngaert eds., 2023).

[8] UN Conf. Trade & Dev., Developing Countries' Experience with Extraterritoriality in Competition Law, UN Doc. UNCTAD/DITC/CPLP/2021/3 (2021).

[9] Magnus Killander, *Extraterritoriality and Africa: In Search of Justice*, *in* RESEARCH HANDBOOK ON EXTRATERRITORIALITY IN INTERNATIONAL LAW, *supra* note 7, at 196.

[10] Ulyarta Naibaho, Gustaaf Reerink & Frangki Boas Rajagukguk, *Anti-corruption (Joint Ventures) Q&A: Indonesia*, Country Q&A, THOMSON REUTERS (Nov. 25).

[11] Alejandro Chehtman, *Strategic Approaches to Extraterritorial Jurisdiction in Latin America*, *in* RESEARCH HANDBOOK ON EXTRATERRITORIALITY IN INTERNATIONAL LAW, *supra* note 7, at 180.

[12] This, of course, is not the sole reason for small states resorting to extraterritoriality; see notes 18–20 *infra* and accompanying text.

[13] Hannah L. Buxbaum, *Extraterritoriality in Comparative Context: Defining the Scope of State Law in a Global Era*, *in* EXTRATERRITORIALITY IN COMPARATIVE PERSPECTIVE 3, 22 (Hannah L. Buxbaum ed., 2025).

https://doi.org/10.1017/aju.2026.10084 Published online by Cambridge University Press

The main areas where this trend is visible are human rights and the economic domain. However, extraterritorial lawmaking in the developing world has not been limited to these areas. Thus, the increasing inefficacy of territorial lawmaking offers only a partial explanation for the phenomenon of extraterritorial lawmaking by small states.

Very few developing states seem to have engaged in trying to enforce human rights obligations for matters with no direct connection to their territories. Absent any geopolitical or strategic interests, even the developed states seem to have rarely relied on extraterritorial enforcement of laws to promote human rights beyond their territories. Post-colonial states in Asia and Africa have traditionally been deferential to the norms of sovereign equality and non-intervention and have been reluctant to deal with human rights questions in foreign territories. Thus, any ideological fervor would not appear to be the explanation for small states resorting to extraterritorial lawmaking or law enforcement.

And, at any rate, what states do and what they say are different questions. Even the empires were touted as for the benefit and for civilizing the colonized, not profiting from the colonized. It appears that sometimes small developing states are mimicking the extraterritorial lawmaking practices of the dominant states, assuming that following suit might produce some modicum of impact, if not a similar one to that of the dominant states. While proving this may be difficult, laws are meant to have an impact and are not just enacted for the sake of enactment. However, that assumption operates on a flawed presupposition that it is the "letter of the law" that commands authority. For instance, in 2012, members of the African Union adopted the African Union Model National Law on Universal Jurisdiction over International Crimes to respond to the practice of some European states asserting universal jurisdiction over crimes committed in Africa.[14] However, that law had no apparent influence on the behavior of the EU member states. This may be contrasted with the EU's backtracking from its directive on aviation emissions—which applied to emissions generated outside EU airspace—when it elicited strong protest from many powerful states. Again, the impact of extraterritorial lawmaking relies on some asymmetry in power between the lawmaking state and the target state(s). For instance, research demonstrates that the Arab nation's Israel boycott laws and U.S. counter-boycott legislation did not have any decisive impact in either direction.[15] This happened because during that episode, the power of the two sides was somewhat symmetrical. Mimicking, of course, offers only a partial explanation. Developing states may enact laws with broad reach in the hope of achieving the same kind of extraterritorial power that dominant states enjoy. They may do so because they are required to as a condition of receiving loans or development assistance, as in the case of competition laws.[16] They may do so because they signed treaties that required them to, as in the case of transnational criminal law.[17] However, whatever the motives may be, they stand to lose much and gain little, as the next section seeks to explain.

The Non-impact or Unintended Impact of Extraterritorial Practices in the Global South

It is not merely the availability of tools like the "effects doctrine" or universal civil jurisdiction that enables powerful countries like the United States to regulate matters pertaining to territories beyond their borders. As in the colonial era, during which real authority derived not from legal texts but from military power, today the expansive use of extraterritorial jurisdiction is rooted not just in law but in economic and political power. In the

[14] Killander, *supra note*, 9, at 197.

[15] Diane P. Wood, *Extraterritorial Enforcement of Regulatory Laws*, 401 Recueil des Cours 9, 80–91 (2019).

[16] Anu Bradford, *Antitrust Law in Global Markets*, *in* Research Handbook on the Economics of Antitrust Law 283 (Einer Elhauge ed., 2012).

[17] *E.g.*, UN Protocol Against the Smuggling of Migrants by Land, Sea and Air, Nov. 15, 2000, 2241 UNTS 507.

https://doi.org/10.1017/aju.2026.10084 Published online by Cambridge University Press

economic context, for instance, not all states are capable of producing a "Brussels effect." As Anu Bradford unabashedly proclaims, "only large economies can become sources of global standards."[18] The same is true in other domains. As has been well documented, for example, the United Nations Convention Against Corruption[19] reflects the established domestic criminal law and anti-corruption approaches of some states in the Global North.[20]

Even if the noble intention of creating a global public good were accepted as a just motivation for extraterritorial lawmaking, the diversity of actors and their motivations would make it difficult to arrive at a common understanding of the global public good. And absent a global consensus, due to the dominance of the legislators, courts, academics, and even private corporations of the Global North, it is their understanding that will dominate. Often the great powers have controlled "the international order from a position of assumed cultural, material and legal superiority" and have enjoyed the privilege "to intervene in the affairs of other states in order to promote some proclaimed community goal."[21]

More often than not, domestic court judgments dealing with the exercise of jurisdiction rely heavily on the interpretation and application of national law; public international law rules of jurisdiction will be of peripheral consideration, if any.[22] Concededly, in the rare cases in which domestic court judgments refer to international jurisdictional law, and thus constitute evidence of state practice or jurisprudence, another municipal court may rely on them. However, the precedents of developing states interpreting international jurisdictional rules are rarely seen as authoritative either in international courts or in courts of advanced economies.

For developing states, the possibility of enforcing their extraterritorial law is modest at best. Hence, they do not gain much by enacting extraterritorial laws. They do, though, stand to lose a lot. First, they abandon their principled or moral stance against extraterritorial lawmaking. Second, they actually contribute to new and much more flexible principles of extraterritoriality under customary international law, further strengthening the hand of the powerful states who *can* effectively enforce their extraterritorial laws.

In the very few cases in which courts of developing states have tried to exercise jurisdiction extraterritorially over matters pertaining to their own subjects and needed to secure some enforcement action outside their own territory, their success seems to be miniscule. The attempt of developing states to recover corruptly obtained assets from the developed states is but one example. As one academic commentary pointing to the differing attitude of the U.S. judiciary and executive in parallel situations involving Canada and Mexico argues, "the difference in the United States government's reaction to these two similar scenarios, one involving a close and powerful ally; the other, a poor developing country, suggests one conclusion: superiority does play a role."[23] That is, the *power* dynamics play a decisive role.

Another prospect of the practice of extraterritorial lawmaking and enforcement in the Global South is that it will give credence to the emergence of new customary international law. As the ICJ in *Nicaragua* has observed, state practice need not be absolutely adhered to, but when breaches of a rule become the practice, the new practice may crystallize as new customary international law.[24] Arguably, there is a customary international law rule

[18] Anu Bradford, The Brussels Effect: How the European Union Rules the World 25 (2020).

[19] UN Convention Against Corruption, Dec. 9, 2003, 2349 UNTS 41 (*entered into force* Dec. 14, 2005).

[20] Mateo J. de la Torre, *The Foreign Corrupt Practices Act: Imposing an American Definition of Corruption on Global Markets*, 49 Cornell Int'l L.J. 470 (2016).

[21] Gerry Simpson, Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order 132, 5 (2004).

[22] Roger O'Keefe, *Domestic Courts as Agents of Development of the International Law of Jurisdiction*, 26 Leiden J. Int'l L. 541 (2013).

[23] Loubna W. Haddad, *Superpower Extraterritorial Abduction: The* Alvarez-Machain *Case*, 5 St. Thomas L. Rev. 543, 555 (1993).

[24] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Merits, Judgment, 1986 ICJ Rep. 14, para. 186 (Jan. 27).

https://doi.org/10.1017/aju.2026.10084 Published online by Cambridge University Press

(or at least state practice) prohibiting extraterritoriality. If that rule (or state practice) starts to be frequently breached, then the new practice (permitting extraterritoriality) will crystallize as a rule of customary international law. Thus, the risk here is that developing states will inadvertently contribute to the embedding of extraterritoriality as an acceptable practice under customary international law.

Some may question whether small states in the Global South can effectively *resist* extraterritoriality even if they cling to a principled position that extraterritoriality is generally unacceptable. After all, if they lack the power to enforce their own laws extraterritorially, how do they possess the power to resist the trend of extraterritoriality? Having acknowledged this dilemma, it would be fair to think that even a principled abstinence without immediate tangible effect is better than being privy to a self-harming practice. If, on the other hand, the small states in the Global South follow the herd, they lose whatever moral claim they might otherwise have had.

A somewhat viable option for the developing world may be initiatives like the draft UN Code on Business and Human Rights, deliberated at the Human Rights Council, which could give people the ability to bring legal claims in the home countries of multinational corporations for harms those companies inflict in the countries where they operate.[25] Muthucumaraswamy Sornarajah describes this as a mechanism by which developing states might seek the "protection of extraterritoriality," and third world states have chosen not to resist it.[26] It is the backing of the dictates of international law and the robust legal system of the developed world that may offer small developing states something through this form of extraterritoriality.

Conclusion

It appears that in extraterritorial lawmaking the Global South seeks, at least in part, to mimic (albeit with varying motivations) the practice of dominant states. Developing states, through their practice, may have further legitimized extraterritorial lawmaking. And because the real bite of extraterritorial law lies in its enforcement, not in the prescriptive and adjudicative dimensions, it is likely that states with lesser power will always lag behind. Thus, it appears that these states would be better off demonstrating dogged fidelity to principled positions, rather than mindless mimicry of overreach in extraterritorial lawmaking by their more powerful counterparts. Mimicking the extraterritorial lawmaking practice of the powerful states will only further legitimize the regulatory oligarchy of a few powerful states. Small states in the Global South can amplify their influence by taking positions based on collective interest and consistent objections to the overreach of extraterritorial lawmaking by the Global North.

[25] Muthucumaraswamy Sornarajah, *Theorising Extraterritorial Jurisdiction: The Travails of TWAIL*, 35 NAT'L L. SCH. INDIA REV. 32 (2024).
[26] *Id.* at 39.

https://doi.org/10.1017/aju.2026.10084 Published online by Cambridge University Press