doi:10.1017/ajil.2024.33

Extraterritoriality's Empire: How Self-Determination Limits Extraterritorial Lawmaking

*By Evan J. Criddle**

Abstract

In recent years, a growing number of countries have courted controversy by regulating activities outside their borders. They have used extraterritorial lawmaking to cultivate competitive global markets, strengthen or weaken data privacy, combat foreign terrorism and military aggression, promote human rights abroad, and suppress political dissent at home. This Article explores whether extraterritorial lawmaking can be reconciled with the right to self-determination under international law. I argue that the right to self-determination entitles each national polity to determine the laws and institutions by which it is governed within its territory. Extraterritorial lawmaking violates the right to self-determination when it subjects peoples to legal norms they have not freely endorsed. This insight calls for a paradigm shift in how international lawyers evaluate extraterritoriality, with broad ramifications for legal theory and practice.

Table of Contents

* Ernest W. Goodrich Professor and Associate Dean for Research and Faculty Development, William & Mary Law School. This Article has benefited from the exceptionally helpful feedback of Tendayi Achiume, Jocelyn Aqua, Ingrid Brunk, Alejandro Chehtman, Anthony Colangelo, Nancy Combs, Caroline Davidson, Andreas Føllesdal, Mark Graber, Michael S. Green, Monica Hakimi, Rebecca Hamilton, Kristen Hessler, Margaret Hu, Fleur Johns, John Knox, Phil Nichols, Carmen Pavel, Steven Ratner, Jiewuh Song, Ben Spencer, Oisin Suttle, several anonymous reviewers, and workshop participants at the ASIL Research Forum and William & Mary Law School. The author gratefully acknowledges the excellent research assistance provided by Kathy Bacuta, Boaz Campbell, Will McCabe, Devan Orr, and Jeyle Sanchez.

Introduction

More than sixty years have passed since the UN General Assembly solemnly declared "the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations."[1] Yet the work of decolonization remains unfinished. A cornerstone of colonial governance survives into the present: great powers still seek to rule the world by applying their laws unilaterally to foreign nationals outside their borders. States extend their laws extraterritorially for a variety of purposes, including to cultivate competitive global markets, strengthen and weaken data privacy, combat foreign terrorism and military aggression, promote human rights abroad, and suppress political dissent at home.[2] National laws are extraterritorial, for these purposes, if they regulate the conduct of people outside the borders of the lawmaking state, regardless of whether they operate concurrently with, or to the exclusion of, local law.[3] Supporters celebrate extraterritoriality's potential to bolster international norms, promote cooperation, and generate global public goods.[4] As during the colonial era, however, extraterritoriality also enables powerful states to dominate weaker states. Critics therefore condemn extraterritoriality as a pernicious form of "legal imperialism"[5] that advances a "neocolonial agenda."[6]

[1] Declaration on the Granting of Independence to Colonial Countries and Peoples, pmbl., GA Res. 1514(XV), UN Doc A/4684 (Dec. 14, 1960) [hereinafter Declaration on Colonial Independence].

[2] *See* Part III *infra*.

[3] *See* Black's Law Dictionary (6th ed.1990) (defining "extraterritoriality" as "[t]he extraterritorial application of laws; that is, their operation upon persons, rights, or jural relations, existing beyond the limits of the enacting state or nation"); Daniel S. Margolies, Umut Özsu, Maïa Pal & Ntina Tzouvala, *Introduction*, *in* The Extraterritoriality of Law: History, Theory, Politics 1, 1 (Daniel S. Margolies, Umut Özsu, Maïa Pal & Ntina Tzouvala eds., 2019) [hereinafter Extraterritoriality of Law] ("Defined in its most familiar form, legal extraterritoriality is the assertion and exercise of jurisdictional powers beyond a specific territorial framework.").

[4] *E.g.*, Cedric Ryngaert, Selfless Intervention: Exercising Jurisdiction in the Common Interest 7–8 (2020) (arguing that extraterritorial prescriptive jurisdiction can be deployed to promote cosmopolitan norms); William S. Dodge, *Extraterritoriality and Conflicts of Laws Theory: An Argument for Judicial Unilateralism*, 39 Harv. Int'l L.J. 101, 105 (1998) (arguing that unilateral extraterritoriality "helps promote international negotiations in the long run"); Roger O'Keefe, *Cooperative National Regulation to Secure Transnational Public Goods: A Reply to Nico Krisch*, 33 Eur. J. Int'l L. 515 (2022) (arguing that extraterritoriality advances states' "respective and collective regulatory interests in the effective securing of public goods, including transnational ones").

[5] Ugo Mattei & Jeffrey Lena, *U.S. Jurisdiction Over Conflicts Arising Outside of the United States: Some Hegemonic Implications*, 24 Hastings Int'l & Compar. L. Rev. 381, 382 (2001).

[6] B.S. Chimni, *The International Law of Jurisdiction: A TWAIL Perspective*, 35 Leiden J. Int'l L. 29, 30 (2022); *see also* Alejandro Chehtman, *The Presumption Against Extraterritorial Criminal Jurisdiction: A Defence*, *in*

https://doi.org/10.1017/ajil.2024.33 Published online by Cambridge University Press

Despite the troubling historical associations between extraterritoriality and empire, few international lawyers dispute that states have broad authority to extend their national laws globally. Conventional wisdom holds that a state's prescriptive jurisdiction[7] reaches outside national borders in a variety of circumstances.[8] The influential *Restatement (Fourth) of the Foreign Relations Law of the United States* proclaims that a state may regulate extraterritorially as long as "there is a genuine connection between the subject of the regulation and the state seeking to regulate."[9] Hence, a state may extend its laws not only to "persons, property, and conduct within its territory" (*territoriality*)[10] but also to extraterritorial "conduct that has a substantial effect within its territory" (*effects*);[11] "the conduct, interests, status, and relations of its nationals outside its territory" (*nationality*);[12] "conduct outside its territory that harms its nationals" (*passive personality*);[13] and "conduct outside its territory by persons not its nationals that is directed against [its security] or . . . other fundamental state interests" (*protective principle*).[14] A state may even apply its national laws to "certain offenses of universal concern, such as genocide, crimes against humanity, war crimes, certain acts of terrorism, piracy, the slave trade, and torture, even if no specific connection exists between the state and the persons or conduct being regulated" (*universal jurisdiction*).[15] Together, these bases for prescriptive jurisdiction are thought to give states sweeping authority to regulate the activities of foreign nationals abroad.

This Article challenges conventional wisdom by arguing that a state's authority to make extraterritorial law is narrower than the international law of prescriptive jurisdiction alone would suggest.[16] I argue that another foundational norm of international law—the right of peoples to self-determination—limits when states may resort to extraterritoriality. The right to self-determination appears in multilateral treaties, including the International Covenant on Civil and Political Rights (ICCPR)[17] and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[18] It also features prominently in regional

TRANSFORMATIONS IN CRIMINAL JURISDICTION: EXTRATERRITORIALITY AND ENFORCEMENT 17, 28–30 (Micheál Ó Floinn, Lindsay Farmer, Julia Hörnle & David Ormerod eds., 2023) (observing that "extraterritorial criminal jurisdiction is usually associated with a colonial or neocolonial political agenda").

[7] *See* RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, Pt. IV, Ch. 1, Introductory Note (2018) [hereinafter RESTATEMENT] ("Prescriptive jurisdiction concerns the authority of a state to make law applicable to persons, property, or conduct.").

[8] *See* JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 443–48 (9th ed. 2019) (discussing various traditional bases for extraterritorial prescriptive jurisdiction).

[9] RESTATEMENT, *supra* note 7, § 402(1).

[10] *Id.*, § 408.

[11] *Id.*, § 409.

[12] *Id.*, § 410

[13] *Id.*, § 411.

[14] *Id.*, § 412.

[15] *Id.*, § 413.

[16] *See* Arrest Warrant of 11 April 2000, Congo (Dem. Rep. Congo v. Belg.), Judgment, 2002 ICJ Rep. 63, 87 para. 79 (Feb. 14) (sep. op., Higgins, Kooijmans, and Buergenthal, JJ.) (emphasizing that "a State may exercise the . . . jurisdiction which it has under international law, but in doing so it is subject to other legal obligations").

[17] International Covenant on Civil and Political Rights, Art. 1, Dec. 16, 1966, S. Exec. Doc. E, 95-2 (1978), 999 UNTS 171, 174 [hereinafter ICCPR].

[18] International Covenant on Economic, Social and Cultural Rights, Jan. 3, 1976, 993 UNTS 3 [hereinafter ICESCR].

https://doi.org/10.1017/ajil.2024.33 Published online by Cambridge University Press

conventions,[19] unanimous UN General Assembly resolutions,[20] and authoritative judgments of international courts and tribunals.[21] As the International Court of Justice (ICJ) has recognized, the legal authority of the right to self-determination is "irreproachable."[22] Nonetheless, international lawyers have yet to account for how self-determination restricts national authority to engage in extraterritorial lawmaking.[23] This Article aims to correct that oversight, recovering the right to self-determination as a bulwark against legal imperialism.

Under international law, the right to self-determination entitles every people to determine the laws and institutions by which it is governed. The right to self-determination is generally understood to have "internal" and "external" dimensions.[24] Internal self-determination refers to a people's right to freely pursue its "political, economic, social and cultural development . . . within the framework of an existing state."[25] External self-determination includes a people's right to determine whether to submit to foreign governance.[26] Extraterritorial lawmaking violates the right to external self-determination whenever it subjects a people to uninvited foreign

[19] *E.g.*, African Charter on Human and Peoples' Rights, *at* https://au.int/en/treaties/african-charter-human-and-peoples-rights [hereinafter African Charter].

[20] *E.g.*, Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, GA Res. 2625 (XXV), 25 UN GAOR Supp. No. 28, 121, UN Doc. A/8028 (1970) [hereinafter Friendly Relations Declaration]; Declaration on Colonial Independence, *supra* note 1, para. 2.

[21] *E.g.*, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 ICJ Rep. 136, 184, para. 122 (July 9) [hereinafter *Legal Consequences of the Construction of a Wall*, Advisory Opinion]; East Timor (Port. v. Austl.), Judgment, 1995 ICJ Rep. 90, 102 para. 29 (June 30) [hereinafter *East Timor (Port. v. Austl.)*, Judgment]; Western Sahara, Advisory Opinion, 1975 ICJ Rep. 12, 32, paras. 33, 55, 58 (Oct. 16) [hereinafter *Western Sahara*, Advisory Opinion].

[22] *East Timor (Port. v. Austl.)*, Judgment, *supra* note 21, at 102, para. 29; *see also* Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, 2019 ICJ Rep. 95, 132, para. 152 (Feb. 25) (recognizing the right to self-determination as a norm of customary international law) [hereinafter *Chagos*, Advisory Opinion]; United Nations Educational, Scientific and Cultural Organization, Final Report and Recommendations, International Meeting of Experts on Further Study of the Concept of the Rights of Peoples 8, UN Doc. SHS-89/Conf.602/7 (Feb. 22, 1990), *at* https://unesdoc.unesco.org/ark:/48223/pf0000085152 (describing the right to self-determination as "universally accepted").

[23] Some scholars have noted that extraterritoriality is in tension with self-determination. *See, e.g.*, José A. Cabranes, *The Foreign Policy of Our Government's "Least Dangerous Branch,"* 41 YALE J. INT'L L. 469, 486 (2016) ("In many ways, the application of our laws extraterritorially is in direct tension with the principles of self-governance and self-determination that we rightly advance as the basis for good government, both here and abroad."); Austen Parrish, *Sovereignty, Self-Determination, and the Duty to Cooperate: Public International Law's Limits on Unilateral Extraterritorial Regulation of Non-citizens*, *in* RESEARCH HANDBOOK ON EXTRATERRITORIALITY IN INTERNATIONAL LAW 45, 50 (Austen Parrish & Cedric Ryngaert eds., 2023) [hereinafter RESEARCH HANDBOOK ON EXTRATERRITORIALITY] (asserting that "the principle of self-determination" applies to extraterritorial lawmaking); Austen Parrish, *The Effects Test: Extraterritoriality's Fifth Business*, 61 VAND. L. REV. 1455, 1485 (2008) [hereinafter Parrish, *Effects Test*] ("Extraterritorial laws are at odds with common notions of independent self-governance and the right to self-determination."). This Article seeks to develop the self-determination objection sufficiently to demonstrate its merits under international law.

[24] *See* Reference re Secession of Quebec, [1998] 2 SCR 217, para. 126 (Can.) (distinguishing internal self-determination from external self-determination).

[25] *Id.*, para. 126.

[26] *Id.* (quoting the Friendly Relations Declaration for the proposition that external self-determination includes a people's right to remain "sovereign and independent" or instead enter into "free association," "integration," or "any other political status" with another state); *see also* KALANA SENARATNE, INTERNAL SELF-DETERMINATION IN INTERNATIONAL LAW: HISTORY, THEORY, AND PRACTICE 1 (2021) (characterizing external self-determination as "a right to independence from foreign rule, a right to a sovereign and independent state").

https://doi.org/10.1017/ajil.2024.33 Published online by Cambridge University Press

rule.[27] States are not free to hold themselves out as global lawmakers just because they have prescriptive jurisdiction under international law. Rather, they must exercise restraint to ensure that their national laws do not undermine another people's equal right to self-determination.

Extraterritoriality is not always the enemy of self-determination. In some scenarios, states can extend their national laws abroad without violating another people's right to self-determination. For example, states do not violate the right to self-determination when they apply their laws to their own expatriate nationals, provided that they afford expatriates the full rights and privileges associated with internal self-determination. Extraterritorial laws are also compatible with national self-determination when they incorporate legal norms that another people has accepted, such as those enshrined in multilateral treaties or customary international law. When a people freely embraces legal norms in these ways, foreign extraterritorial laws affirming those norms do not violate the right to self-determination because they do not qualify as alien rule. Thus, the right to self-determination permits extraterritorial lawmaking in service of shared legal norms, while prohibiting states from unilaterally imposing their national laws on non-consenting foreign peoples. Properly understood, therefore, there is no conflict between the right to self-determination and the extraterritorial extension of national laws based on universally accepted norms, such as those enshrined in international human rights law and international criminal law.

The balance of this Article proceeds in four parts. Part I excavates the historical and conceptual links between extraterritoriality and empire. Colonial-era international law generally prohibited states from exercising prescriptive jurisdiction over foreigners abroad, but this constraint applied only to relations between so-called "civilized" nation-states. Other political communities, which were thought to lack the practical capacity for self-governance, were not entitled to freedom from foreign rule. As colonialism receded, extraterritorial lawmaking resurfaced as a favored manifestation of "neo-colonialism," defined by "imperialism without colonies."[28]

Part II explains how the twentieth-century decolonization movement represented a global struggle to reclaim national self-government from the tyranny of foreign governance. This struggle catalyzed the development of the right to self-determination under international law. The international community established the right to self-determination to serve, at least in part, as a legal bulwark against the unilateral imposition of foreign law—a defining feature of colonialism. The core of the international right to self-determination is a people's exclusive legal power and privilege to determine the laws and institutions by which it is governed. Whenever a foreign power violates this privilege, it commits an internationally wrongful act. Thus, the right to self-determination limits when states may resort to extraterritoriality.

Despite these concerns, recent years have witnessed a steady expansion of unlawful extraterritoriality. Part III illustrates this phenomenon by highlighting four regulatory domains where extraterritoriality is on the rise: political expression, counterterrorism, antitrust, and data governance. For example, China has threatened to prosecute U.S. citizens on

[27] Another way states subject people to domination is by *disclaiming* that their laws apply to certain people who reside in territories under their effective control. *See* PAULINE MAILLET, NOWHERE COUNTRIES: EXCLUSION OF NON-CITIZENS FROM RIGHTS THROUGH EXTRA-TERRITORIALITY AT HOME (2020) (critiquing states' practice of treating spaces on their soil as "extra-territorial"). These practices, which are the mirror image of extraterritorial lawmaking, lie beyond the scope of this Article.

[28] HARRY MAGDOFF, IMPERIALISM WITHOUT COLONIES (2003).

https://doi.org/10.1017/ajil.2024.33 Published online by Cambridge University Press

American soil who publicly criticize or protest its government.[29] Russia has leveraged its criminal code to intimidate and harass foreign officials who oppose its aggression against Ukraine, including a judge and the chief prosecutor of the International Criminal Court (ICC).[30] European Union (EU) law constrains how Silicon Valley companies conduct e-commerce[31] and deploy artificial intelligence.[32] American antitrust law restricts how firms in Africa, Asia, and Latin America price their goods and services.[33] In these and other areas, the international community's neglect of the right to self-determination has emboldened powerful states and regional organizations to project their laws worldwide in a manner that violates international law.

Part IV critiques conventional policy justifications for these practices. Some legal scholars argue that extraterritorial lawmaking promotes universal values and generates global public goods.[34] However, states typically extend their laws extraterritorially only after it becomes apparent that their preferred policies lack international support, and they often do so at other nations' expense. States might have important reasons for resorting to extraterritoriality, such as the desire to suppress transnational terrorism and cyberattacks, but they have other potent options to counter such threats. Thus, there is little reason to suppose that unilateral extraterritorial lawmaking is strictly necessary to protect states and their people from transboundary harm.

Before proceeding to the argument, two final preliminaries are in order. First, the argument developed in this Article is addressed primarily to national legislators and regulators, who are chiefly responsible for ensuring that national laws comport with international law. But the Article also offers valuable guidance to domestic courts, such as the U.S. Supreme Court, which aspire to interpret national laws in a manner compatible with international law.[35]

[29] *See* Helen Regan & Angus Watson, *Hong Kong Issues Arrest Warrants for Six Overseas Democracy Activists Including US Citizen, State Media Reports*, CNN (Aug. 1, 2020), *at* https://www.cnn.com/2020/08/01/china/hong-kong-activists-arrest-warrant-intl-hnk/index.html (noting China's indictment of a U.S. citizen for speech protected under the U.S. Constitution).

[30] *Russia Indicts ICC Prosecutor, Judge Who Issued War Crimes Warrant for Putin*, Associated Press (May 21, 2023), *at* https://apnews.com/article/russia-indictment-icc-prosecutor-judge-putin-260100f9ba533e15ebee3084dba74ff4 [hereinafter *Russia Indicts*].

[31] *See* Regulation (EU) 2016/679 of the European Parliament and the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation), 2016 OJ (L 119) 1, Art. 3 [hereinafter GDPR] (regulating "the processing of personal data of data subjects who are in the Union" in some contexts even if the "controller or a processor [is] not established in the Union").

[32] *See* Council of the European Union, Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts – Analysis of the Final Compromise Text with a View to Agreement 94, Art. 2(1)(c) (Jan. 26, 2024), *at* https://data.consilium.europa.eu/doc/document/ST-5662-2024-INIT/en/pdf (providing that EU law will apply to "providers and deployers of AI systems that have their place of establishment or who are located in a third country, where the output produced by the system is used in the Union"); *id.* at 21, para. 11 (explaining that "high risk" "AI systems . . . fall within the scope of this Regulation even when they are neither placed on the market, nor put into service, nor used in the Union" if they use data from the EU).

[33] *See* Maher M. Dabbah, International and Comparative Competition Law 469–76 (2010) (critiquing this practice).

[34] *See, e.g.*, Ryngaert, *supra* note 4, at 25 (developing this argument); Nico Krisch, *The Decay of Consent: International Law in an Age of Global Public Goods*, 108 AJIL 1, 12–13 (2014) (same).

[35] *See* F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155 (2004) (explaining that when construing geoambiguous statutes, the Supreme Court assumes that Congress ordinarily seeks to respect principles of customary international law) [hereinafter *Empagran*].

https://doi.org/10.1017/ajil.2024.33 Published online by Cambridge University Press

The right to self-determination is one of the international legal norms that courts should consider when determining the extraterritorial scope of their national laws. Hence, courts should avoid interpreting ambiguous national laws to apply extraterritorially when this would violate another people's right to self-determination.

Second, this Article focuses primarily on criminal and regulatory law because those categories of extraterritorial regulation pose especially grave threats to national self-determination. Whether the right to self-determination has broader ramifications for national legal systems—including conflict of laws doctrine—is a question I reserve for future consideration.[36]

An overarching ambition of this Article is to breathe new life into the (mostly moribund) right to self-determination.[37] Some prominent legal scholars question whether self-determination remains relevant in a post-colonial world.[38] In contrast, this Article offers an affirmative vision of the right to self-determination, demonstrating its continuing vitality as a safeguard against imperialism. As long as powerful states aspire to rule the world, the right to self-determination will be necessary to safeguard peoples against legal imperialism. In an era of intensifying great power rivalries, when authoritarian states are weaponizing their laws to expand their global influence, reviving the right to self-determination would contribute to achieving a more free and equitable world order.

I. Extraterritoriality's Imperial Origins

Like many features of international law, extraterritorial prescriptive jurisdiction had its genesis in European imperialism, and it evolved over the twentieth century in response to the shifting demands of the world's great powers.[39] Recovering this history illuminates the mutually constitutive relationship between extraterritoriality and empire. For centuries, international law enabled imperialism by authorizing states to extend their national laws into distant territories without the consent of the Indigenous inhabitants. Extraterritoriality was not just a useful tool for aspiring empires; it was the defining feature of imperial rule. That extraterritoriality survives into the twenty-first century reflects the enduring imperial ambitions of today's great powers.

A. Prescriptive Jurisdiction as Empire

Before the twentieth century, international law generally prohibited states from regulating the activities of foreign nationals outside their borders. Emer de Vattel emphasized this rule in

[36] *See* Michael S. Green, *Jurisdiction and the Moral Impact Theory of Law*, 29 Legal Theory 29, 39–42 (2023) (explaining how prescriptive jurisdiction and judicial conflict of laws analysis are analytically distinct).

[37] I draw inspiration from Jens Ohlin's similar argument that the right to self-determination guarantees freedom from foreign election interference. *See* Jens David Ohlin, Election Interference: International Law and the Future of Democracy 89–117 (2020).

[38] *See* James Crawford, *The Right to Self-Determination in International Law: Its Development and Future*, *in* People's Rights 7, 38 (Philip Alston ed., 2001) (characterizing "self-determination, outside the colonial context," as an "intensely contested concept in relation to virtually every case where it is invoked"); Marc Weller, *Self-Determination and Indigenous Peoples*, *in* The UN Declaration on the Rights of Indigenous Peoples: A Commentary 115, 118 (Jesse Hohmann & Marc Weller eds., 2018) (asserting that the right to self-determination "applie[s] only once, at the point of decolonization").

[39] *See* Kal Raustiala, Does the Constitution Follow the Flag? The Evolution of Territoriality in American Law (2009) (relating the history of extraterritoriality).

https://doi.org/10.1017/ajil.2024.33 Published online by Cambridge University Press

his influential 1758 treatise, *The Law of Nations*, explaining that the territorial limits of prescriptive jurisdiction were necessary to respect states as "free and independent" sovereigns:

> When a nation takes possession of a country . . . , it is considered as acquiring the *empire* or sovereignty of it, at the same time with the *domain*. For since the nation is free and independent, it can have no intention, in settling in a country, to leave to others the right of command, or any of those rights that constitute sovereignty. The whole space over which a nation extends its government, becomes the seat of its jurisdiction, and is called its *territory*.[40]

Note the reference to "empire." For Vattel and his contemporaries, empire (*imperium*) was synonymous with what international lawyers today call "prescriptive jurisdiction," defined as the "right of sovereign command, by which the nation *directs* and regulates at its pleasure every thing that passes in the country."[41] Prescriptive jurisdiction reflected a nation's exclusive right as a self-determining people "to make laws both in relation to the manner in which it desires to be governed, and to the conduct of the citizens."[42] A state's prescriptive jurisdiction therefore extended throughout its territory and to its nationals, wherever located.[43] Conversely, states lacked jurisdiction to regulate persons, property, or conduct outside their sovereign domain. "If any intrude into the domestic concerns of another nation," Vattel cautioned, "they do it an injury."[44]

This vision of states as free and independent vehicles for national self-determination shaped the international law of prescriptive jurisdiction for centuries.[45] Generations of legal publicists affirmed that a state's prescriptive jurisdiction was limited to its territory and nationals,[46] subject to only a few narrow exceptions.[47] The U.S. Supreme Court endorsed this approach to prescriptive jurisdiction in a series of cases, from Justice Joseph Story's ardent manifesto in

[40] EMER DE VATTEL, THE LAW OF NATIONS, Pt. I, Ch. xviii, § 205 (Béla Kapossy & Richard Whatmore eds., Thomas Nugent transl., 2008 [1758]) (emphasis in original).

[41] *Id.*, § 204. (emphasis added)

[42] *See id.*, Pt. I, Ch. iii, §§ 34, 37.

[43] Supporters of Vattel's approach, such as U.S. Supreme Court Justice Joseph Story, accepted that "every nation has a right to bind its own subjects by its own laws in every other place" where they may be found. JOSEPH STORY, COMMENTARIES ON THE CONFLICTS OF LAWS 19, § 21 (1834). However, national courts were not obligated to enforce foreign laws. *See id.*, § 22 ("When . . . we speak of the right of a state to bind its own native subjects everywhere; we speak only of its own claim and exercise of sovereignty over them, and not of [a] right to compel or require obedience to such laws on the part of other nations.").

[44] VATTEL, *supra* note 40, Pt. I, Ch. iii, §§ 34, 37.

[45] *See* Island of Palmas Arbitration (Neth./U.S.) (1928) 2 RIAA 829, 838 ("Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State."); RAUSTIALA, *supra* note 39, at 94 ("At the start of the twentieth century, . . . one sovereign's power simply could not legitimately reach into the geographic domain of another.").

[46] *See* JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW 236 (1906) ("There is no principle better settled than that the penal laws of a country have no extraterritorial force."); LASSA OPPENHEIM, INTERNATIONAL LAW 204, § 147 (2d ed. 1912) ("No right for a State to extend its jurisdiction over acts of foreigners committed in foreign countries can be said to have grown up according to the Law of Nations . . . ."); STORY, *supra* note 43, § 18 (asserting that "every nation possesses an exclusive sovereignty and jurisdiction within its own territory").

[47] *See* John H. Knox, *A Presumption Against Extrajurisdictionality*, 104 AJIL 351, 367 (2010) (observing that traditional exceptions to exclusive territorial jurisdiction included universal jurisdiction offenses, such as piracy and the slave trade).

https://doi.org/10.1017/ajil.2024.33 Published online by Cambridge University Press

The Apollon[48] to Justice Oliver Wendell Holmes's measured opinion in *American Banana Co. v. United Fruit Co.*[49] Through these cases, the Court established a general presumption that domestic legislation would not apply extraterritorially if the United States lacked prescriptive jurisdiction under international law.[50]

Not all political communities benefited from Vattel's approach to prescriptive jurisdiction. Under the state-centric worldview of classical international law, only societies organized as states enjoyed sovereign rights, including the authority to prescribe law for their territory and nationals.[51] Since Western nations refused to recognize most other societies as states, the vast majority of the world's inhabitants remained vulnerable to territorial conquest and subjugation.[52] As colonized territories and peoples were assimilated into a colonial power's sovereign domain, they became subject to its empire.[53]

Some international agreements also authorized Western powers to give their domestic laws extraterritorial scope.[54] As early as the sixteenth century, capitulations granted by Ottoman Sultans conferred special privileges on nationals of favored European countries, including lawful residence and safe passage, tax exemptions, and partial immunity from the jurisdiction of domestic courts.[55] The Ottomans eventually went so far as to allow French nationals to conduct trade and make wills within the empire in accordance with French law while placing them under the exclusive jurisdiction of their own ambassadors and consuls.[56] These concessions made French expatriate communities, in effect, islands of French sovereignty within the broader Ottoman empire (*imperium in imperio*). Western diplomats would later use the capitulation system as a model for "unequal treaties," which provided that their nationals would be

[48] The Appollon, 22 U.S. 362, 371 (1824) (declaring that applying U.S. law to "foreign territory"—in this case, a foreign vessel sailing the high seas—would constitute a "usurpation" of the flag state's "exclusive sovereignty"); *see also* Rose v. Himely, 8 U.S. 241, 279 (1808) ("It is conceded that the legislation of every country is territorial; that beyond its own territory, it can only affect its own subjects or citizens.").

[49] American Banana Co. v United Fruit Co., 213 U.S. 347, 356 (1909) ("[T]he general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done.").

[50] *See* Knox, *supra* note 47, 362–66 (explaining how the Supreme Court originally based the presumption on concerns about international law compliance).

[51] *See* Antony Anghie, *Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations*, 34 N.Y.U. J. Int'l L. & Pol. 513, 513 (2002) ("All sovereign states are equal. Colonies, by definition, lack sovereignty.").

[52] *See* Siba N'Zatioula Grovogui, Sovereigns, Quasi Sovereigns, and Africans: Race and Self-Determination in International Law (1996) ("[P]rior to decolonization, the rights and privileges related to sovereignty and self-determination were the exclusive domain of colonial powers."); E. Tendayi Achiume, *Migration as Decolonization*, 71 Stan. L. Rev. 1509, 1536 (2019) ("International legal doctrine designated non-Europeans uncivilized and lacking in the cultural determinants of membership in international society, thereby largely ejecting them from the international legal framework within which European nations were then able to politically and territorially occupy non-Europeans.").

[53] *See* Andrew Fitzmaurice, Sovereignty, Property and Empire, 1500–2000, at 17–18 (2014) (explaining how colonial powers viewed the creation of overseas possessions as expanding their *imperium*); Vattel, *supra* note 40, Ch. xviii, § 210 ("When a nation takes possession of a distant country, and settles a colony there, that country, though separated from the principal establishment, or mother-country, naturally becomes a part of the state, equally with its ancient possessions.").

[54] *See* Turan Kayaoğlu, Legal Imperialism: Sovereignty and Extraterritoriality in Japan, the Ottoman Empire, and China (2010) (discussing these measures).

[55] Umut Özsu, *The Ottoman Empire, the Origins of Extraterritoriality, and International Legal Theory*, *in* The Oxford Handbook of the Theory of International Law 123, 124 (Anne Orford & Florian Hoffmann eds., 2016).

[56] James B. Angell, *The Turkish Capitulations*, 6 Am. Hist. Rev. 254, 256 (1901).

https://doi.org/10.1017/ajil.2024.33 Published online by Cambridge University Press

subject only to their law when residing, traveling, or transacting business in China and Japan.[57] By grounding extraterritoriality in foreign states' consent, Western powers extended their empires into foreign territory without formally violating other states' sovereignty.

Throughout the colonial era, international lawyers and statesmen understood that extraterritorial lawmaking was an exercise in "empire building and the province of great powers."[58] The United States vigorously resisted proposals to expand prescriptive jurisdiction precisely because "extraterritorial laws conjured reminders of . . . 'taxation without representation'"—the tyranny of colonial rule.[59] Allowing other states to apply their laws to American citizens on American soil was unacceptable because it would have compromised the United States' status as a free and independent, self-governing nation.

B. The New Imperialism

Despite these concerns, the classical approach to prescriptive jurisdiction came under attack in the early twentieth century. Some states embraced an "objective territoriality" theory that allowed states to exercise prescriptive jurisdiction over a foreigner who "puts in motion a force to take effect" within the state's territory (e.g., discharging a firearm across an international border).[60] Over a dozen states also asserted authority to regulate extraterritorial conduct that threatened their national security or other compelling sovereign interests.[61] These developments cast doubt on whether Vattel's approach to prescriptive jurisdiction continued to reflect customary international law. Efforts to broker a multilateral convention on extraterritorial jurisdiction collapsed when it became apparent that states could not agree on the best path forward.[62]

In 1927, the Permanent Court of International Justice (PCIJ) waded into the debate in *The Lotus*,[63] a dispute involving a deadly collision between a French mail steamer and a Turkish collier on the Mediterranean.[64] When Turkey sought to prosecute the French captain, France

[57] *See* Chimni, *supra* note 6, at 42–43 (discussing extraterritoriality in China and Japan); Özsu, *supra* note 55, at 124 (discussing unequal treaties for China). Most-favored-nation clauses in unequal treaties ensured that exemptions and immunities granted to one foreign state applied automatically to others. *See* Shinya Murase, *The Most-Favored-Nation Treatment in Japan's Treaty Practice During the Period 1854–1905*, 70 AJIL 273, 274 (1976) (explaining how these clauses ensured "equality in exploitation").

[58] Austen L. Parrish, *Evading Legislative Jurisdiction*, 87 NOTRE DAME L. REV. 1673, 1688 (2012).

[59] *Id.*; *see also* Foreign Relations of the United States, 1887, at 751 [hereinafter Cutting Affair] (memorializing the United States' objection that "the judicial tribunals of Mexico were not competent under the rules of international law to try a citizen of the United States [under Mexican criminal law] for an offense committed and consummated in his own country").

[60] John B. Moore, *Report on Extraterritorial Crime and The Cutting Case* (1887), *reprinted in* 2 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW, § 202, at 244 (1906).

[61] *See* W.E. Beckett, *The Exercise of Criminal Jurisdiction over Foreigners*, 6 BRIT. Y.B. INT'L L. 44, 45–46, 49 (1925) (discussing national laws prohibiting acts committed by aliens abroad "which are directed against the safety of the state or its financial credit").

[62] *See Criminal Competence of States in Respect of Offences Committed Outside Their Territory*, 20 AJIL Supp. 252 (1926) (relating the Committee of Experts' conclusion that "international regulation of these questions by way of a general convention, although desirable, would encounter grave political and other obstacles"); L.H. Woolsey, *Extraterritorial Crimes*, 20 AJIL 757, 757–58 (1926) (describing how the League of Nations Committee on the Codification of International Law was unable to reach consensus due to states' divergent practices and opinions).

[63] Case of S.S. Lotus (Fr. v. Turk.), 1927 PCIJ (Ser. A) No. 10 (Sept. 7) [hereinafter *Lotus*].

[64] *Id.* at 10.

https://doi.org/10.1017/ajil.2024.33 Published online by Cambridge University Press

objected that Turkey lacked jurisdiction under international law to apply Turkish law to conduct committed on a vessel under French sovereignty.[65] In proceedings before the PCIJ, France contested only the jurisdiction of Turkey's courts under international law (adjudicatory jurisdiction), not the geographic reach of its criminal code (prescriptive jurisdiction).[66] Nonetheless, the parties' arguments referenced broader legal debates over prescriptive jurisdiction: France asserted the presumption against extraterritoriality,[67] while Turkey invoked the objective territoriality theory.[68]

In addressing these arguments, the Court began by affirming the presumption against extraterritoriality: "the first and foremost restriction imposed by international law upon a State is that—failing the existence of a permissive rule to the contrary—it may not exercise its power in any form in the territory of another state."[69] The Court quickly pivoted, however, to reject the idea that the principle applied to extraterritorial lawmaking:

> 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 in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable.[70]

Rather than confine all exercises of sovereign authority to a state's *imperium*, the Court declared that the presumption against extraterritoriality applied only to the "exercise" of state power (i.e., enforcement jurisdiction) and was wholly inapplicable to lawmaking and adjudication. Absent a specific prohibitive rule, "every State remains free to adopt the principles [for prescriptive and adjudicative jurisdiction] which it regards as best and most suitable."[71] States could limit the reach of their domestic law to their territory and nationals, or they could make their domestic law apply globally. The choice was left to their unfettered "discretion."[72] A more sweeping invitation to legal imperialism can scarcely be imagined.[73]

[65] *Id.* at 6–7, 15. The dispute centered on a provision of the Treaty of Lausanne, which expressly prohibited Turkey from exercising "power or jurisdiction in political, legislative or administrative matters . . . outside Turkish territory." British Empire, France, Italy, Japan, Greece, et al., and Turkey, Treaty of Peace, Art. 27, July 24, 1923, 28 LNTS 11 (1924).

[66] *See Lotus*, *supra* note 63, at 15 ("Neither the conformity of [Turkish law] in itself with the principles of international law nor the application of that [law] by the Turkish authorities constitutes the point at issue . . . .").

[67] *See id.* at 7 (arguing that under international law "a State is not entitled, apart from express or implicit special agreements, to extend the criminal jurisdiction of its courts to include a crime or offence committed by a foreigner abroad solely in consequence of the fact that one of its nationals has been a victim of the crime or offence").

[68] *See id.* at 9 (arguing that "the place where the offence was committed" was the Turkish vessel where the injury occurred).

[69] *Id.* at 18.

[70] *Id.* at 19.

[71] *Id.*

[72] *Id.*

[73] Glimmers of this concern about imperialism can be discerned in the dissenting opinions of Judges Bernard Loder and André Weiss. *See Lotus*, *supra* note 63, at 35 (diss. op., Loder, J.) (characterizing the territorial limits of prescriptive jurisdiction as "a postulate upon which the mutual independence of States rests"); *id.* at 49 (diss. op., Weiss, J.) (observing that the end of the Ottoman capitulations terminated Turkey's "inferior status," making it an "equal" sovereign, and emphasizing that "principles of the sovereignty of states" are "founded upon and limited by the territory over which the State exercises its dominion, that is to say, territorial sovereignty" (emphasis omitted));

https://doi.org/10.1017/ajil.2024.33 Published online by Cambridge University Press

After World War II, the United States embraced the PCIJ's invitation to stretch its imperial wings. In *United States v. Aluminum Co. of America* (*Alcoa*),[74] a 1945 opinion authored by Judge Learned Hand, the U.S. Court of Appeals for the Second Circuit repudiated *American Banana*'s strict territorial approach as applied to American antitrust law.[75] The court reasoned that Congress had deliberately authorized antitrust liability for claims based on overseas activities that were "intended to affect" and "did affect" U.S. markets.[76] The court characterized this approach as consistent with the supposedly "settled" principle of objective territoriality, namely, "that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends."[77]

Alcoa opened the door to transnational antitrust litigation in U.S. courts, establishing the United States as a global competition regulator.[78] For the next several decades, the United States experimented with extraterritoriality in other fields, including securities law, intellectual property, bankruptcy, tax, environmental law, civil rights, and labor law.[79] The Supreme Court enabled these developments by declining to apply the presumption against extraterritoriality for nearly forty years.[80] Although the Court eventually revived the presumption in 1991,[81] by that point extraterritorial regulation had already become an entrenched feature of American law. Thus, extraterritorial economic regulation empowered the United States to extend its vision globally of "an international capitalist economic order based on the rights of private property, open markets and 'free' trade."[82]

The imperialist turn in American antitrust regulation sparked fierce opposition from trading partners in Canada, Europe, and Latin America.[83] However, when it became apparent that the United States would not back down, the EU eventually followed suit, extending its own competition rules to foreign activities that produce market effects within its borders.[84]

see generally Chehtman, *supra* note 6, at 25 (noting the irony in the PCIJ approving Turkey's exercise of extraterritorial prescriptive jurisdiction "by reference to the Treaty of Lausanne," which "put an end to the capitulations regime between France and Turkey").

[74] U.S. v. Aluminum Co. of America et al., 148 F.2d 416 (2d Cir. 1945).

[75] *See id.* at 443–44.

[76] *Id.* at 444.

[77] *Id.* at 443.

[78] Decades later, the Supreme Court affirmed that the Sherman Act permits effects-based jurisdiction in *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 (1993): "[I]t is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States."

[79] *See* Austen L. Parrish, *Reclaiming International Law from Extraterritoriality*, 93 MINN. L. REV. 815, 846–48 (2009) (citing relevant legislation).

[80] *See* William S. Dodge, *The New Presumption Against Extraterritoriality*, 133 HARV. L. REV. 1582, 1597 (2020) (recounting this history).

[81] EEOC v. Arab American Oil Co., 499 U.S. 244, 248 (1991).

[82] SUNDHYA PAHUJA, DECOLONISING INTERNATIONAL LAW: DEVELOPMENT, ECONOMIC GROWTH AND THE POLITICS OF UNIVERSALITY 130 (2011).

[83] *See* DABBAH, *supra* note 33, at 469–76 (discussing diplomatic, legislative, and judicial resistance to U.S. extraterritoriality); John Byron Sandage, Forum Non Conveniens *and the Extraterritorial Application of United States Antitrust Law*, 94 YALE L.J. 1693, 1698 (1985) ("Yankee 'jurisdictional jingoism' has created wide-spread resentment and prompted America's closest allies to retaliate by adopting legislation limiting the reach of the Sherman Act in foreign jurisdictions.").

[84] *See* ANU BRADFORD, THE BRUSSELS EFFECT: HOW THE EUROPEAN UNION RULES THE WORLD 100 (2020) (discussing the rise of EU competition law).

https://doi.org/10.1017/ajil.2024.33 Published online by Cambridge University Press

Of particular note is a new generation of EU regulations that govern the online activities of foreign nationals abroad.[85] By setting relatively aggressive rules to promote competitive digital markets and ensure data protection, the EU has positioned itself as the preeminent global regulator for the digital economy. Whether companies operate out of Accra or Bogotá, Canberra or Damascus, they must now reckon with the global reach of EU cyber law.[86]

The EU and the United States are not alone in practicing extraterritoriality.[87] Nationality-based extraterritorial jurisdiction is now common around the world.[88] Many states exercise universal prescriptive jurisdiction over acts of genocide, official torture, and other violations of international *jus cogens*.[89] More controversially, the past two decades have seen more states assert prescriptive jurisdiction based on transboundary effects, passive personality, and the protective principle. Rising powers like Brazil, China, and India have joined the EU and the United States in asserting effects-based antitrust jurisdiction,[90] inspiring other countries around the world to follow suit.[91] As more states resort to extraterritoriality to project power abroad, assertions of concurrent jurisdiction have become increasingly common, generating international friction.[92]

Amidst these changes, one thing remains constant: in practice, extraterritoriality continues to be overwhelmingly the province of great powers.[93] When it comes to regulating the means and methods of international commerce, a handful of states manifestly dominate the field—not just because they have enacted extraterritorial laws, but also because they possess the

[85] *See, e.g.*, European Data Protection Board, Guidelines 3/2018 on the Territorial Scope of the GDPR (Article 3), 7 (2019), *at* https://www.edpb.europa.eu/our-work-tools/our-documents/guidelines/guidelines-32018-territorial-scope-gdpr-article-3-version_en (clarifying the GDPR's extraterritorial reach); European Parliament, *Artificial Intelligence Act: MEPs Adopt Landmark Law* (Mar. 13, 2024), *at* https://www.europarl.europa.eu/news/en/press-room/20240308IPR19015/artificial-intelligence-act-meps-adopt-landmark-law (discussing the European Parliament's A.I. Act, which applies extraterritorially).

[86] *See* Bradford, *supra* note 84, at 131–69 (discussing EU regulation of the global digital economy).

[87] *See* Danielle Ireland-Piper, Extraterritoriality in East Asia: Extraterritorial Criminal Jurisdiction in China, Japan, and South Korea (2021) (examining the approaches to extraterritoriality of China, Japan, and South Korea); Danielle Ireland-Piper, Accountability in Extraterritoriality: A Comparative and International Law Perspective (2017) [hereinafter Ireland-Piper, Accountability] (discussing extraterritoriality from a comparative perspective); Marek Martyniszyn, Developing Countries' Experience with Extraterritoriality in Competition Law 2–6 (UNCTAD 2021) (discussing the experience of thirty-four developing countries that have adopted extraterritorial competition laws); Research Handbook on Extraterritoriality, *supra* note 23, Chs. 9–12 (discussing extraterritoriality in Africa, Asia, Australia, Latin America, New Zealand, and the United Kingdom); Angela Huyue Zhang, Chinese Antitrust Exceptionalism: How the Rise of China Challenges Global Regulation 34–35, 217–21 (2021) (noting the rise of Chinese extraterritorial antitrust regulation); Parrish, *supra* note 79, at 852–56 (discussing how various countries have followed the United States' lead in adopting extraterritorial laws).

[88] Restatement, *supra* note 7, § 410, n. 2 (citing national laws).

[89] *Id.*, § 413, nn. 2–4.

[90] *Id.*, § 409, n. 2 (citing relevant statutes).

[91] *See* Marek Martyniszyn, *Extraterritoriality in Competition Law: Changing Frictions*, *in* Research Handbook on Extraterritoriality, *supra* note 23, at 389, 391 (noting "the steady introduction of competition legislation in domestic legal orders worldwide").

[92] *See* O'Keefe, *supra* note 4, at 523–24 (arguing that a "customary rule" has emerged permitting "overlapping jurisdictional competences . . . without hierarchy or priority among them").

[93] Even in fields where a large number of states assert extraterritorial prescriptive jurisdiction, less powerful states generally refrain from enforcing their extraterritorial laws. *See* Alejandro Chehtman, *Strategic Approaches to Extraterritorial Jurisdiction in Latin America*, *in* Research Handbook on Extraterritoriality, *supra* note 23, at 180, 186 ("Latin American countries have been generally reluctant to effectively assert their extraterritorial jurisdiction.").

https://doi.org/10.1017/ajil.2024.33 Published online by Cambridge University Press

institutional capacity and geopolitical clout to back up their laws with credible threats of enforcement. This dynamic is particularly evident in global competition law and regulation of the digital economy,[94] and the trend seems likely to continue for emerging technologies like artificial intelligence.[95] As during the colonial era, powerful states set the ground rules for the global economy by extending their *imperium* into foreign territory—often with scant regard for the conflicting values, preferences, and interests of foreign peoples.

This "new imperialism"[96] differs from colonial-era imperialism in several key respects. First, under the new imperialism, states arrogate to themselves the authority to govern foreign peoples without claiming sovereignty over those peoples. The new imperialism thus severs the traditional relationship between sovereignty and prescriptive jurisdiction, undermining Vattel's vision of national sovereignty as a safeguard for national self-determination. Second, unlike colonial-era imperialism, the new imperialism dispenses with the physical trappings of colonial administration and military occupation. States typically establish extraterritorial laws without seeking to enforce the laws directly within foreign territories. Third, the new imperialism does not necessarily entail significant power disparities between the state that makes extraterritorial law and states subject to that law. To be sure, great powers continue to deploy extraterritoriality to impose their will on weaker states. But they also subject one another to extraterritorial laws, generating regulatory conflicts within areas of concurrent jurisdiction. Less powerful developing states have also adopted extraterritorial laws, often modeled on the national laws of great powers.[97] This is not what contemporary scholars typically have in mind by "empire" and "imperialism."[98] Like the old colonial-era imperialism, however, the new imperialism involves states asserting prescriptive jurisdiction (*imperium*)

[94] *See* ANU BRADFORD, DIGITAL EMPIRES: THE GLOBAL BATTLE TO REGULATE TECHNOLOGY (2023) (explaining how China, the EU, and the United States vie for regulatory control over the digital economy); Michael L. Rustad & Thomas H. Koenig, *Towards A Global Data Privacy Standard*, 71 FLA. L. REV. 365, 432 (2019) (arguing that the EU has become the de facto global regulator for data).

[95] *See* European Parliament, *supra* note 85 (announcing passage of the EU's AI Act); White House, Exec. Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence, Oct. 30, 2023, *at* https://www.whitehouse.gov/briefing-room/presidential-actions/2023/10/30/executive-order-on-the-safe-secure-and-trustworthy-development-and-use-of-artificial-intelligence (expressing the intention to lead international efforts to develop global regulatory standards for artificial intelligence); Angela Huyue Zhang, *The Promise and Perils of China's Regulation of Artificial Intelligence*, 3, *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4708676 (discussing how "China has emerged as a pioneer in formulating some of the earliest and most comprehensive legislations regulating [recommendation algorithms, deepfakes, and generative] artificial intelligence (AI) services").

[96] *See* V. Rock Grundman, *The New Imperialism: The Extraterritorial Application of United States Law*, 14 INT'L L. 257, 257 (1980) (observing that "the United States has had three major exports: rock music, blue jeans, and United States law").

[97] *See* MARTYNISZYN, *supra* note 87, at 2–6 (reviewing the extraterritorial laws of various developing countries); Austen L. Parrish, *Domestic Responses to Transnational Crime: The Limits of National Law*, 23 CRIM. L. F. 275, 289 (2012) (attributing this "expansion of extraterritorial laws in countries other than the United States . . . to declining U.S. power at the global level"); Mari Takeuchi, *Asian Experience with Extraterritoriality*, *in* RESEARCH HANDBOOK ON EXTRATERRITORIALITY, *supra* note 23, at 169 (explaining that Asian countries have adopted extraterritorial regulation in reliance on EU and U.S. precedents).

[98] *See, e.g.*, MICHAEL DOYLE, EMPIRE 12 (2000) (defining "empire" as "a system of interaction between two political entities, one of which, the dominant metropole, exerts political control over the internal and external policy—the effective sovereignty—of the other, the subordinate periphery"); Susan Marks, The Earl A. Snyder Lecture in International Law, *Empire's Law*, 10 IND. J. GLOB. LEGAL STUD. 449, 450 (2003) (defining "empire" as "the phenomenon by which . . . nations have subjugated their neighbors and brought expanding areas under the control of a single supreme authority").

https://doi.org/10.1017/ajil.2024.33 Published online by Cambridge University Press

unilaterally over foreign nationals abroad. In practice, powerful states use unilateral legislation to advance "imperial agenda[s] . . . by displacing negotiated rules with self-serving regulatory measures."[99] Accordingly, the new imperialism raises similar normative concerns about the evils of uninvited foreign rule.

C. Contemporary Critiques

The new imperialism has attracted significant criticism based on its unilateral and arguably anti-democratic character. However, critics have struggled to make a convincing case that extraterritorial lawmaking violates international law.

Some commentators assert that extraterritorial lawmaking potentially violates state sovereignty.[100] This argument trades on the idea that independence from foreign intervention is an attribute of sovereignty.[101] To qualify as a wrongful intervention under international law, however, a state's actions must address matters within the scope of another state's jurisdiction and use "methods of coercion."[102] Wrongful coercion could involve either *extortion* aimed at coercing another state to act in a particular way[103] or the *usurpation* of another state's sovereign powers.[104] Neither of these options fits extraterritorial lawmaking particularly well. States typically use extraterritorial law to regulate the conduct of private parties, not to extort other states. Characterizing extraterritoriality as "usurpation" might seem more plausible on first impression, but it assumes what it sets out to prove: that states have exclusive jurisdiction within their territorial domains. If this assumption is incorrect—if international law authorizes extraterritorial prescriptive jurisdiction—then exercising this jurisdiction does not usurp another state's sovereign power. Accordingly, few international lawyers accept that extraterritoriality involves wrongful intervention.

[99] Phoebe Okowa, *The Pitfalls of Unilateral Legislation in International Law: Lessons from Conflict Minerals Legislation*, 69 INT'L & COMP. L. Q. 685, 697 (2020).

[100] *See, e.g.*, ALEJANDRO CHEHTMAN, THE PHILOSOPHICAL FOUNDATIONS OF EXTRATERRITORIAL PUNISHMENT 20, 28 (2010) (arguing that sovereignty entails a claim to juridical independence and that states therefore "hold a prima facie immunity against extraterritorial authorities dictating criminal legal rules which are binding on their territory"); Maziar Jamnejad & Michael Wood, *The Principle of Non-intervention*, 22 LEIDEN J. INT'L L. 345, 372–73 (2009) (asserting that "limits on a state's prescriptive jurisdiction can be viewed as a question of nonintervention"); A.V. Lowe, *The Problems of Extraterritorial Jurisdiction: Economic Sovereignty and the Search for a Solution*, 34 INT'L & COMP. L. Q. 724, 724 (1985) (asserting that extraterritoriality undermines a state's "economic sovereignty").

[101] *See* Richard B. Bilder, *Perspectives on Sovereignty in the Current Context: An American Viewpoint*, 20 CAN.-U.S. L.J. 9, 12 (1994) (observing that "sovereignty" has been "used as a surrogate for . . . various attributes ascribed to the traditional state, such as 'independence'").

[102] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Merits Judgment, 1986 ICJ Rep. 14, 108, para. 205 (June 27); *see also id.* ("The element of coercion . . . defines, and indeed forms the very essence of, prohibited intervention."); Friendly Relations Declaration, *supra* note 20 ("No State may use . . . any type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights . . . .").

[103] *See* TALLINN MANUAL 2.0 ON THE INTERNATIONAL LAW APPLICABLE TO CYBER OPERATIONS 319 (Michael N. Schmitt ed., 2d ed. 2017) (concluding that to qualify as coercion, "the coercive act must have the potential for compelling the target State to engage in an action that it would otherwise not take (or refrain from taking an action it would otherwise take)").

[104] *See* Marko Milanovic, *Revisiting Coercion as an Element of Prohibited Intervention in International Law*, 117 AJIL 601, 605 (2023) (arguing that a prohibited intervention may involve two types of coercion: "extortion" or "control").

https://doi.org/10.1017/ajil.2024.33 Published online by Cambridge University Press

Other scholars argue that extraterritoriality may undermine democracy.[105] For example, Austen Parrish suggests that extraterritoriality threatens "democratic sovereignty" when it subjects people to laws they have not chosen and cannot change.[106] To the extent that electoral democracy has become the gold standard for political legitimacy at the national level, extraterritoriality arguably erodes the legitimacy of the international order.

Whether extraterritoriality's undemocratic character violates international law is less obvious. Human rights treaties support democratic governance by enshrining individual rights to political participation and free elections,[107] but the scope and application of those rights are contested.[108] "Citizens" are entitled to political participation and free elections only vis-à-vis their states of nationality.[109] International law does not extend such rights to a state's foreign residents, much less to foreign nationals abroad. The better view, therefore, is that international law does not confer an individual right to freedom from extraterritorial foreign law.

Rather than focus on state rights (democratic sovereignty) or individual rights (democratic participation), a more promising basis for legal critique would emphasize how extraterritoriality undermines a *people*'s collective right to self-determination. The right of peoples to self-determination is enshrined in multilateral conventions, and it is widely recognized as customary international law.[110] Consequently, if extraterritoriality violates the right to self-determination, this would have far-reaching consequences under international law.

Skeptics might consider the right to self-determination an unpromising launching point for an assault on extraterritoriality's empire. Because the right's application to secessionist movements is often unclear and is perennially disputed, self-determination has been labeled "the most controversial and contested term in international law."[111] Some scholars consider the right too "vague and imprecise" to provide meaningful guidance outside the context of

[105] *E.g.*, Mark P. Gibney, *The Extraterritorial Application of U.S. Law: The Perversion of Democratic Governance, the Reversal of Institutional Roles, and the Imperative of Establishing Normative Principles*, 19 B.C. INT'L & COMP. L. REV. 297, 311 (1996) (arguing that "extraterritoriality, by its very nature, goes deeply against the grain of democratic governance"); Parrish, *Effects Test*, *supra* note 23, 1483 ("The greatest problem, often downplayed or overlooked in the literature, is the inherently undemocratic nature of extraterritorial laws.").

[106] Parrish, *supra* note 79, at 848, 859–60.

[107] *E.g.*, ICCPR, *supra* note 17, Art. 25; American Convention on Human Rights, Art. 23(1), *opened for signature* Nov. 22, 1969, 36 OAS TS 1, OAE/ser. L/V/II.23, Doc. 21, Rev. 6, 9 ILM 673, 682 (1970) [hereinafter American Convention]; African Charter, *supra* note 19, Art. 13(1); Protocol (No. 1) to the Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 3, *opened for signature* Mar. 20, 1952, ETS No. 9, 213 UNTS 262, 264 [hereinafter European Protocol]; *see generally* Gregory H. Fox, *The Right to Political Participation in International Law*, 17 YALE J. INT'L L. 539, 553–69 (1992) (arguing that international law reflects an emerging right to democratic governance); Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AJIL 46, 63–77 (1992) (same).

[108] *See* Richard A. Barnes, Book Review, *Democratic Governance and International Law*, 8 IND. J. GLOB. LEG. STUD. 281, 281 (2000) ("[F]or all the rhetoric surrounding the notion of democratic governance, . . . there appears to be little real consensus about . . . whether it exists as an international legal norm."); Niels Petersen, *The Principle of Democratic Teleology in International Law*, 34 BROOK. J. INT'L L. 33, 38–39 (2008) (arguing that a right to democratic governance has not gained traction in international law due, in part, to uncertainty over its scope and requirements).

[109] ICCPR, *supra* note 17, Art. 25; African Charter, *supra* note 19, Art. 13(1); American Convention, *supra* note 107, Art. 23(1).

[110] *See* Section II.A *infra*. Some commentators even characterize the right to self-determination as *jus cogens*. *E.g.*, UN Int'l Law Comm'n, Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, Art. 23, para. 5 Cmt. (2001) [hereinafter Articles on State Responsibility]; Evan J. Criddle & Evan Fox-Decent, *A Fiduciary Theory of* Jus Cogens, 34 YALE J. INT'L L. 331, 373–74 (2009).

[111] Weller, *supra* note 38, at 115.

https://doi.org/10.1017/ajil.2024.33 Published online by Cambridge University Press

decolonization.[112] Perhaps for this reason, the international legal community has yet to take self-determination seriously as a legal constraint on extraterritorial lawmaking.

This neglect of the right to self-determination is regrettable. As Part II will explain, the right to self-determination developed during the twentieth century in direct opposition to the colonial practice of legal imperialism. When states made self-determination a right under international law, they established a new world order in which all peoples are entitled to choose the laws that apply to them rather than leaving them under the rule of alien laws. As the next Part will argue, however, the right to self-determination does not require extraterritoriality's wholesale abolition, as some legal scholars have asserted.[113] Instead, self-determination calls for limiting extraterritoriality so that it no longer subjects people to foreign domination.

II. The Right to Self-Determination

Under international law, the right to self-determination safeguards a people's freedom to choose the laws and institutions by which it is governed.[114] Because the term "people" lacks an official legal definition, international lawyers have long debated which groups qualify.[115] However, some propositions are relatively uncontroversial.[116] Most relevant for present purposes, it is well established that a state's nationals collectively constitute a "people" with a

[112] Hurst Hannum, Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights 27 (1990); *see also* Crawford, *supra* note 38, at 7, 38 ("How can there be a legal concept, a right no less, which is generally admitted to exist when no one knows what it means?"); Fernando R. Tesón, *Introduction: The Conundrum of Self-Determination*, *in* The Theory of Self-Determination 1, 1 (Fernando R. Tesón ed., 2016) ("No other area of international law is more indeterminate, incoherent, and unprincipled than the law of self-determination.").

[113] *See, e.g.*, Gibney, *supra* note 105, 311 (asserting that "extraterritoriality, by its very nature, goes deeply against the grain of democratic governance"); Parrish, *Effects Test*, *supra* note 23, at 1485–86 (arguing that extraterritorial laws are incompatible with self-government and self-determination).

[114] *See* ICCPR, *supra* note 17, Art. 1 ("All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.").

[115] *See* Frédéric Mégret, *The Right to Self-Determination: Earned, Not Inherent*, *in* The Theory of Self-Determination, *supra* note 112, at 45, 54 (observing that the criteria for identifying "peoples" is "forever shrouded in controversy"). These debates have high stakes to the extent that advocates invoke self-determination in support of a right of secession for subnational groups. *See* Timothy William Waters, Boxing Pandora: Rethinking Borders, States, and Secession in a Democratic World 1 (2020) (arguing that the right to self-determination should permit subnational territories to secede by unilateral referendum); Patrick Macklem, *Self-Determination in Three Movements*, *in* The Theory of Self-Determination, *supra* note 112, at 94, 106 (observing that advocates invoke self-determination "as a justification for disrupting the existing distribution of sovereignty around the world"). However, the conventional view today is that the right to self-determination does not entitle subnational groups to secede unilaterally save perhaps in exceptional circumstances. *See* Tom Sparks, Self-Determination in the International Legal System: Whose Claim, to What Right? 25–29 (2023) (concluding that "there is at present no international law *right* to secede," but that secession might be legally permissible as an extraordinary remedy) (emphasis in original).

[116] For example, to the extent that groups seek political enfranchisement and respect for their cultural integrity within an existing state, the right to self-determination arguably can be claimed by a variety of "peoples," including a state's entire population, the populations of non-self-governing territories, Indigenous communities, and other sub-state national groups. *See Reference re Secession of Quebec*, *supra* note 24, para. 124 (recognizing, for these purposes, "that 'a people' may include only a portion of the population of an existing state"); Glen Anderson, *Who Are the "Peoples" Entitled to the Right of Self-Determination?*, *in* The Routledge Handbook of Self-Determination and Secession 41, 55, 57 (Ryan D. Griffiths, Aleksandar Pavković & Peter Radan eds., 2023) [hereinafter Self-Determination and Secession] (arguing that international law recognizes all of these groups as "peoples" for these purposes).

https://doi.org/10.1017/ajil.2024.33 Published online by Cambridge University Press

territorially bounded right to self-determination vis-à-vis foreign powers.[117] Under international law, every national polity is entitled to freedom from foreign rule within its own national territory.[118] When evaluating whether extraterritorial lawmaking violates the right to self-determination, therefore, it is this "polity-based," territorially defined approach to self-determination that supplies the relevant analytical frame.[119]

Curiously, international lawyers have yet to recognize how the right to self-determination restricts when states may resort to extraterritoriality. To correct this oversight, this Part makes several contributions. First, it situates the right to self-determination in historical context as a response to the "alien domination" of foreign rule.[120] Second, it clarifies the juridical character and scope of the right to self-determination under present-day international law. Third, it argues that the right to self-determination offers resources for distinguishing territorial jurisdiction from extraterritoriality. Fourth, it explains when, why, and how the right to self-determination limits the exercise of extraterritorial prescriptive jurisdiction. Lastly, it offers criteria for identifying when extraterritoriality is compatible with the right to self-determination, and it defends extraterritorial lawmaking in support of international human rights and other universally applicable norms of general international law.

A. Self-Determination as Decolonization

Scholars often trace the emergence of self-determination as a global political movement to the American Declaration of Independence and the French Revolution.[121] In both settings, revolutionaries embraced the republican vision of popular sovereignty as an alternative to monarchical sovereignty.[122] According to the republican tradition, true freedom is possible only when a people is self-determining rather than subject to another's will.[123]

[117] *See* SPARKS, *supra* note 115, at 4, 19, 22 (explaining how this formulation has become firmly established in international law); Anderson, *supra* note 116, at 57 (same).

[118] *See* Marcelo G. Kohen, *Self-Determination*, *in* THE UN FRIENDLY RELATIONS DECLARATION at 50, at 133, 160 (Jorge E. Viñuales ed., 2020) ("The definition of 'people' in international law . . . is a legal one[,] and practice in the last half-century shows that the key criterion is the territorial basis."); Timothy William Waters, *The Map Makes the People: The Territorial Nature of Self-Determination*, *in* SELF-DETERMINATION AND SECESSION, *supra* note 116, at 117 (emphasizing the role of national territory in defining which groups qualify for self-determination under international law); *see generally* Jeremy Waldron, *Two Conceptions of Self-Determination*, *in* THE PHILOSOPHY OF INTERNATIONAL LAW 397, 406–13 (Samantha Besson & John Tasioulas eds., 2010) (defending the territorial approach to self-determination on philosophical grounds).

[119] SPARKS, *supra* note 115, at 4.

[120] *See* Declaration on the Occasion of the Fiftieth Anniversary of the United Nations, para. 1, GA Res. 50/6, UN GAOR, 50th Sess., Supp. No. 49, UN Doc. A/RES/50/49 (1995) [hereinafter Vienna Declaration].

[121] *See* ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL 11 (1995) (discussing these antecedents); CHIMÈNE I. KEITNER, THE PARADOXES OF NATIONALISM: THE FRENCH REVOLUTION AND ITS MEANING FOR CONTEMPORARY NATION BUILDING 12 (2007) (describing the French Revolution as the period when "the idea of the nation was fused with that of self-government"). The concept of collective self-determination entered public discourse much earlier. *See* SPARKS, *supra* note 115, 41–46 (arguing that self-determination has roots in the 1286 Scottish War of Independence); Uriel Abulof, *The Emergence and Evolution of Self-determination*, *in* SELF-DETERMINATION AND SECESSION, *supra* note 116, at 16, 17 (asserting that the concept of collective self-determination first appeared in Anglican Church discourse in 1666).

[122] *See* KEITNER, *supra* note 121, at 12 (discussing these developments).

[123] *See* PHILIP PETTIT, ON THE PEOPLE'S TERMS: A REPUBLICAN THEORY AND MODEL OF DEMOCRACY 1 (2012) (explaining how republicans decry the "evil of subjection to another's will").

https://doi.org/10.1017/ajil.2024.33 Published online by Cambridge University Press

Whereas monarchy consigns people to live under alien domination, collective self-determination makes people free and equal citizens and co-authors of their law.[124]

At the end of World War I, self-determination gained renewed salience when U.S. President Woodrow Wilson joined other world leaders in championing the concept as a solution to the collapse of former empires in Eastern Europe.[125] For Wilson, self-determination meant that each "nation" (defined in racially, culturally, and historically essentialized terms) was entitled to choose its form of government.[126] "National aspirations must be respected," Wilson insisted; "peoples may now be dominated and governed only by their own consent."[127] Former empires, therefore, should be restructured into states that align with the geography of nations.[128] International recognition of a right to self-determination was necessary, Wilson believed, to achieve lasting peace.[129]

Although Wilson's vision shaped the post-war geography of Eastern Europe, it did not register immediately elsewhere.[130] Despite Wilson's advocacy, the Covenant of the League of Nations did not mention national self-determination. Former colonial possessions of the Austro-Hungarian, German, and Ottoman Empires were rolled into League mandates, placing them under the de facto sovereignty of other states.[131] Those states, in turn, kept a tight grip on their pre-existing colonies.[132] As a result, Indigenous communities around the world continued to suffer domination and exploitation while launching independence movements that struggled to attract international recognition and support.[133]

[124] *See* PHILIP PETTIT, REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT 51–78 (1997) (developing the republican account of "liberty as non-domination"); JOHN TRENCHARD & THOMAS GORDON, CATO'S LETTERS, VOL. 1, 430 (Ronald Hamowy ed., 6th ed. 1995 [1755]) ("Liberty is, to live upon one's own Terms; Slavery is, to live at the mere Mercy of another . . . .").

[125] *See* CASSESSE, *supra* note 121, at 2021. In emphasizing self-determination's republican roots, Wilson offered a counterpoint to the more radical account of the right of self-determination advanced by Vladimir Lenin. *See* V.I. Lenin, *The Right of Nations to Self-Determination (1914)*, *in* IMPERIALISM AND THE NATIONAL QUESTION 59 (2024) (advocating a right to unilateral secession as a step toward liberating the proletariat from oppression worldwide).

[126] *See* CASSESSE, *supra* note 121, at 20–21.

[127] Woodrow Wilson, Address of the President of the United States Delivered at a Joint Session of the Two Houses of Congress (Feb. 11, 1918), *reprinted in* U.S. Dept. of State, Papers Relating to the Foreign Relations of the U.S. 1918, Supp. 1, Vol. I, Doc. 59, at 108, 110, *at* https://history.state.gov/historicaldocuments/frus1918Supp01v01/d59.

[128] *See id.* at 111–12 (arguing "that national aspirations must be satisfied, even within [the Austro-Hungarian] Empire, in the common interest of Europe and mankind"); Woodrow Wilson, President Woodrow Wilson's 14 Points, Message to Congress (Jan. 8, 1918) (transcript available with the National Archives), *at* https://www.archives.gov/milestone-documents/president-woodrow-wilsons-14-points (demanding, *inter alia*, that "[t]he peoples of Austria-Hungary, whose place among the nations we wish to see safeguarded and assured, should be accorded the freest opportunity to autonomous development").

[129] *See* Wilson, *supra* note 127, at 111–12.

[130] *See* ROBERT GILDEA, EMPIRES OF THE MIND: THE COLONIAL PAST AND THE POLITICS OF THE PRESENT 43 (2019) ("Wilson's high ideals were designed to take the moral high ground from the German, Austro-Hungarian and Ottoman Empires rather than to bring down the colonial system.").

[131] *See* SUSAN PEDERSEN, THE GUARDIANS: THE LEAGUE OF NATIONS AND THE CRISIS OF EMPIRE 3 (2015) ("[W]hatever purposes the mandates system had been devised to serve, extending the right of national self-determination was not one of them.").

[132] *See* Antony Anghie, *The Evolution of International Law: Colonial and Postcolonial Realities*, 27 THIRD WORLD Q. 739, 748 (2006) (observing that the Mandate System "did not apply to the victorious colonial powers").

[133] *See* GILDEA, *supra* note 130, at 43–50 (explaining how the Paris Peace Conference and the subsequent interwar period proved a disappointment to national liberation movements).

https://doi.org/10.1017/ajil.2024.33 Published online by Cambridge University Press

At the close of World War II, self-determination resurfaced in the UN Charter.[134] Articles 1(2) and 55 characterize self-determination as a "principle" that the United Nations should respect to "strengthen universal peace."[135] Rather than affirm a "right" to self-determination, the Charter perpetuates colonial rule by placing former possessions of the defeated Axis powers under UN trusteeship[136] and allowing other states to govern "non-self-governing territories."[137] In theory, these arrangements were supposed to benefit colonized peoples by helping them develop the institutional capacity for effective self-government.[138] However, because colonized peoples lacked a clearly established *right* to independent self-rule, colonial powers did not consider themselves legally obligated to relinquish their territorial claims.[139]

It would take several decades of violent struggle before self-determination became firmly entrenched in international law.[140] As independence movements intensified during the 1950s, most colonial powers eventually felt compelled to divest their colonial territories.[141] Meanwhile, in the UN General Assembly, newly independent states pressed for international recognition of a right to self-determination.[142] This diplomatic assault on colonialism produced a series of landmark UN resolutions, eventually leading to a treaty-based right to self-determination. These instruments rejected the idea that self-determination justified the "disruption of the national unity and the territorial integrity of a country."[143] Instead, the international community re-envisioned the right to self-determination as a sweeping entitlement to freedom from domination.

A pivotal development in the decolonization movement was the General Assembly's 1960 Declaration on Colonial Independence, which unequivocally affirms a universal right to self-determination: "All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural

[134] UN Charter, Arts. 1(2), 55, *at* https://www.un.org/en/about-us/un-charter/full-text.

[135] *Id.* Art. 1(2); *see also id.* Art. 55 (discussing the "principle of . . . self-determination of peoples" in connection with establishing "peaceful and friendly relations among nations").

[136] *Id.* Arts. 75–85.

[137] *Id.* Arts. 73–74.

[138] *See id.* Art. 73(b) (recognizing the "obligation" "to develop self-government, to take due account of the political aspirations of the peoples [within non-self-governing territories], and to assist them in the progressive development of their free political institutions"); *id.* Art. 76(b) (providing for the trusteeship system to advance "progressive development towards self-government or independence as may be appropriate to . . . the freely expressed wishes of the peoples concerned").

[139] *See* Gerry Simpson, *The Diffusion of Sovereignty: Self-Determination in the Post-Colonial Age*, 32 STAN. J. INT'L L. 255, 267–68 (1996) (describing colonial powers' resistance to independence claims throughout this period).

[140] *See* Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Afr.) Notwithstanding Security Council Resolution 276, Judgment, 1970 ICJ Rep. 16, 74 (June 21) (sep. op., Ammoun, J.) (observing that "before being written into charters that were not granted but won in bitter struggle," the right to self-determination first had to be "written painfully, with the blood of the peoples, in the finally wakened conscience of humanity").

[141] Simpson, *supra* note 139, at 68 (discussing this process).

[142] *Id.*

[143] Declaration on Colonial Independence, *supra* note 1, para. 6; *see also* Friendly Relations Declaration, *supra* note 20 (rejecting "any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples").

https://doi.org/10.1017/ajil.2024.33 Published online by Cambridge University Press

development."[144] Some commentators have mischaracterized the Declaration as concerned exclusively with dismantling colonialism.[145] But the Declaration actually goes much further. It calls on colonial administrations to "transfer *all powers* to the people" of trust and non-self-governing territories "without any conditions or reservations, in accordance with their freely expressed will and desire."[146] It "[s]olemnly proclaims the necessity of bringing to a speedy and unconditional end colonialism *in all its forms and manifestations*."[147] And it affirms that "the subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation."[148] The Declaration thus frames self-determination not only as freedom from the "exploitation" of colonialism and territorial dispossession[149] but also as liberation from the "subjugation" and "domination" of foreign rule.[150]

This broad framing of the right to self-determination was essential to achieve complete decolonization.[151] As Lea Ypi has observed, an insidious and pervasive feature of colonialism is the so-called "civilizing mission" whereby colonial powers subject Indigenous communities to foreign rule.[152] By imposing foreign law on Indigenous peoples without their consent, colonial powers forced those communities into "a political association where the rules [were] established . . . without their say."[153] The Declaration on Colonial Independence categorically

[144] Declaration on Colonial Independence, *supra* note 1, para. 2. The Declaration passed by a vote of eighty-nine to zero, with nine abstentions. MORTON H. HALPERIN, DAVID J. SCHEFFER & PATRICIA L. SMALL, SELF-DETERMINATION IN THE NEW WORLD ORDER 21 (1992). In the *Chagos* advisory opinion, the ICJ concluded that the Declaration on Colonial Independence "has a declaratory character with regard to the right to self-determination as a customary norm." *Chagos*, Advisory Opinion, *supra* note 22, at 132, para. 152 (Feb. 25).

[145] *See, e.g.*, Simpson, *supra* note 139, at 271–73 (recounting how some international lawyers during the 1960s considered self-determination to be concerned "only with a very precisely defined form of decolonization" from "salt-water colonialism").

[146] Declaration on Colonial Independence, *supra* note 1, para. 5 (emphasis added).

[147] *Id.*, pmbl. (emphasis added).

[148] *Id.*, para. 1.

[149] *See Chagos*, Advisory Opinion, at 133, para. 155 (affirming that the right to self-determination of peoples includes respect for territorial integrity); *Legal Consequences of the Construction of a Wall*, Advisory Opinion, *supra* note 21, at 184, para. 122 (concluding that Israel's construction of a wall through the West Bank "severely impedes the exercise by the Palestinian people of its right to self-determination, and is therefore a breach of Israel's obligation to respect that right").

[150] *See Chagos*, Advisory Opinion, *supra* note 22, at 131, para. 144 (limiting its analysis "to analysing the right to self-determination in the context of decolonization" but recognizing that the right has "a broad scope of application" outside that context); Héctor Gros Espiell, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, The Right to Self-Determination: Implementation of United Nations Resolutions, UN Doc. E/CN.4/Sub.2/405/Rev.1 (1980) (observing that "the notion of colonial and alien domination is broader than—though it includes— . . . foreign occupation").

[151] *See* ADOM GETACHEW, WORLDMAKING AFTER EMPIRE 2 (2019) (arguing "that decolonization was a project of reordering the world . . . to create a domination-free and egalitarian international order").

[152] Lea Ypi, *What's Wrong With Colonialism*, 41 PHIL. & PUB. AFF. 158, 168 (2013).

[153] *Id.* at 174, 178, 187; *see also* JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 82 (2000) ("Colonialization was rendered illegitimate in part by reference to the processes leading to colonial rule, processes that today clearly represent impermissible territorial expansion of governmental authority.").

https://doi.org/10.1017/ajil.2024.33 Published online by Cambridge University Press

prohibits this legal imperialism by affirming that all peoples are entitled to determine the laws and institutions that govern them, free from foreign subjugation and domination.[154]

The UN General Assembly's unanimous 1970 Friendly Relations Declaration further cements this robust framing of the right to self-determination:

> By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.
>
> Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle, in order:
>
> (a) To promote friendly relations and co-operation among States; and
> (b) To bring a speedy end to colonialism, having due regard to the freely expressed will of the peoples concerned; and bearing in mind that subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle, as well as a denial of fundamental human rights, and is contrary to the Charter.[155]

By proclaiming that peoples are entitled to freely determine their "political status" and linking this entitlement to the struggle for decolonization, the Friendly Relations Declaration confirms that the inhabitants of former colonies are entitled to independence from foreign rule. But the Declaration does not stop there. It affirms that "*all* peoples" are entitled to claim this right and "every State has the duty to respect this right."[156] The right to self-determination thus extends to all peoples everywhere, not just the inhabitants of former colonies.

Should there be any lingering uncertainty about whether the right to self-determination has become a legally binding norm, the international community laid such doubts to rest a few years later in the ICCPR and the ICESCR. Echoing the Friendly Relations Declaration, Common Article 1 of the ICCPR and ICESCR states: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."[157] Like the Declaration, Common Article 1 defines the right to self-determination as applying to all peoples, not just those

[154] *See* CRAWFORD, *supra* note 8, at 621 (explaining that the right to self-determination "has been understood as the right of peoples under colonial, foreign, or alien domination to self-government").

[155] Friendly Relations Declaration, *supra* note 20.

[156] *Id.* (emphasis added); *see also* CASSESE, *supra* note 121, at 90 (emphasizing this point).

[157] ICCPR, *supra* note 17, Art. 1(1); ICESCR, *supra* note 18, Art. 1(1); *see also* African Charter, *supra* note 19, Art. 20 ("All peoples . . . shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.").

https://doi.org/10.1017/ajil.2024.33 Published online by Cambridge University Press

seeking independence from colonial rule.[158] States bear a correlative obligation to respect the self-determination of other peoples, regardless of where those peoples may be found.[159]

International courts and commissions have confirmed the mandatory and universal character of the right to self-determination by defining the right as freedom from uninvited foreign rule. In *Western Sahara*, for example, the ICJ declared that "the right of self-determination requires a free and genuine expression of the will of the peoples concerned" for any political association with a foreign power.[160] Similarly, the Australian Aboriginal and Torres Strait Islander Social Justice Commission equated self-determination with freedom from foreign governance in its First Report:

> The right to self determination . . . is the right to make decisions. . . . Our entire experience since the assertion of British sovereignty over our country has been the experience of the denial of the right to self-determination. Our lives were utterly subject to the control, the decisions, of others.[161]

These pronouncements underscore that the right to self-determination serves not only to liberate peoples from colonialism but also to ensure that every polity enjoys freedom from foreign governance.[162]

B. Defining the Legal Right

As formulated under international law, the right to external self-determination has several interlocking components that come into sharper relief when viewed through Wesley Hohfeld's classic framework for analyzing legal rights.[163] The core of the right to external self-determination is a people's exclusive *privilege* to engage in self-governance by determining the laws and institutions by which it will be governed within the borders of its territorially defined

[158] *See Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *supra* note 149, at 172, para. 88 (stating that Common Article 1 "reaffirms the right of all peoples to self-determination, and lays upon the States parties the obligation to promote the realization of that right and to respect it"); UN Office of the High Commissioner for Human Rights, Human Rights Committee General Comment No. 12: Article 1 (The Right to Self-Determination of Peoples), paras. 1–2, UN Doc. HRI/GEN/1/Rev.9 (Vol. I) (Mar. 13, 1984) (affirming that "all peoples have the right of self-determination"); United Nations, The Realization of the Right to Development: Global Consultation on the Right to Development as a Human Right, para. 3(d), UN Doc. HR/PUB/91/2, 1991 (concluding that self-determination "is not a right to be enjoyed once only and thereafter to be forever lost" (quoted in Patrick Thornberry, *The Democratic or Internal Aspect of Self-determination with Some Remarks on Federalism*, *in* MODERN LAW OF SELF-DETERMINATION 101, 103 (Christian Tomuschat ed., 1993)).

[159] *See* John H. Knox, *Climate Change and Human Rights Law*, 50 VA. J. INT'L L. 163, 205 (2009) (explaining why state duties to respect self-determination apply extraterritorially).

[160] *Western Sahara*, Advisory Opinion, *supra* note 21, at 32, para. 55, 33, para. 58 (Oct. 16); *see also Chagos*, Advisory Opinion, *supra* note 22, at 134, para. 157 (reemphasizing that self-determination "must be the expression of the free and genuine will of the people concerned").

[161] *See* PAUL KEAL, EUROPEAN CONQUEST AND THE RIGHTS OF INDIGENOUS PEOPLES: THE MORAL BACKWARDNESS OF INTERNATIONAL SOCIETY 130 (2003) (quoting AUSTRALIAN ABORIGINAL AND TORRES STRAIT ISLANDER SOCIAL JUSTICE COMMISSION, FIRST REPORT 41 (1993)).

[162] *See* Vienna Declaration, *supra* note 120 ("reaffirm[ing] the right of self-determination of all peoples, taking into account the particular situation of peoples under colonial or other forms of alien domination").

[163] *See* Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913); Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917).

https://doi.org/10.1017/ajil.2024.33 Published online by Cambridge University Press

state,[164] coupled with a *claim-right* protecting the privilege from interference *erga omnes*.[165] Secondarily, the right to self-determination confers an exclusive *power* to waive or modify the privilege of self-government and an *immunity* against other actors unilaterally waiving or modifying the privilege. These components of the right pertain to a people collectively, not to its members individually or the state per se. In appropriate contexts, however, states have standing to represent a people in asserting the right to self-determination on its behalf.[166]

Correlative to these components of a people's right to self-determination are certain duties and liabilities. Under international law, states and other global actors have *no right* to demand that a people refrain from engaging in collective self-governance, and they bear *duties* to refrain from impeding a people's self-governance within its national territory and to cooperate in progressively realizing self-determination for all peoples.[167] A people's power to waive its privilege of self-government creates a *liability* for states and other global actors, which may see their powers correspondingly diminished. States and other global actors also face a legal *disability* that prevents them from unilaterally waiving or modifying a people's right to self-determination.

Collectively, these components of the right to self-determination safeguard a distinctive conception of liberty: freedom from domination.[168] Republican political theorists describe this type of freedom as "liberty" or "independence."[169] Freedom from domination entails independence from the unilateral imposition of alien rule. A people is self-determining when it enjoys independence from uninvited foreign governance,[170] enabling it to develop its political institutions and author its laws.[171] Whereas international law's prohibition of intervention entitles *states* to freedom from *coercive interference* (extortion or usurpation),

[164] Other scholars characterize Hohfeldian privileges as "liberties," e.g., H.L.A. Hart, *Rawls on Liberty and Its Priority*, 40 U. CHI. L. REV. 534, 538 (1973), or "permissions," e.g., HEIDI M. HURD, MORAL COMBAT 280 (1999).

[165] The right to self-determination is a Hohfeldian privilege vis-à-vis foreign powers (the horizontal dimension), but it also constitutes a power insofar as it authorizes a people collectively to confer powers on public institutions to govern those who are subject to the state's jurisdiction (the vertical dimension). *See* Chehtman, *supra* note 6, at 24 (explaining how liberties "capture horizontal relationships between equals," whereas "normative powers establish vertical relations [with] subjects").

[166] Whether individuals, foreign states, or other global actors may assert self-determination claims on behalf of a people is less clear. *See East Timor (Port. v. Austl.)*, Judgment, *supra* note 21, at 102, para. 29, 105, para. 35 (asserting that the right to self-determination "has an *erga omnes* character," but concluding in the particular case that the Court lacked jurisdiction over Portugal's assertion of the right on behalf of the people of East Timor).

[167] *See* Friendly Relations Declaration, *supra* note 20 ("Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples.").

[168] *See* Vienna Declaration, *supra* note 120, para. 1 (emphasizing that the right to self-determination attends to "forms of alien domination or foreign occupation"); JÖRG FISCH, THE RIGHT OF SELF-DETERMINATION OF PEOPLES: THE DOMESTICATION OF AN ILLUSION 234 (Anita Mage transl., 2015) (explaining that self-determination "is freedom without domination"); GETACHEW, *supra* note 151, at 74 ("The anticolonial right to self-determination functioned as the juridical component of international nondomination.").

[169] *E.g.*, Philip Pettit, *Republican Freedom: Three Axioms, Four Theorems*, *in* REPUBLICANISM AND POLITICAL THEORY 102, 102 (Cécile Laborde & John Maynor eds., 2008); Quentin Skinner, *Freedom as the Absence of Arbitrary Power*, *in* REPUBLICANISM AND POLITICAL THEORY, *id.*, at 83, 84–86.

[170] *See* Philip Pettit, *The Globalized Republican Ideal*, 9 GLOB. JUST.: THEORY, PRACTICE, RHETORIC 47, 48 (2016) ("[F]ree peoples should constitute corporate bodies that enjoy freedom as non-domination in their relations with one another and with other global bodies.").

[171] *See* Abulof, *supra* note 121, at 18 (arguing that the liberty envisioned in self-determination goes beyond "being released from coercion (non-interference) or exempt from potential intimidation (non-domination)" to include "be[ing] able to determine things by one*self*") (emphasis in original); Anna Stilz, *The Value of Self-Determination*, 2 OXFORD STUD. POL. PHIL. 98, 101 (2016) (arguing that a people's "interest in being the authors or 'makers' of their political institutions" . . . [constitutes] "the 'intuitive core' of a self-determination theory").

https://doi.org/10.1017/ajil.2024.33 Published online by Cambridge University Press

the right to self-determination entitles *peoples* to independence, defined principally by freedom from foreign *domination* (the unilateral imposition of foreign rule).

Unilateral extraterritorial lawmaking violates the right to self-determination. In Jörg Fisch's words, "[o]ne who determines not oneself, but rather others, exercises alien domination."[172] This is what makes extraterritoriality so threatening to national self-determination. When a state unilaterally extends its laws abroad, it "determines" for others. It subjects other peoples to foreign rule. The right to self-determination prohibits such domination.[173]

Unilateral extraterritoriality is wrongful even when its purpose is benevolent. As republican political theorists have recognized, domination consists of being "under the power of a master" (*in potestae domini*).[174] Subjection to a virtuous king or a benevolent enslaver is dominating even if the king or the enslaver chooses to exercise power altruistically for the benefit of his subordinates.[175] Similarly, imposing national laws unilaterally on a foreign people qualifies as alien domination even if extraterritorial laws advance the people's practical interests. This principle should not be controversial in a post-colonial era. If there is one guiding principle that has galvanized the global struggle for decolonization, it is that the dominating paternalism of the "civilizing mission" is no substitute for the liberty of national self-determination.

The right to self-determination prohibits unilateral extraterritorial lawmaking even if the lawmaking state never actually enforces its laws outside its borders. Simply by enacting extraterritorial law, the lawmaking state impresses upon a foreign people their subjugation and vulnerability to enforcement if they venture abroad, as well as the need to keep within the good graces of the lawmaking state.[176] People subject to extraterritorial law may feel constrained to comply with the law even if they do not support its demands and purposes. This coerced servility is what it means for a people to live under alien domination.

C. Territory and Extraterritoriality

In recent years, it has become fashionable to downplay or deconstruct the distinction between territorial and extraterritorial jurisdiction.[177] For example, Péter Szigeti argues

[172] FISCH, *supra* note 168, at 234.

[173] *See* Vienna Declaration, *supra* note 120, para. 1 (affirming that the right to self-determination prohibits "forms of alien domination").

[174] Phillip Pettit, *Law and Liberty*, *in* LEGAL REPUBLICANISM: NATIONAL AND INTERNATIONAL PERSPECTIVES 39, 44 (Samantha Besson & José Luis Martí eds., 2009); *see also* JOHN LOCKE, SECOND TREATISE OF GOVERNMENT, § 22, at 17 (C. B. Macpherson ed., 1980 [1690]) (asserting that liberty entails not being "subject to the inconstant, uncertain, unknown, arbitrary will of another man"); *cf.* Robert E. Goodin, *Enfranchising All Affected Interests, and Its Alternatives*, 35 PHIL. & PUB. AFF. 40, 52 (2007) (arguing that democratic self-determination requires the inclusion of "all interests that are actually affected by the actual decision").

[175] *See* M.N.S. SELLERS, THE SACRED FIRE OF LIBERTY: REPUBLICANISM, LIBERALISM AND THE LAW 71 (1998) (observing that James Madison in the *Federalist Papers* "attributed tyranny to an excess of power, even in service of the common good").

[176] *See* Pettit, *supra* note 169, at 103 (emphasizing how domination "invigilate[s] the choices of the controlled agent").

[177] *See, e.g.*, Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311, 490 (2002) ("[A]ssuming that nation-state identities are the relevant matrix for understanding community . . . 'serves to foreclose a richer understanding of location and identity that would account for the relationships of subjects to multiple collectivities'" (quoting Akhil Gupta, *The Song of the Nonaligned World: Transnational Identities and the Reinscription of Space in Late Capitalism*, *in* CULTURE, POWER, PLACE: EXPLORATIONS IN CRITICAL ANTHROPOLOGY 179, 196 (Akhil Gupta & James Ferguson eds., 1997)); Péter D. Szigeti, *In the Middle of*

https://doi.org/10.1017/ajil.2024.33 Published online by Cambridge University Press

that "the quest to distinguish territoriality from extraterritoriality" is "futile" because territorial jurisdiction relies on two false assumptions: first, "that everything has a physical location"; and second, that a thing's "location is an observable, verifiable fact."[178] Szigeti observes that it is not always possible to assign a single territory to "immaterial and intangible phenomena, such as actions, events, plans and conspiracies, intangible assets, or digitised information."[179] Foreign activities that produce transboundary harm also pose a puzzle for territorial jurisdiction. Some authorities characterize effects-based jurisdiction as a subset of "territorial" jurisdiction, while others consider it "extraterritorial."[180] Because territorial jurisdiction is a perennially contested legal concept, international lawyers disagree among themselves about which territorial contacts suffice to establish national jurisdiction.

The right to self-determination casts new light on the distinction between territorial and extraterritorial jurisdiction by calling attention to how territory facilitates collective governance. International law relies on territorially organized states to establish domains wherein peoples can exercise collective self-determination. This enables people to experience what Anna Stilz calls "maker" freedom: "the freedom of understanding oneself as a 'maker' of the coercive institutions by which one is governed."[181] Conversely, when a state reaches beyond its territory to exercise prescriptive jurisdiction over foreign peoples outside its territory, those peoples may experience foreign law as unfreedom because it does not reflect their collective co-authorship. Unless they are nationals of the lawmaking state or have consented to abide by foreign law, people outside a state's borders will relate to foreign law as alien domination. Accordingly, the more expansively national authorities construe their state's territorial jurisdiction, the greater the risk that their national laws will undermine other peoples' self-determination.

These considerations counsel in favor of construing "territorial" jurisdiction narrowly to avoid undermining other peoples' right to self-determination. A state must not exploit incidental or insubstantial territorial contacts as a pretext for regulating unilaterally the extraterritorial activities of foreign nationals. Instead, territorial jurisdiction applies only when a state seeks to regulate persons, conduct, or property within its territory.[182]

Under this approach, a law is extraterritorial if its focus relates to persons, conduct, or property outside the state's territory. For instance, Mexico engages in extraterritorial lawmaking if it threatens criminal penalties against newspaper editors in the United States who publish libel about Mexican nationals.[183] The United States exercises extraterritorial jurisdiction when it threatens civil liability against foreign investors outside the United States who purchase

Nowhere: The Futile Quest to Distinguish Territoriality from Extraterritoriality, *in* THE EXTRATERRITORIALITY OF LAW, *supra* note 3, at 30 (critiquing the legal-formalist territoriality/extraterritoriality dichotomy).

[178] Szigeti, *supra* note 177, at 30, 43.

[179] *Id.* at 30–31.

[180] *See* Péter D. Szigeti, *The Illusion of Territorial Jurisdiction*, 52 TEX. INT'L L.J. 369, 371 (2017) (observing that "Learned Hand, the [European Court of Justice], and Cedric Ryngaert treat effects jurisdiction as a form of territorial jurisdiction, while most U.S. scholars consider it to be a form of extraterritorial jurisdiction").

[181] Stilz, *supra* note 171, at 115, 117.

[182] This approach resonates with the Supreme Court's suggestion that applying domestic legislation extraterritorially is "impermissible" under the presumption against extraterritoriality "if the conduct relevant to the [statute's] focus occurred in a foreign country." RJR Nabisco, Inc. v. European Community, 579 U.S. 325, 337 (2016). *But see* Dodge, *supra* note 80, at 1605–08, 1611–12 (arguing that the Supreme Court's recent decisions applying the presumption against extraterritoriality do not actually require domestic conduct if a statute reflects Congress's domestic concerns, such as preventing harmful effects in the United States).

[183] Cutting Affair, *supra* note 59, at 751.

https://doi.org/10.1017/ajil.2024.33 Published online by Cambridge University Press

property confiscated from Americans in Cuba.[184] American lawmakers use territorial jurisdiction to regulate the conduct of data service providers inside the United States, but they exercise extraterritorial jurisdiction when they seek to regulate how foreign companies handle the personal data of U.S. nationals on servers overseas.[185] Thus, national laws are "extraterritorial" to the extent that they purport to govern persons, conduct, or property outside the state's borders—even if those subject to the laws purposefully target the forum.

Reasonable minds will sometimes disagree about whether a particular law is territorial or extraterritorial.[186] Nonetheless, maintaining the distinction between territorial and extraterritorial jurisdiction is necessary to make room for peoples to exercise their right to self-determination free from foreign domination.

D. When Extraterritoriality Constitutes Imperialism

The right to self-determination offers resources for combatting extraterritoriality's imperialistic excesses. To satisfy international law, it is not enough for a state to have prescriptive jurisdiction through a "genuine connection between the subject of the regulation and the state seeking to regulate."[187] Instead, the state must show that a people subject to extraterritorial law has freely and collectively embraced that law for themselves. If extraterritorial law does not reflect the collective self-government of the people concerned, it violates the right to self-determination.

Some conventional bases for extraterritorial prescriptive jurisdiction are difficult to square with the right to self-determination. When a state exercises prescriptive jurisdiction based solely on transboundary effects, passive personality, or the protective principle, it wields power over foreign nationals who are not part of its "people" and may not have embraced its law in any meaningful sense. Accordingly, international lawyers should closely scrutinize extraterritorial laws that rely on these three bases to ensure that the laws do not introduce alien domination.

Consider, for example, the Russian Criminal Code, which applies to foreign nationals abroad whenever "crimes run counter to the interests of the Russian Federation."[188] The Criminal Code is replete with controversial provisions that raise civil liberties concerns.[189]

[184] *See* 22 U.S.C. § 6081(11) ("To deter trafficking in wrongfully confiscated property, United States nationals who were the victims of these confiscations should be endowed with a judicial remedy in the courts of the United States that would deny traffickers any profits from economically exploiting Castro's wrongful seizures.").

[185] *See* Matter of a Warrant to Search a Certain E-Mail Account Controlled and Maintained by Microsoft Corp., 829 F.3d 197, 201–02 (2d Cir. 2016), *vacated and remanded as moot by* United States v. Microsoft Corp., 138 S.Ct. 1186 (2018) (applying the presumption against extraterritoriality and instructing a district court to quash a warrant directed at requiring Microsoft to collect, import, and produce data stored by an independent subsidiary outside the United States).

[186] *See* Hannah L. Buxbaum, *The Scope and Limitations of the Presumption Against Extraterritoriality*, 110 AJIL UNBOUND 62 (2016) (noting that "in securities regulation . . . lower courts have struggled to identify the location of non-exchange-based transactions").

[187] RESTATEMENT, *supra* note 7, § 407. A "genuine connection," such as an individual or corporation's purposeful targeting of the forum, might suffice to show that it is not unreasonable as a matter of fair notice for a state to exercise prescriptive jurisdiction over the particular individual or corporation. However, this does not obviate the state's obligation to respect a foreign people's collective right to self-determination.

[188] Criminal Code of the Russian Federation, Art. 12(3) (Russ.) [hereinafter Russian Criminal Code].

[189] *See* MARIA KRAVCHENKO, INVENTING EXTREMISTS: THE IMPACT OF RUSSIAN ANTI-EXTREMISM POLICIES ON FREEDOM OF RELIGION OR BELIEF 3–7 (U.S. Comm'n on Int'l Religious Freedom, Jan. 2018) (discussing the targeting of religious denominations under the Code's prohibitions against participating in an "extremist

https://doi.org/10.1017/ajil.2024.33 Published online by Cambridge University Press

For example, it prohibits "public actions aimed at discrediting" Russia's armed forces.[190] Critics worry that Russia could use this provision to prosecute foreign journalists and war crimes investigators who publish evidence of military atrocities in Ukraine.[191] Recent developments suggest that this fear may be well founded. After the ICC issued an arrest warrant against Russian President Vladimir Putin in March 2022 for alleged acts of genocide in Ukraine,[192] Russia's Duma amended the Code to prohibit assisting foreign and international bodies to which Russia is not a party.[193] Prosecutors then announced indictments against ICC Prosecutor Karim Asad Ahmad Khan (a British national) and ICC Judge Rosario Salvatore Aitala (an Italian national) based on their service at the ICC.[194] These indictments delivered the message that Russia will not hesitate to assert its criminal law globally to deter and punish challenges to its authority.

If pressed, Russian officials would likely argue that the Criminal Code's extraterritorial scope reflects a permissible exercise of prescriptive jurisdiction based on transboundary effects and the protective principle. This argument rests on dubious premises, given that war crimes investigation and prosecution are not the kinds of activities that the international community recognizes as supporting prescriptive jurisdiction under either the protective principle or the effects test.[195] But even if this jurisdictional argument were sound, it would not follow that Russia's extraterritorial lawmaking is permissible under international law. The Code criminalizes conduct that is perfectly lawful under general international law and the domestic law of most other countries.[196] Leveraging extraterritoriality to intimidate and punish foreign critics in this manner is a textbook example of alien domination. The right to self-determination categorically prohibits such measures.

E. Extraterritoriality Without Imperialism

Extraterritoriality does not always violate the right to self-determination. As we have seen, the right to self-determination includes an exclusive privilege to decide the laws and institutions by which a people will be governed domestically, along with a claim-right against other states interfering with this privilege. As the term "*self*-determination" implies, however, a

community" and organizing or participating in the activity of a banned "public or religious association"); Human Rights Watch, *Russia: Withdraw New Batch of Oppressive Laws* (May 5, 2021), *at* https://www.hrw.org/news/2021/05/05/russia-withdraw-new-batch-oppressive-laws (discussing the prosecution of political dissidents).

[190] Russian Criminal Code, *supra* note 188, Art. 280.3; *see also id.* Art. 207.3 (prohibiting disseminating "deliberate false information about the use of Russian armed forces").

[191] *See* Human Rights Watch, *Russia Criminalizes Independent War Reporting* (Mar. 23, 2022), *at* https://www.hrw.org/news/2022/03/07/russia-criminalizes-independent-war-reporting-anti-war-protests.

[192] Human Rights Watch, *Russia: Law Targets International Criminal Court* (May 5, 2023), *at* https://www.hrw.org/news/2023/05/05/russia-law-targets-international-criminal-court.

[193] Ketrin Jochecová, *Russia Blasts Back at ICC Over Putin Arrest Warrant*, POLITICO (Mar. 20, 2023), *at* https://www.politico.eu/article/putin-russia-icc-criminal-case-moscow-ukraine-war. Even before the April 2023 amendment, the Russian Criminal Code prohibited "confidential cooperation" with foreign governments and international organizations contrary to "state security." Human Rights Watch, *supra* note 192.

[194] *Russia Indicts*, *supra* note 30.

[195] *See* RESTATEMENT, *supra* note 7, §§ 409, 412.

[196] Indeed, by prohibiting expressive conduct, such as publishing news embarrassing to the Russian military, the Code violates human rights norms that nations around the world have endorsed as international law. *See* ICCPR, *supra* note 17, Art. 19(2); European Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 10, Nov. 4, 1950, 213 UNTS 221.

https://doi.org/10.1017/ajil.2024.33 Published online by Cambridge University Press

people cannot claim a comparable exclusive privilege to determine the laws and institutions that govern *others*—not even foreigners within the state's borders. Although international law authorizes a state to establish laws that apply to all present within their territory (a Hohfeldian power), neither the state nor its people may invoke self-determination as a privilege or claim-right against foreign states applying foreign law to foreign nationals.

Consider the common scenario where a state extends its national law to its expatriate nationals. Japan's Penal Code, for example, specifies over a dozen criminal offenses that apply to Japanese nationals abroad, including homicide, robbery, and kidnapping.[197] When prosecutors bring charges against expatriates under Japanese criminal law, the defendants cannot reasonably claim that this violates the right to self-determination. Likewise, the right to self-determination does not bar the United States from punishing U.S. nationals under the Foreign Corrupt Practices Act (FCPA) for bribing foreign officials outside the United States.[198] As applied to U.S. nationals, the FCPA is not "alien rule." Far from inflicting alien domination, extending Japanese law to Japanese nationals and American law to American nationals reflects self-determination in action.

Extraterritoriality also does not violate the right to self-determination when foreign law incorporates international norms that another people has embraced by treaty or as customary international law.[199] For example:

- A Liberian national who has perpetrated torture in Liberia may not invoke self-determination as a defense to prosecution under the U.S. Torture Act.[200]
- Russian military leaders may not evade accountability under Ukrainian law for war crimes committed in violation of the Geneva Conventions and the customary international law of armed conflict.[201]
- Thai nationals who engage in child sex trafficking in Thailand may be prosecuted under foreign law, consistent with the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography.[202]

[197] Keihō [Pen. C.] 1907, Art. 3 (Japan), *at* https://www.japaneselawtranslation.go.jp/en/laws/view/3581/en.

[198] *See* Foreign Corrupt Practices Act of 1977, *as amended* 15 U.S.C. §§ 78dd-1 *et seq.*

[199] *See* Statute of the International Court of Justice, Art. 38, June 26, 1945, 59 Stat. 1055, 33 UNTS 993 (identifying these traditional sources of international law).

[200] *See* United States v. Belfast, 611 F.3d 783 (11th Cir. 2010) (affirming the conviction of Roy M. Belfast, Jr. ("Chucky" Taylor), the son of Liberian President Charles Taylor, for numerous acts of torture in Liberia in violation of the U.S. Torture Act, 18 U.S.C. § 2340 (2006)); Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), Judgment, 2012 ICJ Rep. 442, 455, para. 91, 457, para. 99 (discussing the obligation to criminalize torture and confirming that "the prohibition of torture is part of customary international law and . . . a peremptory norm").

[201] *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 UNTS 3 (prohibiting various war crimes); Liz Sly, *66,000 War Crimes Have Been Reported in Ukraine. It Vows To Prosecute Them All*, WASH. POST (Feb. 6, 2023), *at* https://www.washingtonpost.com/world/2023/01/29/war-crimes-ukraine-prosecution (detailing Ukraine's efforts to investigate and prosecute Russian war crimes).

[202] *See* Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, Art. 1, GA Res. 54/263, UN Doc. A/RES/54/263 (May 25, 2000) ("States Parties shall prohibit the sale of children, child prostitution and child pornography as provided for by the present Protocol.").

https://doi.org/10.1017/ajil.2024.33 Published online by Cambridge University Press

- Members of Iran's Islamic Revolutionary Guard Corps may be held responsible under foreign law for shooting down a civilian airliner in violation of the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation.[203]
- The United States may impose penalties against Russian state-owned banks that provide financial services to terrorists in eastern Ukraine.[204]

In each of these scenarios, the right to self-determination does not shield defendants from legal responsibility under foreign law because international law defines the relevant offenses and authorizes proportional sanctions. When a people freely embraces international norms as binding legal obligations, foreign laws that incorporate those norms do not necessarily reflect alien domination.[205] Accordingly, states do not engage in impermissible "legal imperialism" when they apply their national law to their own nationals abroad[206] or use national law to extend generally applicable norms of international law that foreign peoples have freely embraced through treaty or customary international law.

The right to self-determination thus offers distinctive criteria for evaluating when extraterritoriality is permissible under international law. Extraterritorial laws based on nationality and universal jurisdiction generally fare well under these criteria. In contrast, extraterritorial laws that rely on transboundary effects, passive personality, or the protective principle tend to establish legal requirements that other peoples have not accepted. Hence, international lawyers should take care to ensure that such laws do not subject other peoples to legal imperialism in violation of their right to self-determination.

III. Unlawful Extraterritoriality

Extraterritoriality is experiencing a global resurgence in the twenty-first century. While the United States has taken some steps to rein in extraterritoriality through restrictive statutory

[203] *See* Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Arts. 1–2, Sept. 23, 1971, 974 UNTS 14118 (entered into force Jan. 26, 1973) (requiring "severe penalties" against anyone who "destroys an aircraft in service or causes damage to such an aircraft which renders it incapable of flight or which is likely to endanger its safety in flight); Application Instituting Proceedings Concerning a Dispute Under the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Can. et al. v. Iran), Application (Int'l Ct. Just. July 4, 2023), *at* https://www.icj-cij.org/sites/default/files/case-related/190/190-20230704-app-01-00-en.pdf (instituting proceedings against Iran based on this incident).

[204] *See* International Convention for the Suppression of the Financing of Terrorism, Art. 4, UN GAOR 6th Comm., 54th Sess., pmbl., UN Doc. A/RES/54/109 (1999) (requiring states to prohibit and punish those who participate in terrorist financing); Schansman v. Sberbank of Russia PJSC, 565 F. Supp. 3d 405, 410-11 (S.D.N.Y. 2021) (holding that plaintiffs adequately pleaded claims against several Russian state-owned banks for terrorist financing in violation of U.S. law).

[205] Of course, much depends upon what it means for a people to accept international norms "freely." A more robust agenda for achieving national self-determination might seek to dismantle international norms and institutions that perpetuate global inequities. *See* John Linarelli, Margot E. Salomon & Muthucumaraswamy Sornarajah, The Misery of International Law: Confrontations with Injustice in the Global Economy 159–60 (2018) (characterizing international investment law as an extension of colonial-era extraterritoriality); Chimni, *supra* note 6, at 51 (calling for an exhaustive review and reconsideration "of harmonized rules in all areas of international life—finance, investment, trade, environment, oceans, space—to assess their impact").

[206] *Compare* Al-Skeini v. United Kingdom, App. No. 55721/07, paras. 37–39 (Eur. Ct. H.R. July 7, 2011) (concur., Bonello, J.) (rejecting the notion that applying European human rights law to the UK troops in Iraq would constitute "human rights imperialism"); *with* Al-Skeini and Others v Secretary of State for Defence [2007] UKHL 26, para. 78 (UK) (arguing that applying European human rights law to the actions of the United Kingdom outside its effective control "would run the risk . . . of being accused of human rights imperialism").

https://doi.org/10.1017/ajil.2024.33 Published online by Cambridge University Press

interpretation,[207] other states are moving in the opposite direction. China, the EU, and Russia have become increasingly assertive in using extraterritoriality to project power beyond their borders.[208] Rising powers like Brazil and India are starting to follow their lead.[209] Dismantling this new imperialism will be essential in the years to come if the international community hopes to establish "conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples."[210]

This Part explores how international lawyers could harness the right to self-determination to stem the rising tide of legal imperialism. More specifically, the following Sections examine four settings where powerful states abuse extraterritorial prescriptive jurisdiction to impose their law on foreign peoples in violation of the right to self-determination.

A. Political Expression

Consider first China's recent efforts to suppress extraterritorial political expression. In response to mass protests that paralyzed Hong Kong in June 2019,[211] the National People's Congress of China in 2020 adopted an unprecedented national security law for Hong Kong (NSL).[212] The NSL criminalizes various activities that could undermine Hong Kong's "unification" with China,[213] including violent insurrection and terrorism.[214] Among its most controversial provisions, the NSL outlaws "provoking by unlawful means hatred among Hong Kong residents toward the Central People's Government or the Government of the Region" in a manner "likely to cause serious consequences."[215] China has used this prohibition to curtail political expression, peaceful assembly, and academic freedom not only in Hong Kong[216] but also outside China.[217]

[207] *See* Dodge, *supra* note 80, at 1597–623 (discussing the Court's renewed attention to the presumption against extraterritoriality).

[208] *See, e.g.*, BRADFORD, *supra* note 84, at 67–68 (discussing the EU's extraterritorial regulation); *see* Zhengxin Huo & Man Yip, *Extraterritoriality of Chinese Law: Myths, Realities and the Future*, 9 CHINESE J. COMP. L. 328, 330 (2021) (recounting how "China is surreptitiously extending its domestic laws over territorial borders, tracing the steps of the USA").

[209] *See* Section III.C–D *infra*.

[210] UN Charter, *supra* note 134, Art. 55.

[211] Maggie Shum, *One Year On, Here's How China's National Security Law Has Changed Hong Kong*, WASH. POST (June 30, 2021), *at* https://www.washingtonpost.com/politics/2021/06/30/one-year-heres-how-chinas-national-security-law-has-changed-hong-kong.

[212] The Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region, Standing Committee of the National People's Congress (State Council Information Office transl.), LN 136 of 2020, June 30, 2020 (China) [hereinafter NSL].

[213] *Id.* Art. 20.

[214] *Id.* Arts. 22–28.

[215] *Id.* Art. 29(5).

[216] *See* Shum, *supra* note 211 (reporting that in the NSL's first year, 128 people were arrested for alleged violations, including media members and pro-democracy activists).

[217] *See* TOM GINSBURG, DEMOCRACIES AND INTERNATIONAL LAW 238, 256–62 (2021) (discussing these extraterritorial measures as examples of authoritarian international law); *China's Iron Fist Reaches Across the Globe*, WASH. POST (July 8, 2023), *at* https://www.washingtonpost.com/opinions/2023/07/08/opinion-hong-kong-bounty-dissidents-abroad (discussing arrest warrants and bounties issued against former lawmakers from Hong Kong). The NSL applies to conduct "outside the Region by a person who is not a permanent resident of the Region." NSL, *supra* note 212, Art. 38.

https://doi.org/10.1017/ajil.2024.33 Published online by Cambridge University Press

Among those charged shortly after the NSL's enactment was Samuel Chu, a U.S. citizen and the managing director of a Washington D.C.-based advocacy group that seeks to promote Hong Kong's freedom and autonomy. In a social media post responding to the criminal charges, Chu tweeted out a terse warning: "I might be the 1st non-Chinese citizen to be targeted, but I will not be the last. If I am targeted, any American/any citizen of any nation who speaks out for HK can—and will be—too."[218]

Chu's prediction proved to be prophetic. In July 2023, Hong Kong officials requested an injunction to prevent a popular protest anthem, "Glory to Hong Kong," from being broadcast, performed, published, sold, distributed, or disseminated in any way, including through foreign internet platforms.[219] The writ of summons asserted that the recording violated the NSL because it could incite Hong Kong's residents to pursue secession.[220] One commentator explained that the government's request for injunctive relief was "less about silencing the person on the street than forcing tech giants"—including foreign companies like Apple, Meta, Spotify, and X—"to remove the offending song from their platforms."[221] A few months later, China also threatened to enforce the NSL against protesters who burned Chinese flags and chanted protest slogans against the Chinese Communist Party outside the Chinese embassy in London.[222]

Chinese officials might genuinely believe that international law authorizes the NSL's extraterritoriality. The official Party line asserts that foreign agitation for Hong Kong's autonomy stirs up domestic unrest, leading to demonstrations that encourage vandalism, interfere with public commerce, and undermine the state's authority. If threats of transboundary harm are enough to establish prescriptive jurisdiction, then the NSL's extraterritorial reach might seem plausibly related to effects-based or protective principle jurisdiction. Indeed, for all the criticism that has been heaped upon the NSL, critics have yet to challenge its extraterritorial scope as a violation of international law.[223]

The right to self-determination clarifies how the NSL violates international law. By seeking to censor political expression worldwide in contravention of local civil liberties, the NSL constitutes wrongful legal imperialism. China cannot plausibly argue that the NSL incorporates international norms that other peoples have endorsed via treaty or customary international law. To

[218] Regan & Watson, *supra* note 29 (quoting Chu's Twitter post).

[219] *See Department of Justice Applies for Court Injunction to Ban Playing of Protest Song*, STANDARD (June 6, 2023), *at* https://www.thestandard.com.hk/breaking-news/section/4/204514/Department-of-Justice-applies-for-court-injunction-to-ban-playing-of-protest-song.

[220] *Id.* The anthem's most provocative lyrics are, "Liberate our Hong Kong, in common breath; Revolution of our times!" Keith B. Richburg, *How a Song Threatens the Communist Party's Grip*, WASH. POST (July 19, 2023), *at* https://www.washingtonpost.com/opinions/2023/07/19/hong-kong-song-ban-national-security-law-repression.

[221] Richburg, *supra* note 220.

[222] *See* Tony Cheung, *Beijing Urges Swift British Response to Burning of Chinese Flag, Hong Kong Pro-Independence Chants Outside Its London Embassy*, S. CHINA MORNING POST (Oct. 2, 2020), *at* https://www.scmp.com/news/hong-kong/politics/article/3103934/beijing-urges-swift-british-response-burning-chinese-flag.

[223] Critics have focused instead on the NSL's incompatibility with other international human rights standards, such as freedom of expression, association, and peaceful assembly. *See, e.g.*, U.S. Dept' of State Press Release, Hong Kong's Extra-territorial Application of the National Security Law (July 3, 2023), *at* https://www.state.gov/hong-kongs-extra-territorial-application-of-the-national-security-law ("The extraterritorial application of the Beijing-imposed National Security Law . . . threatens the human rights and fundamental freedoms of people all over the world."); Amnesty International, *Hong Kong: In the Name of National Security* (2021), *at* https://www.amnesty.org/en/documents/asa17/4197/2021/en (explaining how the NSL undermines human rights).

https://doi.org/10.1017/ajil.2024.33 Published online by Cambridge University Press

the contrary, China's restrictive approach to political expression conflicts sharply with the robust legal protections afforded in many other countries, including the United States' constitutionally protected right to freedom of speech.[224] The law's primary impact is to pressure foreign peoples to engage in self-censorship rather than exercise their nationally and internationally guaranteed rights to free expression, association, and peaceful assembly.[225] Thus, the NSL represents the kind of alien domination that violates the right to self-determination.

B. Counterterrorism

A second example of unlawful extraterritoriality comes from U.S. counterterrorism law. Since the 1996 Antiterrorism and Effective Death Penalty Act,[226] the United States has criminalized acts of terrorism committed by foreign nationals abroad.[227] In the wake of the 9/11 terrorist attacks, the United States resolved to enforce its domestic counterterrorism law with increasing vigor "[t]o deter and punish terrorist acts . . . around the world."[228] As a result, the United States has applied its law broadly to acts of terrorism committed by foreign nationals worldwide.[229]

The global reach of American counterterrorism law does not undermine self-determination when it targets conduct prohibited under international law. For example, U.S. law criminalizes using explosives against mass transit systems[230]—acts that are banned by the International Convention for the Suppression of Terrorist Bombings (Terrorist Bombings Convention),[231] a treaty with near-universal membership.[232] The Terrorist Bombings Convention authorizes states parties to exercise prescriptive jurisdiction over a broad range of terrorist attacks that occur abroad.[233] Hence, states parties to the Terrorist Bombings Convention cannot reasonably claim that the right to self-determination has been violated when a state enacts extraterritorial legislation prohibiting such terrorist attacks.

[224] *See* Texas v. Johnson, 491 U.S. 397, 399 (1989) (holding that burning the American flag is constitutionally protected expression); Brandenburg v. Ohio, 395 U.S. 444, 448 (1969) (holding that mere "advocacy of the use of force or of law violation," unlike incitement to imminent unlawful action, is constitutionally protected speech).

[225] *See* Sarah Cook, *Through Hong Kong, Beijing Channels Its Repression to the World*, DIPLOMAT (July 13, 2020), *at* https://thediplomat.com/2020/07/through-hong-kong-beijing-channels-its-repression-to-the-world (explaining how "the Chinese Communist Party has wielded [its extraterritorial law and] its control over access to [Chinese territory] as a cudgel to enforce self-censorship among the Chinese diaspora, journalists, academics, politicians, international corporations, and even Hollywood film studios").

[226] Pub. L. No. 104–132, 110 Stat. 1214.

[227] *See, e.g.*, 18 U.S.C. § 2332B(e) (prohibiting certain extraterritorial terrorist acts); *id.*, § 2339C(b)(2) (prohibiting extraterritorial terrorist financing under various circumstances); *id.*, § 2339D(b) (prohibiting receiving military training from a terrorist organization outside the United States under various circumstances).

[228] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2021 (USA Patriot Act), pmbl., Pub. L. No. 107–56, 115 Stat. 272 (Oct. 26, 2001) [hereinafter USA Patriot Act] (emphasis added).

[229] *See* RICHARD B. ZABEL & JAMES J. BENJAMIN, JR., IN PURSUIT OF JUSTICE: PROSECUTING TERRORISM CASES IN THE FEDERAL COURTS (Hum. Rts. First, 2008) (discussing relevant cases).

[230] 18 U.S.C. §§ 1992, 2332F.

[231] International Convention for the Suppression of Terrorist Bombings, Art. 2, Dec. 35, 1997, 2149 UNTS 256 [hereinafter Terrorist Bombing Convention].

[232] The Terrorist Bombing Convention has 170 states parties. United Nations, *International Convention for the Suppression of Terrorist Bombings*, *at* https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-9&chapter=18&clang=_en (last visited Oct. 4, 2023).

[233] *See* Terrorist Bombing Convention, *supra* note 231, Art. 6 (authorizing prescriptive jurisdiction based on, *inter alia*, nationality, passive personality, and the protective principle).

https://doi.org/10.1017/ajil.2024.33 Published online by Cambridge University Press

More problematic are prohibitions against "providing material support to terrorists"[234] and "providing material support or resources to designated foreign terrorist organizations."[235] Congress has defined "material support or resources" extraordinarily expansively to include "any property," "service," "lodging," "communication," or "transportation."[236] The law prohibits such assistance even if the actor does not know or intend to use the aid for terrorist attacks.

These features of the United States' material support law have been controversial, in part, because they criminalize conduct permitted under international law and the domestic law of most countries.[237] Material support could be as innocuous as informing terrorists about the requirements of international humanitarian law.[238] It could be as mundane as serving a meal or giving a ride to a family member affiliated with a terrorist organization.[239] Material support also encompasses some activities other countries resolutely support, such as delivering humanitarian relief after a natural disaster to regions where terrorists reside.[240]

The United States has prosecuted dozens of foreign nationals for rendering material support to terrorism abroad.[241] Most, if not all, of these prosecutions have involved egregious misconduct that is illegal under international law and the domestic law of the jurisdictions where the conduct occurred. For example, in September 2014, federal prosecutors successfully prosecuted Abu Hamza, a naturalized citizen of the United Kingdom, for providing material support to terrorists in connection with a 1998 hostage-taking in Yemen that led to the death of four hostages.[242] Hamza's participation in the hostage-taking conspiracy qualified as material support under U.S. law, and it violated the International Convention Against

[234] 18 U.S.C. § 2339A.

[235] *Id.*, § 2339B. This provision was introduced into the U.S. Code by the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104–132, § 303, 110 Stat. 1214.

[236] *Id.*, § 2339A(b).

[237] *See* International Convention for the Suppression of the Financing of Terrorism, Art. 2(1), 2178 UNTS 197 (1999) (prohibiting the provision or collection of funds only "with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out" certain acts of violence); IRELAND-PIPER, ACCOUNTABILITY, *supra* note 87, at 148 (observing that the United States' "broad assertion of jurisdiction for the provision of material assistance or resources" is controversial because "material support" is not generally accepted "as a universal crime").

[238] *See* Holder v. Humanitarian Law Project, 561 U.S. 1, 30–33 (2010) (concluding that Section 2339B is constitutional as applied to a human rights organization that planned to provide training in international law and peaceful dispute resolution to the Kurdistan Workers Party, a designated terrorist organization).

[239] *See* Ay v. Holder, 743 F.3d 317 (2d Cir. 2014) (holding that providing meals to terrorists qualifies as material support); Singh-Kaur v. Ashcroft, 385 F.3d 293, 299 (3d Cir. 2004) (same).

[240] *See* Holder v. Humanitarian Law Project, Brief Amicus Curiae of the Carter Center et al. in Support of Humanitarian Law Project et al., at 25–28, *at* https://www.scotusblog.com/wp-content/uploads/2009/11/ACLU-amicus-09-89.pdf (explaining how relief organizations worked with the Sri Lankan government after the catastrophic Indian Ocean tsunami of 2004 to deliver humanitarian assistance in areas controlled by the Tamil Tigers, a designated terrorist organization).

[241] *See, e.g.*, United States v. Al Kassar, 660 F.3d 108, 115 (2d Cir. 2011) (affirming the material support convictions of two Spanish nationals and a Lebanese national for selling arms in the belief that the arms would be used by the FARC, a designated terrorist organization); United States v. Ahmed, 94 F. Supp. 3d 394 (E.D.N.Y. 2015) (declining to dismiss an indictment against two Somali nationals based on their alleged material support for al-Shabaab, a designated terrorist organization); United States v. Abu Khatallah, 151 F. Supp. 3d 116 (D.D.C. 2015) (denying a motion to dismiss an indictment alleging, in part, that the defendant, a Libyan national, had provided material support to a rebel group that attacked the U.S. embassy in Benghazi).

[242] U.S. Atty's Office, S.D.N.Y. Press Release, Mustafa Kamel Mustafa, a/k/a "Abu Hamza," Convicted of 11 Terrorism Charges in Manhattan Federal Court (May 19, 2014), *at* https://www.justice.gov/usao-sdny/pr/mustafa-kamel-mustafa-aka-abu-hamza-convicted-11-terrorism-charges-manhattan-federal.

https://doi.org/10.1017/ajil.2024.33 Published online by Cambridge University Press

the Taking of Hostages (Hostages Convention),[243] a multilateral treaty to which the United Kingdom, the United States, and Yemen are all parties.[244] Notably, the Hostages Convention requires states parties to criminalize participating as an accomplice in hostage-taking.[245] Therefore, Hamza could not plausibly argue that the United States' prohibition of material support violated the right to self-determination as applied to his conduct.

Although the United States has reserved extraterritorial material support prosecutions for weighty cases like the Hamza prosecution, the law's broad scope still undermines the right to self-determination. By criminalizing otherwise lawful activities abroad, the United States has asserted the prerogative to make law for other peoples without their consent. Criminalizing material support may deter foreigners outside the United States from engaging in otherwise lawful and praiseworthy activities, such as providing public education, medical care, and humanitarian aid to impoverished communities abroad. These practices reflect, in Antony Anghie's words, "the re-imposition of imperial order" through "a set of policies and principles that reproduces the structure of [colonialism's] civilizing mission."[246] Before extending its material support law extraterritorially, the right to self-determination obligates the United States to persuade other states to accept its norms through international agreement or by adopting similar national laws.

C. Antitrust

Unlawful extraterritoriality also features prominently in global antitrust law. For nearly eighty years, the United States has used the Sherman Act[247] to regulate foreign commercial activities based on their effect on domestic competition in the United States.[248] The European Court of Justice also has endorsed effects-based jurisdiction, permitting European competition law to regulate foreign cartels that adversely affect the European Economic Community (EEC) or implement their anti-competitive agreements in the EEC.[249] By embracing extraterritoriality in these ways, the European Commission and the United States have assumed dominant roles in global antitrust regulation.[250]

Under pressure from the European Commission, the United States, and multinational donor organizations like the International Monetary Fund and the World Bank, over 130

[243] *See* International Convention Against the Taking of Hostages, Art. 1(2)(b), Dec. 17, 1979, TIAS No. 11081, 1316 UNTS 205 [hereinafter Hostage Taking Convention] (prohibiting serving "as an accomplice of anyone who commits or attempts to commit an act of hostage-taking").

[244] UN Treaty Collection, *International Convention Against the Taking of Hostages*, *at* https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-5&chapter=18&clang=_en (last visited Oct. 4, 2023).

[245] Hostage Taking Convention, *supra* note 243, Art. 2.

[246] ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW 309 (2004).

[247] 15 U.S.C. §§ 1–7 (2012); 21 CONG. REC. 2456 (1890).

[248] *See* United States v. Aluminum Co. of America (Alcoa), 148 F.2d 416 (2d Cir. 1945) (interpreting the Sherman Act to apply the extraterritorial actions of a foreign corporation that "were intended to affect imports [into the United States] and did affect them.").

[249] *See* Case C-413/14 P Intel Corporation Inc. v. Commission [2017] ECLI:EU:C:2017:632, paras. 40–53; Åhlström and Others v. Commission (Wood Pulp), 1985 OJ (L 85) 1, 14–15, 54 CMLR 474, 499–500 (1985), *aff'd in part, void in part* 1988 ECR 5193, 5243; *see also* BRADFORD, *supra* note 84, at 68 (explaining how EU competition law applies extraterritorially).

[250] *See* William E. Kovavic, *Dominance, Duopoly and Oligopoly: The United States and the Development of Global Competition Policy*, 14 GLOB. COMPETITION REV. 39, 39 (2010) (discussing the rise and gradual erosion of EU/U.S. dominance in global competition law).

https://doi.org/10.1017/ajil.2024.33 Published online by Cambridge University Press

countries have adopted antitrust laws.[251] Many of these laws purport to govern the extraterritorial conduct of foreign firms.[252] China, in particular, is beginning to flex its muscles as a self-styled global competition regulator by using its national competition law to regulate corporate mergers in foreign markets.[253]

Proliferating national competition rules might eventually lead to global convergence around shared legal standards for corporate merger review, anti-competitive tying and bundling, compulsory licensing for patented technologies, and other issues. At present, however, consensus remains elusive.[254] With no international agreement in sight, states have elected instead to pursue informal cooperation through associations like the Organization for Economic Cooperation and Development (OECD) and the International Competition Network (ICN).[255] Meanwhile, because less powerful states rarely enforce their domestic competition rules extraterritorially, they have effectively ceded the field to great powers like China, the EU, and the United States.[256]

These features of international competition law raise serious self-determination concerns. Like China's NSL and the United States' material support law, national antitrust laws prohibit some commercial activities that are permissible under local law.[257] Developing countries often complain that the EU and the United States characterize their competition laws as beneficent gifts to the world, but their laws operate in practice as trojan horses that "enable . . . dominant foreign companies . . . to [gain] access to their markets . . . and . . . hinder cooperation among their own firms."[258] The threat to national self-determination is especially acute when

[251] Umut Aydin & Tim Büthe, *Competition Law & Policy in Developing Countries: Explaining Variations in Outcomes; Exploring Possibilities and Limits*, 79 L. & CONTEMP. PROBS. 1, 1–2 (2016); *see also* DABBAH, *supra* note 33, at 3 (lamenting that competition rules developed in the EU and the United States have been "*forced down the throat* of countries in developing parts of the world, often with the aid of international organisations").

[252] *E.g.*, Anti-Monopoly Law of the People's Republic of China, Art. 2 (2008) (China), *at* http://www.npc.gov.cn/zgrdw/englishnpc/Law/2009-02/20/content_1471587.htm ("This Law . . . is applicable to monopolistic conducts outside the territory of the People's Republic of China, which serve to eliminate or restrict competition on the domestic market of China."); Federal Law No. 135-FZ on Protection of Competition (as amended 2011), ROSSISKAIA GAZETA, July 27, 2006, No. 162, Art. 3(2) (Russ.) (providing that Russian competition law provides to agreements between "foreign persons or organisations made outside the Russian Federation, if . . . the agreements lead or can lead to restriction of competition in the Russian Federation"); Competition Act of 2002, No. 12 of 2003, India Code (2003) § 32, *amended by* Competition Law (Amendment) Act 2007, No. 70 of 2007, India Code 2007 (India) (authorizing extraterritorial application); *see also* Martyniszyn, *supra* note 91, at 406 (observing that "numerous legal orders . . . have embraced" effects-based extraterritorial competition regulation, "including in the developing world").

[253] *See* ZHANG, *supra* note 87, at 34–35, 217–21 (describing how Chinese regulators have used extraterritoriality to hold up mergers between foreign companies over the objections of foreign regulators).

[254] *See* BRADFORD, *supra* note 84, at 100–01 (discussing differences between EU and U.S. competition rules and practices); Anu Bradford, *International Antitrust Negotiations and the False Hope of the WTO,* 48 HARV. INT'L L.J. 383, 406–08 (2007) (discussing how negotiations for a global competition treaty faltered during the early 2000s).

[255] *See* OECD/ICN Report on International Co-operation in Competition Enforcement (2021), *at* https://www.internationalcompetitionnetwork.org/wp-content/uploads/2021/01/OECD-ICN-Report-on-International-Co-operation-in-Competition-Enforcement.pdf (discussing international cooperation through the OECD and ICN).

[256] *See* Martyniszyn, *supra* note 91, at 411 (observing that the "shift toward multipolarity" in global competition law has not leveled the playing field because "some states are unable to challenge foreign violators, even though their frameworks allow for it and this is a course of conduct they would like to pursue").

[257] *See* RESTATEMENT, *supra* note 7, § 409, Cmt. b ("The United States, the European Union, China, Japan, and numerous other states have sought to regulate conduct . . . even when the conduct was lawful where it occurred.").

[258] Krisch, *supra* note 34, at 14.

https://doi.org/10.1017/ajil.2024.33 Published online by Cambridge University Press

the EU and the United States impose their competition rules on countries with centrally planned economies that do not embrace the liberal ideal of fair and open market competition.[259] In such settings, extraterritoriality violates a people's privilege to "freely determine [its] political status and freely pursue [its] economic . . . development."[260]

Extraterritoriality is also problematic when states have different competition rules. The U.S. Supreme Court has recognized that "if America's antitrust policies could not win their own way in the international marketplace for such ideas," it would be "an act of legal imperialism" to "impose them [extraterritorially] through legislative fiat."[261] Guided by this insight, the Court in *F. Hoffmann-LaRoche Ltd. v. Empagran S.A.* declined to extend the Sherman Act to "foreign-cubed" claims[262]—civil actions brought by foreign plaintiffs against foreign defendants based on acts committed in foreign countries.[263] The Court emphasized that extending the Sherman Act extraterritorially would be unreasonable, in part, because the Act has a unique feature: private parties may enforce the law through civil actions that yield treble damages.[264] In amicus briefs, foreign governments had complained that extending "American private treble-damages remedies to anticompetitive conduct taking place abroad . . . would unjustifiably permit their citizens to bypass their own less generous remedial schemes, thereby upsetting a balance of competing considerations that their own domestic antitrust laws embody."[265] Acknowledging the legitimacy of these objections, the Court concluded that applying the Sherman Act would violate "principles of prescriptive comity."[266] However, the Court could have rested its holding just as easily on the right to self-determination, as hinted in its reference to "legal imperialism."[267] Extending the United States' distinctive treble-damage remedy to conduct committed by foreign nationals abroad undermines national self-determination by subjecting foreign peoples to laws they have not collectively endorsed.

[259] *See* Igor Artemyev, *Regulator's Introduction: Recent Activities and Policy Priorities in Russia*, *in* COMPETITION LAW IN THE BRICS COUNTRIES 57, 57 (Adrian Emch, Jose Regazzini & Vassily Rudomino eds., 2012) (observing that Russia did not have a domestic competition law prior to the Soviet Union's dissolution in 1991); Ning Wanglu, *Regulator's Introduction: Competition Policies and Competition Law Enforcement in China*, *in* COMPETITION LAW IN THE BRICS COUNTRIES, *id.*, at 149, 149–52 (discussing China's gradual shift from a planned economy to a competitive market).

[260] ICCPR, *supra* note 17, Art. 1; ICESCR, *supra* note 18, Art. 1.

[261] *Empagran*, *supra* note 35, at 169. Ralf Michaels critiques this feature of *Empagran* as "mov[ing] away from the twenty-first century world of interdependence and cooperation into . . . nineteenth-century . . . isolationism." Ralf Michaels, Empagran*'s Empire: International Law and Statutory Interpretation in the U.S. Supreme Court of the Twenty First Century*, *in* INTERNATIONAL LAW IN THE U.S. SUPREME COURT: CONTINUITY OR CHANGE? 533, 538 (David L. Sloss, Michael D. Ramsey & William S. Dodge eds., 2011).

[262] Morrison v. Nat'l Australia Bank Ltd., 561 U.S. 247, 283 n.11 (2010) (concur., Breyer, J.).

[263] *Empagran*, *supra* note 35, at 159.

[264] *Id.* at 167–68; *see also* Donald I. Baker, *Revisiting History—What Have We Learned About Private Antitrust Enforcement That We Would Recommend to Others?*, 16 LOY. CONSUMER L. REV. 379, 385 (2004) (observing that treble damages for antitrust violations is "a uniquely American concept").

[265] *Empagran*, *supra* note 35, at 167; *see also* BRADFORD, *supra* note 84, at 102–03 (explaining how differences between EU and U.S. competition rules reflect philosophical differences and "different political economy conditions prevailing in the two jurisdictions").

[266] *Empagran*, *supra* note 35, at 169.

[267] *Id.*

https://doi.org/10.1017/ajil.2024.33 Published online by Cambridge University Press

D. Data Governance

Data governance is another area where extraterritoriality threatens national self-determination. In the global digital economy, personal data harvested from search engines, electronic transactions, and social media has become big business. Some of the world's largest and fastest-growing firms focus on monetizing and commercializing personal data.[268] Pervasive consumer surveillance in the digital marketplace risks exposing internet users to embarrassment, exploitation, and even extortion. To make matters worse, authoritarian governments use data mining to conduct mass surveillance operations that invade personal privacy and chill civil liberties.[269]

In response to these concerns, states and regional organizations have taken steps to regulate the collection, transmission, and use of personal data domestically and internationally.[270] Leading the way is the EU's General Data Protection Regulation (GDPR),[271] which regulates "the processing of personal data of data subjects who are in the Union" even if the data controller or processor is outside the EU as long as processing activities relate to either: "(a) the offering of goods or services . . . in the Union; or (b) the monitoring of . . . behaviour . . . within the Union."[272] The GDPR thus adopts a "targeting" approach to data protection, extending EU privacy standards to foreign firms located abroad that direct their activities at data subjects in the EU.[273] The GDPR essentially compels foreign companies to choose: adopt EU privacy rules (on pain of substantial fines) or abandon the lucrative European market.[274] Significantly, foreign companies are subject to the GDPR's requirements even if they do not maintain a physical presence or conduct business in the EU, and even if the data they

[268] Hossein Rahnama & Alex "Sandy" Pentland, *The New Rules of Data Privacy*, HARV. BUS. REV. (Feb. 25, 2022), *at* https://hbr.org/2022/02/the-new-rules-of-data-privacy.

[269] *See* JOSH CHIN & LIZA LIN, SURVEILLANCE STATE: INSIDE CHINA'S QUEST TO LAUNCH A NEW ERA OF SOCIAL CONTROL (2022) (reporting how China has used mass digital surveillance to track and control its people's activities).

[270] *See, e.g.*, Lei No. 13.709, de 14 de Agosto de 2018, Diário Oficial da União [D.O.U.] de 15.8.2018, *as amended by* Law No. 13,853/2019 (Braz.), *at* https://iapp.org/resources/article/brazilian-data-protection-law-lgpd-english-translation [hereinafter LGPD]; Zhonghua Renmin Gongheguo Geren Xinxi Baohu *Fa* [Personal Information Protection Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 20, 2021, effective Nov. 1, 2021, Standing Comm. Nat'l People's Cong. Gaz. 1117 (2021) (China) [hereinafter PIPL]; GDPR, *supra* note 31; Digital Personal Data Protection Act, Aug. 11, 2023, GAZETTE OF INDIA (India), *at* https://www.meity.gov.in/writereaddata/files/Digital%20Personal%20Data%20Protection%20Act%202023.pdf [hereinafter DPDP]. A survey by UNCTAD determined that "137 out of 194 countries had put in place legislation to secure the protection of data and privacy." UNCTAD, Data Protection and Privacy Legislation Worldwide, *at* https://unctad.org/page/data-protection-and-privacy-legislation-worldwide (last visited Aug. 11, 2023).

[271] GDPR, *supra* note 31.

[272] *Id.* Art. 3; *see also* Google Spain SL and Google Inc. v AEPD, Mario Costeja Gonzalez (C-131/12), para. 46 (concluding that Google was subject to the GDPR's data processing requirements, despite the fact that Google conducted its data processing operations outside the EU, because a Google subsidiary promoted and sold advertising space in Spain).

[273] *See* MISTALE TAYLOR, TRANSATLANTIC JURISDICTIONAL CONFLICTS IN DATA PROTECTION LAW: FUNDAMENTAL RIGHTS, PRIVACY AND EXTRATERRITORIALITY 103–07 (2023) (discussing the GDPR's targeting criteria).

[274] *See* GDPR, *supra* note 31, Art. 83 (establishing administrative fines for violations); BRADFORD, *supra* note 84, at 142–45 (explaining how the EU has compelled foreign technology companies, such as Facebook and Google, to adopt its privacy norms).

https://doi.org/10.1017/ajil.2024.33 Published online by Cambridge University Press

gather about EU residents is already in the public domain outside the EU.[275] Following in the EU's footsteps, Brazil, China, India, and various other countries have adopted similar laws regulating foreign data processing operations carried out in connection with efforts to profile individuals or provide products or services within their territories.[276]

Extraterritorial laws like the GDPR might be unobjectionable if their requirements were universally accepted, but they are not. The EU's targeting approach has generated friction with the United States due to basic differences in regulatory philosophy.[277] As Christopher Kuner has observed, the United States "would like the EU to make it easier to transfer personal data internationally, both to further economic growth and for reasons of U.S. national security. This has produced resentment in the EU about the extent of U.S. lobbying on data protection, and in the U.S. about pressure from the EU to change its law."[278] In the meantime, the United States has yet to enact comprehensive federal legislation on the collection and use of personal data,[279] effectively ceding the field to an inconsistent patchwork of laws among its fifty states.[280] These local laws deviate from the GDPR in significant respects. Most apply only to companies that exceed robust annual revenue thresholds and derive a high percentage of their revenue from data transmission.[281] Unlike the GDPR, all but one U.S. jurisdiction exempt non-profits from data protection rules.[282] Like them or not, these and other distinctive features of American data protection law reflect calculated political choices. The right to self-determination protects a people's freedom to make such choices free from the dominating imposition of foreign law.

[275] *See* Jennifer Daskal, *Borders and Bits*, 71 VAND. L. REV. 179, 212 (2018) (observing that the GDPR imposes "obligations on companies that offer services in the EU, even if not physically present there").

[276] *See* LGPD, *supra* note 270, Art. 3 (regulating foreign data processing operations if the data was collected in Brazil or the operations are carried out for the purpose of "offering or provision of goods or services, or at the processing of data of individuals" in Brazil); DPDP, *supra* note 270, Art. 4(2) ("The provisions of this Act shall . . . also apply to processing of digital personal data outside the territory of India, if such processing is in connection with any [profiling of, or] activity of offering goods or services to Data Principals within the territory of India."); PIPL, *supra* note 270, Art. 3 (governing activities outside China that involve processing "the personal information of natural persons within the territory" in connection with providing "products or services" or "analyz[ing] and evaluat[ing] the activities of domestic natural persons").

[277] Notably, the U.S. Federal Trade Commission has also asserted that the Children's Online Privacy Protection Act applies to "[f]oreign based websites and online services . . . if they are directed to children in the United States, or if they knowingly collect personal information from children in the U.S." Fed. Trade Comm'n, Complying with COPPA: Frequently Asked Questions B.7, *at* https://www.ftc.gov/business-guidance/resources/complying-coppa-frequently-asked-questions (last visited Mar. 20, 2024).

[278] Christopher Kuner, *Reality and Illusion in EU Data Transfer Regulation Post Schrems*, 18 GER. L.J. 881 (2017); *see also* TAYLOR, *supra* note 273, at 2 ("Where the U.S. is inclined to prioritise national security, the freedom of expression, access to documents, a free and open Internet, and international trade, the EU tends to foreground the privacy or protection of personal data that is processed in all those instances.").

[279] *See* Alfred Ng, *The Raucous Battle Over Americans' Online Privacy Is Landing on States*, POLITICO (Feb. 22, 2023), *at* https://www.politico.com/news/2023/02/22/statehouses-privacy-law-cybersecurity-00083775.

[280] *Id.* A bipartisan bill died in Congress in 2022 due, in part, to objections that its proposed protections were too weak. *Id.*

[281] *See* Richard Lawne, *GDPR vs. U.S. State Privacy Laws: How Do They Measure Up?*, FIELDFISHER (Mar. 1, 2023), *at* https://www.fieldfisher.com/en/insights/gdpr-vs-u-s-state-privacy-laws-how-do-they-measure (comparing the GDPR with U.S. state privacy rules).

[282] *Id.*

https://doi.org/10.1017/ajil.2024.33 Published online by Cambridge University Press

Some might argue that the GDPR does not qualify as "extraterritorial" lawmaking because it can be justified, at least in part, as an exercise of the EU's territorial jurisdiction.[283] However, the GDPR plainly governs activities of foreign individuals and entities located outside the EU.[284] Hence, the GDPR qualifies as "extraterritorial" law, as defined in this Article,[285] notwithstanding the fact that the law requires an effects-based territorial nexus based on the regulated party's "offering of goods or services" or "monitoring of [EU residents'] behaviour . . . within the Union."[286] This extraterritorial scope is significant, for purposes of the right to self-determination, because it reflects alien control over foreign peoples who have not freely embraced EU privacy norms.

Europeans tend to view personal data as being intrinsically entangled with the personhood of data subjects, such that the personal data of EU residents remains territorially linked to the EU even when it is located on foreign servers.[287] This view resonates with the work of legal scholars like Szigeti who question whether "territory" provides a coherent metric for evaluating exercises of national jurisdiction, particularly in a digitally networked world.[288] For these scholars, data processing laws are never "territorial" or "extraterritorial" because data resists such classifications.[289]

Viewed from the perspective of the right to self-determination, however, it makes little difference whether data is deemed to reside in the originating state, the state where it is processed, or both. The decisive issue is not where data "exists" in a metaphysical sense. Instead, the right to self-determination invites us to consider whether data protection laws subject another *people* to alien rule in violation of its privilege to author its own laws and institutions. When a data protection law applies to foreign peoples abroad who have not accepted its standards, the law violates the right to self-determination.[290] Thus, the right to

[283] *See* GDPR, *supra* note 31, Art. 44 ("Any transfer of personal data which are undergoing processing or are intended for processing after transfer to a third country . . . shall take place only if . . . the conditions laid down in this Chapter are complied with by the controller and processor . . . .").

[284] In part, by requiring foreign data controllers and processors to designate representatives inside the EU. *See* GDPR, *supra* note 31, Art. 27.

[285] *See* text accompanying note 3 *supra*.

[286] *See* GDPR, *supra* note 31, Art. 3(2).

[287] *See* Christopher Kuner, *Data and Extraterritoriality*, *in* RESEARCH HANDBOOK ON EXTRATERRITORIALITY, *supra* note 23, at 356, 366 ("EU law data protection rules are designed to 'travel with the data' wherever they go.").

[288] *See, e.g.*, Jennifer Daskal, *The Un-territoriality of Data*, 125 YALE L.J. 326, 331 (2015) (purporting to "expose the fiction of territoriality in a world of highly mobile, intermingled, and divisible data"); Szigeti, *supra* note 177, at 43 (disputing the coherence of the territorial/extraterritorial distinction).

[289] *See* Daskal, *supra* note 288, at 329 (arguing that "the ease, speed, and unpredictability with which data flows across borders make its location an unstable and often arbitrary determinant of the rules that apply"); Szigeti, *supra* note 177, at 31 (arguing that digital data resists territorial classification because it spans "a shifting network of servers in many places"). *But see* Andrew Keane Woods, *Against Data Exceptionalism*, 68 STAN. L. REV. 729, 735 (2016) ("Contrary to prevailing wisdom, jurisdiction over cloud-based data has nearly everything to do with territoriality—it requires an inquiry into the location of the data, the domicile of the data controller, the location of the crime, the citizenship of the victim, and/or the citizenship of the perpetrator.").

[290] Anupam Chander argues that "democracy" supports states applying their own laws to foreign companies that provide services online to their residents "at least until We the People elect to subject ourselves to foreign rules." ANUPAM CHANDER, THE ELECTRONIC SILK ROAD: HOW THE WEB BINDS THE WORLD TOGETHER IN COMMERCE 171–72 (2013). In contrast, I argue that the right to self-determination requires states to respect other peoples' legal privilege to determine the laws by which they are governed. A state does not respect this right if it unilaterally extends its laws to foreign companies operating abroad.

https://doi.org/10.1017/ajil.2024.33 Published online by Cambridge University Press

self-determination prohibits the EU from imposing its preferred rules unilaterally on foreign companies that collect and process data outside the EU.

If the EU aspires to protect its nationals' personal data in the United States without violating the right to self-determination, it should pursue other options. It could engage the United States in negotiations aimed at strengthening U.S. data protection rules. Alternatively, it could prohibit the transfer of sensitive personal data beyond its territorial jurisdiction, thereby forcing foreign firms to establish operations within the EU in order to access the personal data of EU residents.

The latter approach is gaining popularity around the world. Over sixty countries now have "data localization laws," which require that personal data collected from a state's nationals must be stored within the state's territory.[291] Some of these laws prohibit custodians from transferring data outside national borders.[292] Developing countries, in particular, have embraced data localization to combat "digital colonialism"—foreign firms' predatory extraction of user data.[293] Although these laws have been controversial for other reasons,[294] they are compatible with the right to self-determination to the extent that they regulate activities conducted by individuals and entities within a state's own territory for the benefit of the state's people.

Some states have adopted data localization laws requiring foreign websites to return copies of user data from foreign repositories to domestic servers.[295] The trouble with such laws, from the perspective of national self-determination, is that they often require foreign entities to take steps that are not required, and might even be prohibited, under local law. For example, authoritarian states have used data localization laws to pierce foreign data privacy safeguards, enabling them to ferret out political dissidents.[296] In one widely publicized incident, Russia brandished its data localization law[297] to threaten the Jewish Agency for Israel, a non-profit

[291] Nigel Cory & Luke Dascoli, *How Barriers to Cross-Border Data Flows Are Spreading Globally, What They Cost, and How To Address Them*, Info. Tech. & Innovation Found. (July 19, 2021), *at* https://itif.org/publications/2021/07/19/how-barriers-cross-border-data-flows-are-spreading-globally-what-they-cost.

[292] *Id.* The GDPR permits the transfer of personal data outside the EU, but only if the jurisdiction that receives the data is deemed to have an "adequate level of protection" for personal privacy. GDPR, *supra* note 31, Art. 45(1).

[293] *See* Nick Couldry & Ulises A. Meijas, The Costs of Connection: How Data Is Colonizing Human Life and Appropriating It for Capitalism 6–18 (2019) (arguing that data colonialism parallels traditional colonialism by involving the appropriation of resources (data) and the establishment of relations premised on foreign domination); Michael Kwet, *Digital Colonialism: US Empire and the New Imperialism in the Global South*, 60 Race & Class 3, 4 (2019) (describing digital colonialism as a "structural form of domination is exercised through the centralised ownership and control of the three core pillars of the digital ecosystem: software, hardware, and network connectivity").

[294] Critics argue that data localization "poses a mortal threat to the new kind of international trade made possible by the Internet," which "depend[s] on processing information about the user, information that crosses borders from the user's country to the service provider's country." Anupam Chander & Uyên P. Lé, *Data Nationalism*, 64 Emory L.J. 677, 681 (2015).

[295] *See* Alexei Anishchuk, *Russia Passes Law to Force Websites onto Russian Servers*, Reuters (July 4, 2014), *at* https://www.reuters.com/article/us-russia-internet-bill-restrictions-idUSKBN0F91SG20140704 (explaining that Russia's law forces Internet companies "to move Russian data onto servers based in Russia or face being blocked from the web"); Christopher Kuner, *The Path to Recognition of Data Protection in India: The Role of the GDPR and International Standards*, 33 Nat'l L. Sch. India Rev. 69, 88 (2021) (discussing a similar requirement in India's Prevention of Money Laundering Act).

[296] *See* Chander & Lé, *supra* note 294, at 735–38 (explaining how data localization laws have served this purpose in Iran, Vietnam, and Russia, among other states).

[297] Federal Law of 27 July 2006 N 152-FZ on Personal Data, *available at* https://ihl-databases.icrc.org/en/national-practice/federal-law-no-152-fz-personal-data-2006.

https://doi.org/10.1017/ajil.2024.33 Published online by Cambridge University Press

that helps Jews from around the world immigrate to Israel.[298] Concerned that the Agency was recruiting away some of its best and brightest scientists and innovators, Russia accused the Agency of maintaining applicant files on a foreign server and threatened to shutter its Moscow office.[299] This action came shortly after Russia fined several foreign social media companies, such as Snapchat, Spotify, Tinder, and WhatsApp, for refusing to transfer users' sensitive data to Russian servers where the data would be accessible to Russia's Federal Security Service (FSB) on demand.[300] In each of these settings, Russia sought to conscript foreign companies as unwilling accomplices in suppressing civil liberties.

Whenever states dictate unilaterally how foreign companies must conduct their business on foreign soil, they violate the right to self-determination. This holds true for Russia's data localization law, which undermines EU and U.S. privacy norms. It also applies to the EU's well-intentioned efforts to bolster data privacy through extraterritorial regulation. The EU may prohibit data custodians in the EU from transferring user data abroad. However, the EU may not unilaterally dictate how foreign companies handle data *outside* the EU. No state or regional organization is entitled to legislate for the entire world. When national or regional laws extend into foreign territory in this manner, they constitute a form of legal imperialism that violates the international right to self-determination.[301]

IV. Unjustified Extraterritoriality

Given the evident tensions between unilateral extraterritorial lawmaking and self-determination, why has this practice survived into the twenty-first century? Why does it appear to be on the rise today?

A political realist might find the answer to these questions obvious: extraterritoriality persists because it serves the interests of powerful states.[302] Great powers like China, the EU, Russia, and the United States use extraterritoriality to augment their influence, strengthen their national security, and facilitate their accumulation of resources, knowing that other

[298] *See* Justin Sherman, *Russia Is Weaponizing Its Data Laws Against Foreign Organizations*, Brookings (Sept. 27, 2022), *at* https://www.brookings.edu/articles/russia-is-weaponizing-its-data-laws-against-foreign-organizations (recounting this incident).

[299] Anton Troianovski & Isabel Kershner, *Russia Moves to Close Agency Handling Emigration to Israel*, N.Y. Times (July 21, 2022), *at* https://www.nytimes.com/2022/07/21/world/europe/russia-jewish-agency-ban.html. Israel's minister for diaspora affairs, Nachman Shai, expressed concern that Russia's move might be an "attempt to punish the Jewish Agency for Israel's stance [against Russian aggression in Ukraine]." *Id.*

[300] Liza Rozovsky, *In Its War on Jewish Agency, Russia's "Protection of Privacy" Is Another Ruse, Experts Say*, Haaretz (Aug. 11, 2022), *at* https://www.haaretz.com/world-news/2022-08-11/ty-article/.premium/in-fighting-jewish-agency-russian-protection-of-privacy-is-just-a-ruse-experts-say/00000182-88f7-d9bc-affb-ebffedc30000; *see also* Anupam Chander & Paul M. Schwartz, *Privacy and/or Trade*, 90 U. Chi. L. Rev. 49, 51 (2023) (observing that "LinkedIn remains banned in Russia because it refuses to store user data in that country").

[301] *See* Federico Fabbrini & Edoardo Celeste, *EU Data Protection Law Between Extraterritoriality and Sovereignty*, *in* Data Protection Beyond Borders: Transatlantic Perspectives on Extraterritoriality and Sovereignty 9, 25 (Federico Fabbrini, Edoardo Celeste & John Quinn eds., 2021) (recognizing that "the protection of privacy in the digital age increasingly" involves "efforts by legal systems to impose their high standards of data protection outside their borders—and thus [may be] regarded as a form of 'imperialism'").

[302] *See, e.g.*, Hans J. Morgenthau & Kenneth W. Thompson, Politics Among Nations: The Struggle for Power and Peace 69 (6th ed. 1985) (explaining imperialism as the pursuit of domination); Kenneth N. Waltz, Theory of International Politics 209 (1979) ("The need for management increases as states become more closely interdependent. If interdependence is really close, each state is constrained to treat other states' acts as though they were events within its own borders.").

https://doi.org/10.1017/ajil.2024.33 Published online by Cambridge University Press

states are ill-equipped to stop them. When it comes to extraterritorial regulation, "the strong do what they can and the weak suffer what they must."[303]

Most international lawyers eschew the notion that might makes right. They are more likely to ask whether extraterritorial regulation can be justified under international law (*lex lata*) and, if not, whether there are persuasive arguments for revising the law to accommodate the practice (*lex ferenda*).

Thus far, this Article has argued that international law permits extraterritorial lawmaking only when national laws reflect the self-determination of the people they seek to govern. But should the right to self-determination (*lex lata*) yield to the emerging state practice of unilateral extraterritorial lawmaking (*lex ferenda*)? Some legal scholars argue that there are compelling policy arguments for giving extraterritoriality an expansive scope. Extraterritoriality is said to promote international law enforcement, encourage international cooperation, advance universal values, and generate global public goods that benefit all humanity.[304]

In this Part, I offer some reasons to doubt these policy rationales as applied to many forms of unilateral extraterritorial lawmaking. In addition, I argue that states have other tools at their disposal for securing their national interests and collective interests of the international community without violating the right to self-determination. Although none of the alternatives to extraterritorial lawmaking are perfect, together they supply a robust menu of options for preventing and suppressing transboundary harm.

A. Extraterritoriality's False Promises

Legal scholars often depict extraterritoriality as a necessary mechanism for enforcing international law, correcting for institutional failures at the supranational level.[305] Without extraterritoriality, states would struggle to hold pirates accountable for their international crimes.[306] Terrorists and war criminals would find it easier to evade civil and criminal liability.[307] In an international system without a global legislature or police force, decentralized national lawmaking and enforcement may be essential to bolster the rule of international law.

These considerations are compelling as far as they go. Employing extraterritoriality to prevent and suppress violations of international law aligns with the right to self-determination, as the Article has shown.[308] However, international law enforcement does not justify the full range of extraterritorial laws that states have enacted. Many national and regional laws reach

[303] THUCYDIDES, THE HISTORY OF THE PELOPONNESIAN WAR 403 (Richard Crawley transl. 1950); *see also* Tonya L. Putnam, *Political Science and Extraterritoriality*, *in* RESEARCH HANDBOOK ON EXTRATERRITORIALITY, *supra* note 23, at 57, 67–70 (discussing "extraterritoriality as a tool of statecraft").

[304] *See* sources cited in note 4, *supra*.

[305] *See, e.g.*, RYNGAERT, *supra* note 4, at 18 (arguing that "in light of institutional failures to adequately protect global values and common interests, unilateral action may at times be necessary to dispense global corrective justice"); Hannah L. Buxbaum, *Transnational Regulatory Litigation*, 46 VA. J. INT'L L. 251, 255 (2006) (arguing that the enforcement of U.S. law can be an important mechanism for enforcing internationally shared norms).

[306] *See* Roger L. Phillips, *Pirate Accessory Liability: Developing A Modern Legal Regime Governing Incitement and Intentional Facilitation of Maritime Piracy*, 25 FLA. J. INT'L L. 271, 289–90 (2013) (arguing that without universal jurisdiction over privacy an "enforcement gap" would arise "on the high seas where no state has criminal jurisdiction").

[307] *See* Anthony J. Colangelo, *The Legal Limits of Universal Jurisdiction*, 47 VA. J. INT'L L. 149, 151 (2006) (explaining how universal prescriptive jurisdiction extends to "piracy, slavery, genocide, crimes against humanity, war crimes, torture, and 'perhaps certain acts of terrorism'").

[308] *See* Section II.D *supra*.

https://doi.org/10.1017/ajil.2024.33 Published online by Cambridge University Press

extraterritorially without a foundation in international law and lack popular support in the countries they purport to govern. For example, controversial features of China's NSL, the EU's GDPR, Russia's Federal Law on Personal Data, and the United States' material support law impose idiosyncratic national policies on foreign peoples without a solid grounding in general international law. At least where such laws are concerned, it is hard to make the case that extraterritorial lawmaking can be justified as facilitating international law enforcement.

Extraterritoriality's supporters also underscore its potential to promote common interests of humanity.[309] In fields where general international law is thin, such as data privacy, artificial intelligence, and securities regulation, national and regional lawmaking can fill regulatory vacuums, protecting people worldwide from the dominating influence of multinational corporations.[310] For example, some scholars credit EU and U.S. antitrust law with promoting fair competition all over the world.[311] European scholars also celebrate EU regulation for promoting humanity's shared interest in data privacy.[312] Given the formidable political obstacles to international treaty-making and supranational governance, scholars have argued that national and regional regulators are best positioned to address global regulatory challenges that transcend national borders.[313]

This vision of extraterritoriality as "benevolent unilateralism" is alluring but rests on contestable assumptions.[314] First, it takes for granted that there is international consensus about the optimal approach to balancing the pursuit of specific public goods, such as competitive markets and data privacy, against other critical considerations like economic development and national security. There are good reasons to question this assumption. Consider that the international community has failed in the past to conclude an international convention on global competition law precisely because states could not agree about how to reconcile their divergent interests.[315] The fact that the EU and the United States have resorted to extraterritoriality only after their preferred policies failed to attract global support belies the notion

[309] *See* RYNGAERT, *supra* note 4, at 25 ("When the international community has recognized an object as in need of protection, the assumption is that states may be (more) justified to protect this good unilaterally, as they are, *arguendo*, just vicariously enforcing community values.").

[310] *See* Buxbaum, *supra* note 305, at 255 (arguing that U.S. law can promote global economic welfare); Dodge, *supra* note 4, at 104–05 (arguing that "judicial unilateralism" in applying U.S. law extraterritorially "corrects for failures in the legislative process that lead [toward] underregulation"); Krisch, *supra* note 34, at 12–13 (observing that unilateral regulation has been a "practical success" in correcting for local under-regulation of monopolistic enterprises); *see generally* Monica Hakimi, *Unfriendly Unilateralism*, 55 HARV. J. INT'L L. 105, 114–15 (2014) (arguing that the international community tolerates unilateral state action—even if unlawful—for international law enforcement).

[311] *See, e.g.*, CHANDER, *supra* note 290, at 184–86 (arguing that with respect to antitrust law, "U.S. courts have largely avoided provincialism, favoring instead due consideration of foreign and international interests"); Krisch, *supra* note 34, at 12–15 (arguing that unilateral antitrust regulation promotes common interests of the international community).

[312] *See, e.g.*, RYNGAERT, *supra* note 4, at 190–94 (developing this argument).

[313] *See* Berman, *supra* note 177, at 490–91 (arguing for a "jurisdictional system whose objects are no longer conceived as 'automatically and naturally anchored in space'"); Nico Krisch, *Jurisdiction Unbound: (Extra)territorial Regulation as Global Governance*, 33 EUR. J. INT'L L. 481, 486 (2022) (arguing that "the linkage between community and jurisdiction . . . might be less suited to issues of economic regulation").

[314] RYNGAERT, *supra* note 4, at 18.

[315] *See, e.g.*, Anu Bradford, *supra* note 254, at 383, 406–08 (2007) (discussing the collapse of international negotiations for a global antitrust treaty at Cancun in 2003); Krisch, *supra* note 34, at 12–14 (reviewing the history of these efforts).

https://doi.org/10.1017/ajil.2024.33 Published online by Cambridge University Press

that their laws reflect universal values.[316] To quote the U.S. Supreme Court once again, when national laws fail to "win their own way in the international marketplace for such ideas," it is "an act of legal imperialism" to impose such laws on other peoples "through legislative fiat."[317]

Granted, unilateral extraterritorial laws do not always generate intractable conflict. States often manage to resolve their differences through informal cooperation at the enforcement stage.[318] On occasion, states have even exploited foreign extraterritorial laws for their own national interests. For instance, some states have brought antitrust claims as plaintiffs in U.S. courts and have extradited terrorism suspects to face material support charges under U.S. law.[319] However, these cases of international cooperation should not overshadow the many instances in which states have resisted foreign extraterritorial laws. Nor should they convey the false impression that select states or regional organizations speak for the entire international community when they impose their laws on the rest of the world.

Second, even if extraterritorial laws generate global public goods, it is doubtful that they distribute those goods equitably among the world's peoples.[320] Recall developing nations' complaint that EU-U.S. antitrust imperialism advances the interests of multinational corporations at the expense of local economic development.[321] Critics of EU data governance express similar concerns. Although the EU claims that its strict data protection laws benefit people worldwide, critics object that the EU has stunted Africa's economic development by preventing Africans from participating fully in the global digital economy.[322] These concerns underscore an unsettling truth about extraterritorial lawmaking: whenever a powerful state or regional organization purports to legislate for all humanity, there is a high likelihood that its laws will exacerbate structural inequities, perpetuating domination of weaker states.

[316] A similar dynamic is now playing out with respect to global data protection. Even those who support the EU's strict approach to data privacy recognize that it "has set the European Union on a collision course with foreign states." RYNGAERT, *supra* note 4, at 192.

[317] *Empagran*, *supra* note 35, at 169; *see also* Okowa, *supra* note 99, at 698 ("To unilaterally legislate when multilateral processes have failed to produce an outcome could be seen as an attempt to sabotage the will of participating States.").

[318] *See* Krisch, *supra* note 34, at 14 (explaining how states have promoted informal regulatory cooperation through the OECD and ICN).

[319] *See* United States v. al-Moayad, 545 F.3d 139, 145–51 (2d Cir. 2008) (discussing Germany's cooperation in the arrest and extradition of a Yemeni national to face material support charges in the United States); Hannah L. Buxbaum, *Foreign Governments as Plaintiffs in U.S. Courts and the Case Against "Judicial Imperialism,"* 73 WASH. & LEE L. REV. 653, 694 (2016) (discussing private claims initiated by foreign governments in U.S. courts, and arguing that "private enforcement of [American] regulatory law can be viewed as compatible with multilateral governance efforts").

[320] Bill Dodge argues that unilateral regulation "helps promote international negotiations in the long run." Dodge, *supra* note 4, at 105; *see also* William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 BERK. J. INT'L L. 85, 117 (1998) ("[T]he extraterritorial application of U.S. law has led to . . . [bilateral] agreements providing for cooperation in antitrust matters."). Whether these agreements are cause for celebration might be in the eye of the beholder. Given that negotiations have taken place against the backdrop of powerful states' threats to regulate unilaterally, there is room to question whether weaker states have consented to regulatory cooperation "freely."

[321] *See* text accompanying note 225 *supra*.

[322] *See* Cara Mannion, Note, *Data Imperialism: The GDPR's Disastrous Impact on Africa's E-Commerce Markets*, 53 VAND. J. TRANSNAT'L L. 685, 687–88 (2020) (explaining that because "no African countries currently have domestic laws that comply with the GDPR," "the EU has jeopardized Africa's existing e-commerce markets, as well as the continent's opportunity to help innovate the e-commerce market in the future").

https://doi.org/10.1017/ajil.2024.33 Published online by Cambridge University Press

Arguments for benevolent unilateralism thus call to mind colonialism's infamous "civilizing mission" and should be approached with a healthy dose of skepticism.

Third, even if unilateral extraterritoriality has advanced the global public good in some respects in the past, it is not self-evident that this trend will continue. Supporters of unilateral extraterritoriality tend to overlook the rise of authoritarian extraterritoriality,[323] but this looming challenge can no longer be ignored. China and Russia are rapidly ratcheting up their use of extraterritoriality to establish an authoritarian counterweight to EU-U.S. regulatory dominance.[324] Like the EU and the United States, China and Russia purport to use extraterritorial lawmaking to advance the global public interest, not just their narrow national interests.[325] Thus far, however, they have deployed extraterritoriality primarily to challenge Western regulatory hegemony, intimidate foreign critics, and quash domestic political dissent.

As great powers vie for supremacy over the global regulatory domain, the primary casualties are likely to be the people of weaker states caught in the middle. But powerful nations will also pay a price. Now that the EU and the United States are no longer the only self-appointed global lawmakers, their people can expect to encounter more extraterritorial regulation from foreign powers, eroding their freedom from foreign domination. A multipolar world in which states feel free to legislate extraterritorially is a world in which people everywhere are less free.

B. Extraterritoriality's Alternatives

National authorities might worry that dismantling unilateral extraterritoriality could potentially expose their people to harm, whether from criminal elements or private enterprises.[326] It would be particularly ironic if, by respecting the anti-imperialist right to self-determination, states unleashed multinational corporations to exploit and dominate peoples around the world.[327] Fortunately, extraterritoriality is not the only means available to states for dealing with transboundary threats, such as transnational terrorism, global cartels,

[323] Notably, Cedric Ryngaert's erudite monograph defending unilateral extraterritoriality as "benevolent unilateralism" contains only one reference each to China and Russia, see RYNGAERT, *supra* note 4, at 18, 120, and it does not address the possibility that those states might join the EU and the United States in practicing unilateral extraterritoriality.

[324] *See* GINSBURG, *supra* note 217, at 256 (discussing "an increasingly assertive Chinese regime willing to deploy the tools of power," including "extraterritoriality"); ZHANG, *supra* note 87, at 34–35, 217–22 (describing how China has used antitrust extraterritoriality as a foreign policy tool).

[325] *See* Huo & Yip, *supra* note 208, at 330 (arguing that "in sharp contrast to the US unilateralist style of foreign policy, China pledges to build 'a Community with Shared Future for Mankind'" (quoting Chinese President Xi Jinping)).

[326] *See* Jenny S. Martinez, *The New Territorialism and Old Territorialism*, 99 CORNELL L. REV. 1387, 1414 (2014) ("In a legal world governed by territorial formalism, entities (like corporations) that lack corporeal and territorial forms can too easily escape necessary regulation."); Michaels, *supra* note 261, at 544 (arguing that "the choice is between two kinds of imperialism: one that comes from imposing [national] law on the rest of the world, and the other from rejecting access to the courts necessary for protection against [non-state] actors").

[327] *See* Vivian Grosswald Curran, *Mass Torts and Universal Jurisdiction*, 34 U. PA. J. INT'L L. 799, 800 (2013) (noting with irony that U.S. courts have "articulated the goal of avoiding legal imperialism as a reason for immunizing corporations from liability under the [Alien Tort Statute]"); Martinez, *supra* note 326, at 1400 (observing that "the triumph of anti-imperialist rhetoric in [U.S.] courts . . . helped create the so-called 'banana republics' in Latin America").

https://doi.org/10.1017/ajil.2024.33 Published online by Cambridge University Press

and data colonialism. States have a variety of other potent tools at their disposal to prevent and suppress transboundary harm without violating the right to self-determination.

First, states could embrace international cooperation. In the past, efforts to establish multilateral legal standards have been hindered by the misconception that international law condones unilateral extraterritorial lawmaking. Guided by this mistaken belief, great powers like the EU and the United States have had little incentive to compromise in developing international regulatory frameworks.[328] In contrast, acknowledging that unilateral extraterritoriality violates the right to self-determination would change the legal and political landscape, enhancing the prospects for successful negotiations by forcing states to the bargaining table. Policy differences that currently seem intractable might become more amenable to negotiation and compromise. As states relinquish the notion that they may unilaterally impose their preferred legal standards on foreign peoples, national authorities could lay the groundwork for more fruitful international cooperation.[329]

Second, states can sometimes mitigate foreign-sourced threats by leveraging their territorial jurisdiction without directly regulating foreigners' extraterritorial conduct. EU regulation offers an instructive example. As Anu Bradford and others have shown, the EU manages to protect its people from a host of transboundary harms simply by requiring that goods imported into the Union satisfy EU regulatory standards.[330] European regulators do not need to apply their laws directly to farms and factories abroad if they can instead prevent foreign nationals from introducing dangerous items, such as hazardous chemicals and contaminated food, into their borders. Deployed in this way, territorial regulation can be a powerful measure for combatting transboundary harm.

States and regional organizations must take care, however, to ensure that their territorial regulations do not undermine the right to self-determination. Consider EU import restrictions once again. Given the value associated with access to the European market, compliance with EU regulatory standards is an offer that many foreign companies cannot realistically refuse.[331] Once foreign companies align their operations with EU standards, they have incentives to lobby their own states to adopt similar regulations.[332] Bradford refers to this dynamic as the "Brussels Effect": due to its large market and stringent regulatory standards, the EU is "effectively able to set the regulatory standards for all other states."[333] Few would dispute the EU's authority to adopt import restrictions to safeguard its people from exposure to hazardous chemicals and contaminated food. For residents of the EU, such regulations may reflect collective self-determination. However, the more power the EU wields over foreign countries through the Brussels Effect, the more its standards may become a form of *de facto* foreign rule akin to

[328] *See* Parrish, *supra* note 97, at 279 ("Extraterritorial domestic laws often detract from, and can even undermine, more comprehensive, meaningful, multilateral efforts.").

[329] *See* Austen Parrish, Kiobel, *Unilateralism, and the Retreat from Extraterritoriality*, 28 MD. J. INT'L L. 208, 235–39 (2013) (arguing that multilateralism is superior to unilateral extraterritoriality because it produces more durable solutions and better aligns with basic goals of the international legal system).

[330] *See* BRADFORD, *supra* note 84, at 1–2, 171–206 (food safety and chemical safety); RYNGAERT, *supra* note 4, at 145–53 (fishing and vessel-source pollution); Joanne Scott, *Extraterritoriality and Territorial Extension in E.U. Law*, 62 AM. J. COMP. L. 87, 94–95 (2014) (derivatives regulation).

[331] *See* BRADFORD, *supra* note 84, at 142 (explaining how this dynamic has played out in the EU's regulation of the digital economy).

[332] *Id.* at 2.

[333] *Id.* at 5.

https://doi.org/10.1017/ajil.2024.33 Published online by Cambridge University Press

the *de jure* domination of extraterritorial lawmaking.[334] Accordingly, when the EU adopts territorial regulations with extraterritorial effects, it should cooperate with foreign states to address reasonable objections, thereby "promot[ing], through joint and separate action, realization of the principle of equal rights and self-determination of peoples."[335]

Third, when states encounter threats from external sources, they are entitled to call upon other states to prevent and suppress transboundary harm. Customary international law prohibits states from allowing their territory to be used for activities that cause significant harm abroad, such as pollution,[336] terrorism,[337] and cyber-attacks.[338] States from which transboundary harms originate must exercise "due diligence" to prevent transboundary harm.[339] To satisfy this due diligence obligation, they must enact laws that are designed to minimize and mitigate transboundary harm, as well as implement proactive measures to enforce those laws.[340] They must also consult with states likely to be affected to "seek solutions based on an equitable balance of interests."[341] If these consultations do not yield a consensus-based solution, states where transboundary harm originates may decide how to proceed, but in doing so, they must account for other states' equitable interests.[342] Should disputes arise, the states concerned may convene an impartial fact-finding commission or pursue other "peaceful means" for international dispute settlement "chosen by mutual agreement," such as negotiation, mediation, conciliation, arbitration, or adjudication.[343]

Within the past several decades, international cooperation of this nature has produced a flurry of treaties and soft-law instruments aimed at preventing and suppressing transboundary

[334] *See* Cedric Ryngaert, *International Jurisdiction Law*, *in* RESEARCH HANDBOOK ON EXTRATERRITORIALITY, *supra* note 23, at 13, 17 (arguing the EU regulations "may be viewed as amounting to the hegemonic imposition of the life-projects of economically advanced nations on less developed ones, thereby raising the colonial specter of the West's civilizing mission").

[335] Friendly Relations Declaration, *supra* note 20.

[336] *See* Trail Smelter Case (U.S. v. Can.), 3 RIAA 1905, 1965 (Trail Smelter Arb. Trib. 1941), *available at* http://legal.un.org/riaa/cases/vol_III/1905-1982.pdf ("[N]o State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another . . . when the case is of serious consequence . . . .").

[337] Declaration on Measures to Eliminate International Terrorism para. 5, GA Res. 49/60, UN GAOR, 49th Sess., UN Doc. A/RES/49/60 (1994) (declaring that states bear "obligations under the Charter of the United Nations and other provisions of international law" to "ensure that their respective territories are not used . . . for the preparation or organization of terrorist acts . . . against other States or their citizens").

[338] *See* TALLINN MANUAL, *supra* note 103, at 30 (Rule 6) ("A State must exercise due diligence in not allowing its territory, or territory under its governmental control, to be used for cyber operations that affect the rights of, and produce serious adverse consequences for, other States.")

[339] *See* United States v. Arjona, 120 U.S. 479, 484 (1887) ("The law of nations requires every national government to use 'due diligence' to prevent a wrong being done within its own dominion to another nation with which it is at peace, or to the people thereof . . . ."); Pulp Mills on the River Uruguay, 2010 ICJ Rep. 14, 55, para. 105 (Apr. 20) (discussing international environmental law's "principle of prevention," which, "as a customary rule, has its origins in the due diligence that is required of a State in its territory"); Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities, with Commentaries, Rep. of the Int'l Law Comm'n on the Work of Its Fifty-Third Session, Art. 3, Cmt. 7, UN Doc. A/56/10 (2001) [hereinafter Draft Articles] (affirming that states must "take all appropriate measures to prevent significant transboundary harm or at any event to minimize the risk thereof," and characterizing this obligation as "one of due diligence").

[340] *See Arjona*, *supra* note 339, at 487 (explaining that due diligence requires enacting law "to provide for the punishment of such an offense" and to in fact impose "punishment of such an offense").

[341] Draft Articles, *supra* note 339, Arts. 4, 8–10, 12.

[342] *Id.* Art. 9(3).

[343] *Id.* Art. 19. Evan Fox-Decent and I discuss these cooperative obligations at greater length in our monograph, *Mandatory Cooperation Under International Law* (forthcoming 2025).

https://doi.org/10.1017/ajil.2024.33 Published online by Cambridge University Press

harms. In the environmental arena, states have negotiated multilateral conventions to combat marine pollution,[344] atmospheric pollution,[345] hazardous wastes,[346] and nuclear pollution.[347] Nearly every state in the world has committed in the Terrorist Bombings Convention to "cooperate in the prevention of [terrorism]" and to provide "the greatest measure of assistance in connection with [criminal] investigations or criminal or extradition proceedings" arising from terrorist attacks.[348] While major regulatory gaps remain, these instruments illustrate the potential for states to address transboundary harm through international cooperation, rather than relying solely on unilateral extraterritorial lawmaking.

Unilateral action is most defensible when another state is unwilling or unable to curb transboundary harm originating in its territory. International cyberattacks exemplify this challenge. According to a report from the Council on Foreign Relations, thirty-four states are suspected of conducting cyber operations against other nations between 2005 and 2022, with China, Iran, North Korea, and Russia the most frequent offenders.[349] Critics argue that these states have failed to act in good faith, much less exercise due diligence, to prevent cross-border cyberattacks.[350] To make matters worse, none of these states have joined the Council of Europe's Convention on Cybercrime, which obligates states-parties to enact legislation and implement other measures to prevent and suppress cyberattacks.[351] When states decline to prevent and suppress cyberattacks originating from their territories, other states may conclude that unilateral action is their only recourse.

Nevertheless, extraterritorial lawmaking is unlikely to prove an effective deterrent against cyberattacks. As long as cybercriminals operate under the direction, consent, or acquiescence of the state in which they reside, they enjoy de facto impunity from punishment.[352]

[344] *E.g.*, UN Convention on the Law of the Sea, Arts. 94(4)(c), 202, 211(4), Dec. 10, 1982, 1833 UNTS 3; Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (1972, as amended 2006).

[345] *E.g.*, Montreal Protocol on Substances that Deplete the Ozone Layer, Art. 2H, para. 5, Sept. 16, 1987, S. Treaty Doc. No. 100-10, 1522 UNTS 29; United Nations Framework Convention on Climate Change, Art. 2, May 9, 1992, S. Treaty Doc. No. 102-38, 1771 UNTS 164, 166, 170.

[346] *E.g.*, UN Environment Programme, Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (Mar. 22, 1989).

[347] *E.g.*, Convention on Nuclear Safety, June 17, 1994, 1963 UNTS 293, *available at* http://www.iaea.org/Publications/Documents/Infcircs/Others/inf449.shtml; Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management, September 5, 1997, 36 ILM 1436.

[348] Terrorist Bombings Convention, *supra* note 231, Arts. 10, 15; International Convention for the Suppression of the Financing of Terrorism, Arts. 12, 18, Dec. 9, 1999, 2178 UNTS 197; *see also* International Convention for the Suppression of the Financing of Terrorism – Participants, UN TREATY COLLECTION, *at* https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-11&chapter=18&clang=_en (listing 189 states parties).

[349] Council on Foreign Relations, *Cyber Operations Tracker*, *at* https://microsites-live-backend.cfr.org/cyber-operations (last visited Oct. 10, 2023).

[350] *See* Jyh-An Lee, *The Red Storm in Uncharted Waters: China and International Cyber Security*, 82 UMKC L. REV. 951, 954–57 (2014) (reporting that "extensive evidence" supports the view "that most of the cyber attacks from China are government-sanctioned"); Daniel Ortner, Comment, *Cybercrime and Punishment: The Russian Mafia and Russian Responsibility to Exercise Due Diligence to Prevent Trans-boundary Cybercrime*, 2015 BYU L. REV. 177, 204–13 (explaining how Russia's efforts to suppress cybercrime fall short of due diligence).

[351] Convention on Cybercrime, Arts. 2–13, Nov. 23, 2001, ETS No. 185.

[352] *See* U.S. Dep't of Justice Office of Public Affairs Press Release, Seven International Cyber Defendants, Including "Apt41" Actors, Charged in Connection with Computer Intrusion Campaigns Against More Than 100 Victims Globally (Sept. 16, 2020), *at* https://www.justice.gov/opa/pr/seven-international-cyber-defendants-including-apt41-actors-charged-connection-computer#:~:text= In%20August%202019%20and%

https://doi.org/10.1017/ajil.2024.33 Published online by Cambridge University Press

The United States' response to foreign cyberattacks illustrates this challenge. Although American prosecutors have charged dozens of Chinese and Russian nationals implicated in cyberattacks,[353] actual arrests and convictions have been few and far between. Meanwhile, threating prosecution has not dissuaded Chinese and Russian hackers from targeting the United States.[354]

The international law of countermeasures offers an alternative mechanism for compelling states to satisfy their obligations to prevent and suppress transboundary harm.[355] Countermeasures involve a state temporarily suspending its compliance with international obligations to compel another state to desist from violating international law.[356] Countermeasures commonly include international travel bans, asset freezes, and restrictions on international trade. Although countermeasures have a mixed track record at best, they arguably exert more pressure on uncooperative states as compared to criminal charges or civil actions directed against a limit number of individuals.[357]

Lastly, some transboundary harms activate a state's right to self-defense under international law.[358] International lawyers generally agree that cyberattacks and terrorist violence justify the use of force in self-defense if they are attributable to a state and sufficiently destructive in their scale and effects.[359] States may also seek assistance from international institutions, such as the UN Security Council, in suppressing threats from dangerous non-state actors.[360]

* * * *

20August,the%20United%20States%20and%20abroad%2C [hereinafter Int'l Cyber Defendants] (quoting Deputy Attorney General Jeffrey Rosen: "Regrettably, the Chinese communist party has chosen a different path of making China safe for cybercriminals so long as they attack computers outside China and steal intellectual property helpful to China").

[353] *See, e.g.*, Int'l Cyber Defendants, *supra* note 352; U.S. Dep't of Justice Office of Public Affairs Press Release, Multiple Foreign Nationals Charged in Connection with Trickbot Malware and Conti Ransomware Conspiracies (Sept. 7, 2023), *at* https://www.justice.gov/opa/pr/multiple-foreign-nationals-charged-connection-trickbot-malware-and-conti-ransomware#:~:text=A%20federal%20grand%20jury%20in%20the%20Middle%20District%20of%20Tennessee,and%20continuing%20through%20June%202022.

[354] *See, e.g.*, Luke Barr, *9 Russians Charged with Cyberattacks Targeting US Companies*, ABC NEWS (Sept. 8, 2023), *at* https://abcnews.go.com/Politics/9-russians-charged-cyberattacks-targeting-us-companies-doj/story?id=103033736 (discussing U.S. indictments against Russian hackers); Sarah Fitzpatrick & Kit Ramgopal, *Hackers Linked to Chinese Government Stole Millions in COVID Benefits, Secret Service Says*, ABC NEWS (Dec. 5, 2022), *at* https://www.nbcnews.com/tech/security/chinese-hackers-covid-fraud-millions-rcna59636 (discussing continued Chinese cyberattacks).

[355] *See* Articles on State Responsibility, *supra* note 110, Arts. 49–54 (discussing the law of countermeasures).

[356] *Id.* Art. 49.

[357] *See* Ellen Nakashima & David J. Lynch, *US Charges Chinese Hackers in Alleged Theft of Vast Trove of Confidential Data in 12 Countries*, WASH. POST (Dec. 21, 2018), *at* https://www.washingtonpost.com/world/national-security/us-and-more-than-a-dozen-allies-to-condemn-china-for-economic-espionage/2018/12/20/cdfd0338-0455-11e9-b5df-5d3874f1ac36_story.html (citing a China analyst's observation that hitting high-profile Chinese companies with financial sanctions would exert more pressure than "indicting a handful of Chinese agents out of the tens of thousands involved in economic espionage"); Parrish, *supra* note 97, at 289 ("[S]cant evidence exists that extraterritorial criminal laws (at least those that are unconnected to an international agreement) work all that well. . . . Despite the tremendous expansion of extraterritorial laws, 'prosecutions have been few.' And when prosecutions have occurred, they are rarely successful.").

[358] UN Charter, Art. 51 (affirming a state's "inherent right to self-defense" in response to an "armed attack").

[359] *See* TALLINN MANUAL, *supra* note 103, at 328, 330–37, 339–50 (Rules 69, 70–71) (concluding that a cyber-attack "constitutes use of force when its scale and effects are comparable to non-cyber operations rising to the level of a use of force").

[360] *See* Jane E. Stromseth, *The Security Council's Counter-terrorism Role: Continuity and Innovation*, 97 ASIL PROC. 41 (2003) (discussing Security Council's response to the 9/11 terrorist attacks).

https://doi.org/10.1017/ajil.2024.33 Published online by Cambridge University Press

To be clear, none of these alternatives to unilateral extraterritorial lawmaking is a panacea, and all are susceptible to abuse in the hands of powerful states. While multilateral lawmaking formally respects the right to self-determination by allowing national polities to choose the laws that apply to them, it carries the attendant risk that hegemonic powers could leverage their influence to impose treaties and customs that further consolidate their dominant positions.[361] Powerful states might also exploit territorial jurisdiction, countermeasures, self-defense, and international institutions to promote imperialist agendas.[362] The ever-present threat of great power domination looms large in an international order that affirms the formal equality of states but tolerates (and arguably perpetuates) significant practical inequalities.[363] Hence, the international community must remain vigilant to ensure that alternatives to unilateral extraterritorial lawmaking do not resurrect alien domination under a different guise. Whatever steps states and other global actors take to prevent transboundary harm, they must respect the right to self-determination by refraining from subjecting "peoples to alien subjugation, domination and exploitation."[364]

Future scholarship might fruitfully explore the comparative threats of domination and exploitation associated with extraterritorial lawmaking, on the one hand, and other tools for dealing with transboundary harm, such as territorial regulation and multilateral cooperation, on the other hand. For present purposes, however, the essential point is that states have an array of options available for responding to transboundary harm without resorting to extraterritoriality. Ending legal imperialism would not render states defenseless against such harm, but it would necessitate a strategic pivot toward measures that are at least potentially more compatible with the right to self-determination.

Ironically, it is the world's most powerful states—those least vulnerable to foreign domination and best equipped to defend their interests—that resort to extraterritoriality most frequently. Perhaps this should invite us to consider whether unilateral extraterritorial lawmaking continues to operate today as it has in times past: less as a shield for the oppressed than as the tyrant's sword.

Conclusion

Extraterritoriality is long overdue for a reckoning, and not only for its historical associations with colonialism. As this Article has shown, extraterritorial lawmaking continues to subject peoples around the world to foreign domination in violation of their right to self-

[361] *See* Nico Krisch, *International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order*, 16 Eur. J. Int'l L. 369, 382 (2005) ("Most predominant states . . . have made extensive use of the international legal order to stabilize and improve their position.").

[362] *See, e.g.*, Anghie, *supra* note 246, at 273–309 (arguing that the international "war against terrorism" reflects imperialism); Craig Forcese, *Hegemonic Federalism: The Democratic Implications of the UN Security Council's "Legislative" Phase*, 38 Vict. U. Wellington L. Rev. 175, 181, 197 (2007) (arguing that Security Council lawmaking undermines principles of sovereign equality and democratic accountability); Detlev F. Vagts, *Hegemonic International Law*, 95 AJIL 843, 846 (2001) ("[A] hegemon can use an international organization to magnify its authority by a judicious combination of voting power and leadership . . . ."); Jan Zielonka, *Europe as a Global Actor: Empire by Example?*, 84 Int'l Aff. 471, 478–82 (2008) (arguing that the EU leverages access to its markets to promote an imperial agenda).

[363] *See* Benedict Kingsbury, *Sovereignty and Inequality*, 9 Eur. J. Int'l L. 599 (1998) (discussing the tension between formal sovereign equality and the practical reality of global inequality).

[364] Declaration on Colonial Independence, *supra* note 1, para. 1.

https://doi.org/10.1017/ajil.2024.33 Published online by Cambridge University Press

determination. National authorities might believe that their laws promote the global public good. However, this belief—even if accurate in some respects—does not justify the political disenfranchisement and legal subjugation of other peoples. The time has long passed when international law permitted states to pass off imperial rule as benevolent unilateralism. To satisfy the international right to self-determination, law must always reflect "the free and genuine will of the people concerned."[365]

[365] *Chagos*, *supra* note 22, at 134, para. 157.

https://doi.org/10.1017/ajil.2024.33 Published online by Cambridge University Press