

EXTRATERRITORIAL JURISDICTION OF THE STATE: WITHIN AND BEYOND THE BOUNDARIES OF LAW

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Article info

Received –

2025 August 15

Accepted –

2026 March 20

Available online –

2026 June 20

Keywords

Extraterritoriality, jurisdiction,
economic sanctions, blocking
statutes, Lotus case, UN
International Law Commission

The subject. Neither the public order and mandatory rules nor the basic principles of international law provide protection against attempts of transnational legal supremacy. The further progressive development of international law in this area is required.

The aim. The authors consider extraterritoriality as a fundamental legal and political issue that requires the special complex regulation.

The methods of historical and comparative legal analysis made it possible to identify various manifestation of extraterritoriality and to define basic principles of the regulation hereof. The comprehensive analysis of existing and required regulations is based on a comprehensive stocktaking of the current international law.

Main results. A State exercises its right to legislate, enforce and supervise the implementation of laws within its borders. Numerous exceptions to this rule, namely attempts to exercise jurisdiction extraterritorially, have arisen. "Legal expansion" began to acquire widespread scope in the 20th and 21st centuries regarding antitrust, banking, currency legislation, export regulations, anti-corruption laws, economic "sanctions" etc.). The various types of the extraterritorial application of national law have never been analyzed in their entirety. A document intended to serve as the basis for international regulation was prepared within the UN in 2006. The UN has not returned to its discussion over the past 20 years. However, legal expansion and measures to block it may render impossible the international economic exchange. The authors substantiate that a detailed legal regulation of the extraterritoriality is necessary. The main question is whether a state or the international law shall establish the spatial limits of national law.

Conclusion. Draft articles as a special international legal act shall be adopted, and the authors have prepared a sample of such an act suggesting it for broad discussion.

1. Introduction

The question of the scope of national law has always been one of the most complex in jurisprudence. States have always sought to extend the scope of their legal provisions and judicial decisions beyond their own jurisdiction, contrary to the fundamental premise that law has legal force only within the boundaries of a state's territory. In the 20th and early 21st centuries attempts at legal dominance have assumed an unprecedented scale as a part of global competition,

For a long time, legal doctrine sought a way out of the vicious circle: should the boundaries of the scope of national law be determined within it or should such boundaries be established by international law? It was believed that legislation was the sovereign right of states, and the international law should not interfere in this area, as it fell within the state's domestic jurisdiction. At the same time, it became clear that states by expanding their jurisdiction were encroaching on the rights of other states. However, without any external constraints states at first cautiously and then sensing a lack of adequate response began to increasingly expand the scope of their jurisdictional activity.

In both academic and practical terms, the difficulty arose due to the lack of a single term that would encompass the various instances of a state's exercise of sovereign legal powers outside its territory. Gradually, the term "jurisdiction" became established as such a unifying concept.

Meanwhile, the term "jurisdiction" by that time had already become widely used in international treaties, particularly in the areas of maritime and air transport, legal assistance and so on. The problem, however, was that the term was not always given consistent meanings. Consequently, the international legal codification of general jurisdictional issues became a very

difficult task as it was hardly possible to overcome the semantic inconsistencies in the texts of international treaties.

An attempt to change this situation was made by the UN International Law Commission (hereinafter referred to as the UNILC). In 1991, the UNILC's program of work included an item on "Extraterritorial Application of National Law." However only in 2006 an interim document entitled "Extraterritorial Jurisdiction"¹ appeared. In form and content, it is similar to the draft articles typically developed by the UNILC in such cases which could subsequently serve as the basis for the adoption of an international treaty. Since 2006 the UNILC has not returned to open discussion of this topic.

We believe that the drafters of the published text found it insufficiently developed and, moreover, highly questionable. Meanwhile, the situation with states expanding their legislative and judicial jurisdiction is only getting worse. Under these circumstances, it is appropriate to submit for consideration by the UN Commission on International Law a revised and updated version of the Draft Articles on Extraterritorial Jurisdiction, prepared by the authors of this article.

In conducting the research general scientific (analysis and synthesis, induction, deduction, analogy, abstraction), formal-legal and comparative-legal methods were used.

2. Limits of the application of national law and the extraterritoriality

Law experts have long grappled with the question of whether national laws can have legal force beyond the territory of the state that issued them. Some experts' assertions that the

¹ Report of the International Law Commission of the United Nations. 58th session. Official Record of the General Assembly. 61st session. Supplement No. 10. A/61/10. Department for General Assembly and Conference Management [official website]. – URL: <https://docs.un.org/r/a/61/10>.

issue of extraterritoriality arose relatively recently or even "several decades ago" are untrue [1, p. 246]. In fact, it is the same age as international law. The renowned international lawyer Prof. C. Calvo pointed out that the beginnings of some institutions (in particular, extraterritoriality) already appeared during the emergence of international law [2, p. 3].

However, understanding extraterritoriality as a distinct legal phenomenon during this period was complicated by the diversity and heterogeneity of its manifestations, as well as the lack of coordinated terminology. This could include the "extraterritorial effect of law", the "extraterritoriality" of persons, objects, and spaces, the "privilege of extraterritoriality", the "fiction of extraterritoriality" and so on. According to Prof. V.P. Danevsky, a systematic examination of extraterritoriality began with Hugo Grotius's advancement of the "fiction of extraterritoriality." According to this concept, foreign ambassadors should be exempt from the host state's jurisdiction while on its territory [3, p. 243]. It subsequently became clear that such exemptions applied not only to ambassadors but also to other individuals (for example, consuls and foreigners under their protection, foreign merchants, personnel of foreign military bases, etc.). At the same time, V.P. Danevsky himself regarded state territory as the limit of the state's exercise of authority.

Extraterritoriality in public and private law was long considered separately, as unrelated phenomena. On the one hand, extraterritoriality was the subject of analysis in the field of private international law (hereinafter referred to as PIL) when deciding on the choice of a regulatory legal order applicable to cross-border relations. Attempts to resolve the contradiction between the personal and territorial criteria to which a legal relationship may be subject were long pursued within the framework of the so-called "statutory theory". This arose as to whether a

given statute was valid within the territory of the state that adopted it, or whether its transboundary effect was possible. Accordingly, PIL was often interpreted as a doctrine of the spatial application of civil law or the extraterritorial application of laws [4, c. 467-468].

On the other hand, questions of extraterritoriality were the subject of consideration in public international law. Two approaches existed. The first one analyzed the applicability of one state's law to the territory of another within territorially distinct entities (embassies, consulates, commercial cities, free ports, military bases, etc.). The second approach examined the status of persons and objects exempt from the national law of a foreign state (heads of state and government, ambassadors, consuls, warships, etc.). Initially, in these areas the term "extraterritoriality" was sometimes used instead of "extraterritoriality".

For a long time, there was no coordination in the study of extraterritoriality, each of its emanation was considered an isolated phenomenon. Moreover, when the question of the international recognition of the nationalization acts adopted in Soviet Russia after 1917 arose, it was considered without regard for previous research on extraterritoriality [5]. Moreover, some scholars interpreted extraterritoriality as one of the fundamental issues of international law [6].

The question of the scope of national law arose even more broadly at the turn of the 20th and 21st centuries. In the context of global competition, states seek to extend the scope of their legal order beyond national borders. This concerns antitrust, banking, currency, tax law, trade and economic restrictions, restrictive measures in export regulation, securities and stock exchange regulations, anti-corruption law etc. [7].

A number of countries are extending

their law and jurisdiction beyond their national borders so aggressively that German scholar Prof. J. Basedow calls the use of extraterritoriality and associated trade embargoes and blocking statutes an "economic weapon" [8, c. 263]. Prof. S.V. Bakhin views the struggle for economic dominance using legal instruments as an element of global competition [9]. Moreover, in this regard we are now talking about a legal war (the terms "lawfare" and "legal war" are used in this case) [10].

So-called "economic sanctions" are a special instrument of political and economic dominance. In classical international law, sanctions were defined as coercive measures adopted by the UN Security Council. Subsequently, this concept was unjustifiably expanded, and sanctions came to refer to unilateral economic restrictions imposed by individual states or associations of states based on arbitrarily established criteria and without regard to the norms of current international law. These "sanctions" represent nothing more than the forced imposition of unilaterally adopted extraterritorial restrictions [11].

3. The extraterritoriality and countermeasures

States' attempts to expand the scope of their law have provoked a wave of opposition from those countries whose interests are affected by the desire to dominate legal and economic spheres. Both existing and specially developed political and legal measures are being used to protect states' interests.

So-called "blocking" statutes are among the special measures aimed at minimizing the negative consequences of states expanding their jurisdiction. This name accurately reflects the purpose of this legal mechanism, namely to prevent the adverse consequences of foreign legal expansion. To this end, special regulations are adopted to prohibit the application of foreign

extraterritorial acts and the judicial decisions based on them. Initially, "blocking" measures were adopted by individual European countries in response to US sanctions against the Soviet "Urengoy-Pomary-Uzhgorod" gas pipeline. Subsequently, European countries began to coordinate their efforts within the EU (then the European Economic Community), resulting in the creation of EU-wide "blocking" acts and expanded the scope of "blocking" legislation (in addition to the USSR, sanctions against Cuba, Iran, Syria, and others were blocked).

An example of "blocking" legislation is the Council Regulation (EC) No 2271/96 of 22 November 1996 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom (hereinafter referred to as Council Regulation (EC) No 2271/96). It states: "This Regulation shall ensure protection against the extraterritorial application of laws..., including statutory instruments and other legislative texts, and of actions based on or resulting from those laws, and counteract their effects, where such application affects the interests of persons... engaged in international trade..."².

Experts disagree on the legal nature and purpose of blocking statutes. Some believe their primary purpose is to exert pressure on the government of a foreign state whose actions are disapproved by the blocking state [8, p. 263]. Others believe that blocking legislation can be interpreted as a legal countermeasure under international law [12, p. 21]. However, the likelihood of an endless cycle of sanctions being countered by the development of counter-

² Council Regulation (EC) No 2271/96 of 22 November 1996 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom. Of. Journal of the European Union [website]. – URL: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A01996R2271-20180807>.

statutes is highly likely. Such a standoff which could legitimately be called a "war of laws" could ultimately make international economic exchange fundamentally impossible.

4. On the concept of "extraterritorial jurisdiction"

Combining the individual manifestations of extraterritoriality and considering them as a general legal construct was quite difficult as they were analyzed in isolation in relation to various categories of persons, objects, and territorial units. Thus, in addition to monarchs and diplomats, the German Prof. F. Störk proposed including contingents of foreign troops, as well as agents of a foreign government in general, in the performance of their duties (for example, customs officers), among individuals. But F. Störk went further and considered the exclusion of railway rolling stock from foreign jurisdiction as a special phenomenon in this area [13, s. 592-671].

Leaving aside the specifics, the central problem of extraterritoriality was the conflict between the personal and territorial principles of law when its applicability was considered in relation to foreign individuals and enclaves within foreign territory. However, finding a unified approach to the relationship between personal and territorial legal systems applicable to various cases was difficult. Sometimes even quite paradoxical legal constructs were invented, such as the fiction of an individual's non-residence in a given territory. Pointing out the inadmissibility of such an approach and the need for the primacy of the personal principle, German Prof. F. Holtzendorff attempted to classify various types of territory based on the possibility of extending the application of national legal order to them [14, s. 225].

In contrast, F. Sterk viewed extraterritoriality as an independent institution of international law not reducible to territorial delimitation. He proposed distinguishing

between the "normal" (i.e., ordinary) status of an individual when they exist within the framework of the legal order in force in the state and the "abnormal" (i.e., extraordinary) one in which exceptions from the general legal regime or even a special legal status are introduced for the individual. In his opinion, the specificity of the legal status of extraterritorial persons lies not in their exemption from subordination to the local legal order but only in the lack of the ability of local authorities to compel them to comply with the requirements of this legal order [13].

Thus, the question gradually arose not only regarding the validity of national legal provisions beyond the state's borders, but also of the possibility of actually enforcing them, that is, the ability to enforce the state's judicial and jurisdictional mandates outside its territory. Accordingly, the term "jurisdiction" began to be interpreted in a dual sense: as the state's right to subordinate relations arising outside its borders to its law, and as the authority to enforce these normative provisions.

In Russia, N.P. Ivanov proposed combining the term "jurisdiction" with legislative and law enforcement activities as early as 1865. Explaining the use of this term in his book "Foundations of Private International Jurisdiction," he wrote: "In speaking of jurisdiction..., I will mean only substantive jurisdiction, i.e., the legal principles upon which a judge renders his verdict, as opposed to formal jurisdiction, which encompasses the legal proceedings themselves" [15, p. 63]. However, not all experts agreed with such a broad interpretation of jurisdiction. Prof. Yu.G. Barsegov, for example, believed that the term "jurisdiction" should be used only in relation to the state's authority to exercise judicial enforcement powers [16, p. 250].

Meanwhile, if we look at the texts of existing international treaties, we find that the

term "jurisdiction" is widely used to denote various powers of the state in the legal sphere. This applies not only to the right to legislate, but also to enforce law (judicial jurisdiction) and to monitor compliance with its legislation (executive jurisdiction). It was this understanding of the term "jurisdiction" that formed the basis of the document prepared by the International Law Commission of the United Nations.

5. Extraterritorial jurisdiction and international law

A fundamental question regarding extraterritoriality is how it can be regulated, that is, whether the boundaries of its own rights are determined by the state itself, or whether this is the prerogative of international law. This issue was specifically addressed in the famous "Lotus Affair". On August 2, 1926, the French vessel "Lotus" collided with the Turkish vessel "Bozkurt", killing eight Turkish citizens and damaging the "Bozkurt". Turkey held the captain of the "Lotus" liable for the loss of life and damage caused by the accident.

The dispute was heard by the Permanent Court of International Justice (PCIJ). France accused Turkey of unlawfully arresting the captain and claimed that it alone had exclusive jurisdiction as the vessel's flag state. The Court did not support France's position, stating in its decision: "Sovereign States are free to act in any manner they wish, provided this does not contravene an express prohibition established by international law"³. This decision had a significant impact on international law, and the "Lotus principle" served as a starting point for resolving many issues, including those concerning jurisdiction.

However, the "Lotus principle" has not been fully supported by the codification of maritime law. Article 92 of the United Nations

Convention on the Law of the Sea of 10 December 1982 (hereinafter referred to as the 1982 Convention) stipulates: "A vessel shall fly the flag of one State only and, except in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to the exclusive jurisdiction of that State on the high seas"⁴. In other words, it was established that deviations from the exclusive jurisdiction of the flag state, as stipulated in treaties, are possible.

It is quite difficult to deduce from these acts cases where exceptions are permissible. Firstly, there are a significant number of treaties that regulate various aspects of state jurisdiction. The provisions of these agreements are poorly correlated with each other. Secondly, these treaties may refer to jurisdiction in specific areas, and it is unclear how this relates to the concept of "exclusive jurisdiction." Thirdly, international treaties most often refer to specific types of jurisdiction (territorial, personal, object-specific, sectoral, etc.). All this does not create a complete and consistent regulation of issues of state jurisdiction.

Issues of extraterritoriality have been a part of the UN ILC's work since its inception. Therefore, the inclusion of the item "Extraterritorial Application of National Law" in the UN ILC's work program in 1991 represented a continuation of the work begun earlier. The previous codification of jurisdictional issues forced the UN ILC to proceed with a certain degree of caution. It is no coincidence that the UN ILC's preliminary document was not included in the Report of its work, but rather presented only as an addendum. Over the past 20 years, the UN ILC has never returned to this document.

The main problem associated with the regulation of extraterritorial jurisdiction is

³ PCIJ, *SS Lotus (France v Turkey)*. PCIJ Reports. – 1927. – Series A. – № 10. – P. 19.

⁴ United Nations Convention on the Law of the Sea of 10 December 1982. Coll. legislation of the Russian Federation. 1997. No. 48. Art. 5493.

whether this issue can be regulated by international law. Jurisdiction, as an integral part of state sovereignty, is considered by states to be subject to the exclusive regulation of national law.

Experts disagreed on how far international law can go in regulating jurisdiction. Thus, Prof. I.A. Lukashuk argued in 1992 that international law regulates extraterritorial jurisdiction [17, p. 154], and in 2005 he wrote with greater caution: "the problem of the extraterritorial effect of domestic law clearly requires thorough international legal regulation" [18, p. 254].

Prof. M.M. Boguslavsky believed that the extraterritorial application of cartel, currency, and foreign economic legislation of one country violates the rights of other countries, and that this raises the question of violating the principles of state sovereignty and non-interference in the internal affairs of other states [19, p. 14-15]. Are we justified in believing that the fundamental principles of international law can effectively regulate issues of extraterritoriality? Unfortunately due to their abstract nature they are of little use in facilitating the resolution of practical disagreements between states.

5. Conclusions

It has become clear that the issue of the extraterritorial effect of national legislation requires specific international legal regulation. This is not a matter of codifying existing legal norms (they essentially do not exist), but of progressively developing international law. It is clear that the 2006 project should serve as the basis for this. However, in the 20 years since its creation, the necessary adjustments, clarifications, and additions to the legal regulation of extraterritoriality have become evident. The authors of this article have prepared a fundamentally updated and revised text in the form of the UN ILC Draft Articles,

which they are submitting for discussion by their colleagues.

6. Appendix

Draft Articles on Extraterritorial Jurisdiction

The International Law Commission,

considering that the exercise of jurisdiction by States over persons, property, or actions outside their territory is becoming increasingly widespread in the context of globalization;

recognizing that the globalization of the world economy, deepening integration across a wide range of issues and the accelerated implementation of cross-border technologies and particularly artificial intelligence limit the ability of States to protect their national interests through traditional principles and established mechanisms for delimiting jurisdiction;

taking into account the ever-expanding transparency of state borders, the increase in social, entrepreneurial, professional and other types of mobility, as well as population migration, the scope of innovations in the field of transport, communications and intellectual property and the growth in the scale of transnational crime and illegal migration, the increasingly active cross-border use of the latest communication technologies;

believing that there is an urgent need to codify the legal regulation of the exercise of extraterritorial jurisdiction in order to form a unified legal regime;

recognizing that the elimination of disagreements and uncertainties regarding certain aspects of the law governing extraterritorial jurisdiction requires the progressive development of the law;

acknowledging that issues of extraterritorial jurisdiction represent a unique legal phenomenon since they are in fact regulated by the norms of international, integration and national law, and, therefore, this requires interlegal coordination;

bearing in mind that the issues of the exercise of extraterritorial jurisdiction have been included in the long-term programme of work of the International Law Commission of the United Nations since its 43rd session (1991), and in developing this topic the Commission has succeeded in formulating some fundamental approaches;

adopts the present Draft Articles:

1. Jurisdiction, as interpreted in international and national law, extends over persons, property and actions and involves the exercise of power, sovereign rights or authority by a state. State jurisdiction includes legislative, judicial and executive jurisdiction. Legislative jurisdiction implies the right of a state to shape its own legal system i.e. to establish norms of conduct governing the conduct of individuals, relations between individuals, actions or legal status. Judicial jurisdiction implies the power of a state to determine, in accordance with its legal system, the rights of parties in a particular case. Executive jurisdiction concerns the power of a state to ensure and control compliance with its laws. The lawful exercise of legislative jurisdiction in the adoption of any normative act is a prerequisite for the proper exercise of judicial or executive jurisdiction with respect to that act.

2. The starting point for the formation of the legal regime of extraterritoriality in international law was the decision of the Permanent Court of International Justice in the "Lotus case" adopted in 1927 in

which the judges came to the conclusion that the jurisdiction of a state is territorial as a general rule.

3. The exercise of jurisdiction within the territory of a State must be based on the fundamental principles of international law as interpreted in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations of 24 October 1970. A State may not exercise its powers in any form outside its territory in the absence of a corresponding permitting norm of international or integration law and on the territory of another State without the consent of that State.

4. The exercise of extraterritorial jurisdiction involves giving legal force to the normative acts of a state, its documents, actions or their law-forming consequences outside the territory of that state (including land, internal waters, territorial sea and adjacent airspace), namely, on the territory of another state or outside the territorial jurisdiction of states, within the high seas and adjacent airspace as well as in outer space.

5. When exercising extraterritorial jurisdiction, states may not exceed the limits established for them by the principles of sovereign equality of states and cooperation enshrined in the UN Charter. They must also comply with the boundaries of the legal personality of other states and their right to develop their own legal systems. This obligation requires that the extraterritoriality of legal acts and actions must not lead to interference in the internal affairs of other states, infringe on their independence, or violate fundamental human rights and freedoms.

6. When creating rules on extraterritorial jurisdiction, states should be guided by the rule that the rules being created should not transform existing special legal regimes established by current international law (international private law, maritime, space, international humanitarian and tax law, legal assistance and other relevant branches of law as well as the legal status of diplomatic, consular and trade missions, military bases and other facilities located on the territory of another state, the position of which is regulated by special rules of international law).

7. Any normative act is recognized as having a territorial scope of application. If it is deemed extraterritorial, this must be expressly stated in the act itself or in the corresponding documents related to its adoption or implementation. When assessing a normative act by a court it must be assumed that the act does not have such a scope in the absence of a specific clause regarding extraterritoriality,

8. The "assumption" of jurisdiction, i.e. its unlawful establishment, may be evidenced by an obvious infringement on the rights and interests of a foreign state as well as its subordinates, the absence of its express consent or a timely protest. Unilateral restrictive coercive economic measures by states that do not fall under the definition of retorsion as defined in the Draft Articles on Responsibility of States for Internationally Wrongful Acts should be qualified as the unlawful establishment of extraterritorial jurisdiction.

9. The establishment of extraterritorial jurisdiction by a state is recognized by other states only to the extent that it complies with international and integration law. If one state exercises extraterritorial jurisdiction that another state

considers excessive, the other state may object to the exercise of such jurisdiction through means provided for by both international (diplomatic protest) and domestic law (invocation of public order, non-recognition of laws, regulations, and court decisions, legislative measures such as "blocking" statutes and "compensatory provisions", judicial measures such as injunctions).

10. Territoriality must be the basis for delimiting competing jurisdictions; even if another state has concurrent jurisdiction, its right to exercise it is limited if it conflicts with the rights of the state with territorial jurisdiction. Judicial jurisdiction may be delimited only on the basis of special international treaties, jurisdiction may also be waived in the same manner (including the *forum non conveniens* rule).

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BIBLIOGRAPHIC DESCRIPTION

Bakhin S.V., Davydov D.V. Extraterritorial jurisdiction of the state: within and beyond the boundaries of law. *Pravoprimerenie = Law Enforcement Review*, 2026, vol. 10, no. 2, pp. 147–156. DOI: 10.52468/2542-1514.2026.10(2).147-156. (In Russ.).