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INTERNATIONAL LEGAL THEORY

# The international law of jurisdiction: A TWAIL perspective

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## Abstract

The concept of jurisdiction is a relatively undertheorized category of international law. Mainstream international law scholarship advances an ahistorical and asocial account of the rules of jurisdiction in international law. The present article contends that any serious understanding of the categories and rules of jurisdiction, in particular that of extraterritorial jurisdiction, calls for deep appreciation of the evolving material structures over time. It argues that the key factors that have influenced the evolution and development of the doctrine, rules, and practices of jurisdiction are the emergence of the modern state, capitalism, and imperialism. In order to appreciate this contention there is a need to undertake on the one hand a genealogical analysis of modern state and capitalism and on the other hand problematize the categories ‘territory’ and ‘extraterritorial’. The internal relationship between capitalism and imperialism has meant that, despite the territorial organization of the international system, a process of harmonization of legal rules has taken place across geographical spaces in both colonial and postcolonial eras. The outcome is a critical loss of policy and legal space for nations of the Global South. In the colonial era the outcome was achieved through legislation in the instance of colonized nations and through capitulation regimes in the case of semi-colonies. The strategy of advanced capitalist states in the postcolonial era for achieving harmonization of laws has been multi-layered and multi-dimensional. The article concludes by touching on two models of reform of the rules and practices of jurisdiction viz., liberal and subaltern internationalism.

**Keywords:** capitalism; extraterritorial jurisdiction; liberal internationalism; state; TWAIL

## 1. Introduction

The concept of jurisdiction is a relatively undertheorized category of international law.<sup>1</sup> Mainstream international law scholarship (MILS) advances an ahistorical and asocial explanation of the doctrine, rules and practices of jurisdiction in international law.<sup>2</sup> Its discussion involves ‘a

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<sup>1</sup>Mills calls it the most ‘underdeveloped’. He notes that the subject ‘has not received extensive scholarly attention’. See A. Mills, ‘Rethinking Jurisdiction in International Law’, (2014) 84 BYIL 187, at 188.

<sup>2</sup>MILS may be defined as ‘an ensemble of methods, practices, and understandings in relation to the identification, interpretation, and enforcement of international law’ which among other things does not recognize their links with deep structures of capitalism, imperialism, and patriarchy. See B. S. Chimni, ‘An Outline of a Marxist Course on Public International Law’, (2004) 17 LJIL 1, at 1–2.

fairly ritualized account of the standard ‘heads’ of jurisdiction, principally based on territoriality and nationality . . .’<sup>3</sup> There is insufficient acknowledgment that jurisdiction is a ‘multivalent concept’ and that ‘it sits at the intersections of political and legal theory, technical doctrine, sovereignty studies, and critical social theory’.<sup>4</sup> Insofar as critical international law scholarship is concerned a beginning has been made but it is yet to gather significant mass and depth.<sup>5</sup>

This article seeks to offer, from a third world approaches to international law (TWAIL) perspective, a *distinct account of the meaning, history, rules, and implications of international law of jurisdiction*.<sup>6</sup> The purpose of the article is not to give a positivist account of the rules of jurisdiction or extraterritorial jurisdiction. Instead, it advances the following arguments: that MILS overlooks the fact that jurisdiction is a complex social and political concept and its doctrine, rules and practices can have significant class, gender, race and caste effects; that there is an intimate relationship between the rules and practices of jurisdiction and the historical evolution and development of capitalism and the phenomenon of imperialism; that the historical exercise of extraterritorial jurisdiction by advanced capitalist states in its different forms is not an atypical exception to the general principle of territoriality; and that the justification for the use of extraterritorial jurisdiction rooted in the idea of liberal internationalism allows advanced capitalist states to pursue a neo-colonial agenda. In its place TWAIL proposes the principle of subaltern internationalism as it has the potential to address the concerns of subaltern groups and states. Since the aim of the article is to offer an alternative way of thinking about the historical evolution of international law of jurisdiction, and to suggest a new line of research by linking it to the phenomenon of universalizing capitalism, a degree of linearity and generalization is inevitable. The objective is to abstract from complex developments that have taken place over centuries to underscore a broad trend in history in order to open up space for unorthodox analyses of international law of jurisdiction.<sup>7</sup>

The article proceeds as follows: Section 2 contends that since MILS does not engage with the social and political dimensions of the doctrine, rules and practices of jurisdiction, or problematize the foundational concept of ‘territory’, it fails to delineate the material realities that inform and flow from the exercise of jurisdiction. It is thus hardly noticed for instance that the rules and

<sup>3</sup>Mills, *supra* note 1, at 188. The ritualized account can be found in most textbooks of international law. There are also few books on the subject of jurisdiction in international law that offer from a mainstream perspective ‘an overarching study’ of its theory and practice. See C. Ryngaert, *Jurisdiction in International Law* (2015), 1.

<sup>4</sup>A. Kaushal, ‘The Politics of Jurisdiction’, (2015) 78 MLR 759, at 791.

<sup>5</sup>See the pioneering work of M. Pal, *Jurisdictional Accumulation - An Early Modern History of Law, Empires, and Capital* (2020). See also the following illuminating writings: D. S. Margolies et al. (eds.), *The Extraterritoriality of Law: History, Theory, Politics* (2019); U. Özsu, ‘The Ottoman Empire, the Origins of Extraterritoriality, and International Legal Theory’, in A. Orford and F. Hoffmann (eds.), *The Oxford Handbook of the Theory of International Law* (2016), 125; P. S. Berman, ‘The Globalization of Jurisdiction’, (2002) 151 *University of Pennsylvania Law Review* 311; R. T. Ford, ‘Law’s Territory: A History of Jurisdiction’, (1999) 97 *Michigan Law Review* 843; A. Mills, ‘Private Interests and Private Law Regulation in Public International Law Regulation’, in S. Allen et al. (eds.), *Oxford Handbook on Jurisdiction in International Law* (2019), 330.

<sup>6</sup>Such an account has recently been advanced by Maïa Pal for the early modern period, drawing links between the development of capitalism and the doctrine and practices of international law of jurisdiction. The present article is an effort to narrate and problematize an aspect of the linkages between capitalism and international law of jurisdiction over time. See Pal, *supra* note 5. On TWAIL see A. Anghie and B. S. Chimni, ‘Third World Approaches to International Law and Individual Responsibility in Internal Conflict’, in S. R. Ratner and A. M. Slaughter (eds.), *The Methods of International Law* (2004), 185; A. Anghie and B. S. Chimni, ‘Third World Approaches to International Law: A Manifesto’, in A. Anghie et al. (eds.), *The Third World and International Order: Law, Politics and Globalization* (2003), 47; J. T. Gathii, ‘International Law and Eurocentricity’, (1998) 9 *EJIL* 184; O. C. Okafor, ‘Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both?’, (2008) 10 *International Community Law Review* 371.

TWAIL scholarship reflects a great degree of internal diversity, with some scholars relying on a range of social science theories that include postcolonial theory, feminism, Marxism, and postmodernism. The present article draws on Marxism and postcolonial theory to advance an account of the international law of jurisdiction. For an elaboration of that theoretical standpoint see B. S. Chimni, *International Law and World Order: A Critique of Contemporary Approaches* (2017).

<sup>7</sup>For such an effort see Pal, *supra* note 5.

practices of jurisdiction facilitate imperialism or can reinforce internal and international class, gender, race and caste divides.

Section 3 argues that a crucial reason why MILS fails to understand multivalent aspects of the doctrine, rules, and practices of jurisdiction is the absence of genealogical analysis. Among other things, it fails to appreciate the deep links between the emergence of the modern state, the development of capitalism and the international law of jurisdiction. While a range of factors contributed to the emergence of the modern state in Europe, and the accompanying territorial doctrine of jurisdiction, the advent of capitalism provided a critical impulse. A significant factor in the period of transition from feudalism to capitalism was the emerging bourgeoisie in Europe which needed to overcome the hurdles to its growth posed by excessively fragmented territories and laws. While the history of that transition is an intricate story involving class struggle between receding and rising social forces and their interaction with evolving political and legal structures in different territorial entities, there is sufficient evidence to support the hypothesis that mercantile capitalism, and later industrial capitalism, encouraged consolidation of legal spaces.<sup>8</sup> Once capitalism became the dominant mode of production in nineteenth century Europe, the rules and practices of jurisdiction were framed to facilitate its expansion abroad. The essential argument advanced is that the rules of extraterritorial jurisdiction were framed to address the tension between the universal thrust of capitalism (the 'logic of capitalism') and the existence of separate political entities in non-European spaces (the 'logic of territory').

Section 4 offers an illustrative sketch of the history of the exercise of extraterritorial jurisdiction in the colonial and postcolonial eras to show how a principal manifestation of universalizing capitalism was and is the exercise of extraterritorial jurisdiction to harmonize laws across geographical spaces. This objective was achieved in the case of colonies by legislation, treaties with local rulers, the activities of chartered companies, and some forms of consular practices, and in the instance of semi-colonies (or what are also termed the 'semi-periphery' or 'semi-civilized' states) through capitulation agreements. The section focuses on capitulation agreements, not with a view to narrate or document the complex and contested nature of the historical record in each semi-colonial jurisdiction, but to show that a principal goal of these agreements was harmonization of laws in non-capitalist spaces with those in so called civilized capitalist states. In the postcolonial era the process of harmonization of legal rules and institutions continued but was now achieved through a multifaceted and multidimensional strategy that includes the 'direct' exercise of extraterritorial legislation.

Section 5 contends that existing international law of jurisdiction cannot promote the interests of weak groups and states. The proposal to reform it from the standpoint of liberal internationalism may only go to further a neo-colonial agenda, as is the case with Ryngaert's 'new theory of jurisdiction' which calls upon the state to act as an agent of the international community to promote global common good. Instead, a principle of subaltern internationalism is proposed that is best suited to promote the interests of marginalized groups and states. The principle requires that the limits of the exercise of extraterritorial jurisdiction be so determined as to enhance, above all, the legal and policy space of developing nations, giving substance to the principle of self-determination. The section goes on to identify the bare theoretical and policy elements that may inform and flow from the principle of subaltern internationalism.

Section 6 offers some final remarks.

## 2. The concept and doctrine of jurisdiction: Legal, social and political dimensions

It is generally agreed that jurisdiction 'is an aspect of sovereignty and refers to judicial, legislative, and administrative competence' whose exercise is regulated by public international law.<sup>9</sup> It means

<sup>8</sup>For a critique of this position see Pal, *ibid.*, at 103.

<sup>9</sup>L. Oppenheim, *International Law* (1992), 456; I. Brownlie, *Principles of Public International Law* (2008); F. A. Mann, 'The Doctrine of International Jurisdiction Revisited after Twenty Years', (1984) 186 RCADI 9, at 20; A. V. Lowe, 'The Problems of Extraterritorial Jurisdiction: Economic Sovereignty and the Search for a Solution', (1985) 34 ICLQ 724, at 724.

that the jurisdiction of a sovereign state is determined at three levels: prescriptive, adjudicatory, and enforcement.<sup>10</sup> The territorial principle is at the heart of the rules of jurisdiction. A sovereign state has the right to exercise jurisdiction over persons, property, and events on its territory. The nationality principle is the other significant principle. It allows, for example, jurisdiction over an offender even when a criminal act takes place abroad. Together, the territorial and nationality principles have given rise to other bases for exercising jurisdiction such as the contested passive personality principle which allows jurisdiction to be exercised on the basis of the nationality of the victim.<sup>11</sup> Besides, there is the protective principle which is said to permit a state to exercise jurisdiction over crimes committed by foreign nationals outside its territory if these threaten the states' vital interests. However, there is no consensus over the meaning and scope of the protective principle in doctrine or state practice.<sup>12</sup> The general rationale of these bases of jurisdiction is a certain connection with the state exercising jurisdiction. Where there are connections with more than one state it can be the subject of conflicting claims. The validity of a claim will then rest on the quality and thickness of the connections.<sup>13</sup> Over and beyond, there is the concept of universal jurisdiction which 'allows any nation to prosecute offenders for certain crimes even when the prosecuting nation lacks a traditional nexus with either the crime, the alleged offender, or the victim'; its contours and limits continue to be debated.<sup>14</sup>

In examining and analysing these different bases of exercising jurisdiction what is not sufficiently appreciated by MILS is that while jurisdiction is a legal doctrine it also has critical social and political dimensions. In order to grasp the implications of the different aspects of the doctrine of jurisdiction it is important to note the significant set of claims that a modern state makes. These include a right within the borders of the state to determine the system of governance, have the authority to exercise control over land and natural resources, regulate commerce and investment, define citizens and aliens, levy taxes, adopt civil and criminal justice systems, and regulate movement into and out of state territory.<sup>15</sup> A review of these prerogatives shows that the exercise of legislative, adjudicative and enforcement jurisdiction allows a state to regulate essential social and political relations in society. But the general rules for the exercise of jurisdiction advanced by MILS abstract from the social and political realities that both underlie and flow from them. As Ford points out, 'the space of a jurisdiction is conceived of independently of any specific attribute of that space'.<sup>16</sup> A positivist-formalist narrative of jurisdiction portrays its exercise as being, unless otherwise intended, relatively neutral towards groups and communities.<sup>17</sup> Such a view ignores the fact that the exercise of jurisdiction takes place amidst pre-existing social and political divides in society.<sup>18</sup> In the event a state can through the exercise of jurisdiction either strengthen or weaken prevailing social and political relations that can be captured using categories such as class, gender, race, and caste. Thus, for example, as Ford points out, 'South African apartheid was unique in its comprehensiveness, its ruthlessness and the sophistication of its jurisdictional strategy'.<sup>19</sup> A state can equally sustain the institution of patriarchy through the promulgation of jurisdictional rules. To put it differently, as Addis explains, 'to prescribe or adopt jurisdictional rules is to assert that,

<sup>10</sup>Mills, *supra* note 1, at 195ff.

<sup>11</sup>G. R. Watson, 'The Passive Personality Principle', (1993) 28 *Texas International Law Journal* 28.

<sup>12</sup>M. Garrod, 'The Protective Principle of Jurisdiction Over War Crimes and the Hollow Concept of Universality', (2012) 12 *International Criminal Law Review* 763, at 766.

<sup>13</sup>V. Lowe, *International Law* (2007), 171

<sup>14</sup>K. C. Randall, 'Universal Jurisdiction under International Law', (1988) 66 *Texas Law Review* 785, at 785; M. C. Bassiouni, 'Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice', (2001) 42 *Virginia Journal of International Law* 8; R. O'Keefe, 'Universal Jurisdiction: Clarifying the Basic Concept', (2004) 2 *Journal of International Criminal Justice* 735.

<sup>15</sup>A. J. Simmons, 'On the Territorial Rights of States', (2001) 11 *Philosophical Issues* 300, at 306.

<sup>16</sup>Ford, *supra* note 5, at 853–4.

<sup>17</sup>*Ibid.*, at 854 (emphasis added).

<sup>18</sup>*Ibid.*, (emphasis added).

<sup>19</sup>*Ibid.*, at 916.

for this purpose, a particular entity is deemed to be a community of interest, or “a community of principle”.<sup>20</sup> It is thus by relying on territorial and nationality principles of jurisdiction, that states naturalize the categories of nationals and aliens. But if it could be demonstrated that the incidence of the exercise of extraterritorial jurisdiction by a state is of equal salience as territorial jurisdiction, it may destabilize the relationship between territory, nationals, and aliens. In short, ‘jurisdictional boundaries [may] help to promote and legitimate social injustice, illegitimate hierarchy and economic inequality’ and play ‘an important role in shaping our social and political world and our social and political selves’.<sup>21</sup> To be sure, rules of jurisdiction are not the principal reason why there is inequality or injustice in society, but these are often implicated in their production and reproduction. It is only the methodological inability of MILS to integrate the insights of social sciences and give sufficient weight to the differential social and power relations in society that allow the description of jurisdictional rules in relatively neutral legal language.<sup>22</sup>

In the same manner as the exercise of jurisdiction can lead to the formation or strengthening of particular domestic communities, its exercise can also help constitute and promote the interests of certain communities on the international plane. As Addis points out:

a community is not a mere collection of individuals occupying a space or a territory. What transforms a collection of individuals (or other actors) into a community is that those individuals [or other actors] are tied by a network of interest, values and expectations.<sup>23</sup>

Through the exercise of jurisdiction, a state or states can produce or reproduce transnational communities by advancing the interests, values and expectations of particular actors. Thus, for instance, by privileging the interests etc of the transnational fraction of the capitalist class in the process of exercising jurisdiction, states can contribute to the constitution of a transnational capitalist class (TCC).<sup>24</sup> In sum, the exercise of jurisdiction by a state takes place amidst race, gender, class, and caste divides and struggles that can be displaced, weakened or strengthened both on the domestic and international planes.

### 2.1 Social and political meaning of territory

In order to further clarify the meaning and implications of the rules of jurisdiction it may help to problematize the concept of ‘territory’ as it is fundamental to their framing and articulation. The following reasons among others underscore the need for such an exercise. First, there is a growing view in the international community that the legitimate exercise of territorial jurisdiction by a sovereign state is linked to the existence of a democratic system of governance; the connection between ‘territory’ and ‘democratic mode of governance’ diminishes the independent significance of the former as a basis for exercising jurisdiction, whether territorial or extraterritorial.<sup>25</sup> Second, a critical review of the concept of ‘territory’ allows a focus on the relationship between power and the exercise of territorial jurisdiction. It facilitates the insight that the economic and cultural territory of powerful nations extends far beyond their physical territory with a significant bearing on the right of self-determination of weak nations. Third, a critical examination of the concept of

<sup>20</sup>A. Addis, ‘Community and Jurisdictional Authority’, in G. Handl et al. (eds.) *Beyond Territoriality: Transnational Legal Authority in an Age of Globalization* (2012), 13, at 13–14.

<sup>21</sup>Ford, *supra* note 5, at 922.

<sup>22</sup>As Haskell remarks, ‘when adopting a technical legal approach to extraterritoriality, one often presents oneself as apolitical or operating in accordance with the law, with the focus being placed on strict interpretation of traditional sources in order to derive the most correct possible legal outcome’. The technical approach also ‘minimise(s) ideological and theoretical considerations’. See J. Haskell, ‘Ways of Doing Extraterritoriality in Scholarship’, in Margolies et al., *supra* note 5, 14, at 18.

<sup>23</sup>Addis, *supra* note 20, at 23.

<sup>24</sup>On TCC see Chimni, *supra* note 6, at 507–9.

<sup>25</sup>T. M. Franck, ‘The Emerging Right to Democratic Governance’, (1992) 86 AJIL 46.

'territory' helps to show that there is no internal relationship with the concept of jurisdiction. Therefore, jurisdiction can be exercised by actors without territory. Thus, for instance, multinational companies (MNCs) arguably exercise jurisdiction in the universe of private transactions.<sup>26</sup>

It is therefore not surprising that the concept of 'territory' is coming to be closely interrogated by social scientists. Hitherto, as Brenner points out, 'territoriality has been treated within mainstream social science as a relatively fixed, unproblematic, and inconsequential property of statehood'.<sup>27</sup> But there is growing awareness that territory and territoriality are as much physical or natural phenomenon as social. There is therefore a need to avoid, to borrow a phrase from Jessop, Brenner and Jones, 'methodological territorialism', that is, equating territory with a discrete geographical space.<sup>28</sup> It is more insightful to *think of territory as a social institution* that is mutable and produced and reproduced over time through a set of cultural, social, and political practices.<sup>29</sup> Thus, for instance, 'territory' can be productively defined on the internal plane as the ensemble of social relations that constitute a particular social formation and on the external plane as a facet and segment of global social relations or 'the ensemble of relations that humans maintain with exteriority and alterity'.<sup>30</sup> In this view 'territories can be explained as the outcome of a complex, heterogeneous composition (an assemblage) including legal, political and economic dimensions' at both internal and international planes.<sup>31</sup> It points to the need for 'a territorology of law' in the field of law and legal relations.<sup>32</sup>

If 'a territorology of law' is to be produced, the genealogy of the concepts of territory and jurisdiction call for attention. A genealogy of the two concepts helps for instance to remind that the territorial principle has not always been the basis on which political entities have exercised jurisdiction. Historically speaking, 'personality rather than territoriality was the basic principle of jurisdictional order'.<sup>33</sup> Elden writes that 'territory emerges in Western thought relatively late as a concept, not taking on a recognisably modern sense until the late middle ages, and not appearing as a central theme in political theory until the seventeenth century'.<sup>34</sup> Bodin in his well-known

<sup>26</sup>R. Michaels and N. Jansen, 'Private Law Beyond the State? Europeanization, Globalization, Privatization', (2006) 54 *American Journal of Comparative Law* 843; A. G. Scherer et al., 'Global Rules and Private Actors: Toward a New Role of the Transnational Corporation in Global Governance', (2006) 16(4) *Business Ethics Quarterly* 505; T. Bartley, 'Transnational Governance as the Layering of Rules: Intersections of Public and Private Standards', (2011) 12(2) *Theoretical Inquiries in Law* 517; L. C. Backer, 'Private Actors and Public Governance Beyond the State: The Multinational Corporation, the Financial Stability Board and the Global Governance Order', (2011) 18 *Indiana Journal of Global Legal Studies* 751, at 760.

<sup>27</sup>N. Brenner, 'Urban Governance and the Production of New State Spaces in Western Europe, 1960–2000', (2004) 11 *Review of International Political Economy* 447, at 447. Or, as Stuart Elden observes, '[a]lthough it is a central term within political theory, geography, and international relations, the *concept* of territory has been under examined'. S. Elden, *The Birth of Territory* (2013), 3 (emphasis in original).

<sup>28</sup>B. Jessop et al., 'Theorizing Sociospatial Relations', (2008) 26 *Environment and Planning D: Society and Space* 389, at 391.

<sup>29</sup>Ford, *supra* note 5, at 856. In the words of Elden, 'territory is not simply an object: the outcome of actions conducted toward it or some previously supposedly neutral area. Territory is itself a process, made and remade, shaped and shaping, active and reactive'. See Elden, *supra* note 27, at 17. In the same vein Brighenti writes that 'territory is better conceived as an act or practice rather than an object or physical space'. See A. M. Brighenti, 'On Territorology: Towards a General Science of Territory', (2010) 27 *Theory Culture Society* 52, at 53.

<sup>30</sup>C. Raffestin, 'Space, Territory, and Territoriality', (2012) 30 *Environment and Planning D: Society and Space* 121, at 121.

<sup>31</sup>Brighenti, *supra* note 29, at 53.

<sup>32</sup>*Ibid.*, at 54.

<sup>33</sup>Ryngaert, *supra* note 3, at 49. He writes that 'In the ancient world, composed of communities rather than territories, allegiances based on religion, race or nationality prevailed over those based on territoriality'. *Ibid.*, at 51. 'Even in the Roman time, a high-water mark of legal culture, "personal sovereignty" often seemed to prevail over territorial sovereignty'. *Ibid.*, at 51. For further discussion see *ibid.*, at 50–65.

<sup>34</sup>S. Elden, 'How Should We Do the History of Territory?', (2013) 1 *Territory, Politics, Governance* 5, at 7. See also Elden, *supra* note 27.

sixteenth century work on ‘sovereignty’ did not pay any attention to ‘territory’, not even mentioning it.<sup>35</sup> As Benton observes:

Bodin did not omit territory as a category through some oversight. His view was consistent with an early modern construction of sovereignty as spatially elastic. Because subjects could be located anywhere, and the tie between the sovereign and subject was defined as a legal relationship, legal authority was not bound territorially.<sup>36</sup>

Further, as Khan reminds us in the context of Europe:

[I]t was only in the late 19<sup>th</sup> century that the existence of a territorial basis took centre stage in the perception of statehood. Indeed, as far as the spatial element as a *condition sine qua non* for statehood is concerned, Georg Jellinek’s seminal ‘three-element theory’ (territory, population, ultimate ruling power) and other similar definitions from that period find no equivalent in 17<sup>th</sup>- and 18<sup>th</sup>-century post-Westphalian writings.<sup>37</sup>

In order to appreciate the reason for the absence of territorial principle of jurisdiction, the relationship between the emergence of capitalism, the formation of modern state, and the principle of territorial jurisdiction have to be traced, a theme dealt with in Section 3.

In contemporary social sciences it is critical geographers who have pointed to the relationship of capitalism with territory. Thus, for instance, considering and interpreting Lefebvre’s reflections on the subject, Brenner and Elden draw attention to how ‘state, space and territory’ are ‘at once a medium, and an outcome of capitalism’.<sup>38</sup> They have also noted the important role of the state in reproduction of capitalist relations of production and what may be called ‘capitalist territory’. In the words of Brenner and Elden, ‘territory is always being produced and reproduced by the actions of the state and through political struggles over the latter’.<sup>39</sup> It implies among other things that the rules of jurisdiction under capitalism are shaped by the interests of dominant social forces that are challenged from time to time by subaltern groups. The struggles of these groups often pertain to the domain of private property rights which are central to the functioning of capitalism and modern states ‘... have an obligation to exercise their (putative) territorial powers consistently with the respect for private property’.<sup>40</sup> In other words, the deep historical links posited between the capitalist state and the protection of private property rights impacts the nature and character of jurisdiction exercised by it in the domestic and international arenas.<sup>41</sup> Be that as it may, the fact that there is an inextricable relationship between the protection of property rights and the exercise of territorial jurisdiction reveals the umbilical cord between the modern state, capitalism, and imperialism. To be sure, in the abstract, ‘... jurisdictional rights conceptually precede property rights since the state typically defines the kind of property relations that are legal in the state: they define the rules surrounding acquisition, transfer and the like’.<sup>42</sup> But in historical terms the two are mutually constitutive, so much so that the bourgeois state – in its varied and unfinished incarnations over time – is deemed the only form of legitimate state.

<sup>35</sup>L. Benton, *A Search for Sovereignty: Law and Geography in European Empires, 1400-1900* (2010), 287.

<sup>36</sup>*Ibid.*, at 288.

<sup>37</sup>D. E. Khan, ‘Territory and Boundaries’, in B. Fassbender and A. Peters (eds.), *The Oxford Handbook of the History of International Law* (2012), 225, at 234.

<sup>38</sup>N. Brenner and S. Elden, ‘Henri Lefebvre on State, Space, Territory’, (2009) 3 *International Political Sociology* 353, at 365. <sup>39</sup>*Ibid.*, at 367 (emphasis added).

<sup>40</sup>F. R. Teson, ‘The Mystery of Territory’, (2015) 32(1) *Social Philosophy and Policy* 25, at 25.

<sup>41</sup>A. Orford, ‘Constituting Order’, in J. Crawford and M. Koskenniemi (eds.), *The Cambridge Companion to International Law* (2012), 271, at 279.

<sup>42</sup>M. Moore, ‘A Precipice of a Political Theory of Territory’, (2016) 6 *Philosophy and Public Issues (New Series)* 3, at 4.

It is no accident that social scientists have come to make a distinction between different types of territory: physical, legal, cultural, and economic territory. The boundaries of non-physical territories are not limited by corporeal boundaries but determined by power, calling for a relational concept of territory. To put it differently, the concept of legal, cultural and economic territory under capitalism is distinct from physical or land territory which ‘... [is] the part of the earth’s surface that is not covered by water ...’.<sup>43</sup> In fact, even ‘physical’ territory can contract or expand depending on legal regimes regulating global spaces such as has been adopted for the oceans and outer space respectively. But cultural, economic and legal territory can extend as far as the reach of power, and can give rise to the practice of cultural, economic and legal imperialism.<sup>44</sup> The era of hyper globalization has produced further changes to the notion of territory. Sassen, for instance, points out that in this phase ‘territory, as an analytic category, cannot be confined to its national instantiation’ as globalization ‘deborders territoriality’.<sup>45</sup>

Since physical and legal (or cultural or economic) territories are conceptually and operationally distinct, it is possible to conceive of the exercise of ‘jurisdiction without territory’. Historically, the category of ‘jurisdiction without territory’ has had three manifestations all of which have a presence today in one form or another. These are firstly, the direct exercise of extraterritorial jurisdiction by a state exemplified by the capitulation or consular regimes in semi-colonies. It gave rise to a model of an informal empire in which territorial jurisdiction was defined to exclude local jurisdiction over individuals and commerce of imperial western powers.<sup>46</sup> In contemporary times the informal empire can be seen working for example in the State of Forces Agreement signed by the US to protect its armed forces personnel or a civilian component of it.<sup>47</sup> Secondly, there can be the exercise of ‘jurisdiction’ by private firms, historically exercised by chartered companies such as the British East India Company.<sup>48</sup> Today, MNCs exercise jurisdiction by using their power to construct a transnational non-state governance system in which they enjoy authority.<sup>49</sup> Thirdly, there is ‘jurisdiction without territory’ exercised by the international community through international organizations. The Mandate System of the League of Nations was an example of the exercise of jurisdiction sans territory. In contemporary times it has *inter alia* assumed the form of International Territorial Administration (ITA).<sup>50</sup> To put it differently, in thinking about jurisdiction there is a need to avoid the ‘territorial trap’.<sup>51</sup>

In sum, jurisdiction is a profoundly social and political concept. But it is given a relatively technical and neutral colour and meaning by MILS to derive rules for the exercise of state jurisdiction.

<sup>43</sup>*Ibid.* But as Szigeti has observed: ‘In the end, territoriality has very little to do with geography: It does not correspond to any natural geographical phenomena and is better thought of as a type of legal category that is independent of physical space’. See P. D. Szigeti, ‘The Illusion of Territorial Jurisdiction’, (2017) 52 *Texas International Law Journal* 369, at 372.

<sup>44</sup>In sum ‘territory is a multi-faceted concept and practice, one which encompasses economic, strategic, legal and technical aspects ...’. See S. Elden, ‘Territory without Borders’, *Harvard International Review*, 5 December 2019, available at [hir.harvard.edu/territory-without-borders/](http://hir.harvard.edu/territory-without-borders/) (accessed 22 December 2020).

<sup>45</sup>S. Sassen, ‘When Territory Deborders Territoriality’, (2013) 1 *Territory, Politics, Governance* 21, at 39.

<sup>46</sup>E. Augusti, ‘From Capitulations to Unequal Treaties: The Matter of an Extraterritorial Jurisdiction in the Ottoman Empire’, (2011) 4 *Journal of Civil Law Studies* 285, at 290.

<sup>47</sup>K. Raustiala, *Does the Constitution Follow the Flag?* (2009), 138–40.

<sup>48</sup>In the late seventeenth and eighteenth centuries the East India Company became a ‘virtual state’ ‘waging war, administering justice, minting coin, and collecting revenue over Indian territory’. N. Dirks, *Autobiography of an Archive: A Scholar’s Passage to India* (2015), 176. It has therefore been called a company-state, underscoring pluralistic notions of sovereignty.

<sup>49</sup>As Backer puts it:

Transnational nonstate governance theories suggest a fundamental break with the three-legged stool of legitimate governance-state, law, and territory. Nonstate entities now govern through regulatory techniques that might mimic and sometimes supplement or supplant, but are not effectuated through law, nor are grounded in jurisdictional limits measured by “metes and bounds”.

See Backer, *supra* note 26, at 760.

<sup>50</sup>See Section 4, *infra*.

<sup>51</sup>J. Agnew, ‘The Territorial Trap: The Geographical Assumptions of International Relations Theory’, (1994) 1 *Review of International Political Economy* 53.

However, what are seemingly neutral rules turn out to be partisan rules when these play out in internal and international relations. In order to understand this, international lawyers need to deconstruct the concepts of ‘territory’ and ‘jurisdiction’.

## 2.2 A further word on demystifying extraterritorial jurisdiction

A few more words may be said in this regard on the concept of ‘extraterritorial jurisdiction’. According to MILS, the exercise of extraterritorial jurisdiction implies ‘an excess of jurisdictional reach’ and is therefore justified only in exceptional cases.<sup>52</sup> Its exercise is in general acceptable in the instance of prescriptive and adjudicatory jurisdiction but objectionable in the case of enforcement jurisdiction as it requires active intervention in a third state. But even in the instance of prescriptive and adjudicatory exercise of extraterritorial jurisdiction differences can arise depending on the interpretation given to the traditional grounds for exercising jurisdiction, i.e., the territorial, personal, protective, and universal principles. But in reality, it is a dynamic social institution which is produced and reproduced through a set of social, cultural, and political practices and strategies embedded in particular social formations and the differential power of states.<sup>53</sup> The conclusion may be drawn that “territoriality” and “extraterritoriality” . . . are legal constructs. They are claims of authority, or of resistance to authority, that are made by particular actors *with particular substantive interests to promote*.<sup>54</sup>

A telling of the history of the exercise of extraterritorial jurisdiction requires that the narrative be rooted in what Subrahmanyam calls ‘connected histories’ between advanced capitalist nations and other nations.<sup>55</sup> But given the *primary* focus of MILS on the *national* rather than the *imperial* state, the history and relevance of colonial and neo-colonial eras to the development of international law of jurisdiction has been somewhat ignored; even when for instance colonialism is condemned, its bearings on the doctrines of jurisdiction are not adequately recognized.<sup>56</sup> As a result, it is overlooked that since many of the first modern states were imperial states the exercise of extraterritorial jurisdiction was seen as a natural extension of the rules of territorial jurisdiction. The accompanying episodes of the exercise of extraterritorial jurisdiction are rendered invisible by MILS through the use of ahistorical and reified concepts of territory and jurisdiction. The aim may be to formulate parsimonious rules that are easy to apply, but the move has concealed the widespread exercise of extraterritorial jurisdiction over time. While even the mainstream rendering and understanding of the rules of extraterritorial jurisdiction has social and economic consequences for weak nations, their real significance and impact have been grossly underestimated.

The first time imperial states exercised jurisdiction without the presence of colonial or semi-colonial territories was in the postcolonial era. In order to cope with the new situation, i.e., the emergence of independent sovereign states, a different set of means were adopted for the exercise of extraterritorial jurisdiction and the harmonization of laws. The impulse for the exercise of extraterritorial jurisdiction remained the same as in the colonial era: resolving the *tension or mismatch between the logic of capital and the logic of territory*. While capital is extraterritorial by nature the logic of territory limits legal sovereignty and jurisdiction to a physical space. The post-colonial situation therefore necessitated a set of fresh strategies that ensured suitable legal conditions for universalizing capital which requires larger geographical spaces with harmonized

<sup>52</sup>H. L. Buxbaum, ‘Territory, Territoriality, and the Resolution of Jurisdictional Conflict’, (2009) 57 *American Journal of Comparative Law* 631, at 643.

<sup>53</sup>Ford, *supra* note 5, at 856.

<sup>54</sup>Buxbaum, *supra* note 52, at 635. Emphasis added. See also A. J. Colangelo, ‘What Is Extraterritorial Jurisdiction’, (2014) 99 *Cornell Law Review* 1303, at 1304.

<sup>55</sup>S. Subrahmanyam, ‘Connected Histories: Notes towards a Reconfiguration of Early Modern Eurasia’, (1997) 31 *Modern Asian Studies* 735, at 737.

<sup>56</sup>G. K. Bhambra, ‘Comparative Historical Sociology and the State: Problems of Method’, (2016) 10 *Current Sociology* 335, at 346.

laws for effective operation. The effort of the capitalist states in this direction over time has meant legal imperialism.

### 3. Development of capitalism, modern state and doctrine of jurisdiction

If MILS does not explore the social and political aspects of the concept of jurisdiction, or appreciate the social forces that underlie the exercise of extraterritorial jurisdiction it is at least in part because of the failure to undertake a genealogical analysis of the origins of the modern state. Such an exercise would have revealed the deep connection of the emergence of modern state in Europe with the evolution and development of capitalism and imperialism and the international law of jurisdiction. Instead, MILS satisfied itself with adopting a positivist notion of a state first articulated by German jurist Jellinek and embodied in the Montevideo Convention on the Rights and Duties of States, 1933.<sup>57</sup>

The role of capitalism in the creation of the modern state (and concomitant rules of jurisdiction) can inter alia be traced to the needs of an emergent bourgeoisie for larger geographical spaces or territorial entities in which common legal standards applied. The factors that shaped these developments began to emerge in the early modern era (1400–1600) when the merchant class felt the need for consolidated legal spaces in the face of nearly five hundred ‘autonomous political entities’ (reduced to 25 by 1900) with multiplicity of customs, laws, and institutions, often in conflict with each other.<sup>58</sup> Teschke speaks ‘of many territorially disjointed, non-contiguous and institutionally heterogeneous dominions that were held together mainly by the property titles of their ruling dynasts’.<sup>59</sup> Indeed, ‘early modern territoriality was characterized by the continuous divisions, unification and re-division of territories’.<sup>60</sup> It is in this period that *lex mercatoria* emerged, albeit slowly and in specific areas, to inter alia deal with the problem of fragmentation of jurisdictions.<sup>61</sup> Even Kadens, who is otherwise sceptical of the idea of *lex mercatoria* emerging in the medieval period, admits that ‘what the late medieval and early modern commercial manuals’ show ‘is that certain commercial practices and techniques—such as the use of bills of exchange, partnership mechanisms to limit liability, insurance, fractional reserve banking, and creditor collective action bankruptcy—did eventually spread across Europe’.<sup>62</sup> However, by the end of the sixteenth century, as the modern state began to evolve, ‘the private commercial law of the nation state and the state’s law courts had reduced the significance and scope of the Law Merchant, while never quite replacing it’.<sup>63</sup> The emergence of the absolutist state, such as in France in the seventeenth and eighteenth centuries, and later the unification of Germany and Italy in the nineteenth century, saw ‘national legal regimes govern . . . transnational commercial activity’.<sup>64</sup> In the instance of France, Anderson has noted that ‘. . . mercantilism

<sup>57</sup>J. Bernstorff, ‘Georg Jellinek and the Origins of Liberal Constitutionalism in International Law’, (2012) 4 *Goettingen Journal of International Law*, 659, at 659. However, as d’Aspremont points out, the ‘. . . German parentage of the Montevideo definition is . . . unsettling because it does not seem that the work of Jellinek actually influenced the jurists who did the groundwork for 1933 Montevideo Convention’. See J. d’Aspremont, *International Law as a Belief System* (2018), 84.

<sup>58</sup>T. Ertman, ‘State Formation and State Building in Europe’, in T. Janoski et al. (eds.), *The Handbook of Political Sociology: States, Civil Societies, and Globalization* (2005), 367, at 375; T. Ertman, *Birth of the Leviathan: Building States and Regimes in Medieval and Early Modern Europe* (1997), 317. See also W. G. Grewe, *The Epochs of International Law* (2000), 171 ff.

<sup>59</sup>B. Teschke, ‘Debating the “Myth of 1648”: State Formation, the Interstate System and the Emergence of Capitalism in Europe: A Rejoinder’, (2006) 43 *International Politics* 531, at 550.

<sup>60</sup>*Ibid.*, at 550.

<sup>61</sup>E. Kadens, ‘The Medieval Law Merchant: The Tyranny of a Construct’, (2015) 7 *Journal of Legal Analysis* 251. According to Kadens, ‘the known evidence indicates that the specific phrase “lex mercatoria,” the “law merchant,” did not appear until the late 13th century, and its use was unique to England’. *Ibid.*, at 253.

<sup>62</sup>*Ibid.*, at 270.

<sup>63</sup>A. S. Sweet, ‘The New Lex Mercatoria and Transnational Governance’, (2006) 13 *Journal of European Public Policy* 627, at 630.

<sup>64</sup>*Ibid.*

undoubtedly demanded the suppression of particularistic barriers to trade within the national realm, and [the absolutist state] strove to create a unified domestic market for commodity production'.<sup>65</sup> In other words, the emerging capitalist mode of production had generated an impulse to unify laws and legal institutions in new territorial and political formations that were modern nation-states.<sup>66</sup>

It is of course reductionist to suggest that the logic of capital was the most crucial factor in the emergence of the modern state.<sup>67</sup> The process of unification of particular territories presided over by a modern state was determined by many factors such as the science of cartography, linguistic continuities, power and competition between states, need for military preparation, growing urban spaces and markets, and new ideologies such as nationalism. But the drive for unified territorial spaces, which was a complex and long drawn historical process of changing commercial realities and class struggle straddling three to four centuries, was also driven by the emergence and interests of first of mercantile capitalism, and later industrial capitalism, that required the harmonization of laws and legal institutions over a larger territorial complex to work its magic.<sup>68</sup> To be sure, the movement from merchant and agrarian capitalism to industrial capitalism, including the relationship between them, and the different trajectories it assumed in different European territories is the subject of continuing debate.<sup>69</sup> Equally, the fact that territorial unification assumed different histories in different lands, or what Teschke terms the 'variable capitalist strategies of spatialization'.<sup>70</sup> Thus, for instance, in the case of France and other absolutist monarchies there was, as Morton points out, 'the recourse to war as a means of "political accumulation" that translated into state-constitutive and state-building wars . . . bound up with the domestic class structures of pre-capitalist polities linked to absolutism'.<sup>71</sup> But it can be said that:

Although capitalism did not give rise to the nation state, and the nation state did not give rise to capitalism, the social transformations that brought about capitalism, with its characteristic separation of economic and political spheres, were the same ones that brought the nation state to maturity.<sup>72</sup>

As Wood (quoted above) goes on to observe:

Just as the separation of the "political" and the "economic" in capitalism ended the contestation of sovereignty among competing sites of extra economic power, so it helped to fix the state's territorial borders by detaching them from the fluctuating fortunes of personal property and dynastic connections.<sup>73</sup>

Likewise, offering a 'non-reductionist, non-teleological and non-structuralist character of the course of history'<sup>74</sup> Teschke observes:

<sup>65</sup>P. Anderson, 'The Absolutist States of Western Europe', in D. Held et al. (eds.), *States & Societies* (1983), 137, at 145.

<sup>66</sup>The need for *lex mercatoria* only re-emerged in the twentieth century with the growth of transnational commercial society. *Ibid.*, at 632.

<sup>67</sup>See Ford, *supra* note 5, at 910.

<sup>68</sup>But see Ford, *ibid.*, at 866–7 (emphasis added); J. Agnew, 'Capitalism, Territory and "Marxist Geopolitics"', (2011) 16 *Geopolitics* 230, at 231.

<sup>69</sup>See J. Banaji, *A Brief History of Commercial Capitalism* (2020).

<sup>70</sup>Teschke *supra* note 59, at 549.

<sup>71</sup>A. D. Morton, 'The Age of Absolutism: Capitalism, the Modern States-System and International Relations', (2005) 31(3) *Review of International Studies* 495, at 501.

<sup>72</sup>E. M. Wood, *The Origin of Capitalism: A Longer View* (2002), 171.

<sup>73</sup>*Ibid.*, at 173.

<sup>74</sup>Teschke, *supra* note 59, at 546.

Political, geopolitical, technological, ideological and military aspects of society cannot be mechanically reduced to some economic imperatives, but neither can they be dissociated from the ways in which societies organize their collective social metabolism with nature and develop strategies of reproduction in order to defend and advance their modes of existence.<sup>75</sup>

Indeed, there is a rich and complex debate even in the Marxist tradition on the transition from a feudal to a capitalist mode of production in Europe.<sup>76</sup> Its details need not detain us here. What is of note is that under capitalism surplus is generated in a manner distinct from that under feudalism which relies on the use of extra economic coercion (i.e., direct coercion using military, judicial and political power). On the other hand, capitalism depends on the institution of market to generate surplus value which has at its foundation the historical fact of labour power turning into a commodity<sup>77</sup>. The reliance on the market led to the relative separation of the economic and political spheres in society and the state.<sup>78</sup> A political consequence of the emergence of the capitalist mode of production was that territorial boundaries did not vary with group loyalties owed to the ruler that was spread over disconnected geographical spaces.<sup>79</sup> The function of the state also came to be transformed from that of using extra economic coercion to gather rent and tax to creating appropriate commercial and economic conditions that ranged from establishing banks to the creation of consolidated legal spaces.

In sum, the significant role of capitalist mode of production in the creation of the modern state cannot be underestimated. In the words of Grewe, ‘... the specific linkage of the modern State with the economic system of capitalism was of critical importance’.<sup>80</sup> Noting that ‘leading social and economic historians and analysts such as Max Weber, Alfred Weber, Werner Sombart and Josef Schumpeter started from the assumption that the beginnings of the economic age of early capitalism lay at the end of the fifteenth and the beginning of the sixteenth centuries’.<sup>81</sup> Grewe goes on to conclude (and I quote at length):

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<sup>75</sup>*Ibid.*

<sup>76</sup>See, for instance, M. Dobb, *Studies in the Development of Capitalism* (1946), 7; R. Brenner, ‘Dobb on the Transition From Feudalism to Capitalism’, (1978) 2 *Cambridge Journal of Economics*, 121; G. Lefebvre et al., *The Transition From Feudalism to Capitalism* (1985); C. J. Katz, ‘Karl Marx on the Transition from Feudalism to Capitalism’, (1993) 22 *Theory and Society* 363.

<sup>77</sup>The British economist Dobb captures the essence of Marx’s definition of capitalism: ‘Capitalism was not simply a system of production for the market—a system of commodity production as Marx termed it—but a system under which labour power had “itself become a commodity” and was bought and sold on the market like any other object of exchange. Its historical prerequisite was the concentration of ownership of the means of production in the hands of a class, consisting of only a minor section of society, and the consequent emergence of a propertyless class for whom the sale of their labour power was their only source of livelihood.’ Dobb, *ibid.*, at 7.

<sup>78</sup>There was a long period of transition which led to many changes including in the notion and practice of extraterritoriality. Pal thus speaks of ‘the importance of agrarian capitalist social property relations and class dynamics for the shaping of different doctrines of extraterritoriality in the early modern period ...’. See M. Pal, ‘Early Modern Extraterritoriality, Diplomacy, and the Transition to Capitalism’, in Margolies et al., *supra* note 5, 69, at 71.

<sup>79</sup>While pre-modern political entities also exercised territorial jurisdiction their defining feature was, as we have seen, the exercise of personal jurisdiction. Khan observes that ‘[t]o establish territory as the pivotal sounding board for the exercise of sovereign powers was in fact the very idea behind the paradigm shift away from the (medieval) concept of governance (personal jurisdiction)’. See Khan, *supra* note 37, at 237. Wood also writes that:

The precapitalist unity of economic and political powers, such as that of feudal lordship, meant, among other things, that the economic powers of the feudal lord could never extend beyond the reach of his personal ties or alliances and extra-economic powers, his military force, political rule, or judicial authority. Nor, for that matter, could the economic powers of the absolutist state or any pre-capitalist empire exceed its extra-economic range.

See Wood, *supra* note 72, at 177.

<sup>80</sup>Grewe, *supra* note 58, at 167.

<sup>81</sup>*Ibid.*, at 168.

... the essential element in this development was the mutual penetration and reciprocal promotion which occurred in the relationship between the modern State and the capitalist economy. Only the modern State was capable of producing the organizational efficacy which was the prerequisite for the expansion of the capitalist system. Only it was capable of sustaining the orderly monetary and credit systems as well as the large, unified and securely guarded territories with developed infrastructures for transporting the merchandise, information and money which provided the political and economic pressure necessary for the opening and capitalist exploitation of the colonial world. On the other hand, the modern State gained a good deal of its powers of expansion through the increase in general prosperity which resulted from these economic developments, either in the form of increased tax revenue or through direct participation in public monopolies. As a result, it is clear that the incorporation of capitalist energies into the power base of the modern State was of crucial importance for the concentrated, dynamic force which is integral to this system.<sup>82</sup>

As industrial capitalism came to be established in Europe it looked to expand beyond the nation state to sustain and expand the capital accumulation process. Such a move required the creation of facilitative legal conditions. The big picture or hypothesis is simple: at first the concerns and interests of the merchant class and later the industrial bourgeoisie stimulated the unification of national legal spaces in Europe. The logic of capital was thereafter extended to non-capitalist spaces through the colonial project. But MILS does not sufficiently appreciate the critical role imperialism has played in the construction of doctrines of international law, including that of jurisdiction; it does not integrate the genealogies of imperialism and doctrines of international law.

The role of imperialism in the development of capitalism can be narrated in at least two phases. In the first phase, that is, in the fifteenth and sixteenth centuries wealth (in material and human form) plundered from outside Europe entered metropolitan countries to be turned into capital (what Marx termed the 'primitive accumulation of capital'):

The discovery of gold and silver in America, the extirpation, enslavement and entombment in mines of the aboriginal population, the beginning of the conquest and looting of the East Indies, the turning of Africa into a warren for the commercial hunting of black-skins, signaled the rosy dawn of the era of capitalist production.<sup>83</sup>

In this period the establishment of the capitalist order in Europe received impetus from the colonial system. The plunder of colonies contributed to the construction of the modern state in the seventeenth and eighteenth centuries by bolstering its capacity to finance the military and wars and colonial adventures.<sup>84</sup> However, it is only in the second phase, that is, once capitalism had established itself after the industrial revolution in the second half of the nineteenth century that conscious effort was made to implant European laws in semi-colonies and colonies to facilitate the universalizing thrust of capital. This effort was not one sided as the need for harmonized legal spaces impacted in turn the nature and practices of European states. As Benton observes, 'recent studies have emphasized the close kinship between European state formation and the political structuring of empires, both understood as open-ended processes ...'.<sup>85</sup> In contrast to this fluid and dialectical understanding of the political and legal formations of Metropolitan and colonial spaces, MILS divorces jurisdictional rules from their economic, social and political contexts and

<sup>82</sup>Ibid. On other counts see M. Koskenniemi, 'Review: Wilhem Grewe, the Epochs of International Law', (2002) 51 ICLQ 746.

<sup>83</sup>K. Marx, *Capital* (1977), vol. 1, 703.

<sup>84</sup>C. Tilly, *Coercion: Capital and Modern States A.D. 990-1990* (1990). He, of course, stresses the variations in state building in Europe as against a singular master narrative.

<sup>85</sup>Benton, *supra* note 35, at 280.

gave them a reified form. The abstract rules of jurisdiction therefore do not tell us anything about the state of international relations that gave rise to particular doctrines of international law, i.e., whether the doctrines and rules emerged in the era of colonialism, high imperialism or neo-colonialism. Put differently, MILS neglects the fact that while the modern state did not emerge solely in response to the rise of capitalism it became subject to the logic of capital once it became the dominant mode of production.<sup>86</sup> The universalizing impulse of capitalism came to be translated in the legal domain in the period of high imperialism through colonial legislation and practices and in the instance of semi-colonies through the exercise of extraterritorial jurisdiction, or which is the same, 'legal imperialism'. In order to sustain the latter contention an illustrative sketch of the history of extraterritorial jurisdiction follows.

#### 4. Capitalism, imperialism and extraterritorial jurisdiction

MILS projects the exercise of extraterritorial jurisdiction as a relatively infrequent exception to the territorial principle of jurisdiction.<sup>87</sup> However, from the perspective of formerly colonized nations it has had an enduring and substantial presence over time. The origin of the doctrine of extraterritorial jurisdiction can be traced back to the early modern period but it was in the nineteenth century that it assumed greater significance through the creation of new capitulation regimes and consular courts in semi-colonies; in the case of regular colonies territorial jurisdiction was exercised by the Metropolitan power.<sup>88</sup> In this era extraterritoriality referred to 'a legal regime whereby a state claims exclusive jurisdiction over its citizens in another state'.<sup>89</sup> A number of capitulation regimes were in operation in semi-colonies of the nineteenth and early twentieth centuries:

During the late nineteenth and early twentieth centuries, Western powers imposed a system known as extraterritoriality in Japan, the Ottoman empire, and China. Western extraterritorial courts—not local courts—had jurisdiction over Westerners in Japan (1856-1899), the Ottoman Empire/Turkey (1825-1923), and China (1842-1943). During the mid-1880s, for example, forty-four Western extraterritorial courts operated in Japan's treaty ports. In 1895, thirty-two British courts operated in the Ottoman Empire. Three decades later (circa 1926), twenty-six British, eighteen American, and eighteen French courts dotted China's ports and cities . . . these states limited, and eventually eliminated in collaboration with groups in the local elite, the authority of the indigenous systems. They replaced them with Western legal categories and practices.<sup>90</sup>

The justification for these regimes was in the final analysis the standard of civilization argument. As Kayaoglu succinctly observes, 'the categories of extraterritoriality were the categories of

<sup>86</sup>See J. Kocka, *Capitalism: A Short History* (2016).

<sup>87</sup>Thus, for instance Ryngaert writes that 'exceptionally . . . national laws may be given extraterritorial application, provided that these laws could be justified by one of the recognized principles of extraterritorial jurisdiction under public international law: the active personality principle, the passive personality principle, the protective principle, or the universality principle'. See Ryngaert, *supra* note 3, at 101.

<sup>88</sup>For the evolution of the practice of extraterritoriality in the early modern period see Pal, *supra* note 5. She has proposed ' . . . rethinking early modern extraterritoriality in relation to a fundamental concurring event: the transition to capitalism'. Pal, *supra* note 78, at 70.

<sup>89</sup>T. Kayaoglu, *Legal Imperialism: Sovereignty and Extraterritoriality in Japan, the Ottoman Empire, and China* (2010), 2. It is worth stressing that while the section relies on the work of Kayaoglu there is considerable literature on capitulation regimes in semi-colonies. For instance, on the capitulation regimes in the Ottoman empire see J. B. Angell, 'The Turkish Capitulations', (1901) 6 *American Historical Review* 254; L. Ellsworth Thayer, 'The Capitulations of the Ottoman Empire and the Question of their Abrogation as it Affects the United States', (1923) 17 *AJIL* 207; U. Özsu, 'Ottoman Empire', in Fassbender and Peters, *supra* note 37, 229; M. van den Boogert, *The Capitulations and the Ottoman Legal System: Qadis, Consuls and Beraltis in the 18<sup>th</sup> Century* (2020).

<sup>90</sup>Kayaoglu, *ibid.*, at 1.

civilization'.<sup>91</sup> It was, to put it simply, a form of 'legal imperialism'.<sup>92</sup> The underlying factor that drove the capitulation regimes was the absence of cohesive laws and institutions considered necessary to promote commercial interests of imperial powers. According to Kayaoglu, 'during the nineteenth century, *Asian legal systems were fragmented* because state rulers shared legal authority with societal groups and local communities'.<sup>93</sup> Therefore, it was difficult for foreign traders to learn about local rules and practices to safeguard commercial interests.<sup>94</sup> The capitulation regimes were 'a crude form of legal harmonization to facilitate the conduct of international trade and transactions in the early era of global commerce'.<sup>95</sup> Therefore, the explanation for the eventual abolition of these regimes does not come as a surprise. Kayaoglu writes:

Legal institutionalization explains the timing of the abolition of extraterritoriality. Facing the Asian states' resistance to extraterritoriality, Western states required the institutionalization of state law, in the form of positive law, as a condition for the recognition of Asian sovereignty.<sup>96</sup>

As he goes on to explain, 'institutionalized state law compatible with a positive legal order facilitate(d) transnational trade by providing information about legal and property rights, credibly enforcing these rights, and making the state accountable for the legal system within its boundaries'.<sup>97</sup> In other words, once harmonized laws and institutions were in place it led to the end of the capitulation regimes.<sup>98</sup> In historical terms, the abolition of extraterritoriality can be traced to 'Meiji legal reforms in the 1880s, Republican Turkey's legal transformation under Atatürk in the 1920s . . . and the Guomindang's legal reorganization in China in the 1930s'.<sup>99</sup> It is worth pausing

<sup>91</sup>*Ibid.*, at 9.

<sup>92</sup>Kayaoglu defines 'legal imperialism' of the era as follows:

Legal imperialism is the extension of a state's legal authority into another state and limitation of legal authority of the target state over issues that may affect people, commercial interest, and security of the imperial state. Extraterritoriality was quintessential legal imperialism; it extended Western legal authority into non-Western territories and limited non-Western legal authority over Western foreigners and their commercial interest.

*Ibid.*, at 6.

<sup>93</sup>*Ibid.*, at 12 (emphasis added).

<sup>94</sup>Fidler writes:

While various motivations can be attached to the capitulatory regimes established in the nineteenth century, the primary intention was to establish some fundamental conditions for commercial interaction between the United States and European states on one side and non-Western countries and regions on the other. Exempting Americans and Europeans from the application of civil and criminal law in non-Western countries would facilitate trade and economic intercourse because legal uncertainty and risk were removed for American and European enterprises seeking to do business abroad.

See D. Fidler, 'A Kinder, Gentler System or Capitulations? International Law, Structural Adjustment Policies, and the Standard of Liberal, Globalized Civilization', (2000) 35 *Texas International Law Journal* 387, at 390–1.

<sup>95</sup>Fidler, *ibid.*, at 391. He further adds:

Capitalism in both Europe and the United States rested on well-established legal systems that supported free enterprise. Capitulations represented the partial exportation of these legal systems to support commerce in the emerging markets of the uncivilized world.

*Ibid.*, at 393.

<sup>96</sup>Kayaoglu, *supra* note 89, at 11–12.

<sup>97</sup>*Ibid.*, at 12.

<sup>98</sup>Such an '... approach links the abolition of extraterritoriality to the institutionalization of state law in non-Western states, or simply, domestic legalization. Domestic legalization includes the codification of rules, the spread of court systems, and the establishment of a legal hierarchy; positive legal scholars deem all three elements to be necessary parts of a legal system that clarifies and enforces legal and property rights'. See Kayaoglu, *supra* note 89, at 51. The process involved was much more complex and layered. For a glimpse of that process see L. Benton and L. Ford, *Rage for Order: The British Empire and the Origins of International Law 1800-1850* (2016); P. Cassel, *Grounds of Judgement: Extraterritoriality and Imperial Power in Nineteenth Century China and Japan* (2012).

<sup>99</sup>Kayaoglu, *ibid.*, at 12.

here and noting that the reasons for the exercise of extraterritoriality were the same as those which contributed to the emergence of the modern state in Europe viz., the fragmentation of laws. Or as Kayaoglu puts it, ‘by demanding the institutionalization of state law in non-Western countries, Western states aligned domestic arrangements making them compatible with . . . capitalism’.<sup>100</sup>

The attempt at harmonization of laws has since been a ceaseless historical process for decolonization once again raised the problem of fragmentation and diversity of laws. The process of harmonization gained momentum in the era of globalization with the ambition of advanced capitalist states being to unify economic space and laws at the regional and global levels. The goal has been realized through the adoption of uniform legal standards in key areas of international social and economic life through means of multilateral arrangements, on which more presently. Of course, the progress towards harmonization or homogenization is not a linear process but comes with twists and turns. Yet the trend over the centuries is clear. The role of capital in shaping the doctrine of extraterritoriality also becomes abundantly clear from the Kayaoglu observation that his thesis on the ending of the exercise of extraterritorial jurisdiction in the colonial era ‘does not adequately explain the Soviet Union’s abolition of extraterritoriality in the Ottoman Empire and Turkey following the revolution in 1917’.<sup>101</sup> In his view, ‘abolition in this instance occurred *as a result of mostly antiimperialist ideological reasons* and the new Soviet regime’s desire to break its international relations’.<sup>102</sup> To put it differently, capitalism, imperialism, and extraterritorial jurisdiction proceed hand in hand in history. The one implies the other.

#### **4.1 Harmonization of laws in the postcolonial era: Multidimensional strategy**

The felt need of universalizing capitalism for larger harmonized legal spaces continued in the post-colonial period.<sup>103</sup> Indeed, an important lesson from historicizing the concepts of ‘territory’ and ‘jurisdiction’ is that while the scope and form of the exercise of extraterritorial jurisdiction changes over time, there is a stability of end purposes. As Raustiala observes:

. . . extraterritoriality has shown surprising continuity in its purpose even as its form has changed. Extraterritoriality meant very different things to nineteenth-century lawyers than it does to contemporary lawyers. But despite dramatic changes in form, *the primary function of extraterritoriality has remained much the same. That function . . . is to manage and minimize the legal differences entrenched by the Westphalian sovereignty*.<sup>104</sup>

A crucial change has been that whereas in the past ‘imperialism mitigated difference by colonizing foreign places’ today this objective is realized primarily through ‘consensually negotiating shared rules’.<sup>105</sup> A multi-layered and multidimensional strategy or means has been adopted by advanced capitalist states to achieve harmonization goals. There are at least three elements of such a strategy. These may be termed *the power, mediation, and revolutionary strategies*. The latter two strategies do not involve the classic exercise of extraterritorial jurisdiction, and tend not to be associated with it, but achieve the same objectives. Their exclusion from the discussion of the international law of jurisdiction/extraterritorial jurisdiction demonstrates how positivist legal doctrines and rules, veil the strategies of imperialism, by being divorced from social and political realities or by slicing reality. Instead, the exercise of ‘extraterritorial jurisdiction’ should be defined in *historical-sociological* terms,

<sup>100</sup>T. Kayaoglu, ‘The Extension of Westphalian Sovereignty: State Building and the Abolition of Extraterritoriality’, (2007) 51 *International Studies Quarterly* 649, at 651–2.

<sup>101</sup>Kayaoglu, *supra* note 89, at 65.

<sup>102</sup>*Ibid.*, at 65.

<sup>103</sup>See N. Walker, *Intimations of Global Law* (2015); B. S. Chimni, ‘International Institutions Today: An Imperial Global State in the Making’, (2004) 15 *EJIL* 1.

<sup>104</sup>Raustiala, *supra* note 47, at vii (emphasis added).

<sup>105</sup>*Ibid.*, at 7.

that is, as *the power advanced capitalist states to influence and shape the standards, laws and institutions in other jurisdictions.*

In the first instance advanced capitalist states like the US rely on their economic and political power to enforce their laws extraterritorially, replacing the earlier institution of consular rights, the last of which it gave up in 1956 in Morocco.<sup>106</sup> As Raustiala writes ‘... just as one form of extraterritoriality was waning, another was waxing’:<sup>107</sup>

By mid-century, the executive branch, Congress, and the courts were all seeking to extend the reach of a burgeoning array of domestic statutes to acts and actors overseas. This new form of extraterritoriality rapidly became a common part of American jurisprudence, and was in many respects *more encompassing and powerful than the old extraterritoriality.* Like the old, the new extraterritoriality deliberately extended American law beyond the borders of the United States in *an effort to minimize the effects of legal difference.* This time, however, domestic legal rules penetrated the borders of acknowledged and coequal sovereigns, not merely weak semisovereign powers.<sup>108</sup>

The ‘use of extraterritorial domestic law’ allowed the US ‘... to exert American influence without having to worry about the constraints and mutual obligations that international treaties impose—a particularly strong form of American exceptionalism’:<sup>109</sup>

From antitrust, to copyright, to securities regulation, to trademarks and trade names, to intellectual property, to corporate law and governance, to bankruptcy and tax, to criminal laws, to environmental laws, to civil rights, to labor—the list goes on—the United States has utilized prescriptive (i.e., legislative) jurisdiction to regulate conduct occurring abroad.<sup>110</sup>

US Courts have also resorted to the ‘effects doctrine’ and the doctrine of ‘universal civil jurisdiction’ to regulate conduct abroad.<sup>111</sup> There have of course been ebbs and flows in the use of these doctrines to exercise extraterritorial jurisdiction. However, recounting the changes is not of significance here, as overall there is little doubt that the US sought to use these doctrines to extend its laws to other geographical spaces.

In the second instance bilateral and multilateral regimes are used to achieve the objective of harmonization of laws. The advanced capitalist states have found multilateral arrangements a

<sup>106</sup>C. M. Bishop, ‘The American Consular Court System in China’, (1992) 8 *American Bar Association Journal* 223; R. Young, ‘The End of American Consular Jurisdiction in Morocco’, (1957) 51 *AJIL* 402; T. Ruskola, ‘Colonialism Without Colonies: On the Extraterritorial Jurisprudence of the U.S. Court for China’, (2008) 71 *Law and Contemporary Problems* 217.

<sup>107</sup>Raustiala, *supra* note 47, at 94.

<sup>108</sup>Raustiala, *ibid.*, at 94–5 (emphasis added). He concludes:

Postwar American hegemony ... was manifested not only in military power and economic influence, but also in an expansive understanding of the reach of domestic law—an understanding that honored American anti-imperialism while it simultaneously extended American legal rules throughout the globe.

*Ibid.*, at 96.

<sup>109</sup>A. L. Parrish, ‘Reclaiming International law from Extraterritoriality’, (2009) 83 *Minnesota Law Review* 815, at 846.

<sup>110</sup>*Ibid.*, at 846–8.

<sup>111</sup>The definition of the ‘effects doctrine’ in the Third Restatement of the Foreign Relations Law of the USA is ‘conduct outside [the state’s] territory that has or is intended to have substantial effect within its [i.e., US] territory’. *Restatement (Third) of the Foreign Relations Law of the United States* (1988), § 402(l)(c). An International Bar Association Report defines ‘universal civil jurisdiction’ as follows:

Universal civil jurisdiction refers to the ability of states to provide civil judicial remedies for violations of human rights and other fundamental norms of international law without requiring a link between the subject matter of the dispute or the parties on the one hand and the forum on the other.

‘Report of the Task Force on Extraterritorial Jurisdiction’, 2009, at 15, available at [www.ibanet.org/MediaHandler?id=ECF39839-A217-4B3D-8106-DAB716B34F1E](http://www.ibanet.org/MediaHandler?id=ECF39839-A217-4B3D-8106-DAB716B34F1E) (accessed 6 September 2021).

significant instrument in seeking the global harmonization of laws. The multilateral regimes are either a part of or a 'complement to the dense network of American-created post war international institutions' which 'sought to harmonize domestic rules on largely American terms'.<sup>112</sup> In arriving at multilateral arrangements overt coercion exercised by Metropolitan states in the colonial era is replaced by forms of 'structural coercion'.<sup>113</sup> The goal of harmonization is realized either through a single instrument such as the WTO Agreement on Trade Related Intellectual Property Rights (TRIPS) or through a set of international agreements as in the field of international investment law. In the former case, as is well known, a set of minimal standards are set out that each WTO member has to observe.<sup>114</sup> This has meant that in critical areas like patent rights advanced nations like the US and France and less developed nations such as Nepal and Rwanda legislate the same core standards.<sup>115</sup> These are ratcheted up through TRIPS Plus standards adopted in bilateral and multilateral agreements that include free trade agreements (FTA).<sup>116</sup> Where foreign investment is concerned, the harmonization has been achieved through a network of agreements that include Bilateral Investment Protection Treaties, the WTO Agreement on Trade Related Investment Measures, the WTO General Agreement on Trade in Services, a number of free trade agreements, and the use of inter-state dispute settlement system to resolve disputes between states and MNCs.<sup>117</sup> After the end of the cold war comprehensive harmonization was sought to be achieved through an OECD Multilateral Agreement on Investment which was undone by protests of civil society in Europe concerned with its negotiations in secrecy and the idea of global corporate rule.<sup>118</sup> Currently there are ongoing negotiations on adopting a WTO Agreement on Investment Facilitation.<sup>119</sup> Arguably, over time the process of harmonization has taken place in most areas of international law including banking and finance, competition, human rights, environment, oceans, space and trade and commerce.<sup>120</sup> It is not harmonization of standards per se that is problematic but the loss of critical legal and policy space for developing nations with troubling outcomes for the welfare of its peoples.<sup>121</sup> In instances when the US and other advanced capitalist states do not become party to particular multilateral treaties and institutions

<sup>112</sup>Raustiala, *supra* note 47, at 95.

<sup>113</sup>By 'structural coercion' is meant a situation in which developing nations are prevented from exercising choice because it carries too heavy costs. It is a function of the profound inequalities of power between states in diplomatic, economic, and military domains. See generally Johan Galtung, 'Violence, Peace, and Peace Research', (1969) 6 *Journal of Peace Research* 167; T. Pogge, *World Poverty and Human Rights* (2002), Chs. 4 and 8.

<sup>114</sup>See WTO, *Intellectual Property: Protection and Enforcement*, available at [www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/agrm7\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm7_e.htm) (accessed 6 September 2021).

<sup>115</sup>'The TRIPS Agreement describes the minimum rights that a patent owner must enjoy, and defines the conditions under which exceptions to these rights are permitted.' *Ibid.*

<sup>116</sup>S. K. Sell, 'TRIPs Was Never Enough: Vertical Forum Shifting, FTAs, ACTA, and TPP', (2011) 18 *Journal of Intellectual Property Law* 447; H. G. Ruse-Khan, 'The International Law Relation between TRIPs and Subsequent TRIPs-Plus Free Trade Agreements: Towards Safeguarding TRIPs Flexibilities', (2011) 18 *Journal of Intellectual Property Law* 325.

<sup>117</sup>See generally M. Sornarajah, *The International Law on Foreign Investment* (2018).

<sup>118</sup>See Global Policy Forum, 'Multilateral Agreement on Investment', available at [www.globalpolicy.org/globalization/globalization-of-the-economy-2-1/multilateral-agreement-on-investment-2-5.html](http://www.globalpolicy.org/globalization/globalization-of-the-economy-2-1/multilateral-agreement-on-investment-2-5.html) (accessed 6 September 2021); S. Picciotto, 'A Critical Assessment of the MAI', in S. Picciotto and R. Mayne (eds.), *Regulating International Business: Beyond Liberalization* (1999), 82.

<sup>119</sup>See WTO, 'Investment Facilitation', available at [www.wto.org/english/thewto\\_e/minist\\_e/mc11\\_e/briefing\\_notes\\_e/bfinvestfac\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/mc11_e/briefing_notes_e/bfinvestfac_e.htm) (accessed 6 September 2021).

<sup>120</sup>See generally M. Andenaes, A. Tonnesson and B. Camilla (eds.), *Theory and Practice of Harmonization* (2012).

<sup>121</sup>Chimni, *supra* note 103; Ha-Joon Chang, *Kicking Away the Ladder: Development Strategy in Historical Perspective* (2003); K. Gallagher, *Putting development first: the importance of policy space in the WTO and IFIs* (2005); D. Rodrik, *The Globalization Paradox: Democracy and the Future of the World Economy: Why Global markets, states, and democracy can't coexist* (2011); A. Andreoni, H. Chang and J. Estevez, 'New Global Rules, Policy Space and quality of Growth in Africa', in A. Noma, J. E. Stiglitz and R. Kanbur (eds.), *The Quality of Growth in Africa* (2019), 111.

or withdraw from them, they resort to the traditional exercise of extraterritorial jurisdiction to defend either local interests or ‘to deal unilaterally with global public goods’.<sup>122</sup>

Finally, there is the revolutionary strategy which is implemented in the name of the ‘international community’, a good example of which is the United Nations undertaking of ITA. The antecedents of ITA can be traced to colonial times, in particular to the Mandate System under the League of Nations.<sup>123</sup> But the idea of ITA has assumed new forms in the postcolonial era.<sup>124</sup> Among the two major instances of the implementation of revolutionary strategy have been the creation of ITAs in East Timor and Kosovo. The scope of ‘extraterritorial jurisdiction’ exercised on behalf of the ‘international community’ on these territories can be gauged from UN Security Council Resolution 1272 (25 October 1999) which established the United Nations Transitional Administration in East Timor (UNTAET). It stated that UNTAET will be ‘... endowed with overall responsibility for the administration of East Timor and will be empowered to exercise all legislative and executive authority, including the administration of justice’.<sup>125</sup> UNTAET was expected to:

set and enforce the law, establish customs services and regulations, set and collect business and personal taxes, attract foreign investment, adjudicate property disputes and liabilities for war damage, reconstruct and operate all public utilities, create a banking system, run schools and pay teachers, and collect the garbage.<sup>126</sup>

It has therefore been aptly observed of the international administrations of Kosovo and East Timor that these ‘constitute *the most manifest and extensive contemporary assertions of an international jurisdiction* that acts as a substitute for traditional State or territorial sovereignty’.<sup>127</sup> In both these territories, according to Scobbie, ‘the SG’s Special Representative exercised *powers akin to that of the colonial administrator* who is ultimately possessed of all legislative and executive authority ...’.<sup>128</sup> Orford is therefore right in observing that ‘international territorial

<sup>122</sup>In recent years, the United States has withdrawn from international law and multilateral institutions. Concomitant with the withdrawal has been a dramatic expansion of the use of extraterritorial laws—both in the public and private law contexts. Other countries are now following suit. See Parrish, *supra* note 109, at 874. Indeed, Parrish speaks of ‘the rise of global extraterritoriality as an alternative to international law making’. *Ibid.*, at 819. N. Krisch, ‘The Decay of Consent: International Law in an Age of Global Public Goods’, (2014) 108 *American Journal of International Law* 1, at 8.

<sup>123</sup>As Wilde observes, ‘the involvement of international organizations in varying degrees of territorial administration has a long history, stretching back to the start of the League of Nations’. See R. Wilde, ‘From Danzig to East Timor and Beyond: The Role of International Territorial Administration’, (2001) 95 *AJIL* 583, at 583. See also A. Orford, ‘Book Review: International Territorial Administration and the Management of Decolonization’, (2010) 59 *ICLQ* 227.

<sup>124</sup>The recent history of ‘direct administration over people and territory’ has been described by Benvenisti:

Beginning with the intervention in Somalia in December 1992, the UN Security Council has acted under Chapter VII to authorize the non-consensual administration of territories of member States, in internal or post-conflict situations. The preferred policy remained to rely formally on domestic institutions, as was the case for example, in Cambodia (1991), Haiti (1994), and Bosnia (1995), but when such indigenous institutions were not available or judged untrustworthy, the Security Council assigned responsibility to the foreign forces in control of the direct control over the territory, as in the cases of Kosovo (UNMIK, 1999) and East Timor (UNTAET, 1999).

See E. Benvenisti, *The Law of Global Governance* (2014), 69.

<sup>125</sup>UN Doc. S/RES/1272 (1999), para. 1.

<sup>126</sup>Panel on United Nations Peace Operations, Report to the United Nations Secretary-General, UN Doc. A/55/305-S/2000/809 (2000), at ¶ 77 (Brahimi Report), cited in Orford, *supra* note 123, at 229. Or, as Orford puts it, the international administrators can ‘detain people, establish systems of judicial administration, redistribute property, set and collect taxes, nationalize industry, run schools, adjudicate disputes, allocate resource contracts, create central banks, provide services and so on. International officials undertake all these tasks while benefiting from an extremely broad regime of immunities and privileges developed to enable the conduct of international public service or diplomatic relations’. *Ibid.*, at 243.

<sup>127</sup>I. Scobbie, ‘New Wine in Old Bottles or Old Wine in New Bottles or only Old Wine in Old Bottles?: Reflections on the Assertion of Jurisdiction in Public International Law’, in P. Capps et al. (eds.), *Asserting Jurisdiction: International and European Legal Perspectives* (2003), 17, at 24 (emphasis added).

<sup>128</sup>*Ibid.*, at 25 (emphasis added).

administrations *are revolutionary regimes*, designed to eliminate any existing laws, property relations and political cultures deemed illegitimate'.<sup>129</sup> The revolution is carried out by the 'international community' to create the social and political conditions that can extend the spatial reign of capital. In fact, ITA missions take on faith 'the universal purchase of the models of economics and politics they are promoting'.<sup>130</sup> These spaces became the subject of harmonization of laws and are thereby rendered productive for global capital.

Of course, it is important to admit at this point that global capitalism flourishes 'not only through homogenization or assimilation . . . but also through the production of difference'.<sup>131</sup> The existence of difference provides opportunities for exploitation of different standards such as in labour and environmental laws in industrialized and developing nations. Therefore, the continuous discursive production of difference is as essential, but in terms of strategy of secondary significance to the objective of capital accumulation, i.e., in contrast to the harmonization of laws. These differences are part of the legacy of colonialism.

### 5. Jurisdictional internationalism: Liberal or subaltern?

It is time to assess ways of reforming the international law of jurisdiction, in particular the exercise of extraterritorial jurisdiction, from the standpoint of weak nations and groups. It has been argued that while the logic of territory is about spatial limitations on the exercise of jurisdiction, the logic of capital is inherently extraterritorial in its orientation. Therefore, in order to create facilitative conditions for universalizing capital – which seeks to create a global economic space where uniform global standards apply – advanced capitalist states have had to find a way around the principle of territorial jurisdiction. The effort of these states has translated into legal imperialism resulting in a critical loss of policy space for weak states in the postcolonial era. The move to harmonize laws is justified by advanced capitalist states on the grounds that it will both help promote growth and development in weak states and help realize the global common good. The broad argument has been rejected by many an economist and international lawyer as the loss of policy space deprives weak states of the ability to respond to local and national realities and goes to subvert the parochial interests of powerful capitalist states.<sup>132</sup> But MILS justifies the exercise of extraterritorial jurisdiction using inter alia the contentions and vocabulary of liberal internationalism, which as is argued below, does not safeguard the interests of subaltern nations or promote global common good. In the final analysis MILS promotes the accumulation of capital on a global scale through among other things unequal exchange promoted by harmonized international trade law and the creation and protection of private property rights, including intellectual property rights, by means of synchronized international investment law.<sup>133</sup> Indeed, the 'logic of capital' demands

<sup>129</sup>Orford, *supra* note 123, at 249 (emphasis added).

<sup>130</sup>R. Wilde, *International Territorial Administration: How Trusteeship and the Civilizing Mission Never Went Away* (2008), 449.

<sup>131</sup>Ford, *supra* note 5, at 906.

<sup>132</sup>See Chimni, *supra* note 103; D. Rodrik, *The Globalization Paradox: Democracy and the Future of World Economy* (2011); D. Rodrik, *Straight Talk on International Trade: Ideas for a Sane World Economy* (2017); J. E. Stiglitz and A. Charlton, *Fair Trade for All: How Trade Can Promote Development* (2005); J. E. Stiglitz, *Making Globalization Work: The Next Steps to Global Justice* (2007).

<sup>133</sup>In simple terms 'unequal exchange arises when spatial production of value is disjointed from its geographical distribution, in the same way as social production of value diverges from its distribution between social classes. Production and capture of value by locations are two different things, and trade is one of the ways of their uncoupling'. A. Ricci, 'Unequal Exchange in the Age of Globalization', (2019) *Review of Radical Political Economics* 1–21, at 2; A. Ricci, *Value and Unequal Exchange in International Trade: The Geography of Global Capitalist Exploitation* (2021), at 14; J. Smith, *Imperialism in the Twenty-First Century: Globalization, Super-Exploitation, and Capitalism's Final Crisis* (2016); J. G. Sprankling, *The International Law of Property* (2014); S. K. Sell, *Private Power, Public Law: The Globalization of Intellectual Property Rights* (2003); the footnotes at Ford, *supra* note 5.

that the limits of the exercise of extraterritorial jurisdiction are constantly extended, the latest effort involves the creation of a stable international property rights regime in outer space.<sup>134</sup>

### 5.1 Liberal internationalism

The liberal internationalist position may be *illustrated* by reference to Ryngaert's 'new theory of jurisdiction' as he has most clearly and cogently articulated that standpoint. He proposes that a state exercising extraterritorial jurisdiction act as an agent of the international community with the goal of promoting global common good. In advancing his version of liberal internationalism Ryngaert is aware that acting on his suggestion can lead to the erosion of the foundational international law principles of sovereign equality and non-intervention.<sup>135</sup> But he contends that these principles should not stand in the way of advancing the global common good. Instead, the doctrine of jurisdiction must place 'the interests of the *international community*, and not of single "sovereign" States . . . center-stage'.<sup>136</sup> He goes on to observe:

If the "primary" State fails to exercise jurisdiction, even, if, from a global perspective, this were desirable, the "subsidiary" State has the right—and, it may be argued, sometimes the duty—to step in, in the interests of the global community. Such a jurisdictional system connects sovereign interests—on which the law of jurisdiction was traditionally based—with global interests, and ensures that impunity and globally harmful underregulation do not arise. *Sovereignty then becomes a "relative" concept*: international law and the international interest determine when States can invoke it . . . the State with the strongest nexus to a situation is entitled to exercise its jurisdiction, yet if it fails adequately to do so, another state with a weaker nexus (and in case of violations of *jus cogens* without a nexus) may step in, provided that its exercise of jurisdiction serves the global interest.<sup>137</sup>

His functional stance is not entirely without merit. There is a certain value in casting the state as an agent of the global common good and creating new identities and roles on that basis. But it is difficult not to point to the utopian strain in such thinking. In view of the power differentials between states, and in particular the material and ideological hegemony of advanced capitalist nations, it is their legislators, courts, policy makers and academia or the international institutions that they control that define the meaning of global common good. In doing so the interests of global capital are most often placed centre-stage. To put it differently, what Ryngaert does not offer is a persuasive theory of sociology or history to accompany his proposal of States serving the cause of global common good.<sup>138</sup> He therefore overlooks the possibility that his proposed liberal jurisdictional internationalism can actually facilitate the realization of the parochial economic and political interests of transnational capital or advanced capitalist states.<sup>139</sup>

In his other writings Ryngaert attempts to justify the exercise of extraterritorial jurisdiction observing that the fact that:

the powerful are more likely to exercise unilateral jurisdiction does not mean . . . that, when so doing, they are necessarily intent on furthering their own interests. Powerful states could

<sup>134</sup>S. Coffey, 'Establishing a Legal Framework for Property Rights to Natural Resources in Outer Space', *case Western Reserve Journal of International Law*, available at [scholarlycommons.law.case.edu/jil/vol41/iss1/6](http://scholarlycommons.law.case.edu/jil/vol41/iss1/6) (accessed 30 September 2021).

<sup>135</sup>Ryngaert, *supra* note 3, at 231.

<sup>136</sup>*Ibid.*, at 230.

<sup>137</sup>*Ibid.*, at 231 (emphasis added). See also Berman, *supra* note 5, at 322.

<sup>138</sup>Consequently, he also does not explore the notion of 'global economic and value interests'. See Ryngaert, *ibid.*, at 190.

<sup>139</sup>As Parmar puts it, 'the LIO [liberal international order] is a class-based, elitist hegemony—strongly imbued with explicit and implicit racial and colonial/imperial assumptions—in both US domestic and foreign relations'. I. Parmar, 'The US-Led Liberal Order: Imperialism by Another Name?', (2018) 94 *International Affairs* 151, at 152.

well use their stronger enforcement capacities to protect international community interests.<sup>140</sup>

This is not the first time that a proposal has been advanced to put the fox in charge of the chickens, and with great solemnity. However, to be fair he does call ‘for jurisdictional or substantive limitation of unilateral action to avert false universalism’.<sup>141</sup> He talks of ‘such jurisdictional mitigating mechanisms as dual illegality, democratic participation, equivalence, and compensation’.<sup>142</sup> These ideas may help limit the abuse of the exercise of extraterritorial jurisdiction but the fact is that Ryngaert is relying precisely on those actors to further cosmopolitan interests that have historically invoked it to advance legal and political imperialism. To privilege this view against centuries of contrary evidence is to essentially be on the side of imperialism, howsoever disclaimed. While appearing to be reasonable the proposals of liberal jurisdictional internationalism are neo-imperialist in their ambition and design.

It is true that in some instances related to the promotion and protection of human rights a state can represent the international community to advance global common good. In such cases perhaps ‘extraterritoriality is [not] at odds with the principles of democracy and representation’.<sup>143</sup> A principle of subaltern internationalism that seeks to further the interests of weak nations and groups would concede this. But the lesson of history is that powerful states are less inclined to invoke extraterritoriality to pursue a genuine human rights agenda as against geopolitical agendas. In the instance of international economic law Ryngaert himself admits that ‘the democratic deficiencies of extraterritorial jurisdiction should be taken seriously’.<sup>144</sup> But his response to the unjust situation has once again a utopian flavour to it:

The democratic deficit of extraterritoriality could possibly be overcome when legislatures, courts, and regulators embark on a dialogue with foreign corporations [the subjects of regulation], regulators, and courts, either through institutionalized channels, or through *amicus curiae* briefs or statements of interest, when exercising jurisdiction over foreign situations.<sup>145</sup>

While the solution of dialogue, co-operation and *amicus curiae* has appeal, in practice weak states and their civil society organizations are unlikely to be heard. The reference at one point to the role of ‘transnational judicial networks’ only aggravates the problem as it is used as a means for transmitting first world solutions to the third world, the classic goal of the exercise of extraterritorial

<sup>140</sup>C. Ryngaert, ‘Unilateral Jurisdiction and Global Values’, 2015, at 32, available at [unijuris.sites.uu.nl/wp-content/uploads/sites/9/2014/12/Inaugural-Lecture.-Unilateral-Jurisdiction-and-Global-Values.pdf](http://unijuris.sites.uu.nl/wp-content/uploads/sites/9/2014/12/Inaugural-Lecture.-Unilateral-Jurisdiction-and-Global-Values.pdf) (accessed 22 December 2020). He goes on to write:

Admittedly, in practice, unilateral jurisdiction in the global interest is, at least in the socio-economic field, often only exercised when the integrity of domestic regulation is undermined, and domestic actors’ rights and interests are affected by foreign activity (“levelling the playing field”). This tends to create an impression of self-centeredness, arbitrariness, exclusivity to the detriment of less powerful actors, domination, or outright legal imperialism. But one should not forget that most of the time, these so-called “hegemonic” actors may just be enforcing shared values or challenges of the international community, even if they have technically not yet risen to the level of public international law norms: there is undeniably a global interest in accountability for international crimes, transnational corruption, antitrust conspiracies, securities fraud, or in addressing climate change. These global interests are, moreover, often laid down in various binding or non-binding international instruments. It is somewhat disingenuous then to blame states for enforcing these instruments.

*Ibid.*, at 33–4.

<sup>141</sup>*Ibid.*, at 74.

<sup>142</sup>*Ibid.*

<sup>143</sup>Ryngaert, *supra* note 3, at 194.

<sup>144</sup>*Ibid.*

<sup>145</sup>*Ibid.*

jurisdiction.<sup>146</sup> Furthermore, the power differential between states means that when democratic deficit in the exercise of extraterritorial jurisdiction fails to be addressed ‘reciprocity might not serve as a restraining principle’.<sup>147</sup> On the other hand, Ryngaert correctly rejects the ‘better law approach’ as he rightly recognizes that it will work only if it serves national interests of powerful states and will therefore go against weaker states.<sup>148</sup> Yet he insists that the only way forward is to:

... devise a rigorous rule-based system of international jurisdiction, modulated depending on the subject matter to be regulated, to which all states have to adhere, weaker nations are more likely to go along with it. Such a system, administered by independent courts, may restrict powerful States’ sphere of action and delegitimize their protest against weaker States’ own jurisdictional assertions.<sup>149</sup>

The refusal to engage with the problematic nature of the global order again comes to the fore. The solution Ryngaert recommends may at best work among the advanced capitalist states. In any case, given his positivist legal definition of extraterritorial jurisdiction, as against the historical and sociological understanding, Ryngaert does not take cognizance of its expanded domain through treaty regimes in the areas of trade, money and finance and decisions of international bodies such as the UN Security Council. His proposal has therefore a limited scope of application. In the final analysis Ryngaert’s ‘rationality’ turns out to be ‘capitalist rationality’.

## 5.2 Subaltern internationalism

A more productive response to the undemocratic and unjust exercise of jurisdiction and extraterritorial jurisdiction may be termed the principle of subaltern internationalism (PSI). While it would require a separate paper to explore its meaning, scope and implications, *some* of the *bare* theoretical and policy elements that will inform and flow from the application of PSI are indicated below.<sup>150</sup>

First, as opposed to a positivist understanding, PSI would proceed to make recommendations on the basis of a historical and sociological reading of the international law of jurisdiction. Such a view will help demonstrate that at least since the nineteenth century the exercise of jurisdiction/extraterritorial jurisdiction, has helped imperial nations create legal conditions for the expanded accumulation of capital at the expense of weak states.

Second, noting that the harmonization of international laws disadvantages weak nations and their marginalized groups, PSI would call for a review of harmonized rules in all areas of international life – finance, investment, trade, environment, oceans, space – to assess their impact. The aim will be to call for the restoration of critical policy space by making suitable changes in relevant international law regimes such as investment, intellectual property rights, trade and environment regimes.<sup>151</sup>

<sup>146</sup>*Ibid.*, at 195, 208–15. The Ryngaert proposal is also echoed by Judge Breyer of the U.S. Supreme Court who writes:

‘... when interpreting the statutes, the Court sought not simply to avoid conflict but also to harmonize analogous American and foreign law so that the systems, taken together, could work more effectively to achieve common aims ... The Court’s changing approach tracks a similar change in its conception of comity—from one emphasizing the more formal objective of simple conflict avoidance to the more practical objective of maintaining cooperative working arrangements with corresponding enforcement authorities of different nations. It is also consistent with the efforts in the executive branch to harmonize regulatory rules with foreign authorities.’

See S. Breyer, *The Court and the World: American Law and the New Global Realities* (2015), 133.

<sup>147</sup>Ryngaert, *supra* note 3, at 195, 204.

<sup>148</sup>*Ibid.*, at 199–200, 204–8. See generally on the export of US legal model and the variables and complexities involved: Y. Dezalay and B. G. Garth, ‘Legitimizing the New Legal Orthodoxy’, in Y. Dezalay and B. G. Garth (eds.), *Global Prescriptions: The Production, Exportation, and Importation of a New Legal Orthodoxy* (2002), 306.

<sup>149</sup>Ryngaert, *ibid.*, at 208–9.

<sup>150</sup>In case of elements that have not been discussed earlier in the article the footnotes refer the reader to readings that might help illuminate them.

<sup>151</sup>See Chimni, *supra* note 103.

Third, PSI would invoke the all affected principle (AAP) to allow civil society organizations to voice the concerns of groups significantly impacted by the exercise of extraterritorial jurisdiction or the harmonization of international laws.<sup>152</sup> In other words, going beyond weak states PSI will allow transnational marginalized and oppressed groups to have a say in the shaping of international laws relating to jurisdiction.

Fourth, PSI would call for the adoption of an international declaration or convention on jurisdiction that specifies among other things the limits of the unilateral exercise of extraterritorial jurisdiction. The declaration or convention will set out the conditions for the exercise of extraterritorial jurisdiction on the basis of doctrines such as the ‘effects doctrine’ or the doctrine of ‘universal civil jurisdiction’.<sup>153</sup> The declaration or convention would also attempt to codify principles that ‘inculcate ideals of tolerance, dialogue, and mutual accommodation’ in the process of regulation and adjudication of the exercise of extraterritorial jurisdiction.<sup>154</sup> For as has been aptly observed, ‘universalism inevitably erases diversity . . . such erasure may involve the silencing of less powerful voices’.<sup>155</sup> It is encouraging in these respects that the US Supreme Court has itself attempted in the recent past to inter alia curb the exercise of universal civil jurisdiction.<sup>156</sup>

Fifth, PSI will seek to limit the private exercise of extraterritorial jurisdiction by MNCs through the conduct of intra-firm trade and the adoption of voluntary codes of conduct, and make them more amenable to the tax and regulatory jurisdiction of host states.<sup>157</sup> PSI will seek a special regime for the regulation of digital platforms like Amazon, Facebook, and Google which are becoming ‘functionally sovereign’ and are ‘playing a quasi-governmental role as they adjudicate conflicts between consumers, marketers, content providers, and an expanding array of third and fourth parties’.<sup>158</sup> The recent decision of the Facebook Oversight Board in the Trump Twitter suspension case points to the limits of self-regulation.<sup>159</sup> There is also a need to, among other things, help address the question of divergent responses of digital platforms in different national jurisdictions.

<sup>152</sup>B. S. Chimni, ‘The Limits of the All Affected Principle: Attending to Deep Structures’, (2018) 3 *Third World Thematics: A TWQ Journal* 807; J. von Bernstorff, ‘New Responses to the Legitimacy Crisis of International Institutions: The Role of “Civil Society” and the Rise of the Principle of Participation of “The Most Affected” in International Institutional Law’, (2021) XX *EJIL* 1–33.

<sup>153</sup>The exercise of extraterritorial jurisdiction on the basis of these doctrines represents contested fields. Thus, for instance, one observer notes with respect to the exercise of universal civil jurisdiction that its deployment by US courts ‘is mistaken’. D. Wallach, ‘The Irrationality of Universal Civil Jurisdiction’, (2015) 46 *Georgetown Journal of International Law* 803, at 804–5, 834–5. Others have also suggested that ‘though the principle of universal jurisdiction is well established in the criminal sphere, it is still regarded as novel in the civil context’. See D. F. Donovan and A. Roberts, ‘The Emerging Principle of Universal Civil Jurisdiction’, (2006) 100(1) *AJIL* 142, at 142. See also A. G. Jain, ‘Universal Civil Jurisdiction in International Law’, (2015) 55(2) *Indian Journal of International Law* 209.

<sup>154</sup>P. S. Berman, ‘Global Legal Pluralism’, (2007) 80 *Southern California Law Review* 1155, at 1237.

<sup>155</sup>*Ibid.*, at 1190–1.

<sup>156</sup>See *Kiobel v. Royal Dutch Petroleum Co.*, 569 U. S. 108 (2013), at 108; *Jesner et al. v. Arab Bank PLC*, 138 S.Ct. 1386 (2018), at 1389.

<sup>157</sup>L. C. Backer, ‘Governance Without Government: An Overview and Application of Interactions Between Law-State and Governance-Corporate Systems’, in G. Handl, J. Zekoll and P. Zumbansen (eds.), *Beyond Territoriality: Transnational Legal Authority, in An Age of Globalization* (2012), 87; J. G. Ruggie, *Multinationals as Global Institution: Power, Authority and Relative Autonomy*, (2018) 12 *Regulation and Governance* 317.

<sup>158</sup>F. Pasquale, ‘Tech Platforms and the Knowledge Problem’, (2018) 2 *American Affairs* 3, at 8. See generally K. Klonick, ‘The New Governors: The People, Rules, and Processes Governing Online Speech’, (2017) 131 *Harvard Law Review*, 1598–1670.

<sup>159</sup>Case decision 2021-001-FB-FBR: Suspension of Trump Facebook Account, available at [oversightboard.com/decision/FB-691QAMHJ/](https://oversightboard.com/decision/FB-691QAMHJ/) (accessed 6 September 2021). See generally S. Vaidhyanathan, ‘What If Regulating Facebook Fails?’, *WIRED*, 7 February 2021, available at [www.wired.com/story/what-if-regulating-facebook-fails/?utm\\_source=pocket-newtab-intl-en](https://www.wired.com/story/what-if-regulating-facebook-fails/?utm_source=pocket-newtab-intl-en); S. Vaidhyanathan, ‘Facebook is pretending it cares how its platform affects the world’, *Guardian*, 6 May 2021, available at [www.theguardian.com/commentisfree/2021/may/06/facebook-donald-trump-ruling-oversight-board](https://www.theguardian.com/commentisfree/2021/may/06/facebook-donald-trump-ruling-oversight-board) (accessed 6 September 2021); N. Alkiviadou, ‘Freedom of Expression and Its Slow Demise: The Case of Online Hate Speech (and Its Moderation/Regulation)’, *Opinio Juris*, 25 July 2021, available at [opiniojuris.org/2021/07/25/freedom-of-expression-and-its-slow-demise-the-case-of-online-hate-speech-and-its-moderation-regulation/](https://opiniojuris.org/2021/07/25/freedom-of-expression-and-its-slow-demise-the-case-of-online-hate-speech-and-its-moderation-regulation/) (accessed 7 September 2021).

Sixth, PSI would call for the structural reform of the concept of ‘international territorial administration’, and accompanying practices, which allows powerful states to exercise extraterritorial jurisdiction over ‘new’ nations in the name of the ‘international community’. In other words, PSI would call for full adherence to the principle of self-determination.

Seventh, PSI would help reimagine the promotion of environment protection in the Anthropocene (better termed ‘Capitalocene’) by transcending the binary of territorial and extraterritorial jurisdiction to seek the global regulation of the production and distribution activities of private actors that result in war against Nature<sup>160</sup>. It will also attempt to articulate alternatives to market based measures to address the problem of climate change as these result in ‘carbon colonialism’ and ‘green grabbing’.<sup>161</sup>

Eighth, in the matrix of a historical-sociological understanding of the extraterritorial exercise of jurisdiction, PSI would relativize the distinction between citizens and aliens and encourage advanced capitalist states to adopt a more liberal policy towards asylum seekers. In other words, in view of the exploitation of weak peoples and nations through the exercise of extraterritorial jurisdiction these states have the responsibility to welcome refugees fleeing threats to their life and freedom.

Ninth, PSI will seek to, and here it is one with liberal internationalism, strengthen the principle of solidarity in the matrix of international human rights law by taking seriously the observation of ICJ in its advisory opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*: ‘the International Covenant on Civil and Political Rights is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory’.<sup>162</sup> The Inter-American Commission on Human Rights has also drawn attention to the need for extraterritorial obligations of home states.<sup>163</sup> The UN Committee on Economic, Social, and Cultural Rights has also underlined the need for observance of extraterritorial obligations in General Comment 24 (2017) on ‘State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities’.<sup>164</sup> There is growing literature on the extraterritorial application of human rights treaties.<sup>165</sup> In 2011, 40 international law experts from all regions of the world went further and adopted the Maastricht Principles on Extraterritorial Obligations underscoring its importance in the area of economic, social and cultural rights.<sup>166</sup>

<sup>160</sup>Chimni, *supra* note 6, at 202–11; C. Storr, ‘Denaturalising the Concept of Territory in International Law’, in J. Dehm and U. Natarajan (eds.), *Locating Nature: Making and Unmaking International Law* (2020). The term ‘Capitalocene’ was first used by Swedish academic Andreas Malm.

<sup>161</sup>J. Dehm, ‘Carbon Colonialism or Climate Justice? Interrogating the International Climate Change Regime from a TWAIL Perspective’, (2016) *Windsor Yearbook of Access to Justice* 129–61.

<sup>162</sup>*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, Judgment of 9 July 2004, [2004] ICJ Rep. 136, at 180, para. 111.

<sup>163</sup>Inter-American Commission on Human Rights, *Indigenous Peoples, Afro-Descendent Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities*, Organization of American States Inter-American Commission on Human Rights, OEA/Ser.L/V/II Doc. 47/15 (2015), available at [www.oas.org/en/iachr/reports/pdfs/ExtractiveIndustries2016.pdf](http://www.oas.org/en/iachr/reports/pdfs/ExtractiveIndustries2016.pdf) (accessed 6 September 2021).

<sup>164</sup>United Nations Economic and Social Council Committee on Economic, Social and Cultural Rights, ‘General Comment 24 (2017) on State obligations Under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities’, UN Doc. E/C.12/GC/24 (2017).

<sup>165</sup>S. Miller, ‘Revisiting Extraterritorial Jurisdiction: A Territorial Justification for Extraterritorial Jurisdiction under the European Convention’, (2009) 20 EJIL 1223; M. Milanović, ‘From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties’, (2008) 8 *Human Rights Law Review* 411.

<sup>166</sup>ETO Consortium, *Maastricht Principles on Extraterritorial Obligations in the Area of Economic, Social and Cultural Rights* (2013), available at [www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx\\_drblob\\_pi1%5BdownloadUId%5D=23](http://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUId%5D=23) (accessed 6 September 2021). See also the recent decision of the Supreme Court of Canada in *Nevsun Resources Ltd v. Araya*, 2020 SCC 5, 28 February 2020, available at [scc-csc.lexum.com/scc-csc/scc-csc/en/18169/1/document.do](http://scc-csc.lexum.com/scc-csc/scc-csc/en/18169/1/document.do) (accessed 6 September 2021).

## 6. Conclusion

The international law of jurisdiction has long been the subject of technical and neutral description. In presenting the triad of sovereignty, territory, and jurisdiction as the normal order of things MILS reifies and mystifies rules relating to the exercise of jurisdiction. In other words, MILS entirely neglects the historical, social and political dimensions of the doctrine and rules of jurisdiction. It is left to critical theory to problematize and deconstruct the categories 'territory', 'jurisdiction', and 'extraterritorial jurisdiction' and identify the particular social forces and states that shape and give life to them. It is not as if the technical aspects of the rules of jurisdiction are superfluous. These do aid the resolution of international legal disputes. But a historical and socio-logical understanding of the international law of jurisdiction more adequately captures the meaning, scope, and consequences of the exercise of jurisdiction and extraterritorial jurisdiction.

In the TWAIL view the rules relating to the exercise of jurisdiction and extraterritorial jurisdiction have been framed in a great measure in response to the needs of capital since the nineteenth century. Historically, universalizing capitalism has sought to annihilate non-capitalist legal spaces through the exercise of different forms of extraterritorial jurisdiction. In the colonial era, relevant laws and institutions of capitalist states were extended to the non-western world by either subjecting them to direct rule or in the case of semi-colonies through capitulation regimes. The latter arrangement continued until the laws and institutions in the semi-colonies were brought in line through domestic legislative measures.

The felt need of universalizing capitalism for harmonized regional and global legal spaces continued in the post second world war period. It was *inter alia* realized through the creation of regional legal spaces such as the European Union and in the instance of non-capitalist spaces by adopting doctrines that allowed the exercise of extraterritorial jurisdiction or through multi-lateral legal regimes. In the period of globalization, the project of harmonization of laws assumed a particular class dimension with the emergence of a TCC, indicating a lack of resistance of elites of Global South to the harmonization project. It is not as if capitalism does not celebrate difference but only if these are not obstacles to its expansion or can be used to advance the process of capital accumulation. Indeed, capital uses both moments of congruence and difference to extend and sustain its empire.

In order to legitimize the exercise of extraterritorial jurisdiction MILS has often presented the advanced capitalist state as an agent of international community which seeks to advance the global common good. What is overlooked is the vast inequalities of power and resources between developed and weak states. It is true that the move to legitimize extraterritorial jurisdiction has also been relied on by critical liberal scholars to call for the extraterritorial application of international human rights law. This is a justified proposal but its application is resisted by powerful states or turned around to legitimize transnational property rights or inflict violence against weaker states through doctrines such as the responsibility to protect. What is required is the application of PSI which requires that the scope and limits of the exercise of jurisdiction and extraterritorial jurisdiction be restricted to enhance the legal and policy space of developing nations to give substance to the principle of self-determination. In the final analysis the international law rules of jurisdiction must promote global democracy and global justice.