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### Jurisdiction as Legal Protection Against Terrorism

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# JURISDICTION AS LEGAL PROTECTION AGAINST TERRORISM

by Christopher L. Blakesley\*

On June 14, 1985, Robert Stethem was shot to death aboard a hijacked TWA airliner.<sup>1</sup> On October 7, 1985, the Italian cruise-liner, *Achille Lauro*, was hijacked<sup>2</sup> and the next day Leon Klinghofer was killed and thrown overboard.<sup>3</sup> On July 2, 1986, Rodrigo Rojas was mortally wounded when he was doused with gasoline and set afire while walking with protesters in Santiago, Chile.<sup>4</sup> Soviets are said to leave booby-trapped dolls for Afghan Moujahadeen children.<sup>5</sup> There is evidence that the United States government directly or indirectly supports the Nicaraguan contras who, in waging their guerilla war, allegedly have killed innocent citizens.<sup>6</sup> It is said that the Nicaraguan Sandinis-

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1. See N.Y. Times, June 15, 1985, at A1, col. 6.

2. See N.Y. Times, Oct. 12, 1985, at A1, col. 6.

3. See N.Y. Times, Oct. 10, 1985, at A1, col. 6.

4. Gordon, *Rodrigo Rojas—Murdered in Chile*, The Washington Post, Aug. 24, 1986, at C3, col. 1.

5. SELECT SENATE COMMITTEE ON FOREIGN RELATIONS & HOUSE COMMITTEE ON FOREIGN AFFAIRS, 99TH CONG., 1ST SESS., COUNTRY REPORTS ON HUMAN RIGHTS FOR 1984, at 1159-69 (Joint Committee Print 1985) [hereinafter Country Reports] (State Dept. Report presenting the atrocities and abuses of human rights committed in Afghanistan by the Soviet-backed regime).

6. Neier, *There's a Contradiction*, Sacramento Bee, Forum, Apr. 5, 1987, at 1, col. 6, reprinted from N.Y. Times, Book Review. See also, N.Y. Times, Feb. 12, 1986, at A6, col. 5; N.Y.

tas have done the same in fighting to maintain their power.<sup>7</sup> In September 1982, civilians and other non-combatants were slaughtered in the refugee camps at Sabra and Shatila, Lebanon, by Lebanese-Christian forces dependent on Israel.<sup>8</sup> These tragic episodes and events exemplify the ugly saga of terrorism, a modern "mal du siecle" that masks as righteous warfare.

A war of national liberation is, by definition, murderously violent—"a war that gives no quarter."<sup>9</sup> Such a war inevitably turns many of the combatants on both sides into victims, executioners, or both.<sup>10</sup> The important question today is whether certain conduct—whether perpetrated by governmental officials, soldiers, police, freedom fighters, insurgents in a civil war, or dissidents—is criminal, notwithstanding that it may be deemed by nations and other groups to be acceptable or even "morally" justifiable because of the cause it supports or promotes.

But if killing innocents is deemed effective or necessary to promote a desired end—even if it actually is an efficient means to intimidate a government or dissident group or to render a population insecure—it does not need to be accepted as morally justified or legal.<sup>11</sup> An irony

Times, Oct. 19, 1985, at 3, col. 1; N.Y. Times, July 20, 1985, at 3, col. 5.

7. Neier, *supra* note 6. See N.Y. Times, July 20, 1985, at A3, col. 5 (denial of charges that "Nicaragua was backing terrorists").

8. L. GREEN, *ESSAYS ON THE MODERN LAW OF WAR* 215, 228-37 (1985).

9. Sartre, *Preface* to F. FANON, *THE WRETCHED OF THE EARTH* 18 (C. Farrington trans. 1963). See also R. ARON, *HISTORY AND THE DIALECTIC OF VIOLENCE* 185-93 (B. Cooper trans. 1975); Friedlander, *Terrorism and National Liberation Movements: Can Rights Derive from Wrongs?*, 13 CASE W. RES. J. INT'L L. 281 (1981).

10. See A. CAMUS, *NEITHER VICTIMS NOR EXECUTIONERS* 27 (D. MacDonald trans. 1972). See, e.g., T. TAYLOR, *NUREMBERG AND VIETNAM: AN AMERICAN TRAGEDY* 41, 124-25 (1970) [hereinafter T. TAYLOR, *NUREMBERG AND VIETNAM*] (eyewitness account of German SS killing Jews, Nuremberg Doc. 2922-PS; eyewitness accounts of killing in Son My during Vietnam war).

11. Even within war, some conduct has always been unjustifiable or unacceptable. A fight for survival or even one for gaining or retaining power, may cause people to do unspeakable things, but people or law need not justify or even accommodate such behavior. This has long been recognized. As early as 634 A.D., Caliph Abu Bakr charged the Moslem Arab Army invading Christian Syria: "Do not commit treachery, nor depart from the right path. You must not mutilate, neither kill a child or aged man or woman. . . ." Solf, *Protection of Civilians Against the Effects of Hostilities Under Customary International Law and Under Protocol I*, 1 AM. U.J. INT'L L. & POL'Y 117, 118 (1986) (quoting M. KHADDURI, *WAR AND PEACE IN THE LAW OF ISLAM* 102 (1955). See also SUN TZU, *THE ART OF WAR* 75-76 (S. Griffith trans. 1963) (there is an obligation to care for wounded and prisoners of war). The killing of infants, for example, has almost always been regarded as murder—prosecutable and sometimes prosecuted. See Solf, *supra*, note 10. See also *United States v. Calley*, 22 C.M.A. 534, 48 C.M.R. 19 (1973); *United States v. List*, vol. XI, *Trials of War Criminals*, at 1246. See generally T. TAYLOR, *NUREMBERG AND VIETNAM*, *supra* note 10. The U.S. military atrocities in Vietnam were not as sporadic as first believed, but endemic—and clearly constituted war crimes or terrorism. For example:

arises when one who is oppressed or regards himself as oppressed claims that a child is the enemy because she will inherit the benefits of the oppressors, or when he bombs or attacks women and children in a refugee camp or town which he believes harbors "terrorists." Once that occurs, he becomes caught up in some "infernal dialectic that whatever kills one side kills the other too, each blaming the other and justifying his violences by the opponent's violence. The eternal question as to who was first responsible loses all meaning. . . ."12

It is easy to slip into the infernal dialectic. From the perspective of those who are oppressed, it is easy to believe that all law, including that prohibiting violence against innocents, works to perpetuate the oppression.<sup>13</sup> They may argue that such law is itself an age-old oppression and

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By 1969, American aircraft had engaged in 39 distinct bombing attacks on the internationally renowned leper sanatorium in Quyuah Lap, North Vietnam. The roofs of the buildings in the sanatorium were painted with the Red Cross. Nevertheless, this humanitarian, non-military target was a favorite among United States pilots. . . .

D'Amato, *Public International Law as a Career*, 1 AM. U.J. INT'L L. & POL'Y 13 (1986). See also D'Amato, Gould & Woods, *War Crimes and Vietnam: The "Nuremberg Defense" and the Military Service Register*, 57 CALIF. L. REV. 1055, 1086 (1969). Professor D'Amato quotes a Vietnam pilot to show the "psychology" behind this kind of bombing mission: "When you hit school buildings, or hospitals, or especially dams, you have a feeling of accomplishment. You see the effects below in terms of scattering adults and children, or water bursting and knocking down houses, or buildings caving in." D'Amato, *Public International Law as a Career*, *supra* at 13. The United States is hardly alone in having to bear responsibility for such slaughter of innocents. The Soviet Union has been accused of numerous atrocities in Afghanistan. See COUNTRY REPORTS, *supra* note 5, at 1159-69. Although some argue that war crimes are not terrorism, precisely because they are war crimes. The laws of war obtain for war crimes and, thus, the distinction ought to be maintained carefully. Moreover, it is argued that some conduct may be allowed in war that would not be allowed in peacetime. See Address by L. Green, Conference on Human Rights and Terrorism, U. of Southern California (Mar. 20, 1987) (author's notes). See also L. GREEN, ESSAYS ON THE MODERN LAW OF WAR, *supra* note 8, at 1-26; INT'L L. ASS'N REP. ON INT'L TERRORISM 123, 131 (1982). The distinction is appropriate, but certain core conduct—certainly that condemned by the laws of war, such as killing or torturing prisoners, and unnecessarily injuring or endangering non-combatants—are, a fortiori, condemnable and condemned in time of peace. See *infra* note 24 and accompanying text.

12. A. Camus, *Appeal for a Civilian Truce in Algeria* (lecture given in Algiers in Feb. 1956), in RESISTANCE, REBELLION, AND DEATH 131, 135, 137 (J. O'Brien trans. 1960). "[Even if] murder is in the nature of man, the law is not intended to reproduce that nature." A. Camus, *Reflections on the Guillotine*, *id.* at 174, 198. Camus was certainly right in observing that humanity generally does not want to be either victim or executioner. See A. CAMUS, NEITHER VICTIMS NOR EXECUTIONERS, *supra* note 10, at 27.

13. Jean-Paul Sartre put the argument well:

A fine sight they are too, the believers in non-violence, saying that they are neither executioners nor victims. Very well then; if you're not victims when the government which you've voted for, when the army in which your younger brothers are serving without hesitation or remorse have undertaken race murder, you are, without a shadow of doubt, executioners. . . . Try to understand this at any rate: if violence began this very evening

amounts to its own form of violence against innocents—themselves. Alternatively, they may opt to reject the rules prohibiting violence against civilians, as a means to break the yoke of oppression. They might reason that since the rules of today's international society foster oppression and violence against the oppressed, the oppressed are not bound to obey those rules.

However valid the arguments of the oppressed in today's international community, any violence they direct against civilians only works to allow the oppressors to feel more justified in their oppression, or at least in using violence to maintain their power. Innocent civilians attacked by those representing or claiming to represent the oppressed look for support to their governments, which tends in turn to increase their own counter-violence against the offenders. It is a vicious and terrible cycle.

The best way to combat terrorism is to work at eliminating its causes—the oppression and depredation that are forms of terrorism themselves. Domestic and international law provide means to combat both aspects of terrorism: to keep pressure on those who perpetrate oppression and to prosecute and punish all violence against innocents for purposes of intimidation, or for other military, political or religious ends.

Unfortunately, some ideologues believe that terrorism is inevitable, and that the rule of law may be pushed aside to combat it. This gives rise to the notion that some violence against civilians or against those perceived as enemies is justified, and hence, legal. This is the illogic of those who wish to promote the idea that there is no law when it comes to international relations.<sup>14</sup> It is ultimately self-defeating. The purpose of this article is to examine the legal bases upon which the assertion of jurisdiction over terrorists and terrorist acts may be founded, so that

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and if exploitation and oppression had never existed on the earth, perhaps the slogans of non-violence might end the quarrel. But if the whole regime, even your non-violent ideas, are conditioned by a thousand-year-old oppression, your passivity serves only to place you in the ranks of the oppressors.

Sartre, *supra* note 9, at 21.

14. It is the illogic of the executive branch that has attempted to eviscerate the Constitution when the Constitution stands in the way of executive policies in matters of foreign relations. See Blakesley, *The Evisceration of the Political Offense Exception to Extradition*, 15 DEN. J. INT'L L. & POL'Y 109 (1986) [hereinafter Blakesley, *Evisceration of the Political Offense Exception*]. See generally F. WARMUTH & E. FIRMAGE, *TO CHAIN THE DOG OF WAR: THE WAR POWER OF CONGRESS IN HISTORY & LAW* (1986); Blakesley, *An Essay on the Executive Branch's Attempt to Eviscerate the Separation of Powers—Thoughts Prompted by To Chain the Dog of War*, 1987 UTAH L. REV. 451 [hereinafter Blakesley, *Essay on . . . the Dog of War*].

those responsible for such conduct can be held accountable under law. The article also considers the priorities that may arise when concurrent jurisdiction exists. International law and the domestic law of virtually all states do provide bases for the assertion of jurisdiction over terrorist activity.

The U.S. Congress, for one, has promulgated legislation to this end.<sup>15</sup> In August 1986, Congress enacted the Omnibus Diplomatic Security and Antiterrorism Act of 1986,<sup>16</sup> condemning terrorist violence and providing jurisdiction to extradite or prosecute its perpetrators. The Act provides, among other things, for the domestic prosecution of those who kill American citizens abroad when the offense was "intended to coerce, intimidate, or retaliate against a government or a civilian population."<sup>17</sup> Thus, Congress has exercised its prerogative to al-

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15. Other nations have also been active recently in the effort to combat terrorism. For example, the Italian government has been working to prevent the use of Italy as a base for terrorist acts and has developed information in conjunction with its investigation and prosecution of 14 persons involved in the *Achille Lauro* hijacking. See *supra* notes 2-3 and accompanying text. The Italians have turned up information implicating several individuals in specific terrorist acts. See Simonetti & Zagaris, *International Terrorism: Italian Investigation into International Terrorism*, 2 INT'L ENFORCEMENT L. RPTR. 228 (1986). Some of the increased international activity in combatting terrorism may have been prompted by an agreement at the 1986 Tokyo Summit, in which seven industrialized nations and the European Economic Community representatives agreed to cooperate and to take domestic measures consistent with international and domestic law to combat terrorism. Some of the proposed measures included: strict limits on the size of the diplomatic corps; denial of entry to all persons, including diplomatic personnel, who have been expelled or excluded from one of the summit states on suspicion of involvement in terrorism; improved extradition procedures within due process requirements; stricter immigration and visa requirements and procedures; providing for the closest possible bilateral and multilateral cooperation among police, security and other relevant organizations. See *Tokyo Summit Agrees on Methods to Fight International Terrorism*, 2 INT'L ENFORCEMENT L. RPTR. 138 (1986). See also Zagaris & Simonetti, *Judicial Assistance Under Bilateral Treaties to Combat International Terrorism*, in LEGAL RESPONSES TO INTERNATIONAL TERRORISM: U.S. PROCEDURAL ASPECTS (M. Bassiouni ed. 1987) (publication forthcoming).

16. 18 U.S.C. § 2331 (Supp. 1986).

17. *Id.* at § 2331(e). The Act provides for fines and imprisonment for those who commit murder or manslaughter against American nationals abroad, or for those who attempt or conspire to do so. The legislative history makes it clear that the Act does not "reach nonterrorist violence inflicted upon American victims. Simple barroom brawls or normal street crime, for example, are not intended to be covered by this provision. . . ." Omnibus Diplomatic Security and Antiterrorism Act of 1986, H.R. REP. NO. 494, 99th Cong., 2d Sess., at 87 (1986), reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS 1865, 1986. Earlier draft bills applied a broad passive-personality principle theory of jurisdiction, see *infra* notes 137-54 and accompanying text, so as to include all common criminal violence against American nationals. See *Antiterrorism Act of 1986: Hearings on H.R. 4292 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 99th Cong., 2d Sess. 57-62 (1986) (statement of Christopher L. Blakesley). Rep. Ron Wyden proposed the adoption of his Terrorist Prosecution Act of 1986, H.R. 4288, designed to extend 18 U.S.C. §§ 1114 & 1116, which protect our diplomats and other internationally protected persons, to all U.S.

## low jurisdiction over extraterritorial terrorist violence. The legislation

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citizens. *Id.* at 18-21. Apparently, H.R. 4288 is to track the language of the Terrorist Prosecution Act of 1985, S. 1429, as amended, which provides in pertinent part: "the purpose of this chapter is to provide for the prosecution and punishment of persons who, in furtherance of terrorist activities or because of the nationality of the victims, commit violent acts upon Americans outside the United States or conspire outside the United States to murder Americans within the United States." (emphasis added). This language does pose a problem, if it is not intended to allow jurisdiction to be asserted for non-terroristic type violence against Americans. If it is not intended to reach a robbery-killing of an American abroad, where the perpetrator acted because he believed that Americans have more cash on them, or a bar fight that ends in homicide when the violence was directed towards an American, then the definition of the crime needs clearly to be tied to some definition of terrorism.

The relevant theories allowing jurisdiction to be asserted over extraterritorial crime are the "protective principle" and the "passive personality principle." The protective principle is applicable whenever the criminal conduct impacts or threatens our national sovereignty or an important governmental function. *See infra* notes 30 & 115-36. Passive personality theory, on the other hand, applies simply on the basis of the victim's nationality. *See infra* notes 33-36 & 137-54 and accompanying text. This latter basis for jurisdiction is not widely accepted. It has been roundly rejected in the U.S. because we have not wanted to assert jurisdiction in the case of the robbery-killing or bar brawl or common murder. Moreover, we do not want to extradite when the violence occurs in our country and the victim is a national of a foreign country. *See Blakesley, Terrorism: Problems Relating to and Conflicts of Jurisdiction*, in *INTERNATIONAL TERRORISM: U.S. PROCEDURAL ASPECTS* (M. Bassiouni ed. 1987) (publication forthcoming). The Act apparently is designed to extend to all United States citizens, regardless of status, the protections of 18 U.S.C. §§ 1114-1116 (1982). The domestic charges levied against the *Achille Lauro* hijackers, *see supra* note 3 and accompanying text, appear to have been based on yet another relevant Congressional act, the 1984 Act for the Prevention and Punishment of the Crime of Hostage Taking, 18 U.S.C. § 1203 (Supp. 1986). *See* N.Y. Times, Oct. 11, 1985, at A11, col. 4. *See also* Note, *U.S. Legislation to Prosecute Terrorists: Antiterrorism or Legalized Kidnapping?*, 18 VAND. J. TRANSNAT'L L. 915, 916 n.2 (1985). The Hostage Act provides that:

[W]hoever, whether inside or outside the United States, seizes or detains and threatens to kill, to injure, or to continue to detain another person in order to compel a third person or governmental organization to do or abstain from doing any act as an explicit or implicit condition for the release of the person detained, or attempts to do so, shall be punished by imprisonment for any term of years or for life.

18 U.S.C. § 1203(a) (1984). *See also* Terrorist Death Penalty Act, S. 1508, 99th Cong., 1st Sess., 131 CONG. REC. S10, 180 (1985) (proposal to amend 18 U.S.C. § 1203, to include the death penalty). Other relevant legislation includes 10 U.S.C. §§ 818, 821 (1976) (providing for war crimes prosecutions); 10 U.S.C. §§ 918-19 (1976) (the murder and manslaughter provisions of the Uniform Code of Military Justice); 18 U.S.C. § 7(7) (1982 & Supp. 1985) (creating a special maritime jurisdiction, under which certain acts may be punished if they occur at "any place outside the jurisdiction of any nation with respect to an offense by or against a national of the United States"); 18 U.S.C. § 1651 (1982) (piracy); 49 U.S.C. § 1472(i) (1976) (making air hijacking illegal). *See generally* Paust, *United States Military Law*, in *LEGAL RESPONSES TO INTERNATIONAL TERRORISM: U.S. PROCEDURAL ASPECTS* (M. Bassiouni ed. 1987) (publication forthcoming); Paust, *Aggression Against Authority: The Crime of Oppression, Politicide and Other Crimes Against Human Rights*, 18 CASE W. RES. J. INT'L L. 283 (1986) [hereinafter Paust, *Aggression Against Authority*]; Paust, *Federal Jurisdiction over Extraterritorial Acts of Terrorism and Nonimmunity for Foreign Violators of International Law Under the FSIA and the Act of State Doctrine*, 23 VA. J. INT'L L. 191 (1983) [hereinafter Paust, *Federal Jurisdiction*]. Furthermore, in addition to the aforementioned congressional acts, the United States government is a

does not, however, articulate the theoretical underpinnings of its jurisdiction. This article explores which of the five traditional theories of jurisdiction is most appropriate under various circumstances. It first defines and develops the traditional theoretical bases in international law for asserting jurisdiction over extraterritorial crime, focusing on terrorism. Finally, the article discusses United States law of jurisdiction over extraterritorial crime, contrasting it with that of other nations.

## I. DEFINING TERRORISM

Some have argued that there is no appropriate legal definition of terrorism because the notion of what constitutes terrorism is so very subjective. They argue further that international law is ineffectual against terrorism, and therefore irrelevant to combating it, because states often refuse to extradite or prosecute perpetrators of terrorist violence when it is perpetrated for a cause those states deem good.<sup>18</sup> The fundamental flaw in this reasoning, however, is that it is irrelevant in seeking to define terrorism or in proposing a theory of jurisdiction over such acts that some states do not cooperate in prosecuting or extraditing those with whose politics they might sympathize. Failure to enforce the law does not negate the law itself;<sup>19</sup> consistent enforcement is not an essential precondition for law to exist.<sup>20</sup> International law, like its domestic counterparts, is an inherently valid and effective means of combating terrorism.

This article suggests that the best protection against terrorism is a consistent national policy that condemns oppression and other terrorist acts and that clearly refuses to participate in or to promote them. The rule of law can condemn oppression and terrorist violence and provide

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party to the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Done at New York, 14 Dec. 1973, G.A. Res. 3166 (XXVIII), 28 U.N. GAOR Supp. (No. 30) at 146, U.N. Doc. A/9030, 28 U.S.T. 1975, T.I.A.S. No. 8532 (Feb. 20, 1977).

18. See generally Oliver, *International Law, Morality, and the National Interest: Comments for a New Journal*, 1 AM. U.J. INT'L L. & POL'Y 57 (1986).

19. A. D'AMATO, *INTERNATIONAL LAW: PROCESS AND PROSPECT* 2-10 (1987); D'Amato, *Is International Law Really Law?*, 1 AM. U.J. INT'L L. & POL'Y 1295-96 (1986). See T. TAYLOR, *NUREMBERG AND VIETNAM*, *supra* note 10, at 32, 39 (noting historical tendency to prosecute spasmodically, and the specific practice of not prosecuting violations that occurred in the Vietnam War); Schachter, *In Defense of International Rules on the Use of Force*, 53 U. CHI. L. REV. 113, 119-24 (1986). See generally Derby, *Duties and Powers Respecting Foreign Crimes*, 30 AM. J. COMP. L. 523 (Supp. 1982).

20. D'Amato, *Is International Law Really Law?*, *supra* note 19, at 1293-94; Fisher, *Bringing Law to Bear on Governments*, 74 HARV. L. REV. 1130, 1131-32 (1961). See generally R. FISHER, *IMPROVING COMPLIANCE WITH INTERNATIONAL LAW* 39-72, 236-300 (1981).



the means of thwarting it, by, for example, prosecuting and punishing terrorists of all types. But a rule of law, by its very articulation and long-term, consistent application, can only influence governments and groups if each branch of every government consistently adheres to and promotes the rule of law condemning terrorist violence from any and every quarter.

In order to establish such a consistent policy, it is necessary to provide a legal definition of the crime or crimes that we condemn as terrorism. Because many would tolerate—and the law would often condone—violence to escape oppression and violence used in self defense, we must distinguish criminal acts of terrorism from justifiable violence perpetrated against an enemy in war, rebellion or insurgency. Some commentators have suggested that terrorism represents a concept incapable of precise legal definition,<sup>21</sup> but in practice, of course, no legal definition of anything makes any sense, except in terms of the purpose for which it is applied. Once we can decide what our purpose is in seeking to prevent the violence most people fear and call “terrorism,” we will have the working definition we need. Thus, this article proposes a very limited definition of terrorism: *the intentional or extremely reckless application of violence against innocent individuals or property*

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21. The late Prof. Richard Baxter articulated the common sense of futility in trying to do so: “We have cause to regret that a legal concept of ‘terrorism’ was ever inflicted upon us. The term is imprecise; it is ambiguous; and above all, it serves no operative legal purpose.” Baxter, *A Skeptical Look at the Concept of Terrorism*, 7 AKRON L. REV. 380, 380 (1974). See also J. MURPHY, PUNISHING INTERNATIONAL TERRORISTS: THE LEGAL FRAMEWORK FOR POLICY INITIATIVES 3 (1985) [hereinafter *J. Murphy, Punishing Terrorists*] (generally agreeing with Baxter). See also generally Paust, *A Definitional Focus*, in TERRORISM: INTERDISCIPLINARY PERSPECTIVES 18 (1977) (agreeing with Baxter in part). I agree with what I believe is the sense of Prof. Baxter’s statement of regret as to a legal definition of terrorism. It is not good to have a legal definition of terrorism, or to even use the term, if it is used in legalistic quibbling and obfuscation or as a rhetorical device to achieve ulterior ends or even to justify counter-conduct which may in itself be criminal or violate civil liberties or constitutional rights. See Blakesley, *Evisceration of the Political Offense Exception*, *supra* note 14; Blakesley, *An Essay on . . . the Dog of War*, *supra* note 14. See, e.g., the so-called Schultz Doctrine, which would apply military force to preempt terrorism or to retaliate against terrorists or against states supporting, harboring or training them. Address by Secretary of State George Schultz, Low Intensity Warfare Conference, Nat’l Defense U., Washington, D.C., reprinted in 25 I.L.M. 204, 206 (1986). Secretary of Defense Caspar Weinberger has opposed such responsive military strikes, because they “kill women and children.” Paust, *Responding Lawfully to International Terrorism: The Use of Force Abroad*, 8 WHITTIER L. REV. 711, 712 (1986). Moreover, one can agree with Prof. Baxter in another sense: the conduct that this article condemns as a war crime or genocide or killing of non-combatant civilians for political or military ends, for example, is universally condemned as common crime. See Friedlander, *The Enforcement of International Criminal Law*, 17 CASE W. RES. J. INT’L L. 79, 88 (1984).

*for the purpose of obtaining a military, political or religious end.*<sup>22</sup>

Without engaging extensively in debate over what the proper definition of terrorism might be, it is nevertheless appropriate to determine what sort of *conduct* clearly constitutes terrorism.<sup>23</sup> Any conduct by which the perpetrators exert violence upon innocents—including taking them hostage—in order to reap some political or military advantage or benefit, is terrorism. In this sense, terrorism in the form of war crimes can be committed by the military even during a war<sup>24</sup>—when the state allows, or ignores, purposeful or reckless killing of persons *hors de combat*.<sup>25</sup> A crime against humanity, such as genocide, torture or apartheid is a form of terrorism.<sup>26</sup> Clearly, terrorism in its most commonly recognized form is violence against innocents—those *hors de combat*, for example—committed by private individuals or members of political or military groups to fulfill or further their political or military ends. On the other hand, killing or other violence directed against the opposition in military, civil or international strife, for political or military purposes, is not terrorism.

Whether terrorist violence is committed in a setting in which it should be called a war crime, a crime against humanity, or state or

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22. This is a sort of “rough and ready definition which will not stand up under sustained [critical] scrutiny,” Baxter, *A Skeptical Look at the Concept of Terrorism*, *supra* note 21, at 380, but which is useful for the purpose of establishing jurisdiction and providing for extradition and prosecution.

23. For further discussion of a legal definition of terrorism, see Khan, *A Legal Theory of International Terrorism*, 19 CONN. L. REV. 945 (1987).

24. Note that the definition is broad enough to include conduct that would be a war crime during armed conflict or common criminal violence that is perpetrated domestically. It is certainly appropriate to differentiate among these types of violence and to recognize that they may fit into separate categories. Nevertheless, the core concept of my definition is the *use of innocents (non-combatant, civilian population) as a means to achieving a political, military, or religious end*. Such conduct is criminal whether or not it occurs during a war (war crime); whether it is perpetrated by a state government against persons within its borders or by persons within a state's borders against other persons within the state's borders; or whether it is perpetrated across national boundaries. For the purposes of this article, and for purposes of jurisdiction, extradition, and prosecution, it is all the same. See generally L. GREEN, *ESSAYS ON THE MODERN LAW OF WAR*, *supra* note 8, at 215-237. See also *supra* note 11.

25. See *United States v. Calley*, 22 C.M.A. 534, 48 C.M.R. 19 (1973); T. TAYLOR, *NUREMBERG AND VIETNAM*, *supra* note 10, at 123-53. See also *supra* note 11 and accompanying text.

26. See *infra* notes 47-77 and accompanying text. See, e.g., pending request by Argentina for extradition of Gen. Carlos G. Suarez Mason, accused of having been responsible, when he was in charge of the Buenos Aires area, for the disappearances and deaths of hundreds of Argentine and non-Argentine citizens. Extradition Request filed in the Office of the U.S. Attorney for the Northern District of California. In the Matter of the Requested Extradition of Carlos G. Suarez Mason, Crim. No. 87-23 Misc. (D.L.J.), on file in Office of Clerk, U.S. District Court for the Northern District of California.

group terrorism, is unimportant for purposes of this article. It is all criminal. Terrorism from this point of view is simply violent crime, or a grouping of several independent crimes committed to promote the indicated political or military end, and so it has traditionally been considered by, and condemned under, Anglo-American, continental and Islamic jurisprudence, and international law.<sup>27</sup>

## II. TERRORISM AND THE TRADITIONAL BASES OF JURISDICTION OVER EXTRATERRITORIAL CRIME

A corollary to the educational and normative nature of law and the impact it can have on protecting against terrorism is the enforcement of law. Significant elements of this protective scheme are the condemnation, extradition, prosecution, and punishment of terrorists. Neither international law nor domestic law can have any immediate impact on a terrorist, however, unless there exists legislative, adjudicatory, and enforcement jurisdiction.<sup>28</sup> Moreover, any international legal

27. See Friedlander, *Mere Rhetoric Is Not Enough*, HARV. INT'L REV., May-June 1985, at 4, 6 (noting that the acts that constitute terrorist acts are crimes and have been recognized and proscribed as such in Anglo-American and Continental jurisprudence); Solf, *supra* note 11. Friedlander, *supra* note 21, at 88 (such crimes are universally condemned as criminal). The same was true even among ancient civilizations. For example, among the Cheyenne, poisoning the water supply was viewed as a major, terroristic type of crime. See R. Fairbanks, *A Discussion of the Nation State Status of American Indian Tribes: A Case Study of the Cheyenne Nation* 31 (1976) (unpublished LL.M. thesis in Columbia University School of Law Library). There are also contemporary domestic law definitions of terrorism. As part of a provision creating rewards for information concerning terrorist acts, an *act of terrorism* is defined as:

an activity that —  
 (A) involves a violent act or an act dangerous to human life that is a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; and (B) appears to be intended —  
 (i) to intimidate or coerce a civilian population;  
 (ii) to influence the policy of a government by intimidation or coercion; or  
 (iii) to affect the conduct of a government by assassination or kidnapping.  
 18 U.S.C. § 3077 (Supp. 1986).

28. The term jurisdiction may be defined as the authority to affect legal interests—to prescribe rules of law (legislative or prescriptive jurisdiction), to adjudicate legal questions (judicial jurisdiction) and to compel or induce compliance (enforcement jurisdiction). L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT, *INTERNATIONAL LAW, CASES AND MATERIALS* 420 (1980) [hereinafter L. HENKIN, *INTERNATIONAL LAW*]; *RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES* § 401 (Tent. Draft No. 6, 1985) [hereinafter *RESTATEMENT DRAFT*]. The definition, nature, and scope of jurisdiction vary depending on the context in which jurisdiction is to be asserted. United States domestic law, for example, defines and applies notions of jurisdiction pursuant to the constitutional provisions relating to the separation of powers, federalism, and due process. Within the United States, jurisdiction is defined and applied in a variegated fashion depending on whether a legal problem is within the federal or the state sphere. Conflicts of jurisdic-

definition of the crime, and any action against terrorism, must be viewed in relation to jurisdiction—which provides the only practical means for applying the law to reality.

In 1935, Harvard research in the area of international law revealed five traditional bases of jurisdiction over extraterritorial crime:<sup>29</sup>

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tion are resolved by reference to the full faith and credit clause, U.S. CONST. art IV, § 1 (“full faith and credit shall be given in each state to the Public Acts, Records and judicial proceedings of every other state”), and other constitutional principles. *See generally* *Zschernig v. Miller*, 389 U.S. 429, 440-41 (1968) (states are precluded from infringing on the exclusive federal authority in matters of foreign affairs); *Hines v. Davidowitz*, 312 U.S. 52, 62-65 (1941) (states’ jurisdiction to prescribe law is limited by the supremacy clause, U.S. CONST. art. VI, § 2, as well as by federal law, international custom and treaties); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936) (identifying federal authority based on “foreign affairs power” incident to sovereignty). The international setting gives rise to another set of definitions and applications of jurisdiction. International law has failed to develop jurisdictional rules that are as comprehensive or precise as the domestic jurisdictional laws of individual nations. *See* L. HENKIN, *INTERNATIONAL LAW*, *supra* at 421. The set of rules relating to legislative, judicial, and enforcement jurisdiction in the international criminal setting is not as well developed as the parallel domestic laws of the various nations. *See generally* *Zagaris & Rosenthal, United States Jurisdictional Considerations in International Criminal Law*, 15 CAL. W. INT’L L.J. 303, 314 (1985) (hereinafter *Zagaris and Rosenthal, Jurisdictional Considerations*). Various bodies of law limit a state’s authority to apply domestic law to events occurring outside that state’s territory. *See generally* *Blakesley, Extraterritorial Jurisdiction*, in 2 *INTERNATIONAL CRIMINAL LAW* 5 (M. Bassiouni ed. 1986) [hereinafter *Blakesley, Extraterritorial Jurisdiction*]; *Blakesley, United States Jurisdiction Over Extraterritorial Crime*, 73 J. CRIM. L. & CRIMINOLOGY 1109 (1982) [hereinafter *Blakesley, Jurisdiction*]; *Blakesley, A Conceptual Framework for Extradition and Jurisdiction Over Extraterritorial Crime*, 1984 UTAH L. REV. 685 [hereinafter *Blakesley, Conceptual Framework*]. The limiting bodies of law include constitutional limitations and public international law. *See, e.g.*, *Cutting Case*, 1887 For. Rel. 751 (1888) (sanction for violating international law on jurisdiction may be an unfavorable diplomatic protest); *The S.S. “Lotus” Case (France v. Turkey)*, 1927 P.C.I.J. (ser. A) No. 9 (judgment of Sept. 7, 1927) (sanction may be an unfavorable judgment in the Int’l Court of Justice). Other limitations include domestic law, *see* *Reese, Limitations on Extraterritorial Application of Law*, 4 DALHOUSIE L.J. 589, 589 (1978), and the law of the foreign state itself, which may preclude enforcement of the judgment rendered by the state assuming jurisdiction or seeking extradition. *See* *Homberger, Recognition and Enforcement of Foreign Judgments*, 18 AM. J. COMP. L. 367, 375 n.55 (1970). For discussion of the dual or double criminality condition in this context, *see* *Blakesley, Conceptual Framework, supra*, at 731-35.

29. Harvard Research in International Law, *Draft Convention on Jurisdiction with Respect to Crime*, 29 AM. J. INT’L L. 435, 445 (Supp. 1935) [hereinafter *Harvard Research*] (part of an effort by the American Society of International Law to codify international law). Pertinent judicial decisions in the United States on international law, as well as most international law casebooks and treatises, have adopted the Harvard Research designations. *See, e.g.*, *Rivard v. United States*, 375 F.2d 882, 885 (5th Cir. 1967); *Rocha v. United States*, 288 F.2d 545, 549 (9th Cir. 1961); *United States v. Rodriguez*, 182 F. Supp. 479, 487 (S.D. Cal. 1960); W. BISHOP, *INTERNATIONAL LAW CASES AND MATERIALS* 531, 551, 552 (3d ed. 1971); B. WESTERN, R. FALK & A. D’AMATO, *INTERNATIONAL LAW AND WORLD ORDER* 564 (1980). *See also* *Blakesley, Extraterritorial Jurisdiction, supra* note 28, at 4 n.10; L. HENKIN, *INTERNATIONAL LAW, supra* note 28, at 420-51.

territorial, protective, nationality, universal, and passive-personality.<sup>30</sup>

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30. The "territorial theory" allows for jurisdiction over conduct an element or the effect of which takes place within the territorial boundaries of the state. When an element of an offense occurs within the territory, it is the subjective territorial theory that justifies jurisdiction. The objective territorial theory applies when an effect of an offense impacts on the asserting state's territory. *See infra* note 31.

The "nationality theory" bases jurisdiction on the allegiance or nationality of the perpetrator of the offenses as prescribed by the state of his allegiance, no matter where the offenses take place. *E.g.*, *Rose v. Himely*, 8 U.S. (4 Cranch) 241, 279 (1808) (dictum) (recognizing the existence of the power to punish offenses perpetrated extraterritorially by U.S. nationals); Blakesley, *Extraterritorial Jurisdiction*, *supra* note 28, at 23-27 (extensive discussion and authority for the nationality principle).

The "protective principle" or "injured-forum theory" emphasizes the effect or possible effect of the offense and provides for jurisdiction over conduct deemed harmful to specific national interests of the forum state. *E.g.*, *United States v. Pizzarusso*, 388 F.2d 8, 9 (2d Cir. 1968) (recognizing and clearly describing the protective principle).

The "passive personality principle" extends jurisdiction over offenses where the victims are nationals of the forum state. *E.g.*, French Law of July 11, 1975, No. 75-624, modifying CODE DE PROCÉDURE PÉNALE [C. PR. PÉN.] art. 689 to read: "Any foreigner who, beyond the territory of the Republic, is guilty of a crime, either as author or accomplice, may be prosecuted and convicted in accordance with the disposition of French law, when the victim of the crime is a French national." C. PR. PÉN. art. 689 § 1 (Dalloz 1975) (author's translation).

The "universality theory" allows jurisdiction in any forum that obtains jurisdiction over the person of the perpetrator of certain offenses considered particularly heinous or harmful to humankind generally. *E.g.*, *The Marianna Flora*, 24 U.S. (11 Wheat.) 1, 40 (1826) ("Pirates may, without doubt, be lawfully captured on the ocean by the public or private ships of every nation: for they are in truth common enemies of all mankind, and, as such are liable to the extreme rights of war."). *See also* Convention on the Law of the Sea (Montego Bay Convention), U.N. Doc. A/Conf. 62/122, 21 I.L.M. 1261 (1982) arts. 100-111; M. BASSIOUNI, *INTERNATIONAL CRIME: DIGEST/INDEX OF INTERNATIONAL INSTRUMENTS 1815-1925* (2 vols.), containing references to jurisdictional clauses in international criminal law conventions.

There has been a tendency in the United States recently to expand jurisdiction over extraterritorial crime in a manner inconsistent with these fundamental international law principles. Recent court decisions and *FOREIGN RELATIONS LAW IN THE UNITED STATES* (Tent. drafts, Nos. 1 (1980), 2 (1981), 3 (1982), 4 (1984), 6 (1985), and 7 (1986)), have expanded jurisdiction over extraterritorial crime by extending the objective territoriality principle beyond any actual effect or connection with the territory of the United States. For example, the territorial theory has been applied to thwart extraterritorial narcotics conspiracies when no overt act or other effect has occurred in the United States. *United States v. Winter*, 509 F.2d 975 (5th Cir. 1975), provides a good example of how this erroneous perception has been developed or rationalized. There, the court admitted that in *Ford v. United States*, 273 U.S. 593 (1927) and *Rivard v. United States*, 375 F.2d 882 (5th Cir. 1967), illegal contraband had actually been imported into the U.S.—thus establishing a harmful effect. The court, however, discounted the distinction as being without significance under the facts of the case because the conspiracy had been thwarted before importation could occur, and "because it is immaterial to the commission of the crime of conspiracy whether the object of the conspiracy is achieved." *Winter*, 509 F.2d at 982 (quoting *United States v. Carlton*, 475 F.2d 104, 106 (5th Cir. 1973)). The court said that "[a]n overt act, seeming innocent in itself yet in furtherance of the conspiracy, is sufficient under the law of conspiracy. We see no reason why it should be any different for jurisdictional purposes, to the extent that proof of an overt act is required." *Id.* *See also* *United States v. Cadena*, 585 F.2d 1252 (5th Cir. 1978). The result, of course, is appropriate, but the objective territorial principle is not the appropriate

These bases provide the foundation upon which a state may assert jurisdiction over extraterritorial conduct in violation of the asserting state's criminal law.

The primary bases for assertion of jurisdiction over extraterritorial terrorism would be the universality theory, the protective principle, and the passive-personality principle.<sup>31</sup> The protective principle is applicable

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theoretical vehicle to accomplish it. See Blakesley, *United States Jurisdiction over Extraterritorial Crime*, 73 J. CRIM. L. & CRIMINOLOGY 1109, 1135 n.65 (1982) (additional cases and discussion).

That this practice has caused confusion and indignation among the other nations of the world was made clear in the author's discussion and correspondence with eminent continental jurists in relation to the Conference on New Horizons in International Criminal Law, *Institut Supérieur International des Sciences Criminelles*, Noto, Italy (May 7-12, 1984). Among them are: Prof. Pierre Bouzat, Dean and Professeur Emeritus, Faculté de Droit, Université de Rennes, France; Prof. Georges Levasserur, Professeur Emeritus de Droit Pénal, Faculté de Droit, Université de Paris II, France; Prof. Claude Lombois, Recteur de l'Académie d'Aix-Marseilles, Professeur de Droit Pénal, Université de Paris II, Faculté de Droit, Aix-en-Provence; Prof. Zelco Horvatic, Dean and Professor of Law, University of Zagreb, Yugoslavia; Prof. Joachim Hermann, Professor of Criminal Law and former Dean, Faculty of Law, University of Augsburg, Federal Republic of Germany; Ekkehard Muller-Rappard, Chief Division of Crime Problems, Council of Europe, Strasbourg, France (correspondence); Prof. Renée Koering-Joulin, Faculté de Droit, Université de Strasbourg, France; Prof. Mario Chiavario, Faculta di Giurisprudenza, Università di Torino, Italy (correspondence). See also *United States v. Toyota Motor Corp.*, 569 F. Supp. 1158, 1162-64 (C.D. Cal. 1983) (wrongly stating that the RESTATEMENT DRAFTS articulate international law on the subject of jurisdiction); *Compagnie Européenne des Pétroles S.A. v. Sensor Nederland B.V.*, No. 82/716 (D.Ct. Neth. Sept. 17, 1982) (trans. at 22 Int'l Legal Materials 66 (1983)), cited in Rosenthal, *Jurisdictional Conflicts*, *infra* this note; Diplomatic Note & Comments of the European Community on the Amendments of 22 June 1982 to the U.S. Export Administration Regulations (Aug. 12, 1982), reprinted in Rosenthal, *Jurisdictional Conflicts Between Sovereign Nations*, 19 INT'L L. 487, 489 (1985); A. LOWENFELD, *TRADE CONTROLS FOR POLITICAL ENDS* 80-93 (1977); Craig, *Application of the Trading With the Enemy Act to Foreign Corporations Owned by Americans: Reflections on Fruehauf v. Massardy*, 83 HARV. L. REV. 579 (1970). Often, today, a sixth theory of jurisdiction is articulated. Under what is sometimes called the floating-territorial principle, a "flagship" state is recognized as having jurisdiction over any offense committed on one of its craft or vessels. See generally *Lauritzen v. Larsen*, 345 U.S. 571 (1953); *Empson*, *The Application of Criminal Law to Acts Committed Outside the Jurisdiction*, 6 AM. CRIM. L.Q. 32, 32-33 (1967); George, *Extraterritorial Application of Penal Legislation*, 64 MICH. L. REV. 609, 613 (1966); Note, *Jurisdiction*, 15 TEX. INT'L L.J. 379, 404 n.3 (1980).

31. The objective territorial theory obtains when a significant effect or result of the offense occurs within a nation's territory. *E.g.*, *Strassheim v. Daily*, 221 U.S. 280, 285 (1911) (Holmes, J.) ("[a]cts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a State in punishing a cause of the harm as if he had been present at the effect, if the State should succeed in getting him within its power"); *In re Schwartz*, Judgment of Feb. 25, 1911, 1915 S. I. 171 (Cass. crim., France) (jurisdiction allowed when letter was sent from abroad to France to obtain secret information); C. PR. PÉN. arts. 689-96 (Daloz 1985-86) (France, allowing jurisdiction on the objective territorial theory). When an element of an offense occurs within the territory, it is the subjective territorial theory that justifies jurisdiction. *E.g.*, C. PR. PÉN. art. 693 (Daloz 1985-86) (an offense is considered to have occurred on French territory and to provide French jurisdiction when an act characterizing one of its elements is accomplished in

whenever the criminal conduct had an impact on or threatened the asserting state's national sovereignty, security, or some important governmental function.<sup>32</sup> Passive-personality theory, on the other hand, applies simply on the basis of the victim's nationality.<sup>33</sup> This latter basis of jurisdiction is not widely accepted and has been roundly rejected in the United States,<sup>34</sup> except perhaps in relation to recent terrorism against United States nationals.<sup>35</sup> The United States government has rejected it because it has generally not been deemed appropriate or wise to assert jurisdiction over common crimes committed abroad against our nationals. Moreover, because of the paramount nature of the territorial principle in criminal law,<sup>36</sup> it has not been considered desirable to extradite to a foreign country a defendant who has committed such an offense against a foreign national in the United States. The universality theory, which allows any forum to assert jurisdiction over particularly heinous and universally condemned acts, may appropriately be asserted when no other state has a prior interest in asserting jurisdiction.<sup>37</sup>

The protective principle appears to be appropriate for many acts of terrorism. Because terrorist violence is by definition purposeful and ma-

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France.). It is subjective in the European sense that an element or subjective aspect of the offense, rather than the object, occurred within the territory. United States courts have over the years found jurisdiction where any element of an offense occurs within the state. *E.g.*, *People v. Botkin*, 132 Cal. 231, 232-33, 64 P. 286, 287 (1901); *State v. Sheehan*, 33 Idaho 553, 560-61, 196 P. 532, 534 (1921); *People v. Zayas*, 217 N.Y. 78, 81-83, 111 N.E. 465, 465-66 (1916); *People v. Licenziata*, 199 A.D. 106, 110, 191 N.Y.S. 619, 622 (1921). *See also*, *Criminal Jurisdiction and the Territorial Principle*, 30 MICH. L. REV. 238 (1931); Leavitt, *Jurisdiction Over Crimes*, 16 J. CRIM. L. & CRIMINOLOGY 316 (1925). Some cases construing newer statutes similar to the old New York laws are: *People v. Utter*, 24 Cal. App. 3d 535, 550, 101 Cal. Rptr. 214, 224 (1972), *aff'd in part, rev'd in part*, 34 Cal. App. 3d 366, 108 Cal. Rptr. 909 (1973); *Connors v. Turner*, 29 Utah 2d 311, 312, 508 P.2d 1185, 1185 (1973). *See also* cases cited in Schwab, *Have Crime, Will Travel: Borderlines and Criminal Jurisdiction*, 50 CAL. ST. B.J. 30 (1975). In sum: The objective territorial theory is only appropriate when an element of the terror-violence is committed on the territory or when the terrorism has an actual impact on the asserting state's territory. The objective territorial, or "effects," theory is not appropriate for asserting jurisdiction over thwarted extraterritorial conspiracies to commit terrorism in the asserting state, or to assert jurisdiction over terrorism committed abroad. The subjective territorial principle is appropriate to assert jurisdiction over terrorism or conspiracy to commit terrorism when an element of the offense has occurred within the asserting state, even when the terroristic violence has taken place or was intended to take place abroad.

32. *See supra* note 30 and *infra* notes 115-36 and accompanying text.

33. *See supra* note 30 and *infra* notes 137-55 and accompanying text.

34. *See infra* notes 148-51 and accompanying text.

35. *See* Omnibus Diplomatic Security and Anti-Terrorism Act of 1986, *supra* notes 16-17.

36. *See infra* notes 84-90 and accompanying text.

37. *See supra* note 30 and *infra* notes 45-83 and accompanying text.

licious and is aimed at a state's innocent citizens or government, for the purpose of intimidation or procuring some political or military end, such violence clearly has an impact on a state's sovereignty.<sup>38</sup> Thus, there is generally no need to call upon the more controversial and less accepted passive-personality theory.<sup>39</sup> The universality principle, which allows the assertion of jurisdiction over certain heinous offenses, even though the offenses have no effect on the territory, security or sovereignty of the asserting state, may also often be appropriate to address the growing problems of terrorism today. As defined in this article,<sup>40</sup> terrorism has reached the stage where it may often fit within the universality theory.

Although the universality, protective, and passive-personality theories are all potentially applicable, priorities for states having concurrent jurisdiction must be set, to avoid diplomatic problems and conflicts of jurisdiction. A likely and effective hierarchy of jurisdiction would give first priority to the state on whose territory the violence actually has an impact. This would obviously involve an objective territorial theory of jurisdiction and would be inapplicable to wholly extraterritorial acts of violence. Under a protective principle, the state whose security, or important governmental functions or interests are damaged would have second priority. Under the passive-personality theory, the state of the

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38. It may also be argued that certain types of conduct in which one takes violent action, knowing there is a high degree of risk to innocents, may be termed terrorism. Such risk-taking with the lives and well-being of innocent people is similar to conduct punished as felonious reckless homicide in substantive criminal law. For example, if an official orders a pilot to bomb a section of a town wherein it is believed that an enemy training facility or sanctuary might be hidden, hoping that no innocent civilians will be killed or injured, although knowing the high degree of risk to those *hors de combat*, such conduct might be considered criminal if the military value of the military target is insignificant compared to the risk to non-combatants. This may be classic depraved heart murder. See R. PERKINS & R. BOYCE, *CRIMINAL LAW* 59-61 (3d ed. 1982) (defining and analyzing depraved heart murder or wanton and willful disregard of unreasonable human risk).

39. The State of Israel applied the passive-personality theory as a basis for asserting jurisdiction over Adolf Eichmann, deciding that it was most appropriate to assert jurisdiction based solely on the national character of the victims. *Attorney Gen. v. Eichmann*, 36 I.L.R. 18 (D. Ct. Jerusalem 1961), *aff'd.*, 36 I.L.R. 277 (S. Ct. Isr. 1962). See McCredie, *Contemporary Uses of Force Against Terrorism: The United States Response to Achille Lauro—Questions of Jurisdiction and Its Exercise*, 16 GA. J. INT'L & COMP. L. 435, 438 (1986); Silving, *In re Eichmann: A Dilemma of Law and Morality*, 55 AM. J. INT'L L. 307, 331 (1961). For further critical discussion of the passive-personality theory, see L. HENKIN, *HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY* 209 (1968); M. McDUGAL & F. FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER* 719 (1961); Paust, *Federal Jurisdiction*, *supra* note 17, at 212; Blakesley, *Extraterritorial Jurisdiction*, *supra* note 28, at 28-31; Kittrie, *A Post Mortem of the Eichmann Case—The Lessons for International Law*, 55 J. CRIM. L., CRIM. & POL. SCI. 16, 21-22 (1964).

40. See *supra* notes 18-22 and accompanying text.



victims' nationality would enjoy third priority. A state on whose territory an element of the offense occurred would have fourth priority under a subjective territoriality approach, and any other state having custody of the accused and the necessary evidence could have last priority under the universality theory.<sup>41</sup> In practice, a state whose innocent citizens are injured or kidnapped for purposes of intimidation, or for some political or military purpose, would argue that its sovereignty has been attacked and that thus the protective principle, rather than the passive-personality theory, would be applicable.

Thus, no assertion of jurisdiction is proper without the existence of one or more of the bases. But even if such a basis exists, an exorbitant or unreasonable assertion of jurisdiction may be blocked by operation of the so-called "rule of reasonableness."<sup>42</sup> Although the rule of reasonableness has become a term of art in Anglo-American jurisprudence,<sup>43</sup> in the international context, jurists have no historical or theoretical background from which to understand the term, and thus have no frame of reference from which to apply it. Moreover, American decisions applying the rule of reasonableness have been criticized as arbitrary and discriminatory to foreign nations.<sup>44</sup> In developing a theoretic-

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41. This hierarchy of jurisdiction is an attempt to articulate an application of the American Law Institute's "rule of reasonableness" to the crime of terrorism. See *RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES* (Tent. Drafts Nos. 1-7, 1980-86). The Restatement adopts the traditional bases of jurisdiction over extraterritorial crime, *id.* § 402, and posits the rule of reasonableness as a means of *limiting* the assertion of jurisdiction in the international context. *Id.* § 403. The rule of reasonableness requires that even when an appropriate traditional basis for jurisdiction exists, assertion will not be proper if it is exorbitant or unreasonable. Assertion of jurisdiction will be exorbitant if there is significant interest by another state in asserting jurisdiction. *Id.* Using the terminology of private international law or the conflicts of law, the rule of reasonableness is an attempt to determine the proper forum when two or more states have a traditional basis for asserting jurisdiction. See Blakesley, *Extraterritorial Jurisdiction*, *supra* note 28, at 33, 43-47.

42. See *supra* note 41.

43. The rule of reasonableness is pervasive in Anglo-American case law. It has become a term of art that requires a balancing or weighing of competing interests. See *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947) (applying the notion in the tort setting). For an application of the rule of reasonableness in the jurisdictional setting, see *Timberlane Lumber Co. v. Bank of Am. Nat'l Trust & Sav. Ass'n*, 549 F.2d 597 (9th Cir. 1976). See Fletcher, *Proportionality and the Psychotic Aggressor: A Vignette in Comparative Criminal Theory*, in *STUDIES IN COMPARATIVE CRIMINAL LAW* 123, 125, 136 (1975) (this notion developed out of and is dominant only in common law jurisdictions). Cf. J. HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 117-33, 152-58 (2d ed. 1947). This proposition is also supported by the author's discussions with jurists, cited in note 30 *supra*.

44. Virtually all European commentators have criticized the American application of the rule of reasonableness in the jurisdictional setting. The jurists cited in note 30, *supra*, all found it repugnant. See also *INTERNATIONAL LAW, CASES AND MATERIALS* 829 (L. Henkin, R. Pugh, O.

cal concept of jurisdiction over terrorism, and in determining the priorities for assertion of that jurisdiction, this article also attempts to bring new meaning to the rule of reasonableness.

### A. *Universal Jurisdiction*

International law provides that there are certain offenses for which any nation obtaining personal jurisdiction over an accused may assert jurisdiction. These offenses are considered so heinous that any of the "community" of nations may prosecute the accused.<sup>45</sup> In the recent past, such offenses have been explicitly identified by treaty or convention; many multilateral treaties condemn various types of conduct that could be characterized as terrorism.<sup>46</sup> Moreover, all nations condemn, prosecute and punish terrorist violence when perpetrated against them or their nationals. Consequently, inasmuch as terrorism is universally condemned, it would lend itself to the exercise of jurisdiction under this theory.

There have been attempts, beginning early in this century, explicitly to proscribe terrorism by international convention.<sup>47</sup> In 1970, the

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Schachter, & H. Smit eds. 2d ed. 1987); Reidweg, *The Extra-Territorial Application of Restrictive Trade Legislation—Jurisdiction and International Law*, INT'L L. ASS'N REPORT OF THE 51ST CONFERENCE 357, 372-73 (1965); Jennings, *Extraterritorial Jurisdiction and the United States Antitrust Laws*, 33 BRIT. Y.B. INT'L L. 146, 159 (1957). Even some American courts have found the notion difficult. "When one state exercises its jurisdiction and another, in protection of its interests, attempts to quash the first exercise of jurisdiction 'it is simply impossible to judicially "balance" these totally contradictory and mutually negating actions.'" *Laker Airways, Ltd. v. Sabena, Belg. World Airlines*, 731 F.2d 909, 950 (D.C. Cir. 1984).

45. See *Demjanjuk v. Petrovsky*, 776 F.2d 571, 581-82 (6th Cir. 1985) (extradition decision explicitly recognizing the universality principle), *cert. denied*, 106 S. Ct. 1198 (1986); H. GROTIUS, 2 DE JURE BELLI AC PACIS LIBRIS TRES 504 (F. Kelsey trans. 1925); Blakesley, *Extraterritorial Jurisdiction*, *supra* note 28, at 31; Paust, *Federal Jurisdiction*, *supra* note 17, at 211-12.

46. See *infra* notes 54-63 and accompanying text.

47. The 1934 assassination of King Alexander I of Yugoslavia, in Marseilles, triggered the Convention for the Prevention and Punishment of Terrorism, LEAGUE OF NATIONS DOC. C.546(I) M.383(I) 1937 V (1938), *opened for signature* Nov. 16, 1937, *reprinted in* 1 INTERNATIONAL CRIMINAL LAW 487 (M. Bassiouni ed. 1986), and the Convention for the Creation of an International Criminal Court, LEAGUE OF NATIONS DOC. C. 547(1) M.384(1) 1937 V (1938), *opened for signature* Nov. 16, 1937, *reprinted in* 3 INTERNATIONAL CRIMINAL LAW 497 (M. Bassiouni ed. 1986); 1 R. FRIEDLANDER, TERRORISM: DOCUMENTS OF INTERNATIONAL AND LOCAL CONTROL 253 (1979) [hereinafter R. FRIEDLANDER, TERRORISM: DOCUMENTS]. See also 7 M. HUDSON, INTERNATIONAL LEGISLATION 862 (1941); CONTROL OF TERRORISM: INTERNATIONAL DOCUMENTS 19 (Alexander, Browne, Nanes eds. 1979). Neither convention was ever entered into force. See Jescheck, *Development & Future Prospects*, in 1 INTERNATIONAL CRIMINAL LAW 83 (M. Bassiouni ed. 1986) [hereinafter Jescheck, *Developments*]; Draft Code of Offences Against the Peace and Security of Mankind, 9 U.N. GAOR Supp. (No. 9) at 9, U.N. Doc. A/2693 (1954) (envisaging punishment by one state of support for terrorist activities to be committed in another state).

United Nations General Assembly imposed a duty on states "to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another state or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts . . . involve a threat or use of force."<sup>48</sup> The European Convention on the Suppression of Terrorism,<sup>49</sup> signed in 1977 under the auspices of the Council of Europe by seventeen member states,<sup>50</sup> provides that certain terrorist acts are not to be covered by the political-offense exception to extradition and that the listed conduct is to be considered extraditable and punishable in the signatory states.<sup>51</sup> It further provides that the substantive laws of the party states, and those relating to criminal jurisdiction, must be adjusted to fulfill these requirements.<sup>52</sup> The state that obtains custody of a person who has allegedly engaged in specified violent conduct is obligated to prosecute or

48. Declaration of Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, 25 U.N. GAOR Supp. (No. 18) at 122-24, U.N. Doc. A/8082 (1970), *reprinted in* R. FRIEDLANDER, *TERRORISM: DOCUMENTS*, *supra* note 47, at 469. Another proposed U.N. provision, Draft Convention for the Prevention and Punishment of Certain Acts of International Terrorism, 26 U.N. GAOR (No. 26), U.N. Doc. A/C. 6/L. 850 (1972), *reprinted in* R. FRIEDLANDER, *TERRORISM: DOCUMENTS*, *supra* note 47, at 487, has never been adopted. Jescheck, *Developments*, *supra* note 47, at 94 nn.43-44; Rovine, *The Contemporary International Legal Attack on Terrorism*, 3 ISRAEL Y.B. ON HUMAN RIGHTS 9, 27 (1973). The latter Draft Convention would have provided for binding cooperation among the parties, aimed at prophylaxis, extradition, and prosecution, as well as a duty to abstain from organizing, instigating, or participating in terrorist conduct.

49. European Convention on the Suppression of Terrorism, *opened for signature* Jan. 27, 1977, E.T.S. No. 90, 25 EUR. Y. B. 289 [hereinafter European Convention], *reprinted in* 15 I.L.M. 1272-76 (1976).

50. The political-offense exception developed out of principles of asylum and sovereignty. It requires that extradition be denied if the offense charged is political in nature. It prevents a victorious regime from using an extradition treaty to round up political enemies and allows a nation to refuse to participate in a "victor's justice." Blakesley, *Evisceration of the Political Offense Exception*, *supra* note 14, at 110-18; Blakesley, *Essay on . . . the Dog of War*, *supra* note 14.

51. The Convention excludes from coverage of the political-offense exemption from extradition the use of a bomb, grenade, rocket, automatic firearm, letter bomb, or parcel bomb, if the use endangers private persons. European Convention, *supra* note 49, art. 1. The Convention does allow the signatory parties to reserve the right to "refuse extradition in respect of any offence . . . which it considers to be a political offence," as long as the reserving state takes due account of three factors: the "collective danger to the life, physical integrity or liberty of persons;" "whether the crime "affected persons foreign to the motives behind it;" and whether "cruel or vicious means have been used." *Id.* art. 13(1). *See also* Blakesley, *Evisceration of the Political Offense Exception*, *supra* note 14, at 116 n.30; Epps, *The Political Offense Exception in U.S. Extradition*, in *LEGAL RESPONSES TO INTERNATIONAL TERRORISM: U.S. PROCEDURAL ASPECTS* (M. Bassiouni ed. 1987) (publication forthcoming) [hereinafter *LEGAL RESPONSES TO INTERNATIONAL TERRORISM*]; Pyle, *The November Treaty Approved*, in *LEGAL RESPONSES TO INTERNATIONAL TERRORISM*, *supra* this note.

52. European Convention, *supra* note 49, art. 6.

extradite that person.<sup>53</sup> The European Convention does not define terrorism in the abstract, but recognizes a body of core offenses that are universally condemned and recognized as terrorism. Thus, the combination and correlation of treaties condemning all conduct amounting to terrorism creates a composite and widely recognized set of crimes subject to the universality theory of jurisdiction.<sup>54</sup>

The history and development of the universality theory makes this clear. Perhaps the most ancient offense of universal interest is piracy,<sup>55</sup> a crime that may be considered an analogue to terrorism or part of the set of terrorist offenses. Like piracy, several other crimes are so universally condemned that international conventions have been aimed at eliminating them and have provided universal jurisdiction to do so. These include slave trade,<sup>56</sup> war crimes,<sup>57</sup> crimes against humanity,<sup>58</sup>

53. *Id.* at art. 7. A state may refuse to assist or extradite, if it has substantial grounds to believe that the requesting state has made the request in order to prosecute or punish the person on account of race, religion, nationality, or political opinion, or if the accused's rights may be prejudiced for any of these reasons. *Id.* art. 8. See R. LILICH, *TRANSNATIONAL TERRORISM: CONVENTIONS AND COMMENTARY* 120-29 (1982); Jescheck, *Developments, supra* note 47, at 94.

54. Terrorism was not included as a separate and distinct offense among the international crimes enumerated in either the Draft International Criminal Code, see M. BASSIUNI, *INTERNATIONAL CRIMINAL LAW: A DRAFT INTERNATIONAL CRIMINAL CODE* 49 (1980), or the Draft Statute for an International Criminal Court, B. FERENCZ, *AN INTERNATIONAL CRIMINAL COURT—A STEP TOWARD WORLD PEACE* 360 (1980). The reason they do not provide an abstract definition is because terrorism consists of separate crimes universally condemned as criminal.

55. With regard to universal jurisdiction over piracy, Hackworth writes: "It has long been recognized and well settled that persons and vessels engaged in piratical operations on the high seas are entitled to the protection of no nation and may be punished by any nation that may apprehend or capture them." G. HACKWORTH, *2 DIGEST OF INTERNATIONAL LAW* 681 (1941). See also R. MERLE & A. VITU, *TRAITÉ DE DROIT CRIMINEL* 319 (1974). The 1958 Geneva Convention on the High Seas provides that:

On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.

Geneva Convention on the High Seas, April 28, 1958, art. 19, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82 [hereinafter Geneva Convention on the High Seas]. See also *The Marianna Flora*, 24 U.S. (11 Wheat.) 1, 40 (1826) ("Pirates may, without doubt, be lawfully captured on the ocean by the public or private ships of every nation: for they are, in truth, common enemies of all mankind, and, as such, are liable to the extreme rights of war."); Dickinson, *Is the Crime of Piracy Obsolete?*, 38 HARV. L. REV. 334 (1925).

56. The modern legal movement to abolish slave trade began with the Paris Peace Treaties of 1814 and 1815 and the Congress of Vienna in 1815. Bassiuni & Nanda, *The Crime of Slavery and Slave Trade*, in 1 *INTERNATIONAL CRIMINAL LAW* 325, 327 n.12 (1986); Geneva Convention on the High Seas, *supra* note 55, arts. 13, 22. See United Nations Conference on Plenipotentiaries on a Supplementary Convention of the Abolition of Slavery, the Slave Trade, and Institutions and

hijacking and sabotage in civil aircraft,<sup>59</sup> genocide,<sup>60</sup> and apartheid.<sup>61</sup>

Practices Similar to Slavery, Aug. 13-Sept. 4, 1956, Final Act and Supp. Conv., U.N. Doc. E/CONF. 24/20, cited in Bassiouni & Nanda, *The Crime of Slavery and Slave Trade*, supra, at 331 n.40; Geneva Convention Relative to Protection of Civilian Persons in Time of War, *infra* note 57, arts. 40, 51, 95.

57. See, e.g., Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287 [hereinafter Geneva Conventions]. See also *In re Yamashita*, 327 U.S. 1 (1945); *United States v. Calley*, 22 C.M.A. 534, 48 C.M.R. 19 (1973); I. BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* ch. IX (1963); T. TAYLOR, *NUREMBERG AND VIETNAM*, supra note 10 at chs. 6 & 7; Bond, *Application of the Law of War to Civil Conflicts*, 3 GA. J. INT'L & COMP. L. 345 (1973); D'Amato, *Is International Law Really "Law"?*, 79 NW. U.L. REV. 1293 (1984-85); D'Amato, *Public International Law as a Career*, supra note 11, at 13; D'Amato, Gould & Woods, *War Crimes and Vietnam: The "Nuremberg Defense" and the Military Service Register*, 57 CAL. L. REV. 1055, 1086 (1969); Taubenfeld, *The Applicability of the Laws of War in Civil War*, in *LAW AND CIVIL WAR IN THE MODERN WORLD* 499 (Moore ed. 1974). See generally *INTERNATIONAL CRIMINAL LAW* (1986) (ch. 2, Armed Conflict and War Crimes; ch. 3, Crimes Against Fundamental Human Rights; ch. 4, Crimes of Terror-Violence).

58. See Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, Nov. 26, 1968, 754 U.N.T.S. 73; European Convention on the Non-Applicability of Statutory Limitation to Crimes Against Humanity and War Crimes, Jan. 25, 1974, E.T.S. 82, 22 EUR. Y.B. 371, 7 H.R.J. 707; Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity, 14 U.N. GAOR at 448, U.N. Doc. A/Res/3074 (XXVIII).

59. See Convention on Offences and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, 20 U.S.T. 2941, T.I.A.S. No. 6768, 704 U.N.T.S. 219 (entered into force in U.S. Dec. 4, 1969) (regulates international jurisdiction over offenses committed on board aircraft). See also Jescheck, *Developments*, supra note 47, at 96. The Convention contains no penal, extradition or mutual-assistance provisions. *Id.* Moreover, the state of the aircraft's registration is always competent to prosecute. *Id.* See also Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 565, T.I.A.S. No. 7570, 974 U.N.T.S. 177 (entered into force in U.S. Jan. 26, 1973); Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, T.I.A.S. No. 7192, 860 U.N.T.S. 105 (entered into force in U.S. Oct. 14, 1971); Law of July 5, 1972, No. 72-623, 92 Gazette du Palais (Législation) 360 (1972), discussed *infra* note 80. See generally M. BASSIOUNI, *INTERNATIONAL TERRORISM & POLITICAL CRIMES* (1973); J. MURPHY, *PUNISHING TERRORISTS*, supra note 21, at ch. 1; Bassiouni, *Extradition Reform Legislation in the United States: 1981-1983*, 17 AKRON L. REV. 495 (1984); Bassiouni, *Terrorism, Law Enforcement, and the Mass Media: Perspectives, Problems, Proposals*, 72 J. CRIM. L. & CRIMINOLOGY 1 (1981); George, *Criminal Law Aspects of Legislation on the Prevention, Control and Suppression of Terrorism, International Terrorism*, in *LEGAL RESPONSES TO INTERNATIONAL TERRORISM*, supra note 51; McGinley, *The Achille Lauro Affair—Implications for International Law*, 52 TENN. L. REV. 691 (1985).

60. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention]. The United States government, although instrumental in developing the convention, took until 1986 to receive the advice and consent of the Senate. See S. Res. 347, 99th Cong., 2d Sess., 132 CONG. REC. 1371 (1986) (*ratification*). See

There is a growing trend to include traffic in narcotic drugs.<sup>62</sup> This history, these treaties and others, and the domestic criminal law of all states, when considered as a whole, make it clear that terrorism—including hostage taking or kidnapping<sup>63</sup> or wanton violence against innocent civilians—is really a composite term including all of these separate universally condemned offenses, and thus triggers the universality theory of jurisdiction.

Universal condemnation of and jurisdiction over terrorist-violence, as defined herein, during peacetime is no less valid than for torture or execution of prisoners or non-combatants during wartime.<sup>64</sup> All such

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generally S. EXEC. REP. NO. 50, 98th Cong., 2d Sess. (1984); 62 U.S. DEP'T OF STATE BULL. 350 (1970) (wherein the Secretary of State urges its ratification). See Paust, *Aggression Against Authority*, *supra* note 17, at 293, and authorities cited therein.

61. International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* March 7, 1966, 660 U.N.T.S. 195; International Convention on the Suppression and Punishment of the Crime of *Apartheid*, G.A. Res. 3068, 28 U.N. GAOR Supp. (No. 30) at 75, U.N. Doc. A/9030 (1973). See also Bassiouni, *International Criminal Law Conventions by Crime*, in 1 INTERNATIONAL CRIMINAL LAW 137, 148 (1986); Clark, *The Crime of Apartheid*, *id.* at 299; Paust, *Aggression Against Authority*, *supra* note 17, at 289-90.

62. See U.S. DEPARTMENT OF JUSTICE, BUREAU OF NARCOTICS AND DANGEROUS DRUGS, A STUDY OF INTERNATIONAL CONTROL OF NARCOTICS AND DANGEROUS DRUGS (1972). This study includes texts of 12 international agreements, dating from 1909 to 1972, concerning control of narcotics. See, e.g., Protocol (with Annex) amending the Agreements, Conventions and Protocols on Narcotic Drugs, Dec. 11, 1946, 61 Stat. 2230, T.I.A.S. No. 1671, 12 U.N.T.S. 179; Single Convention on Narcotic Drugs, Mar. 30, 1953, 18 U.S.T. 1407, T.I.A.S. No. 6298, 520 U.N.T.S. 151. See also Blakesley, *Extraterritorial Jurisdiction*, *supra* note 28, at 44 (problems related to the universality principle's application).

63. See, e.g., Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1975, T.I.A.S. No. 8532 (entered into force by U.S. Feb. 20, 1977); Convention Against the Taking of Hostages, Dec. 18, 1979, G.A. Res. 34/146, 34 U.N. GAOR Supp. (No. 46) at 245, U.N. Doc. A/34/46 (1979). See also Bassiouni, *The Crime of Kidnapping and Hostage Taking* in 1 INTERNATIONAL CRIMINAL LAW: CRIMES 475 (1986).

64. The universal nature of jurisdiction over terrorism is evident from the various international conventions which cover the conduct defined as terrorism by this article. E.g., Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, *supra* note 63; Convention Against the Taking of Hostages, *supra* note 63; the Geneva Conventions, *supra* note 57; Protocol I, Additional to the Geneva Conventions of 12 Aug. 1949 and Relating to the Protection of Victims of International Armed Conflicts, *opened for signature* Dec. 12, 1977, U.N. Doc. A/32/144 (1977), *reprinted in* 72 AM. J. INT'L L. 457-509 (1978) [hereinafter Protocol I] and in I-IV PROTECTION OF WAR VICTIMS: PROTOCOL I TO THE GENEVA CONVENTION (H. Levie ed. 1979) (with many related background documents); Protocol II, Additional to the Geneva Conventions of 12 August 1949, U.N. Doc. A/32/144 (1977) [hereinafter Protocol II]; European Convention, *supra* note 49; Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that are of International Significance, Feb. 2, 1971, O.A.S. Doc. A6/doc. 88, rev. 1 corr. 1, 27 U.S.T. 3949, T.I.A.S. No. 8413 [hereinafter O.A.S. Convention]; Convention on the Physical Protection of Nuclear Material, *opened for signature* March 3, 1980, *reprinted in* 18 I.L.M. 1419, 1422-31 (1979);

conduct is universally condemned and triggers universality jurisdiction. It is ludicrous to suggest that war crimes or similar crimes against humanity are not universally condemned, simply because some states refuse to prosecute or extradite when they are sympathetic with the cause behind the violence. War crimes and crimes against humanity are analogous to terrorism and such acts have been uniformly condemned.<sup>65</sup> Using violence against innocents such as non-combatants or their analogue during times of "peace," to fulfill some military, political, religious, or philosophical purpose, may be called a war crime during a recognized period of belligerency, or it may be referred to as "state terrorism" or a crime against humanity when a state participates in or promotes it while there is no internationally recognized belligerency. When the conduct is performed by private individuals, as members of groups or independently, it may be called "private terrorism," irrespective of whether the ends sought happen to be public ends.<sup>66</sup>

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United Nations Resolution Regarding Terrorism, 27 U.N. GAOR (2114th Gen. Mtg.) (Agenda Item 92) at 20, U.N. Doc. A/8968 (1972) (U.S. voted against it for not being strong enough), 68 U.S. DEP'T OF STATE BULL. 81 (1973)). See generally 1, 2, & 3 INTERNATIONAL CRIMINAL LAW (1986) [hereinafter INTERNATIONAL CRIMINAL LAW]; Roling, *Criminal Responsibility for Violations of the Laws of War*, 1 REV. BELGE DE DROIT INT'L 8 (1976); Draper, *The Modern Pattern of War Criminality*, 6 ISRAEL Y.B. ON HUMAN RIGHTS 9 (1976); Gulbrandsen, *Humanitarian Law of Armed Conflicts*, in 1 A TREATISE ON INTERNATIONAL CRIMINAL LAW 368 (1973). See also Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, Nov. 26, 1968, 754 U.N.T.S. 73; European Convention on the Non-Applicability of Statutory Limitation to Crimes Against Humanity and War Crimes, *supra* note 58. But see Dinstein, *International Criminal Law*, 5 ISRAEL Y.B. ON HUMAN RIGHTS 55, 71 (1975) (doubting that there are crimes *against*, as opposed to *under* international law), all cited in Jescheck, *Developments*, *supra* note 47, at 88 n.24. See also J. MURPHY, PUNISHING TERRORISTS, *supra* note 21, at ch. 2; Bassiouni, *International Criminal Law Conventions by Crime*, in 1 INTERNATIONAL CRIMINAL LAW 137 (1986).

65. See 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG 11, 17 (1947) (crimes against humanity include: "murder, extermination, enslavement, deportation and other inhuman acts against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connection [sic] with any crime against peace or any war crime"). See also Geneva Conventions, *supra* note 57; Protocol I, *supra* note 64; Protocol II, *supra* note 64.

66. There have been prosecutions for such offenses. First Lt. William Calley was prosecuted in 1971 by a military court for killing approximately 400 civilians in March, 1968, near My Lai, during the Vietnam conflict. *United States v. Calley*, 22 C.M.A. 534, 48 C.M.R. 19 (1973). The conviction was reversed, however, because he was denied the opportunity to confront his accusers and compulsory process of witnesses, as required by the Sixth Amendment to the United States Constitution. *Calley v. Callaway*, 382 F. Supp. 650 (M.D. Ga. 1974), *rev'd*, 519 F.2d 184 (5th Cir. 1975), *cert. denied*, 425 U.S. 911 (1976). See also *In re Yamashita*, 327 U.S. 1 (1946) (sanctioning trial of enemy aliens by military commission for offenses of war); Jescheck, *Developments*, *supra* note 47, at 89 n.28; Komarow, *Individual Responsibility Under International Law: The Nuremberg Principles in Domestic Legal Systems*, 29 INT'L & COMP. L.Q. 21, 27 (1980).

The most recent treaty to codify and develop international humanitarian law applicable to armed conflicts—the 1977 Geneva Protocol I<sup>67</sup>—was signed by the United States in that same year, but has since been criticized and apparently deemed unacceptable by the Reagan administration, which will not likely submit it to the Senate for its advice and consent.<sup>68</sup> Portions of the protocol represent a significant amelioration in international law relating to protection of innocent civilians. It explicitly prohibits indiscriminate attacks against innocent civilians, and includes most terrorist acts.<sup>69</sup>

Other international crimes such as genocide<sup>70</sup> and apartheid<sup>71</sup> provide additional impetus toward the recognition that terrorism fits

67. Protocol I, *supra* note 64. See Aldrich, *Commentary, Progressive Development of the Laws of War: A Reply to Criticisms of the 1977 Geneva Protocol I*, 26 VA. J. INT'L L. 693 (1986) [hereinafter Aldrich, *Commentary*]. Protocol I relates to international armed conflicts and Protocol II to non-international armed conflicts.

68. See Aldrich, *Commentary, supra* note 67, at 694; Roberts, *The New Rules for Waging War: The Case Against Ratification of Additional Protocol I*, 26 VA. J. INT'L L. 109 (1986).

69. See Protocol I, art. 51, *supra* note 64. The Protocol was warmly welcomed by the U.S. government in 1977. Aldrich, *Commentary, supra* note 67, at 699 (citing U.S. Delegation to the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Sept. 8, 1977). See also ALDRICH, *Foreward to I PROTECTION OF VICTIMS, PROTOCOL I, supra* note 64, at xi. However, it was apparently not so well accepted by some advisors to the Reagan Administration. See Aldrich, *Commentary, supra* note 67, at 699, 712-14; Roberts, *New Rules, supra* note 68, at 149-52. This is a curious approach for an Administration that claims it is against all versions of terrorism. Such inconsistency has not been uncommon for the Reagan Administration. See Blakesley, *Essay on . . . the Dog of War, supra* note 14; Blakesley, *Evisceration of the Political Offense Exception, supra* note 14.

70. Genocide is directly punishable under international law and may be prosecuted and jurisdiction obtained on the basis of the universality principle. This is so despite the fact that the Genocide Convention, *supra* note 60, inexplicably and in contrast to the Geneva Conventions, *supra* note 57, adopted the territorial and not the universality principle. See Jescheck, *Developments, supra* note 47, at 90. The Supreme Court of Israel has noted that:

Article VI [of the Genocide Convention] imposes upon the parties contractual obligations with future effect, that is to say, obligations committed . . . within their territories in the future. This obligation, however, has nothing to do with the universal power vested in every State to prosecute for crimes of this type committed in the past—a power which is based on *customary* international law.

Attorney Gen. v. Eichman, *supra* note 39, 36 I.L.R. at 304. See also Dinstein, *International Criminal Law*, 5 ISRAEL Y.B. ON HUMAN RIGHTS 55, 60-62 (1975); Paust, *Aggression Against Authority, supra* note 17, at 293, and references cited therein. For an excellent study of Nazi war crimes and transnational criminal law, see Lubet and Reed, *Extradition of Nazis from the United States to Israel: A Survey of Issues in Transnational Criminal Law* 22 STAN. J. INT'L L. 1 (1986).

71. The Apartheid Convention declares apartheid to be a crime against humanity. International Convention on the Suppression and Punishment of *Apartheid, supra* note 61. The Convention imposes a duty to punish acts of apartheid, with jurisdiction based in the universality principle. See also Jescheck, *Developments, supra* note 47, at 90.



within the universality theory of jurisdiction. Conventions relating to hostage-taking also fit within the universality theory of jurisdiction. The United Nations Convention Against Taking of Hostages provides for the prosecution or extradition of any person who commits the offense of hostage-taking, without reference to motive or identity of the victim.<sup>72</sup> Some states have also taken measures to establish jurisdiction over the crime of hostage-taking and to provide appropriately severe penalties.<sup>73</sup> The conventions relating to aircraft hijacking and sabotage provide examples of how universal jurisdiction is established. The Hague Convention for Suppression of Unlawful Seizure of Aircraft<sup>74</sup> creates universal jurisdiction in that all contracting parties have jurisdiction over unlawful acts of taking seizure or control of aircraft and the party obtaining custody of the alleged hijackers is obligated to prosecute or extradite them.<sup>75</sup> All parties are to promulgate laws to punish "severely" the prohibited conduct.<sup>76</sup> Priorities of jurisdiction are also established.<sup>77</sup> The Montreal Convention<sup>78</sup> extends the Hague Convention beyond hijacking and unlawful control of aircraft to include acts of sabotage.<sup>79</sup>

Domestic legislation has been promulgated to accommodate these conventions, notably, for example, in France<sup>80</sup> and in the United

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72. Convention Against the Taking of Hostages, *supra* note 63. See also Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, *supra* note 63.

73. *E.g.*, 85 StGB § 239b (1986) (West German statute prosecuting and providing punishment for hijacking).

74. Convention for Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, T.I.A.S. No. 7192, 860 U.N.T.S. 105 (entered into force in U.S. Oct. 14, 1971) [hereinafter *Hague Convention*], reprinted in 65 AM. J. INT'L L. 440 (1971).

75. *Id.* at arts. 1, 4.

76. *Id.* at art. 2.

77. The state of the aircraft's registration and the state in which it landed, if the criminal act occurred in the air, are made "primary jurisdictions." Other states are so-called "substitutionary jurisdictions" to assert jurisdiction in the case that the primary jurisdiction cannot or will not assert it. *Id.* art. 8. Some states have enacted domestic legislation incorporating these notions. See, *e.g.*, 85 StGB art. 316c (1986) (West Germany).

78. Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 565, T.I.A.S. No. 7570, 974 U.N.T.S. 177 (entered into force in U.S. Jan. 26, 1973).

79. *Id.* at art. 1. Contracting parties are required to promulgate laws to severely punish the condemned conduct and to establish jurisdiction for cases of primary competence, such as when the offense is committed on the state's territory or against or on board an aircraft registered in the state, or when the aircraft lands, with the alleged perpetrator aboard, on the state's territory. *Id.* arts. 3, 4.

80. The Law of July 5, 1972, No. 72-623, 92 Gazette du Palais (Législation) 360 (1972), translated in N. LEECH, C. OLIVER & J. SWEENEY, CASES AND MATERIALS ON THE INTERNA-

States.<sup>81</sup> The U.N. Convention Against the Taking of Hostages simi-

TIONAL LEGAL SYSTEM 258-59 (2d ed. 1981), provides that:

Art. L.121-7: French courts have jurisdiction over any infraction committed aboard an airplane registered in France. They have jurisdiction as well over any crime or tort committed against such plane outside of the French territory.

Art. L.121-8: French courts have jurisdiction with respect to a crime or a tort committed aboard a plane which is not registered in France when the author or the victim has French nationality, when the plane lands in France after the commission of the crime or tort, or when the infraction was committed aboard a plane while rented without crew to a person who has his principal place of establishment or, if there be none, his permanent residence in France.

Moreover, in case a plane that is not registered in France is forced off its course [i.e., hijacked], French courts have jurisdiction over the infraction and over every other act of violence against the passengers or the crew done by the person alleged to have forced the plane off its course in the commission of [literally, in direct relationship to] the offense, when the person is found in France.

81. United States legislation provides for jurisdiction over air piracy or hijacking, as follows:

(i)(1) Whoever commits or attempts to commit aircraft piracy, as herein defined, shall be punished—

(A) by imprisonment for not less than 20 years; or

(B) if the death of another person results from the commission or attempted commission of the offense, by death or by imprisonment for life.

(2) As used in this subsection, the term "aircraft piracy" means any seizure or exercise of control, by force or violence or threat of force or violence, or by any other form of intimidation, and with wrongful intent, of an aircraft within the special aircraft jurisdiction of the United States.

(3) An attempt to commit aircraft piracy shall be within the special aircraft jurisdiction of the United States even though the aircraft is not in flight at the time of such attempt if the aircraft would have been within the special aircraft jurisdiction of the United States had the offense of aircraft piracy been completed.

49 U.S.C. § 1472(i) (1976). *See* United States v. Dixon, 592 F.2d 329, 339-40 (6th Cir. 1979) (elements of proof required in an air-piracy charge are seizure or exercise of control of an aircraft; by force, violence, or intimidation, or threat thereof; with wrongful intent; and while in the special aircraft jurisdiction of the United States), *cert. denied*, 441 U.S. 951 (1979). A related provision, 49 U.S.C. § 1472(l) (1976), proscribes carrying or placing or attempting to place weapons, loaded firearms, and explosives or incendiary devices aboard aircraft, including in the baggage. *See also* United States v. Bradley, 540 F. Supp. 690, 692-93 (D. Md. 1982) (the offense is committed when the device or weapon is carried or otherwise placed on the aircraft, whether or not injury occurs). In addition, United States special aircraft jurisdiction is defined in 49 U.S.C. § 1301(34) (1976). This provides that U.S. jurisdiction obtains for any

(c) . . . aircraft within or

(d) . . . outside the United States —

(i) that has its next scheduled destination or last point of departure in the United States, if that aircraft next actually lands in the United States; or (ii) having "an offense", as defined in the Convention for the Suppression of Unlawful Seizure of Aircraft, committed abroad, if that aircraft lands in the United States with the alleged offender still aboard. . . .

49 U.S.C. § 1301(34) (1976). And in another related provision, the act provides that:

(1) Whoever aboard an aircraft in flight outside the special aircraft jurisdiction of the United States commits "an offense", as defined in the Convention for the Suppression of Unlawful Seizure of Aircraft, and is afterward found in the United States shall be pun-

larly provides, in strong language, for prosecution and extradition of offenders.<sup>82</sup>

The responsibility to desist from promoting or committing terrorism and actively to combat it devolves on all nations universally because terrorism consists of conduct universally condemned by civilized society.<sup>83</sup> Although no one multilateral treaty explicitly states as much, it is clear that the universality principle would apply to much of today's terrorist activities.

### B. *Territorial Jurisdiction*

The territorial principle is the primary basis of jurisdiction over crime in virtually all countries. Criminal law itself may be said to be rooted in the conception of law enforcement as a means of keeping the peace within a certain territory.<sup>84</sup> Nation-states generally are consid-

ished —

(A) by imprisonment for not less than 20 years; or

(B) if the death of another person results from the commission or attempted commission of the offense, by death or by imprisonment for life.

(2) A person commits "an offense", as defined in the Convention for the Suppression of Unlawful Seizure of Aircraft when, while aboard an aircraft in flight, he —

(A) unlawfully, by force or threat thereof, or by any other form of intimidation, seizes, or exercises control of, that aircraft, or attempts to perform any such act; or

(B) is an accomplice of a person who performs or attempts to perform any such act.

49 U.S.C. § 1472(n) (1976). This section only applies when the place of the aircraft's takeoff was not the same as the place of the aircraft's registration. *Id.* § 1472(n)(3). See generally Stevenson, *International Law and the Export of Terrorism*, 67 U.S. DEP'T OF STATE BULL. 645 (1972).

82. The Convention provides that:

The State Party in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a grave nature under the law of that State.

*International Convention Against the Taking of Hostages*, 34 U.N. GAOR Supp. (No. 46) at 246, art. 8, U.N. Doc. A/34/46 (1979), reprinted in 18 I.L.M. 1456-63 (1979).

83. See R. FRIEDLANDER, *TERROR-VIOLENCE: ASPECTS OF SOCIAL CONTROL* (1983); Friedlander, *The Origins of International Terrorism: A Micro Legal-Historical Perspective*, 6 ISRAEL Y.B. ON HUMAN RIGHTS 49 (1976); Friedlander, *The Enforcement of International Criminal Law: Fact or Fiction?*, 17 CASE W. RES. J. INT'L L. 79, 88 (1985); Paust, *Federal Jurisdiction*, *supra* note 17, at 223-27. See also *supra* note 45 and accompanying text.

84. See Perkins, *The Territorial Principle in Criminal Law*, 22 HASTINGS L.J. 1155, 1157 (1971) (noting that at the inception of the nation-state as a sovereign unit, the "king's peace" was the ideological tool used to promote the consolidation of power against "private justice"). Another commentator describes the subsequent history:

[W]e observe the evolution among the Germanic people, and especially among the Franks, from blood-revenge, essentially anti-legal in character [but nevertheless, in reac-

ered competent to prescribe laws, to prosecute and punish all offenses committed, or whose impact falls, in whole or in part, on their territory. This notion, like the notion of sovereignty, sometimes tends to confuse international and domestic reaction to terrorism.

Sovereignty requires that the power in control of the territory prescribe, adjudicate and enforce its laws on that territory; any state that does not maintain such jurisdiction within its territory is not sovereign. In 1812, Chief Justice Marshall expressed what has become the traditional United States perception of sovereignty—a power “necessarily exclusive and absolute” unless limited by consent of the nation itself.<sup>85</sup> Chief Justice Marshall articulated the completion of his notion of the relationship between sovereignty and territorial jurisdiction over crime thirteen years later, declaring that “[the c]ourts of no country execute the penal laws of another.”<sup>86</sup>

The territorial principle of jurisdiction historically has been applied very strictly in the United States. It has had negative as well as positive application. For example, in 1906, in reference to a case in which a French citizen was suspected of murdering an American citizen in China, the Secretary of State said the American government would “not exercise jurisdiction over crimes committed beyond the ter-

tion to acts considered common crimes today] to a system in which rules of public law and procedure were developed and penalties prescribed . . . [and] designed primarily to keep the peace. The retaliatory element gave way in large measure to public defense, but the elimination of the dangerous offender, whether by exile, death, or slavery, continued to be a primary means of protection. The objectives of general deterrence and individual prevention inhered in the establishment of the king's peace. . . .

Tappan, *Pre-Classical Penology*, in *ESSAYS IN CRIMINAL SCIENCE* 33, 45 (1961). See also Blakeley, *The Practice of Extradition from Antiquity to Modern France and the United States: A Brief History*, 4 *B.C. INT'L & COMP. L. REV.* 39, 46-48 nn.28-35 (1981).

The Harvard Research, *supra* note 29, describes the territorial principle as follows:

A crime is committed “in whole” within the territory when every essential constituent element is consummated within the territory; it is committed “in part” within the territory when any essential constituent element is consummated there. If it is committed either “in whole or in part” within the territory, there is territorial jurisdiction.

Harvard Research, *supra* note 29, at 495.

85. *The Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812). Chief Justice Marshall explained that:

The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction . . . in that power which could impose such restriction.

All exceptions, therefore, to the full and complete power of a nation, within its own territories, must be traced up to the consent of the nation itself.

*Id.*

86. *The Antelope*, 23 U.S. (10 Wheat.) 66, 123 (1825).

ritorial limits of this country, except a few involving extraordinary elements, in which category [this case] is not included. . . ."<sup>87</sup> The Supreme Court later declared that under American law, jurisdiction in criminal matters rests solely with the legislative and judicial branches of government of the state or country in which the crime is committed.<sup>88</sup> The Court has also held that a local criminal statute "has no extra-territorial operation, and . . . [a party] cannot be indicted . . . [in the United States] for what he did in a foreign country."<sup>89</sup> Jurisdiction over extraterritorial violence, even against one state's nationals, would be improper under such a strict territorial approach. Although jurisdiction over such violence could obtain upon a nonterritorial basis, such as the protective principle,<sup>90</sup> the territorial nature of criminal law is so important that when the terrorist violence occurs on another nation's soil, jurisdiction could not be properly asserted unless and until that nation has consented to another state's prior assertion of jurisdiction or has already completed its own process of justice. The priority of jurisdiction would go to the state on whose territory the violence actually occurred.

Other countries' criminal jurisdiction is also based essentially on the territorial principle. The French Civil Code provides a common example: the "laws of police and security oblige all those who reside in the territory."<sup>91</sup> On its face, this provision appears to make legislative jurisdiction dependent on residence in France, but it has been interpreted to provide authority for jurisdiction over any offense committed within French territory.<sup>92</sup>

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87. MS. Dep't of State, file No. 226/16 (Sept. 17, 1906) ("Our . . . [consular officials] can have no authority to try a French citizen charged with crime in that country (China), even though the victim should happen to be an American. . . ."), *quoted in* 2 G. HACKWORTH, *DIGEST OF INTERNATIONAL LAW* 179 (1941). Any acceptance of jurisdiction under the circumstances of this case would have been based on the passive personality principle. *See infra* notes 137-54 and accompanying text.

88. *Huntington v. Attrill*, 146 U.S. 657, 669 (1892). *See also* *Brown v. United States*, 35 App. D.C. 548, 557 (1910) (the courts of one state shall not execute the criminal law of another); *Stewart v. Jessup*, 51 Ind. 413, 416 (1875) (a person is not subject to conviction and punishment in this state for a crime committed outside the state).

89. *United States v. Nord Deutscher Lloyd*, 223 U.S. 512, 517-18 (1912).

90. *See infra* notes 115-36 and accompanying text.

91. C. CIV. art. 3, para. 1 (Dalloz 1984-85) (author's translation). The French text reads: "les lois de police et de surêté obligent tous ceux qui habitent le territoire."

92. *See* P. BOUZAT & J. PINATEL, 2 *TRAITÉ DE DROIT PÉNAL ET DE CRIMINOLOGIE* 1301 (1963); R. MERLE & A. VITU, *TRAITÉ DE DROIT CRIMINEL* 355-56 (1973). French commentators have described the traditional territorial theory as follows:

To affirm the territoriality of criminal law (*lex loci delicti*) is to proclaim that penal law

The territorial theory of jurisdiction is deceptively simple. Most nations, to differing degrees, apply fictions and exceptions that transmute actions taken abroad into their legal notion of territorial jurisdiction. Alternatively, jurisdiction is asserted based on a theory of need supporting an exception to the territorial theory. Most states, including the United States, recognize the importance and the fundamental nature of the territorial principle. Most require statutory authority to authorize the extension of judicial jurisdiction to offenses committed beyond their territorial limits, although the courts in most states have also been adept at interpreting statutory authority to authorize the extension of judicial jurisdiction to offenses committed beyond their territorial limits.<sup>93</sup> Moreover, courts and commentators have recognized two types of territorial jurisdiction—subjective and objective.

### 1. Subjective Territoriality

When at least one element of an offense constituting terrorism occurs within a state, that state has jurisdiction based on the subjective territoriality theory. Subjective territorial jurisdiction is secondary to jurisdiction of the state on whose territory the principal impact of the terrorist violence occurred. French legislation articulates the classic subjective territorial theory. Article 693 of the Code de Procedure Pe-

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applies to all individuals whatever their nationality or that of their victims, who have committed an offense on the territory of the State in which the law is in force; *a contrario*, that law is refused all application outside the same territory.

*Id.* (author's translation). See also Blakesley, *Extraterritorial Jurisdiction*, *supra* note 28, at 5. French law also recognizes other, nonterritorial, theories of jurisdiction, such as the nationality theory (*personnalité active*), the passive-personality theory (*personnalité-passive*), the protective principle (*protection des intérêts fondamentaux*), and the universality theory (*la compétence universelle*). These are applied as exceptions to the territorial principle. See also C. PR. PÉN. §§ 689-96 (1978-79) and discussed in Blakesley, *Extraterritorial Jurisdiction*, *supra* note 28, at 11-13; Blakesley, *A Conceptual Framework*, *supra* note 28; Blakesley, *Jurisdiction* *supra* note 28. The French tend to expand the applicability of nonterritorial theories, rather than fictionally extending territorial theories as the Americans have done.

93. See Delaume, *Jurisdiction Over Crimes Committed Abroad: French and American Law*, 21 GEO. WASH. L. REV. 173, 181 (1952-53). Professor Delaume explains:

[O]nce a statute is promulgated, it is irrelevant whether its scope is limited to the punishment of nationals or to that of foreigners, or rather whether it combines the idea of jurisdiction based on allegiance with that of the punishment of only certain types of offenses. It is also irrelevant that such a statute is not express, provided there cannot be any doubt as to the legislative intent.

*Id.* (footnotes omitted). For example, in *United States v. Bowman*, 260 U.S. 94 (1922), the Supreme Court interpreted a statute to allow jurisdiction over an offense committed on the high seas and in a foreign port, although the statute did not expressly provide for such jurisdiction. *Id.* at 98-99.

nal provides that an offense is considered to have been committed on French territory when "an act characterizing one of its elements is accomplished in France."<sup>94</sup> The territorial element exists, even though the

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94. C. PR. PÉN. art. 693 (Daloz 1984-85) (author's translation of the French text: "un acte caractérisant un de ses éléments constitutifs a été accompli en France"). The case law that led to art. 693, and such law decided since its 1958 promulgation, clearly have recognized the subjective territorial theory and have allowed such jurisdiction to be asserted in various situations. That indicates a trend toward an ever-broadening scope of territorial jurisdiction. Some examples relating to cases antedating the promulgation of art. 693, and cited by Harvard Research, *supra* note 29, at 499, are *Defamation*: the decisions reported in Clunet (1901), 990, and Sirey (1908), 1, 553; *Espionage*: Clunet (1912), 1162; *Extortion*: Clunet (1885), 443; *Fraud*: Decision of Dec. 18, 1908, Sirey (1913), 1, 116; Decision of Aug. 31, 1911, *Rev. de Dr. Int. Privé* (1912) 360; Tribunal d'Avignon, Oct. 23, 1911, Clunet (1912) 827; Tribunal de Bayonne, Dec. 29, 1887, Clunet (1887) 517; *Revelation of Trade Secrets*: Sirey (1904), 1, 105. General commentaries relating to the application of jurisdiction in situations of the type envisaged by art. 693 include: P. BOUZAT & J. PINATEL, 2 TRAITÉ DE DROIT PÉNAL ET DE CRIMINOLOGIE, *supra* note 92, at 898-901 (and cases cited therein); H. DONNEDIEU, D. DE VABRES, TRAITÉ ÉLÉMENTAIRE DE DROIT CRIMINEL ET DE LÉGISLATION PÉNALE COMPARÉE 826 (2d ed. 1943); DONNEDIEU DE VABRES, LES PRINCIPES MODERNE DU DROIT PÉNAL INTERNATIONAL 43-45, 47-48 (1928); R. MERLE & A. VITU, TRAITÉ DE DROIT PÉNAL 355, 378 (2d ed. 1978); R. MERLE & A. VITU, TRAITÉ DU DROIT CRIMINEL I.I. 298 (2d ed. 1974); M. TRAVERS, TRAITÉ DE DROIT PÉNAL INTERNATIONAL, 1 No. 67 at 108-80 (1920); Travers, *Compétence criminelle*, in 4 RÉPERTOIRE DE DROIT INTERNATIONAL 360, 383-88 (Lapradelle & Niboyet eds. 1929). *See also* Costa Case, 1969 *Juris-Classeur Périodique*, La Semaine Juridique (J.C.P. II) No. 16011 (violation of good morals, *bonnes moeurs*, to photograph nude women in France and attempt to send undeveloped film to Sweden); Légal, *La localisation du délit complexe*, 1970 *REVUE DE SCIENCE CRIMINELLE ET DROIT PÉNAL COMPARÉ* [Rev. Sci. Crim. et Dr. Pén. Comp.] 84. The basic fictions used were *connexité* and *indivisibilité*; the offenses committed outside the territory were deemed to be connected to or indivisible from the elements that have occurred in France. Fayard, *La localisation internationale de l'infraction*, 1968 *REV. DE SCI. CRIM. ET DR. PÉNAL COMPARÉ* 753; Robert, *Compétence Territoriale: Délit commis en France et à l'étranger*, 1967 *REV. SCI. CRIM. ET DR. PÉN. COMP.* 879, 880; Lagarde, *Note re Decision of 10 Oct. 1959*, 1960 *Daloz* 300 (Cass. crim. 1959); Laress & Signolle, *Note re Decision of 25 Sept. 1948*, 1948 *SEM. JUR.* 4788. Art. 693 was inspired partly by the jurisprudentially recognized need to provide for jurisdiction over cases involving what is called the *infraction complexe* (complex offense). The complex offense assumes a chain of distinct acts (elements) that culminate in the principal crime. The classic example is the basic swindle in which a combination of two distinct constituent elements establishes the offense: the use of fraudulent methods to obtain funds or property, and the taking or receipt of the funds or property. If one of the elements occurs in France, jurisdiction over the entire offense is allowed under art. 693. The pretext is that the element committed in France is inherently connected to or indivisible from the element or the result that occurs elsewhere. C. PR. PÉN. art. 405 (Daloz 1979-80). *See also* C. PR. PÉN. art. 207 (Daloz 1978-79); R. MERLE & A. VITU, *supra* note 92, at 366-67 (citing cases and authorities); Légal, *Chroniques de Jurisprudence*, 1967 *REV. DE SOC. CRIM. ET DR. PÉN. COMP.* 171. The connection may be real or fictional, depending on the case. *See Segui v. Min. Pub.*, Decision of July 27, 1933, 1933 *D.P.I.* 159 (Cass. crim.). Any act or omission that occurs in France and is regarded by a French tribunal as a constituent element of an offense may be prosecuted in France as a consummated offense if the act or omission is considered criminal under French law and if the offense is consummated abroad, or if the act that occurs abroad would be perceived by foreign authority to be an attempt to commit an offense.

The same fiction, further abstracted, has applied to allow French jurisdiction over some of-

offense was not committed in its entirety within the territory.

In most states, as in France, the territorial principle has been expanded through subjective territoriality to provide legislative, judicial and enforcement jurisdiction over offenses that actually culminate beyond the asserting state's territory. So long as any constituent element of the offense has occurred within the territory of the asserting state, and so long as the crime or attempted crime is "connected to" or "indivisible from" that element, jurisdiction obtains. Thus, a conspiracy to commit terrorism, or the transport of weapons from or through a state for purposes of terrorism, may provide that state with subjective territorial jurisdiction not only over the conspiracy or the illegal transport of weapons, but also over the terrorism that actually occurs elsewhere.

The view of subjective territoriality under United States law is similar. It is not uncommon for jurisdiction to be extended to offenses consummated outside United States territory when a constituent element occurs within the United States. The federal system has provided fertile ground for the development of the subjective territorial principle, but maintaining a strictly applied territorial principle would be difficult because of a jurisdictional scheme in which each state and the national government has its own criminal law and procedure.<sup>95</sup> Application of

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fenses committed entirely outside French territory. Thus, offenses committed entirely abroad are deemed to be connected to other offenses committed in whole or in part in France, thereby rendering the extraterritorial offenses subject to French jurisdiction. French case law and commentary have applied that broad scope of territorial jurisdiction, notwithstanding the fact that art. 693, which mentions only the constituent elements of one offense, does not explicitly envisage that application. As an example, consider the offense of receiving stolen property abroad, which takes place entirely outside French territory—where the property is received. Jurisdiction on the territorial principle will nevertheless obtain if some of the property received was stolen in France. *See, e.g.,* Decision de 2 Juillet 1932, G.P. 1932.2.532 (Cass. crim.) (receiving stolen property abroad); R. MERLE & A. VITU, *TRAITÉ DE DROIT PÉNAL* 367 (2d ed. 1978); Blakesley, *Conceptual Framework*, *supra* note 28, at 692 n.23 and accompanying text.

For a view of the British practice and perspective on this subject, see Hirst, *Jurisdiction Over Cross-Frontier Offences*, 97 L.Q. REV. 80 (1981) (discussing "terminatory" and "initiatory" theories of jurisdiction). British courts often categorize crimes as "conduct crimes" or "result crimes" in order to rationalize taking or rejecting jurisdiction over crimes. *See* Treacy v. Director of Pub. Prosecutions, 1971 A.C. 537, 543 (1970) (defining blackmail as a conduct crime, thus creating jurisdiction if any of its elements occur in England). Murder, on the other hand, is a result crime, over which English courts will have jurisdiction if "any part of the proscribed 'result' takes place in England." *Secretary of State for Trade v. Markus*, 1976 A.C. 35, 61 (1975). For application of similar concepts in the United States, see N.Y. CRIM. PROC. LAW § 20.20(2)(a) (McKinney 1975) (jurisdiction extends to any "result" offense in which the result occurs in the state).

95. The sixth amendment to the United States Constitution provides that criminal defendants must be tried in "the state and district wherein their crime shall have been committed. . . ." U.S. CONST. amend. VI. *Cf. United States v. Jackalow*, 66 U.S. (1 Black) 484 (1851) (for a federal court to have jurisdiction of a crime not committed within its district, the defendant must have



the subjective territorial principle has mitigated the difficulties that arise under such a system.<sup>96</sup>

## 2. Objective Territoriality

Although subjective territoriality requires at least one element of an offense to have occurred within the asserting state's territory, objective territoriality obtains when the effect of the crime has an impact on the asserting state's territory, even though the acts or omissions that comprise the offense have taken place wholly beyond its territorial boundaries.<sup>97</sup> Thus, the traditional American iteration of objective territoriality is an "effects" test.<sup>98</sup> The objective territorial principle has

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been apprehended within that district and the offense must not have been committed within any other state or federal jurisdiction); 18 U.S.C. § 3238 (1982) (the jurisdiction of all offenses occurring on the high seas or elsewhere out of any state or federal jurisdiction shall be in the district in which the offender is apprehended). *See generally* Note, *Extraterritorial Jurisdiction—Criminal Law*, 13 HARV. INT'L L.J. 346 (1972) (discussing the United States policy of declining to prosecute crimes committed outside its territorial jurisdiction).

96. *See* Harvard Research, *supra* note 29, at 484. Courts in the United States have over the years approved assertion of jurisdiction where any element of an offense occurs within the state. *See supra* notes 31, 95. Jurisdiction also will lie when an offense is initiated outside a state's territory but consummated within it. In *People v. Botkin*, 132 Cal. 231, 64 P. 286 (1901), for example, the California courts took jurisdiction over a person and convicted him of murder for mailing poisoned candy from California to his victim, who received the candy, ate it and died in Delaware. The Model Penal Code encourages an expansive application of both the subjective and objective theories for assertion of territorial jurisdiction. MODEL PENAL CODE § 1.03 (Proposed Official Draft 1962) (providing that territorial jurisdiction should obtain when an element of an offense occurs within the asserting state). *See also* FINAL REPORT, U.S. NAT'L COMM'N ON REFORM OF THE FEDERAL CRIMINAL LAWS § 208(d) (1970) (proposed federal criminal code based on subjective theory and no mention of effects theory); Feinberg, *Extraterritorial Jurisdiction and the Proposed Federal Criminal Code*, 72 J. CRIM. L. & CRIMINOLOGY 385 (1981). In 1979, Congress for the first time provided a general rule regarding the nature and scope of extraterritorial jurisdiction over crime. S. 1722, 96th Cong., 1st Sess. § 204 (1979-80); H.R. 6915, 96th Cong., 2d Sess. § 111(c) (1979) (Criminal Code Revision Act of 1980).

97. *See, e.g.*, *Strassheim v. Daily*, 221 U.S. 280, 285 (1911) (jurisdiction may lie when offense is committed entirely outside the state, but intended effect or result occurs within it). *See also* Harvard Research, *supra* note 29, at 387. In practice, the objective and subjective theories of territorial jurisdiction often are combined to provide a comprehensive competence. *Id.* at 494. Until recently, however, an actual territorial nexus—either an element of the offense or its result or effect—was always required to bring an act under at least one of the two theories. *See* cases cited in notes 94-114. I have found no cases allowing jurisdiction on a territorial theory without the existence of an element or effect on the territory, until those discussed in Blakesley, *Extraterritorial Jurisdiction*, *supra* note 28, at 38-50.

98. According to John Bassett Moore: "The principle that a man who, outside of a country willfully puts in motion a force to take effect in it is answerable to the place where the evil is done, is recognized in the criminal jurisprudence of all countries." Moore, *Report on Extraterritorial Crime and the Cutting Case*, 1887 FOR. REL. 757, 771. Another noted jurist stated that: "The setting in motion outside of a State of a force which produces as direct consequences an injurious

essentially three applications: to assert jurisdiction to prosecute and punish offenses committed abroad when the effect or result occurs within the territory of the asserting state; to seek extradition of the person accused of committing such an offense; and to provide extradition of an accused who has committed such an offense against the requesting state.<sup>99</sup>

A classic example of this type of offense is that in which a defendant or group of defendants initiates an act of terrorist violence in one state, say Italy, injuring a person in France, who later dies in Switzerland.<sup>100</sup> Switzerland would have primary jurisdiction over the murder, and probably over the terrorism, on the basis of the objective territoriality principle. But there is also a problem of concurrent jurisdiction. Because the terrorism occurred in all three states, the accused could be tried and, if convicted, punished in each. If all three states were trying to extradite the accused from a fourth state, Switzerland would likely receive priority, with France second, and Italy third. If several people were injured in France and some died in various different countries,

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effect therein, justifies the territorial sovereign in prosecuting the actor when he enters its domain." 1 C. HYDE, *INTERNATIONAL LAW* 422 (2d ed. 1945) (referring to general rights of property and contracts).

99. Blakesley, *Extraterritorial Jurisdiction*, *supra* note 28 (containing this author's thoughts on where and how it is applied). See also, *Quinn v. Robinson*, 783 F.2d 776 (9th Cir. 1986) (jurisdiction sought under, among others, an objective territoriality theory), *cert. denied*, 107 S. Ct. 271 (1986); *United States v. Layton*, 509 F. Supp. 212, 216 (N.D. Cal. 1981) (jurisdiction asserted on the basis of the objective territorial and protective principles), *cert. denied*, 452 U.S. 972 (1981).

100. Many of the cases in which the objective territorial theory applies are of the type the French denominate "simple offenses" (*des infractions simples*). See R. MERLE & A. VITU, *TRAITÉ DE DROIT PÉNAL* 355 (2d ed. 1978). A simple offense is one in which the prohibited conduct is constituted by one tier of conduct and mens rea; an example is the intentional killing of a human being. *Id.* at 366-67. A complex offense, on the other hand, is one in which there is a chain of distinct acts and mental states related to those acts, such as the common crime of fraud, in which a combination of two distinct constituent elements must be established: the use of fraudulent methods to obtain funds or property, and the taking of the funds or property. *Id.* See also Robert, *Compétence territoriale: délit commis en France et à l'étranger*, 1967 *REV. SCI. CRIM. ET DR. PÉNAL COMPARÉ* 879, 880. The CODE DE PROCÉDURE PÉNAL allows the assertion of jurisdiction on the objective territorial theory for both the *infraction simple* and the *infraction complexe*. C. FR. PÉN. arts. 689-96 (Dalloz 1978-79). See also Blakesley, *Extraterritorial Jurisdiction*, *supra* note 28, at 33-36. The British have had a similar academic and judicial discussion. See Hirst, *Jurisdiction Over Cross-Frontier Offenses*, 97 L. Q. REV. 80, 81-84 (1981); Lew, *The Extraterritorial Criminal Jurisdiction of English Courts* 27 *INT'L & COMP. L.Q.* 168, 168-79 (1978); Williams, *The Venue and Ambit of the Criminal Law*, 81 L.Q. REV. 518 (1965). See also *Treacy v. Director of Pub. Prosecutions*, 1 All E.R. 110 (1971); G. GORDON, *THE CRIMINAL LAW OF SCOTLAND* 63 (2d ed. 1978) (wherein the terminology "result" and "conduct" crimes is used to determine which theory of jurisdiction will provide competence to the courts).

perhaps France would have jurisdiction over the offense whose major impact occurred in France.

For the objective territorial principle to apply, it is essential that a significant effect of the offense occur within the territory of the asserting state. French judicial decisions and juristic commentary have made it clear that even in the case of an attempted act it is necessary that an effect occur within the territory for the objective territoriality theory to obtain. Many jurisdictions appropriately do not allow the objective territoriality theory to be the vehicle for jurisdiction over an extraterritorial attempt to commit a crime on their territory when it is thwarted extraterritorially. The attempt occurred elsewhere and no effect has actually occurred on the intended state's territory.<sup>101</sup>

Probably the most famous international case involving the principle of objective territoriality is the *Lotus* case,<sup>102</sup> in which Turkey prosecuted and convicted of manslaughter a French officer of the *Lotus*, a French-flag merchant vessel that had collided with a Turkish-flag vessel, causing much property damage and the loss of eight Turkish lives. France objected to the Turkish prosecution, claiming that Turkey had no basis for jurisdiction under any principle of international law. France and Turkey submitted the dispute to the Permanent Court of International Justice for resolution of the jurisdictional issue.

The French argued that an officer of a ship on the high seas can be held to obey only the laws and regulations of the flag state and that international law prohibited Turkey from asserting jurisdiction simply on the basis of the nationality of the victims, that is, that the passive-personality principle was not sufficient to support Turkey's assertion of jurisdiction.<sup>103</sup> The court declined to decide the passive-personality issue, but held that Turkey's assumption of jurisdiction could be predicated on the fact that the effects had occurred on the Turkish-flag vessel, which was assimilated to Turkish territory for the purposes of the

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101. Profs. Merle and Vitu have explained: "we cannot go so far as to assimilate the result which would have occurred here to one that has actually occurred here." R. MERLE & A. VITU, *TRAITÉ DE DROIT PÉNAL* 367 n.2 (2d ed. 1978). French legislation and the *cour de cassation* (France's court of last resort which, while lacking the U.S. Supreme Court's type of review power, can nullify lower court decisions, have created an exception to this general rule for situations presenting a more dangerous risk of national security, sovereignty, or governmental function. In these cases, jurisdiction obtains via the protective principle. See *CODE DE LA SANTÉ PUBLIQUE* arts. 626, 627 (Daloz 1980).

102. The S.S. "Lotus" (France v. Turkey), 1927 P.C.I.J. (ser. A) No. 9 (judgment of Sept. 7). See Hudson, *The Sixth Year of the Permanent Court of International Justice*, 22 AM. J. INT'L L. 1, 8 (1928).

103. 1927 P.C.I.J. (ser. A.) No. 9, at 26.

case.<sup>104</sup>

Most of the French opposition to the Turkish position and to the application of the objective territorial theory related not to the validity of the theory itself, but to its application to a pilot of a ship on the high seas. The French argument related more to a question of concurrent jurisdiction and to legislative jurisdiction rather than to enforcement jurisdiction. The French argued that from a practical standpoint in maritime matters, the law of the flagship state must govern the captain of a vessel.<sup>105</sup> On the other hand, the effect of the pilot's conduct caused harmful results on the Turkish vessel. The French point of view is appropriate for non-intentional conduct. However, the law relating to murder or other intentional violence which is to be applied ought to be that of the state on which the homicide occurs—in this case, Turkey. Certainly, adjudicative and enforcement jurisdiction should be appropriate and legislative jurisdiction ought to be as well, at least in cases of intentional violence. This is simply an issue of the predominance of objective territoriality over subjective territoriality.

Thus, the same would be true if the captain of a vessel perpetrated or helped perpetrate terrorist violence aboard another ship. The substantive legislative jurisdiction of the state in which the effects occur, as well as its adjudication and enforcement jurisdiction, should apply because the conduct was aimed at and had an impact on its territory. Objective territoriality allows jurisdiction to obtain in the state of the ship on which the terrorism occurred, as a matter of first priority.

With regard to terrorism perpetrated on a vessel by hijackers or saboteurs, objective territoriality would similarly apply. The law of the vessel on which the violence occurred would apply and jurisdiction to prosecute and punish would obtain primarily in the state of the ship on

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104. *Id.* at 27. See also RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 30 (1965) (reporter's note), describing the *Lotus* case and its holding. This type of jurisdiction more aptly may be called the "floating territorial principle." See Empson, *The Application of Criminal Law to Acts Committed Outside the Jurisdiction*, 6 AM. CRIM. L.Q. 32, 32 (1967); George, *Extraterritorial Application of Penal Legislation*, 64 MICH. L. REV. 609, 613 (1966). The position of the French government and that of the dissent in the *Lotus* case was that the law of the flagship ought to govern the actions of the pilot. That position later was adopted by two major international conventions relating to navigation on the high seas. See Brussels International Convention for the Unification of Certain Rules Relating to Penal Jurisdiction in Matters of Collisions or Other Incidents of Navigation (1952), reprinted in 4 SINGH, BRITISH SHIPPING LAWS 3111 (1983); Geneva Convention on the High Seas, *supra* note 55. See also *United States v. Williams*, 589 F.2d 210, 212 n.1 (5th Cir. 1979) (noting that the Geneva Convention on the High Seas "is a codification of international law"), *aff'd*, 617 F.2d 1063, 1090 (5th Cir. 1980).

105. *Lotus*, 1927 P.C.I.J. (ser. A) No. 9, at 25.

which the offense occurred. The policy of concern in the *Lotus* case—to allow the law of the flagship to control the ship's governance—is not at issue in the case of terrorism on the high seas. Thus, in the case of the *Achille Lauro*,<sup>106</sup> it was perfectly appropriate that primary jurisdiction obtain in Italy, as the crimes occurred on her floating territory.<sup>107</sup>

American law traditionally has allowed the assertion of jurisdiction when the conduct giving rise to an offense has occurred extraterritorially, so long as some harmful effects or results have taken place within United States territory.<sup>108</sup> Probably the most frequently cited United States decision enunciating the objective territoriality principle is *Strassheim v. Dailey*,<sup>109</sup> in which Justice Holmes held that “[a]cts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a state in punishing a cause of the harm as if [the defendant] had been present at the effect, if the state should succeed in getting him within its power.”<sup>110</sup> It is clear from Jus-

106. See *supra* notes 2-3 and accompanying text.

107. When U.S. fighter planes intercepted an Egyptian jetliner carrying the *Achille Lauro* hijackers (later to be convicted by the Italian judicial system, N.Y. Times, Oct. 11, 1985, at A1, col. 6), they either committed kidnapping or hijacking—an act of violence—of their own, or they have a claim of justification. The only justification could be that the Egyptian government or jetliner pilot consented to the taking, or were participating in the alleged hijackers' escape. See McGinley, *The Achille Lauro Affair—Implications for International Law*, 52 TENN. L. REV. 691 (1985). See also Singer, *Terrorism, Extradition, and FSIA Relief: The Letelier Case*, 19 VAND. J. TRANSNAT'L L. 57 (1986). In the *Letelier* case, the court stated flatly that:

there is no discretion to commit, or to have one's officers or agents commit an illegal act. . . . Whatever policy options may exist for a foreign country, it has no 'discretion' to perpetrate conduct designed to result in the assassination of an individual or individuals, action that is clearly contrary to the precepts of humanity as recognized in both national and international law.

*Letelier v. Republic of Chile*, 488 F. Supp. 665, 673 (D.D.C. 1980).

108. In both France and the United States it is necessary that legislation provide for jurisdiction when either the subjective or objective territoriality theories apply. See Perkins, *supra* note 84, at 1157 n.9; CAL. PENAL CODE § 778 (West 1985) (providing that “when the commission of a public offense, commenced without the state, is consummated within its boundaries by a defendant, himself outside the state, through the intervention of an innocent or guilty agent or any other means proceeding directly from said defendant, he is liable for punishment therefor”). See also *Commonwealth v. Macloon*, 101 Mass. 1 (1869) (statutory authority is required for judicial competence in a homicide case in which the victim was wounded on board a British vessel on the high seas but died in Massachusetts); Blakesley, *Jurisdiction*, *supra* note 28, at 1123 & n.38. The problem, of course, in all such cases is determining what is “the evil effect” or result that will allow the assertion of jurisdiction. See Comment, *Jurisdiction over Interstate Homicides*, 10 LA. L. REV. 87 (1949). See also *State v. Lang*, 108 N.J.L. 98, 154 A. 864 (1931); *Hunter v. State*, 40 N.J.L. 495 (1878).

109. 221 U.S. 280 (1911).

110. *Id.* at 285. The Supreme Court in *Strassheim* traced the development of case law supporting the objective territorial principle. *Id.* (citing *American Banana Co. v. United Fruit Co.*,

tice Holmes' opinion and from historical precedent that the objective territoriality principle is not designed to apply when parties merely intend their criminal activity to take effect within territorial boundaries, but the effects never occur there. Lately, however, the application of the objective territorial principle by United States courts has been more expansive than that of all other countries.<sup>111</sup> It has been expanded beyond any notion of territoriality to accommodate assertion of jurisdiction, for instance, over thwarted extraterritorial narcotics conspiracies.<sup>112</sup>

Objective territoriality clearly is not the proper vehicle for assertion of jurisdiction over any act of terrorism that has not actually had an impact within the territory of the United States. Neither is it the proper vehicle for jurisdiction over thwarted extraterritorial conspiracies to commit terrorism in the United States. The objective territoriality theory is inappropriate, even if the object of the conduct was United States citizens or other interests. There are traditional bases of jurisdiction, however, that would accommodate such circumstances. In addition to the universality theory<sup>113</sup> and the passive-personality theory,<sup>114</sup> there is the protective principle.

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213 U.S. 347, 356 (1909); *Simpson v. State*, 92 Ga. 41, 42, 17 S.E. 984, 985 (1893); *Commonwealth v. Macloon*, 101 Mass. 1, 6, 18 (1869); *Commonwealth v. Smith*, 93 Mass. (11 Allen) 243, 256, 259 (1865)). A similar analysis has been relied upon by more modern courts. *See, e.g.*, *United States v. King*, 532 F.2d 505 (5th Cir. 1976), *cert. denied*, 429 U.S. 960 (1976); *Rivard v. United States*, 375 F.2d 882 (5th Cir.), *cert. denied*, 389 U.S. 884 (1967); *United States v. Layton*, 509 F. Supp. at 216; *People v. Fea*, 47 N.Y.2d 70, 76, 390 N.E.2d 286, 288-89, 416 N.Y.S.2d 778, 780-81 (1979).

111. *See, e.g.*, *United States v. Marino-Garcia*, 679 F.2d 1373, 1380-81 (applying a "nexus" theory along with the objective territorial theory and the protective principle), *reh'g denied*, 685 F.2d 1389 (11th Cir. 1982), *cert. denied*, 459 U.S. 1114 (1982); *United States v. Conroy*, 589 F.2d 1258 (5th Cir. 1979); *United States v. Postal*, 589 F.2d 862 (5th Cir. 1979); *United States v. Cadena*, 585 F.2d 1252 (5th Cir. 1978).

112. *United States v. Winter*, 509 F.2d 975, 982 (5th Cir. 1975), *reh'g denied*, 588 F.2d 100 (5th Cir. 1979) (since federal narcotics conspiracy law does not require an overt act, jurisdiction based on the objective territorial theory obtains, even though no effect has occurred on U.S. territory). *See also*, *United States v. Cadena*, *supra* note 111; Note, *Drug Smuggling and the Protective Principle: A Journey Into Uncharted Waters*, 39 LA. L. REV. 1189 (1979). For an extensive critique of this expansion, see Blakesley, *Jurisdiction*, *supra* note 28, at 1141-63. *See also*, Rosenthal, *Jurisdictional Conflicts Between Sovereign Nations*, 19 INT'L LAW. 487, 487-92 (1985); Zagaris & Rosenthal, *Jurisdictional Considerations*, *supra* note 28, at 312, 317.

113. *See supra* notes 45-83 and accompanying text.

114. *See infra* notes 137-55 and accompanying text.

### C. *The Protective Theory of Jurisdiction*

The protective principle provides a basis for jurisdiction over an extraterritorial offense when that offense has or could have an adverse effect on, or poses a danger to, a state's security, integrity, or sovereignty, or on an important governmental function.<sup>115</sup> Most incidents of terrorism as defined in this article aimed at a particular state or government will trigger jurisdiction in the object state based on the protective principle. This may be true even if the conduct is aimed at or has an impact on individual nationals, as long as it is designed to intimidate, influence, or to extort some concession from the state or to threaten its security or sovereignty. If the conduct is perpetrated or promoted by one government against another state's nationals or against some dissident or other group, it is state terrorism or an act of war that will trigger the universality theory of jurisdiction.

There is a clear distinction between the protective theory and the objective and subjective territoriality principles. The objective territoriality theory provides jurisdiction over crimes committed wholly outside the forum state's territory, when the effects or results of those crimes actually *occur* within the territory.<sup>116</sup> The subjective territorial theory provides for jurisdiction over crimes in which a material element has occurred within the territory.<sup>117</sup> The protective principle, on the other hand, provides for jurisdiction over offenses committed wholly outside the territory of the forum state, even when no effect occurs within the territory. The protective principle, however, is *only* appropriate when those offenses have an impact on or threaten the state's security, integrity, sovereignty or important governmental function.<sup>118</sup>

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115. In 1935, the Harvard Research described the traditional principle:

A state has jurisdiction with respect to any crime committed outside its territory by an alien against the security, territorial integrity or political independence of that state, provided that the act or omission which constitutes the crime was not committed in exercise of a liberty guaranteed the alien by the law of the place where it was committed.

Harvard Research, *supra* note 29, art. 7, at 543. Of course, an important motive in any assertion of jurisdiction is the protection of the forum state. That is true whatever theory of jurisdiction is asserted.

116. See *supra* notes 97-114 and accompanying text.

117. See *supra* notes 94-96 and accompanying text.

118. The focus of the protective principle of jurisdiction, therefore, is the nature of the interest that may be injured, rather than the place of the harm or the place of the conduct. This distinction was clearly articulated in *United States v. Pizzarusso*, 388 F.2d 8 (2d Cir. 1968), *cert. denied*, 392 U.S. 938 (1968). An alien was convicted of knowingly making false statements under oath in a visa application to a United States consular officer in Canada. The court was careful to point out that the violation of 18 U.S.C. § 1546 took place entirely in Canada, but the effect on U.S. sovereignty supported the prosecution under the protective principle. *Pizzarusso* at 10. The

The protective principle is the only accepted theory that allows jurisdiction over conduct that poses a *potential* threat to certain interests or functions of the asserting state. Furthermore, because of the significant dangers it poses to relations among nations, it is limited to recognized and stated interests or functions.<sup>119</sup> With very few exceptions, national penal codes throughout the world recognize this principle and its limitations.<sup>120</sup> Most nations would recognize that the protective principle should apply when terrorist violence is ultimately aimed at themselves or other states.

International law and the domestic law of most countries maintains a clear distinction between the objective-subjective territorial principles and the protective principle. French law provides a prototype

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fact that the accused entered the United States was not an element of the offense. *Id.* at 9. The court defined the protective principle as the authority to "prescribe a rule of law attaching legal consequences to conduct outside [the state's] territory that *threatens* its security as a state or the operation of its governmental functions, provided the conduct is generally recognized as a crime under the law of states that have reasonably developed legal systems." *Id.* at 10 (emphasis added) (quoting RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 33 (1965)). Thus, lying to a consular officer which occurs entirely abroad may be perceived as constituting "an affront to the very sovereignty of the United States," and as having "a deleterious influence on valid governmental interests." *Id.* See also *supra* note 28, RESTATEMENT DRAFT §§ 402-03 (retaining the traditional bases of extraterritorial jurisdiction); Blakesley, *Extraterritorial Jurisdiction*, *supra* note 28, at 1137 n.72. The Restatement draft recognizes the protective principle and provides that jurisdiction pursuant to the principle will obtain for: "[c]ertain conduct [performed] outside its [the asserting state's] territory by persons not its nationals which is directed against the security of the state or certain state interests." *Supra* note 28, RESTATEMENT DRAFT § 402(3). If lying to a consular officer to obtain a passport is sufficient, then killing or kidnapping a state's national to intimidate or influence his or her government certainly is. See also *United States v. Layton*, *supra* note 99. (employing protective principle in convictions of conspiracy to murder and aiding and abetting the murder of a U.S. congressman and the wounding of an American diplomat in connection with the cult activities at Jonestown, Guyana). See Egelko, *Ex-Jones Follower Convicted by Jury in Guyana Deaths*, *The Los Angeles Daily J.*, Dec. 2, 1986, at 1, col. 4. See also *infra* notes 135-39 and accompanying text. There may be some overlap between the objective territoriality and the protective principles. When the effect actually infringes on the sovereignty or integrity of a state or impinges upon some governmental function, either or both of the theories may be appropriate, depending on whether the effect actually falls upon some territorial situs. It may be said that the objective and subjective territorial theories are distinctions within the territorial principle, while the protective principle is an exception to it, as the latter does not require an actual effect to occur within the territory. See Harvard Research, *supra* note 29, at 543. See also Blakesley, *Extraterritorial Jurisdiction*, *supra* note 28, at 19-22.

119. See *United States v. Pizzarusso*, 388 F.2d 8; *United States v. Egan*, 501 F. Supp. 1252, 1257-58 (S.D.N.Y. 1980); *United States v. Keller*, 451 F. Supp. 631, 635 (D.P.R. 1978); Note, *Drug Smuggling and the Protective Principle*, 39 LA. L. REV. 1189 (1979).

120. See, e.g., C. PR. PÉN. art. 694 (Daloz 1978-79), discussed *infra* notes 121-23 and accompanying text. See also Harvard Research, *supra* note 29, at 543, 547-51; Sahovic & Bishop, *The Authority of the State: Its Range with Respect to Persons and Places* in MANUAL OF PUBLIC INTERNATIONAL LAW 311, 363-64 (M. Sorensen ed. 1968).



example, in the context of reaction to terrorism. France traditionally has not asserted jurisdiction over aliens who committed crimes outside French territory.<sup>121</sup> There are, however, exceptions to this refusal to assert jurisdiction over crimes committed abroad by aliens. Indeed, French law explicitly allows jurisdiction over acts that threaten the general interests of the Republic, including the security of the state and its diplomatic or consular posts or agents, and counterfeiting the seal or national currency.<sup>122</sup> Such offenses are "punishable in the same manner as an infraction committed within . . . [French] territory," indicating that the basis for jurisdiction is the protective principle--an exception to the territorial theory.<sup>123</sup>

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121. In the famous *Fornage* case, 84 J. du Palais 229 (Cass. crim. 1873), for example, a Swiss national was indicted in France for larceny committed in Switzerland. On appeal, the judgment of the lower court was quashed because jurisdiction cannot extend to offenses committed outside the territory by foreigners who, by reason of such acts, are not justiciable by the French tribunals; seeing that, indeed, the right to punish emanates from the right of sovereignty, which does not extend beyond the limits of the territory; that, except in the cases specified in Article 7 of the Code of Criminal Instruction, the provision of which is founded on the right of legitimate self defense, the French tribunals are without power to judge foreigners for acts committed by them in a foreign country; that their incompetence in this regard is absolute and permanent; that it can be waived neither by the silence or the consent of the accused; that it exists always the same at every state of the proceedings. *Id.* at 230 (author's translation), also translated in J. SWEENEY, C. OLIVER & N. LEACH, *THE INTERNATIONAL LEGAL SYSTEM* 122 (1981) (partial translation) and 2 J. MOORE, *INTERNATIONAL LAW DIGEST* 262-63 (1906). See also Delaume, *supra* note 93, at 176 n.8.

122. C. PR. PÉN. art. 694 (Daloz 1984). art. 694 provides that:

Every alien who, outside the territory of the Republic, commits, either as author or as accomplice, a crime or a delict against the security of the State or of counterfeiting the seal of the State or national currency in circulation, or a consular agents or posts is to be prosecuted and adjudged according to the disposition of French law, whether he is arrested in France or the Government obtains his extradition.

*Id.* at para. 1 (author's translation). Thus, art. 694 calls for exceptional prosecution to protect basic French national interests in cases "for which foreign governments may only have an imperfect appreciation." C. PR. PÉN. art. 694 para. 2. See also Bigay, *Les dispositions nouvelles de compétence des juridictions françaises a l'égard des infractions commises a l'étranger*, 1976 Dalloz-Sirey, *Législation* [D.S.L.] 51-52; Blakesley, *Extraterritorial Jurisdiction*, *supra* note 28, at 21 n.57. French law also allows jurisdiction for offenses against French nationals, relying on the passive-personality theory of jurisdiction, see *infra* notes 137-54 and accompanying text, and for those very grave crimes that all states have an interest in prosecuting, under the universality theory, see *supra* notes 45-82 and accompanying text.

123. In numerous cases, jurisdiction has been asserted over offenses fitting the protective principle. *E.g.*, Rivièrè Case, 13 REV. DE DROIT INT'L PRIVÉ 543 (Cass. crim. 1917) (treason); *In re Glass*, 1858 D.P. IV 339 (Trib. corr. de Boulogne sur Mer) (alien outside French territory obtained false French passport); *In re Urios*, 1920 Bull. Crim. No. 26, 34 (Cass. crim.) (alien, outside French territory, endangered French national security), cited in 2 G. HACKWORTH, *supra* note 87, at 203, and Delaume, *supra* note 93, at 176 n.8. With art. 694, the French legislature introduced a scheme that provides clear, if rather broad, application of the protective principle. In the 1930s, French judicial application of the protective principle was criticized as being "inadmis-

In the United States, early draft legislation, aimed at creating jurisdiction over terrorism was too broad to resolve the problems relating to jurisdiction over terrorism, because it could be read to cover common criminal violence against United States nationals.<sup>124</sup> Ultimately, Congress enacted the Omnibus Diplomatic Security and Antiterrorism Act of 1986 to apply strictly to terrorist violence of the nature defined in this article. Although not explicitly articulated, the essence of the legislation is the protective principle.<sup>125</sup> Some case law in the United States provided the theoretical underpinnings for the legislation. The 1978 murder of Congressman Leo Ryan in Guyana, for example, had provided a federal district court with a vehicle to apply both the objective territorial and the protective principles of jurisdiction. In *United States v. Layton*,<sup>126</sup> defendant Larry Layton was charged with conspiracy to murder a United States congressman;<sup>127</sup> aiding and abetting the murder of a United States congressman;<sup>128</sup> conspiracy to murder an internationally protected person;<sup>129</sup> and aiding and abetting in the at-

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sible in principle and in excess of anything which international law permits." Harvard Research, *supra* note 29, at 558. The late Professor Garcia-Mora also severely criticized any overbroad application of the protective principle because of the likelihood of wide-ranging discretion by the prosecuting state causing unjust, politically oriented judgments. Garcia-Mora, *Criminal Jurisdiction Over Foreigners for Treason and Offenses Against the Safety of the State Committed Upon Foreign Territory*, 19 U. PITT. L. REV. 567, 588 (1958). See also Blakesley, *Extraterritorial Jurisdiction*, *supra* note 28, at 43 & n.181; Note, *Extraterritorial Jurisdiction and Jurisdiction Following Forceable Abduction: A New Israeli Precedent in International Law*, 72 MICH. L. REV. 1987 (1974); Paust, *Federal Jurisdiction*, *supra* note 17, at 210-11.

124. See H.R. 4288, 99th Cong., 1st Sess. (1986) (The Anti-Terrorism Act of 1986); H.R. 4294, 99th Cong., 1st Sess. (1985); S. 1429, 98th Cong., 2d Sess. (1985) (The Terrorist Prosecution Act of 1985).

125. 18 U.S.C. § 2331 (Supp. 1986). See *supra* notes 16-17. Chapter 113A, "Extraterritorial Jurisdiction Over Terrorist Acts Abroad Against United States Nationals," provides in § 2331(a) for reaching "whoever kills a national of the United States, while such national is outside the United States, . . . if the killing is a murder, . . . voluntary manslaughter, and involuntary manslaughter. . . ." In § 2331(e), the Act provides: "No prosecution for any offense described in this section shall be undertaken by the United States except [when] . . . in the judgment of the certifying official, such offense was intended to coerce, intimidate, or retaliate against a government or a civilian population." The legislative history comments to the Act provide: "[T]he committee of conference does not intend that chapter 113A reach nonterrorist violence inflicted upon American victims. Simple barroom brawls or normal street crime, for example, are not intended to be covered by this provision." H.R. REP. NO. 494, 99th Cong., 2d Sess., at 87 (1986), reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS 1865, 1960 (legislative history).

126. 509 F. Supp. 212 (N.D. Cal. 1981).

127. See 18 U.S.C. § 351(d) (1976) (proscribing conspiracy to kill or kidnap members of Congress, among other officials).

128. See *id.* at § 351(a) ("whoever kills a member of Congress [or other officials] . . . shall be punished").

129. Layton was also charged in connection with the wounding of a diplomat, the American

tempted murder of an internationally protected person.<sup>130</sup> The district court found that it had proper subject-matter jurisdiction over all counts.<sup>131</sup>

Among the potential theories of jurisdiction cited, the court relied in part upon "[t]he objective territorial principle, which allows countries to reach acts committed outside territorial limits, but intended to produce, and producing, detrimental effects within the nation."<sup>132</sup> The protective principle, however, was the most appropriate and the primary basis for asserting jurisdiction, since the effect of the killing clearly ended Congressman Ryan's ability to continue functioning as a congressman, hence impairing an important governmental function. The murder could also be construed as a threat to or as actual damage to United States sovereignty. The court clearly saw this application, noting that "[t]he alleged crimes certainly had a *potentially* adverse effect upon the security or governmental functions of the nation, thereby providing the basis for jurisdiction under the protective principle."<sup>133</sup> The court held that Congress is free to extend jurisdiction ex-

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deputy chief of mission in Guyana. 509 F. Supp. at 214. See 18 U.S.C. § 1117 (1982) (providing punishment for these offenses).

130. See 18 U.S.C. § 1116(a)2 (1982) (providing that "whoever kills or attempts to kill a foreign official, official guest, or internationally protected person shall be punished as provided under sections 1111, 1112, and 1113 of this title").

131. The *Layton* court held that "the courts of the United States have repeatedly upheld the power of Congress to attach extraterritorial effect to its penal statutes, particularly where they have been applied to citizens of the United States." 509 F. Supp. at 215 (citing *Blackmer v. United States*, 284 U.S. 421, 437 (1932); *United States v. Baker*, 609 F.2d 134, 136 (5th Cir. 1980); *United States v. King*, 552 F.2d 833, 850-51 (9th Cir. 1976), *cert. denied*, 430 U.S. 966 (1977)). The court believed that jurisdiction would be appropriate under the following theories: objective territoriality; protective principle; nationality; and passive-personality. 509 F. Supp. at 216.

132. 509 F. Supp. at 215 (citing *Strassheim v. Dailey*, 221 U.S. 280, 285 (1911)); *United States v. King*, 552 F.2d at 850; *United States v. Fernandez*, 496 F.2d 1294, 1296 (5th Cir. 1974)). If there was no actual impact on the territory of the United States, the effects of the acts might have been felt in Washington, D.C., or in Northern California where Congressman Ryan served.

133. 509 F. Supp. at 216. The court said that "[a]n attack upon a member of Congress, wherever it occurs, equally threatens the free and proper functioning of government." *Id.* at 219. The court saw this as different from other homicides because "Congressmen were singled out for protection because of the position they hold in our constitutional government, because their protection is important to the integrity of the national government and therefore serves an important interest of the government itself." *Id.* Thus, explained the court, if Congress assigns its members to function in the arena of foreign relations, they must often travel abroad. If it were possible to escape jurisdiction by attacking members of Congress while abroad, there would be clear obstruction and injury to the governmental function, sovereignty, and integrity. *Id.*

tratorritorially if it wishes.<sup>134</sup>

The murders and other acts of violence in *Layton* were extraterritorial acts of terrorism. Given that the acts were directed against officials of the government, the protective principle was clearly appropriate. Such conduct against "internationally protected persons" was proscribed by statute and jurisdiction was created by multilateral convention and domestic law.<sup>135</sup> Those laws would not, however, cover purposeful or wanton attacks on non-combatants committed in order to intimidate the government, to further some political end, or to gain a military or political advantage. It was to ensure legislative, adjudicatory and enforcement jurisdiction in these cases—when the offense is against a victim who does not fit the "internationally protected person" category—that Congress recently promulgated the Omnibus Diplomatic Security and Anti-Terrorism Act of 1986.<sup>136</sup> In exercising its

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134. *Id.* at 216. The court explained:

Courts have generally inferred such jurisdiction for two types of statutes: (1) statutes which represent an effort by the government to protect itself against obstructions and frauds; and (2) statutes where the vulnerability of the United States outside its own territory to the occurrence of the prohibited conduct is sufficient because of the nature of the offense to infer reasonably that Congress meant to reach those extraterritorial acts.

*Id.* at 218. *See* *Skirotos v. Florida*, 313 U.S. 69, 73-74 (1941), wherein the Supreme Court combined the protective and nationality principles as follows:

[A] criminal statute dealing with acts that are *directly injurious to the government*, and are capable of perpetration without regard to particular locality, is to be construed as applicable to citizens of the United States upon the high seas or in a foreign country, though there be no express declaration to that effect.

(emphasis added). *See also* *United States v. Cotten*, 471 F.2d 744, 750 (9th Cir.) (jurisdiction over theft of government property overseas), *cert. denied*, 411 U.S. 936 (1973); *Stegeman v. United States*, 425 F.2d 984, 986 (9th Cir.) (jurisdiction allowed over violations of bankruptcy laws relating to the concealment of assets, as the statute "was enacted to serve *important interests of government*, not merely to protect individuals who may be harmed by the prohibited conduct.") (emphasis added) *cert. denied*, 400 U.S. 873 (1970); *United States v. Fernandez*, 496 F.2d 1294 (5th Cir. 1974). In *United States v. Pizzarusso*, 388 F.2d 8 (2d Cir. 1968), the court determined that Congress intended to apply the laws there in question extraterritorially. *Id.* at 10-11. In making this decision, the court explained that the statutes implicitly and necessarily suggested an extraterritorial application. *Id.* The government has the right and capacity to protect itself. In *United States v. Bowman*, 260 U.S. 94, 98-99 (1922), the integrity of the U.S. Treasury was involved, when the defendants conspired to defraud a corporation in which the U.S. government had a significant interest. The participants' nationality played a significant role in *Bowman*, as the conviction of the three U.S. nationals was affirmed on the ground that they were "certainly subject to such laws as [Congress] might pass to protect itself and its property." *Id.* at 102. The extension of the protective principle beyond kidnapping, murder, or conspiracy to kidnap or murder internationally protected persons is apt only if the violence is designed to intimidate the government or presents a potential danger to United States sovereignty, security, integrity or to an important governmental function.

135. *See supra* notes 127-29 and accompanying text.

136. 18 U.S.C. § 2331 (Supp. 1986) (jurisdiction over extraterritorial violence). *See also*

prerogative to allow jurisdiction over extraterritorial terrorist violence, it appears clear that Congress relied on either the protective principle or some modification of the passive-personality theory that encompasses elements of the protective principle.

#### D. *Passive-Personality Jurisdiction*

The passive-personality theory of jurisdiction provides a state with competence to prosecute and punish perpetrators of criminal conduct that is aimed at or harms the nationals of the asserting state. The evolution of French law on the passive-personality theory provides an interesting view of how the principle may apply to terrorism. In France today, passive-personality jurisdiction is important—but it was not always so. Before 1975, jurisdiction based on the passive-personality theory was recognized in France but rarely applied; it was asserted only after a decision of the *ministère publique* that it was in the public interest to do so. This usually meant that the theory would be applied only when the offense threatened public order or security<sup>137</sup> or when the victim was injured in an airplane.<sup>138</sup> In fact, when the Turkish government in the S.S. *Lotus* case prosecuted a French national on the basis of a Turkish law that relied on such passive-personality jurisdiction, France objected vociferously.<sup>139</sup>

In 1975, however, the French expanded authority to assert jurisdiction over extraterritorial offenses committed against its nationals with the promulgation of article 689 of the Code of Criminal Procedure.<sup>140</sup> Article 689 incorporates the passive-personality principle to its

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*supra* notes 16 & 125 and accompanying text.

137. R. MERLE & A. VITU, *supra* note 92, at 319.

138. *Id.* See CODE DE L'AVIATION CIVIL art. L. 121-8 (1976) (prohibiting and punishing violence aboard aircraft). Several ordinances provided for jurisdiction over offenses committed against French nationals during World War II, but those ordinances are no longer in force. See Ord. Aug. 28, 1944, art. 1; Ord. Nov. 9, 1944, art. 2.

139. See *supra* notes 102-05 and accompanying text.

140. Law of July 11, 1975, No. 75-624, C. PR. PÉN. art. 689, para. 1 (Daloz 1975). The law changed art. 689 to read: "Any foreigner who, beyond the territory of the Republic, is guilty of a crime, either as author or accomplice, may be prosecuted and convicted in accordance with the disposition of French law, when the victim of the crime is a French national." *Id.* at para. 1 (author's translation and emphasis). Art. 696 was amended in the 1970s to allow jurisdiction over offenses as required by international convention. C. PR. PÉN. art. 696 (Daloz 1978-79). It allows French jurisdiction over *crimes*, *délits*, and *contraventions* (terms roughly equivalent, respectively, to felonies, second degree felonies and high misdemeanors, and misdemeanors and infractions) committed abroad for which an international convention attributes jurisdiction to France. France has entered into many such conventions in the past two decades. *E.g.*, Convention for the Suppression of Unlawful Seizure of Aircraft, *supra* note 74; Convention for the Suppression of Unlawful

fullest measure, providing that every alien who is either principal or accomplice in a crime committed outside French territory may be prosecuted and adjudged on the basis of French law if the victim is a French national.<sup>141</sup>

There was rather forceful opposition to such a legislative enactment of the passive-personality principle. It was feared that broad application of jurisdiction based on the nationality of the victim could cause international disputes and create a confusing scheme of concurrent jurisdiction.<sup>142</sup> The proponents of the new law prevailed by arguing that there was no danger of confusing concurrent jurisdiction because French jurisdiction under the law would be *subsidiary* to that of the country in which the offense occurred, except in cases involving national security.<sup>143</sup> Thus, if it is not a matter of national security, France will only take jurisdiction over such crimes if the country in which the offense occurred fails to do so.

This does leave some problem of concurrent jurisdiction. When the offense impinges on national security, France suggests that it has primary jurisdiction. A state on whose territory the offense actually occurred, however, would probably also claim primary jurisdiction. If a dispute developed over which state ought to have primary jurisdiction in such a circumstance, the state on whose territory the harm actually occurred would likely prevail. That state could acquiesce to the state whose national security was compromised. In addition, the latter state would still retain jurisdiction and could seek extradition after justice

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Acts Against the Safety of Civil Aviation, *supra* note 78; Protocol (with annex) Amending the Agreements, Conventions and Protocols on Narcotics, *supra* note 62; Single Convention on Narcotic Drugs, *supra* note 62. The French legislature promulgated the new art. 696 to provide authority to execute those treaties. Thus, as a precaution, art. 696 is sufficiently general to apply to any international convention according to need. See generally Bigay, *supra* note 122.

141. C. PR. PÉN. art. 689, para. 1 (Dalloz 1975), *quoted and translated supra* note 140.

142. One member of Parliament, M. J. P. Cot, declared his opposition to the Law of July 11, 1975, in the *Assemblée Nationale* on the basis of the French tradition marked by the *Lotus* case, see *supra* notes 102-05 and accompanying text, and the Brussels Convention of 1952. He believed that, as in the past, the passive personality principle should be applied only when French social order is troubled. See Bigay, *supra* note 122, at 52.

143. Proponents of this argument cited C. AV. CIV., *supra* note 138, at art. L. 121-28. as precedent for the new article. In addition, they presented foreign examples to reinforce the validity of the new law: art. 7 of the German (Federal Republic) Penal Code provides jurisdiction over acts injuring German nationals if the acts are punishable in the place they occurred and if no other authority takes jurisdiction; art. 10 of the Italian Penal Code provides for jurisdiction over acts committed by foreigners abroad that injure Italy or one of its citizens, when the offense is punishable under Italian law by perpetual hard labor or imprisonment for one year or more. See Bigay, *supra* note 122, at 52 (citing Italian Penal Code art. 10 and German Penal Code art. 7).

was satisfied in the former.

Among the factors that motivated the French legislature to promulgate this new law were the rapidly developing international penal law<sup>144</sup> and, most importantly, the increasing prevalence of international terrorist activity, such as the events at the Hague in 1974, when French hostages were taken and French property was damaged at the French Consulate General.<sup>145</sup> This incident illustrated in dramatic fashion that French law as it stood in 1974 would have inhibited and possibly precluded the prosecution of the offenders, even if their persons were obtained by extradition.<sup>146</sup> The paramount rationale for the new law, however, was the legislators' belief that the Republic's laws should provide for prosecution and punishment for crimes against its citizens when the territorial or protective principles failed to do so. The concern was that in some circumstances, other nations might not feel the same urgency to prosecute as would the French.<sup>147</sup>

In the realm of common criminal conduct, the passive-personality theory of jurisdiction traditionally has been anathema to United States law and practice. The *Restatement (Second) of Foreign Relations Law of the United States* provides the traditional repudiation of the principle: "A State does not have jurisdiction to prescribe a rule of law attaching a legal consequence to conduct of an alien outside its territory merely on the ground that the conduct affects one of its nationals."<sup>148</sup> Thus the United States government has vehemently protested any assertion of jurisdiction by foreign courts over acts of United States nationals committed against nationals of the forum state outside that state's territory. The *Cutting* case<sup>149</sup> provided the opportunity for the most famous protest. Cutting, a United States national, was seized by Mexican authorities during a visit to that country, and jailed pending prosecution for criminal libel allegedly perpetrated in Texas against a Mexican national.<sup>150</sup> The U.S. Secretary of State protested the asser-

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144. See *supra* note 64.

145. These events are reported at Bigay, *supra* note 122, at 51.

146. *Id.* at 51-52.

147. Compared to other states of Europe, France actually was late in developing the passive-personality principle to this extent. See, e.g., THE PENAL CODE OF SWEDEN pt. I, ch. 2, § 3(3), at 15 (G. Mueller ed., T. Sellin trans. 1972). See also *supra* note 143.

148. RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 30(2) comment e (1965). This has not been changed in a new tentative draft of the Restatement. See RESTATEMENT DRAFT §§ 402-03, *supra* note 28.

149. *Cutting Case*, 1887 For. Rel. 751 (1888), reported in 2 J.B. MOORE, INTERNATIONAL LAW DIGEST 232-40 (1906).

150. *Cutting Case*, 2 J.B. MOORE, INTERNATIONAL LAW DIGEST, *supra* note 149, at 229.

tion of jurisdiction under the passive-personality theory, arguing that under traditional principles of international law such an extension of authority was not possible.<sup>151</sup>

Although the passive-personality theory today is gaining recognition internationally,<sup>152</sup> it is not necessary to adopt this theory in the United States to address growing contemporary problems with terrorist violence. If the passive-personality theory were seen as the basis for

151. The Secretary argued that:

[T]he assumption of the Mexican Tribunal, under the law of Mexico, to punish a citizen of the United States for an offense wholly committed and consummated in his own country against its laws was an invasion of the independence of this Government. . . .

[I]t is not now, and has not been contended, by this Government . . . that if Mr. Cutting had actually circulated in Mexico a libel printed in Texas, in such a manner as to constitute a publication of libel in Mexico within the terms of Mexican law, he could not have been tried and punished for this offense in Mexico.

As to the question of international law, I am unable to discover any principle upon which the assumption of jurisdiction made in Article 186 of the Mexican Penal Code can be justified. . . . [I]t has consistently been laid down in the United States as a rule of action that citizens of the United States cannot be held answerable in foreign countries for offenses that were wholly committed and consummated either in their own country or in other countries not subject to the jurisdiction of the punishing state. . . . To say that he may be tried in another country for this offense, simply because its object happens to be a citizen of that country, would be to assert that foreigners coming to the United States bring hither the penal laws of the country from which they came, and thus subject citizens of the United States in their own country to an indefinite criminal responsibility.

*Cutting Case*, 2 J.B. MOORE, INTERNATIONAL LAW DIGEST, *supra* note 149, at 228-42 (quoting cable, Mr. Brayard, Sec. of State, to Mr. Connery, Charge to Mexico, Nov. 1, 1887, 1887 For. Rel. 751). It was important that the alleged criminal conduct had occurred on United States territory. In 1940, in the *Fiedler* case, a case similar to the *Cutting* case, the Counsel for the Department of State instructed the American Consul General in Mexico City as follows:

This Government continues to hold the views which [are] expressed to the Mexican Government in the *Cutting Case*. . . . This Government continues to deny that, according to the principles of international law, an American citizen can be justly held in Mexico to answer for an offense committed in the United States, simply because the object of that offense happens to be a Mexican citizen, and it remains that according to the principles of international law, the penal laws of a State, except with regard to nationals thereof, have no extraterritorial force. Accordingly, it is desired that your office should refrain from recognizing the above quoted provisions of Mexican law in the event that another American citizen shall be detained in Mexico charged with an offense committed within the jurisdiction of the United States.

6 WHITEMON DIGEST OF INTERNATIONAL LAW 103-04 (1968) (quoting *In re Fiedler*, Dept. of State File 312.1121, Feb. 9, 1940).

152. Although § 402 of the RESTATEMENT DRAFT, *supra* note 28, is equivocal as to whether it rejects or accepts the passive-personality theory, when it is read along with comment e it appears to indicate that this theory is acceptable. *See supra* note 146 and accompanying text. Certainly, given wider acceptance of this principle, it would be difficult to say that international law bars a broad application of it.



asserting jurisdiction in the United States over extraterritorial acts of terrorism, that jurisdiction would be subsidiary to assertions of jurisdiction based on any of the territorial principles and the protective principle. Although the Omnibus Diplomatic Security and Anti-Terrorism Act of 1986 has language suggesting the passive-personality theory,<sup>153</sup> it is better interpreted as employing the protective principle. It articulates clearly that the purpose of the Act is to provide jurisdiction over and to prosecute and punish extraterritorial terrorism.<sup>154</sup> This alone should be enough for courts to interpret the basis of jurisdiction under the Act to be the protective principle.

### CONCLUSION

The language of the Omnibus Antiterrorism Act of 1986 makes it clear that the theory of jurisdiction at its base is the protective principle. It provides that if violence is perpetrated against a United States national, United States jurisdiction will obtain only when the terrorist violence is of the nature defined as terrorism in this article.<sup>155</sup> It is only when the terrorism is not aimed at intimidation of the state or at the accomplishment of some political or military objective, or when it would not otherwise infringe on United States sovereignty, that assertion of jurisdiction would be undesirable or inappropriate.

International law condemns terrorism and provides bases for all nations to assert jurisdiction over its perpetration and its perpetrators. Most of the world population does not wish to be the victims or the executioners. International and domestic law can equip us to extricate ourselves from the "infernal dialectic" of violence; they provide the means whereby we may avoid accepting or participating in, even by acquiescence, oppression, or the slaughter of innocents. It is error of the highest order to accept the ideologues' argument that because some nations or rebel groups participate in oppression and terror-violence, it is inevitable and therefore necessary to combat it with like conduct. Self defense under the rule of law does not include the use of innocent civilians as tools.

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153. Omnibus Diplomatic Security and Anti-Terrorism Act of 1986, P.L. 99-399, 100 Stat. 853 (1986) (§ 1202, inserting ch. 113A into 18 U.S.C. as § 2331: "(a) Homicide.—Whoever kills a national of the United States, while such national is outside the United States [and] (c) whoever outside the United States engages in physical violence—(1) with the intent to cause serious bodily injury to a national of the United States. . . .")

154. *Id.* See *supra* notes 124-25 and accompanying text for more elaboration on this Act and its focus on terrorist violence.

155. See *supra* notes 18-27 and accompanying text.

There is a tendency today to believe that there is no international law, that it cannot be enforced and, concomitantly, that there is a need to fight terrorism with like action. In such a conflict, both sides consider the other to be terrorists and each regards its conduct as "freedom fighting." But there is a point beyond which any government or any freedom fighter clearly commits crime—a point reached when they use innocent civilians as the means to achieve their ends. All nations accept this in principle, and both international law and the domestic law of virtually every nation substantively condemn terrorism so defined. International and domestic law provide jurisdiction over that conduct and its perpetrators, according to a hierarchy of jurisdiction based on the traditional jurisdictional theories. Jurisdiction will obtain for a given state depending on whether the terrorism occurred within or had an impact on its territory; whether it damaged or threatened to damage the state's national security or other governmental interest; or whether the terrorism had an impact upon one of the state's nationals for the purpose of intimidation or achieving some military or political purpose. If no other state seeks to assert jurisdiction, any state may obtain jurisdiction over the perpetrators of such violence, based on the universality theory.

Even if violence is of a terrorist nature and is perpetrated against a country's nationals, it may be that another nation has a higher priority of jurisdiction. This would be true, for example, when the violence occurs on that other nation's territory. The definition of the crime must clearly be tied to the definition of terrorism provided in this article and the priorities of jurisdiction must be set out as described herein. Thus, in the *Achille Lauro* affair, for instance, Italy had primary jurisdiction pursuant to the territorial theory of jurisdiction. The United States would have had subsidiary jurisdiction on the basis of the protective principle or the passive-personality theory. Had the perpetrators escaped Italian jurisdiction and been captured by some other nation, that nation would have had the right—indeed, the obligation—to prosecute or to extradite the fugitives on the basis of the universality theory.

