Wings For Talons: The Case for Extraterritorial Jurisdiction Over Sexual Exploitation of Children Through Cyberspace

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WINGS FOR TALONS: THE CASE FOR THE EXTRATERRITORIAL JURISDICTION OVER SEXUAL EXPLOITATION OF CHILDREN THROUGH CYBERSPACE

CHRISTOPHER L. BLAKESLEY

DAN STIGALL

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I. INTRODUCTION

In November 2003, thirty-seven Vietnamese girls, one as young as five years old were rescued in raids on a notorious brothel district in Phnom Penh, Cambodia.1 Prosecutors noted that seven women and five men were charged with prostituting children and conspiracy to prostitute children, for


In addition, the United States cannot ignore its contribution to the sex trafficking industry. American sex tourists travel worldwide to exploit women and girls. IJM’s recent experience in Cambodia demonstrates the multi-national nature of the crime. Vietnamese girls, some as young as 5 years old, are trafficked to Cambodia and exploited by American sex tourists. Of the tens of thousands of women and children in prostitution in Cambodia, the ILO reports that ‘more than 15 percent of prostitutes were from 9 to 15 years of age, and that 78 percent of these girls were Vietnamese.’ A survey conducted in December 2001 by World Vision and the Cambodian government indicates that Western pedophiles accounted for about 38 percent of all child sex offenders in Cambodia. Information about the thriving commercial sex trade in Cambodia is easily found by anyone with access to the Internet. Just type the name of a popular Cambodian Brothel village like Svay Pak on google.com or hop on one of the many pedophile internet chat rooms and you will easily find maps, guidelines, and ratings of the brothels and their services. Illegal Immigrant Smuggling: Hearing before the Subcomm. on Crime, Corrections and Victims’ Rights of the Senate Judiciary (July 25, 2003) (statement of Sharon B. Cohn, Director of Anti-Trafficking Operations, International Justice Mission), available at 2003 WL 56336600.
which they could face between ten to twenty years of prison. This article will consider a range of criminality from the use and dissemination of cyberpornography and related exploitation of minors, including slave-trade, even murder. Every day, at every hour, pedophiles are engaged in the heinous practice of luring young boys and girls into sexual encounters and otherwise sexually exploiting children. This is probably no truer today than it was a century ago. However, the development of the Internet has given the pedophile a new method of stalking his prey—a medium that allows him to reach out to millions of potential victims without leaving the comfort of his basement. Not only has technology increased the modern pedophile’s pool of potential victims, it has increased his reach.

This article will consider a range of criminality from the use and dissemination of cyberporn-facilitated exploitation of minors to the concomitant expansion to physical exploitation, including slave-trade, even murder. Ellen Podgor’s suggestion that a hybrid approach be applied to crime that occurs or is facilitated through cyberspace.\(^2\) Professor Podgor suggests that the law should first determine whether the conduct is cybercrime. Once determined to be cyber-conduct, the conduct should be categorized and fit within one of the many extant forms of computer criminality. Thus, cyber-fraud may have different jurisdictional basis than cyber-terrorism. The cyber-aspect will place the conduct within a separate category and the specific form of cyber-conduct in order to determine proper jurisdiction. This paper will consider how well this thoughtful approach will work for sexual abuse and exploitation through the use of the computer.

Technology has changed the landscape of sexual exploitation. No longer limited to hanging around near playgrounds, modern pedophiles can stalk children in cyberspace. The techniques commonly used by such sexual predators are sexually suggestive online conversations (often involving enticement) and sending dirty pictures to children (the modern equivalent of candy outside the playground.

The changed landscape also gave modern child exploitation an inextricably international aspect. Cyberspace has no borders and distance is in that realm is irrelevant. Today, a child in rural Alabama is potential prey for sexual predators in Munich, Germany.

To cope more effectively with the changed landscape of child

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exploitation, it is necessary for laws to expand their extraterritorial reach. Some statutes in the "child exploitation arena" have already been ruled to apply extraterritorially. The prime example of this is 18 U.S.C. § 2252 (2004) (certain activities relating to the material involving the sexual exploitation of minors). Two of the more useful statutes in combating online pedophiles are 18 U.S.C. § 1470 (2003) (transfer of obscene materials to minors) and 18 U.S.C. § 2422 (2003) (coercion and enticement). These latter statutes, however, have yet to receive significant or wide-spread recognition as having extraterritorial application.

The internet has dispensed with territorial limitations for sexual predators. This article addresses issues relating to the international law of extraterritorial jurisdiction as well as domestic law as it relates to extraterritorial jurisdiction. We will discuss traditional international law of jurisdiction and apply the various jurisdictional theories to a series of hypothetical situations and cases that have occurred or may occur in the international arena. We will analyze which of the traditional bases of jurisdiction is more appropriate in each circumstance. We will also discuss whether new theories of jurisdiction or combinations of traditional bases are appropriate and sufficient to address the problem.

We will also consider whether any form of sexual exploitation of children through the internet might be or may become a true international crime of a universal nature. Part of this discussion will focus on the transnational versus international dichotomy to see whether the distinction makes sense and, if so, where the line between the two is drawn.

This will require a study of traditional and current international treaty law, customary international law, general principles of international law, especially *jus cogens* principles, and the laws of various domestic legal systems.

Finally, we argue that it is time for United States and other nations' domestic courts to follow suit with regard to its statutes criminalizing the enticement and transfer of obscene material children. Beyond that, we will argue that issues relating to the extension of sexual exploitation of children to the horrors of abduction, sexual slavery and assassination. To combat modern sexual predators, it is not enough to have talons. One must also have wings.
II. INTERNATIONAL AND DOMESTIC LAW ON EXTRATERRITORIAL JURISDICTION

Jurisdiction may be defined as the authority to effect legal interests—to prescribe rules of law, to adjudicate legal questions and to compel, to induce compliance or to take any other enforcement action.\textsuperscript{3} Jurisdiction is the means of making law functional. It is the practical way to make law a reality. Our focus essentially will be on prescriptive jurisdiction, which is the jurisdiction to prescribe rules of law or the jurisdiction to proscribe conduct as criminal. Any definition of crime includes necessarily its scope in time and space—its jurisdictional breadth.

The definition, nature, and scope of jurisdiction may vary depending on the context in which jurisdiction is claimed or asserted. Domestic constitutional law and international may limit a state's authority to apply its domestic law to events that occur outside that state's territory.\textsuperscript{4} Domestic law obviously limits jurisdiction,\textsuperscript{5} and on the enforcement side, may preclude prosecution or enforcement of a judgment rendered by a state that assumed jurisdiction or that sought extradition.\textsuperscript{6}


\textsuperscript{4} See, e.g., Cutting Case, 1887 For. Rel. 751 (1888). Also reported in 2 J.B. Moore, International Law Digest at 228-242 (1906); Blakesley, et al. The International Legal System, \textit{supra} note 3, at 163-166 (sanction for violating international law on jurisdiction may be an unfavorable diplomatic protest); S.S. "Lotus" (Fr. v. Turk.), 1929 P.C.I.J. (ser. A) No. 9 (Sept. 7, 1927) (indicating that although international law is permissive, sanction for violation may be an unfavorable judgment in the Int'l Court of Justice). See generally Christopher L. Blakesley, Terrorism, Drugs, International Law and the Protection of Liberty Ch. 3 (1992); Christopher L. Blakesley, United States Jurisdiction Over Extraterritorial Crime, 73 J. Crim. L. & Criminology 1109 (1982) [hereinafter Blakesley, U.S. Jurisdiction]; Christopher L. Blakesley, A Conceptual Framework for Extradition and Jurisdiction Over Extraterritorial Crime, 1984 Utah L. Rev. 685 [hereinafter Blakesley, Conceptual Framework].

\textsuperscript{5} See Willis L. M. Reese, Limitations on the Extraterritorial Application of Law, 4 Dalhousie L.J. 589 (1978).

\textsuperscript{6} See Adolf Hoberger, Recognition and Enforcement of Foreign Judgments, 18 Am. J. Comp. L. 367, 375 n.55 (1970). This is the function of the principle of double criminality. For discussion of this, see Christopher L. Blakesley, Terrorism, Drugs, International Law and the Protection of Human Liberty 224-50 (1992);
In the United States, jurisdiction must comply with constitutional principles, such as those relating to the separation of powers, federalism, and due process. Within the United States, of course, conflicts of jurisdiction are resolved by reference to the Full Faith and Credit Clause, Article IV, Section 1, which provides that, "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. The rules of comity provide similar benefits internationally.

Prescriptive jurisdiction is permissive in international law. Unless a prohibition to prescriptive jurisdiction is proved, a state may properly claim jurisdiction. Enforcement and adjudicative jurisdiction are not permissive and are dependant on the existence of prescriptive jurisdiction.

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Christopher L. Blakesley, Extraterritorial Jurisdiction, in II INTERNATIONAL CRIMINAL LAW 33 (M. Cherif Bassiouni ed. 1999).

7. Cf., U.S. v. Suerte, 291 F.3d 366 (5th Cir. 2002) (holding that while the Due Process Clause of the U.S. Constitution may constrain the extraterritorial reach of the Maritime Drug Law Enforcement Act (MDLEA), it does not necessarily impose a nexus requirement, because the Congress promulgated the law pursuant to the Piracies and Felonies Clause of the U.S. CONST., art. I, § 8, cl. 10.

8. See generally Zschernig v. Miller, 389 U.S. 429, 440-41 (1968) (indicating that 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) (finding a states' jurisdiction to prescribe law is limited by the supremacy clause, U.S. CONST. art. VI, § 2, cl. 2, as well as by federal law, international custom and treaties); U.S. v. Curtiss-Wright Export Corp., 299 U.S. 304, 318 (1936) (identifying federal authority based on "foreign affairs power" incident to sovereignty).

9. In 1895, the U.S. Supreme Court noted that international comity, "is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws." Hilton v. Guyot, 159 U.S. 113, 164 (1895) (subsequently quoted in Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 409 (1964)).


11. Id.

12. See, e.g., Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 123 (1812); Antelope, 23 U.S. (10 Wheat.) 66, 123 (1825) ("The courts of no country execute the penal laws of another."); Huntington v. Attrill, 146 U.S. 657, 669 (1892) ("Laws have no force of themselves beyond the [territorial] jurisdiction of the State which enacts them, and can have extra-territorial effect only by the comity of other States.").

13. BLAKESLEY, ET AL., supra note 3, at 183-86; Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 123 (1812); Antelope, 23 U.S. (10 Wheat.) 66, 123 (1825) ("The courts
United States courts and those of other nations have expanded jurisdictional law to include more international and transnational crime.\textsuperscript{14} The major impetus for this expansion has been the burgeoning of serious transnational and international crimes, such as terrorism,\textsuperscript{15} money laundering,\textsuperscript{16} drug trafficking,\textsuperscript{17} and now trafficking in humans.\textsuperscript{18}

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of no country execute the penal laws of another....
\textsuperscript{14}\textsuperscript{14} Huntington v. Attrill, 146 U.S. 657, 669 (1892) ("Laws have no force of themselves beyond the [territorial] jurisdiction of the State which enacts them, and can have extra-territorial effect only by the comity of other states..."); \textit{Arrêt Fornage}, 84 Journal du Palais 299 (Fr., Cour de Cassation, 1873).
\textsuperscript{15}\textsuperscript{15} For example, U.S. federal law has been written to cover extraterritorial terrorist conspiracies. \textit{See} 18 U.S.C. §§ 2332b(e) and (f) (2003).
\textsuperscript{17}\textsuperscript{17} \textit{Cf.}, U.S. v. Suerte, 291 F.3d 366 (5th Cir. 2002) (holding that while the Due Process Clause of the U.S. Constitution may constrain the extraterritorial reach of the Maritime Drug Law Enforcement Act (MDLEA), it does not necessarily impose a nexus requirement, because the Congress promulgated the law pursuant to the Piracies and Felonies Clause of the U.S. Constitution (art. I, § 8, cl. 10). \textit{See also} U.S. v. Davis, 905 F.2d 245, 249, n.2 (9th Cir. 1990).
\textsuperscript{18}\textsuperscript{18} In an attempt to punish violations of the law of nations, Congress in 1789, provided for extraterritorial jurisdiction over the crimes of piracy, slave trading, and kidnapping of ambassadors. The Alien Tort Claims Act, 28 U.S.C. § 1350 (2003), which was part of the original Judiciary Act of 1789, provides: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." The Act provides for federal jurisdiction for any civil action in tort committed in violation of the laws of nations or a treaty of the United States. Federal courts have interpreted this Act to, permit "aliens to bring private tort suits against corporations for certain human rights violations committed in the United States or abroad." \textit{Developments in the Law, International Criminal Law: Corporate Liability for Violations of International Human Rights Law}, 114 HARV. L. REV. 2025, 2026 (2001) [hereinafter \textit{Corporate Liability}]. American citizens as well as non-Americans may bring actions in U.S. courts under the FSIA. The U.S. Supreme Court has noted that Congress did not intend to limit jurisdiction under the Act to actions brought by American citizens. So long as an action "satisfies the substantive standards of the Act, it may be brought in federal court regardless of the citizenship of the plaintiff." Verlinden B.V. v. Cent. Bank of Nig., 461 U.S. 480, 490-91 (1983). Scholarly commentary on this Act is quite polarized. \textit{See}, e.g., Craig Force, \textit{ATCA's Achilles Heel: Corporate Complicity, International Law and the Alien Tort Claims Act}, 26 YALE J. INT'L L. 487, 497 (2001); Curtis A. Bradley, \textit{Chevron Deference and Foreign Affairs}, 86 VA. L. REV. 649, 680 (2000); Joan Fitzpatrick, \textit{The Future of the Alien
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Cooperation among and between governments in investigation, extradition, and in acceptance of each other's prescriptive jurisdiction have become matters of acute importance. 19 Expansion of jurisdiction also poses serious risks to human rights relating to civil liberty, fair trial, and fair procedure. 20 It is important not to allow this expansion foster expediency over civil liberty, human rights or coherent anti-crime strategy. 21


20. Id.

III. TRADITIONAL THEORIES OR BASES OF JURISDICTION

In 1935, Harvard Research in International Law described five traditional bases of jurisdiction over international and transnational crime: territorial, protective, nationality, universal, and passive personality. Actually, territorial jurisdiction has two types: objective and subjective. In addition, the passive personality theory is a form of nationality jurisdiction, where the victim of the crime is a national of the state claiming jurisdiction. We will discuss each theory or basis briefly in turn. These theories of jurisdiction form the foundation for conceptualizing how nations have applied their law to criminalize conduct.

A. The Territorial Theories

Historically, the territorial theories have been the foundation of criminal jurisdiction, especially over crime. Nation-states, by definition in international law are competent to proscribe conduct that occurs in whole or in part within their territory.

Criminal law has been rooted in the conception of law and law enforcement as a means of keeping peace within the territory. At the inception of the nation-state, and of international law, the King’s Peace was the ideological tool used to promote the consolidation of power against private justice. Tappan stated:


[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 reaction 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. . . .

Harvard Research described 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.” European scholars traditionally have described the theory similarly: “[t]o affirm the territoriality of criminal law (lex loci delicti) is to proclaim that penal law 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.”

25. Tappan, supra note 24, at 45.
27. Author’s translation of: Affirmer la Territorialité de la répression (lex loci delicti), c’est proclamer que la loi pénale s’applique à tous les individus quelle que soit leur-nationalité ou celle de leurs victimes, qui ont commis une infraction sur le territoire de l’Etat ou cette loi est en vigueur; a contrario, on refuse a cette loi toute application en dehors de ce même territoire.
ROGER MERLE & ANDRÉ VITU, TRAITÉ DE DROIT PÉNAL: PROBLÈMES GÉNÉRAUX DE
Recently, nations have clearly expanded the reach of their extraterritorial jurisdiction due to complexities in our modern, transient world along with the vigorous creation of modern crimes. Initially, this began by applying fictions to transfuse or conceptualize extraterritorial conduct to be territorial. Later, extraterritorial theories were adopted to extend jurisdiction.

Once 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 is not express, provided there cannot be any doubt as to the legislative intent.

For example, in United States v. Bowman, the U.S. Supreme Court in 1922 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. Thus, national courts have been adept at interpreting legislation to authorize extension of jurisdiction to cover offenses committed beyond their nation’s territorial limits.

B. Nationality Jurisdiction

Although the nationality principle of jurisdiction is universally recognized,

31. Id. at 103.
32. Delaume, supra note 29, at 179.
33. For example, even though Title 15 of the U.S. Code, which includes various statutes governing securities exchanges, is silent on whether they are to be applied extraterritorially, U.S. federal courts have recognized that prescriptive jurisdiction may extend to transnational securities frauds. See, e.g., Alfadda v. Fenn, 935 F.2d 475, 478 (2d Cir. 1991) (citing 15 U.S.C. § 78aa (1987)). Federal law has been written to cover extraterritorial terrorist conspiracies. See 18 U.S.C. § 2332b(e)-(f) (2002).
there are differences among nations in its application. United States practice is not opposed in principle to nationality jurisdiction and applies it to certain crimes. On the other hand, jurisdiction on the basis of the nationality of the victim (passive personality) has not been accepted, except in certain specific and exceptional situations, such as offenses threatening national security, or trafficking in narcotics.

Continental countries insist on applying the active personality (nationality) principle and have also more broadly accepted passive personality principle. Nationality is considered a link so strong that the

34. See, e.g., Bowman, 260 U.S. 94 (applying nationality jurisdiction to U.S. nationals for offenses committed on the high seas and in a foreign port); U.S. v. Boshell, 952 F.2d 1101 (9th Cir. 1991) (applying nationality jurisdiction to U.S. nationals for possession of cocaine); U.S. v. Juda, 46 F.3d at 967; see also U.S. v. Cardales, 168 F.3d 548, 553 (1st Cir.) cert. denied, 528 U.S. 838 (1999); U.S. v. Thomas, 893 F.2d 1066 (9th Cir. 1990) (applying nationality jurisdiction to U.S. nationals for violation of child pornography statutes).

35. For example, 21 U.S.C. §955 (1970) makes it unlawful for any citizen of the United States on board any vessel to intentionally possess a controlled substance with intent to distribute.

36. Blakesley, ET AL., THE INTERNATIONAL LEGAL SYSTEM, supra note 3, at 161-166 and authority cited therein; Blakesley, The Autumn of the Patriarch: The Pinochet Extradition Debacle and Beyond—Human Rights Clauses Compared to Traditional Derivative Protections such as Double Criminality, 91 J. CRIM. L. AND CRIMINOLOGY 1, 48-49, n.192-200, and authority cited therein. See also Blakesley, TERRORISM, supra note 4, at Ch. 3, especially, pp. 96, 127-137 and authority cited therein; Professor W. E. Hall stated:

The authority possessed by a state community over its members being the result of the personal relation existing between it and the individuals of which it is formed; its laws travel with them wherever they go, both in places within and without the jurisdiction of other powers. A state cannot enforce its laws within the territory of another state; but its subjects remain under obligation not to disregard them, and it preserves the power of compelling observance by punishment if a person who has broken them returns within its jurisdiction.

national state may prosecute any of its nationals for offenses they commit anywhere in the world. Most require that the offense be punishable in the place where it was committed as well. The idea is that jurisdiction is required as a manifestation of their sovereignty over their nationals and to maintain their respect around the world by punishing their own wrongdoers. Most also maintain a concomitant exception to extraditing their nationals, although this is breaking down slightly. If a continental nation refuses extradition, it has an obligation to prosecute the perpetrator. The principle of not extraditing one's nationals has its roots in the writings of Grotius, "aut dedere—aut punire." Some argue that prosecution is secondary to extradition: "primo dedere—secundo prosequi," except in cases of the "nationality principle," where extradition is always forbidden. This does not appear clear-cut, however.

Many continental nations see the non-extradition of nationals as very

of State, 50 CASE W. RES. L. REV. 127, 144 (1999), noting that Spain has also relied on the passive personality principle to try Argentine citizens accused of human rights violations committed during the Dirty War. Id. at 145-46.


39. The Italian Constitution and Penal Code allow extradition of nationals only if a treaty allows for it. COSTITUZIONE DELLA REPUBBLICA ITALIANA [COST] art. 26.1 (Italy); CODICE PENALE [C.P.] art. 13.4 (Italy); see Nicoletta Parisi, National Report of Italy, in ALBIN ESER, OTTO LAGODNY, & CHRISTOPHER L. BLAKESLEY, THE INDIVIDUAL AS SUBJECT OF INTERNATIONAL COOPERATION IN CRIMINAL MATTERS 370 n.188 (2002) [hereinafter Eser, Lagodny, & Blakesley, The Individual as Subject]. The Netherlands Extradition Act, since 1988, has allowed the extradition of Dutch nationals, if they will be allowed to serve their custodial sentence in the Netherlands. See Extradition Act, Art. 4 (Neth.) [not yet located]; Bert Swart, National Report of the Netherlands, in ESER, LAGODNY, & BLAKESLEY, INDIVIDUAL AS SUBJECT, supra, at 499.

40. Eser, Lagodny, & Blakesley, THE INDIVIDUAL AS SUBJECT, supra note 36, at 110 (European Union); 179 (Finland); 268 (Germany); 372 (Italy); 499 (The Netherlands); 610 (United States). See also D. OEHLER, INTERNATIONALES STRAFRECHT 497 (2d ed. 1983)[library supposedly requested through worldcat]; in Otto Lagodny, The European Convention on the Suppression of Terrorism: A Substantial Step to Combat Terrorism?, 60 U. COLO. L. REV. 583, 587 n.22 (1989) [hereinafter Lagodny, European Convention on Suppression].

41. Lagodny, European Convention on Suppression, supra note 40, at 587.

42. Id.
important and nonnegotiable. The strength of the idea arose in antiquity, which saw citizens of the Greek city states, the Italian cities, and Rome, as well as other great civilizations, exempt their citizens from extradition. Native American tribes refused to deliver up their denizens. The extradition treaties in the mid-eighteenth century contained provisions exempting nationals. Today, jurisdictional law of virtually all continental nations covers nationals who commit serious offenses outside the national territory, as long as the conduct is punishable in the state of

43. See Extradition Issues—Papers Presented at the Harvard Conference on International Cooperation in Criminal Matters, and on file HARV. J. INT'L L. including that of Torston Stein; Jurgen Meyer and Deitrich Oehler. A summary of Stein's and Meyer's papers is available in 31 HARV. INT'L L. J. at 5, and at 108, respectively (1990). Of the total of 163 extradition treaties printed in the League of Nations Treaty Series and the first 550 volumes of the United Nations Treaty Series, 98 except the national of the requested State absolutely, 57 give to the requested state a discretionary right to refuse to surrender its nationals, while only 8 provide for extradition regardless of the nationality of the fugitive. IVAN SHEARER, EXTRADITION IN INTERNATIONAL LAW 96, app. II (1971).

44. SHEARER, infra note 46, at 95.

45. Crimes committed by members of the tribe against outsiders were usually not considered to be crimes, and “extradition” was refused. See Robert Fairbanks, A Discussion of the Nation Status of American Indian Tribes: A Case Study of the Cheyenne Nation 31 (1976) (unpublished LL.M. thesis, available at the Columbia University Law Library); FOUSTER DE COULANGES, LA CITÉ ANTIQUE, LIVRE III, Ch. XIII (1864); KARL LLEWELLYN AND E. HOEBEL, THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE (1941). However, the most severe penalty for intra-tribal crimes was banishment. See authority cited supra.

46. See G. F. MARTENS, RECUEIL DE TRAITÉS, 7 VOLS. (1791-1826), SUPPLÉMENTS DE PRINCIPAUX TRAITÉS, 20 vols. (1802-1842), cited and discussed in IVAN SHEARER, EXTRADITION IN INTERNATIONAL LAW 8 (1971), which lists some ninety-two treaties that were concerned with the return of fugitives, concluded between 1718 and 1830. See also Aupècle, L'Extradition et la Loi de 10 mars 1927, 14-16 (Paris, 1927) (unpublished thesis available in the Columbia University School of Law Library); FERNAND DE CARDILLAC, DE L'EXTRADITION 3-4, 9 (1875); ANDRÉ BILLOT, TRAITÉ DE L'EXTRADITION 34, 552 (1874); IVAN SHEARER, EXTRADITION IN INTERNATIONAL LAW at 10, 17, 103 (1971).

commission. 48

Europeans have clear-cut reasons for asserting jurisdiction over nationals who have committed offenses outside national territory. 49 They assert, for example, that a nation’s nationals have the benefit and protection of their nationality and owe allegiance to their country and thus should be answerable to the national jurisdiction for any offense they commit. 50 Furthermore, Europeans contend, any offense committed by a national abroad actually injures the nation’s reputation and respect in the world. 51 Most persuasively, Europeans argue that if the country of their nationality did not have the authority to assert jurisdiction, the national who has committed an extraterritorial offense might be immune from prosecution anywhere. 52 Even in Europe, however, nationality jurisdiction is subsidiary to that of a state on whose territory the crime has been committed, unless it occurs under exceptional and specific circumstances. Protective principle jurisdiction, however, is not subsidiary.

The United States Supreme Court recognized early in its history the existence of the power to punish offenses committed extraterritorially by U.S. nationals. 53 Congress, however, never has made a general rule

48. The French Minister of Justice formally promulgated a circulaire in 1841, prohibiting the extradition of nationals. Circulaire du Ministre de la Justice, Apr. 4, 1841, para. 2 in SHEARER, supra note 46, at 104 n. 5.


51. See authority cited in supra notes 36-40.

52. See authority cited in supra notes 36-40.

53. See Rose v. Himley, 8 U.S. (4 Cranch) 241, 279 (1808) (dictum). See also Chief Justice Marshall’s speech, Livingston’s Resolution, United States House of Representatives, quote in Appendix, 18 U.S. (5 Wheat.) 129 Note I (1829); Henfield’s Case, 11 F. Cas. 1099 (C.C.D. Pa. 1793) (No. 6360). In addition to the traditional (essentially territorial) function of keeping the peace, one of the functions of a municipal criminal justice system is simply to control its citizens’ conduct - to prohibit and attempt to limit conduct deemed to be socially harmful. This may be contrasted with a policy of keeping the king’s peace, which obviously is the essence of territoriality. That function may be considered necessary and apt whether the conduct occurs within or without the state’s territory. There have been periods in history in which the determinative factor for jurisdiction was citizenship or non-citizenship of the accused offender. S. Z. Feller, Jurisdiction Over Offenses With a Foreign Element, in 2 A TREATISE ON INTERNATIONAL CRIMINAL LAW §, at 5, 12, 30-32 (Bassiouni & Nanda eds., 1973).
relating to extraterritorial jurisdiction.\textsuperscript{54} Thus, at least traditionally and for
the most part, extraterritorial application of a statute is an exception to the
territorial general rule. Nevertheless, U.S. jurisprudence has approved
jurisdiction over nationals who commit crimes abroad even though the
appropriate statute did not explicitly declare that it applied extraterritorially.

The United States Supreme Court declared its basic attitude toward
nationality jurisdiction in the case of \textit{United States v. Bowman}:\textsuperscript{55}

The three defendants who were found in New York [but who
committed the criminal acts while in Brazil] were citizens of the
United States and were certainly subject to such laws as it might
pass to protect itself and its property. Clearly it is no offense to
the dignity of right of sovereignty of Brazil to hold them for this
crime against the Government to which they owe allegiance.\textsuperscript{56}

And again, in \textit{Blackmer v. United States},\textsuperscript{57} the Supreme Court stated:
"[W]ith respect to such an exercise of authority, there is no question of
international law, but solely of the purport of the municipal law which
establishes the duties of the citizen in relation to his own government."\textsuperscript{58}

The nationality theory's application in the U.S. is not as expansive as

\textsuperscript{54} Note, \textit{Extraditional Jurisdiction—Criminal Law}, 13 Harv. Int'l L.J. 346, 348-49
(1972). The Supreme Court attempted to lay down a general rule of statutory interpretation
with regard to extraterritorial offenses in \textit{U.S. v. Bowman}, 260 U.S. 94 (1922). It has not
become a general rule, however. \textit{See generally}, Ellen S. Podger, \textit{Defensive Territoriality: A
Comp. L. 1 (2002); Kenneth R. Feinberg, \textit{Extraterritorial Jurisdiction and the Proposed
proposed federal criminal code's provision of extraterritoriality). NATIONaL COMMISSION
ON REFORM OF THE FEDERAL CRIMINAL LAWS, \textit{Final Report of the National
Commission on Reform of the Federal Criminal Laws} § 208 (1971) (legislative
attempt to develop a general rule). Certain statutes expressly and specifically apply to
offenses committed by nationals outside the prosecuting state's territory. For example, 49
punishes unauthorized attempts by United States nationals, "wherever [they] may be," to
influence a foreign government in its relations with the United States. 18 U.S.C. § 953
(1994).

\textsuperscript{55} 260 U.S. 94 (1922).

\textsuperscript{56} \textit{Bowman}, 260 U.S. at 102.

\textsuperscript{57} 284 U.S. 421 (1932).

\textsuperscript{58} \textit{Id.} at 437.
that in Europe. There is no general principle that U.S. criminal law be applied to nationals wherever they may be. In fact, the crimes to which the nationality principle has been extended often have been those that indicate a strong protectionist motive. For example, in Bowman, jurisdiction was extended to cover extraterritorial fraudulent acts committed by a national, because the conduct was "directly injurious to the government and against which the government has the right to defend itself." Nationality are "certainly subject to such laws as [the U.S.] might pass to protect itself."

Nationality often appears to play a significant role in the application of U.S. legislation to extraterritorial conduct. Jurisdiction has been approved, for example, in the case of an extraterritorial violation of a penal clause in an absentee voting statute. Nationality jurisdiction also has been applied to American nationals assisting in the illegal immigration of alien contract laborers, trafficking in controlled substances on the High Seas, and sexual exploitation. Even a murder committed by a

60. Id. at 102; see also Blackmer, 284 U.S. at 437 ("[W]henever the public interest requires it.").
61. State v. Main, 16 Wis. 421 (1863).
63. 21 U.S.C. § 955 (1970) makes it unlawful for any citizen of the United States on board any vessel intentionally to possess a controlled substance with intent to distribute.
U.S. national on an uninhabited Guano island was prosecuted.\textsuperscript{65} Furthermore, courts have upheld a contempt judgment for failure to comply with a subpoena that had been served abroad by a consular officer\textsuperscript{66} and sustained jurisdiction to require income tax payment by nationals domiciled abroad.\textsuperscript{67} Sometimes the same act committed by an alien and a national might be punishable only against the national.\textsuperscript{68} Nationality jurisdiction may obtain, even though the national also is a national of the state in which the offense is committed.\textsuperscript{69}

In sort of an ascribed nationality form of jurisdiction, Congress

\textsuperscript{65} Jones v. U.S., 137 U.S. 202 (1890). Interestingly, the same philosophy as that which motivates continental countries to apply nationality jurisdiction—namely the accused’s likelihood of escaping justice altogether—motivated U.S. jurisdiction.

\textsuperscript{66} See, e.g., Blackmer v. U.S., 284 U.S. 421, 441 (1932). In Blackmer, a U.S. citizen residing in France was held in contempt of court for failing to comply with a subpoena to be a witness in a criminal trial. The Act of July 3, 1926, c. 762, 44 Stat. 835 (codified at 28 U.S.C. §§ 711-718 (1926) (current version at 28 U.S.C. § 1783 (1982)), provided that the court could issue a subpoena to be served personally by the U.S. Consul and that a contempt fine of up to $100,000 could be levied for refusal to comply and failure to show cause why it should not be levied. Blackmer, 284 U.S. at 433-46. The Supreme Court found that the hearing for contempt, done with the accused in absentia, did not violate due process and that jurisdiction extended to U.S. citizens abroad. \textit{Id.} at 440-41. It also found that the U.S. Consul could serve subpoenas in order to satisfy due process requirements without any treaty agreement. \textit{Id.} With regard to extraterritorial application of United States legislation, the Court found that, unless intent to the contrary was manifest, application of legislation to acts committed abroad was a matter of judicial construction, not one of legislative power. \textit{Id.} at 436-37. The Court was able to enforce the order because the defendant had property within the territory of the United States could be attached. \textit{Id.} at 441. Likewise, in \textit{U.S. v. First Nat’l City Bank}, 396 F.2d 897 (2d Cir. 1968), a branch of Citibank in Germany was under a U.S. subpoena to produce documents. \textit{Id.} at 898. The branch risked civil liability if it complied with the subpoena to produce documents. \textit{Id.} The court held that it has jurisdiction over branches of United States companies on the basis of the nationality principle. \textit{Id.} at 901. Nationality was determined by the place of incorporation. The court applied a balancing approach to decide whether to assert jurisdiction. \textit{Id.} at 902. The court weighed the plaintiff’s interest in receiving the documents against the defendant’s interest in avoiding civil liability. \textit{Id.} at 902-05. The court also had to consider delicate diplomatic interests. \textit{Id.} The decision went against Citibank, although it may have been different had the German penalty been criminal instead of civil. \textit{Id.}

\textsuperscript{67} Cook v. Tait, 265 U.S. 47 (1924).

\textsuperscript{68} \textit{Bowman}, 260 U.S. at 98.

\textsuperscript{69} Tomoya Kawakita v. U.S., 343 U.S. 717 (1952); Coumas v. Superior Court, 192 P.2d 449 (1948).
addressed shortcomings in jurisdiction over Reservists promulgating legislation in 1986 that would subject reservists "in Federal status to the same disciplinary standards as their regular component counterparts." At the end of 2000, Congress passed the Military Extraterritorial Jurisdiction Act (MEJA), which extends federal jurisdiction over U.S. civilians accompanying the armed forces abroad.

IV. THE PROTECTIVE PRINCIPLE

The protective principle is not subsidiary, even though it does not require a territorial nexus. It provides jurisdiction over offenses committed wholly outside the forum state's territory, when the offense poses a danger of causing an adverse effect on a state's security, integrity, sovereignty or important governmental function. The focus of the protective principle is the nature of the interest that is or that may be injured, rather than the place of the harm or the place of the conduct.

The protective principle is the only accepted traditional theory that allows jurisdiction over conduct that poses a potential threat to certain interest or functions of the asserting state. It is limited to recognized and stated interests or functions. Most national penal codes recognize this principle and its limitations. There may be some overlap between the objective territoriality and the protective principles. When a crime's 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 territorial theories are distinctions within and expansions of the territorial principle, while the

71. 18 U.S.C. §§ 3261-3267 (2000); see Tyler J. Harder, Moving Towards the Apex: Recent Developments in Military Jurisdiction, ARMY LAWYER, April-May 2003, at 3.
72. 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 22, at 543.
74. See, e.g., CODE DE PROCEDURE PÉNALE [C. PR. PÉN.] art. 694 (Fr.); see also Harvard Research, supra note 22 at 543, 547-51.
protective principle is an exception to it, as the latter does not require an actual territorial effect.

Most incidents of terrorism and other crimes against humanity\(^7^5\) will allow 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 the violence is designed to intimidate, influence, or to extort some concession from the state or to threaten its security or sovereignty and important governmental function. A question for this article is whether the protective principle is appropriate for application to cybercrime, including the sexual exploitation of children.

The distinction between the protective principle and the territorial theories was clearly articulated by the Second Circuit in *U.S. v. Pizzaruoso*, where an alien was convicted of knowingly making false statements under oath in a visa application to a U.S. consul in Canada.\(^7^6\) The fact that the accused ultimately entered the U.S. was not an element of the offense.\(^7^7\) The court was careful to point out that the violation of 18 U.S.C. § 1546 took place entirely in Canada.\(^7^8\) The crime’s effect on U.S. sovereignty supported jurisdiction on this theory.\(^7^9\) 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.’”\(^8^0\) Lying to a consular officer in Canada constituted “an affront to the very sovereignty of the United States [and had] a deleterious influence on valid governmental interests.”\(^8^1\) If lying to a consular officer is within the

\(^7^5\) See M. Cherif Bassiouni, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW (1994); Christopher L. Blakesley, Ruminations on Terrorism and Anti-Terrorism, 57 U. MIAMI L. REV. 701 (2003).

\(^7^6\) 388 F.2d 8 (2d Cir. 1968), cert. denied, 392 U.S. 938 (1968).

\(^7^7\) Id. at 11.

\(^7^8\) Id. at 9.

\(^7^9\) Id. at 10.

\(^8^0\) Id. (quoting RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE U.S. § 33) (emphasis added).

\(^8^1\) Pizzaruoso, 388 F.2d at 10; see also Blakesley, U.S. Jurisdiction, supra note 4 at 1137 n.72. The RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE U.S. § 402(3) (1987), recognizes the protective principle and provides that jurisdiction pursuant to the principle will obtain for: “[C]ertain conduct [performed] outside [the asserting state’s]
protective principle, then attacking officials working internationally certainly is.\textsuperscript{82} Our question is whether conspiring to or actually exploiting minors through cyberspace also fits or should fit?

V. THE PASSIVE PERSONALITY PRINCIPLE

The passive personality theory applies simply on the basis of the victim’s nationality. The passive-personality theory 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. This basis of jurisdiction is not widely accepted, indeed it has been roundly rejected in the United States in the past, except perhaps in relation to terrorism against U.S. nationals.\textsuperscript{83}

In Europe today, the passive personality-theory is on the ascendancy. This principle developed and became widespread during the Middle Ages, especially in Italy. The notion was that since the essential object of criminal law is to protect public and private interests, the victim’s national law and justice had the best appreciation of what protection ought to be afforded.\textsuperscript{84} German criminalists of the 19th century promoted what they called \textit{Realsystem}, a combination of both the passive personality and the protective principle theories of jurisdiction. \textit{Realsystem} emphasized the protection of the state-injury to a victim injured state.\textsuperscript{85} It went into desuetude on the European continent during the 19th Century when the heyday of positivism hit. It rebounded the mid-20th century.

\begin{itemize}
\item Territory by persons not its nationals that is directed against the security of the state or against a limited class of other state interests."
\item \textsc{Merle & Vitu, supra} note 27, at 372 (citing \textsc{Donnedieu de Vabres, Les Principes Modernes du Droit Penal International} 56 (1928)) [It is available at the L.S.U. Law Center and a photocopy is packed away in a box somewhere in my archives]; Donnedieu de Vabres, \textit{Le Système de la Personnalité Passive ou de la Protection des Nationaux}, 1950 REV. INT’L DR. PÉN. 511.
\item \textsc{Merle & Vitu, supra} note 27, at 374 (citing Schultz, \textit{Compétence des Juridictions Pénales pour les Infractions Commises à l’Etranger}, 1936 REV. SCI. CRIM. 331 (1936)).
\end{itemize}
Passive personality jurisdiction, like other extraterritorial bases, presents some problems of concurrent jurisdiction. When the offense is deemed to be one of primary importance, such as when it impinges on national security, most nations claim primary jurisdiction. However, a state on whose territory the offense actually occurred would probably claim the same. In the arena of cybercrime and sexual exploitation, many nations might do similarly. Typically, 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 under international law, but cybercrime presents the issue of where the crime actually occurred.

Traditionally, the passive-personality theory has been anathema to U.S. law and practice. THE RESTATEMENT (SECOND) provided the traditional repudiation: "A state does not have jurisdiction to prescribe a rule of law attaching legal consequences to conduct of an alien outside its territory merely on the ground that the conduct affects one of its nationals." 86 The U.S. government has vigorously protested assertions of jurisdiction based on this theory. The Cutting Case 87 provided the most famous protest. Cutting, a U.S. national, was seized by Mexican authorities during a visit to Mexico. He was jailed, pending prosecution for criminal libel, an incident that had allegedly been perpetrated in Texas against a Mexican national. 88 The U.S. Secretary of State protested the assertion of jurisdiction, arguing that the passive personality theory was improper under traditional principles of international law:

[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


87. Cutting Case, 1887 For. Rel. 751 (1888), in J.B. MOORE INTERNATIONAL LAW DIGEST 232-40 (1906); see also BLAKESLY, THE INTERNATIONAL LEGAL SYSTEM, CASES AND MATERIALS, supra note 3, at ch.3.

88. J.B. MOORE, supra note 4, at 229.
. . . [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. . . . [T]o 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.89

89. J.B. MOORE at 228-42 (quoting a cable from Mr. Brayard, Sec. of State, to Mr. Connery, Chargé to Mexico, Nov. 1, 1887). It was important that the alleged criminal conduct had occurred on United States territory. In 1940, in the Fiedler case, similar to Cutting, 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 maintains that according to the principles of international law, the penal laws of a State, except with regard to nationals thereof, have 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 WHITEMAN DIGEST OF INTERNATIONAL LAW at 103-04 (quoting M.S. Dept. of State File
Although the passive-personality theory today is gaining recognition internationally,\(^9\) it is not necessary to adopt it to address growing contemporary problems with terrorist violence. Although the Omnibus Diplomatic Security and Anti-Terrorism Act of 1986 has language suggesting the passive-personality theory,\(^9\) it is better interpreted as employing the protective principle. It articulates clearly that the purpose of the Act is to provide jurisdiction over, prosecute and punish extraterritorial terrorism.\(^9\)

VI. UNIVERSAL JURISDICTION

International law provides that there are certain offenses for which any nation obtaining personal jurisdiction over an accused may prosecute. These offenses are condemned by virtually all domestic law,\(^9\) so that any

\(^9\)Omnibus Diplomatic Security and Anti-Terrorism Act of 1986, Pub. L. No. 99-399, 100 Stat. 853 (1986) (defining domestic terrorism in 18 U.S.C. § 2331 as: "[A]ctivities that involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; appear to be intended to intimidate or coerce a civilian population; influence the policy of a government by intimidation or coercion; or to affect the conduct of a government by mass destruction, assassination, or kidnapping; and occur primarily within the jurisdiction of the United States."); Ahmad v. Wigen, 726 F. Supp. 389, 398 (E.D.N.Y. 1989) ("The United States recognizes nationality of the victim as a basis for criminal jurisdiction.") (citing 18 U.S.C. § 2331 (2002)).

nation that gets hold of the accused has an obligation to extradite or to prosecute. Since there has been some difficulty in determining universally what “prosecute” means, it has been set to mean to bring one’s prosecutorial mechanism to bear on an accused.  

Perhaps the most ancient offense of universal interest is piracy, a international law to do so. In 1985, the French promulgated loi No. 85-1407, du 30 Déc. 1985, providing jurisdiction to prosecute and punish anyone who commits [anywhere] crimes or delict that constitute torture, as provided by Art. 1 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment, U.N. GAOR, 39th Sess., U.N. Doc. A/39/708 (1984). In 1987, the French promulgated loi No. 87-541, du 16 Juillet 1987 to apply to the European Convention For the Repression of Terrorism and other anti-terrorism conventions, allowing French jurisdiction over the conduct prohibited by those treaties and made criminal in articles 295-298, 301, 303, 30 as well as the first and third paragraphs of art. 305, 310, 311, 312, 341-344, 354, 355, of the Code Pénal. These articles were replaced in 2002, inter alia, by Code Pénal arts. 421-1, 421-2, 421-2-2 through 421-2-5, 422-1 through 422-7, and 434-6.  

94. Demjanjuk v. Petrovsky, 776 F.2d 571, 581-82 (6th Cir. 1985) (recognizing explicitly the universality principle in an extradition decision), cert denied, 106 S. Ct.1198 (1986); BASSIOUNI & WISE, AUT DEDERE AUT JUDICARE, supra note 87; Blakesley, Extraterritorial Jurisdiction, supra note 6, at 31; GROTIUS, DE JURE BELL AC PACIS LIBRIS TRES 504 (F. Kelsey trans., 1925); O. Lagodny, European Terrorism Convention, supra note 37, at 586-87 (aut dedere—aut punire; or primo dedere—seundo prosequi); Paust, Federal Jurisdiction, 23 YALE J. INT’L L. 191, 211-12.  

95. 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.” 2 Hackworth DIGEST at 681. See also MERLE & VITU, supra note 27, at 374-75. 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, 450 U.N.T.S. 82 [hereinafter Geneva Convention on the High Seas]. See also The Marianna Flora, 24 U.S. 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, as such, are liable to the extreme rights of war.”); Alfred P. Rubin, The Law of
crime that may be considered analogous 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 participation in the slave trade, war crimes, crimes against humanity.


hijacking and sabotaging civil aircraft,\textsuperscript{99} genocide,\textsuperscript{100} apartheid,\textsuperscript{101} and


there is a growing trend to include traffic in narcotic drugs. This history, these treaties as well as others, and the domestic criminal law of all states, when considered as a whole, make it clear that terrorism—including hostage taking, kidnaping or wanton violence


against innocent civilians—is really a composite term including all of these separate universally condemned offenses, thus triggering the universality theory of jurisdiction. Recently, many multilateral treaties have condemned various international offenses that could be characterized as terrorism.\footnote{104} Moreover, all nations condemn, prosecute and punish terrorist violence, such as that described in Chapters 1 and 2, when perpetrated against them or their nationals. Other international conventions proscribing genocide,\footnote{105} apartheid\footnote{106} and hostage taking provide additional impetus


105. Genocide is directly punishable under international law and may be prosecuted under jurisdiction based on the universality principle, despite the fact that the Genocide Convention, inexplicably and in contrast to the Geneva Conventions, adopted the territorial and not the universality principle. \textit{See Genocide Convention, supra} note 100, 78 U.N.T.S. at 277; \textit{Geneva Conventions, supra} note 97, 75 U.N.T.S. at 287; \textit{Jescheck, Developments, supra} note 99, at 90. The Supreme Court of Israel noted that "Article 6 [of the Genocide Convention] imposes upon the parties contractual obligations with future effect, that is so say, obligations . . . committed within their territories in the future. This obligation, however, has nothing to do with the universal power vested in every Stateto prosecute for crimes of this type committed in the past—a power which is based on customary international law." \textit{Attorney Gen. v. Eichmann}, 36 I.L.R. 277, 304 (1962). \textit{See also} Yoram Dinstein, \textit{International Criminal Law}, 20 ISR.-L. REV. 206, 211-12 (1985). Paust, \textit{Aggression Against Authority, supra} note 100 at 293; Steven Lubet and Jan Stern Reed, \textit{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) (providing an excellent study of Nazi war crimes and transnational criminal law).


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beyond hijacking and unlawful control of aircraft to include acts of sabotage.\textsuperscript{114}

Domestic legislation has been promulgated to incorporate these conventions, notably in Europe\textsuperscript{115} and in the United States.\textsuperscript{116} The United

\begin{quote}
criminal act occurred in the air, are made “primary” jurisdictions. Other states are so-called “substitutionary” jurisdictions that may assert jurisdiction if the primary jurisdiction cannot or will not assert it. Hague Convention, supra note 109, art. 6-8, 22 U.S.T. at 1645-47. The references in FN. 109 are correct. Some states have enacted domestic legislation incorporating these notions. See, e.g., 85 StGB § 316c (1986) (W. Ge.).


114. Montreal Convention, supra note 113, art. 1, 24 U.S.T. at 568, 974 U.N.T.S. at 178-79. Contracting parties are required to promulgate laws to punish severely 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 territory. Montreal Convention, supra note 113, arts. 3-4, 24 U.S.T. at 569, 974 U.N.T.S. at 181.

115. For example, France’s Law No. 86-1020 of Sept. 9, 1986, provided that “any person aboard an airplane in flight, a boat at sea or any other means of collective transportation, who, by violence or threat of violence, takes possession of this [means of transport] . . . or exercises control over it (Law No. 70-634 of July 15, 1970) will be punished . . . .” Code pénal [C. PÉN] art. 462 (1986) (Fr.). Law No. 72-623 of July 5, 1972 (92 Gaz. Pal. 360 [1972] (Fr.)), provided jurisdiction over infractions committed aboard or against airplanes registered in France, even if committed outside French territory. Code de l’aviation civile art. L. 121-8.

116. United States legislation provides for jurisdiction over air piracy or hijacking in a manner similar to France. See 49 U.S.C.S. § 46502 (2003); see also U.S. Anti-Terrorism Act of 1990, 18 U.S.C. § 2331-2332 (2003); Dixon v. U.S., 592 F.2d 329, 339-40 (6th Cir. 1979) (requiring in an air-piracy charge proof of “[s]eizure or exercise of control of an aircraft . . . by force, violence, or intimidation, or threat thereof . . . with wrongful intent . . . while in the special aircraft jurisdiction of the United States), cert. denied, 441 U.S. 951 (1979). A related provision, 49 U.S.C.S. § 46505 (2003), prohibits carrying, placing or attempting to place weapons, loaded firearms and explosive or incendiary devices aboard an aircraft, including in the baggage. See also U.S. v. Bradley, 540 F. Supp. 690, 692-93 (D. Md. 1982) (considering offense committed when a device or weapon is “carried or otherwise placed on the airplane,” whether or not an injury occurs); 49 U.S.C. §§ 46501, 46504-46505 (defining U.S. special aircraft jurisdiction). The legislation incorporating the above noted conventions has been held to allow jurisdiction to be asserted over child sexual abuse, done by a foreign national, aboard a foreign airliner, which was in international airspace, but, given that it was on its way to the U.S., was in the “special maritime and territorial jurisdiction.” U.S. v.
Nations' International Convention against the Taking of Hostages similarly provides, in strong language, for prosecution and extradition of offenders.\textsuperscript{117}

The responsibility to desist from promoting or committing terrorism and actively to combat it devolves on all nations universally because terrorism consists of universally condemned conduct.\textsuperscript{118} Although no one multilateral treaty explicitly states as much, clearly the universality principle would apply to much of today's terrorist activities.

The theory of jurisdiction actually applied by the United States' Omnibus Antiterrorism Act of 1986\textsuperscript{119} is the protective principle. The act provides that if violence is perpetrated against a United States national, jurisdiction will be obtained only when the violence is intended to coerce, intimidate, or retaliate against a government or civilian population.\textsuperscript{120}

International law condemns terrorism and provides bases for all


\textsuperscript{117} 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 law 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.


\textsuperscript{120} Id.
nations to assert jurisdiction over its perpetration and its perpetrators, whether they are state functionaries or rebel groups.121

The United States government has tended lately to extend its enforcement and adjudicatory jurisdiction beyond the bounds allowed by international law, in a manner that amounts to arrogant international vigilantism. The famous decisions of United States v. Yunis and Noriega are prime examples.122 The attempt to claim that invasion and abduction are legal sets a dangerous precedent.

VII. INTERNATIONAL LAW AND U.S. FOREIGN RELATIONS LAW ALLOW FOR THE EXTRATERRITORIAL APPLICATION OF CHILD EXPLOITATION LAWS

We have shown that there is no general bar to the extraterritorial application of United States laws under the general principles of international law123 and United States foreign relations law.124 International law is permissive as to prescriptive jurisdiction. Both recognize the legitimate application of national criminal law outside of a nation’s borders, unless international law prohibits a specific jurisdictional application.125

The United States Supreme Court has found that Congress possesses undoubted power, subject only to the constraints of the Constitution, to define criminal offenses against the United States and prescribe punishments.126 The Constitution interposes no bar as such to the

121. See Richard Falk, Revolutionaries & Functionaries: The Dual Face of Terrorism Ch. 1-2 (1988).


124. See U.S. CONST. art. I, § 8, cl. 10 (allowing Congress to proscribe conduct that violates the Law of Nations).

125. See the venerable Lotus Case, supra note 10, and discussion supra. But, cf., The Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, both discussed in Blakesley, et al. The International Legal System, supra note 3, at 136-144.

extraterritorial application of criminal law.\textsuperscript{127} Thus, if the Constitution permits Congress generally to proscribe extraterritorial conduct, and if Congress does so, United States law is satisfied. If there is no international law prohibition to jurisdiction, prescriptive jurisdiction is proper.

We have seen how international law recognizes the right of a country to apply its statutes to the extraterritorial acts of its citizens abroad.\textsuperscript{128} Two classic United States decisions provide clear acceptance of the objective territorial theory. In \textit{Strassheim v. Daily}, Justice Holmes noted that "[a]cts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a State in punishing the cause of the harm as if he had been present at the effect."\textsuperscript{129} In \textit{United States v. Aluminum Co. of America}, Judge Hand applied the effects theory more ethereally, such as the effect on the economy, finding that "it is settled law . . . that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state comprehends."\textsuperscript{130}

The rules set forth by those distinguished jurists have remained constant and are now reflected in The Restatement (Third) of the Foreign Relations Law of the United States,\textsuperscript{131} although the Restatement incorrectly suggests that objective territorial jurisdiction is obtained when there is intent alone to cause an effect. It cites and misreads \textit{Strassheim}, for that decision clearly requires both an effect and the intent to cause an effect.\textsuperscript{132} Still, United States jurisprudence and the Restatement clearly allow that a state has jurisdiction to prescribe law with respect to conduct outside its territory that has and is intended to have substantial effect

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\textsuperscript{128} See U.S. v. King, 552 F. 2d 833 (9th Cir. 1976), cert. denied 430 U.S. 966 (1977).
\textsuperscript{129} Strassheim v. Daily, 221 U.S. 280, 285 (1911).
\textsuperscript{130} U.S. v. Aluminum Co. of America, 148 F.2d 416, 443 (2nd Cir. 1945). In this venerable decision, Judge Hand decided the case because the U.S. Supreme Court did not have a quorum, due to Justice Jackson's being at Nuremberg. See THE INTERNATIONAL LEGAL SYSTEM, supra note 3, at 149-50.
\textsuperscript{131} RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 401 (1987).
\textsuperscript{132} \textit{Id.} at § 402; \textit{Strassheim}, 221 U.S. at 285.
\end{flushleft}
within is territory. Further, the Restatement reiterates the active personality or nationality theory, wherein a state has jurisdiction to prescribe laws with respect to the activities of its nationals outside, as well as within, its territory. This position is consistent with both United States and international law.

As illuminated in greater detail below, more expansive theories of extraterritorial jurisdiction have developed both domestically and internationally to allow prescriptive jurisdiction over the sexual exploitation of women and children with the use of the Internet. A review of United States law governing child exploitation reveals that these offenses have been routinely held to have extraterritorial application. Therefore, no bar prevents the statute’s extraterritorial application. Moreover, the legal principles detailed in this article provide a constellation of reasons to apply extraterritorial United States laws on cyber-based sexual exploitation, such as 18 U.S.C. § 1470, extraterritorially.

VIII. LAWS CURRENTLY AVAILABLE TO PROSECUTE THE EXTRATERRITORIAL EXPLOITATION OF CHILDREN

This really needs to be included—it is a good transition to the subsequent discussion and adds relevant, up to date discussion of 18 U.S.C. 1840.

A fair number of statutes exist within the American prosecutorial arsenal to combat the sexual exploitation of children. The most obvious (and perhaps the most commonly used) tool to combat the proliferation of child pornography on the internet is 18 U.S.C. § 2252A (the Child Pornography Prevention Act). This statute outlaws the receipt or distribution of child pornography and, as an advantage in international cases, has been ruled to apply extraterritorially.

The extraterritorial application of 18 U.S.C. § 2252, et. seq. is now

133. Id. at § 402.
134. See id.
without question. However, as the nature of the predator is to seek its prey, pedophiles use the Internet to find more than mere child pornography—they use it to find real children. Today's online pedophile has utilized the technological benefits of the information age and adapted them to the sinister techniques of grooming and seducing children for the purpose of sexual exploitation.

These new techniques and behavior of online sexual predators, thus, implicate a far wider range of statutes in the American prosecutorial arsenal than 18 U.S.C. § 2252A.

There are over twenty federal criminal statutes within the prosecutorial quiver that may be used as direct weapons against child sexual exploitation. Given the lack of homogeneity in criminal behavior, and the existence of state laws criminalizing such behavior, many other criminal laws may be implicated by such conduct, depending on the circumstances of each case. An analysis of each specific statute implicated by every possible permutation of predatory conduct would be far more cumbersome than enlightening. However, a focus on some commonly seen conduct (and those statutes that address such conduct) provides an instructive analysis that can serve as a paradigm, or even extended by analogy, to other such statutes.

Pedophiles commonly use Internet chatrooms to seduce children through online conversation. Likewise, they often use pornographic images of adults as "candy" to entice children into sexual activity. Accordingly, two of the most valuable tools available to combat this new breed of online pedophile are 18 U.S.C. § 2242 (Coercion and Enticement of a Minor) and 18 U.S.C. § 1470 (Transmitting Obscene Material to a Minor). Title 18 U.S.C. § 2422 outlaws the enticement of minors to engage in illegal sexual activity (to include molestation.) It is a vital statute to combat pedophiles that use Internet chatrooms to seduce young children. A tragic string of recent jurisprudence demonstrates both the increasing commonality of this technique by predators and the use by

139. See 18 U.S.C. § 2241 (Aggravated Sexual Abuse Resulting in Death); 18 U.S.C. § 2242 (Sexual Abuse); 18 U.S.C. § 2245 (Sexual Abuse Resulting in Death); 18 U.S.C. § 2258 (Failure to Report Child Abuse); 18 U.S.C. § 2425 (Use of Interstate Facilities to Transmit Information About A Minor); 18 U.S.C. § 2423(a) (Transportation of minors); 18 U.S.C. § 2423(b) (Travel for Sex with Minors); 18 U.S.C. § 2260 (Production of Sexually Explicit Depictions of a Minor for Importation into the United States), etc.
prosecutors of 18 U.S.C. § 2422 to combat it.140

Title 18 U.S.C. § 1470 criminalizes the transfer of obscene material to a minor, another tactic used by pedophiles. Again, one need only look to the jurisprudence for examples of such tactics in action and the use of this statute to combat them.141

However, as important as these statutes are in combating the criminal behavior of online pedophiles, there has been little appellate attention given to the direct question of their extraterritorial applicability.

The extraterritorial applicability of 18 U.S.C. § 2242 was obliquely addressed in United States v. Corey,142 when the Ninth Circuit ruled that 18 U.S.C. § 2422 did apply to a U.S. citizen living on a military base overseas in the Phillipines. However, the court did not directly rule that the statute had extraterritorial application. Rather, it found jurisdiction over the offense by reading 18 U.S.C.S. § 7 (3) in such a way as to extend fictionally the territory of the United States to "... any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building."143 Although often engaged in, this fictionalizing is incorrect and unnecessary. Actually, the jurisdictional basis is ascribed nationality.144

In effect, the Court in Corey ruled that the presumption against extraterritorial application only applies when the conduct at issue occurs beyond the territorial jurisdiction of the United States as defined by 18 U.S.C. § 7. Thus, the Ninth Circuit, although offering supportive language in the form of obiter dicta, avoided the direct extraterritorial argument by

140. See United States v. Miranda, 348 F.3d 1322 (11th Cir. 2003); United States v. Panfil, 338 F.3d 1299 (11th Cir. 2003); United States v. Rice, 61 Fed. Appx. 14 (4th Cir. 2003), etc.


144. Blakesley et al., INTERNATIONAL LEGAL SYSTEM, supra note 3, at 162-163.
falling back on the comfortable notion of territoriality. As we have argued herein, several other bases of jurisdiction may obtain to provide jurisdiction, when the perpetrator engages in the conduct outside U.S. territory (real or fictionalized) or nationality jurisdiction.

Similar expansions of the notion of territoriality are seen in subsequent decisions by military courts. In United States v. Cream, the Navy Marine Corps Court of Criminal Appeals found that 18 U.S.C. § 2242A applied to a serviceman's conduct in Spain. The court noted:

. . . the Government clearly established that Appellant's conduct did not occur beyond this territorial reach. In fact, the Federal code, under which Appellant was convicted, defines Federal territory as "any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof." Title 18 U.S.C. § 7(3). The U.S. Naval Station at Rota, Spain, on which Appellant committed his offenses, squarely falls under this broad definition. 146

Though the Cream court, again in obiter dicta, provided a useful and illuminating discussion of other reasons 18 U.S.C. § 2242A should be given extraterritorial application, the court's clear holding is based on an expanded view of territoriality.

A problem with a reliance on an expansive reading of 18 U.S.C. § 7(3), arises, however, when viewing the rationale of another federal court in United States v. Gatlin, where the Second Circuit found that 18 U.S.C. § 2243 did not apply extraterritorially, where a civilian allegedly sexually abused a child on land leased by the United States in Germany. This shows the fallacy of using fictionalized territoriality, rather than ascribed nationality, which would be readily accepted Germany or other national systems as a proper basis. 148

The Second Circuit Court of Appeals noted: "Although § 7(3) is the immediate focus of our inquiry, the ultimate question here is whether a criminal statute—i.e., 18 U.S.C. § 2243(a)—applies extraterritorially. The

146. Id.
presumption against extraterritoriality plainly applies to criminal statutes (other than the Bowman variety ...), so § 2243(a) applies extraterritorially only if there is a clear manifestation of Congress’s affirmative intent. That this inquiry requires us to look to Congress’s intent in enacting 18 U.S.C. § 7, which is incorporated by reference in § 2243(a), does not, in our view, alter the applicable rule of statutory interpretation. Indeed, to accept [such a] view would seriously undermine the presumption against extraterritoriality since Congress often enacts jurisdictional provisions that are then incorporated by reference elsewhere.”

The Second Circuit Court of Appeals took issue with the fictionalized territoriality based analysis of 18 U.S.C. § 7(3) (adopted by the Cream and Cory courts) and found that the statute was not intended to confer jurisdiction over crimes committed abroad. Thus, a civilian who abused a child on a military base abroad walked free.

This article posits that the holding of U.S v. Gatlin is incorrect for the same reason that the rationale supporting the holdings of cases like U.S. v. Corey and U.S. v. Cream are flawed. There is no need to look to 18 U.S.C. § 7(3) or traditional notions of territoriality to find jurisdiction over the acts of pedophiles abroad. Given the fact that cyberspace has no borders and distance is in that realm is irrelevant, there is no reason why U.S. courts should not eschew reliance on traditional notions of territoriality and directly rule that such statutes have extraterritorial application.

IX. U.S. LAW—HISTORY OF THE CHILD-EXPLOITATION STATUTES

Title 18 U.S.C. § 2422 is a vestige and descendant of the “White Slave Traffic Act,” also known as the Mann Act. According to

149. Id. at 212.
151. In an unreported case entitled United States v. Navrestad, a U.S. Army trial court in the Fifth Military Circuit (Vilseck, Germany) recently ruled that both apply extraterritorially without reference to 18 U.S.C. § 7(3). Though this 2003 case has not finished the appellate process at the time of publication of this article, it serves to lend some jurisprudential support to prosecutors seeking to apply such laws extraterritorially.
Lawrence M. Friedman, the early Twentieth Century saw an excited campaign against "white slavery." The Mann Act was, therefore, enacted in 1910 "to stamp out the business of vice, the enslavement and sale of women’s bodies."

Between 1910 and 1915, more than a thousand defendants were convicted of "white slavery" in the United States because of the Mann Act, which made it a federal crime to transport females "for the purpose of prostitution or debauchery, or for any other immoral purpose."

By 1940, however, the Mann Act was entering a "period of twilight." Prosecutions under the act dwindled, with "157 convictions in 1961, but only 36 at the end of the decade. The last flashy prosecution resulted in the conviction, in 1962, of Chuck Berry, the rock-and-roll celebrity."

In 1978, the law became a bit more unisex; Congress outlawed the "commercial exploitation" of minors in the sex industry, adding minor boys to the protected class. Finally, in 1986, Congress overhauled the whole bloody business. It dropped from the law the obnoxious and racist term "white slavery." The pungent and evocative old word "debauchery" also departed, along with the reference to "immoral purposes." The act was now firmly gender-neutral.

Friedman notes that, as a blunt federal weapon against immorality, the statute was passing into a state of suspended animation. However, the descendant of the Mann Act was slowly amended and modernized to combat contemporary threats to society. No longer criminalizing interstate lust and general immorality, 18 U.S.C. § 2422 was refocused to target the transportation and enticement of individuals to engage in prostitution or any other sexual activity for which any person can be charged with a criminal offense. Today, 18 U.S.C. § 2422 states:

154. Id.
155. Id.
156. Id. at 327.
157. Id. at 343.
158. Id.
159. Id.
160. Id. at 325.
161. Compare former text of the statute with the current statutory language, discussed above and also noted by Friedman, as we have shown. The substantive focus changes.
162. See supra note 161, comments and accompanying text.
Whoever, using the mail or any facility or means of interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years, to engage in prostitution or any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be fined under this title and imprisoned not less than 5 years and not more than 30 years.\(^{163}\)

On the other hand, 18 U.S.C. § 1470,\(^{164}\) is a modern creation with a much less colorful history. This offense was created by the Protection of Children from Sexual Predators Act of 1998.\(^{165}\) The statute states:

Whoever, using the mail or any facility or means of interstate or foreign commerce, knowingly transfers obscene matter to another individual who has not attained the age of 16 years, knowing that such other individual has not attained the age of 16 years, or attempts to do so, shall be fined under this title, imprisoned not more than 10 years, or both.\(^{166}\)

Because the statute is relatively new, the jurisprudence regarding 18 U.S.C. § 1470 is limited. However, it shares a hereditary link with 18 U.S.C. § 2422, for the act which spawned 18 U.S.C. § 1470 also modified 18 U.S.C. § 2422.

In 1998, 18 U.S.C. § 2422 was amended by the Protection of Children from Sexual Predators Act of 1998.\(^{167}\) This act increased the maximum punishment for enticement of a minor to thirty years of imprisonment.\(^{168}\) Additionally, the act changed the wording of 18 U.S.C. § 2422 and clarified that the enticement or coercion, which is the subject of the modern statute, could take place through the use of mail or any

\(^{166}\) 18 U.S.C. § 1470.
\(^{168}\) 18 U.S.C. § 2422(b).
facility of interstate or foreign commerce.169

The statute, once in its twilight, has been given a new life and purpose and is now used as a means to combat pedophiles that use interstate or foreign commerce to entice minors to engage in criminal acts. Though the Protection of Children from Sexual Predators Act of 1998 did not create the offense, it certainly increased its firepower.

The history of these statutes is not of trivial relevance. As discussed later in this article, this history plays an important role in determining the question of their extraterritorial application.

X. LAWS CRIMINALIZING THE EXPLOITATION AND VICTIMIZATION OF CHILDREN APPLY EXTRATERRITORIALLY BY VIRTUE OF LEGISLATIVE INTENT

Child exploitation occurs globally and is finally recognized as an international dilemma.170 United States jurisprudence has held that statutes

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169. Id.

170. See Viktor Mayer-Schönberger, The Shape of Governance Analyzing the World of Internet Regulation, 43 VA. J. INT' L L. 605, 629, n.103 (2003) (citing and quoting, e.g., Final Communiqué, G-8 Summit 2001 ¶ 33 (Genoa, July 22, 2001), available at www.g8.utoronto.ca (accessed from homepage by selecting the Delegations & Documents link under the heading of Summits, Meetings & Documents of G7 & G8, selecting the link for Genoa, Italy, 20-22 July 2001, then Final Communiqué, July 22, 2001) (last visited Feb. 9, 2004) (“We encourage further progress in the field of judicial co-operation and law enforcement, and in fighting corruption, cyber-crime, online child pornography, as well as trafficking in human beings.”); Communiqué, Conference of the G8 Ministers of Justice and the Interior (Milan, February 26-27, 2001), available at www.g8.utoronto.ca (accessed from homepage by selecting the Ministerial Meetings link under the heading of Summits, Meetings & Documents of G7 & G8, then selecting the link for Justice and Interior, then click the link entitled Communiqué under the heading February 26, 27, 2001) (last visited Feb. 9, 2004) (“[E]ncouraging the Group of Anti-terrorism Experts rapidly to achieve further results, with particular emphasis [sic] on the operational problems connected with cyber-terrorism and on the analysis of potentially high-risk international developments and “[a]ction against high-tech crime, including use of the Internet in child pornography.”); Final Communiqué, G-8 Summit 2000 ¶ 44 (Okinawa, July 23, 2000), available at www.g8.utoronto.ca (accessed from homepage by selecting the Delegations & Documents link under the heading of Summits, Meetings & Documents of G7 & G8, then selecting the link for Okinawa, Japan, 21-23 July 2000, then G8 Communiqué Okinawa 2000, Kyushu-Okinawa Summit Meeting, July 23, 2000 ) (last visited Feb. 9, 2004) (“We must take a concerted approach to high-tech crime, such as cyber-crime, which could seriously threaten
may apply extraterritorially, even absent any explicit language calling for it.\textsuperscript{171} Thus, while there must be evidence that Congress intended extraterritorial application, this does not require express language to that effect. In addressing the question of extraterritoriality, courts can look beyond the language of the statute and "are permitted to consider 'all available evidence' about the meaning of the statute, including its text, structure, and legislative history."\textsuperscript{172}

security and confidence in the global information society."); Okinawa Charter on Global Information Society ¶ 8 (Okinawa, July 22, 2000), available at www.g8.utoronto.ca (accessed from homepage by selecting the Delegations & Documents link under the heading of Summits, Meetings & Documents of G7 & G8, then selecting the link for Okinawa, Japan, 21-23 July 2000, then Okinawa Charter on Global Information Society, July 22, 2000) (last accessed Feb. 9, 2004):

International efforts to develop a global information society must be accompanied by co-ordinated action to foster a crime-free and secure cyberspace. We must ensure that effective measures . . . are put in place to fight cyber-crime. G8 co-operation within the framework of the Lyon Group on Transnational Organised Crime will be enhanced. We will further promote dialogue with industry, building on the success of the recent G8 Paris Conference, "A Government/Industry Dialogue on Safety and Confidence in Cyberspace." Urgent security issues such as hacking and viruses also require effective policy responses. We will continue to engage industry and other stakeholders to protect critical information infrastructures.


171. See, e.g., Nieman v. Dryclean U.S.A. Franchise Co., 178 F.3d 1126, 1129 (11th Cir. 1999) (stating "[i]t is undisputed that Congress has the power to regulate the extraterritorial acts of U.S. citizens); United States v. MacAllister, 160 F.3d 1304, 1307-08 (11th Cir. 1998) (stating "[c]ongress need not expressly provide for extraterritorial application of a criminal statute if the nature of the offense is such that it may be inferred.").]

A look at the history and the facts surrounding the creation of 18 U.S.C. § 1470 shows that Congress intended that the statute have extraterritorial application. The Internet has increased the global implications of child exploitation and made extraterritorial legislation necessary in order to combat it.\(^\text{173}\)

Aware of the growing international aspects of child exploitation and prompted by general international law, including treaty and customary international law, U.S. courts have recognized the need for extraterritorial application of the relevant criminal statutes.\(^\text{174}\) Thus, aware of the international context of child exploitation, Congress, in 1998, passed "The Protection of Children from Sexual Predators Act."\(^\text{175}\) This Act, which created 18 U.S.C. § 1470 and modified 18 U.S.C. § 2422, was clearly designed to combat this particular genre of crime.\(^\text{176}\)

_The purpose of the Protection of Children from Sexual Predators Act is to provide stronger protections for children from those who would prey upon them._\(^\text{177}\) Threats to children and concomitant concern for their protection have intensified due to the increased access to and popularity of the Internet.\(^\text{178}\) Cyberspace is a wonderful tool for education, communication, and entertainment, giving users access to massive volumes of information and connecting people around the world.\(^\text{179}\) Unfortunately, this has also generated new opportunities for predators and pornographers to victimize children.\(^\text{180}\)

Again, in deciding whether or not a statute should apply

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178. See id.

179. See id.

180. See id.
extraterritorially, courts should consider “are permitted to consider ‘all available evidence’ about the meaning of the statute, including its text, structure, and legislative history.”^81 The legislative history of 18 U.S.C. § 1470 and 18 U.S.C. § 2422 indicates a strong awareness of the growing international specter of child exploitation and the urgent need to provide stronger measures to combat this global malevolence.^82

XI. SUCH LAWS MUST APPLY EXTRATERRITORIALLY DUE TO THE INTERNATIONAL NATURE OF THE OFFENSE IT IS DESIGNED TO COMBAT

The U.S. Supreme Court has established that statutes apply extraterritorially when they, “as a class, [are] not logically dependent on their locality for the government’s jurisdiction, but are enacted because of the right of the government to defend itself against [harms] wherever perpetrated, especially, if committed by its own citizens, officers, or agents.”^83

With the recent technological advances in communication, child exploitation has become an international problem.^84 There can be no doubt that the Internet makes children targets for pedophiles around the globe. “As an international system, the Internet . . . is considered the ‘absolute best hunting ground (for a) pedophile,’ and ‘the most efficient pornography distribution engine ever conceived.’”^85 According to Interpol,

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84. See, e.g., Plasencia, supra note 173, at 19-20.

an international police organization, the Internet was the genesis of child pornography rings in Europe involving over 30,000 pedophiles.\textsuperscript{186}

Given the fact that the Internet allows pedophiles from any country to target children, neither 18 U.S.C. § 1470 nor 18 U.S.C. § 2422 can be logically dependant on locality or territoriality for the jurisdiction. Rather, these statutes were enacted based on Congress’s sense that it needed to protect the state and the people against such social harm “wherever perpetrated, especially if committed by its own citizens, officers, or agents.”\textsuperscript{187}

\textbf{XII. 18 U.S.C. 1470 and 18 U.S.C. § 2422 Are Part of a Comprehensive Legislative Scheme That Has Already Been Judicially Determined to Apply Extraterritorially}

In \textit{United States v. Kolly},\textsuperscript{188} the United States Navy-Marine Corps Court of Criminal Appeals found that the Protection of Children Against Sexual Exploitation Act, a “comprehensive statutory scheme to eradicate sexual exploitation of children,” applied extraterritorially.\textsuperscript{189} The court recognized that certain statutes, though silent on the question of extraterritorial application, still apply extraterritorially if they form part of an important legislative scheme that would be curtailed if its application were merely territorial.\textsuperscript{190} The statute should not be interpreted in a manner that would not allow it properly to work.\textsuperscript{191}

The court applied essentially a combination of the protective principle and the nationality theory of jurisdiction. It emphasized these two well-established principles: (1) the “inherent right of a sovereign to protect its Governmental functions,”\textsuperscript{192} and (2) the “inherent right of a sovereign . . . to regulate the conduct of its own citizens, regardless of their location.”\textsuperscript{193} It ruled that refusing to apply the statute to a U.S. citizen simply because

\begin{itemize}
\item \textsuperscript{186} Esposito, \textit{supra} note 185, at 552 (citing \textit{Child Abuse Sounding Alarms Across Europe}, ARIZ REP., Sept. 15, 1996, at A26).
\item \textsuperscript{187} \textit{Bowman}, 260 U.S. at 98.
\item \textsuperscript{188} 48 M.J. 795 (N-M. Ct. Crim. App. 1998)
\item \textsuperscript{189} \textit{Id.} at 797 (quoting \textit{United States v. Thomas}, 893 F.2d 1066, 1068 (9th Cir. 1990)).
\item \textsuperscript{190} \textit{Id.} at 797.
\item \textsuperscript{191} \textit{See Kolly}, 48 M.J. at 797.
\item \textsuperscript{192} \textit{Id. See also} discussion of the protective principle, \textit{supra}.
\item \textsuperscript{193} \textit{Kolly}, 48 M.J. at 797. \textit{See also} discussion of the nationality principle, \textit{supra}.
\end{itemize}
that citizen was in Japan when the crime was committed would "greatly . . . curtail the scope and usefulness of the [Protection of Children Against Sexual Exploitation Act]" ("PCSEA").

The court interpreted the Act, finding that protection of children is a vital governmental interest that would overcome the rebuttable presumption against extraterritoriality. Accordingly, the court found that the PCSEA applied to the conduct of United States citizens abroad.

The PCSEA was updated in 1998 with the passage of "The Protection of Children from Sexual Predators Act." This new act modifies the PCSEA's core statutes (18 USC §§ 2251-2257) and adds additional statutes to strengthen the PCSEA's original purpose. The legislative scheme is not new, but a continuation of the PCSEA—the legislative scheme considered in U.S. v. Kolly.

The Senate Congressional Record from the 105th Congress, 2nd Session noted:

The goal of [The Protection of Children from Sexual Predators Act] is to provide stronger protections for children from those who would prey upon them. Concerns over protecting our children have only intensified in recent years with the growing popularity of the Internet and the World Wide Web. Cyberspace gives users access to a wealth of information; it connects people from around the world. But it also creates new opportunities for sexual predators and child pornographers to ply their trade.

Congress responded to these concerns by modifying the existing regime of law concerning child exploitation and adding 18 U.S.C. § 1470. Section 1470 makes it illegal to use a means of interstate or

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194. Kolly, 48 M.J. at 797 (citing United States v. Harvey, 2 F.3d 1318, 1327 (3d Cir. 1993)).
195. Kolly, 48 M.J. at 797.
196. Id.
198. Id.
foreign commerce knowingly to transfer obscene material to an individual under 16 years of age, or attempt to do so.202 Congress also modified 18 U.S.C. § 2422, increasing the maximum punishment for enticing a minor and clarifying the statute’s jurisdictional reach to include foreign commerce.203

The goal of the Protection of Children from Sexual Predators Act is to provide stronger and more effective protections against harm done by sexual predators.204 The Act that created § 1470 as an extension or expansion of the PCSEA is part of the same legislative scheme, and therefore has the same legislative purpose.205 Moreover, the legislative scheme was designed by Congress to increase the existing protections to combat the increasingly global problem of child exploitation.206 Therefore, the clear intent of Congress was that 18 U.S.C. § 1470 and 18 U.S.C. § 2422 should, like the other statutes in the legislative scheme, apply extraterritorially.

The same rationale would allow jurisdiction over conduct by non-U.S. nationals who use the internet to exploit or otherwise damage to children in the United States. This would be based on the objective territorial theory of jurisdiction and the protective principle.207 Similarly, conduct committed in the United States by U.S. nationals that injures children abroad would provide jurisdiction in U.S. courts on the nationality theory of jurisdiction.208 This would allow prosecution in the U.S. or extradition to the country of the victim’s nationality.209 Prosecution in the U.S. would be based on the subjective territorial theory of jurisdiction, wherein a constituent element of the offense occurs on the territory.210 Extradition would be based on the passive personality principle, perhaps coupled with

207. See discussion of the territorial and protective principles, supra note 192.
208. See discussion of the nationality principle, supra note 193.
209. See discussion of the nationality principle, supra note 193. It is possible that the universality theory might also apply, but it would not be necessary. See discussion of the universality principle, supra.
210. See discussion of the territorial principle, supra 192.
the requesting country's application of the protective principle and, perhaps, even the universality theory.\textsuperscript{211} In keeping with Professor Podgor's theory,\textsuperscript{212} jurisdiction would be based on the nature of the offense, which may include the use of the internet.\textsuperscript{213} If murder, sex-slavery, or other abuses occur, those offenses would be covered in a similar manner.\textsuperscript{214} Professor Podgor suggests that a hybrid approach be applied to crime that occurs or is facilitated through cyberspace.\textsuperscript{215} Professor Podgor suggests that the law should first determine whether the conduct is cybercrime.\textsuperscript{216} Once determined to be cyber-conduct, the conduct should be categorized and fit within one of the many extant forms of computer criminality.\textsuperscript{217} Thus, cyber-fraud may have different jurisdictional basis than cyber-terrorism. The cyber-aspect of the conduct will place it within a separate category and the specific form of cyber-conduct will determine proper jurisdiction.\textsuperscript{218}

This approach comports with both national and international recognition of the growing problem as well as the adoption of mechanisms in various states and in the international community to combat these offenses.\textsuperscript{219}

XIII. ACCORDING TO AMERICAN JURISPRUDENCE, THE PRESUMPTION AGAINST EXTRATERRITORIALITY DOES NOT APPLY TO FEDERAL LAWS PENALIZING THE EXPLOITATION OF CHILDREN

Though most laws are generally not presumed to apply extraterritorially, American law has long recognized:

[C]ategor[ies] of congressional statutes [that] apply to acts

\textsuperscript{211} See discussion of the passive personality, protective, and universality principles, supra.
\textsuperscript{213} Podgor, supra note 212, at 101-02.
\textsuperscript{214} Id.
\textsuperscript{215} Podgor, supra note 212, at 102.
\textsuperscript{216} Id.
\textsuperscript{217} Id.
\textsuperscript{218} Id.
\textsuperscript{219} See discussion of the international aspect, supra notes 123 - 151 and accompanying text.
outside the United States even absent explicit statements. In these cases, ‘Congress has not thought it necessary to make specific provision in the law that the locus shall include the high seas and foreign countries, but allows it to be inferred from the nature of the offense.’

The body of federal law penalizing the exploitation of children is one of these exceptional categories that gives rise to automatic extraterritoriality. The jurisprudence addressing the extraterritorial application of laws criminalizing child exploitation makes it clear that these laws apply extraterritorially. Laws criminalizing the exploitation of children are exceptional in this regard because of the overwhelming governmental interest in preventing these terrible crimes. As one court stated, “[w]e can think of few more important efforts than eradicating sexual exploitation of children.” The United States Supreme Court noted that “[t]he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance.” “To deny [extraterritorial application of such legislation] ‘would be [to] greatly . . . curtail the scope and usefulness of the statute[s].’”

United States laws such as 18 U.S.C. § 1470 and 18 U.S.C. § 2422 directly address the exploitation of children. As a part of “The Protection of Children from Sexual Predators Act,” they clearly fall into one of the expressly recognized categories of statutes that apply extraterritorially even in the absence of express statements.

**XIV. CONCLUSION**

Child exploitation is an international scourge, a growing evil that recognizes no border. Unlike the physical spaces available for the distribution of pornography and sexual favors for money, the Internet, with

222. Harvey, 2 F.3d at 1327.
224. Harvey, 2 F.3d at 1327 (quoting Wright-Barker, 784 F.2d at 167).
its lack of structure, has led to an unimaginable amount of pornography available for any on-line spectator. Information necessary for consummation of transactions in the sex economy worldwide is more easily available than ever before. Moreover, children worldwide are now at greater risk than ever before.\textsuperscript{226}

To combat this global threat to children, the international legal system has the legal sources and wherewithal to enhance domestic and international action. In the United States, Congress passed "The Protection of Children from Sexual Predators Act" and 18 U.S.C. § 1470 to protect children from these depredations.\textsuperscript{227} The legislative history of this act and the Congressional intent of this statute dictate that it must have extraterritorial application.\textsuperscript{228} To consider limiting the rule to conduct committed within U.S. territory would run counter to the statute's underlying rationale.\textsuperscript{229}

The decisions of the United States Supreme Court, the Restatement of Foreign Relations Law of the United States, and the consistent jurisprudence addressing the body of law criminalizing child exploitation, provide American courts with a constellation of reasons to apply 18 U.S.C. § 1470 and 18 U.S.C. § 2422 extraterritorially. The dangers posed by a new generation of online pedophiles should compel them to do so.

To combat modern sexual predators, it is not enough to have talons. One must also have wings.

\textsuperscript{226} Plasencia, \textit{supra} note 173, at 16.


\textsuperscript{228} See \textit{supra} notes 171-183 and accompanying text.

\textsuperscript{229} See 144 CONG. REC. S12263 (daily ed. Oct. 9, 1998) (statement of Sen. Leahy) (stating that the goal of the statutory scheme was to "provide stronger protections for children").