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I. INTRODUCTION

International law is the language by which nations assert and attempt to resolve competing legal interests. As with any other language, if the definitions of essential concepts become muddled, it is difficult to communicate. The traditional bases of jurisdiction over extraterritorial crime are essential concepts in the language of international law. The decision to grant or deny extradition, for example, often depends on whether the interested nation recognizes the basis of jurisdiction asserted by another. Confusion over the traditional bases of jurisdiction therefore risks disagreement over and denial of extradition.

United States courts have recently expanded the traditional bases of jurisdiction over extraterritorial crimes. The major impetus behind that expansion is the burgeoning problem of extraterritorial conspiracies to import narcotics into the United States. The courts have sought to discouraged prophylactically narcotics importation by asserting jurisdiction over even thwarted conspiracies. Although that judicial approach might have great practical merit, it also creates a conceptual crisis: thwarted extraterritorial narcotics conspiracies come close to fitting within several of the traditional bases of extraterritorial jurisdiction, but they actually fit none. As a result, the courts have tugged and stretched the traditional bases of jurisdiction in order to obtain jurisdiction over the anomalous case of the thwarted extraterritorial narcotics conspiracy. In so doing, however, the courts have muddled the language of international law and created the risk that extradition in such

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cases will be denied.

In a previous article the author examined recent United States assertions of jurisdiction over thwarted extraterritorial narcotics conspiracies and criticized the judicial expansion of the traditional bases of jurisdiction. This article will expand that criticism and elaborate on an alternative approach that supports assertion of jurisdiction over such offenses while preserving the integrity of the traditional bases of extraterritorial jurisdiction.

First, this article will review the traditional bases of jurisdiction over extraterritorial crime, demonstrating that none of those bases alone is adequate to support an assertion of jurisdiction over thwarted extraterritorial narcotics conspiracies. Next, possible solutions to the problem will be discussed. Those include (1) expanding one or more traditional bases of jurisdiction by means of the "rule of reasonableness"; (2) candidly abrogating the traditional bases of jurisdiction and replacing them with an all-encompassing rule of reasonableness; or (3) combining two or more of the traditional bases of jurisdiction, without expanding any single basis, in a hybrid approach under the rule of reasonableness. The article will argue that although each solution reaches the same substantive result, the first two do so only at the expense of the conceptual integrity of the traditional bases of jurisdiction, while the last preserves that integrity. Finally, the article will discuss the relationship between jurisdiction and extradition to show, through several hypotheticals, that the proposed hybrid approach overcomes many potential conflicts between the two concepts.

II. TRADITIONAL BASES OF JURISDICTION

Various bodies of law limit a state's authority to apply domestic law to events occurring in a foreign state. They include public international law; jurisdictional limitations in domestic law; and the law of the foreign state itself, which may preclude enforcement of the judgment rendered by the state assuming jurisdiction, or

3. Id.; see also Cutting Case, 1887 For. Rel. 751 (1888) (sanction for violating international law on jurisdiction may be an unfavorable diplomatic protest); The "S.S. Lotus" Case (France v. Turkey), 1927 P.C.I.J., ser. A, no. 9 (judgment of Sept. 7) (sanction may be an unfavorable judgment in the International Court of Justice).
4. Reese, supra note 2, at 589.
5. See generally Homberger, Recognition and Enforcement of Foreign Judgments,
more importantly for the purposes of this article, may serve as a basis for denying extradition. 6

In 1935, Harvard research in the area of international law (the "Harvard Research") revealed five traditional bases of jurisdiction over extraterritorial crime. 7 Those bases, denominated territorial, protective, nationality, universal and passive personality, provide the foundation upon which a state may assert jurisdiction over offenses committed abroad in violation of the asserting state’s criminal law. The following sections 8 examine the traditional French and American iterations of those theories.

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6. See infra notes 147–65 and accompanying text (discussing the double criminality condition).


8. Portions of these sections are adapted from Blakesley, Jurisdiction, supra note 1.
A. Territorial Principle

The territorial principle is the primary basis of jurisdiction over crime in both France and the United States. Criminal law may be said to be rooted in the conception of law enforcement as a means of keeping the peace within the territory.9 Nation-states are generally considered competent to prescribe laws and to prosecute, in whole or in part, all offenses committed within their territory. The Harvard Research describes the territorial principle as follows:

[A] crime is committed "in whole" within the territory when every essential constituent element is consummated within the territory; it is committed "in part within the territory" when any essential constituent element is consummated there. If it is committed either "in whole or in part" within the territory, there is territorial jurisdiction.10

Sovereignty requires that the power in control of the territory prescribe, adjudicate and enforce its laws on that territory; any state that does not maintain such jurisdiction within its territory is not sovereign. In 1812, Chief Justice Marshall expressed what has become the traditional United States perception of sovereignty:

The jurisdiction of the nation, within its own territory, is necessarily exclusive and absolute; it is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty, to the extent of the restriction, . . . in that power which could impose such restriction. All exceptions, therefore, to the full and complete power of a nation, within its own territories, must be traced up to the consent

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9. Perkins, supra note 7, at 1155. At the inception of the nation-state as a sovereign unit, the "king's peace" was the ideological tool used to promote the consolidation of power against "private justice." One commentator describes the subsequent history:
[W]e observe the evolution among the Germanic people, and especially among the Franks, from blood-revenge, essentially anti-legal in character [but 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 . . . .
10. Harvard Research, supra note 7, at 495.
of the nation itself.\textsuperscript{11}

Chief Justice Marshall completed his notion of the relationship between sovereignty and territorial jurisdiction over crime thirteen years later, declaring \textquotedblleft[the] courts of no country execute the penal laws of another.\textsuperscript{12}\textsuperscript{12}

The territorial principle of jurisdiction has historically been applied strictly in the United States. It has had negative as well as positive application. For example, in reference to a case in which a French citizen was suspected of murdering an American citizen in China, the Secretary of State said:

\textit{[T]he United States Government does not exercise jurisdiction over crimes committed beyond the territorial limits of this country, except a few involving extraordinary elements, in which category [this case] is not included . . . . Our [consular officials] can have no authority to try a French citizen charged with crime in that country (China), even though the victim should happen to be an American . . . .}\textsuperscript{13}\textsuperscript{13}

The United States Supreme Court later declared that under American law, jurisdiction in criminal matters rests solely with the legislative and judicial branches of government of the state or country in which the crime is committed.\textsuperscript{14}\textsuperscript{14} Further, the Court held that a local criminal statute \textquotedblleft has no extraterritorial operation and [a party] cannot be indicted [in the United States] for what he did in a foreign country.\textsuperscript{15}\textsuperscript{15}

French criminal jurisdiction is based essentially on the territorial principle as well.\textsuperscript{16}\textsuperscript{16} The French Civil Code provides that \textquote{the

\begin{itemize}
\item \textsuperscript{11} Schooner \textit{"Exchange"} v. McFaddon, 11 U.S. (7 Cranch) 74, 85 (1812).
\item \textsuperscript{12} The \textit{"Antelope"}, 23 U.S. (10 Wheat.) 30, 53-54 (1825).
\item \textsuperscript{13} MS DEPT OF STATE, file no. 226/16 (Sept. 17, 1906), \textit{quoted in} 2 G. HACKWORTH, \textit{DIGEST OF INTERNATIONAL LAW} 179 (1942). Any acceptance of jurisdiction under the circumstances of this case would have been based on the passive personality principle. That principle is discussed \textit{infra} notes 84-99 and accompanying text.
\item \textsuperscript{14} Huntington v. Attrill, 146 U.S. 657 (1892); \textit{see also} Brown v. United States, 35 App. D.C. 548 (1910) (the courts of one state shall not execute the criminal laws of another); Stewart v. Jessup, 51 Ind. 413 (1875) (a person is not subject to conviction and punishment in this state for a crime committed outside the state).
\item \textsuperscript{15} United States v. Nord Deutscher Lloyd, 223 U.S. 512, 517-18 (1912). Of course, that flat statement must be qualified today by the realization that there are some substantive crimes and theories of jurisdiction that provide legislative or judicial jurisdiction even when the conduct occurs abroad. See discussion of those theories \textit{infra} notes 26-100 and accompanying text.
\item \textsuperscript{16} While United States law has tended to extend the territorial principle in order to provide for jurisdiction over extraterritorially committed crime, French law and commentary have promoted a more elaborate extension that applies separate theories—the national-
laws of police and security oblige all those who reside in the territory."\textsuperscript{17} On its face, this article of the civil code appears to make legislative jurisdiction dependent on residence in France, but it has been interpreted to provide authority for jurisdiction over any offense committed within French territory.\textsuperscript{18} French commentators have described the traditional territorial theory as follows:

To affirm the territoriality of criminal law (lex loci delicti) is to proclaim that penal law 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; \textit{a contrario}, that law is refused all application outside the same territory.\textsuperscript{19}

French application of the negative aspect of the territorial principle has not been as strict as that quote would suggest. In the past, France has tended to extend legislative and judicial jurisdiction to offenses committed beyond its territory much more than has the United States.

\textit{Code Civil} [C. Civ.] art. 3, § 1 (Petits Codes Dalloz 1981-82) (author's translation). The French text reads: "les lois de police et de sûreté obligent tous ceux qui habitent le territoire." The French notion of national territory or French national sovereignty consists of the following: (a) land with French national boundaries; (b) the territorial sea (that directly surrounding French land); (c) aerial space above French land; (d) French flag air and sea vessels. See Koering-Joulin, \textit{Infractions Commises a l'Étranger}, in 5 \textit{Juris-Classeur de Droit International} § 1, at 5 (1977).


The territorial theory of jurisdiction is deceptively simple. Both France and the United States, to differing degrees, apply fictions and exceptions that transfuse actions taken abroad into their legal notion of territorial jurisdiction. Both countries, the differences in their laws notwithstanding, ostensibly recognize the importance and basic nature of the territorial principle. Both countries require statutory authority to extend judicial jurisdiction to offenses committed beyond their territorial limits, although their courts have been adept at interpreting statutory authority to allow jurisdiction. 20 A brief discussion of the differences and similarities of the French and the United States conceptualization and application of the territorial principle follows.

1. Subjective Territoriality—French View—Article 693 of the Code de Procédure Pénal provides that an offense is considered to have been committed on French territory when "an act characterizing one of its elements is accomplished in France." 21 That is the classic subjective territoriality theory. 22 Article 693 em-

20. Delaume, Jurisdiction Over Crimes Committed Abroad: French and American Law, 21 Geo. Wash. L. Rev. 173, 181 (1952). Professor Delaume explains: [O]nce a statute is promulgated, it is irrelevant whether its scope is limited to the punishment of nationals or to that of foreigners, or rather whether it combines the idea of jurisdiction based on allegiance with that of the punishment of only certain types of offenses. It is also irrelevant that such a statute is not express, provided there cannot be any doubt as to the legislative intent.

Id. (footnotes omitted).

For example, in United States v. Bowman, 280 U.S. 94 (1922), the United States Supreme Court interpreted a statute to allow jurisdiction over an offense committed on the high seas and in a foreign port, although the statute did not expressly provide for such jurisdiction. See infra note 78 and accompanying text.

Delaume cites an interesting statute from Texas, now rescinded, which exemplifies the legislative extension of jurisdiction over offenses committed abroad:

Persons out of the State may commit and be liable to indictment and conviction for committing any of the offenses enumerated in this chapter which do not in their commission necessarily require a personal presence in this State, the object of this chapter being to reach and punish all persons offending against its provisions, whether within or without the State.

Delaume, supra this note, at 181 n.25 (discussing Tex. Penal Code Ann. § 1006 (Vernon 1936) (repealed 1973)). The validity of the Texas statute was upheld in Hanks v. State, 13 Tex. App. 289 (1882). Compare Tex. Penal Code Ann. § 1006 (Vernon 1936) (repealed 1973) (discussed supra this note) with Utah Code Ann. § 76-1-201 (1978) (requiring either that some criminal conduct be performed within the state or that the act outside the state constitute an act of conspiracy to commit a crime within the state).


22. The case law that culminated in the creation of article 693 of the Code de Procédure Pénal, and that handed down since its promulgation in 1958, has clearly recognized the

23. E.g., Costa Case, 1959 Juris-Classeur Periodique, La Semaine Juridique [J.C.P. II] no. 1601; Légal, La Localisation du délit complexe, 1970 Revue de Science Criminelle et Droit Pénal Comparé [Rev. Sci. Crim. et Dr. Pénal Comparé] 243. The basic fictions used were connectivité and indivisibilité; the offenses committed outside the territory were deemed to be connected to or indivisible from the elements that occurred in France. Fayard, La Localisation International de l’Infraction, 1968 Rev. Sci. Crim. et Dr. Pénal Comparé 753; Robert, Compétence Territorial: Délit Commis en France et a l’Étranger, 1967 Rev. Sci. Crim. et Dr. Pénal Comparé 769, 80; Lagarde, Note re Decision of 10 Oct. 1958, 1960 Dalloz 300 (Cour Cass. Ch. Crim. 1959). Article 693 was inspired partly by the jurisprudentially recognized need to provide for jurisdiction over cases involving what is called the infraction complexe (complex offense). The complex offense assumes a chain of distinct acts (elements) that culminate in the principal crime. The classic example of that type of offense is the basic swindle (l’escroquerie) in which a combination of two distinct constituent elements establishes the offense, the use of fraudulent methods to obtain funds or property, and the taking or receipt of the funds or property. If one of the elements occurs in France, jurisdiction over the entire offense is allowed under article 693 of the Code. The pretext is that the element committed in France is inherently connected to or indivisible from the element or the result that occurs elsewhere. C. Pr. Pén. art. 693 (1982); Code Pénal [C. Pén.] art. 405 (Petits Codes Dalloz 1979-80); see also C. Pr. Pén. art. 207 (Dalloz 1978-79) (formerly article 227 of the Code d’Instruction Criminelle); R. Merle & A. Vitu 2d ed., supra note 7, at 366-67 (citing cases and authorities); Légal, Chroniques de Jurisprudence, 1987 Rev. Sci. Crim. et Dr. Pénal Comparé 171. The connection may be real or fictional itself, depending on the case. See Segui v. Min. Pub., Decision of July 27, 1933, 1933 D.P. I 159 (Cass. Crim.). Any act or omission that occurs in France and is regarded by a French tribunal as a constituent element of an offense may be prosecuted in France as a consumed offense if the act or omission is considered criminal under French law and if the offense is consummated abroad, or if the act that occurs abroad would be perceived by foreign authority to be an attempt to commit an offense. R. Merle & A. Vitu 2d ed., supra note 7, at 366 n.9; R. Merle & A. Vitu, supra note 16, at 203.

The same fiction, further abstracted, has applied to allow French jurisdiction over some offenses committed entirely without French territory. Thus offenses committed entirely
the offense in its entirety was not committed within the territory.

abroad are deemed to be connected to other offenses committed in whole or in part in France, thereby rendering the extraterritorial offenses subject to French jurisdiction. French case law and commentary have applied that broad scope of territorial jurisdiction, notwithstanding the fact that article 693 does not explicitly envisage that application. Article 693 mentions only the constituent elements of one offense: "Est repute commise sur le territoire de la Republique toute infraction dont un acte caracterisant un de ses elements constitutifs a ete accompli en France" (one of its elements) (emphasis added). As an example, consider the offense of receiving stolen property abroad, which takes places in its entirety outside French territory where the property is received. Jurisdiction on the territorial principle nevertheless will obtain if some of the property received was stolen in France. Philippe Case, Decision of Sept. 7, 1894, 1894 S. Jur. I 249 (Cass. Crim.) (receiving stolen property abroad); R. Merle & A. Vitu 2d ed., supra note 7, at 387.

Another good example is a case in which the French courts asserted jurisdiction over the crime of espionage when the spy took employment in the French public service in order to discover state secrets and deliver them to a foreign power. The acts of obtaining the information, the deliveries and other elements of the offense all occurred outside French territory, but the spy's engagement in the service took place in France and constituted an element sufficient for jurisdiction. Segui v. Min. Pub., Decision of July 27, 1933, 1933 D.P. I 159 (Cass. Crim.) (note G.L.), noted in R. Merle & A. Vitu 2d ed., supra note 7, at 366 n.9. Selling state secrets could have triggered the protective principle as well.

In another case, fraudulent negotiations in France that culminated in the manufacture and delivery of inappropriate goods to the French Army stationed in Germany were a constituent element for purposes of territorial jurisdiction. Decision of May 25, 1967, 1967 Bull. Crim. 165; see also Robert, supra this note, at 880-81.

Jurisdiction obtained in a case in which wine was intentionally doctored with glycerin while being delivered through France to Germany from Spain. The doctoring of the wine in France with the intent to defraud the public in Germany was held to be a sufficient element to instigate French legislative and judicial jurisdiction even though there is no punishable offense in France for attempting to falsify wine. Magin Case, Decision of Feb. 12, 1964, 1965 D.P. I 808 (Cass. Crim.) (note Forgoux) (criticizing the result). In another wine falsification case, the accused were charged with fraud (la tromperie) for the delivery of falsified wine to Germany. Alcohol was added to the wine in France, but the term "natural" was included in the billing. Countering the defense argument that if fraud occurred, it happened in Germany, the cour de cassation held that a constituent element—the addition of the alcohol coupled with the intent to defraud—took place in France. Decision of June 7, 1967, 1967 Bull. Crim. 178; 1968 J.C.P. II, no. 15471 (note Vives).

The subjective territoriality theory has been triggered in France when a defendant emitted a check abroad on a French bank account having insufficient funds. Decision of Jan. 28, 1960, 1961 Bull. Crim. 55. It is interesting to note that in this case the essential elements of the offense (the emission of the check and its delivery to the beneficiary) occurred in Switzerland. The element deemed to have occurred in France (lack of funds) appears to be a necessary condition (condition préalable). The essential reason for the French court's taking jurisdiction is one of public policy quite similar to that behind the use of the nationality principle. Just as it is deemed important to punish French nationals who do harm (to France as well as to the victim) by committing an offense anywhere in the world, so it is considered desirable that those issuing bad checks from French bank accounts be punished in France. Writing short checks on French bank accounts is an attack on France's public credit. See Légal, La Localisation dans l'Espace des Délits Complexes, 1961 Rev. Sci. Crim. et Dr. Pénal Comparé 340.

For a view of British practice and perspective on this subject, compare "terminatory" and "initiatory" theories of jurisdiction, discussed in Hirst, Jurisdiction Over Cross-Frontier Offences, 97 L.Q. Rev. 80 (1981). British courts often categorize crimes as "conduct
In France, the territorial principle has thus expanded to provide legislative, judicial and executive jurisdiction over offenses that actually occur beyond French territory, as long as any constituent element of the offense has occurred in France and as long as the crime or attempted crime is "connected to" or "indivisible from" the element that occurs in France.

2. Subjective Territoriality—United States View—As in France, it is not uncommon for United States jurisdiction to be extended to offenses consummated outside United States territory when a constituent element occurs within that territory. The United States federal system has provided fertile ground for the development of the subjective territoriality principle. Indeed, maintenance of a strictly applied territorial principle in the United States would render any question of legislative or judicial jurisdiction very difficult to resolve due to the jurisdictional scheme in which criminal law and procedure are established on a composite of variegated legislation and the case law of the several states, as well as that of the national or federal authority. Application of the subjective territoriality principle has mitigated the difficulties that could arise under this system.24

The various states of the United States have applied the subjective theory of jurisdiction to acts consummated in other states of the union as well as to acts consummated in foreign countries. The territorial connection is clear and the need obvious. That has been done notwithstanding the language of the sixth amendment to the United States Constitution, which provides that a person must have his trial in the state and district where the crime was committed.25

24. Harvard Research, supra note 7, at 484.

25. U.S. Const. amend. VI; cf. United States v. Jackalow, 66 U.S. (1 Black) 484 (1861) (for a circuit court to have jurisdiction of a crime not committed within its district, the defendant first must have been apprehended within that district and the offense must not have been committed within any other state or federal jurisdiction); 18 U.S.C. § 3238
(1982) (the jurisdiction of all offenses occurring on the high seas or elsewhere out of any state or federal jurisdiction shall be in the district in which the offender is apprehended); see also infra notes 132-36 and accompanying text; see generally Note, Extraterritorial Jurisdiction—Criminal Law, 13 HARV. Int’l L.J. 346 (1972) (discussing the United States policy of declining to prosecute crimes committed outside its territorial jurisdiction).


Jurisdiction also will lie when an offense is commenced outside a state’s territory but consummated within, or when an offense is committed completely outside the territory, if the effect or result of the offense occurs within the state. The theory behind the application of jurisdiction thus moves from subjective territoriality to objective territoriality. The Model Penal Code encourages an expansive application of both the subjective and objective theories for assertion of territorial jurisdiction. MODEL PENAL CODE § 1.03 (1980); see also NATIONAL COMMISSION FOR THE REFORM OF THE FEDERAL CRIMINAL LAWS, FINAL REPORT 21 (1970) (proposed federal criminal code); Feinberg, Extraterritorial Jurisdiction and the Proposed Federal Criminal Code, 72 J. CRIM. L. & CRIMINOLOGY 385 (1981). The United States Congress, for the first time, has provided a general rule regarding the nature and scope of extraterritorial jurisdiction over crime. See S. 1772, 96th Cong., 1st Sess. § 204 (1979); H.R. 6915, 96th Cong., 2d Sess. § 111(c) (1979).

Virtually all states apply the subjective territoriality principle. For example, section 76-1-201 of the Utah Code provides:

(1) A person is subject to prosecution in this State for an offense which he commits, while either within or outside the State, by his own conduct or that of another for which he is legally accountable, if: (a) The offense is committed either wholly or partly within the State; or . . . .

(3) An offense which is based on an omission to perform a duty imposed by the law of this State is committed within the State, regardless of the location of the offender at the time of the omission.

UTAH CODE ANN. § 76-1-201 (1978). See also CAL. PENAL CODE § 778a (West 1970), which provides:

Whenever a person, with intent to commit a crime, does any act within this State in execution or part execution of such intent, which culminates in the commission of a crime, either within or without this State, such person is punishable for such crime in this State in the same manner as if the same had been committed entirely within this State.

Section 27 of the California Penal Code provides: “The following persons are liable to punishment under the laws of this State: 1. All persons who commit, in whole or in part, any crime within this State.” CAL. PENAL CODE § 27 (West 1970). The comments to section 1.03 of the Model Penal Code explain that where conduct within the territory of the forum state causes harm outside that state, jurisdiction will usually be allowed, if the conduct within the state, standing alone, would constitute an attempt to commit the offense charged. Model.
for assertion of the subjective territoriality theory), are those off-
fenses in which the acts or omissions that comprise the offense are
committed wholly beyond the territorial boundaries of the forum
state, but whose effect or result occurs within that state. Those
latter offenses provide jurisdiction on the basis of the “objective
territoriality” theory. 26

The classic example of this type of offense, of course, is that in
which the defendant shoots a gun in Italy, injuring a person in
France, and the injured person travels to Switzerland where he
succumbs to his wounds. 27 It is essential that a significant effect of

Penal Code § 1.03 commentary (1980). See also People v. Werblow, 241 N.Y. 55, 148 N.E.
786 (1925), and cases cited in Harvard Research, supra note 7, at 484-87. In People v. Bot-
kin, 132 Cal. 231, 64 P. 286 (1901), for example, the California courts took jurisdiction over a
person and convicted him of murder for mailing poisoned candy from California to his vic-
tim, who received the candy, ate it and died in Delaware.

26. Harvard Research, supra note 7, at 487. In practice, the objective and subjective
theories of territorial jurisdiction are often combined to provide a comprehensive com-
petence. Id. at 494. Until recently, however, an actual territorial nexus was always required.

27. Many of the cases in which the objective territoriality theory applies are of the
type the French denominate “simple offenses” (des infractions simples). See R. Merle & A.
Vitu 2d ed., supra note 7, at 355. Articles 689-696 of the Code de Procédure Pénale allow the
assertion of jurisdiction on the objective territorial theory for both the infraction simple
and the infraction complexe. See C. Pr. Pén. arts. 689-696 (Dalloz 1978-79). French com-
mentators were split for years on the issue of which country should have jurisdiction in the
classic example noted in the text. This classic example is cited in virtually all of the works
cited in this note. See R. Merle & A. Vitu 2d ed., supra note 7, at 367 (identifying the
notions behind the division of authority and providing citations to those authorities); see
also D. de Vabres, Traité, supra note 22, at 826 (favoring jurisdiction being asserted in the
place where the action was set in motion, because that place usually retains most of the
evidence). Other commentators believed that competence or jurisdiction to try the case
should rest both with the place of action and with the place of result. 2 J.A. Roux, Cours de
Droit Criminel Française 1310 (1890); 2 G. Vidal & J. Magnol, Cours de Droit Criminel
et de Science Pénitentiaire 1123 n.1 (9th ed. 1949). One commentator even believed that
the place of jurisdiction should be the state in which the offense is sociologically rooted
(socialement enraciné). Légais, L’Evolution des Solutions Françaises de Conflits de Lois en
Matières Pénales, in Mélanges Savatier 545 (1965); see also Légais, Conflit de Juridic-
Pences, Compétence Pénal, article 693, Code de Procédure Pénale, 1963 J.C.P. II 1387. For
many years, French case law favored jurisdiction in the place of the result. For example,
jurisdiction was held to apply only in the place of the receipt of a letter sent for purposes of
jurisdiction was allowed when a letter was sent from abroad to France in order to obtain
secret information. Jurisdiction in the place of reception of the letter was deemed appro-
priate on the basis of the objective territoriality principle. It was not uncommon, however, for
concurrent jurisdiction to be considered valid in the place of the action, the place of the
immediate goal of the action and the place of the result. For example, Mercier favored con-
current jurisdiction of the courts in the place of the action, the immediate goal and the
place of the result, with the tribunal to which the action is first brought preempting the
others. Mercier, Le conflit des lois pénales, 1931 Revue de Droit International et de Lég-
islation Comparée 439; see also R. Merle & A. Vitu 2d ed., supra note 7, at 368 and author-
ities cited therein.
the offense occur within the territory of the asserting state. French judicial decisions and juristic commentary have made it clear that even in the case of an attempt it is necessary that an effect occur within the territory for the objective territoriality theory to obtain. The objective territoriality theory cannot be the vehicle for jurisdiction over an attempt to commit a crime in France when it is thwarted extraterritorially, because no effect has occurred on French territory. As Professors Merle and Vitu explained, “we cannot go so far as to assimilate the result which would have occurred here to one that has actually occurred here.”

Probably the most famous international case involving the principle of objective territoriality also involved France and illustrates the principle well. In the Lotus case, Turkey prosecuted

Prior to 1959, French courts often took jurisdiction in cases in which the result or the effects of the offense took place in France, in spite of a doctrinal tendency to favor the place of the action. For example, in cases of offenses occurring in the press, jurisdiction was nearly always taken when the illegal publications were published and printed abroad but distributed and sold in France. E.g., Decision of April 30, 1908, 1908 S. Jur. I 553 (Cass. Crim.) (note Roux), cited in R. Merle & A. Vitu 2d ed., supra note 7, at 368 nn.3-4. During the 1930’s, concurrent jurisdiction was considered valid with preemption by the first tribunal to take the case. Delest Case, Decision of May 16, 1936, 1936 D.P. II 314 (Cass. Crim.). Although decisions have been split, there is no dearth of those admitting concurrent jurisdiction in the place of the action and the place of the event. See, e.g., Decision of Aug. 3, 1937, 1937 S. Jur. I 360 (Cass. Crim.) (the tribunal of the place of origin and receipt of threatening telephone calls was considered competent); Decision of Dec. 12, 1935, 1937 S. Jur. I 280. The same was true in a case of murder threats by correspondence, in Le Havre, Decision of Nov. 11, 1887, 1888 S. Jur. II 200 (Trib. Corr.), cited in R. Merle & A. Vitu 2d ed., supra note 7, at 368-69. This is an example of the combined use of subjective and objective theories. In all cases, however, the territorial theories require some clear connection with the territory.

The British have had a similar academic and judicial discussion involving what have been called the terminatory and initiatory theories of jurisdiction. Hirst, supra note 23, at 81-84; Lew, supra note 23, at 168-79; Williams, The Venue and Ambit of the Criminal Law, 81 L.Q. Rev. 518, 518-27 (1965); see also Treacy v. D.P.P., [1971] 1 All E.R. 110; G. Gordon, The Criminal Law of Scotland 63 (2d ed. 1978) (wherein the terminology “result” and “conduct” crimes is used to determine which theory of jurisdiction will provide competence to the courts).


29. The “S.S. Lotus” Case (France v. Turkey), 1927 P.C.I.J., ser. A., no. 9 (judgment of Sept. 7); see Hudson, The Sixth Year of the Permanent Court of International Justice, 22 Am. J. Int’L L. 1, 8 (1928). The Lotus case stands for the principle of objective territoriality (perhaps including the floating territorial principle). France opposed the application of Turkish jurisdiction because of maritime practicality. The court specifically held that there
and convicted of manslaughter a French officer of the French flag merchant vessel, the Lotus. The Lotus had collided with a Turkish flag vessel, the Boz-Kourt, causing much property damage and the loss of eight Turkish lives. France objected to the Turkish prosecution, claiming that Turkey had no basis for jurisdiction under any principle of international law. France and Turkey submitted the dispute to the Permanent Court of International Justice for resolution of the jurisdictional issue.

France argued that an officer of a ship on the high seas can be held to obey only the laws and regulations of the flag state and that international law prohibited Turkey from asserting jurisdiction simply on the basis of the nationality of the victims, i.e., that the passive personality principle was not sufficient to support Turkey's assertion of jurisdiction. The court declined to decide the passive personality issue, but held that Turkey's assumption of jurisdiction could be predicated on the fact that the effects had occurred on the Boz-Kourt which, being a Turkish flag vessel, was a place assimilated to Turkish territory for the purposes of the case.30 French opposition to the Turkish position and to the appli-

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30. 1927 P.C.I.J., ser. A, no. 6; see RESTATEMENT, supra note 7, § 30 (reporter's note). This type of jurisdiction may more aptly be called the "floating territorial principle." See Empson, The Application of Criminal Law to Acts Committed Outside the Jurisdiction, 6 Am. Crim. L.Q. 32 (1967); George, Extraterritorial Application of Penal Legislation, 64 Mich. L. Rev. 609, 613 (1966). The position of the French government and that of the dissent in the Lotus case was that the law of the flagship ought to govern the actions of the pilot. That position was later adopted by two major international conventions relating to navigation on the high seas and probably reflects customary international law today. See United States v. Williams, 617 F.2d 1063, 1090 (5th Cir. 1980); D.J. Harris, CASES AND MATERIALS ON INTERNATIONAL LAW 93 (2d ed. 1979). French opposition to the assertion of jurisdiction in cases occurring on vessels on the high seas eventually won out, at least with regard to the signatories, in the 1952 Brussels International Convention for the Unification of Certain Rules Relating to Penal Jurisdiction in Matters of Collisions or Other Incidents of Navigation. The parties to this convention were: Signatories: Germany, Belgium, Brazil, Denmark, Spain, France, United Kingdom, Greece, Italy, Monaco, Nicaragua, Yugoslavia; Ratifiers: United Kingdom, France, Spain, Yugoslavia, the Vatican, Egypt, Portugal, Belgium, Argentina; Accessers: Switzerland, Costa Rica, Cambodia, French Overseas Territories, the Republic of Togo, the Cameroons. 1958 Geneva Convention on the High Seas, April 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200, 460 U.N.T.S. 82, reprinted in Conflicts of Law, in 4 BRITISH SHIPPING LAWS 902 (McGuffie ed. 1961). The 1958 Geneva Convention states in article 11:

1. In the event of a collision or of any other incident of navigation concerning a ship on the high seas, involving the penal or disciplinary responsibility of the master or of any other person in the service of the ship, no penal or disciplinary proceedings may be instituted against such persons except before the judicial or adminis-
cation of the objective territoriality theory related not to the validity of the theory itself (as France had long adhered to its application), but to its application to a ship on the high seas. From a practical standpoint in maritime matters, France argued, the law of the flagship state must govern the captain of a vessel.

In summary, the objective and subjective territoriality principles have been adopted and applied broadly in France. If any part of an offense or any of its effects or if any aspect of participation occurs in France, legislative jurisdiction obtains and the judiciary has competence to enforce the legislation. A clear territorial nexus is always required, however.\(^{31}\)

4. **Objective Territoriality—United States View**\(^{32}\)—American law has traditionally allowed the assertion of jur-
ridiction over offenses when the conduct giving rise to the offense has occurred extraterritorially, as long as the harmful effects or results have taken place within United States territory.\textsuperscript{33} Probably the most frequently cited United States decision enunciating the objective territoriality principle is \textit{Strassheim v. Dailey},\textsuperscript{34} in which Mr. Justice Holmes stated: "Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a state in punishing a cause of the harm as if he had been present at the effect, if the state should succeed in getting him within its power."\textsuperscript{35} It is clear from Mr. Justice Holmes' opinion and from historical precedent that the objective territoriality prin-

Nevertheless, extradition when jurisdiction was based on the objective territoriality theory has been allowed on occasion. In Hammond v. Sittel, 59 F.2d 683 (9th Cir. 1930), the accused had forged a check drawn on a Canadian bank and had deposited it in his account in California. The court concluded that Canada had jurisdiction over the offense because the harm or effect actually occurred in that country. It declared: "The Supreme Court in the decision from which we have quoted [Ford v. United States, 273 U.S. 593 (1927)] shows the desirability of surrendering a person for trial who puts in motion forces which operate to consummate a crime within the territory of the demanding nation . . . and there is no reason to suppose that the treaty was intended to exclude such a class of offenders . . . ." 59 F.2d at 686. In Sternaman v. Peck, 83 F. 690 (2d Cir. 1897), the court extradited a woman to Canada where her husband had died after she had poisoned him in New York. In \textit{Ex parte Davis}, 54 F.2d 723 (9th Cir. 1931), the court allowed extradition to Mexico for acts perpetrated in Mexico that culminated in the death of an individual in California. The court recognized as appropriate the Mexican application of the objective territoriality principle and decided not to apply the objective territoriality principle to assert United States jurisdiction, thus approving extradition to Mexico on the ground that the necessary elements to complete the offense were consummated in the requesting state. It is likely that the court actually did not wish to burden itself with a difficult case in which most of the evidence and the strongest interest in prosecution rested with the requesting state. Many decisions are based on such practical considerations rather than on some theoretical principle of jurisdiction. In reality, however, that was a proper use of discretion and not a derogation from the double criminality condition, as Mexico was asserting a theory of jurisdiction recognized by United States law. \textit{See infra} notes 147-55 and accompanying text.

33. \textit{It should be noted that in both France and the United States it is necessary that legislation provide for jurisdiction in situations in which either the subjective or objective territoriality theories should obtain. Perkins, supra note 7, at 1187 n.9; see also Commonwealth v. Macloon, 101 Mass. 1 (1869) (statutory authority is required for judicial competence in a homicide case in which the victim was wounded on board a British vessel on the high seas but died in Massachusetts). For further discussion and additional authorities, see Blakesley, \textit{Jurisdiction, supra} note 1, at 1123 n.38 and accompanying text.}

34. 221 U.S. 280 (1911).

ciple is not designed to apply when parties merely intend their criminal activity to take effect within territorial boundaries, but contemplates those cases in which the intended effects actually occur within those boundaries. 36

Lately, the approach by United States courts has been as expansive as that of their French counterparts. 37 The territorial theories, therefore, have been liberally extended to mitigate the evils that would arise from a strictly territorial basis of jurisdiction. 38 As long as the offense itself, its result or effect, or any of its constituent or material elements actually occur within the sovereign territory of the requesting party, assertion of jurisdiction will be seen as proper in either state and extradition will be approved pursuant to either state’s theory of jurisdiction. Difficulties may arise, however, when a claim of jurisdiction is based on some theory other than territoriality, or when the claimed “territorial basis” is strained beyond that deemed proper by the other state. Some recent United States cases have put such a strain on the objective territoriality theory. 39

B. The Protective Theory of Jurisdiction

The protective principle provides a basis for jurisdiction over an extraterritorial offense when that offense has or potentially has an adverse effect on or poses a danger to a state’s security, integrity, sovereignty or governmental function. 40

There is a clear distinction between the protective and the objective-subjective territoriality principles. If the theories are to retain any integrity, that distinction must be observed. The objective territoriality theory provides for jurisdiction over crimes committed wholly outside the forum state’s territory, when the effects or results of those crimes actually occur within the territory. 41 The subjective territoriality theory provides for jurisdiction over crimes

36. For detail and thorough analysis of United States application of the objective territoriality theory, see Blakesley, Jurisdiction, supra note 1, at 1123-32.
37. Indeed, United States extension of jurisdiction over conduct that constitutes extraterritorial conspiracy appears to be expanding to meet a similar trend in France. Id. at 1141-63.
38. Id. at 1128 n.53.
39. Id. at 1130-32 (discussing those cases).
40. Of course, an important motive in any assertion of jurisdiction over territorial crime is the protection of the forum state. That is true whatever theory of jurisdiction is asserted. See id. at 1132-39.
41. See supra notes 26-39 and accompanying text.
a material element of which has occurred within the territory.\textsuperscript{42} The protective principle, on the other hand, provides for jurisdic-
thion over offenses committed wholly outside the territory of the forum state even when no effect occurs within the territory, but only when those offenses threaten the state's security, integrity, sovereignty or governmental function.\textsuperscript{43} There may be some over-
lap between the objective territoriality principle and the protective principle; when the effect actually occurs on the abstraction of so-
vereignty or that of state integrity or it impinges upon some govern-
mental function, either or both of the theories may be appropriate, depending on whether the effect is perceived to fall upon some ter-
ritorial situs. It may be said that the objective and subjective terri-
toriality theories are extensions of the territorial principle, while the protective principle is an exception to it, as the latter does not require an actual effect to occur within the territory.

1. Protective Principle—France—France has always main-
tained a clear distinction between the objective-subjective territo-
riality principles and the protective principle. France did not tradi-
tionally assert jurisdiction over aliens who committed crimes
outside French territory. In the \textit{Fornage} case,\textsuperscript{44} for example, a
Swiss national was indicted in France for larceny committed in
Switzerland. The judgment of the lower courts was quashed by the \textit{Cour de Cassation} because jurisdiction

cannot extend to offenses committed outside the territory by for-
igners who, by reason of such acts, are not justiciable by the French
tribunals; seeing that, indeed, the right to punish emanates from the
right of sovereignty, which does not extend beyond the limits of the
territory; that, except in the cases specified in Article 7 of the Code
of Criminal Instruction, the provision of which is founded on the
right of legitimate self defense, the French tribunals are without

\textsuperscript{42} \textit{See supra} notes 21-25 and accompanying text.

\textsuperscript{43} Blakesley, \textit{Jurisdiction, supra} note 1, at 1132-39. United States v. Pizzarusso, 388
F.2d 8 (2d Cir. 1968), is a case that most accurately articulates this distinction. An alien was
convicted of knowingly making false statements under oath in a visa application to a United
States consular officer in Canada. The court was careful to point out that the violation of
title 18, section 1546 of the U.S. Code took place entirely in Canada; the accused's entering
the United States was not an element of the offense. \textit{Id.} at 11 (discussing 18 U.S.C. \textsection{} 1546 (1976)). \textit{See Blakesley, Jurisdiction, supra} note 1, at 1136 n.68 (providing additional dis-
cussion and authority).

\textsuperscript{44} 84 J. Du \textit{Palais} 229 (1873) (Cour de Cass.), \textit{cited and discussed in N. Leach}, C.
Oliver \& J. Sweezy, \textit{The International Legal System} 122 (1981) (included edited trans-
lation), 2 J.B. Moore, \textit{International Law Digest} 261-63 (1906), and Delaume, \textit{supra} note
20, at 176 n.8.
power to judge foreigners for acts committed by them in a foreign country; that their incompetence in this regard is absolute and permanent; that it can be waived neither by the silence nor by the consent of the accused; that it exists always the same at every stage of the proceedings.\footnote{The Fornage Case, 84 J. DU PALAIS at 230 (author's translation), also translated in N. LEECH, C. OLIVER, & J. Sweeney, supra note 44, at 122, and 2 J.B. Moore, supra note 44, at 262-63.}

As the above-quoted language implies, however, there are expansive exceptions to this refusal to assert jurisdiction over crimes of aliens committed abroad. Indeed, French law explicitly recognizes the protective principle and allows jurisdiction to be asserted over: (1) acts that threaten the general interest of the Republic, including the security of the State and its diplomatic or consular posts or agents, or counterfeiting the seal or national currency;\footnote{C. Pr. Pén. art. 694 (Dalloz 1978-79).} (2) offenses against French nationals;\footnote{The Law of July 11, 1975, no. 75-624, extends the previously recognized but rather exiguously applied passive personality jurisdiction. C. Pr. Pén. art. 689, ¶ 1 (Dalloz 1978-79). See infra notes 84-94 and accompanying text.} and (3) those very grave crimes that all states have an interest in prosecuting.\footnote{This is the universal theory of jurisdiction over crime. See infra notes 100-108 and accompanying text.}

The authority for the protective type exceptions is article 694 of the \textit{Code de Procédure Pénal}, which, since July 11, 1975, has provided:

Every alien who, outside the territory of the Republic, commits, either as author or as accomplice, a crime or a délit against the security of the State or of counterfeiting the seal of the State or national currency in circulation, or a crime against French diplomatic or consular agents or posts is to be prosecuted and adjudged according to the dispositions of French law, whether he is arrested in France or the Government obtains his extradition . . . .\footnote{Author's translation of: \textit{Tout étranger qui, hors du territoire de la République, s'est rendu coupable, soit comme auteur, soit comme complice, d'un crime ou d'un délit attentatoire a la sûreté de l'Etat ou de contrefaçon du sceau de l'Etat, de monnaies nationales ayant cours ou de crime contre des agents ou des locaux diplomatiques ou consulaires français est juge d'après les dispositions des lois françaises s'il Gouvernement obtient son extradition. Des poursuites peuvent être engagées à ces fins. C. Pr. Pén. art. 694, ¶ 1 (Dalloz 1978-79).}
“for which foreign governments may only have an imperfect appreciation.” Those offenses may be prosecuted just as if they had been committed in French territory. The use of the language “punishable in the same manner as an infraction committed within this [French] territory” is a clear indication that the French understand that the basis for jurisdiction is the protective principle and an exception to the territorial theory.

2. Protective Principle—United States—United States courts have defined the protective principle as the authority to

50. Bigay, Les Dispositions Nouvelles de Compétence des Juridictions Françaises a l'égard des Infractions Commises a l'Étranger, 1976 Dalloz-Sirey Législation [D.S.L.] 51-52. The changes made by the Law of July 11, 1975, which modified the old article 694 of the Code de Procédure Pénale were rather profound in two directions. First, competence was extended for extraterritorial conduct endangering diplomatic or consular posts or agents. Second, the law equalized the treatment of French and foreign nationals with regard to the protective principle, making it clear that the legislation was recognizing the protective principle and not merely using the nationality theory of jurisdiction. C. Pr. Pén. art. 694 (Dalloz 1978-79).


52. There is an abundance of cases in which jurisdiction is asserted over offenses fitting the protective principle. In 1917, for example, a French national was convicted of entering into a commercial transaction with an Austrian (enemy) firm while he was residing in Portugal. He was convicted in absentia, though his conduct, which took place in Portugal, did not violate Portuguese law. Rivière Case, 13 Rev. de Droit Int'l Prévét 543 (Cass. Crim. 1917). Of course, that case represented treason, which is also based on the nationality principle. French case law abounds in convictions of aliens who have committed acts that threaten to harm French national security or sovereignty as well. E.g., In re Glass, 1858 D.P. IV 339 (Trib. Corr.). In the Glass case, the defendant, an Englishman, while outside French territory obtained a French passport by using a false name and providing false information. The court asserted jurisdiction on the basis of the protective principle. In another case, the cour de cassation upheld a lower court's assertion of jurisdiction and application of French law to a Spanish national who, while in Spain, violated French national security by maintaining correspondence with France's enemies. In re Urios, 1920 Bull. Crim. 26, 34 (Cass. Crim.), cited in 2 G. Hackworth, supra note 13, at 203, and Delaume, supra note 20, at 176 n.8.

With the promulgation of article 694, the French legislature introduced a scheme that provides clear, if rather broad, application of the protective principle. In the 1930’s, French judicial application of the protective principle was criticized as being “inadmissible in principle and in excess of anything which international law permits.” Harvard Research, supra note 7, at 558, cited with criticism reemphasized in Note, Extraterritorial Jurisdiction and Jurisdiction Following Forceable Abduction: A New Israeli Precedent in International Law, 72 Moch. L. Rev. 1087, 1095 (1974). The late Professor Garcia-Mora also severely criticized any overbroad application of the protective principle because of the likelihood of its causing unjust, politically oriented judgments made as a result of rather wide-ranging discretion in such cases by the prosecuting state. Garcia-Mora, Criminal Jurisdiction Over Foreigners for Treason and Offenses Against the Safety of the State Committed Upon Foreign Territory, 19 U. Prrr. L. Rev. 567, 589 (1958), cited and discussed in Note, supra this note, at 1095-96. The dangers of an overbroad application of the protective principle are evident. Blakesley, Jurisdiction, supra note 1, at 1154 n.153.
 prescribe a rule of law attaching legal consequences to conduct outside its territory that threatens its [the state's] 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. The focus of this principle of jurisdiction, therefore, is the nature of the interest that may be injured, rather than the place of the harm or the place of the conduct causing the harm or, for that matter, the nationality of the perpetrator. Thus, lying to a consular officer which occurs entirely abroad may be perceived as constituting "an affront to the very sovereignty of the United States," and as having "a deleterious influence on valid governmental interests." The protective principle is designed to allow a state to protect itself against and to punish the perpetrators of actual and inchoate offenses that damage or threaten to damage state security, sovereignty, treasury or governmental functions. It is the only accepted theory that allows jurisdiction over conduct that threatens potential danger to the above-mentioned interests or functions and, because of the significant dangers it poses to relations among nations, it is limited to those recognized and stated interests or functions. With very few

53. Blakesley, Jurisdiction, supra note 1, at 1136-37 n.68; see, e.g., United States v. Pizarusso, 388 F.2d 8, 10 (2d Cir. 1968) (quoting Restatement, supra note 7, § 33); see also Harvard Research, supra note 7, at 543; Restatement Tentative Draft, supra note 7, § 402(3).

54. Blakesley, Jurisdiction, supra note 1, at 1132-39; Harvard Research, supra note 7, at 543.

55. United States v. Pizarusso, 388 F.2d 8, 10 (2d Cir. 1968).

56. Id.; see Blakesley, Jurisdiction, supra note 1, at 1137 nn.71-72 and accompanying text; Restatement Tentative Draft, supra note 7, §§ 402-403 (retaining the traditional bases of extraterritorial jurisdiction). The Restatement draft recognizes the protective principle and provides that jurisdiction pursuant to that principle will obtain for "Certain conduct [performed] outside its [the asserting state's] territory by persons not its nationals which is directed against the security of the state or certain state interests." Id. § 402(3).

In 1935, the Harvard Research described the traditional protective 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.

A state has jurisdiction with respect to any crime committed outside its territory by an alien which consists of falsification or counterfeiting, or an uttering of falsified copies or counterfeits, of the seals, currency, instruments of credit, stamps, passports, or public documents, issued by the state or under its authority.

Harvard Research, supra note 7, at 543, 561.

exceptions, national penal codes throughout the world recognize this principle and its limitations.  

C. Nationality Principle or Roman Theory of Jurisdiction

In addition to extending territoriosity via subjective and objective territoriosity, and making exceptions to it via the protective principle, extraterritorial jurisdiction may be asserted on the basis of the nationality principle. Jurisdiction based on the nationality of the perpetrator is a generally accepted principle of international law. The nationality principle plays an important part in the law of both France and the United States. In fact, this theory of jurisdiction is the second most important of the five theories in terms of its worldwide application. From the perspective of international law, nationals of a state remain under that state's personal sovereignty and owe their allegiance to it, even though travelling or residing outside its territory. The state has legal authority under international and domestic law, based on that allegiance, to assert criminal jurisdiction over actions of one of its nationals deemed criminal by that state's laws.

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The Turkish government attempted to assert the protective principle as well as the passive personality principle in the famous *Lotus* case, but the court allowed jurisdiction only on the basis of the objective territoriosity or what might more appropriately be called the "floating territorial theory," in which the flag vessel is deemed to be assimilated to the territory of the sovereign behind the flag. The "S.S. *Lotus*" Case (France v. Turkey), 1927 P.C.I.L., ser. A, no. 9 (judgment of Sept. 7); see also Harvard Research, supra note 7, at 543-44 and cases, commentators and statutes cited therein.

59. Harvard Research, supra note 7, at 519; Perkins, supra note 7, at 1155-57.

60. See Blackmer v. United States, 284 U.S. 421 (1932). Oppenheim stated that the law of nations does not prevent a state from exercising jurisdiction over its subjects traveling or residing abroad, because they remain under its personal supremacy. 1 L. OPPENHEIM, INTERNATIONAL LAW § 145, at 390 (8th ed. 1955); see also 1 C. HYDE, supra note 32, at 802-03. Professor W.E. Hall states:

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 an obligation not to disregard them, their social relations for all purposes as within its territory are determined by them, and it preserves the power of compelling observance by punishment if a person who has broken them returns within its jurisdiction.

W.E. HALL, INTERNATIONAL LAW 56 (8th ed. 1924). Some states, of course, may prosecute even their nationals by *contumace*, or default. See C. Pr. Pén. arts. 627-641 (Daloz 1978-
Although the nationality principle of jurisdiction is universally recognized, there are vast differences in its application among the states of the world. United States practice is ostensibly opposed to the assertion of jurisdiction on the basis of the nationality of either the offender or the victim, except in certain “specific” and “exceptional” situations, such as offenses threatening national security. France, on the other hand, asserts nationality jurisdiction in a substantially more comprehensive manner.

1. **Nationality Principle—France (Personnalité Active)**—French law provides for the assertion of jurisdiction over virtually every crime in French law, and over all those délits which could also be prosecuted in the state of commission, committed by French nationals outside French territory.


61. British law recognizes jurisdiction on the basis of the nationality of the accused in some instances:

[T]he general rule of English law is that offenses committed by British subjects out of England are not punishable by the criminal law of this country. We need not explore the origin of this doctrine . . . . [I]t depends partly on the law of nations which would regard an offense committed on the soil of one nation as, at least primarily, the concern of the sovereign of that country, but one can also see the procedural difficulty which would have occurred to a medieval lawyer who would be unable to understand how the jury presentment consisting of persons taken from the vicinage could have knowledge of crimes committed abroad sufficient to present them to the sovereign’s courts . . . . [C]ertainly from the reign of Henry VIII, this rule has been subject to statutory exceptions. Crimes of the present day which can be tried in England though committed abroad are treason, homicide, bigamy and offenses against the Foreign Investment Act, 1870. There may be others, but these instances will suffice.


62. C. Pr. Pén. art. 689 (Dalloz 1978-79). French penal law divides criminal acts into three categories: crimes, délits and contraventions. These are roughly equivalent to felonies, misdemeanors, and police or administrative offenses. To avoid confusion, however, this article will use the French terms. For general discussions of crimes committed abroad, including those committed by nationals, see Herzog, Compétences des Juridictions Pénales pour les Infractions Commises a l’Étranger, in VIIth Congrés de Droit Comparé, Études de Droit Contemporain, Contributions Françaises 545 (Uppsala ed. 1969).

63. Nationality is determined as of the day of the prosecution, not the day of the commission of the crime. C. Pr. Pén. art. 689, ¶ 3 (Dalloz 1978-79); Serlute Case, 1898 Clunet 1058 (the basic French decision on this issue). Assertion of jurisdiction is not automatic, however; there are conditions that must be met first. None of the conditions apply when the offender commits a crime that threatens the national security or treasury, or a crime against a diplomatic or consular agent or post. See supra notes 44-51 and accompanying text. There are two types of conditions: conditions communes, which apply both to crimes and to délits, and conditions spéciales, which apply only to délits. R. Merle & A.
The French put forth persuasive reasons to assert jurisdiction

Virtu, supra note 16, at 314.

There are three conditions communes that must be met before nationality jurisdiction may be asserted: (1) article 689 of the Code de Procédure Pénale requires that the offense be punishable under French law; France does not enforce the public order of other nations. Etcheverry Case, 1886 S. Jur. II 168 (Cour d'Appel) (French national cannot be prosecuted in France for counterfeiting foreign currency in a foreign country); (2) the accused must not have definitely fulfilled the requirements of the foreign state's justice for the crime committed there. C. Pr. Pén. art. 692 (Dalloz 1978-79); see In re Moisdon, 1890 Dalloz, Jurisprudence [D. Jur. I] 138 (Cass. Crim.) (defendant convicted and punished for a crime against public morals in Belgium and, therefore, could not be prosecuted in France for that crime); (3) the statute of limitations must not have run. C. Pr. Pén. art. 692 (Dalloz 1978-79). See generally R. Merle & A. Virtu, supra note 16, at 314 and cases cited therein.

When the offense committed by a French national outside French territory is merely a délit, as opposed to a crime, conditions spéciales must be met in addition to the abovementioned conditions communes. C. Pr. Pén. arts. 689, ¶ 2, 691 (Dalloz 1978-79). Those additional conditions are required because French legislators believed that since délit is a priori less grave than crimes, jurisdiction should be asserted over délit only if particularly compelling reasons exist for doing so. R. Merle & A. Virtu, supra note 16, at 315. The first condition spéciale requires that the délit be punishable by the laws of the country in which it was committed. C. Cr. Pén. art. 689, ¶ 2 (Dalloz 1978-79). The second requires that a complaint be made by either the victim or the government of the state in which the délit was committed. Id. art. 691. Third, the ministère public is the only person who can decide whether the circumstances are grave enough to merit taking jurisdiction. Id. The complaint does not have to be against a specific person; a general complaint is sufficient. Id.; see also R. Merle & A. Virtu, supra note 16, at 317. Fourth, the juge d'instruction and the aggrieved party cannot institute an action on their own. C. Pr. Pén. art. 691 (Dalloz 1978-79). Until 1958, one could not be prosecuted in absentia for one's extraterritorial délit. The condition that the party be present for prosecution has been abolished. See id. arts. 627-641. In sum, if the conditions communes are met, a French national may be prosecuted for any crime committed abroad. The conditions spéciales, however, must be met in addition to the conditions communes for all extraterritorially committed délit that do not endanger state security or sovereignty.

Failure to meet those conditions has frequently led to dismissal of the case against the accused. For example, in the Decision of May 19, 1971, 1971 Bull. Crim. 164, 409 (Cass. Crim.), the conviction of a person for the crime of abus de confiance was quashed because the court below did not determine whether this délit was penalized by the law of the foreign country in which it was committed. See Stoufflet, L'Application de la Loi Pénal Étranger par le Juge National, 1960 Revue Internationale de Droit Pénal [Rev. Int'L Dr. Pén.] 515, 525. Courts, therefore, are usually careful to assure themselves first that the conditions are met, and second, that their judgment articulates that fact. See Decision of May 8, 1925, 1926 Clunet 73.

It is necessary, therefore, that réciprocité d'incrimination (double criminality) be proved for jurisdiction to be asserted over délit committed abroad by French nationals. The ministère public has the burden of proving the reciprocity. R. Merle & A. Virtu, supra note 16, at 315. Exact identity of incrimination of the conduct is not required. It is only necessary that the actions be criminalized in some way by both states. Thus, for extradition purposes, France would have jurisdiction to prosecute certain délit and all crimes (where there was no double criminality), but not to obtain jurisdiction from the United States under the treaty. See Blakesley, Extradition Between France and the United States: A Study in Comparative and International Law, 13 Vand. Transnat'l L.J. 653, 672-73 (1980) [hereinafter cited as Blakesley, Extradition]; see detailed discussion of double criminality and extradition, infra notes 147-223 and accompanying text.
over nationals who have committed offenses outside French territory. They argue, for example, that any offense committed by a French national abroad actually injures France's reputation and respect in the world. Furthermore, because French nationals have the benefit and protection of French nationality, and they owe allegiance to the Republic, they should be answerable to French justice for any offense they commit. Most persuasively, if France did not have the authority to assert jurisdiction, a French national who has committed an offense beyond French territory could be immune from prosecution anywhere. For example, a French national who has committed an offense outside French territory, but who has returned to French territory before the foreign authorities have caught up with him, is exempt from extradition. The French Law of March 10, 1927, prohibits extradition of nationals. Thus were it not for France's principle of jurisdiction based on the nationality of the perpetrator, that person could remain in France and be immune from any prosecution.

It should be emphasized, so as to provide proper perspective on the French law of nationality jurisdiction, that although France maintains a very broad application of the nationality principle, its application, except in certain exceptional and specific circumstances, is subsidiary to jurisdiction asserted by the state in which the offense is committed. France will assert jurisdiction only if the accused escapes from foreign justice. By contrast, jurisdiction over offenses that trigger the protective principle is not subsidiary; jurisdiction will be asserted in those instances whether or not foreign jurisdiction is applicable, or even if foreign justice has been met.

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64. R. Merle & A. Vrin, supra note 16, at 313.
67. See discussion of offenses against national security, integrity, sovereignty or governmental function, supra notes 44-52 and accompanying text.
2. Nationality Principle—United States—The United States Supreme Court recognized early in its history the existence of the power to punish offenses committed extraterritorially by United States nationals.\(^{68}\) The United States Congress has never made a general rule relating to extraterritorial jurisdiction,\(^{69}\) however; thus the application of any statute to extraterritorial offenses is an exception to the territorial principle and must be done on a case-by-case basis.

United States case law has approved jurisdiction over nationals who commit crimes abroad even though the appropriate statute did not explicitly declare that it applied extraterritorially. Indeed, United States citizenship or nationality often appears to play a significant role in the application of United States legislation to extraterritorial conduct.\(^{70}\) Jurisdiction has been approved, for example, in the case of an extraterritorial violation of a penal clause in

68. Rose v. Himley, 8 U.S. (4 Cranch) 143, 166 (1808) (dictum); see also Chief Justice Marshall’s speech, Livingston’s Resolution, United States House of Representatives, quoted in the “Venus” Case, 18 U.S. (5 Wheat.) 128, App. n.1 (1820); Henfield’s Case, 11 F. Cas. 1099 (C.C.D. Pa. 1793) (No. 6380). 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 the 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 which the determinative factor was the citizenship or noncitizenship of the accused offender. Feller, supra note 7, at 5, 12, 30-32. This may still be found today. Soviet citizens are subject to Soviet criminal law regarding their conduct wherever it occurs. Supreme Soviet, Principles of the Criminal Legislation of the Soviet Union arts. 5, 12 n.5 (1958), quoted in M.C. Bassiouni & V.M. Savitsky, The Criminal Justice System of the U.S.S.R., App. C, at 247 (1979).

69. Note, supra note 25, at 348-49. The Supreme Court attempted to lay down a general rule of statutory interpretation with regard to extraterritorial offenses in United States v. Bowman, 260 U.S. 94 (1922). It has not become a general rule, however. But see Proposed Federal Criminal Code, S. 1772, 96th Cong., 1st Sess. § 204 (1979); H.R. 6915, 96th Cong., 2d Sess. § 111(c) (1979) (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, section 953 of title 18 of the United States Code 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 (1982). For further discussion and authority, see Blakesley, Jurisdiction, supra note 1, at 1132 n.63.

70. See, e.g., Steel v. Bulova Watch Co., 344 U.S. 280 (1952) (applying United States antitrust laws extraterritorially to activities of United States nationals); Ramirez & Feraud Chile Co. v. Las Palmas Food Co., 146 F. Supp. 594 (S.D. Cal. 1956), aff’d per curiam, 245 F.2d 674 (9th Cir. 1957), cert. denied, 355 U.S. 927 (1958); cf. Vanity Fair Mills, Inc. v. T. Eaton Co., 234 F.2d 633 (2d Cir. 1956) (holding that the Lanham Act did not apply to a Canadian corporation even though harm was done in the United States by offenses committed by that corporation).
an absentee voting statute.\textsuperscript{71} Nationality jurisdiction also has led to the prosecution of American nationals assisting in the illegal immigration of alien contract laborers.\textsuperscript{72} Even a murder committed by a United States national on an uninhabited Guano island was considered proper subject matter for a United States court.\textsuperscript{73} The courts have upheld a contempt judgment for failure to comply with a subpoena that had been served by a consular officer\textsuperscript{74} and sustained jurisdiction to require income tax payment by nationals domiciled abroad.\textsuperscript{75} Sometimes the same act committed by an alien and a national might be punishable only against the national.\textsuperscript{76} Nationality jurisdiction, where it is deemed appropriate, is applicable even though the national is also a national of the state in which the offense is committed.\textsuperscript{77}

The United States Supreme Court declared its basic attitude

\textsuperscript{71} State v. Maine, 16 Wis. 398, 421 (1863).
\textsuperscript{72} United States v. Craig, 28 F. 795, 801 (E.D. Mich. 1886).
\textsuperscript{73} Jones v. United States, 137 U.S. 202 (1890). Interestingly, the same philosophy that motivates France to apply nationality jurisdiction—namely the accused's likelihood of escaping justice altogether—motivated United States application of the principle in this case.
\textsuperscript{74} Blackmer v. United States, 284 U.S. 421, 441 (1932). In this case, a United States 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, ch. 762, 44 Stat. 385 (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 United States 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. 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 United States citizens abroad. It also found that the United States Consul could serve subpoenas in order to satisfy due process requirements without any treaty agreement. 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 of legislative power. The Court was able to enforce the order because the defendant had property within the territory of the United States that could be attached. 284 U.S. at 441. See Fed. R. Civ. P. 45(e)(2); Fed. R. Crim. P. 17(e)(2). In United States v. First National City Bank, 396 F.2d 897 (2d Cir. 1968), a branch of Citibank in Germany was under a United States subpoena to produce documents. The branch risked civil liability if it complied with the subpoena. The court held that it had jurisdiction over branches of United States companies on the basis of the nationality principle. Nationality was determined by the place of incorporation. The court applied a balancing approach to decide whether to assert jurisdiction. The court weighed the plaintiff's interests in receiving the documents against the defendant's interest in avoiding civil liability. The court also had to consider delicate diplomatic interests. The decision went against Citibank, although it may have been different had the German penalty been criminal instead of civil.
\textsuperscript{75} Cook v. Tait, 265 U.S. 47 (1924).
\textsuperscript{76} United States v. Bowman, 260 U.S. 94 (1922).
\textsuperscript{77} Kawakita v. United States, 343 U.S. 717 (1952); Coumas v. Superior Court, 31 Cal. 2d 682, 192 P.2d 449 (1948).
toward nationality jurisdiction in the case of United States v. Bowman.\textsuperscript{78}

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 or right of sovereignty of Brazil to hold them for this crime against the Government to which they owe allegiance.\textsuperscript{79}

And again, in Blackmer v. United States,\textsuperscript{80} the Supreme Court stated: "With 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{81}

Thus the nationality theory of jurisdiction has become an important means of obtaining jurisdiction in the United States as well as in France. Its application is not as expansive as that in France, however, although the trend in the United States also has been to expand its application. Nevertheless, there is no general principle that United States criminal law always be applied to United States nationals wherever they may be. In fact, the crimes to which the nationality principle has been extended have generally been those that indicate a strong protectionist motive. For example, in Bowman, jurisdiction was extended to cover fraudulent acts committed abroad by a United States national which were "directly injurious to the government and against which the government has the right to defend itself."\textsuperscript{82} Nationals are "certainly subject to such laws as [the United States] might pass to protect itself."\textsuperscript{83}

This distinction between the French and the United States legal systems, and traditionally between the so-called continental and Anglo-American systems, is the source of many of the problems relating to extradition. Indeed, one reason France prosecutes its nationals in such an expansive way is to be certain that a person who has committed a crime abroad, and who will not be

\textsuperscript{78} 260 U.S. 94 (1922).
\textsuperscript{79} Id. at 102.
\textsuperscript{80} 284 U.S. 421 (1932).
\textsuperscript{81} Id. at 437.
\textsuperscript{82} Bowman, 260 U.S. at 99, 102.
\textsuperscript{83} Id. at 102; see also Blackmer, 284 U.S. at 437 ("whenever public interest requires").
extradited because of his nationality, will nonetheless be prosecuted. This is considered below.

D. Passive Personality Theory

1. France—In France today, the passive personality theory, which is based on the nationality of the victim, is an important theory of jurisdiction—but it was not always so. Before 1975, jurisdiction based on the passive personality theory was recognized in France but rarely applied; it was asserted only after a decision of the ministère public that it was in the public interest to do so. This usually meant that the theory would be applied only when the offense troubled or threatened public order or security, or when the victim was injured in an airplane. In fact, when the Turkish government prosecuted a French national on the basis of a Turkish law that allowed jurisdiction based on the nationality of the victim, France objected vociferously. However, the promulgation of the Code of Criminal Procedure article 689, paragraph 1, on July 11, 1975, expanded French authority to assert jurisdiction

84. The Law of July 11, 1975, no. 75-624, changed article 689 of the Code de Procédure Pénale to read: “Any foreigner who, beyond the territory of the Republic, is guilty of a crime, either as author or accomplice, may be prosecuted and convicted in accordance with the dispositions of French law, when the victim of this crime is a French national.” C. Pr. Pén. art. 689, ¶ 1 (Dalloz 1975) (author’s translation and emphasis).
86. Id.; CODE DE L’AVIATION CIVIL [C. AV. CIV.] art. L.121, ¶ 8 (1976). Several ordinances provided for jurisdiction over offenses committed against French nationals during World War II, but those ordinances are no longer in force. Ord. Aug. 28, 1944, art. 1; Ord. Nov. 9, 1944, art. 2.
87. See the “S.S. Lotus” Case, 1927 P.C.I.J. ser. A, no. 9 (judgment of Sept. 7), discussed supra note 29 and accompanying text.
over extraterritorial offenses against its nationals.

Article 689, paragraph 1 incorporates the principle of passive personality to its fullest measure. It provides that every alien who is either principal or accomplice in a crime (as opposed to délit) committed outside French territory may be prosecuted and adjudged on the basis of French law, if the victim of the crime is a French national. There was rather forceful opposition to that legislative expansion of the passive personality principle. It was feared that broad application of jurisdiction based on the nationality of the victim would create the danger of confusing concurrent jurisdiction. The proponents of the new law prevailed by arguing that there was no danger of confusing concurrent jurisdiction because French jurisdiction is subsidiary to that of the country in which the offense occurs, except in cases involving national security. Thus if it is not a matter of national security, France will not take jurisdiction unless the country in which the offense occurs fails to do so.

The factors that motivated the French Legislature to promulgate this new law included the quickly developing international penal law and, most importantly, the events at the Hague in 1974, where French hostages were taken and French property was dam-

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89. Law of July 11, 1975, no. 75-624, C. Pr. Crimin. art. 689, ¶ 1 (Dalloz 1978-79); see generally Bigay, supra note 50.

90. Mr. J.P. Cot declared his opposition to the Law of July 11, 1975, in the Assemblée Nationale on the basis of the French tradition marked by the Lotus case, discussed supra note 29 and accompanying text, and the Brussels Convention of 1952. He believed that, as in the past, the passive personality principle should be applied only when French social order is troubled. Bigay, supra note 50, at 52.

91. Mr. Cot's objections were countered by Mr. Foyer and by the garde des Sceaux. The most important refutation was that because the new law was to be subsidiary to the jurisdiction of the place where the offense occurs, except in national security cases, there would be no confusion as to concurrent jurisdiction. They cited article 121, paragraph 8 of the Code de l'Aviation Civil as precedent for the new article. C. Av. Civ. art. L.121, ¶ 8 (1978), discussed supra note 86 and accompanying text. In addition, they presented foreign examples to enhance the validity of the new law: article 7 of the German (Federal Republic) Penal Code provides for application to acts injuring German nationals if the acts are punishable in the place they occurred or if no other authority takes jurisdiction; article 10 of the Italian Penal Code provides for jurisdiction over acts committed by foreigners abroad that injure Italy or one of its citizens, when the offense is punishable under Italian law by perpetual hard labor or imprisonment for one year or more. Bigay, supra note 50, at 52. This is how the reasonableness test suggested by this article would work, if passive personality were accepted as a basis for jurisdiction.

92. See, e.g., treaties listed supra note 88.
aged at the French Consulate General. Those events illustrated in
dramatic fashion that French law as it stood in 1974 would have
inhibited and possibly precluded the prosecution of the offenders,
even if their persons were obtained by extradition, which was un-
likely at the time because of the political nature of the offenses.93
The paramount rationale for the new law, however, was the legisla-
tors' belief that the Republic's laws should provide for prosecution
and punishment for crimes against its citizens when the lex loci
delicti has failed to do so.94

2. United States—The passive personality theory of jurisdic-
tion is generally considered to be anathematic to United States
law. The Restatement (Second) of Foreign Relations Law of the
United States contains the traditional repudiation of the principle:
"A State does not have the jurisdiction to prescribe a rule of law
attaching a legal consequence to conduct of an alien outside its ter-
ritory merely on the ground that the conduct affects one of its na-
tionals."95 Thus the United States government has refused to as-
sert jurisdiction over offenses committed extraterritorially by
aliens simply on the basis of the victim's United States national-
ity.96 Moreover, the United States government has vehemently
protested any assertion of jurisdiction by foreign courts over acts
of United States nationals committed against nationals of the fo-
rum state outside that state's territory. The Cutting case97 pro-
vided the opportunity for the most famous protest. Mr. Cutting, a
United States national, had been seized by Mexican authorities
during a visit to Mexico. He was jailed pending prosecution for
criminal libel that he allegedly perpetrated in Texas against a
Mexican national. The Secretary of State's protest presents the
unequivocal United States position repudiating the passive person-
ality theory of jurisdiction:

93. See Bigay, supra note 50, at 51-52. For a discussion of political offenses and ex-
tradition, see Blakesley, Extradition, supra note 63, at 697-706. The protective principle in
article 694 would have helped today. See C. Pr. Pén. art. 694 (Dalloz 1978-79).
94. Compared to other states of Europe, France was actually late in developing the
passive personality principle to this extent. See, e.g., The Penal Code of Sweden part I, ch.
95. Restatement, supra note 7, § 30(2) comment (e); see also J. BRIERLY, LAW OF
NATIONS 302 (1955). This has not been changed. Restatement Tentative Draft, supra note
7, §§ 402-403.
96. MS Dep't of State, supra note 13, at 179-80; see supra text accompanying note
13.
97. Cutting Case, 1887 For. Rel. 751 (1888), reported in 2 J.B. Moore, supra note 44,
at 232-40.
The 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.

It 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 . . . . It has consistently been laid down in the United States as a rule of action that citizens of the United States cannot be held answerable for offenses that were wholly committed and consummated either in their own country or in other countries not subject to the jurisdiction of the punishing state . . . . To say that he may be tried in another country for his 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.

Certainly, where a principle of jurisdiction is anathema in one state and rapidly gaining recognition in another, disputes will arise when the state claiming the validity of the theory of jurisdiction seeks extradition from the other.

98. Cutting Case, 1887 For. Rel. at 753-57, reported in 2 J.B. Moore, supra note 44, at 228-42. In 1940, a case similar to the Cutting case arose, and the Counselor of the Department of State instructed the American Consul General in Mexico City as follows:

This Government continues to hold the view which is expressed to the Mexican Government in the Cutting Case mentioned in your dispatch, in which case there was involved the validity of Mexican legislation . . . . 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 no extraterritorial force. Accordingly, it is desired that your office should refrain from recognizing the above quoted provisions of Mexican law in the event that another American citizen shall be detained in Mexico charged with an offense committed within the jurisdiction of the United States.

MS DEP'T OF STATE, Instruction, file no. 312/1121 (Feb. 9, 1940). The Mexican law that applied in various forms in the Cutting and Feidler cases provided, in effect, that penal offenses committed in a foreign country by a foreigner against a Mexican national were punishable in Mexico.

99. Although section 402 of the Restatement of Foreign Relations, Tentative Draft, is equivocal as to whether it rejects or accepts the passive personality theory, when read along
E. Universal Jurisdiction

International law provides that there are certain offenses for which any nation obtaining personal jurisdiction over the accused may assert jurisdiction; these offenses are considered so heinous that any of the "community" of nations may prosecute. Perhaps the most ancient offense of universal interest is piracy. 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." In 1958, the Geneva Convention on the High Seas, article 19, stated:

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.

In addition to piracy, several other crimes are of such universal or nearly universal interest that international conventions have been aimed at their elimination. These include slave trade, war crimes, hijacking or sabotage of civil aircraft and geno-

with comment (e) it appears to indicate that this theory is acceptable. See Restatement Tentative Draft, supra note 7, § 402 comment (e). Certainly, given the wide acceptance of this principle, see supra note 94, it would be difficult to say that international law bars a broad application of it.

100. 2 G. Hackworth, supra note 13, at 681; see R. Merle & A. Vitu, supra note 16, at 319.

101. Geneva Convention on the High Seas, April 28, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82, art. 19; see The "Marianna Flora," 24 U.S. (1 Wheat.) 1, 18 (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 the common enemies of all mankind, and, as such, are liable to the extreme rights of war"); Dickinson, Is the Crime of Piracy Obsolete?, 38 Harv. L. Rev. 334 (1925).


104. See the Montreal Convention (convention for the suppression of unlawful acts

French Legislation:

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

Art. L.121, ¶ 8: French courts have jurisdiction with respect to a crime or a tort committed aboard a plane which is not registered in France when the author or the victim has French nationality, when the plane lands in France after the commission of the crime or tort, or when the infraction was committed aboard a plane while rented without crew to a person who has his principle place of establishment or, if there be none, his permanent residence in France. Moreover, in case a plane that is not registered in France is forced off its course (i.e., hijacked), French courts have jurisdiction over the infraction and over every other act of violence against the passengers or the crew done by the person alleged to have forced the plane off its course in the commission of (literally, in direct relationship to) the offense, when the person is found in France.

Montreal Convention, supra this note, cited and translated in N. Leech, C. Oliver & J. Sweeney, supra note 44, at 278.

United States Legislation:


105. Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), Dec. 9, 1948, 78 Un.T.S. 277. The United States government, although instrumental in developing the convention, has not yet received the advice and consent of the Senate and thus has not ratified the convention. See 62 U.S. Dep't of State Bull. 350 (1970) (wherein the Secretary of State urges its ratification).


107. See Department of Justice, Study of International Control of Narcotics and Dangerous Drugs (1972). This study includes texts of some twelve international agreements, dating from 1909 to 1972, concerning control of narcotics.
however, have not yet achieved sufficient intensity of interest to warrant recognition as true bases for universal jurisdiction, either on the basis of custom or universal participation in international agreement.\textsuperscript{108}

Treaty obligations require both France and the United States either to extradite or to prosecute narcotics law violators, aircraft hijackers and counterfeiters if the offense was committed within the jurisdiction of the requesting state. There is a clear distinction, however, between the treaty obligation to extradite or to punish for certain extraterritorial crimes and the right (i.e., jurisdiction) to do so. Nevertheless, because states generally regard multilateral treaties binding parties to take such action as proper, indeed desirable, it may be argued that all states have the right to assert jurisdiction in such cases. The implicit recognition of the right to assert jurisdiction puts those offenses in the universal jurisdiction category, regardless of how many nations have actually obliged themselves to exercise such jurisdiction.

III. THE NEED FOR A NEW APPROACH

A. The Inadequacy of the Traditional Theories

The traditional theories of jurisdiction discussed above provide a backdrop for a consideration of jurisdiction over thwarted extraterritorial narcotics conspiracies. While the need to assert jurisdiction over such crimes may be apparent, the basis upon which to assert jurisdiction is more problematic. Thwarted extraterritorial narcotics conspiracies come close to fitting into several of the traditional theories of jurisdiction, but actually fit none. For example, the objective territoriality theory of jurisdiction has recently been asserted as providing a basis of jurisdiction over thwarted extraterritorial narcotics conspiracies. The traditional iteration of that theory, however, requires that a significant adverse effect actually occur in the asserting state's territory. When the conspiracy is thwarted, no significant effect occurs to trigger the objective territoriality theory.

Another example of the inadequacy of the traditional theories of extraterritorial jurisdiction occurs when the protective principle is asserted as a basis of jurisdiction over thwarted extraterritorial

\textsuperscript{108} See Restatement, supra note 7, § 34 (reporter's note 2); Restatement Tentative Draft, supra note 7, § 204.
narcotics conspiracies. That theory does cover offenses that are merely intended to have an effect in the asserting state's territory, even though no effect actually occurs. The protective principle, however, is traditionally limited to offenses that pose a threat to national security, sovereignty or some important governmental function. Most drug conspiracies do not pose such a threat.

Finally, one might argue that the universality principle is an appropriate basis of jurisdiction over thwarted extraterritorial narcotics conspiracies. The universality principle allows the assertion of jurisdiction even though the offense neither affects the territory of the asserting state nor threatens national security, sovereignty or other important governmental functions, as long as the offense is recognized as being so heinous as to allow any state obtaining jurisdiction over the person of the perpetrator to assert jurisdiction over the subject matter as well. However, due to disagreement among nations over what constitutes conspiracy and whether conspiracies ought to be punished, narcotics conspiracies have not as yet been universally condemned. Because of dispute over what substances are prohibited and in what quantities, even the substantive offense of narcotics importation itself, although perhaps universally regarded as being criminal, is not universally regarded as being so heinous as to meet the requirements of the universality theory.

Thus none of the traditional bases of extraterritorial jurisdiction alone is adequate to support an assertion of jurisdiction over thwarted extraterritorial narcotics conspiracies. The need to assert jurisdiction over such crimes, however, remains great. To meet the need for jurisdiction, either the existing theories must be expanded or a new approach must be developed that incorporates the theories; they cannot be abandoned, for they remain the sole bases in international and domestic law for proper assertion of jurisdiction.

109. Of the three traditional theories of jurisdiction, perhaps the universality theory is best suited for expansion to cover thwarted extraterritorial narcotics conspiracies. The problem is that some narcotics offenses are not seen as being as universally heinous as others. Another problem with applying this theory independently is that its application to this one crime would not provide a general principle to accommodate similar assertions of jurisdiction over other serious thwarted extraterritorial conspiracies that do not relate to trafficking in narcotics. Finally, the fact that many nations have not promulgated laws to prohibit what United States law denominates as "conspiracy" would pose a serious difficulty to the application of this theory alone.

110. Restatement Tentative Draft, supra note 7, § 402(3) (listing factors to be considered in determining significance of forum and respective interests of foreign states).
Recent United States cases have opted for expanding the traditional bases of jurisdiction to accommodate thwarted extraterritorial narcotics conspiracies. Support for that expansion is found in the so-called rule of reasonableness articulated in the American Law Institute Restatement of Foreign Relations Law, Tentative Draft number 2. The rule of reasonableness, it has been suggested, allows expansion of the traditional theories to meet the needs of the asserting state as long as another state is not offended by the expansion. For example, the objective territoriality theory might be expanded to cover a thwarted extraterritorial narcotics conspiracy, even though no effect actually occurs in the asserting state’s territory, as long as there was an intent to cause such an effect. This expanded territoriality theory, then, could be asserted as a basis for jurisdiction as long as no other state were offended thereby. The Restatement Draft adopts that expanded notion of the objective territoriality theory (limited by the rule of reasonableness) as the proper basis for the assertion of jurisdiction over thwarted extraterritorial narcotics conspiracies. Such an expansion and use of the rule of reasonableness, however, is not appropriate for two reasons. First, the Restatement Draft itself requires that there be a proper traditional basis of jurisdiction before the rule of reasonableness can be applied. The rule of reasonableness states that even where an appropriate basis of jurisdiction exists, assertion of jurisdiction will not be allowed if such an assertion is unreasonable or exorbitant. An assertion of jurisdiction is unrea-

111. Id. § 403(1).
112. Most of the cases that assert jurisdiction over thwarted extraterritorial conspiracies appear to assume this use of the rule of reasonableness. See, e.g., United States v. Jonas, 639 F.2d 200 (5th Cir. 1981); United States v. DeWeese, 632 F.2d 1267 (5th Cir. 1980), cert. denied, 451 U.S. 902 (1981); United States v. Arpa, 630 F.2d 836 (1st Cir. 1980); United States v. Ricardo, 619 F.2d 1124 (5th Cir. 1980), cert. denied, 449 U.S. 1063 (1981); United States v. Mann, 615 F.2d 668 (5th Cir. 1980), cert. denied, 450 U.S. 994 (1981); United States v. Baker, 609 F.2d 134 (5th Cir. 1980); United States v. Postal, 589 F.2d 862 (5th Cir. 1979); United States v. Williams, 589 F.2d 210 (5th Cir. 1979), aff’d, 617 F.2d 1063 (5th Cir. 1980); United States v. Cadena, 685 F.2d 1252 (5th Cir. 1978); United States v. Brown, 549 F.2d 954 (4th Cir. 1977), cert. denied, 430 U.S. 949 (1977); United States v. Winter, 509 F.2d 975 (5th Cir. 1975), cert. denied sub nom. Parks v. United States, 423 U.S. 825 (1975); United States v. Streifel, 507 F. Supp. 481 (S.D.N.Y. 1981); see also Blakesley, Jurisdiction, supra note 1, at 1141-51, 1156-63 (discussing the cases cited in this note).
113. Restatement Tentative Draft, supra note 7, §§ 402(1)(c), 403.
114. Id. § 402.
115. Id. § 403(1). Section 403(1) of the Restatement Tentative Draft provides:
Limitations on Jurisdiction to Prescribe: Although one of the bases for jurisdiction under § 402 is present, a state may not apply law to the conduct, relations, status, or interests of persons or things having connection with another state or states when the
sonable or exorbitant if, based on certain factors enumerated in the Restatement Draft, another state has a significant interest in asserting jurisdiction and thus would be offended by the first state's assertion. Properly understood, then, the rule of reasonableness is a means of limiting, not expanding, the assertion of jurisdiction in the international context.

Second, use of the rule of reasonableness to expand the traditional bases of extraterritorial jurisdiction is not appropriate because such use emasculates those traditional theories and elevates the rule of reasonableness to being the sole substantive basis of jurisdiction. That argument will be developed shortly. Suffice it

exercise of such jurisdiction is unreasonable.

Id.

116. Section 403(2)-(4) of the Restatement Tentative Draft provides:

(2) Whether the exercise of jurisdiction is unreasonable is judged by evaluating all the relevant factors, including:

(a) the extent to which the activity (i) takes place within the regulating state, or (ii) has substantial, direct and foreseeable effect upon or in the regulating state;

(b) the links, such as nationality, residence or economic activity, between the regulating state and the persons principally responsible for the activity to be regulated, or between that state and those whom the law or regulation is designed to protect;

(c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;

(d) the existence of justified expectations that might be protected or hurt by the regulation in question;

(e) the importance of regulation to the international political, legal or economic system;

(f) the extent to which such regulation is consistent with the traditions of the international system;

(g) the extent to which another state may have an interest in regulating the activity;

(h) the likelihood of conflict with regulation by other states.

(3) An exercise of jurisdiction which is not unreasonable according to the criteria indicated in Subsection (2) may nevertheless be unreasonable if it requires a person to take action that would violate a regulation of another state which is not unreasonable under those criteria. Preference between conflicting exercises of jurisdiction is determined by evaluating the respective interests of the regulating states in light of the factors listed in Subsection (2).

(4) Under the law of the United States:

(a) A statute, regulation or rule is to be construed as exercising jurisdiction and applying law only to the extent permissible under § 402 and this section, unless such construction is not fairly possible; but

(b) where Congress has made clear its purpose to exercise jurisdiction which may be beyond the limits permitted by international law, such exercise of jurisdiction, if within the constitutional authority of Congress, is effective as law in the United States.

Restatement Tentative Draft, supra note 7, § 403(2)-(4).

117. See infra notes 119-31 and accompanying text.
to say here that the rule of reasonableness was not designed to be an independent basis of jurisdiction over extraterritorial crime, but only to limit unreasonable assertions made using one of the traditional bases.

The alternative to using the rule of reasonableness to expand the traditional theories of jurisdiction in a way that effectively emasculates them is to combine those theories in a way that preserves their conceptual integrity and at the same time meets the needs of the asserting state. Under such a hybrid approach, the rule of reasonableness could retain its proper role of limiting unreasonable or exorbitant assertions of jurisdiction.

The hybrid approach would function as follows: Jurisdiction could be properly asserted if the offense charged meets all but one of the requirements of any two or more traditional bases of jurisdiction, even though it does not meet all the requirements of any single theory, as long as the assertion does not violate the rule of reasonableness. Applying that approach to the thwarted extraterritorial narcotics conspiracy, the offense meets all but one of the requirements of both the protective principle and the universality principle, even though it does not meet all the requirements of either theory. It is intended to affect United States territory, but being thwarted it actually causes no effect. Additionally, the conspiracy poses a threat to national interests, but not to national security, sovereignty or important governmental functions. Finally, it is universally condemned as being criminal, but is not universally regarded as so heinous as to come within the universality principle. Nevertheless, as long as the assertion does not violate the rule of reasonableness by impinging on another state's interest in asserting jurisdiction, jurisdiction should be allowed.

It might be argued that recent cases and the Restatement Draft reach the same result as would application of the hybrid approach articulated above. The virtue of the hybrid approach is not that the ends it achieves are better or even different, but that the means it employs are conceptually sound. Under the hybrid approach, the traditional theories of jurisdiction over extraterritorial crime retain meaning and importance as substantive bases of jurisdiction. Further, the rule of reasonableness is used as it was intended to be used—as a limitation on the unreasonable expansion

118. It should be noted, however, that for the approach to be triggered, the conspiracy must come so close to affecting or causing an effect on the territory that there can be no doubt as to what territory it was going to affect.
of jurisdiction rather than as an independent substantive basis of jurisdiction. The next section will develop those arguments on behalf of the hybrid approach.

B. The Relative Merits of the Proposed Solutions

It may be argued that a simple expansion of the objective territoriality theory to include offenses intended to have an effect on the territory is the best solution to the problem, and that the rule of reasonableness will sufficiently control exorbitant assertions of jurisdiction. While that may be true from a purely functional perspective, the notion is flawed.

It has been said that a “civilian” or “continental” jurist views legal problems with “a conceptualistic, abstract and doctrinaire” bent, while the Anglo-American view is practical but unsystematic and casuistic. The divergent approaches represented by recent United States case law and the Restatement, on the one hand, and suggested by this article, on the other, may be due to those contrasting views. Nevertheless, a conceptual approach is required in this instance unless the traditional theories or bases of jurisdiction are to be relegated to a supporting role as mere manifestations of the overriding new theory, the rule of reasonableness. If the traditional theories or bases of jurisdiction are to continue in their role as substantive prerequisites to asserting jurisdiction, it is necessary that they have meaningful limits or definition. If they better serve their function of allowing and limiting the assertion of jurisdiction over extraterritorial crime as manifestations of the rule of reasonableness, that fact ought to be candidly recognized.

The starting point of this polemic is the question of whether the objective territoriality theory of jurisdiction ought to be expanded, as in recent United States case law and in the Restatement, to include thwarted extraterritorial conspiracies. Underlying that question is a more fundamental one: whether expansion coupled with the rule of reasonableness effects a fundamental change in the traditional theories, rendering them no longer substantive theories of jurisdiction, but manifestations of the rule of reasonableness.

We have seen that the objective territoriality theory has traditionally applied when an effect of an extraterritorial offense actually has occurred within the asserting state’s territory and that the

subjective territoriality theory has applied only when an element of the offense has actually occurred within that territory. The territorial principle has always required some actual territorial nexus. We also have seen that recent United States cases and the Restatement of Foreign Relations Law, Tentative Draft number 2, have determined that the objective territoriality theory should apply to thwarted extraterritorial conspiracies, even though no effect or element of the offense actually occurred within the territory, as long as there existed an intent to cause such an effect. Certainly the need for assertion of jurisdiction in extraterritorial narcotics conspiracies aimed at the United States is great. Indeed, assertion of jurisdiction in such cases is necessary to fulfill the prophylactic function of the crime of conspiracy. Moreover, the apparent rationale continues, the expansion of the theory to cover those needs poses no functional problem, since the rule of reasonableness provides a limitation to prevent any abusive or exorbitant application.

Thus we have a natural and functional extension of jurisdiction over extraterritorial crime by way of simply expanding an already existing theory to meet a pressing need. It may be argued that this is better than the hybrid approach suggested in this article, because the parameters of the territoriality theory are already understood, whereas the parameters of the latter approach would be difficult to determine because it requires combining two or more theories. Further, expanding the territoriality theory is not without precedent: the rule requiring “strict” application of the territorial theory (that the entire crime be committed on the asserting state’s territory) was expanded to cover extraterritorial crimes that had an actual effect on the asserting state’s territory even though not all the elements had occurred on the territory; and to cover extra-territorial crimes of which merely an element, but not the entire crime, had actually occurred within the territory of the asserting state.

It seems, however, that expanding a territorial theory totally beyond territoriality, and limiting it by a standard of reasonableness applied by the courts of the asserting state, render the concept of territoriality meaningless. The problem with expanding the territoriality theory admittedly is conceptual. The application of the territoriality principle on the sole basis of “intent to have an effect” on the territory renders the theory conceptually defective and violates the “integrity” of the principle. Serious questions may be asked regarding the validity of this point. What is meant by violating the “integrity” of a theory? What is wrong with simply
extending the territorial principle to apply to thwarted extraterritorial narcotics conspiracies when they are intended to affect United States territory? How is the extension of the territorial principle in this manner critically different from the expansion that occurred earlier in our history?

The difference, albeit conceptual and definitional, does appear to be critical. Of course, it is true that when merely an element or an effect of an offense has occurred within the territory of the asserting state, the crime (in a holistic sense—all of its elements and its criminal consequence) did not occur within the territory. In that sense, the claim that the crime actually occurred within the territory is fictional. On the other hand, the fiction does have a territorial nexus. A material element or effect of the offense has actually occurred within the territory. Functionally, with modern transient society as the context of crime, many crimes that have several elements never occur completely within one territorial jurisdiction. Without expansion of the territorial theory many offenses would have gone unpunished. Thus the expansion of the territorial theory to include subjective and objective aspects was necessary and reasonable. More important for our purposes, the expansion also retained a clear and actual territorial nexus. A state has a territorial basis for, and an interest in, asserting jurisdiction over an act defined by its law as criminal when the conduct affects its territory or when an element of the criminal activity takes place in the state’s territory. Thus the functional need to expand the strict notion of territoriality was met, but the notion of territoriality was left intact.

Today there is a new reality requiring similar adjustment of the principles of jurisdiction. Extraterritorial narcotics conspiracies are so rampant that an effective prophylaxis requires the use of the crime of conspiracy. If the crime of conspiracy is to be used, it must be applied before the underlying substantive offense (the importation of narcotics) actually occurs. If the conspiracy takes place essentially beyond territorial limits until importation actually occurs, jurisdiction must be asserted on the basis of what occurs extraterritorially in order to obtain the prophylactic effect. Hence, it was natural for the courts and the drafters of the Restatement to follow the formula established when the strict territorial principle was expanded to create the objective and subjective territoriality theories. The courts and the Restatement drafters simply expanded the objective territoriality theory to include those offenses which, although they had caused no effect nor had an ele-
ment occur within the territory, were “intended to have an effect on United States territory.”

Although that solution might appear natural and functional, it does not follow that it is appropriate. No matter how exigent it might be to extend the territorial theory to the point that its application requires no actual territorial nexus at all, such an explanation is a quantum leap beyond territoriality; it leaves no definitional or conceptual limit to territorial jurisdiction. To say that the only real reason to limit a theory is to ensure that states will not apply it in an exorbitant manner—and the rule of reasonableness does this well—begs the question. Why retain an independent theory of territoriality if the notion of reasonableness of the application of jurisdiction encompasses it?

Perhaps the rule of reasonableness should completely replace the traditional theories of jurisdiction. Functionally, whether we apply the rule of reasonableness to limit an “objective territoriality theory,” which functions beyond territoriality, or the hybrid approach, which retains the traditional theories intact but combines several to solve the problem, the result is the same. But if we accept the traditional theories of extraterritorial jurisdiction as extant and viable (and the recent United States court decisions and the Restatement give lip service to their continued existence and viability), the definition or conceptualization of those theories is important. If the “territorial theory” applies beyond any conceivable nexus with territory merely because it is reasonable, then the territorial theory ceases to exist; it becomes merely a term that reflects an aspect of the rule of reasonableness. In effect, unless the recent case law and Restatement Draft are read to include the approach articulated in this article, they make a subtle change in the application of the traditional theories which, in effect, causes those theories to be replaced by the rule of reasonableness. Rather than being the substantive triggering mechanism for asserting jurisdiction over extraterritorial offenses, the traditional theories become manifestations or aspects of the rule of reasonableness. Thus jurisdiction will be appropriate as long as no other state’s sovereignty or interests are violated by the assertion of jurisdiction.

Perhaps the traditional bases should be recognized simply as aspects or manifestations of the rule of reasonableness, rather than substantive theories of jurisdiction. If this is true, however, the shift in emphasis and the abolition of the bases as substantive theories of jurisdiction ought to be forthrightly stated. On the other hand, if the traditional bases should be retained as substantive
theories of jurisdiction, a conceptual framework that does so while meeting growing jurisdictional needs ought to be articulated. The hybrid approach would do this. It is not designed as a panacea, but as a stimulus for thought. There may be instances, as with any approach, in which its application may be questionable or difficult. At least the hybrid approach draws attention to the conceptual problems created by the recent development in United States case law and in the Restatement and stimulates thought and dialogue in an important area of international and domestic law.

C. France and the Assertion of Jurisdiction Over Extraterritorial Narcotics Conspiracies

It is interesting to evaluate whether French theory as developed in this article would approve or disapprove the expansion of the objective territoriality theory to accommodate the assertion of jurisdiction over a thwarted extraterritorial narcotics conspiracy. French doctrine and jurisprudence have rejected the application of the objective territoriality theory, the universality theory and the protective principle as the basis for such an assertion when used alone. Given French case law and doctrinal writings, however, an argument can be made that the French would accept the hybrid approach articulated herein.\(^{120}\)

Generally, French law does not conceive of the crime of conspiracy as it is known in the United States, unless the combination or association is designed to commit crimes against the security of the Republic or to violate French laws against the use, sale and importation of narcotics.\(^{121}\) The French have made a specific legis-

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\(^{120}\) Discussion and correspondence with eminent continental jurists in relation to the Conference on New Horizons in International Criminal Law, Institut Supérieur International des Sciences Criminelles, held May 7-12, 1984, Noto, Sicily, including, among others: Professeur Pierre Bouzet, Dean and Professeur Emeritus, Faculté de Droit, Université de Rennes, France; Professeur Georges Levassor, Professeur de Droit Pénal, Faculté de Droit, Université de Paris II, France; Professeur Claude Lombois, Recteur de l'Académie d'Aix-Marseille, Professeur de Droit Pénal, Université de Paris II, Faculté de Droit, Aix-en-Provence, France; Professor Zelco Horvatic, Dean and Professor of Law, University of Zagreb, Yugoslavia; Professor Joachim Hermann, Professor of Criminal Law and former Dean, Faculty of Law, University of Augsburg, Federal Republic of Germany; Ekkehard Muller-Rappard, Chief, Division of Crime Problems, Council of Europe, 67 Strasbourg, France; Professeur René Koering-Joulin, Faculté de Droit, Université de Strasbourg, France; Professore Mario Chiavari, Facultà di Giurisprudenza, Università di Torino, Italy.

\(^{121}\) The French notion of conspiracy focuses on general combinations or associations to plan crimes (the most serious of French offenses) in the plural. C. Pén. art. 265 (Dalloz 1980-81). That is, the law does not contemplate conspiracy to commit a specific offense unless it reaches the level of an attempt, but rather the combination or association of indi-
lative exception for those offenses. Although the protective principle is clearly the jurisdictional basis for asserting jurisdiction over crimes against the security of the Republic, including association for that purpose, the legislation on narcotics does not state a jurisdictional basis.

In 1970, the French Legislature promulgated legislation designed to battle the drug problems in France on both the medicosocial and the penal fronts. That legislation included article L. 627 of the Code de la Santé Publique, which established serious criminal penalties for violating French laws against drug trafficking. Paragraphs two and three of that law refer to the crime of association or entente with a view to violating French narcotics laws and making such association or entente punishable just as the consummated offense. An association is defined as follows by article 265 of the French Penal Code:

Associations de Malfaiteurs

Every association formed, no matter what its duration or the number of its members, every entente established with the goal of preparing or committing crimes against the person or the property, constitutes a crime against the Public Peace.

Negotiations for the purpose of obtaining, manufacturing or selling prohibited narcotics suffice to establish such an association or entente, even before an agreement is reached among the parties. Thus there is no question that French law considers the at-
tempt or the conspiracy to import narcotics into France to be a crime independent of the underlying substantive offenses.

For our purposes, the most interesting aspect of article 627 of the Code de la Santé Publique is paragraph three, which provides that the penalties therein prescribed will apply for violation of the French narcotics laws (apparently including the association to import narcotics into France) even though the acts constituting the elements of the offense "are accomplished in different countries."127 Thus French courts will have jurisdiction and French law will apply to punish conspirators who associate to import narcotics illegally into France, even if the conspiracy is thwarted abroad.128 Interestingly, article L. 627 of the Code de la Santé Publique does not articulate the theory of jurisdiction that provides the basis for such an assertion. It is clear, however, that French doctrine and jurisprudence have rejected the notion that the United States courts and the Restatement have adopted to cover similar situations: that the appropriate basis for jurisdiction is the objective territoriality theory. Even in an attempt, which is conceptually closer to being accomplished than an association or conspiracy to commit, it is necessary that an effect or element of the offense actually occur within the territory for the objective or subjective territoriality theories to obtain. The objective territoriality theory, therefore, cannot be the vehicle for jurisdiction in an attempt to commit a crime in France when it is thwarted extraterritorially, because no effect has occurred in French territory.129

There have been attempts in France to accommodate the assertion of jurisdiction over extraterritorial narcotics offenses via the universality theory. The Projet or draft revision of the French Penal Code in 1934 contained the statement that the universality principle ought to be the basis for assertion of jurisdiction over extraterritorial commission of the crimes of white slavery, slave trade, trafficking in narcotics and in obscene material, among others.130 That statement was dropped, however; instead, extradition became the preferred mechanism for dealing with such offenses when they occur extraterritorially, and French courts and


128. Id.

129. See supra notes 27-28 and accompanying text.

commentators hesitate to apply the universality theory.\textsuperscript{131}

French reticence to apply the universality theory to such cases is well taken. The universality theory requires that the offense be recognized universally not only as a crime but as one so heinous as to warrant universal condemnation. The danger in extending the universality theory alone to include narcotics conspiracies is that there is currently no universal agreement about the crime of conspiracy generally or about which, if any, of the narcotics offenses are so heinous as to be analogous to piracy or genocide. If it could be determined by convention or otherwise that all or some specific narcotics offenses and conspiracies to commit them were universally condemned, perhaps the universality principle would be an appropriate vehicle for assertion of jurisdiction. To date, that is not the case.

Thus France has promulgated legislation to allow assertion of jurisdiction over extraterritorial narcotics conspiracies but has not articulated a jurisdictional basis for such an assertion. Further, France rejects the expansion of the traditional bases of jurisdiction to cover this crime. Those facts together indicate that France may be amenable to a hybrid approach that meets the needs of the requesting state without expanding the traditional theories of jurisdiction beyond recognition.

\section*{IV. Extradition, Jurisdiction and the Condition of Double Criminality}

The discussion of the traditional bases of jurisdiction over extraterritorial crime and the development of a new theory for such jurisdiction provide the backdrop for the remainder of this article, which will consider the inconsistency between traditional jurisdiction theory and the practice of extradition.

The distinctions between the French and the United States legal systems, and traditionally between the so-called continental and Anglo-American systems, is the source of many of the problems that occur at the convergence of extradition practice and jurisdiction principles. For example, traditional notions of nationality and the role of law and the state with regard to nationals—stemming from ancient Roman law—suggest the reason for

the French emphasis and broad application of the nationality principle in asserting jurisdiction over French nationals. The honor and sovereignty of the state are involved when one of its nationals commits a crime abroad. That state must punish the wrongdoer—thus expiating itself—but also must protect that national against violation by the other state’s justice or lack thereof. These principles require that France refuse to extradite its nationals, but also that it assert jurisdiction over them when they have committed crimes abroad. To that end, France inserts a clause in its treaties prohibiting the extradition of nationals but maintains a broad application of the nationality principle of jurisdiction so as to prosecute them for committing crimes abroad.

United States law is quite different. If a United States national commits an offense in France and returns to the United States, a nonextradition of nationals clause in the extradition treaty would prevent the United States from extraditing the fugitive back to France. Furthermore, not subscribing to the broad


133. This is precisely what occurred in 1936 when France sought the extradition from the United States of an American national for crimes committed in France. Valentine ex rel. Neidecker v. United States, 299 U.S. 5 (1936). The exemption of nationals clause in the Extradition Treaty, supra note 132, at 1530, reads: “[N]either party should be bound to deliver up its own citizens or subjects under the stipulations of this convention.” That clause would appear, on its face, to allow discretionary extradition of nationals. It does not. Neither France nor the United States will allow it. The French Extradition Law of Mar. 10, 1927, 1927 D.P. IV 265, reprinted in C. Pr. Pén. following art. 696 (Dalloz 1978-79), prohibits the extradition of French nationals outright. “Extradition is not granted: 1. When the person, the object of United States request, is a French citizen or a person under French protection, the status of citizen or protected person being determined as of the time of the offense for which the extradition is requested.” French Extradition Law of Mar. 10, 1927, 1927 D.P. IV 265, art. 5, ¶ 1. With regard to the timing of determining the accused’s nationality, the court of appeals at Aix-en-Provence, Decision of Mar. 15, 1951, 1951 J.C.P. II, No. 6243, 1951 I.L.R. 324, held that under this article of the Extradition Law of 1927 France
could surrender a fugitive from the justice of Italy who had committed certain extraditable offenses in 1945, even though he had acquired his French citizenship by naturalization in 1950. In the Valentine case, the United States Supreme Court held unequivocally that the exemption of the nationals clause in the Extradition Treaty created an absolute bar to the extradition of United States citizens to France. The Court stated that this was not a matter of policy but of legal authority, and reasoned that the power to extradite from the United States must be specially granted in the terms of the extradition treaty. Extradition requires a positive statement of the power to extradite. The Court stated that a negative phrase cannot be construed as a grant of power to the executive. 299 U.S. at 9-10. The executive cannot extradite by executive agreement; a valid treaty or statute is necessary. Blakesley, Extradition, supra note 63, at 1151 passim.

The United States government, although it would prefer to incorporate a clause explicitly allowing extradition of nationals, has had to use four different approaches to the extradition of nationals in its extradition treaties. The first, like the Extradition Treaty between France and the United States, provides that the parties to the treaty are not bound to extradite their nationals. This is a complete and absolute bar. The second approach, adopted by the 1970 Supplementary Convention, recognizes no obligation to extradite nationals, but expressly gives the executive discretionary authority to extradite nationals on a case-by-case basis. Thus article III of the Supplementary Convention amended article V of the Extradition Treaty to read:

There is no obligation upon the requested State to grant the extradition of a person who is a national of the requested State, but the executive authority of the requested State shall, insofar as the legislation of that State permits, have the power to surrender a national of that State if, in its discretion, it be deemed proper to do so. Supplementary Treaty, supra note 132. The minutes to the negotiations of the Supplementary Convention read:

The United States representative explained to the French delegation the inability of the United States to extradite its own nationals under the present Convention and expressed a strong desire to rectify this situation. He explained that the United States Supreme Court had decided, in Valentine v. United States, that the French Convention did not, as indirectly required by the United States Constitution, grant the executive authority to extradite United States citizens. He noted that very few United States penal laws provided any form of extraterritoriality, and therefore, that unless such persons were returned to France, they could not be prosecuted in the United States.

The French delegation explained that their extradition law generally prohibited extradition of nationals and expressed opposition to the formula proposed by the United States (the formula explicitly providing for extradition of nationals). The United States representative then suggested the article used in the United States-Brazil Treaty of 1961 (article VII) to which the French delegation agreed.


The third approach is to remain silent on the subject of the extradition of nationals. See, e.g., Extradition Treaty, Dec. 22, 1931, United States-Great Britain-Northern Ireland, 47 Stat. 2122, T.I.A.S. No. 849.


The United States government extradites its nationals pursuant to the latter three
territorial crime, the United States government would be incapable of prosecuting the individual for want of jurisdiction. Now suppose that the accused criminal is a French national who committed his offense in a third country and has made his way to the United States, where he is provisionally arrested pursuant to a French extradition request. The jurisdictional basis for the extradition request would be the nationality principle to which France subscribes. The extradition request would have to be refused by the United States government, however, because the jurisdictional theory behind the request is not applied broadly enough in the United

types of provisions. When discretion to extradite nationals is expressly allowed, the courts have found that the executive has the discretion, but not the obligation, to do so. In re Lucke, 20 F. Supp. 658, 659 (N.D. Tex. 1937). With regard to treaties that are silent on the extraditability of nationals, the United States Supreme Court has held that nationals are extraditable. If the treaty requirements are met, the executive is obligated to extradite nationals because they are included in the term “persons” used in such treaties.

In Charlton v. Kelly, 229 U.S. 447 (1913), the United States Supreme Court stated: "[T]here is no principle of international law by which citizens are excepted out of an agreement to surrender "persons," where no such exception is made in the treaty itself. Upon the contrary, the word "persons" includes all persons when not qualified as it is in some of the treaties between this and other nations. That this country has made such an exception in some of its conventions and not in others demonstrates that the contracting parties were fully aware of the consequences unless there was a clause qualifying the word "persons." Id. at 467-68 (emphasis in original). Canadian courts take the same view. See In re Burley, 1 Can. L.J. 34 (1865).

The policy preference of the United States government is to extradite fugitives regardless of their nationality. United States negotiators always attempt to include a clause expressly allowing extradition of nationals. When that is not possible due to the internal extradition laws of the other negotiating party, the United States delegation suggests the inclusion of a clause explicitly providing executive discretion to extradite nationals. That allows the United States government to maintain its policy of extradition of its own nationals whether or not the other party can reciprocate. Most commentators on extradition suggest that such discretionary clauses are meaningless because discretion will not be exercised unless reciprocity exists. See, e.g., P. Bouzet & J. Pinatel, supra note 18, at 1325; R. Merle & A. Virtu, supra note 16, at 329 n.2; I. Sheares, EXTRADITION IN INTERNATIONAL LAW 94 (1971). That clearly is not true in United States practice. The discretionary clause is put into extradition treaties precisely to allow extradition of United States nationals in spite of the lack of reciprocity. The clause allows the extradition of United States nationals without either accepting or deprecating the internal extradition law of the other contracting party.

(The author saw the extradition of several United States citizens, despite a lack of reciprocity, during his two-year stay in the Legal Adviser's Office of the Department of State.)

That policy allows for flexibility without renegotiation, in case the foreign country changes its internal extradition law to allow extradition of its own nationals. Thus the accused fugitive was not extraditable to France and was not prosecutable in the United States because the nationality principle was not extended to his crime. The solution is to allow discretion to extradite one's nationals if one does not employ the nationality principle to the extent necessary to prosecute the accused fugitive. That is just what the United States did in 1970 by amending the United States-France Extradition Treaty. The alternative is to extend jurisdiction to prosecute by way of the nationality principle.
States to cover the circumstances of the case. That result is a manifestation of the so-called "special use" of the double criminality condition to extradition. Problems related to the nationality principle are not the only ones that confront the extradition process as it interacts with jurisdictional theory.

As the hypothetical described above indicates, there may often be serious doubt that extradition will be successful, even though the offense allegedly committed is one listed as extraditable under the treaty and one for which the requesting state has proper jurisdiction under its own law and international law. The aspect of extradition practice that causes the most serious problems of inconsistency with the principles of jurisdiction is the double criminality condition. That condition requires that conduct for which extradition is sought be proscribed as a serious offense in both the requesting and the requested state.\textsuperscript{134} Even when the crimes match, a special use of the double criminality condition requires that the requested state approve as acceptable jurisdiction theory the jurisdictional basis asserted by the requesting state.

A. Jurisdiction and Extradition

Article I of the 1909 extradition treaty between France and the United States\textsuperscript{135} provides that the parties "agree to deliver up persons who, having been charged with or convicted of any of the crimes or offenses specified in the following article, committed within the jurisdiction of one of the contracting parties," are within their country.\textsuperscript{136} That language has not been altered. This

\textsuperscript{134} Factor v. Laubheimer, 290 U.S. 276 (1933); Brauch v. Raiche, 618 F.2d 843, 847 (1st Cir. 1980). The First Circuit stated in the Brauch case that:

[The Extradition Treaty] imposes on all extraditable offenses a requirement of "double criminality"—that is, an offense for which extradition is sought must be a serious crime punishable under the laws of both countries. The requirement that the acts alleged be criminal in both jurisdictions is central to extradition law and has been embodied explicitly or implicitly in all prior extradition treaties between the United States and Great Britain since the Jay Treaty of 1794.

\textit{Id.} In Caplan v. Vokes, 649 F.2d 1336, 1344 (9th Cir. 1981), the Court of Appeals for the Ninth Circuit stated:

In our view, an adequate extradition proceeding must include in its record a specific delineation, as to each charge, of the legal theories under the requesting country's law by which the accused's conduct is alleged to constitute an extraditable offense, together with an identification of the corresponding offenses in this country relied on to show that the "dual criminality" requirement has been met.

\textsuperscript{135} Extradition Treaty, \textit{supra} note 132; Supplementary Convention, \textit{supra} note 132; 7 C. Bevans, Treaties and Other International Agreements of the United States of America 872 (1968); see Blakesley, \textit{Extradition, supra} note 63, at 663.

\textsuperscript{136} Extradition Treaty, \textit{supra} note 132, art. I (emphasis added).
treaty could be construed, on its face, to provide jurisdiction to extradite whenever an extraditable offense is committed in such a way as to trigger the jurisdiction of either contracting party as defined by the laws of either state. The term “jurisdiction” as used in extradition treaties, however, has traditionally been interpreted by United States courts and commentators to connote territorial jurisdiction exclusively.\textsuperscript{137}

The United States Attorney General's opinion on this matter, written for the case of \textit{In re Stupp}, states:

I am quite clear that the words “committed within the jurisdiction,” as used in the treaty, do not refer to the personal liability of the criminal, but to the \textit{locality}. The locus delicti, the place where the crime is committed, must be within the jurisdiction of the party demanding the fugitive.\textsuperscript{138}

The Attorney General's language fairly sums up the traditional official United States position on the interpretation of the term “jurisdiction” in extradition treaties.\textsuperscript{139} French notions of jurisdiction, although they include territorial aspects, clearly transcend the territorial concept. French law provides a rather broad authority for application of its criminal laws to events that occur beyond its national territory, and thus to prosecute and punish individuals who have committed “extraterritorial offenses.”\textsuperscript{140} In contrast to that of the United States, French law has long provided clear substantive alternatives to territorial jurisdiction such as the nationality principle.


\textsuperscript{138} \textit{Stupp}, 23 F. Cas. at 283 (emphasis added).

\textsuperscript{139} This has been the consistent traditional Anglo-American interpretation of the term “jurisdiction.” In 1931, for example, France requested extradition from Great Britain of a fugitive from French justice. Great Britain denied the request on jurisdictional grounds. The court stated that the 1873 Convention of Extradition applies only to “crimes committed within the territory of the Power which is seeking extradition . . . .” [In their Lordships' opinion, not one of the appellants was liable to be extradited under the treaty, unless the crime of which he was convicted was, in fact, committed within the territory of the French Republic.” Kossekechatko Case, 1932 A.C. 78, 97; see also Harvard Research, \textit{supra} note 7, at 543, 545.

\textsuperscript{140} \textit{See supra} notes 9-108 and accompanying text (discussing French views on each of the traditional bases of jurisdiction over extraterritorial crime).
Difficulties may arise when one of the parties to an extradition treaty attempts to extradite an offender who has committed an extraditable offense deemed by the requesting state to fit within its notion of jurisdiction, but which would not be considered by the law of the requesting state to be within its jurisdiction under similar, but obverse, circumstances. For example, if a French national accosted and robbed or obtained money, securities or other property from another French national on foreign soil, French law may admit jurisdiction of its courts over the subject matter on the basis of the nationality principle.\textsuperscript{141} United States law, on the other hand, would not allow the assertion of jurisdiction in the above circumstances, so extradition would be denied.\textsuperscript{142} To the French, that would appear as a violation of the treaty; to the United States, it would not.

If, on the other hand, some individuals conspired to violate United States securities or narcotics laws, and the conspiracy were thwarted abroad, United States law arguably may consider the conspiracy to have been committed within United States "territory," given the recent trend toward an expanded version of the objective territoriality principle.\textsuperscript{143} If extradition of those accused of the offense were sought from France, it is possible that the request would be denied or, if approved, would be approved on the basis of an alternative theory of jurisdiction rather than the territorial principle.

The drafters of the Supplementary Convention on Extradition between France and the United States attempted to resolve those problems by adding the following provision: "Without prejudice to the jurisdictional provision of Article I of this Convention when the offense has been committed outside the territory of both contracting Parties, extradition may be granted if the laws of the requested Party provide for the punishment of such an offense committed in similar circumstances."\textsuperscript{144} Although this new article might appear to provide an exception to the traditional United States interpretation of the term "jurisdiction" in extradition treaties, judicial interpretation of the clause suggests that it does not. If the drafters' purpose was to make such an exception, they essentially failed by connecting jurisdiction for extraditability to the law

\textsuperscript{141} See supra notes 59-83 and accompanying text (discussing the nationality principle of jurisdiction).
\textsuperscript{142} Blakesley, Extradition, supra note 63, at 664.
\textsuperscript{143} See supra notes 9-58 and accompanying text.
\textsuperscript{144} Supplementary Convention, supra note 132, art. I.
of the requested party. In practical effect, that changes very little. It simply makes United States law on jurisdiction determinative for most extradition requests. The provision would allow the United States, for example, to seek extradition pursuant to its expansive and fictionalized version of the objective territoriality theory of jurisdiction, but would allow United States courts to deny a French extradition request based on the nationality theory. In addition, the provision incorporates a strict adherence to the special and general double criminality condition that will be considered in detail and criticized below.\textsuperscript{146}

There appear to be at least two explanations for the wording of article I. It could have been presented by the United States negotiating team as an attempt to allow the flexibility to expand the notion of jurisdiction for extradition beyond the territorial principle as United States domestic law expands beyond that principle. Alternatively, it could have been an attempt to allow the requesting state to obtain jurisdiction over the person through extradition if that state's law allowed jurisdiction over the subject matter, even when the requested state's law would not allow jurisdiction in similar circumstances. That would have been an attempt to eliminate the "special use" of the double criminality principle. Both explanations contradict the traditional principle in United States law that jurisdiction in extradition treaties means territorial jurisdiction. While that interpretation does not violate the language of article I on its face, the courts have construed article I otherwise.

It is likely that the former explanation is more accurate. United States law on jurisdiction over extraterritorial crimes has been expanding.\textsuperscript{146} The United States delegation proposed the additional article, and apparently both negotiating teams agreed that the new clause would be helpful in countering narcotics and counterfeiting offenses, areas in which United States courts have transcended the pure territorial theory to take jurisdiction. The French delegation probably decided that a little expansion of ex-

\textsuperscript{145} See infra notes 147-65 and accompanying text (discussing the double criminality condition).

\textsuperscript{146} This expansion is apparent in relation to violations of: antitrust laws, United States v. Aluminum Co., 148 F.2d 416, 443-44 (2d Cir. 1945); securities laws, Schoenbaum v. Firstbrook, 405 F.2d 200, 206, rev'd on other grounds, 405 F.2d 215 (2d Cir. 1968) (en banc); and conspiracy to import narcotics, United States v. Conroy, 589 F.2d 1258, 1265-66 (5th Cir. 1979); United States v. Postal, 589 F.2d 862, 885-86 (5th Cir. 1979); United States v. Williams, 589 F.2d 210, 213 (5th Cir 1979); United States v. Cadena, 585 F.2d 1252, 1257-58 (5th Cir. 1978); United States v. Petrulla, 457 F. Supp. 1367, 1373 (M.D. Fla. 1978); United States v. Keller, 451 F. Supp. 631, 635 (D.P.R. 1978); Note, supra note 57.
traditability beyond the territorial principle was better than none.

The major contradiction between extradition practice and general principles of jurisdiction arises from the requirements of double criminality. The next section will discuss that requirement. Clearly, although the crime charged may be proscribed by the law of the requesting state, such as narcotics conspiracies or crimes involving economic regulation in the United States, extradition will not be approved by the requested state unless the charged crime is punishable under the law of the requested state and unless the theory of jurisdiction asserted is accepted by that state.

The next section will analyze the relationship of the double criminality condition with the principles of jurisdiction to determine whether the double criminality requirement operates contrary to generally accepted notions of jurisdiction, and if so, to what degree. After examining the extradition treaty between France and the United States, the article will analyze the definition, role, purpose and scope of the double criminality requirement. Then the requirement of double criminality will be applied to several hypothetical situations to determine whether extradition would be granted. Finally, suggestions will be offered for resolving any inconsistencies.

B. Principle of Double Criminality (Réciprocité d’ Incrimination)

The double criminality principle, having its basis in the long-standing maxim, nulla poena sine lege, ensures the requested state that the fugitive will not be punished for acts not made criminal under its domestic law. For extradition to be proper, a court must determine that the offense charged is listed as extraditable in the relevant extradition treaty and that the conduct behind the charge is made criminal in the law of each party state.147 Thus “an offense for which extradition is sought must be a serious crime punishable under the laws of both countries. The requirement that the acts alleged be criminal in both jurisdictions is central to extradition law and has been embodied explicitly or implicitly in all prior extradition treaties . . . .”148

The double criminality principle has often been criticized.149

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147. See supra note 134 and accompanying text.
149. See P. Bernard, Traité Théorique et Pratique de l’Extradition 226 (1890); D. de Vaubres, Traité, supra note 22, at 878-79; I. Shearer, supra note 130, at 138-39; 4 M. Travers, supra note 19, at no. 2158. Professor Shearer criticizes the aspect of the principle
Notwithstanding such criticism, double criminality remains a very important principle in extradition law because of the sharp divergencies among the criminal laws of the various countries of the world. The French Extradition Law of March 10, 1927,\(^{150}\) provides that the offense for which extradition is sought must be punishable by the laws of the requesting state and by those of the requested state.\(^{151}\) Cases in the United States and France in which the principle of double criminality has determined the outcome of the extradition request are abundant.\(^{152}\) The Supplementary Convention of 1970 followed the law and custom of both France and the United States when it added a general double criminality provision. That provision reads: "Extradition shall be granted for the following acts if they are punished as crimes or offenses by the laws of both States."\(^{153}\)

Although it has been suggested that the double criminality principle is not a general principle of international law,\(^{154}\) it appears to have been generally applied in practice, and certainly was extant in French and United States law well before the addition of the general clause in the 1970 Supplementary Convention. For example, the 1909 extradition treaty applied the principle to specific offenses that were believed to be the ones that might present dis-

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\(^{151}\) Id. United States case law provides similarly. See Kelly v. Griffin, 241 U.S. 6 (1916); Wright v. Henkel, 190 U.S. 40 (1903).

\(^{152}\) Kelly v. Griffin, 241 U.S. 6 (1916); Wright v. Henkel, 190 U.S. 40 (1903); see also Factor v. Laubenheimer, 290 U.S. 276, 300 (1933); Collins v. Loisel, 259 U.S. 309, 311 (1922); Pettit v. Walshe, 194 U.S. 205, 217 (1904). A good example is Eisler v. United States, 170 F.2d 273 (D.C. Cir. 1948); United States v. Eisler, 75 F. Supp. 640 (D.D.C. 1948); Eisler v. United States, 338 U.S. 189 (1949). After having been convicted of perjury in the United States for making false statements to U.S. officials, the British Bow Street Magistrate refused to extradite the defendant, an alien communist, because the British crime of perjury required that the false statements be made in court. See M. Whitteman, supra note 30, at 797-99; cf. Decision of Oct. 23, 1935, 1936 Journal de Droit International 372 (as long as the actions are considered to be offenses under the law of both states and as long as they are extraditable under the terms of the treaty, it does not matter if they are denominated differently).

\(^{153}\) Supplementary Convention, supra note 132.

\(^{154}\) I. L. Oppenheim, supra note 60, § 331, at 701 n.1; Note, Extradition and the Scope of the Principle of Double Criminality, 54 Austl. L.J. 240 (1980).
crepancies between French and United States law.\textsuperscript{155}

The famous \textit{Factor} case\textsuperscript{156} exemplifies the function and scope of the double criminality principle. In that case, Great Britain had requested the extradition of a fugitive for the crime of "receiving money knowing the same to have been fraudulently obtained."\textsuperscript{157} The fugitive had been apprehended in Illinois, where the extradition hearing was to be held. The conduct, however, was not criminal under Illinois law. To be extraditable, of course, the offense must be so listed in the appropriate treaty, which it was, and it must be a crime in both the requesting and the requested states, which it was not, if Illinois law were the focus. Britain had properly made its extradition request to the United States, but due to the fortuitous circumstance that the fugitive was apprehended in a state of the Union that did not make that particular action criminal, the question arose as to whether the rule of double criminality was satisfied.

The United States Supreme Court held the fugitive extraditable on a different basis,\textsuperscript{158} but stated very clearly what its solution to the double criminality dilemma would be. It noted that the conduct with which Factor was charged was a crime in Great Britain, was within the provisions of the relevant extradition treaties between the two countries, and was "a crime under the law of many states, if not Illinois, punishable either as receiving money obtained fraudulently or by false pretense, or as larceny."\textsuperscript{159}

The Supreme Court's approach, therefore has been to hold the

\textsuperscript{155} For example, the crimes of breach of trust and fraud were qualified with the proviso, "when such act is made criminal by the laws of both countries." Extradition Treaty, \textit{supra} note 132, art. II(7). The French law has required it since March 10, 1927. French Extradition Law of Mar. 10, 1927, 1927 D.P. IV 265, art. 4. Each of the individual statements of the double criminality principle was eliminated by the Supplementary Convention, \textit{supra} note 132, when it added the general clause applying the principle to the entire treaty.

\textsuperscript{156} \textit{Factor v. Laubenheimer}, 290 U.S. 276 (1933).

\textsuperscript{157} \textit{Id.} at 303.

\textsuperscript{158} The Supreme Court resolved the problem by holding that the offense or the actions described in the extradition papers need not be denominated in the same language by the law of the requested state. All that is necessary is that the offense or the actions constituting the offense be enumerated in the treaty, that those actions be some kind of an offense in the requested state, although denominated differently, and that both offenses be enumerated as extraditable under the treaty. Thus the conduct may be denominated "obtaining money by false pretenses" in Britain, and "fraud" in Illinois, and be extraditable because both denominations are extraditable crimes under the treaty. \textit{Id.} at 282, 299.

\textsuperscript{159} \textit{Id.} at 299. The same logic was implicit in a Texas case, although extradition was denied on grounds of insufficiency of evidence. \textit{In re Wise}, 168 F. Supp. 366 (S.D. Tex. 1957). For a critical view of the \textit{Factor} decision, see Hudson, \textit{The Factor Case and Double Criminality in Extradition}, 28 Am. J. Int'l L. 274 (1934).
offense extraditable if it is generally recognized as criminal in the United States. An offense is considered to be “generally recognized as criminal” if it is criminalized in “many” of the states of the Union. The decision does not determine what the term “many” means, but what it appears to be saying is that the deciding judge will determine, in his or her own mind, whether the conduct of the accused is considered extraditable under the terms of the treaty and whether there are sufficient states of the Union that criminalize the action in question to make it a crime in both countries in satisfaction of the principle of double criminality. 160

Some recent United States federal decisions have expanded that liberal interpretation of the double criminality condition by providing that there need not be complete congruity between the relevant offenses; “the test of double criminality is met where the offenses of the two countries are ‘substantially analogous.’” 161 Indeed, the First Circuit argued that the double criminality condition is satisfied if the conduct on which the charges were based was proscribed by criminal provisions of the federal law or of a preponderance of the states. 162

160. Factor v. Laubenheimer, 290 U.S. 290, 299 & n.7 (listing the states of the Union that have criminalized the conduct under one denomination or another); see also Cucuzzella v. Keliikoa, 638 F.2d 105, 107 (9th Cir. 1981).

161. Brauch v. Raiche, 618 F.2d 843, 847 (1st Cir. 1980); McElvy v. Civiletti, 523 F. Supp. 42, 48 (S.D. Fla. 1981); cf. Freedman v. United States, 437 F. Supp. 1252, 1262-63 (N.D. Ga. 1977) (extradition from Georgia to Canada on basis of “commercial bribery” charge was not allowed because such a charge is totally unknown to state or federal law, but assisting securities fraud by failure to disclose material information was “Comparable” and “similar” to Georgia crime, so extradition granted on that charge); Extradition of David, 395 F. Supp. 803, 807 (E.D. Ill. 1975) (French “willful homicide” and United States “murder” similar enough to allow extradition).

162. Brauch v. Raiche, 618 F.2d 843, 843, 849-50 (1st Cir. 1980); see also Caplan v. Vokes, 649 F.2d 1336, 1344 n.16 (9th Cir. 1981); cf. Hu Lau-Leung v. Soscia, 649 F.2d 914, 918 n.4 (2d Cir. 1981) (accused extradited because his acts constituted a felony under the laws of the asylum state); Freedman v. United States, 437 F. Supp. 1252, 1261-63 (N.D. Ga. 1977) (accused extraditable because his acts constituted a felony under Georgia law and federal securities law); Shapiro v. Ferrandina, 355 F. Supp. 563, 572-73 (S.D.N.Y. 1973) (accused extradited because his acts constituted a felony under the law of the asylum state). This liberal interpretation of the double criminality condition has been adopted by other states. For example, in two recent British decisions out of the divisional court, the accused fugitives attempted to thwart extradition to the United States with the argument that, whereas entry as a trespasser was a required element of the offense of burglary under the British Theft Act of 1968, it was not required under the District of Columbia criminal code. The divisional court held that absolute identity is not required; substantial similarity is sufficient. See Note, supra note 154, at 240 (citing In re Budlong, [1980] 1 All E.R. 701, 708-12). The court stated that absolute identity would give rise to insuperable difficulties in the application of extradition practice. Id. It held that the double criminality condition under British extradition law was satisfied if it were shown: “(1) that the crime in respect of which
In an attempt to resolve problems relating to the denomination of the offense and the double criminality requirements, the 1970 Supplementary Convention provided that "[e]xtradition shall be granted for the following [listed] acts if they are punished as crimes or offenses by the laws of both States,"\textsuperscript{163} and added the following exchange of formal letters:

The purpose intended in this modification is to eliminate certain difficulties which could arise in the application of the Convention. Extradition will be based on the nature of acts and not on the particular statutory terminology.

In particular, it is understood that this modification will resolve any question concerning jurisdictional terminology of Federal offenses of the United States. Thus, extradition will also be granted for any act which serves as the basis of an offense foreseen in Article II even though, for the purposes of granting jurisdiction to the Government of the United States of America, transporting or transportation is also considered a necessary element of the offense.\textsuperscript{164}

The extradition treaty between France and the United States, in a manner similar to most of the United States' current extradition treaties, absolutely prohibits extradition absent satisfaction of this traditional general use of the double criminality condition.\textsuperscript{165}

\section*{C. Special Application of the Double Criminality Provision}

In addition to the traditional general use of the double criminality condition, a "special use" of that condition has evolved that requires not only that the conduct behind the offense charged be

\begin{footnotesize}

\textsuperscript{163} Supplementary Convention, \textit{supra} note 132, art. II, at 3.

\textsuperscript{164} \textit{Id.} at 9-10.


\end{footnotesize}
penalized in both states, but also that the theory of jurisdiction over the conduct asserted by the requesting state be accepted as proper by the requested state.

Around 1853, John Anderson, a fugitive slave from Missouri, entered Canada on the underground railway to what he hoped would be freedom. In 1860, however, proceedings began for his extradition back to Missouri for the murder of Seneca T. Diggs. Anderson, indeed, had killed Diggs in Missouri in a manner likely to result in his conviction for murder under Missouri law. His act—the intentional killing of a human being—constituted murder in Canada as well. Had the events occurred in Canada, however, as opposed to Missouri, Anderson would have had a specialized genre of self-defense in that he had killed Diggs in order to escape from slavery. The question was whether a special defense applicable only in the requested state would trigger the double criminality provision so as to allow denial of extradition for an offense otherwise punishable in each state. The Queens Bench judges, on a habeas corpus action brought in England, answered affirmatively and ruled that surrender should be forbidden unless the offense charged was not only extraditable, but also punishable in Canada.166

Although the result of the Anderson case seems eminently proper, United States law might have required a different result. Generally, the double criminality condition does not extend to the point of prohibiting extradition unless the conduct is both prohibited and punishable. Many cases may be found wherein the fugitive’s claims of alibi or other defenses in an extradition hearing are held irrelevant and do not bar extradition pursuant to the rule of double criminality.167 Indeed, even insanity will not be considered in an extradition hearing.168

A specialized notion of double criminality that generally works

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168. See, e.g., Charlton v. Kelly, 229 U.S. 447, 458, 462 (1913); Hooker v. Klein, 573 F.2d 1360, 1368 (9th Cir. 1978); Shapiro v. Ferrandina, 478 F.2d 894, 901 (2d Cir. 1973); 6 M. WHITEMAN, supra note 30, at 1003.
to deny extradition, even when the offense on which the extradition requested is based constitutes a crime in each state and is listed in the treaty as extraditable, will be labelled the "special use" of double criminality. Extradition will be denied when the theory of jurisdiction maintained by the requesting state is not accepted by the requested state.

Both the United States and France have adopted this special use of the double criminality condition, which often works contrary to the traditional notions of jurisdiction. The rule and the problem are illustrated by the well publicized Abu Daoud case. In 1974, the government of Israel formally requested the French government to arrest Abu Daoud pursuant to article 10 of the French-Israeli Extradition Convention and to an arrest warrant issued by Israeli judicial authorities on charges relating to the 1972 Munich Olympics massacre. The Paris Court of Appeal decided, in camera, that the continued provisional detention of Abu Daoud for extradition would not be proper under French law and under the terms of the extradition treaty between France and Israel in effect at the time of the alleged offense. The point of that decision was that Israel's request, based on acts against Israeli nationals in Munich, West Germany, by non-Israeli nationals, asserted the jurisdictional principle of passive personality, to which France did not adhere at the time of the events in Munich. Although France


171. Note, supra note 169, at 552.

172. The fugitive, Abu Daoud, was released before Israeli officials in France were contacted. It was reported that Israel would have sought extradition for acts of terrorism allegedly committed by Abu Daoud in Israel, thus eliminating this double criminality problem. See Who Will Hear Our Evidence Now, The Economist, Jan. 15, 1977, at 46, cited in Note, The Provisional Arrest and Subsequent Release of Abu Daoud by French Authorities, 17 Va. J. Int'l L. 495, 501 (1977). The relevant French law, not allowing extradition where French jurisdiction would not obtain, provided:

The French government may surrender to foreign governments, at their request, any individual, not a French national or a French subject, found on the territory of the French Republic or of its colonial possessions, who is the object of proceedings begun in the name of the requesting State or of a sentence handed down by its courts.
had promulgated a law that approved the assertion of jurisdiction in such cases three years subsequent to the events in Munich and one and one-half years prior to the *Abu Daoud* decision, the Paris Court of Appeal held that this law could not be applied retroactively. The decision not to extradite when the requested

Nonetheless, extradition shall be granted only if the offense that has occasioned the request was committed:

Either on the territory of the requesting State by a national of that State or by an alien;

Or outside the territory of that State by one of its nationals;

Or outside its territory by a non-national of the requesting State if the offense is among those for which French law authorizes prosecution in France even though they were committed by a foreign national on foreign territory.

French Extradition Law of Mar. 10, 1927, 1927 D.P. IV 265, art. 3(5).


174. Note, *supra* note 169. Extradition treaties, of course, do not criminalize actions; they merely recognize offenses as being extraditable. Thus extradition agreements generally are applied retroactively without violating the principle of *nulla poena sine lege* or traditional protections against ex post facto laws. The Supplementary Convention contains a specific declaration of retroactivity. Supplementary Convention, *supra* note 132, art. II. This article was agreed to without discussion during the negotiations. For background on retroactivity, see H.R. Gaither, *supra* note 133, at 8; 6 M. Whiteman, *supra* note 30, at 753; see also United States-Sweden Treaty, *supra* note 165; Treaty of Extradition, Jan. 13, 1961, United States-Brazil, 15 U.S.T. 2093, T.I.A.S. No. 5691. Several judicial decisions have supported this view. See, e.g., Markham v. Pitches, 605 F.2d 436 (9th Cir. 1979); Cleugh v. Strakosch, 109 F.2d 330, 335 (9th Cir. 1940); In re Stupp, 23 F. Cas. 296 (C.C.S.D. N.Y. 1875) (No. 18,563); In re de Giacono, 7 F. Cas. 366 (C.C.S.D. N.Y. 1874) (No. 3747); cf. Gallina v. Frazer, 177 F. Supp. 856, 864-65 (D. Conn. 1959) (treaty suspended during World War II was revived retroactively and extradition would therefore be proper), aff'd, 278 F.2d 77 (2d Cir.), cert. denied, 364 U.S. 851 (1960); In re d'Amico, 177 F. Supp. 648, 653 (S.D.N.Y. 1959) (D'Amico extradited to Italy for a crime committed during World War II when the extradition treaty was suspended); 4 J.B. Moore, *supra* note 44, at 269.

In France, cases have held similarly, at least with regard to the question of exemption from extradition on the basis of nationality. See French Extradition Law of Mar. 10, 1927, 1927 D.P. IV 265, art. 5, ¶ 1: "Extradition is not granted: 1. When the person, the object of the request, is a French citizen or a person under French protection, the status of citizen or protected person being determined as of the time of the offense for which the extradition is requested." With regard to the issue of the timing of the determination of the accused's nationality, the court of appeal in Aix-en-Provence held that under this article of the *Extradition Law of 1927*, France could surrender a fugitive from the justice of Italy who had committed certain extraditable offenses in 1945, even though he had acquired his French citizenship by naturalization in 1950. Decision of Mar. 15, 1951, 1951 J.C.P. II 6243 (Chambre d'Accusation). The Franco-Italian Extradition Treaty of 1870, then in effect, exempted the extradition of nationals, but extradition was approved on the basis of the nationality at the time of the offense, as required by the 1927 law.

The determination of nationality for prosecution in France of French nationals who have committed crimes outside French territory is just the opposite. Article 639, paragraph 3 of the French *Code de Procédure Pénal*, provides that for the jurisdiction of French courts to apply over offenses committed abroad by French nationals, the nationality of the accused
state’s law on jurisdiction does not accept the asserted jurisdictional theory of the requesting state appears to be standard in France, the United States and international extradition practice.

1. United States Application of the “Special Use” of Double Criminality—The Department of State and courts in the United States have been just as strict as those in France in rigorously applying the special use of the double criminality condition. In 1940, Mexican authorities asked the United States Consul whether extradition of an American citizen could be obtained for crimes committed against a Mexican national outside Mexican territory. The United States Department of State replied that although

is determined as of the day of the prosecution, not the day of the offense. French practice with regard to the timing of the determination of nationality for purposes of extradition exemption is different from general international extradition practice. The determination of nationality for purposes of the exemption from extradition usually occurs as of the time of the extradition hearing. C. P. Pén. art. 639, ¶ 3 (Daloz 1978-79).

The Court of Appeal in Nancy expressed the French position on retroactivity. The government of Belgium had charged one Spiessens with collaboration with the enemy, but Spiessens had escaped to France. Belgium sought his extradition from France, but Spiessens argued that extradition would not be proper because the offense charged was not extraditable at the time of its commission. The crime had been added to the France-Belgium Extradition Treaty in 1946 to 1947, subsequent to Spiessen’s offense, and he contended that this addition could not be retroactive. The court rejected his argument, stating:

The offender was not a party to the treaty, and cannot rely on or interpret its silence.

The treaty is not concluded in his interest, but in that of the Contracting Parties and their sovereignty. Likewise, Spiessens cannot invoke the principle of the non-retroactivity of laws. He has no acquired right not to be surrendered for acts which were not provided for, at the time of the consummation of the offense, by the Franco-Belgian Convention, to which he is not a party, as long as both French and Belgian law make the offences criminal and punishable at the time when they were committed.


175. Cf. Fornge Case, 84 J. du Palais 229 (1873), reported in 2 J.B. Moore, supra note 44, at 261: “But the law cannot give to the French tribunals the power to judge foreigners for crimes or misdemeanors committed outside of the territory of France; that exorbitant jurisdiction, which would be founded neither on the personal statute nor the territorial statute, would constitute a violation of international law . . . .” 84 J. du Palais, at 230, 2 J.B. Moore, supra note 44, at 261-62; see also discussion of the French position in the “S.S. Lotus” case, discussed supra note 29 and accompanying text.

176. 84 J. du Palais at 229, 2 J.B. Moore, supra note 44, at 259-68 & nn. 370-81 and accompanying text. But see supra note 174 and infra notes 181-85 and accompanying text (discussing retroactive application and the “special use” of the double criminality condition).

177. See Richard Fiedler case, MS Dep’t of State, file no. 312/1121 (1940) (instruction from counselor of United States Department of State to United States Consul General in Mexico) (the alleged crime was committed in the United States), cited in 6 M. Whiteman, supra note 30, at 104.
Mexico had adopted the passive personality principle, the United States would not recognize that assertion of jurisdiction. With regard to extraterritorial jurisdiction on the basis of the passive personality principle, Secretary of State Bayard said:

To say, however, that the penal laws of a country can bind foreigners and regulate their conduct, either in their own or any other foreign country, is to assert a jurisdiction over such countries and to impair their independence . . . . [C]itizens of the United States cannot be held answerable to foreign countries for offenses which 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 his offense, simply because its object happens to be a citizen of that country, . . . can never be admitted by this Government.

That position was reiterated on November 11, 1975, when the United States Department of State informed the Federal Republic of Germany by diplomatic note that the United States would be unable to extradite several non-German nationals to Germany for the alleged murder of four German officers on board the vessel Mimi (a non-German vessel) on the high seas. The note explained that although it appeared that the Federal Republic of Germany would have jurisdiction under German law, the extradition request must be denied pursuant to the rule of double criminality because, although murder certainly was a crime in both the United States and Germany, United States law on jurisdiction did not recognize jurisdiction over a crime committed against a requesting state’s nationals outside the requesting state’s territory. Here follows a portion of the note:

The Department of State has carefully studied the facts of the case as developed by investigation, and the extradition treaty in force between the United States and the Federal Republic of Germany, and has determined that extradition is not possible in this case because of lack of dual criminality as required by Article I of the treaty. Although it appears that the Federal Republic of Germany would have jurisdiction by its internal law to prosecute fugitives for offenses committed against German citizens outside the territory of the Federal Republic of Germany, the United States under its law may prosecute for offenses committed outside its territory.

178. 6 M. WHITEMAN, supra note 30, at 104; see also Cutting Case, 1887 For. Rel. 751 (1888), reprinted in 2 J.B. MOORE, supra note 44, at 228-42.

179. Statement of Mr. Bayard, Secretary of State, to Mr. Connery, Chargé to Mexico, Nov. 1, 1887, quoted in 2 J.B. MOORE, supra note 44, at 236-38.
only if the offenses occurred within the special maritime and territorial jurisdiction of the United States as defined in section 7 of Title 18 of the United States Code. The United States has no jurisdiction to prosecute fugitives based upon United States citizenship of the victim of the offense.\textsuperscript{180}

Thus the traditional position of the United States on this special use is clear. If the theory of jurisdiction asserted by the state requesting extradition is not acceptable to the requesting state, extradition will be denied. In a recent decision regarding the extradition of an alleged arsonist to Sweden,\textsuperscript{181} however, the Seventh Circuit considered the problem of the “special use” of double criminality, and suggested a “refined” application of the condition. The fugitive had been charged with counts of arson and insurance fraud for fires that burned his merchandise and buildings in Sweden and in Denmark. The fugitive was insured by a Swedish insurance company. The Seventh Circuit held that even though “the United States generally does not prosecute citizens for crimes committed outside our borders,” extradition would still be proper. The basis on which Swedish authorities asserted jurisdiction was the passive personality principle (fraud against a Swedish company).

The court explained that the application of the double criminality provision of a treaty depends on the language of that treaty. Where the language of the treaty clearly provides that the executive has discretion to extradite for extraterritorial offenses, even if there would be no proper basis for the assertion of jurisdiction in United States law, the executive may do so.\textsuperscript{182} Indeed, the court went further than necessary for its holding to provide that, “if the extradition treaty so provides, the United States may surrender a fugitive to be prosecuted for acts which are not crimes within the United States.”\textsuperscript{183} Thus the court allowed for discretion to avoid the general and special uses of the double criminality condition.


\textsuperscript{181} Matter of Assarsson, 635 F.2d 1237 (7th Cir. 1979).

\textsuperscript{182} \textit{Id.} at 1245.

\textsuperscript{183} \textit{Id.} (quoting Gallina v. Frazer, 177 F. Supp. 856, 864-65 (D. Conn. 1959)) (emphasis added). The relevant treaty provisions read:

Each Contracting State undertakes to surrender to the other . . . those persons . . . who have been charged with or convicted of . . . offenses . . . committed . . . outside [the territorial jurisdiction of the other] under the conditions specified in Article IV. United States-Sweden Treaty, \textit{supra} note 165, art. 1.
The treaty language, therefore, controls. The plain language of this treaty indicates that the executive has discretion to extradite for extraterritorial offenses, even when United States law does not accept the theory of jurisdiction asserted by the requested state. The treaty language provides that extradition "need not be honored . . . unless . . . ". This suggests and allows discretion to extradite. If the treaty language were "shall not [extradite] . . . unless . . . ", states the court, "we might agree that discretion to extradite was lacking." Perhaps the approach of the Swedish treaty and the Assarson case ought to become the trend of the future. This would allow the rule of reasonableness to apply in the extradition and jurisdiction over extraterritorial crime setting.

As the rule is now interpreted by the courts in the United States, unless the extradition treaty in question specifically provides for discretion to extradite in the face of the double criminality condition, both its general and special use will absolutely prevent it. This requirement does more than limit the exercise of adjudicatory jurisdiction based on a principle of reasonableness in accordance with accepted principles of jurisdiction. As it now stands, the double criminality condition acts as an absolute bar to extradition; it does not function, as one might suggest that it should, like the public policy exception in conflicts of law cases, giving the requested state discretion to accept or reject extradition. Under treaties that do not allow discretion, if the offense is not penalized in each state, or if the condition or theory of jurisdiction over the conduct asserted by the requesting state is not one accepted by the requested state, extradition must be denied by the courts, even though the requesting state appears to be the state with the predominant interest in the prosecution of the accused.

184. Article IV, section 2 of the treaty defines the condition:
When the offense has been committed outside the territorial jurisdiction of the requesting State, the request for extradition need not be honored unless the laws of the requesting State and those of the requested State authorize prosecution of such offense under corresponding circumstances.


185. Assarson, 635 F.2d at 1245.

186. It is clearly not the trend now. See, e.g., treaties listed supra note 165.

187. Thus, in the famous case of Eisler v. United States, 170 F.2d 273 (D.C. Cir. 1948), discussed in Jacob, International Extradition: Implications of the Eisler Case, 59 Yale L.J. 622 (1950), Great Britain refused extradition to the United States because perjury ob-
In light of the absolutely required (though liberally interpreted) application of the double criminality condition, several hypotheticals will be posed. Those hypotheticals will show that the double criminality condition proper (not the special use) when offense definitions are liberally interpreted often will not contradict jurisdictional theory and extradition will usually succeed when it ought to do so. The special use of double criminality, on the other hand, often does contradict general principles of jurisdiction and will cause denial of extradition when perhaps it ought to succeed.

The articles of the United States-French extradition treaty, 188 which apply to resolve the hypotheticals, provide that extradition shall be granted for the following acts if they are punished as crimes or offenses by the laws of both states:

Offenses against the laws relating to the traffic in, possession, or production or manufacture of, opium, heroin, and other narcotic drugs, cannabis, hallucinogenic drugs, cocaine and its derivatives, and other dangerous drugs and chemicals or substances injurious to health. 189

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188. See supra note 135; see also Blakesley, Extradition, supra note 63 (containing detailed analysis of the extradition process generally and the French-United States practice specifically).

189. Supplementary Convention, supra note 132, art. II. This clause combines two separate American offenses. Under United States law, narcotics offenses are separate from offenses relating to poisonous chemicals and substances injurious to health. They were combined in the treaty because the French delegation felt that it would help avoid confusion in the French courts because the French Code de Procédure Pénal combines them. C. Pr. Pén. arts. R. 5149-5167 (Petits Codes Dalloz 1980-81).

It is interesting to note that the United States government had previously attempted to have the Extradition Treaty of 1909 interpreted to include narcotics violations under the “poisonous substances” clause, because the treaty did not cover narcotics violations specifically. An alleged offender of United States narcotics laws had been incarcerated in a French jail, pursuant to an extradition request from the United States, although narcotics violations were not listed as extraditable in the treaty. In order to decide whether to extradite the fugitive, the French government requested an opinion from the United States government as to whether the United States would reciprocate and extradite a fugitive from France in the obverse circumstances by interpreting the poisonous substances clause to include narcotics offenses. The United States Embassy in Paris replied by diplomatic note that the Department of State would consider narcotics violations extraditable under the terms of the Supplementary Convention of 1929, which had added “infractions of laws concerning poisonous substances” to the list of extraditable offenses in the 1909 Convention. Diplomatic Note from American Embassy, Paris, to the French Ministry of Foreign Affairs, Jan. 21, 1966, No. 139, quoted in Airgram from American Embassy, Paris, to Department of State, Jan. 27, 1966. MS Dep't of State, file no. PS 10-4 (1966), and recorded in 6 M. Whiteman, supra note 30, at 789-90.

The Department of State's opinion, although weighty, cannot bind the judiciary in the United States. Thus, had the issue come to a decision and had France approved extradition, there might have been consternation if a United States court had subsequently failed to
Obtaining money, valuable securities or other property by false pretenses.\footnote{190}

Use of the mails or other means of communication in connection with schemes devised or intended to deceive or defraud the public or for the purpose of obtaining money or property by false pretenses.\footnote{191}

In addition, the extradition treaty provides that, “[e]xtradition shall also be granted for participation or complicity or attempt to commit any of the crimes or offenses above-mentioned when such participation, complicity, or attempt is punishable by the laws of the two countries.”\footnote{192}

Suppose that a conspiracy to import narcotics into the United States is thwarted when United States agents arrest the participants (foreign nationals aboard a foreign vessel) on the high seas. Suppose also that one of the co-conspirators was not on board, but was in Guadaloupe for supplies. The first question is whether the United States assertion of jurisdiction is proper. Assuming the assertion to be proper, the second question is whether extradition would be successful under the United States-French extradition treaty pursuant to the general use and the special use of double criminality.

We have seen above that the assertion of jurisdiction over the accused individuals would not be proper under traditional theories of jurisdiction over extraterritorial crime. The thwarted conspiracy to import narcotics into the United States has had no effect on United States territory, so the objective territoriality theory does not properly apply. The conspiracy does not clearly pose a threat

\footnote{190}{Supplementary Convention, supra note 132, art. II, § 8.}
\footnote{191}{Id. art. II, § 18.}
\footnote{192}{Extradition Treaty, supra note 132, art. II. Law of Dec. 31, 1970, no. 70-1320 (codified at Code de la Santé Publique art. L. 627 (Daloz 1975)), provides for prescriptive adjudicatory and enforcement jurisdiction over attempts to violate and combinations (ententes or associations) with a view to violate French narcotics laws. These “inchoate” offenses will be punished like the completed offense. Id. C. Pén. art. 2 (Daloz 1978-79); see supra notes 120-31 and accompanying text.}
to sovereignty, national security or some governmental function and it does not fall within the universality principle. The Restatement approach is likewise inconsistent with traditional theory and creates conceptual problems. The hybrid approach suggested above, however, would allow jurisdiction to be asserted consistent with traditional jurisdictional principles.

2. French Application of the Double Criminality Condition—

(a) General use—It is necessary to determine whether the conduct that constitutes a conspiracy to import narcotics into the United States would also constitute a crime in France, were the circumstances reversed. The offense as provided by the United States Code requires only an agreement among two or more persons to import prohibited substances.\(^{193}\) Obviously, if there is no equivalent offense under French law, extradition will be denied. France has never developed the classic Anglo-American crime of conspiracy,\(^{194}\) although the French Penal Code does punish various combinations of aiding, abettors and participants in all crimes.\(^{195}\)

Recent French legislation provides that an attempt to commit, an association designed to commit and an entente established to commit violations of narcotics laws, including the unlawful importation and exportation of prohibited substances, “will be punished in the same manner as the offense itself.”\(^{196}\) This is specialized legislation designed specifically for narcotics offenses.

The subjective territoriality theory (whereby jurisdiction is asserted when one or more material elements of an offense occurs in the territory, but the result occurs or is to occur elsewhere), provides the basis for jurisdiction in the Loiseleur case.\(^{197}\) The French Cour de Cassation in the Loiseleur case allowed jurisdiction on the basis of the accused’s participation in an association or entente to

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\(^{194}\) See R.S. Wright, supra note 121, § 16, at 60. French law does provide for a classic conspiracy offense in a very limited setting. It relates essentially to conspiracies to violate or threaten the security of the state. See C. Pr. Pén. art. 694 (Daloz 1978-79). French notions of entente or association with a view to violate narcotics laws would allow successful extradition in many cases if the conduct which comprised the given conspiracy also constituted a crime in France. See supra notes 120-31 and accompanying text.

\(^{195}\) R. Merle & A. Vitu 2d ed., supra note 7, at 370.

\(^{196}\) CODE DE LA SANTÉ PUBLIQUE arts. L. 626-627 (Daloz 1975); see Gassin, L’Évolution de la Législation et de l’action International en Matière de Stupéfiants, in 1971 REV. SCI. CRIM. ET DR. PÉNAL COMPARÉ 204.

\(^{197}\) Loiseleur case, 1971 BULL. CRIM. 285 (Cass. Crim.).
violate French law in relation to the sale and exportation of narcotic drugs. The entente was established to export from France to Canada some ten kilograms of heroin. The preparatory discussions between the leader of the entente, along with payment of money by the leader of the entente to the accused, occurred in France and were deemed by the French court to be the constituent elements of the offense of entente to export narcotics. The defendant, an employee of an air transport company, was charged with planning to ship the heroin from Paris by plane to Montreal. He had met the leader of the entente several times in Paris and had received from this leader a sum of 139,000 French francs, later found in the defendant’s domicile in Sucy-en-Brie. 198

(b) Special use—The language of the Code de la Santé Publique clearly provides that an extraterritorial entente similar to that recognized in Loiseleur, designed to import narcotics into France, would be punishable. Jurisdiction, however, could not be on the basis of the subjective territoriality theory, unless an element of the offense had occurred in France. French legislation recognizes the need to assert jurisdiction over such offenses. 199 The same provision of the Code de la Santé Publique that recognizes the offense of association or entente for purposes of importing narcotics into France provides that the penalty obtains even though the diverse acts constituting the listed offenses “occur in different countries.” 200 This means that all the elements need not occur in one place. This result, however, clearly would not obtain for offenses generally. 201 It is not clear whether one element or “diverse” act must also occur in France. It is not certain that jurisdiction would obtain if all of the “diverse acts” of the entente of foreign nationals had occurred abroad when the entente’s goal of importation into France was thwarted, but it appears that the language of the statute might abide such an interpretation. 202 The author has not found any cases in which jurisdiction was asserted over an entente that occurred entirely outside French territory but that had

198. Code de la Santé Publique art. L. 627, ¶ 2 (Daloz 1975) and the Convention of Dec. 31, 1961, on Drug Trafficking, art. 32-2-a-ii, place attempts to import and associations or ententes with a view to export narcotic drugs on the same footing as the completed offense.

199. See supra notes 121-31 and accompanying text.


202. Code de la Santé Publique art. L. 627, ¶ 3; see also Cassin, supra note 196, at 199, 205.
a goal to import narcotics into France. French jurists have been skeptical about the assertion of jurisdiction pursuant to the sole application of any one of the traditional bases under such circumstances. 203 It is clear that French doctrine would not abide the application of the objective territoriality theory for such an assertion. 204

It has been stated, for example, that an attempt cannot provide the basis for the objective territoriality theory. 205 Since an attempt is much closer to fruition than a conspiracy or an entente, a fortiori logic would suggest that the objective territoriality theory is not appropriate for that offense either. If the French Code de la Santé Publique can be read to allow jurisdiction over such an entente but the universal and objective territoriality theories of jurisdiction are considered inappropriate for its assertion, perhaps it can be argued that French assertion can be explained on the basis of exceptional application of the hybrid approach developed in this article. The assertion on that basis certainly serves the policies of societal protection and the fight against drug trafficking dangerous to the interests of the asserting state, without violating the integrity of the bases of jurisdiction.

Thus in a case of a thwarted extraterritorial conspiracy to import narcotics into the United States, France would not approve an extradition request based on an objective territoriality theory of jurisdiction, but might approve a request on the jurisdictional conditions described herein. The rule of reasonableness including the hybrid approach would provide a theoretical basis that will allow the prophylactic protection and still allow a coherent conceptual framework. Thus as long as the assertion of jurisdiction by the United States would not impinge on French sovereignty or on the French desire to prosecute the offense, the jurisdictional conditions would be sufficient under the hybrid approach and France would not dispute the extradition request. The special use of the double criminality condition, therefore, would not work to deny extradition based on such an approach.

Suppose that several British nationals entered into a conspiracy in Guadaloupe to violate United States securities laws by using the wires and mails to defraud United States citizens in the United States. If the conspiracy is thwarted before any overt acts occur

203. Author's discussion with French scholars, cited supra note 120.
204. See supra note 129 and accompanying text.
205. See supra notes 27-28 and accompanying text.
within United States territory, the question is whether the United States would be successful in obtaining the extradition of the fugitives from France.

The extradition treaty between France and the United States provides that it is an extraditable offense to obtain money, valuable securities or other property by false pretenses and to use the mails or other means of communication for schemes devised or intended to deceive or defraud the public or for the purpose of committing those offenses.206 Further, the treaty provides that extradition will be granted for participation or complicity in or attempt to commit such offenses, when such complicity, participation or attempt is punishable in both countries.207

Thus extradition appears to be possible under the treaty as long as the double criminality condition is met. The double criminality requirement, however, has often prevented successful extradition by the United States of fugitives who have violated United States laws prohibiting certain economic activity.208 The Factor case209 exemplifies the difficulty in matching economic type offenses so as to allow extradition. The Factor case deemphasizes the denomination of the offense and emphasizes the notion that the offense for which extradition is sought be “generally recognized as criminal” in the law of each of the contracting parties.210 The number of instances of successful extraditions for economic offenses is increasing, as the language in extradition treaties reflects more adroitly the notion that the conduct, not the denomination of the offense, needs to be criminalized in the law of each state.211

207. Id. art. III (see final paragraph).
208. The major problem in extradition, exemplified by Factor v. Laubenheimer, 290 U.S. 276 (1933), has related to fraud, especially securities fraud. Most treaties in the recent past have attempted to solve the problem by including clauses allowing extradition for mail and wire fraud. E.g., Supplementary Convention, supra note 132, art. II(18) (providing that extradition shall be granted for “use of the mails or other means of communication in connection with schemes devised or intended to deceive or defraud the public or for the purpose of obtaining money or property by false pretenses”). In addition, the actual conduct still must be an offense in each country, however, and securities offenses often do not match.
209. Factor v. Laubenheimer, 290 U.S. 276 (1933), discussed supra notes 147-65 and accompanying text.
211. E.g., cases cited supra note 152; Factor v. Laubenheimer, 290 U.S. 276 (1933); Cucuzzella v. Kelikoa, 638 F.2d 105 (9th Cir. 1981); Shapiro v. Secretary of State, 499 F.2d 527 (D.C. Cir. 1974), aff’d sub nom. Commissioner of Internal Revenue v. Shapiro, 424 U.S.
There is no doubt that France penalizes conduct that constitutes most securities fraud.\(^{212}\) It is doubtful, however, that French law criminalizes conspiracy to violate securities law. As previously discussed, France does not make conspiracy to commit any particular offense criminal except in certain specifically iterated crimes; it was therefore necessary to promulgate a special law to penalize association and entente to violate French narcotics laws because of the serious danger to society's health and welfare represented by those crimes.\(^{213}\) France has not promulgated a similar law for securities fraud conspiracies. It is doubtful that France would approve extradition in such a case unless the conspiracy had developed far enough to constitute an attempt.

Even if France had promulgated a law prohibiting entente to violate French securities laws, it is likely that the special use of double criminality would prevent approval of the extradition request. Indeed, even United States courts are much more reticent to assert jurisdiction over extraterritorial securities fraud conspiracies than they are for extraterritorial narcotics conspiracies. For example, the Second Circuit found that in transactions with substantial extraterritorial aspects, it is necessary to find that losses in the United States due to fraud in securities transactions were caused by acts or culpable failures to act that occur within the United States.\(^{214}\) This is a combination of the subjective and objective territoriality theories and the court required that actual elements and effects occur within the territory. In another decision, the Second Circuit held that for jurisdiction to obtain, it was necessary that harmful effects occur within the United States securities markets.\(^{215}\) This, of course, is the traditional objective territoriality theory. In 1981, the District Court for the Central District of California relied on the above-mentioned Second Circuit decisions to hold that no jurisdiction could be asserted in the United States when the fraudulent securities transaction related to foreign securities, was among foreign parties and had no actual effect on Ameri-


\(^{212}\) See C. Pén. arts. 402-433 (Dalloz 1980-81) (which fall under the section entitled Banqueroutes, escroqueries et autres espèces de fraude).

\(^{213}\) See supra notes 193-98 and accompanying text.


can investors or securities markets.\textsuperscript{216}

There have been no decisions in United States courts relating to extradition for extraterritorial conspiracy to violate the securities laws with the intent to affect such United States markets, but the Restatement Tentative Draft number \textsuperscript{217} could be construed to approve the assertion of jurisdiction in such a case on the expanded notion of objective territoriality wherein intended effects are sufficient,\textsuperscript{218} as long as the assertion was not exorbitant. Intent to cause an effect might be sufficient under section 402, but section 416 of the Restatement Tentative Draft number 2 reflects the concerns of the cases cited above. Section 416(2) refers to the rule of reasonableness in section 403(2), discussed throughout this article. Moreover, the reporters' notes discuss the relevant links that would justify jurisdiction in the extraterritorial setting. Those notes refer again to the rule of reasonableness of section 403(2).\textsuperscript{219} All of the reporters' notes that describe assertion of jurisdiction over extraterritorial offenses, however, refer to situations in which an element of actual territoriality is found to establish the reasonableness of asserting jurisdiction. Each example provides for either an element of the offense (negotiations, representations, use of a United States market) or an effect (damage to market, injury in the United States to a United States national or resident). Indeed, the reporters state that injury to or protection of a United States national living abroad may not warrant exercise of jurisdiction without some additional factor.

The above-mentioned cases and the Restatement Tentative Draft leave some doubt as to whether United States courts would approve such jurisdiction. Application of the hybrid approach may or may not support the assertion of jurisdiction in a case such as the securities fraud hypothetical, depending on whether it is seen as an offense that nearly fits the prerequisites of the several traditional theories of jurisdiction.\textsuperscript{220} It is doubtful that it would. Securities cases likely would not have elements related to the require-

\begin{itemize}
\item \textsuperscript{217} \textit{Restatement Tentative Draft, supra} note 7, §§ 401, 416. Although section 401 appears to allow jurisdiction on the basis of intent to cause an effect, section 416(b) is not so clear.
\item \textsuperscript{218} See \textit{supra} notes 111-17 and accompanying text; Blakesley, \textit{Jurisdiction, supra} note 1, at 1132.
\item \textsuperscript{219} \textit{Restatement Tentative Draft, supra} note 7, at 144-47 (reporter's notes).
\item \textsuperscript{220} See \textit{supra} notes 109-18 and accompanying text; Blakesley, \textit{Jurisdiction, supra} note 1, at 1154-63.
\end{itemize}
ments of the protective or universal bases of jurisdiction, so the hybrid approach would not trigger jurisdiction. It appears that even United States courts and the drafters of the Restatement Tentative Draft number 2, which would allow jurisdiction according to the intended effects theory, would consider the assertion of jurisdiction exorbitant if another state had an interest in prosecuting.

It is clear, however, that French doctrine and jurisprudence have rejected the application of the objective territoruality principle as the basis of asserting jurisdiction in any attempt, let alone conspiracy to commit a violation of its laws outside French territory: "We cannot go so far as to assimilate the result which would have occurred here to one that has actually occurred here."221 Unless French law made an exception such as that for narcotics conspiracies, jurisdiction would not be appropriate in French law and extradition would not be available. Certainly any United States claim that the basis of jurisdiction over the thwarted extraterritorial conspiracy was the objective territoruality theory under the Restatement Tentative Draft would trigger the "special use" of the double criminality condition and cause a rejection of the extradition request.

It does not appear that the securities fraud conspiracies meet the requirements of the hybrid approach, and thus jurisdiction would not be appropriate in United States courts at any rate. Under the Restatement Tentative Draft approach, unmodified by the hybrid approach, the United States would assert jurisdiction but France would deny extradition.

In cases in which the circumstances do meet the requisites of the hybrid approach but in which the special use of double criminality would cause denial of extradition, individuals may go unpunished even though they have committed an offense that is an offense in each state, unless the countries either adopt the hybrid approach or come to an agreement on some other appropriate approach or abrogate the special use of the double criminality principle.

Suppose that several French nationals acting in Britain violate British securities laws to the detriment of several other French nationals in a manner that would also violate United States and French law. The French accused fugitives flee to the United States and France requests their extradition on the basis of the nationality and passive personality principles. Would France succeed?

It is clear from the discussion above that the special use of the double criminality condition would apply to deny extradition in this case. Under the United States-French extradition treaty, no discretion is allowed United States courts to approve an extradition request when it would be just and proper to do so.\textsuperscript{222} If the British were not seeking extradition for violation of their laws, it would appear that the appropriate response for the United States to make would be to extradite to France. In this case, special use of the double criminality condition, however, would not allow extradition, because the United States does not allow such an expansive application of the nationality principle. This clearly works counter to the general principles of jurisdiction and international cooperation. The solution would be to draft or amend extradition treaties in a manner similar to that between Sweden and the United States to allow judicial discretion to extradite in the face of the special use of the double criminality condition.\textsuperscript{223}

V. Conclusion

If our courts are to avoid confusion and our government is to avoid diplomatic difficulties in matters of extradition and international judicial cooperation, a coherent and consistent approach to jurisdiction over extraterritorial crime needs to be developed, and the special use of the double criminality condition needs to be reconsidered. The purpose of this article is to foster a proper understanding of the bases of extraterritorial jurisdiction, to promote a coherent application of those bases and to suggest a refurbishing of extradition treaties to allow discretion to extradite despite the special use of double criminality.

The hybrid approach articulated herein is designed to provoke debate on the conceptual problem created by recent case law and the Restatement Draft approach to extraterritorial jurisdiction and to propose a possible solution. The suggested approach uses a combination of the protective and universality principles, limited by

\textsuperscript{222} See supra notes 162-64 and accompanying text; see also treaties, supra note 165.

\textsuperscript{223} See, e.g., Extradition Treaty, supra note 132. The same is true for most other recent extradition treaties, including the extradition treaty between the United States and Japan, supra note 165, art. VI, which incorporates the "special use" of dual criminality: When the offense for which extradition is requested has been committed outside the territory of the requesting Party, the requested Party shall grant extradition if the laws of that Party provide for the punishment of such an offense committed outside its territory, or if the offense has been committed by a national of the requesting Party.

\textit{Id.} (emphasis added).
the rule of reasonableness, to allow jurisdiction over thwarted extraterritorial narcotics conspiracies. Thus jurisdiction may be asserted over conspiracies or other inchoate crimes although no effect actually occurred within the target state’s territory, as long as the crime related to a universally recognized, significant state interest and had progressed far enough towards fruition to establish both the intended goals of the conspiracy and the fact that the impact or effect of the crime would have been certain to have occurred had intervention not prevented it.

The desired result might be achieved in at least three ways: By applying the hybrid approach as an additional avenue through which to assert jurisdiction; by making an exception to the objective territoriality theory to allow jurisdiction to be asserted over thwarted extraterritorial narcotics conspiracies within certain limitations; or by candidly abrogating the traditional bases or theories of jurisdiction and replacing them with the rule of reasonableness as the sole basis of jurisdiction over extraterritorial crime. The latter two approaches incorporate the traditional bases of jurisdiction and their hybrid combination as manifestations or aspects of reasonableness. The dangers of uncertainty, unpredictability and incoherency that are concomitants of such a revolutionary abrogation of traditional theory are significant and must be considered. Nevertheless, a frank adoption of any one of these approaches would be a significant improvement over the current approach, which leaves the law in a state of confusion, risking diplomatic dispute and denial of extradition.

Adoption of the hybrid approach or a recognition of its viability, along with the abrogation of the special use of the double criminality condition, would benefit extradition practice and diplomatic relations. It is hoped that this article will focus attention on the problem of extraterritorial jurisdiction and will foster a solution that will be conceptually sound while allowing sufficient flexibility to meet the needs of society in combatting modern crime.