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International Law Principles Governing the Extraterritorial Application of Criminal Law

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letter rogatory "is confined to civil suits and does not extend to criminal proceedings; criminal law being strictly local and a subject to which the comity of states does not extend."

Since 1977 the United States has become party to seven bilateral Mutual Legal Assistance Treaties, has signed and obtained Senate advice and consent on five others, has signed but not yet ratified three others, and is presently negotiating such treaties with several other countries.

This has been intended as a brief, historical introduction to set a foundation for more in-depth commentary by our panelists.

REMARKS BY CHRISTOPHER L. BLAKESLEY*

I just recently finished an article that I cowrote with a friend of mine who is a law professor in Germany. It was a comparative exercise relating to international principles of jurisdiction over extraterritorial crime. I found that our ideas are not all that different although we often approach things from a different angle and sometimes have difficulty understanding each other.

The Germans have a principle called the "ubiquity principle," another called the "vicarious administration of justice," and another one known as "meaningful connections." The German criminal code provides that there are certain types of conduct which will give German courts jurisdiction, and also the opportunity to seek extradition, if there are certain significant connections between the conduct and the state of Germany. Examples of domestic interests that are covered include planning a war of aggression; treason; endangering external security; abduction and casting political suspicion on one domiciled or customarily resident within Germany. The section of the German Code entitled "international interests that trigger German jurisdiction" includes crimes involving atomic energy, explosives and radiation; attacks on air traffic; unauthorized dealings in narcotics; dissemination of pornography; encouraging prostitution; counterfeiting and economic subsidy fraud.

The German principle of ubiquity provides that a crime is deemed to have occurred in the place where the perpetrator acted or in the place where the harm occurs or where one of the just-noted interests is implicated. Where there is no territorial basis, Germany relies on the principle of *sinnvoller Anknüpfungspunkt*, meaningful touch points or special connecting factors. It seems to me that this is a combination and adaptation of several bases of jurisdiction including the universality principle, passive personality, territoriality and the protective principle in much broader terms than the United States has used. You must also recognize that the German Constitution provides that any international law is by definition part of German law. So any treaty that they have entered into or any customary international law is seen as part of German law.

Our Chairman just mentioned that there are difficulties in determining what specific conduct will fit into which type of basis of jurisdiction to allow a court to have jurisdiction over extraterritorial conduct. I will address the basic American conceptualizations through a hypothetical situation. Suppose that a French woman was married to an American national and that the couple lived in Germany. Assume that the American husband was going to travel to the United States aboard a Norwegian ship. In Germany, before the husband left, the French wife, with the intent to kill, gave her husband some poisoned cookies. The husband took the cookies on the trip with him and ingested them on the high seas, where he became

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mortally ill, but did not die, until he was taken to a hospital in the United States, where he expired from the poisoning.

Which state or states would have jurisdiction to prosecute the wife? Well, probably all of the states. Germany would have jurisdiction under its principle of ubiquity, as well as under the U.S. subjective territoriality theory, because a material element of the crime occurred in that state. Because a state's territorial jurisdiction includes ships registered to it, Norway would have jurisdiction since a material element of the offense of murder includes the injuring which results in the death later on, on the basis of the subjective territoriality theory as well as the objective territoriality (the effects) principle. The United States would have jurisdiction solely on the basis of the objective territoriality principle.

One of the problems being faced internationally right now is the question of hierarchy. When you have a situation such as this where you have concurrent jurisdiction among three states, which one ought to be given priority in exercising its jurisdiction? Certainly the United States would feel its interest is strong enough for it to prosecute the wife for murder and to seek her extradition from Germany. Germany might say it does not want to surrender her to the United States because it wants to prosecute her itself. France could assert jurisdiction on the basis of her being a French national who committed a crime extraterritorily. (In addition to France, most states in Europe and Latin America recognize the nationality principle as an appropriate basis of exercising jurisdiction.) I don't know if there is an answer to the problem of hierarchy. Probably, Germany would deny requests for her extradition and undertake its own prosecution. After she had served her sentence, perhaps, she could be extradited to the United States, France or Norway, depending on whether the relevant extradition treaties had *non bis in idem* (double jeopardy) clauses.

Now let me modify this hypothetical to bring in the protective principle. Let's suppose the victim was like Leo Ryan in the Layton case. You may recall that when Congressman Ryan of San Francisco went down to investigate the Jim Jones commune in Guyana, he and an American consular officer were shot by Larry Layton, a U.S. citizen who was a member of the commune. The Northern District Court of California prosecuted and convicted Layton for the murder of Representative Ryan and the attempted murder of the diplomat. Which theory of jurisdiction was applied in this case? The court talked about objective territoriality, although I think it strange to view this case as an effects case. I guess you could say that some of Representative Ryan's functioning ability was diminished in Northern California since he was dead. More importantly, it seems to me, was the court's discussion of the protective principle. If our governmental officials functioning abroad are killed, it certainly impacts on our sovereignty and important national interests. We also could have asserted a nationality principle, given that Layton was a U.S. citizen, but the United States has generally resisted asserting jurisdiction on this basis. However, several new pieces of legislation, such as the Omnibus Anti-Terrorism Act and the Money Laundering Act, incorporate the nationality principle.

In addition to the protective principle, since Representative Ryan and the consular officer were officials functioning abroad, the murder and attempted murder might have been covered by the universality principle, through the adoption by most countries of the international convention making it an offense to kill certain officials and diplomats. In addition, the argument could be made that the act was terrorism, and therefore covered by the Omnibus Anti-Terrorism Act (which combined the protective and passive personality principles, and arguably the uni-

versality principle, in relation to terrorism), since it was the killing of an individual for the purpose of influencing the United States or some other government.

One final aspect of the Layton case that needs to be dealt with is the passive personality theory. Leo Ryan was an American national and the passive personality theory provides that when a national of a state is injured by the criminal behavior of another person, the state of the victim's nationality has jurisdiction to prosecute if it ever obtains custody of the perpetrator. This theory of jurisdiction has been frowned upon by the United States; indeed it has been anathema, and there is some strong language in several old cases saying that we will not recognize jurisdiction on the basis of the victim's nationality. Nonetheless, in the Omnibus Anti-Terrorism Act of 1986, promulgated to protect common citizens who do not qualify as internationally protected persons who are murdered or injured due to terrorism, we see application of a sort of passive personality theory joined up with the universality principle and the protective principle.

In sum, it seems to me that the Europeans have a broader definition of universality, a broader definition of the protective principle, a broader definition maybe even of objective and subjective territoriality, and they use the passive personality principle, where in general the United States does not. Nevertheless in the recent past, the United States has begun to catch up with the Europeans. Whether it is catching up in a coherent or systematic fashion is another question. We are converging conceptually with the Europeans and coming to a point where we are beginning to understand each other's language. That was the conclusion that I came to in writing my article with my German colleague.

REMARKS BY ANDREAS F. LOWENFELD*

To me the question of application of U.S. criminal law abroad involves two sides of the same coin. On one side of the coin, we must ask the question: Does the United States have jurisdiction? That, I submit, is in the first instance a constitutional question, informed of course, and to some extent limited by, international law. Only if that threshold question is answered in the affirmative do we reach the second part of the question, whether a given exercise of jurisdiction comes within a statutory grant. It is a major mistake—one we would not make in other areas—to skip immediately to the second part of the question, and to assume that whatever Congress says authorizes governmental action. All of this is still on one side of the coin. The other side of the coin—assuming we come out of the first series of inquiries with an affirmative answer—is what restraints apply to actions taken under the authority of the U.S. Government. My submission—which I regret to say has not found favor here in Washington, either in the Department of Justice or in the Supreme Court—is that if the Constitution authorizes conduct by the U.S. Government, the restraints on governmental conduct written into the Constitution also apply. Put another way, there is no such thing as a lawful extraconstitutional act by an officer of the United States.

The first side of the coin is perhaps less controversial, probably because there is less source material—either in the records of the Constitutional Convention or in decided cases. I tried to look at the issue of the constitutional reach of U.S. law enforcement in my brief piece in the centennial issue of the *Journal* in October 1989, stimulated by news of the *Yunis* case, also known as Operation Goldenrod. That case, you may remember, involved a Lebanese national who led a hijacking

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