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Recent Development--U.S. Legislation to Prosecute Terrorists: Antiterrorism or Legalized Kidnapping?

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RECENT DEVELOPMENT

U.S. LEGISLATION TO PROSECUTE TERRORISTS: ANTITERRORISM OR LEGALIZED KIDNAPPING?

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I. INTRODUCTION

On October 10, 1985, four United States fighter planes were dispatched from an aircraft carrier in the Mediterranean Sea under orders to intercept an Egyptian jetliner carrying the alleged terrorist hijackers of the Italian cruise ship, the Achille Lauro.[1]

1. N.Y. Times, Oct. 11, 1985, at A1, col. 6. A White House spokesman said President Reagan ordered the military action after Egypt repeatedly refused to prosecute the hijackers. *Id.* The Achille Lauro was carrying more than 400 passengers, including about a dozen United States citizens on a Mediterranean

The United States fighter planes forced the Egyptian aircraft to land in Italy, where the hijackers were taken immediately into custody by Italian authorities and charged with crimes that included kidnapping, ship hijacking and murder[2] for the death of

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cruise when it was hijacked Oct. 7, 1985, by four Palestinian gunmen believed to be associated with a Tunis-based faction of the Palestinian Liberation Front. N.Y. Times, Oct. 8, 1985, at A1, col. 6. The gunmen demanded the release of 50 Palestinian prisoners in Israel and asylum in Syria. NEWSWEEK, Oct. 21, 1985, at 35. Egypt agreed to provide the gunmen with safe exit from Egypt upon release of the hostages. As the hijackers were being exported from Egypt, United States warplanes intercepted the Egyptian plane.

2. N.Y. Times, Oct. 12, 1985, at A1, col. 6. If convicted in Italy, the hijackers could face life imprisonment. *Id.* The United States government urged Italy to turn the alleged hijackers over to the custody of the United States to face prosecution in a United States courtroom. Italy, however, insisted upon dealing with the terrorists first, claiming that the Italian legal system was the proper jurisdiction to try the terrorists since the crime was committed on an Italian ship in international waters. TIME, Oct. 21, 1985, at 29. United States officials nonetheless prepared extradition charges against the hijackers. The charges included hostage taking, piracy and conspiracy. Washington Post, Oct. 15, 1985, at A1, col. 6. While extradition of the hijackers to the United States received widespread attention immediately after the hijacking, aspects of extradition in connection with the Achille Lauro incident are beyond the scope of this RecentDevelopment.

The United States charges apparently are based partly on a 1984 act entitled The Act for the Prevention and Punishment of the Crime of Hostage Taking (Hostage Act), 18 U.S.C.A. § 1203 (West Supp. 1985). *See* N.Y. Times, Oct. 11, 1985, at A11, col. 4. The Hostage Act states in part:

> (a) Except as provided in subsection (b) of this section, whoever, whether inside or outside the United States, seizes or detains and threatens to kill, to injure, or to continue to detain another person in order to compel a third person or a governmental organization to do or abstain from doing any act as an explicit or implicit condition for the release of the person detained, or attempts to do so, shall be punished by imprisonment for any term of years or for life.

18 U.S.C.A. § 1203 (West Supp. 1985). On July 26, 1985, Sen. Arlen Specter of Pennsylvania proposed the Terrorist Death Penalty Act, S. 1508, 99th Cong., 1st Sess., 131 CONG. REC. S10,180 (1985) which would amend Title 18 of the United States Code to authorize application of the death penalty upon conviction of first degree murder under the Hostage Act, 18 U.S.C.A. § 1203 (West Supp. 1985).

Other United States charges against the hijackers included piracy, which is a federal crime in the United States under 18 U.S.C. § 1651 (1982). Section 1651 states:

> Whoever, on the high seas, commits the crime of piracy as defined by the law of nations, or is afterwards brought into or found in the United States, shall be imprisoned for life.

Leon Klinghoffer,[3] a United States citizen and passenger aboard the commandeered Italian ship. This single show of force sparked international turmoil, leaving in its wake injured relations between otherwise friendly nations. In the aftermath of the Achille Lauro incident, tensions flared between the United States and two of its allies, Egypt and Italy.[4] Egyptian President Hosni Mubarak called the United States' interception of its airliner a separate "act of piracy" that had caused a "coolness and strain" in United States-Egyptian relations.[5] The Achille Lauro incident was also blamed for the subsequent collapse of the Italian pro-United States government,[6] which crumbled under public outcry over Italy's release of a Palestinian leader who allegedly orchestrated the hijacking.[7]

Id.

The high seas is included in the special maritime and territorial jurisdiction of the United States under 18 U.S.C.A. § 7 (West Supp. 1985) which states that "special maritime and territorial jurisdiction of the United States" includes:

> (7) Any place outside the jurisdiction of any nation with respect to an offense by or against a national of the United States.

18 U.S.C.A. § 7(7) (West Supp. 1985). International law also recognizes piracy as a universal crime, which means that any state can prosecute and punish persons accused of piracy whenever custody over that person is obtained. Terrorism per se is not yet considered a universal offense. *See infra* notes 72-74 and accompanying text. For a more detailed discussion of universal offenses, see *infra* notes 68-74 and accompanying text.

3. Klinghoffer, 69, a Jewish American confined to a wheelchair, was believed to have been shot in the head. His body, along with his wheelchair, was tossed into the Mediterranean Sea. His body later was recovered. N.Y. Times, Oct. 10, 1985, at A1, col. 6; N.Y. Times, Oct. 17, 1985, at A1, col. 4.

4. TIME, Oct, 21, 1985, at 24. *See also* Washington Post, Oct. 18, 1985, at A1, col. 6.

5. TIME, Oct. 21, 1985, at 24.

6. Washington Post, Oct. 17, 1985, at A1, col. 5. Italian Prime Minister Bettino Craxi resigned after criticism by the United States and a segment of the Italian government of his decision to allow a Palestinian leader who allegedly participated in the hijacking plot to go free. *Id.* at A1, col. 6. Craxi was later reinstated. N.Y. Times, Oct. 22, 1985, at A1, col. 4. Upon resigning, Craxi criticized the United States use of force to intercept the Egyptian airliner. He claimed that the United States had landed military transport planes and personnel at an Italian-American airforce base with orders to return the hijackers to the United States. *Id.*

7. NEWSWEEK, Oct. 21, 1985, at 32. The head of the Palestinian Liberation Front, Muhammad Abbas, who participated in negotiations to free the hostages, accompanied the four hijackers on the intercepted flight from Egypt. Italian authorities detained the four hijackers after the plane landed in Italy. Abbas, how-

Less than three months after the Achille Lauro incident and only days before the close of 1985, terrorists struck again by unleashing hand granades and spraying gunfire at the check-in counters of airport terminals in Rome and Vienna.[8] Five United States citizens were killed in the Rome airport raid.[9] The attacks spurred cries of military retaliation by Israel[10] and the imposition of economic and political sanctions by the United States against Libya.[11]

The United States' aggressive and bold reaction to the Achille Lauro hijacking and its threat of sanctions following the airport raids illustrate the executive branch's frustration with its impotence in stemming the rise in terrorist attacks against United States personnel and citizens abroad.[12] Because of these attacks,

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ever, was allowed to flee to Yugoslavia despite pleas by the United States to either prosecute or extradite him. The United States also issued warrants for Abbas' arrest. N.Y. Times, Oct. 13, 1985, at A1, col. 6.

8. Washington Post, Dec. 28, 1985, at A1, cols. 1, 3 and 5.

9. *Id.*; N.Y. Times, Jan. 9, 1986, at A1, col. 6.

10. Washington Post, Dec. 28, 1985, at A1, cols. 1, 3 and 5.

11. N.Y. Times, Jan. 9, 1986, at A1, col. 6. The United States directed sanctions against Libya because of its support for terrorist groups and its alleged role in the attacks in Rome and Vienna. *Id.* at A6, col. 1. Libyan leader Muammar Qaddafi threatened the United States with increased terrorism at United States targets should the United States retaliate militarily against Libya. *Id.*

12. Reports indicate that in 1983, 2,574 domestic and international incidents of state-sponsored terrorism were committed against foreign nationals, institutions or governments. SENATE SUBCOMM. ON SECURITY AND TERRORISM, STATE-SPONSORED TERRORISM, S. DOC. No. 56, 99th Cong., 1st Sess. 12 (1985) [hereinafter cited as STATE-SPONSORED TERRORISM.] More than 10,000 persons were killed in 1983 as a result of these incidents, including 301 United States citizens. In 1984, the total incidents rose to 3,282. Assassinations numbered 362 in 1983 and 414 in 1984. *Id.* Four hundred international terrorist attacks were reported between 1973-1983 against United States diplomatic and military facilities and United States personnel. *Id.* These casualties resulted from bombings, murders, kidnappings and malicious vandalism. *Id.* The Subcommittee report describes the threat of state-sponsored terrorism:

> At present, communist states, especially the Soviet Union, and a number of other militant totalitarian regimes like Iran, Libya, and Syria, are actively exporting terrorist and terror techniques into other countries whose governments they wish to injure or overthrow. Thus, their activity is a manifestation of transnational state-sponsored terrorism.

Id. at xi. The report predicts that state-sponsored terrorism will increase in the future. "Operations have become more effective, wider in scope, more sophisticated, and with a higher destructive potential. It can be assumed that U.S. adversaries will continue to utilize terrorism — 'warfare on the cheap' — as a

President Reagan and other public officials have advocated a tougher stance toward the apprehension and prosecution of terrorists, including support for aggressive preemptive strikes upon known terrorists.[13] However, the Achille Lauro incident and the airport attacks clearly illustrate the international repercussions that arise when one nation either acts unilaterally or threatens to act in concert with other nations to combat an international problem such as terrorism.[14]

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significant strategic tool of their foreign policy." *Id.* at xv.

13. United States Secretary of State George Shultz has publicly stated that traditional methods of enhanced security and better intelligence are no longer adequate to combat terrorism and more aggressive tactics are necessary. *See* N.Y. Times, April 4, 1984, at A13, col. 1. At other times, Shultz has asserted that governments must improve their methods of infiltrating terrorist groups and be willing to take appropriate preventive or preemptive action to strike terrorists before they strike. *See, e.g.,* N.Y. Times, June 25, 1984, at A3, col. 4. Following a 1985 terrorist attack upon United States Marines and civilians in San Salvador, *infra* note 138, an outraged President Reagan said, "The war which terrorists are waging is not only directed against the United States, it is a war against all civilized society. This is a war in which innocent civilians are targets. This is a war in which innocent civilians are intentional victims and our servicemen have become specific targets. This cannot continue." N.Y. Times, June 21, 1985, at A1, col. 3. Reagan further warned that the United States was ready to take forceful action stating:

> I believe that our actions must be appropriate and proportionate to the criminal acts which have been taken against our citizens. Those who are responsible for such lawlessness and those who support it must know that the consequences of their actions will never be capitulation to terrorist demands. We are both a nation of peace and a people of justice. By our very nature, we are slow to anger and magnanimous in helping those in less fortunate circumstances. No nation has been more generous to others in need. But we also have our limits—and our limits have been reached.

Id. at A9, col. 1.

14. *See* N.Y. Times, Oct. 20, 1985, § 4 (The Week in Review), at 1, col. 1. The newspaper states that the United States paid a high price for its triumph in the Achille Lauro incident. The author suggests that Washington was so preoccupied with the search for and seizure of the hijackers of the Achille Lauro that little attention or concern was paid to reactions of Egypt and Italy and that Egypt viewed the interception of its airline as an attack by the United States on its national dignity. *Id. See generally* Evans, *Perspectives on International Terrorism,* 17 WILLAMETTE L. REV. 151, 151-55 (1980). Evans states that

> [There] is a growing disposition on the part of a wide variety of states to recognize that international terrorists are no respecters of persons, places, governments, international organizations, or international communications systems. In the long run, each state has a stake in the control of international terrorism, lest it find itself controlled by terrorists or, at least, en-

Within the shadow of these recent acts of terrorism and amid United States' protestations to "get tough" with terrorism, the United States Senate passed on February 19, 1986, the Terrorist Prosecution Act of 1985[15] (Terrorist Prosecution Act or the Act).[16] The bill follows a flurry of recent terrorist legislation aimed at both the prevention of terrorism and the punishment of terrorist offenders.[17] The Act would amend Title 18 of the United States Code to give United States courts jurisdiction to prosecute terrorists who commit murder and other violent acts against United States nationals abroad or terrorists who conspire outside the United States to commit murder against United States citizens within the United States. The proposed legislation would apply when these terrorists are apprehended and brought to the United States to stand trial. The legislation bases jurisdiction on Congress' authority to apply its statutes extraterritorially when the proscribed conduct threatens the United States' security or government functions.[18] Enforcement of the Act contemplates the

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thralled in an unending struggle to contain them.
Id. at 151.

Evans concludes that treaties, laws, security measures and prosections, while not eliminating international terrorism, have proven effective in controlling terrorism. *Id.* at 159. The author states, however, that measures to control terrorism are only effective "if they are founded on law and carried out through *cooperative state action.*" *Id.* at 164. (emphasis supplied).

15. S. 1429, 99th Cong., 2nd Sess., 132 CONG. REC. S1382-88 (1986). The Terrorist Prosecution Act was sponsored by Sen. Arlen Specter of Pennsylvania, a Republican, who was elected to the Senate in 1980 and is a member of the Senate Judiciary Committee. The Senate bill was cosponsored by Senators Andrews, Boren, Cohen, D'Amato, Denton, Dusenburger, Grassley, Hecht, Leahy, McConnell, Murkowski, Roth, Levin, and Hawkins. The bill passed the Senate by a 92-0 vote.

16. The Terrorist Prosecution Act which passed the Senate was substantially the same as an amended version of S. 1429 which passed the Senate Judiciary Committee on Dec. 12, 1985. The amended S. 1429, however, was substantially different from prior versions of the bill and was the result of a compromise worked out between the Judiciary Committee, the Justice Department and the State Department.

17. In 1984, three major pieces of anti-terrorism legislation were enacted: (1) The Act for the Prevention and Punishment of Hostage Taking, *supra* note 2, (2) The Aircraft Sabotage Act, 18 U.S.C.A. § 31-32 (West Supp. 1985), which addresses terrorist acts of aircraft piracy and aircraft sabotage, and (3) The 1984 Act to Combat International Terrorism, 18 U.S.C.A. § 3071 (1985), which provides rewards for information leading to the arrest and conviction of terrorists.

18. *See infra* notes 52-61 and accompanying text.

use of force, if necessary, to apprehend known terrorists and return them to the United States for prosecution and punishment.[19]

This Recent Development examines the jurisdictional bases for the proposed extraterritorial extension of The Terrorist Prosecution Act to crimes that do not occur within the territory of the United States and to persons who are not United States citizens. The historical basis for allowing the prosecution of persons who have been forcibly brought into the court's jurisdiction and constitutional due process concerns that accompany such enforcement means are also detailed. Also discussed is the potential conflict between the Act and United States foreign relations law, particularly with respect to the possible forceful intrusion by the United States upon another state's territorial sovereignty to apprehend terrorists and bring them to justice. Finally, this article examines the potential consequences of using such forceful measures to international relations, particularly when United States' allies with sophisticated legal systems and proper jurisdictional claims are equally willing to prosecute terrorists themselves.

II. LEGAL BACKGROUND

A. Jurisdictional Limitations: Laws Having Extraterritorial Effect

International law recognizes limitations on a state's authority to legislate and apply its domestic laws extraterritorially when such laws conflict with the interests of other states.[20] The RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW OF THE UNITED STATES expresses this limitation in terms of a state's jurisdiction to prescribe, to adjudicate and to enforce.[21] Jurisdiction to pre-

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19. *See infra* notes 158-61 and accompanying text.

20. *See* RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW OF THE UNITED STATES Part IV, Introductory Note, at 179 (Tent. Draft No. 6, 1985) [hereinafter cited as RESTATEMENT (REVISED)]

21. *Id.* at § 401. Section 401 of the RESTATEMENT (REVISED) states:

> Under international law, a state is subject to limitations on its authority to exercise
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> (1) "jurisdiction to prescribe," i.e., to make its law applicable to the activities, relations, or status of persons, or the interests of persons in things, whether by legislation, by executive act or order, by administrative rule or regulation, or by determination of a court;
>
> (2) "jurisdiction to adjudicate," i.e., to subject persons or things to the process of its courts or administrative tribunals, whether in civil or in criminal proceedings, and whether or not the state is a party to the pro-

scribe, the authority of a state to legislate and to apply its substantive laws in a transnational context to particular persons and circumstances,[22] is a precondition to a state's ability to enforce its laws.[23] International law recognizes certain bases of jurisdiction to prescribe.[24] Underlying these bases of jurisdiction are strong notions of territoriality and nationality.[25] These notions also confer jurisdiction to prescribe conduct that occurs outside a state's ter-

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ceedings; and

(3) "jurisdiction to enforce," i.e., to induce or compel compliance or punish noncompliance with its laws or regulations, whether through the courts or by use of executive, administrative, police, or other non-judicial action.

Id. For a discussion of the historical development of jurisdiction to adjudicate, see RESTATEMENT (REVISED), *supra* note 20, § 421, comment a, citing such cases as International Shoe Co. v. Washington, 326 U.S. 310 (1945), Shaffer v. Heitner, 433 U.S. 186 (1977), World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980), and Rush v. Savchuk, 444 U.S. 320 (1980).

22. RESTATEMENT (REVISED), *supra* note 20, Part IV, introductory note, at 185.

23. *See* Rivard v. United States, 375 F.2d 882, 885 (5th Cir.), *cert. denied sub nom.* Groleau v. United States, 389 U.S. 884 (1967). *Rivard* notes the general principle that "[u]nder international law a state does not have jurisdiction to enforce a rule of law prescribed by it, unless it had jurisdiction to prescribe the rule." 375 F.2d at 885. Comment a to § 421 of the RESTATEMENT (REVISED) states:

Under international law a state may not exercise authority to enforce law which it has no jurisdiction to prescribe. Such assertion of jurisdiction, whether carried out through the courts or by non-judicial means, may be objected to both by the affected person directly and by the state concerned at the international level.

RESTATEMENT (REVISED), *supra* note 20, § 421, comment a.

24. *Id.* § 402. Section 402 of the RESTATEMENT (REVISED) states the accepted bases of jurisdiction to prescribe:

Subject to § 403, a state has jurisdiction to prescribe law with respect to

(1) (a) conduct a substantial part of which takes place within its territory;

(b) the status of persons, or interests in things, present within its territory;

(c) conduct outside its territory which has or is intended to have substantial effect within its territory;

(2) the activities, status, interests or relations of its nationals outside as well as within its territory; or

(3) certain conduct outside its territory by persons not its nationals which is directed against the security of the state or a limited class of other state interests.

Id.

25. *Id.* § 402, comment a.

ritory by nonnationals when such conduct has an effect within the prescribing state.[26]

These international legal principles reflect limitations placed upon the enactment of domestic legislation.[27] Legislation prescribed by Congress generally applies only within the territorial jurisdiction of the United States or to nationals of the United States.[28] Congress does have authority, however, to extend its laws extraterritorially,[29] especially if such intent is clearly ex-

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26. See discussion of the protective principle of jurisdiction, *infra* notes 52-61 and accompanying text.

27. *See* RESTATEMENT (REVISED), *supra* note 20, § 401, comment b, which states:

> International law deals with the propriety of the exercise of jurisdiction by a state, and the resolution of conflicts of jurisdiction between states. The domestic law of the United States considers the propriety of exercises of jurisdiction by legislative, executive, administrative or judicial bodies, both federal and State, under the U.S. Constitution, the State constitutions, and State and federal law. In general, domestic law is construed, when fairly possible, so as not to bring it into conflict with international law.

28. *See* Blackmer v. United States, 284 U.S. 421, 437 (1932). In *Blackmer*, a United States citizen residing in Paris, France, was found guilty of contempt of court for refusing to respond to subpoenas served upon him in France which ordered him to appear as a witness at a criminal trial in the United States. The Court, holding that United States laws were applicable to the citizen abroad, concluded that "[w]hile the legislation of the Congress, unless the contrary intent appears, is construed to apply only within the territorial jurisdiction of the United States, the question of its application, so far as citizens of the United States in foreign countries are concerned, is one of construction, not of legislative power." *Id.* at 437. *See also* United States v. Cotten, 471 F.2d 744, 750 (9th Cir.), *cert. denied*, 411 U.S. 936 (1973) (absent evidence of contrary intent, presumption exists against extraterritorial application of a statute); American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909) (reluctance by court to ascribe extraterritorial effect to a statute). *Accord* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 38 (1965) [hereinafter cited as RESTATEMENT (SECOND)] (stating that United States law applies only to conduct occurring within or having effect within the territory of the United States unless clearly indicated by statute.)

29. The case most cited for this proposition is United States v. Bowman, 260 U.S. 94 (1922), in which the Court held that a United States law prohibiting presentment of a false claim against the government or its officers could be applied extraterritorially. The *Bowman* court's discussion of the locus of a crime is often cited:

> The necessary *locus*, [for application of a statute] when not specially defined, depends upon the purpose of Congress as evinced by the description and nature of the crime and upon the territorial limitations upon the power and jurisdiction of a government to punish crime under the law of

pressed or if such intent can be inferred from the purpose and nature of the statute.[30] Nonetheless, these laws must be based upon sound jurisdictional principles recognized by domestic courts and international law. Thus, legislation proposed by Congress, such as the Terrorist Prosecution Act, must be based upon one or a combination of the five[31] traditional theories of jurisdiction: the nationality theory, the territorial theory, the protective principle, the passive personality principle, or the universal theory.[32] The most common and widely-accepted independent bases

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nations. Crimes against private individuals or their property, like assaults, murder, burglary, larceny, robbery, arson, embezzlement, and frauds of all kinds, which affect the peace and good order of the community, must of course be committed within the territorial jurisdiction of the government where it may properly exercise it. If punishment of them is to be extended to include those committed outside of the strict territorial jurisdiction, it is natural for Congress to say so in the statute, and failure to do so will negative the purpose of Congress in this regard.

Id. at 97-98. For decisions subsequent to *Bowman*, see United States v. Baker, 609 F.2d 134, 137 (5th Cir. 1980) (nature of drug control statute mandated extraterritorial application to obtain jurisdiction) ; United States v. King, 552 F.2d 833, 851 (9th Cir. 1976), *cert. denied*, 430 U.S. 966 (1977) (territorial jurisdiction is not exclusive nor does it accurately characterize a state's power to exercise jurisdiction beyond its geographical boundaries).

30. *See* United States v. Layton, 509 F. Supp. 212 (N.D. Cal.), *cert. denied*, 452 U.S. 972 (1981). In *Layton*, the defendant was indicted on four criminal counts in connection with the 1978 death of a United States Congressman in Guyana. The court said the inference of extraterritorial jurisdiction was reasonable because Congress, by passing legislation to protect Congressmen from assault and murder, was prohibiting conduct that could easily occur outside the territorial limits of the United States. 509 F. Supp. at 217-19. *See also* Skiriotes v. Florida, 313 U.S. 69, 73-74 (1941) (application of criminal statute dealing with acts directly injurious to the government and capable of being committed without regard to location are construed as applicable to United States citizens upon the high seas or in a foreign country); United States v. Fernandez, 496 F.2d 1294 (5th Cir. 1974) (applications of statute prohibiting possessing, forging, and uttering of stolen checks to acts committed outside United States); United States v. Cotten, 471 F.2d at 750 (extraterritorial application of theft statute to acts committed overseas); Stegeman v. United States, 425 F.2d 984, 986 (9th Cir.), *cert. denied* 400 U.S. 837 (1970) (application of United States bankruptcy statute to United States citizens outside territory of government).

31. The objective territorial principle, *infra* notes 48-51 and accompanying text, is often referred to as a sixth theory of jurisdiction. This author prefers to consider the objective territorial principle as a subdivision of the territorial theory rather than a distinct jurisdictional principle.

32. *See* United States v. Pizzarusso, 388 F.2d 8, 10 (2d Cir.), *cert. denied* 392 U.S. 936 (1968). *See also Harvard Research in International Law, Jurisdiction*

of jurisdiction are territoriality or nationality.[33] All five jurisdictional bases, however, have been asserted to encompass crimes committed by nonnationals outside the United States' territory, either by expanding the theory of territoriality, by relying upon the protective principle, passive personality or universality principles or by asserting a combination of these theories.[34] Each of these theories and examples of their uses are discussed below.

1. *Nationality*

Nationality jurisdiction allows a state to prescribe laws that extend to its nationals regardless of where the proscribed offense occurs. [35] Therefore, under international law, a state has almost unlimited legal control over its nationals and can prosecute either while they are still abroad or after they return to the United States for acts committed abroad.[36] The theory underlying nationality jurisdiction is that persons who commit crimes owe allegiance to the state of which they are considered nationals.[37] Nationality jurisdiction, for example, has been used as a bases for authority to order a United States national abroad to answer a subpoena requiring his presence in the United States as a witness.[38] Principles of nationality are also relied upon as a jurisdictional base to tax foreign nationals.[39] Recently, the exercise by

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With Respect to Crime, 29 AM. J. INT'L L. SUPP 435, 445 (1935) [hereinafter cited as *Harvard Research*]; Blakesley, *United States Jurisdiction Over Extraterritorial Crime*, 73 J. CRIM. L. & CRIMINOLOGY 1109, 1110-11 (1982) [hereinafter cited as *Extraterritorial Crime*].

33. RESTATEMENT (REVISED), *supra* note 20, § 402, comment a.

34. *See Extraterritorial Crime, supra* note 32, at 1113.

35. *See Harvard Research, supra* note 32, at 519. *See also Extraterritorial Crime, supra* note 32, at 1110-11. This Recent Development assumes that the Terrorist Prosecution Act is designed primarily to reach crimes committed by nonnationals of the United States. It also assumes that if the offender were a United States national, then United States jurisdiction over the offender would be virtually assured. Therefore, the nationality principle will be only briefly considered.

36. *Harvard Research, supra* note 32, at 519.

37. *Id.*

38. *See* Blackmer v. United States, 284 U.S. 421 (1932). In *Blackmer*, the court said that the "jurisdiction of the United States over its absent citizen, so far as the binding effect of its legislation is concerned, is a jurisdiction in personam, as he is personally bound to take notice of the laws that are applicable to him and to obey them." *Id.* at 438.

39. *See* RESTATEMENT (REVISED), *supra* note 20, §§ 411-13.

the United States of nationality jurisdiction over foreign corporations owned and controlled by corporations that are nationals of the United States has been a source of controversy.[40]

2. *Territorial Jurisdiction*

A state's authority to exercise jurisdiction over all persons and objects within its territory is well-established.[41] The territoriality

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40. *See* RESTATEMENT (REVISED), *supra* note 20, § 402, comment e. Section 414 of the RESTATEMENT (REVISED) deals with jurisdiction over activities of foreign branches and subsidiaries. The controversy over the definition of "national," e.g., inclusion of domicile or resident, further complicates use of the nationality principle. *Id.* § 402, comment e.

41. *See, e.g.*, The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116 (1812) in which the Court states:

> 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 dimunition of its sovereignty, to the extent of the restriction, and an investment of that sovereignty, to the same extent, in that power which could impose such restriction. All exceptions, therefore, to the full and complete power of a nation, within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source.

Id. at 135. The territorial principle has also been used to explain a state's authority to apply its laws to ships and aircraft on the basis that a vessel or aircraft is a "floating" (or flying) "territory." RESTATEMENT (REVISED), *supra* note 20, § 402, reporter's note 3. In the seminal case of The S.S. "Lotus," (Turk. v. France) 1927 P.C.I.J. ser. A, No. 10 (Judgment of Sept. 7), the court was faced with a sensitive jurisdictional issue following the collision of two Turkish and French steamships. Eight Turkish sailors and passengers died in the collision. At issue was whether Turkey had jurisdiction under international law to prosecute a French lieutenant who had commanded the French vessel. *Id.* 1927 P.C.I.J., ser. A, No. 10, at 12. The French claimed that jurisdiction was held by the state under whose flag the vessel sails. *Id.* at 13. The French also claimed that the Turkish court needed some base of jurisdiction to try the French citizen. *Id.* at 18. The court said the primary restriction imposed by international law upon a state is the prohibition against exercising its power in the territory of another state. *Id.* The court noted, however, that international law does not generally prohibit states from exercising jurisdiction with respect to acts abroad. *Id.* at 19. The *Lotus* court ruled in favor of Turkey. The case is subsequently cited for its discussion of the exercise of jurisdiction over offenses committed outside a state's territory but having effects within the territory.

> No argument has come to the knowledge of the Court from which it can be deduced that States recognize themselves to be under an obligation towards each other only to have regard to the place where the author of the offence happens to be at the time of the offence. On the contrary, it is

theory determines jurisdiction according to the location of the crime.[42] A state acquires sovereignty by asserting the right to prescribe and enforce its laws within its territory.[43] The territorial principle recognizes that the state where the crime is committed usually has the strongest interest in and the greatest facilities for prosecuting crimes committed either by its nationals or by aliens.[44]

The territorial principle has been subdivided into the subjective and objective territorial views.[45] The subjective territorial view allows extension of jurisdiction over offenses committed outside United States' borders when an essential element of the crime occurs within the United States.[46] As an illustration, the subjective territorial principle was used to assert jurisdiction over a homicide when the defendant mailed poisonous candy from California to an intended victim in Delaware. The Delaware recipient died from eating the candy.[47] The objective territorial view expands territorial jurisdiction by allowing states to reach acts committed wholly outside a state's territory if such acts cause detrimental effects within the state.[48] The RESTATEMENT (REVISED),

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certain that the courts of many countries, even of countries which have given their criminal legislation a strictly territorial character, interpret criminal law in the sense that offences, the authors of which at the moment of commission are in the territory of another State, are nevertheless to be regarded as having been committed in the national territory, if one of the constituent elements of the offence, and more especially its effects, have taken place there.

Id. at 23.

42. *Id.* at 48.

43. *See Extraterritorial Crime, supra* note 32, at 1114.

44. *See* Note, *Extraterritorial Jurisdiction and Jurisdiction Following Forcible Abduction: A New Israeli Precedent in International Law,* 72 MICH. L. REV. 1087, 1089 (1974) [hereinafter cited as *Extraterritorial Jurisdiction*].

45. *See Harvard Research, supra* note 32, at 484-508; *Rivard,* 375 F.2d at 886.

46. *Extraterritorial Crime, supra* note 32, at 1118-19.

47. People v. Botkin, 132 Cal. 231, 64 P. 286 (1901).

48. *Extraterritorial Crime, supra* note 32, at 1123. Blakesley suggests that the objective territorial view is properly applied only when the effects of the extraterritorial crime were intended to occur within a state's territory and when the effects actually did occur there. *Id.* at 1132. For cases basing jurisdiction on the objective territorial principle, see Strassheim v. Daily, 221 U.S. 280, 285 (1911) (bribery of public officer produced detrimental effects in United States although acts occurred elsewhere); United States v. King, 552 F.2d 833, 851-52 (9th Cir. 1976), *cert. denied,* 430 U.S. 966 (1977) (defendant's prosecution for

which refers to the objective territorial view as the "effects principle," acknowledges that controversy has arisen in the international arena over the United States' use of the effects principle to challenge activity abroad that has an economic effect within the United States.[49] For example, United States' application of its antitrust and securities laws to acts performed outside the United States has stirred criticism from foreign states.[50] By combining the subjective and objective territorial views, the territorial principle allows jurisdiction if a crime is committed either in whole or in part within a state's territory.[51]

3. *Protective Jurisdiction*

The protective principle provides a basis of jurisdiction to prescribe laws that attach legal consequences to conduct occurring outside a state's territory if that conduct harms or could harm a state's national interests.[52] One justification for this principle is

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unlawful distribution in Japan of heroin intended for United States importation justified under objective territorial principle); United States v. Fernandez, 496 F.2d 1294, 1296 (5th Cir. 1974) (forging and uttering of stolen United States Treasury checks in Mexico produced detrimental effects in United States.); *Layton*, 509 F. Supp at 215-16 (murder of United States Congressman in Guyana produced harmful effects in the United States); *accord* RESTATEMENT (SECOND), *supra* note 28, § 18, comment a; RESTATEMENT (REVISED), *supra* note 20 § 402(1)(c); *cf.* United States v. Columbia-Colella, 604 F.2d 356, 360 (5th Cir. 1979) (effects within United States insufficient to support jurisdiction under objective territorial principle because not a conspiracy as in *Fernandez* and *Rivard*).

49. RESTATEMENT (REVISED), *supra* note 20, § 402, reporter's note 2; *see also id.*, comment e, stating that "a state may exercise jurisdiction based on impact in the state, but only when the effect or intended effect is substantial and the exercise of jurisdiction is reasonable under § 403."

50. *See id.* § 403, comment a. *See also id.*, introductory note to "Jurisdiction to Prescribe," at 186, where drafters state that the:

> [a]pplication of antitrust and securities laws, both on governmental and on private initiative, has often reached beyond the territorial frontiers of the United States, and has from time to time been perceived by other states to be intruding into their rightful domain. In response to the reactions of other states the United States has begun to modify its assertions of jurisdiction in some areas.

Id.

51. *See Extraterritorial Crime, supra* note 32, at 1114; *Harvard Research, supra* note 32, at 495.

52. *See Extraterritorial Crime, supra* note 32, at 1134-35. The protective principle is restated in the RESTATEMENT (REVISED), *supra* note 20, § 402(3),

that domestic legislation of most states inadequately regulates or punishes offenses committed within the state's territory which threaten the security or sovereign interests of a foreign state.[53] Therefore, the state whose interests are threatened is justified in legislating against such conduct.[54] United States courts have asserted jurisdiction under the protective principle to crimes outside United States territory such as making false statements on a VISA application,[55] forging United States documents,[56] inducing an alien to enter the United States illegally,[57] and making false statements to secure necessary documents to enter the United States.[58]

The protective principle is difficult to apply, however, because the scope of conduct that potentially threatens a state's security or the operation of its governmental functions is not well-de-

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which states that under international law a state may exercise jurisdiction to prescribe and apply its law with respect to "certain conduct outside its territory by persons not its nationals which is directed against the security of the state or a limited class of other state interests." See § 402, comment d, citing as examples of such conduct "crimes by developed legal systems, *e.g.*, espionage, counterfeiting of the state's seal or currency, the falsification of official documents, as well as perjury before consular officials or conspiracies to violate the immigration or customs laws, which are offenses likely to be committed outside the territory by aliens." *See Pizzarusso,* 388 F.2d at 10. The *Pizzarusso* court distinguished the protective and objective territorial principles, noting that the objective territorial view requires an actual effect inside the state while under the protective principle only a "potentially adverse" effect upon the security or government function is required. *Id.* at 10-11. *See also Extraterritorial Crime, supra* note 32, at 1111 (objective territorial theory requires that a significant adverse effect occur within the asserting state's jurisdiction whereas the protective principle allows jurisdiction over crimes that are intended to have an adverse effect).

53. *Harvard Research, supra* note 32, at 552.

54. *Id.* The focus of the protective principle 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." *Extraterritorial Crime, supra* note 32, at 1137.

55. *Pizzarusso,* 388 F.2d at 10-11.

56. United States v. Birch, 470 F.2d 808, 812 (4th Cir. 1972), *cert. denied,* 411 U.S. 931 (1973).

57. United States v. Williams, 464 F.2d 599, 601 (2d Cir. 1972).

58. United States v. Rodriquez, 182 F. Supp. 479 (S.D. Cal. 1960), *rev'd on other grounds sub nom.* Rocha v. United States, 288 F.2d 545 (9th Cir.), *cert. denied,* 366 U.S. 948 (1961). *See also* United States v. Romero-Galue, 757 F.2d 1147, 1154 (11th Cir. 1985) (protective principle permits a nation to prosecute foreign nationals on foreign vessel on the high seas for possession of narcotics).

fined.[59] Therefore, critics caution against use of this principle to assert broad criminal jurisdiction because of the possibility that individuals will face prosecution for actions unknown to them as illegal[60] and because unjustified expansion of jurisdiction over crimes committed in other states could exacerbate otherwise friendly relationships among nations.[61]

4. *Passive Personality Jurisdiction*

The passive personality principle gives a state jurisdiction over offenses committed against its nationals wherever those offenses take place.[62] For example, nationals from several countries, including the United States, Italy and Great Britain, were aboard the Achille Lauro when it was hijacked. Passive personality jurisdiction standing alone would give all states whose citizens were on

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59. RESTATEMENT (SECOND), *supra* note 28, § 33, comment d. The protective principle is restated in the RESTATEMENT (REVISED), *supra* note 20, § 402(3).

60. The author criticizes a 1972 amendment to the Israeli penal law that proscribes certain offenses committed abroad. The amendment was used to prosecute a Turkish citizen for membership in a terrorist organization. The author states that the legislation illustrates the pitfalls of an overly broad use of the protective principle:

> If Israel unilaterally extends protective or universal jurisdiction to offenses of membership in organizations, why could not other nations similarly extend extraterritorial jurisdiction to acts of a different nature? Statements, political contributions, or acts of economic significance as simple as deciding where to invest may be deemed by one country or another to violate its new conception of international law or to harm its security interests.

Id. at 1103. *See Extraterritorial Jurisdiction, supra* note 44, at 1096-97, 1101. *See also* Note, *Bringing the Terrorist to Justice: A Domestic Law Approach,* 11 CORNELL INT'L L.J. 71 (1978) [hereinafter cited as *Bringing the Terrorist to Justice*].

In *Bringing the Terrorist to Justice*, the author notes that a state wishing to expand protective jurisdiction to cover terrorists offenses should be able to draft domestic legislation accordingly. *Id.* at 76 n.17. He gives as an example a 1975 amendment to the French penal code that expands protective jurisdiction yet limits the principle to felonies against French diplomatic or consular agents or officers. *Id.* at 77.

61. *See Extraterritorial Crime, supra* note 32, at 1138.

62. *See Bringing the Terrorist to Justice, supra* note 60, at 78. For example in the *Lotus* case, the Turkish Penal Code contained legislation providing:

> Any foreigner who, apart from the cases contemplated by Article 4, commits an offence abroad to the prejudice of Turkey or a Turkish subject for which offence Turkish law prescribes a penalty. . .shall be punished in accord with the Turkish Penal Code provided that he is arrested in Turkey.

Lotus, 1927 P.C.I.J. ser. A, No. 10, at 14-15.

the ship a jurisdictional base to prosecute the terrorists under their own criminal laws. While United States courts continue to recognize the passive personality principle,[63] the principle has been widely criticized.[64] The RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW rejects use of the passive personality principle as a basis of jurisdiction under international law.[65] Some authorities suggest, however, that the passive personality principle could be used either in conjunction with other more firmly recognized jurisdictional principles[66] or if implemented with a direct and limited purpose, such as securing the safety of a state's citizens from the threat of terrorism.[67]

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63. *See, e.g.* States v. Benitez, 741 F.2d 1312 (11th Cir. 1984). In *Benitez*, the defendant, a non-United States citizen, was convicted in the United States for conspiracy to murder, assault and robbery of United States Drug Enforcement Agents. The crime occurred in Colombia, South America. The court found that:

> [t]wo of the principles enumerated in *Rivard* [were] applicable in this case - the protective principle and the passive personality principle. Under the former, jurisdiction is based on whether the national interest is injured; under the latter, jurisdiction is based on the nationality or national character of the victim (citing United States v. Layton, 509 F. Supp 212 (N.D. Cal. 1981). We have no doubt that jurisdiction exists in this case under these principles.

Benitez, 741 F.2d at 1316; *see also* United States v. Marino-Garcia, 679 F.2d 1373, 1381 (11th Cir. 1972) (passive personality allows jurisdiction over persons or vessels that injure the citizens of another country).

64. The passive personality principle has been criticized and is subject to the same concerns expressed with regard to the protective principle over potential abuse. *See supra* note 60 and accompanying text. The protective principle, however, is limited by the requirement that the crime must threaten the government's national interests or security. No such requirement is placed on the passive personality principle. *See Bringing the Terrorist to Justice*, *supra* note 60, at 79.

65. RESTATEMENT (SECOND), *supra* note 28, § 30(2) & comment e. "A state does not have jurisdiction to prescribe a rule attaching legal consequences to conduct of an alien outside its territory merely on the ground that the conduct affects one of its nationals." *Id.* § 30 (2). *But see* RESTATEMENT (REVISED), *supra* note 20, § 402, reporter's note g, which does not reject the passive personality principle but merely notes that it has faced considerable controversy. The RESTATEMENT (REVISED) further acknowledges that the passive personality principle "has been increasingly accepted when applied to terrorist and other organized attacks on a state's nationals by reason of their nationality, or to assassinations of a state's ambassadors or government officials." *Id.*

66. *Bringing the Terrorist to Justice*, *supra* note 60, at 79.

67. *Id.* The author states that the potential for abuse of the passive personality principle can be mitigated

> if implemented with a direct and limited purpose, namely securing the

5. *Universal Jurisdiction*

The universal theory recognizes that certain offenses are so heinous and so widely condemned that any state may punish an offender once custody is obtained.[68] Piracy is the most commonly recognized universal crime.[69] Additionally, certain other crimes have captured international interest, such as slave trade, traffic in women for prostitution, narcotics trafficking, and war crimes.[70] These offenses, however, have not acquired universal status primarily because of an inability to obtain a consensus among nations as to which offenses should be prosecuted and punished on the same basis as piracy.[71] The RESTATEMENT (REVISED), however, elevates the crimes of slave trade, aircraft hijacking, genocide and war crimes to universal status.[72] Although terrorism is mentioned as a possible universal crime,[73] it has not acquired full universal status because of an inability to agree on its definition.[74]

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safety of one's citizens from terrorist acts abroad, the risk of abuse would be minimized. For, while it may be too much to expect the average citizen to be familiar with all of the criminal laws of every country, it is not unrealistic to assume he would realize that committing a terrorist act might subject him to foreign prosecution.

Id.

68. *See Harvard Research, supra* note 32, at 445; *Extraterritorial Crime, supra* note 32, at 1139.

69. *Harvard Research, supra* note 32, at 563-564; RESTATEMENT (SECOND), *supra* note 28, § 34. Section 34 states:

A state has jurisdiction to prescribe a rule of law with respect to piracy on the high seas and to enforce it in its territory or on the high seas, provided such action is consistent with international law as stated in the Convention on the High Seas of April 29, 1958.

Id.

70. *Id.* § 34, reporter's note 2.

71. *See Harvard Research, supra* note 32, at 569.

72. RESTATEMENT (REVISED), *supra* note 20, § 404, entitled "Universal Jurisdiction to Define and Punish Selected Offenses," states:

A state may exercise jurisdiction to define and punish certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps terrorism, even where none of the bases of jurisdiction indicated in § 402 is present.

73. *Id.*

74. RESTATEMENT (REVISED), *supra* note 20, § 404, comment a; *Extraterritorial Crime, supra* note 32, at 1109; *see also* STATE-SPONSORED TERRORISM, *supra* note 12, which notes:

The semantic confusion over the precise definition of terrorism. . .has

B. Jurisdiction When Jurisdiction Collides

Because international and domestic legal principles allow the extraterritorial extension of laws, two states may assert and have arguable bases for concurrent jurisdiction.[75] In this situation, determination of which state has the greater jurisdictional claim may be difficult, particularly since jurisdictional rules of international law are less comprehensive and less precise than the domestic jurisdictional laws of individual nations.[76] International law recognizes certain limitations on a nation's authority to exercise jurisdiction that affects other states. The RESTATEMENT (SECOND)[77] lists certain factors that modify the exercise of extraterritorial jurisdiction when two states have concurrent jurisdiction to prescribe and enforce their laws.[78] These factors include vital national interests and the extent to which the proscribed conduct takes place within a state's territory.[79] Relying upon what it de-

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hindered formulation of national and military policy by nations of the free world. Consequently, it has been hard to formulate authoritative and systematic doctrinal and policy recommendations on initiatives to prevent, deter, and decrease the effectiveness of terrorist acts, or to punish identified terrorists after the fact.

Id. at 25. *See generally* Paust, *A Survey of Possible Legal Responses to International Terrorism: Prevention, Punishment and Cooperative Action*, 5 GA. J. INT'L & COMP. L. 342, 432-35. Paust discusses how efforts to obtain acceptance of the 1972 Draft Convention for the Prevention of Certain Acts of Terrorism were hampered by definitional issues. *Id.* at 432-35. *See also* S. Res. 186, 99th Cong., 1st Sess., 131 CONG. REC. S8751 (1985) which calls upon the President to negotiate a treaty to prevent and respond to terrorist acts. The resolution states that the treaty should incorporate a working definition of terrorism and should establish uniform laws on asylum, extradition and punishment of terrorists. *See also* S. Res 473, 98th Cong., 2nd Sess., 122 CONG. REC. S13,201-02 (1984). S. Res. 473 encourages states to negotiate a functional definition of international terrorism and supports universal jurisdiction over terrorism as a means of facilitating prosecution of terrorists. *Id.* at S13,201.

75. *See, e.g., Lotus*, 1927 P.C.I.J., ser. A, No. 10.

76. *See Extraterritorial Crime, supra* note 32, at 1109. Blakesley's article compares and contrasts United States domestic and international law relating to jurisdiction over extraterritorial crime. Blakesley concludes that recent case law and the RESTATEMENT (REVISED) have extended jurisdictional theories beyond their traditional meanings. *Id.* at 1111-12.

77. RESTATEMENT (SECOND), *supra* note 28, § 40.

78. *Id.*

79. Section 40 states:

Where two states have jurisdiction to prescribe and enforce rules of law and the rules they may prescribe require inconsistent conduct upon the

scribes as a "principle of reasonableness,"[80] the RESTATEMENT (REVISED) lists factors that restrain a state's assertion of jurisdiction over activities or persons having connections with other states.[81] Acts by one state against another state that are consid-

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part of a person, each state is required by international law to consider, in good faith, moderating the exercise of its enforcement jurisdiction, in the light of such factors as:

(a) vital national interests of each of the states,

(b) the extent and nature of the hardship that inconsistent enforcement actions would impose upon the person,

(c) the extent to which the required conduct is to take place in the territory of the other state,

(d) the nationality of the person, and

(e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.

Id. See United States v. First National City Bank (Citibank), 396 F.2d 897 (2d Cir. 1968), in which the court applied these factors to resolve a conflict between a United States court order requiring the Frankfort, Germany office of Citibank to produce documents and German law that prohibited release of the files under German secrecy laws. The court said § 40 of the RESTATEMENT (SECOND) required it to "balance the national interests of the United States and Germany and to give appropriate weight to the hardship, if any, Citibank will suffer." 396 F.2d at 902. The court ruled in favor of the issuance of the subpoena.

80. RESTATEMENT (REVISED), *supra* note 20, § 403, comment a and reporter's note 1. See *id.* § 403, reporter's note 10, which states that the factors listed in § 403 are derived from sections of the RESTATEMENT (SECOND) and also include consideration of factors listed in § 6 of the RESTATEMENT (SECOND) CONFLICT OF LAWS (1971).

> In contrast to prior § 40 [RESTATEMENT (SECOND)] reasonableness in all the relevant circumstances is understood here not as a basis for requiring that states consider moderating their enforcement of laws which they are authorized to prescribe, but as an essential element in determining whether, as a matter of international law, the state has jurisdiction to prescribe.

RESTATEMENT (REVISED), *supra* note 20, § 403, reporter's notes 10.

81. The RESTATEMENT (REVISED), *supra* note 20, § 403, entitled "Limitations on Jurisdiction to Prescribe," states:

> (1) Even when one of the bases for jurisdiction under § 402 is present, a state may not exercise jurisdiction to prescribe law with respect to the activities, relations, status, or interests of persons or things having connections with another state or states when the exercise of such jurisdiction is unreasonable.
>
> (2) Whether the exercise of jurisdiction is unreasonable is judged by evaluating all the relevant factors, including where appropriate,
>
> (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;

ered unreasonable are deemed to be "exorbitant."[82] Thus, even if grounded upon a legitimate jurisdictional base, the exercise of criminal jurisdiction over acts committed in another state's territory may be perceived as intrusive upon a state's sovereignty and thereby in violation of international law.[83] The RESTATEMENT (RE-

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(b) the connections, 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 in question 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; and

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

(3) When more than one state has a reasonable basis for exercising jurisdiction over a person or activity, but the prescriptions by two or more states are in conflict, each state is expected to evaluate its own as well as the other state's interest in exercising of jurisdiction in light of all the relevant factors, including those set out in subsection (2); and to defer to the other state if that state's interest is greater.

Id.

82. *See Extraterritorial Crime, supra* note 32, at 1112. Blakesley describes assertions of jurisdiction as "exorbitant"

if there is significant interest by another state in asserting jurisdiction. Using the terminology of private international law or the conflicts of law, the rule of reasonableness is an attempt to determine the proper forum when two or more states have a traditional basis for asserting jurisdiction. Thus, no assertion of jurisdiction is proper without one (or more) of the bases, but even if such a basis exists, the rule of reasonableness may block the exorbitant or unreasonable assertion of jurisdiction.

Id. See also RESTATEMENT (REVISED), *supra* note 20, § 403, reporter's note 1, stating that some states have questioned various applications of United States laws as "exorbitant," for instance United States antitrust legislation and trade legislation. The reporter's note also states that application of the "effects doctrine," *supra* note 49, to economic effects has been questioned as unreasonable.

83. *Extraterritorial Crime, supra* note 32, at 1112. Blakesley asserts that the "notion of reasonableness functions to disallow or to find unlawful the exercise of jurisdiction, even pursuant to a traditional basis for it, when such exercise would be 'exorbitant.'" *Id.* at 1156; *accord* RESTATEMENT (REVISED), *supra* note

VISED) states that when more than one state has a "reasonable" basis for jurisdiction,[84] each state should conduct an "interest" evaluation and defer to the state whose interest is greater.[85]

C. Jurisdiction to Enforce: Constitutional Requirements

Once a state validly prescribes a rule of law, it has jurisdiction to enforce[86] that law within its territory,[87] as long as the accused is present[88] and jurisdiction is exercised in conformity with the United States Constitution.[89] Conformity with constitutional principles also is required for the prosecution of acts committed outside the United States either by a national or an alien.[90] His-

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20, § 403, comment a. Blakesley further states that § 403 of the RESTATEMENT (REVISED) "generally considers assertion of jurisdiction over acts committed in foreign territory as being exorbitant, unless the acts are universally condemned." *Extraterritorial Crime, supra* note 32, at 1162.

Arguably the application of anti-terrorism legislation to acts committed abroad by non-United States citizens would not offend the rule of reasonableness because acts of terrorism have been universally condemned or at least have attracted universal interest. Terrorism, however, is not yet considered officially a universal crime to be treated like piracy. *See Extraterritorial Crime, supra* note 32, at 1140. Numerous international conventions on the subject of terrorism are evidence of the crime's universal condemnation. *See, e.g., International Convention Against the Taking of Hostages,* June 3, 1983, ____ U.S.T. ____, T.I.A.S. No. ____, ____U.N.T.S.____; *Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, entered into force* Feb. 20, 1977, 28 U.S.T. 1975, T.I.A.S. No. 8532, ____ U.N.T.S. ____; *Convention for Suppression of Unlawful Acts Against the Safety of Civil Aviation, entered into force* Jan. 26, 1973, 24 U.S.T. 565, T.I.A.S. No. 7570, ____ U.N.T.S. ____. For a comprehensive treatment of international conventions and treaties dealing with terrorism prior to 1979, see CONTROL OF TERRORISM: INTERNATIONAL DOCUMENTS (1979).

84. Reasonable jurisdiction could be asserted by more than one state when, for example, one state exercises territorial jurisdiction and another state exercise nationality jurisdiction. *See* RESTATEMENT (REVISED), *supra* note 20, § 403 comment d.

85. *See id.* § 403 (3) & comment e.

86. See definition of "jurisdiction to enforce," *supra* note 21.

87. RESTATEMENT (SECOND), *supra* note 28, § 20.

88. *See* RESTATEMENT (REVISED), *supra* note 20, § 442(2) (Tent. Draft No. 2 1981), which states: "A court in the United States may not try a criminal action without the presence of the accused."

89. *Id.* § 442, comment b. Comment c to § 442 elaborates upon the constitutional safeguards to United States criminal prosecutions, such as requirements regarding the presence of the accused and the location of trial.

90. *Id.* § 442 comment c (iv), which states:

torically, United States courts have been very reluctant to deny a court's authority to try a defendant once the accused appears before the court, regardless of the methods used to secure his presence.[91] In 1886, the United States Supreme Court enunciated this attitude in the now-famous case of *Ker v. Illinois*.[92] In *Ker*, the Court upheld the conviction of a defendant who had been kidnapped by a United States agent in Lima, Peru, and brought back to the United States to stand trial for larceny and embezzlement. The Court said:

> [A]uthorities of the highest respectability . . . hold that such forcible abduction is no sufficient reason why the party should not answer when brought within the jurisdiction of the court which has the right to try him for such an offence and presents no valid objection to his trial in such court.[93]

Many years later, the Supreme Court in *Frisbie v. Collins*[94] reaffirmed the *Ker* ruling in its decision upholding the murder conviction of a man forcibly seized in Chicago, Illinois, by Michigan officers and carried back to Michigan. The *Frisbie* Court concluded that

> [t]he power of a court to try a person for a crime is not impaired by the fact that he had been forcibly brought within the court's jurisdiction by reason of "forcible abduction." . . .[Prior cases] rest on the sound basis that due process of law is satisfied when one present in court is convicted of crime after having been fairly apprised of the charges against him and after a fair trial in accordance with constitutional safeguards . . . [N]othing in the Constitution requires a court to permit a guilty person rightfully

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In those instances in which the United States applies its criminal law to acts committed outside the United States, whether to its nationals abroad, to aliens abroad under the "protective principle", or in the application of universal jurisdiction (§ 402(2)(3) and § 404), the accused must be tried in a United States court (or a court of one of the States), and subject to constitutional safeguards for those accused of crime.

91. *See generally,* Shafer, *District Court Jurisdiction Over Criminal Suspect Who Was Abducted In Foreign Country and Returned to United States for Trial or Sentencing,* 64 A.L.R. FED. 292 (1983); Chermside, *Jurisdiction of Federal Court to Try Criminal Defendant Who Alleges That He Was Brought Within United States Jurisdiction Illegally or As Result of Fraud or Mistake,* 28 A.L.R. FED. 685 (1976).

92. 119 U.S. 436 (1886).

93. *Id.* at 444.

94. 342 U.S. 519 (1952).

> convicted to escape justice because he was brought to trial against his will.[95]

The two Supreme Court cases read together, commonly referred to as the Ker-Frisbie Doctrine, establish a powerful rule of law that has provided strong precedent for courts to uphold jurisdiction regardless of whether the defendant's presence was secured by kidnapping,[96] illegal arrest,[97] abduction,[98] or sabotage.[99]

The Ker-Frisbie Doctrine, however, has not weathered the years without some criticism founded upon constitutional due process requirements. In 1974, the Second Circuit Court of Appeals in *United States v. Toscanino*[100] refused to apply the Ker-Frisbie Doctrine in a case involving an Italian citizen convicted in a United States court of conspiring to import and distribute narcotics. The Italian defendant alleged that agents of the United States Government kidnapped him in Uraguay, tortured and interrogated him for days and then put him on a commercial flight to the United States where he was arrested.[101] After conducting an extensive analysis of the Ker-Frisbie Doctrine, the court concluded that the rule had been eroded by subsequent case law expanding due process rights of criminal defendants.[102] The court was unable to reconcile the Ker-Frisbie rule with the Supreme Court's "expansion of the concept of due process, which now protects the accused against pretrial illegality by denying to the government the fruits of its exploitations of any deliberate and unnecessary lawlessness on its part."[103]

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95. *Id.* at 522.

96. *See, e.g.,* United States *ex rel.* Lujan v. Gengler, 510 F.2d 62 (2d Cir.) *cert. denied,* 421 U.S. 1001 (1975).

97. *See eg.,* United States v. Sobell, 244 F.2d 520 (2d Cir.), *cert. denied,* 355 U.S. 873, *reh'g denied,* 355 U.S. 920 (1957).

98. *See, e.g.,* United States v. Cotten, 471 F.2d 744 (9th Cir.), *cert. denied,* 411 U.S. 936 (1973).

99. *See, e.g.,* Charron v. United States, 412 F.2d 657 (9th Cir. 1969).

100. 500 F.2d 267 (2d Cir.), *reh'g denied,* 504 F.2d 1380 (2d Cir. 1974), *on remand* 398 F. Supp 916 (1975).

101. *Id.* at 268-71. The court remanded the case for a hearing on defendant's allegations of misconduct by United States agents.

102. *Id.* at 272-73; *see, e.g.,* Mapp v. Ohio, 367 U.S. 643 (1961) (the Supreme Court interpreted the Due Process Clause of the 14th Amendment to require the application of the federal Exclusionary Rule in state prosecutions); *see also* Miranda v. Arizona, 384 U.S. 436 (1966); Wong Sun v. United States, 371 U.S. 471 (1963); Silverman v. United States, 365 U.S. 505 (1961).

103. *Toscanino,* 500 F.2d at 275.

Cases subsequent to *Toscanino,* however, have narrowed the decision to apply only to actions by government agents that are extremely outrageous or egregious. Less than a year after *Toscanino,* the same court retreated from a total abdication of the Ker-Frisbie Doctrine. In *United States ex rel. Lujan v. Gengler,*[104] the Second Circuit confirmed the conviction of a defendant, who, relying on *Toscanino,* claimed his abduction from Bolivia to the United States violated his due process rights. Distinguishing *Toscanino,* the court stated that it had not intended to eviscerate the long-standing Ker-Frisbie rule.[105] The court recognized that *Ker* and *Frisbie*:

> no longer provided a carte blanche to government agents bringing defendants from abroad to the United States by the use of torture, brutality and similar outrageous conduct, [it] did not intend to suggest that *any* irregularity in the circumstances of a defendants arrival in the jurisdiction would vitiate the proceedings of the criminal court.[106] (Emphasis in original).

While courts have expressed due process concerns regarding forcible seizure of defendants to obtain personal jurisdiction, cases subsequent to *Toscanino* have generally followed the Ker-Frisbie Doctrine. Limitations to the rule are apparent only when evidence exists of outrageous conduct on the part of law enforcement officials.[107]

D. Forcible Seizure: Violation of International Law

Even if jurisdiction is upheld, forcible arrest or kidnapping from another country of a suspected felon, may nonetheless violate international law.[108] For example, the RESTATEMENT (RE-

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104. 510 F.2d 62, 63 (2d Cir.), *cert. denied,* 421 U.S. 1001 (1975).

105. *Id.* at 65.

106. *Id.*

107. *See, e.g.,* Rochin v. California, 342 U.S. 165 (1952) (forced emetic solution into defendant's stomach to recover swallowed morphine capsules offended decency and fairness, shocked the judicial conscious, and offended sense of justice).

108. *See* N.Y. Times, Jan. 19, 1986, at A1, col. 4. The newspaper article, entitled "U.S. Is Said to Weigh Abducting Terrorists Abroad for Trial Here," discusses possible plans by the U.S. government to seize persons in the Middle East who have been implicated by U.S. authorities in recent terrorist attacks. *Id.* The article quotes Abraham Sofaer, legal advisor to State Department, as saying he would support seizure of terrorists, but acknowledging that such moves would violate international law. *Id.* The article states the opponents of seizure of ter-

VISED) recognizes that enforcement measures, even if safe from judicial scrutiny, may still be subject to legal constraints. The RESTATEMENT (REVISED) contends that enforcement measures

> are exercises of jurisdiction, and are subject, under international law, to the requirement of reasonableness. Enforcement frequently implies coercion, but in some instances the line between persuasion, inducement and coercion is unclear. Often, there is doubt about where reasonable pursuit of one state's jurisdiction to prescribe and enforce its law ends, and unwarranted intrusion into another state's jurisdiction begins.[109]

Additionally, the RESTATEMENT (REVISED) places limitations on external measures employed by a state to enforce its criminal laws,[110] based on the widely understood principle that "officials of one state may not enter or exercise their functions in the territory of another state without the latter's consent."[111] Violation of a state's territorial sovereignty absent consent entitles the violated

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rorists cite fears about the effect such action would have on the country involved as well as the reactions of European allies. *Id. See also* N.Y. Times, Jan. 25, 1986, at A26, col. 1 (editorial stating that "snatching" terrorists is no longer a farfetched idea).

109. RESTATEMENT (REVISED), *supra* note 20, ch. 3, introductory note, at 291-92.

110. "External Measures in Aid of Enforcement of Criminal Law" are set forth in the RESTATEMENT (REVISED) as follows:

> (1) A state may enforce its criminal law within its own territory through the use of police, investigative agencies, public prosecutors, courts, and custodial facilities, provided
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> (a) the law being enforced is within the state's jurisdiction to prescribe;
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> (b) when enforcement is through the courts, the state has jurisdiction to adjudicate with respect to the person who is the target of the enforcement; and
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> (c) the procedures of investigation, arrest, adjudication and punishment are consistent with the state's obligations under the law of international human rights.
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> (2) A state's law enforcement officers may exercise their functions in the territory of another state only with the consent of the other state, given by officials of the consenting state authorized to do so.

Id. § 432.

111. *Id.* § 432, comment b. Comment b further states: "Thus, while a state may take certain measures of enforcement against a person in another state, § 431, its law enforcement officers cannot, generally, arrest him in another state, and can engage in criminal investigation in that state only with that state's consent."

state to protest and receive reparation if appropriate.[112] In the famous case of *Attorney General of Israel v. Eichmann*,[113] persons allegedly carrying out the instructions of the Israeli Government kidnapped Eichmann, a Nazi war criminal, from Argentina and returned him to Israel to stand trial.[114] In a complaint to the United Nations Security Council, Argentina vehemently objected to the kidnapping as a violation of its sovereignty.[115] The breach of international law was healed only by an agreement between Israel and Argentina to treat the incident as closed.[116]

Years later, Israeli tactics again were questioned when an Israeli military court convicted a Turkish citizen for crimes committed outside the territorial jurisdiction of Israel.[117] The defendant was captured during an Israeli raid into Lebanon.[118] In addition to jurisdictional questions, the defendant's forcible abduction raised issues of violation of international law because of the apparent intrusion upon another state's sovereignty.[119]

United States courts also have acknowledged the potential international consequences of forcible abduction. For example, the *Toscanino* court,[120] citing *Eichmann*, recognized that the international kidnapping of an Italian citizen from Uraquay violated both the United Nations Charter and the Charter of the Organization of American States.[121] Additionally, in several recent United States cases, courts have faced demands by foreign states

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112. *Id.* § 432, comment c.

113. 36 I.L.R. 5 (Israel District Court Jerusalem 1961). For a general discussion of the Eichmann trial, see P. PAPADATOS, THE EICHMANN TRIAL (1964).

114. THE EICHMANN TRIAL, *supra* note 113, at 53.

115. The United Nations Security Council treated Eichmann's abduction like an international tort for which Israel was enjoined to make appropriate reparations to Argentina. *See* Resolution of June 24, 1960, 15 U.N. SCOR (868th mtg.) at 1, U.N. Doc. S/4349 (1960). *See also* Schwarzenberger, *The Eichmann Judgment*, 15 CURRENT LEGAL PROBLEMS 248, 253 (1962).

116. *The Eichmann Judgment, supra* note 115, at 254.

117. *See Extraterritorial Jurisdiction, supra* note 44, at 1087-88.

118. *Id.*

119. *Id.* at 1103.

120. *Toscanino*, 500 F.2d 267.

121. *Id.* at 277-78; *see also Extraterritorial Jurisdiction, supra* note 44, at 1112-13. The author argues that in addition to violating national sovereignty, use of forcible abduction would undermine international and domestic laws of extradition and ultimately violate individual human rights. *Id.*;*see also* Cardozo, *When Extradition Fails, Is Abduction the Solution?* 55 AM. J. INT'L L. 127 (1961).

desiring to prosecute United States nationals who enter their territory to abduct others accused of a crime in the United States. In *Kear v. Hilton,*[122] the Fourth Circuit Court of Appeals affirmed extradition of a professional bondsman to Canada to stand trial on kidnapping charges resulting from the bondsman's apprehension of a bail jumper who had fled to Canada. The bondsman had seized the bail jumper and returned him to Florida to stand trial. Canada, upset by the apparent violation of its territorial sovereignty, filed kidnapping charges against the bondsman.[123]

III. RECENT DEVELOPMENT

The Terrorist Prosecution Act which passed the Senate contains only two sections, beginning with Section 2331 that sets forth the bill's findings and purposes.[124] This section notes that more than half of the incidents of international terrorism between 1968 and 1985 were aimed at United States targets.[125] This sec-

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122. 699 F.2d 181 (4th Cir. 1983).

123. *Id.* "Canada permissibly might take a dim view of aliens descending upon it and abducting persons located within its borders without prior resort to legal process or to Canadian officials." *Id.* at 184; *see also* Villareal v. Hammond, 74 F.2d 503, 506 (5th Cir. 1934) (appellants violated sovereignty of Mexico where defendant sought asylum when appellants seized defendant unlawfully and took him back to the United States); Collier v. Vaccaro, 51 F.2d 17, 19 (4th Cir. 1931) (federal officer guilty of kidnapping after forcibly carrying accused out of Canada into the United States).

124. *See infra* note 125 for the text of the findings and purposes section. Specter stated that the findings and purposes section is designed to "make it clear the act is intended to cover acts of international terrorism, as opposed to barroom brawls or other violence which fails to trigger these national interests." S. 1429, *supra* note 15, at S1384.

125. Section 2331 states:

The Congress hereby finds that:

(a) between 1968 and 1985, there were over eight thousand incidents of international terrorism, over 50 per centum of which were directed against American targets;

(b) it is an accepted principle of international law that a country may prosecute crimes committed outside its boundaries that are directed against its own security or the operation of its governmental functions;

(c) terrorist attacks on Americans abroad threaten a fundamental function of our Government: that of protecting its citizens;

(d) such attacks also threaten the ability of the United States to implement and maintain an effective foreign policy;

(e) terrorist attacks further interfere with interstate and foreign commerce, threatening business travel and tourism as well as trade relations;

tion further states that international law recognizes that a country may prosecute crimes committed outside its boundaries if those crimes are "directed against its own security or the operation of its government functions. . . ."[126] Based on this principle, Congress found that terrorist attacks on United States citizens abroad (1) threaten the government's function of protecting its citizens; (2) threaten the ability of the United States to implement and maintain an effective foreign policy; (3) interfere with interstate and foreign commerce; and (4) threaten business travel, tourism, and trade relations.[127] The bill expresses Congress' purpose as: "[T]o provide for the prosecution and punishment of persons who, in furtherance of terrorist activities or because of the nationality of the victims, commit violent attacks upon Americans outside the United States or conspire outside of the United States to murder Americans within the United States."[128]

The proscribed crimes and their penalties are set forth in Section 2332 which states:

> (a) Whoever outside the United States commits any murder. . .or manslaughter. . ., or attempts or conspires to commit murder, of a national of the United States shall upon conviction in the case of murder be punished as provided in section 1111, for manslaughter be punished as provided in section 1112, for attempted murder be imprisoned for not more than twenty years, and for conspiracy be punished as provided by section 1117 of this title, notwithstanding that the offense occurred outside the United States.
>
> (b) Whoever outside the United States, with intent to cause serious bodily harm or significant loss of liberty, assaults, strikes,

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and

(f) the purpose of this chapter is to provide for the prosecution and punishment of persons who, in furtherance of terrorist activities or because of the nationality of the victims, commit violent attacks upon Americans outside the United States or conspire outside of the United States to murder Americans within the United States.

126. *Id.* § 2331(b). "[T]here has been a great deal of tough talk about terrorism, but very little tough action. The enactment of this measure will enable the United States to supplement the tough talk with some tough action," Sen. Specter told the Senate. S. 1429, *supra* note 15, at S1385.

127. *Id.* § 2331(c)-(e).

128. *Id.* § 2331(f). "At the heart of this bill is the notion that international terrorists and ought to be treated as such - that they should be located promptly, apprehended and brought to trial for their heinous crimes," Sen. Specter told the Senate, S. 1429, *supra* note 15, at S1383.

wounds, imprisons, or makes any other violent attack upon the person or liberty of any national of the United States or, if likely to endanger his person or liberty, makes violent attacks upon his business premises, private accommodations, or means of transport, or attempts to commit any of the foregoing, shall be fined not more than $5,000 or imprisoned not more than three years, or both. Whoever in the commission of any such act uses a deadly or dangerous weapon shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

(c) Whoever, outside of the United States, conspires to commit murder, as defined in section 1111(a) of this title, within the United States of any national of the United States, shall be punished as provided in section 1117 of this title notwithstanding that the offense occurred outside the United States.

(d) As used in this section, the term "national of the United States" has the meaning given such term in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22)).

(e) No indictment for this section can be returned without the written approval of the Attorney General or his designee.[129]

The Act approved by the Senate bears little resemblance in language or form to the Terrorist Prosecution Act, introduced July 11, 1985, that underwent hearings before the Judiciary Committee's Subcommittee on Security and Terrorism (the Subcommittee).[130] For purposes of comparison and perspective, the Terrorist Prosecution Act of 1985 that entered the Subcommittee is

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129. *Id.* § 2232. Title 18 U.S.C. § 1111 (1982) states that the penalty for first degree murder is death unless the jury qualifies its verdict by adding the words "without capital punishment," in which event the punishment is imprisonment for life. Title 18 U.S.C. § 1112 (1982) states that the punishment for manslaughter is imprisonment for not more than ten years; the punishment for involuntary manslaughter is a fine of not more than $1,000 or imprisonment for not more than three years or both. Title 18 U.S.C. § 1117 (1982) states that the punishment for conspiracy to murder shall be imprisonment for any term of years or for life. Specter noted in remarks to the Senate that § 2332(e) states that only the Attorney General can return an indictment under the Act. Specter said, "The intention of this section is to further ensure that application of the law is limited to acts of national interest consistent with the findings and purposes set forth in the act. . . . [T]hese provisions are adequate to satisfy this objective and, thus, the bill does not attempt to define terrorism." S. 1429, *supra* note 15, at S1384.

130. For a text of the proposed Terrorist Prosecution Act that was considered by the Senate Subcommittee, see S. 1429, 99th Cong., 1st Sess., 131 CONG. REC. S9430-32 (1985).

discussed below. This bill granted jurisdiction to United States courts to try anyone who assaulted or murdered any national of the United States regardless of where the crime occurred if the crime was part of an "act of international terrorism."[131]

Section 2321(a) of the Act stated:

> (a) Whoever in an act of international terrorism kills or attempts to kill any national of the United States shall be punished as provided under section 1111, 1112, and 1113 of this title, except that any such person who is found guilty of murder in the first degree shall be sentenced to imprisonment for life, and any such person who is found guilty of attempted murder shall be imprisoned for not more than twenty years.[132]

Upon introducing the bill, Senator Arlen Specter noted that during the 98th Congress legislators passed two anti-terrorism

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131. *See infra* note 148 regarding definition of "act of international terrorism."

132. S. 1429, *supra* note 130, at S9430. Section 2321(b) of the Act, *supra* note 130, stated:

> (b) Whoever in an act of international terrorism assaults, strikes, wounds, imprisons or makes any other violent attack upon the person or liberty of any national of the United States *in any foreign country or in international waters or air space,* or, if likely to endanger his or her person or liberty, makes *violent attacks upon his or her official premises, private accommodation, or means of transport,* or attempts to commit any of the foregoing, shall be fined not more than $5,000 or imprisoned not more than three years, or both. Whoever in the commission of any such act uses a deadly or dangerous weapon shall be fined not more than $10,000 or imprisoned not more than ten years, or both. (emphasis added).

Note that § 2321(b) above, which applied to assaults, strikes, and wounds, etc., contains the specific jurisdictional limitation "in any foreign country or in international waters or air space." Yet, § 2321(a), which applied to murder, did not contain this language. Apparently, § 2321(a) as written applied to domestic attacks as well as attacks abroad. The reason for this distinction is unclear. *See Bills to Authorize Prosecution of Terrorists and Others Who Attack U.S. Government Employees and Citizens Abroad: Hearings on S. 1373, S. 1429 and S. 1508 Before the Subcomm. on Security and Terrorism of the Senate Comm. on the Judiciary,* 99th Cong., 1st Sess. 10 (statement of Abraham Sofaer) [hereinafter cited as *Terrorism Hearings*]. Additionally, subsection (b) referred to "violent attacks upon his or her official premises, private accommodations, or means of transport." Sofaer notes that such attacks against foreign officials, official guests or internationally protected persons are already covered by 18 U.S.C. § 112(a), *infra* note 149. *Terrorism Hearings, supra* note 132, at 10-11. Regarding private citizens, Sofaer "would question whether such a provision, which derives ultimately from the international legal protections for diplomats codified in the Vienna Convention on Diplomatic Relations, is necessary or appropriate." *Id.*

bills that provide United States courts with extraterritorial jurisdiction over the crimes of hostage taking[133] and aircraft sabotage.[134] According to Specter, the Terrorist Prosecution Act was designed to fill a "critical gap [that remains] in our arsenal against terrorism: murder of U.S. citizens outside our borders, other than of specially designated Government officials and diplomats, is not a crime under U.S. law."[135] In hearings on the Act before the Subcommittee,[136] Abraham Sofaer, legal advisor to the Department of State, testified that the Act was "both warranted by reality and logic, and consistent with international law."[137] The June 19, 1985, murder of four Marines and two United States civilians at a sidewalk cafe in San Salvador exemplifies the need for such a bill, Sofaer said.[138] Although United States law protecting internationally-protected persons would govern the murders of the Marines,[139] the murders of the civilians in San Salvador are not presently United States crimes, Sofaer said.[140] Other positive comments about the bill have included its usefulness in encouraging other nations to either extradite or prosecute or to enact similar legislation.[141]

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133. *See* Hostage Act, *supra* note 2.

134. Aircraft Sabotage Act, *supra* note 17, 18 U.S.C.A. § 31-32 (West Supp. 1985).

135. S. 1429, *supra* note 130, 131 CONG. REC. at S9430. Specter stated:

> I was stunned to realize that those responsible for murdering over 260 U.S. marines while they slept in their barracks in Lebanon are not guilty of any U.S. crime for their murder. Existing law punishes only those who assault our diplomats. Under my bill, when a U.S. marine or any other American is killed or wounded, an investigation can be initiated and the culprits can be brought to this country and prosecuted.

Id.

136. *Terrorism Hearings, supra* note 132.

137. *Terrorism Hearings, supra* note 132, at 2 (statement by Abraham Sofaer).

138. On June 19, 1985, gunmen dressed as members of the Salvadorean armed forces opened fire upon an outdoor cafe in San Salvador. Thirteen persons, including four off duty United States Marines and two United States businessmen, were killed. At least 15 persons were injured. N.Y. Times, June 21, 1985, at A1, col. 4.

139. *See infra* note 149.

140. *Terrorism Hearings, supra* note 132, at 2-3 (statement of Abraham Sofaer).

141. Robert Oakley, director of the Office for Counter-Terrorism and Emergency Planning, testified in 1985 before the Subcommittee on Security and Terrorism that the proposed bill (1) can be useful in efforts to obtain extradition or

The Terrorist Prosecution Act considered by the Subcommittee was itself the revised version of S. 3018,[142] which was later reintroduced with amendments as S. 1373.[143] These earlier bills are collectively entitled "Protection of United States Government Personnel Act of 1984 (1985)." S. 3018, the earlier and more narrow of the three bills, covered crimes of murder or attempted murder "in international waters or air space, [against] any officer, agent or employee of the United States Government. . . ."[144] The 1985 version of the Protection of Government Personnel Act broadened the scope of S. 3018 by substituting the word "citizen"[145] for the words "*any officer, agent or employee* (emphasis supplied)."[146] The amended Terrorist Prosecution Act, however, abandoned any attempt to limit protection to either United States personnel or citizens by substituting the terms "any *national* of the United States (emphasis added)."[147]

While broadening the scope of the persons covered by the proposed legislation, the Terrorist Prosecution Act limited applica-

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persuading another government to prosecute, by emphasizing that criminal acts by terrorists require punishment, (2) is a useful step in developing an international legal framework against terrorism by filling gaps in United States criminal jurisdiction and encouraging other states to enact similar legislation and (3) is a symbolic measure that underscores United States reaction to a series of recent murders of United States citizens overseas. *Terrorism Hearings*, *supra* note 132, at 1-2 (statement of Robert B. Oakley, director, Office for Counter-Terrorism and Emergency Planning). Sen. Jeremiah Denton, in opening remarks before the same Subcommittee, said:

> The pattern that emerges . . . is that terrorism is the most widely practiced form of modern warfare. It is both a major force and a major trend in foreign affairs. How successful have we been in dealing with terrorist warfare against our commerce, soldiers, diplomats, facilities, leaders, and private citizens? Not very. . . . Terrorism must be dealt with on many fronts and a military response alone will not suffice. First, we must have laws that are sufficient to meet the threat. We must have a mechanism capable of enforcing these laws. . . . We must in the end be prepared to employ a full range of sanctions: legal, diplomatic, economic and military.

Id. (statement of Sen. Jeremiah Denton).

142. S. 3018, 98th Cong., 2nd Sess., 130 CONG. REC. S11,776 (1984).

143. S. 1373, 99th Cong., 1st Sess., 131 CONG. REC. S8961 (1985). Both S. 3018 and S. 1373 were introduced by Sen. Specter.

144. S. 3018, *supra* note 142, at S11,776.

145. S. 1373, *supra* note 143, at S8961.

146. S. 3018, *supra* note 142, at S11,776.

147. S. 1429, *supra* note 130, § 2331(a).

tion of its provisions to acts of "international terrorism."[148] This language was not included in the previous two Senate bills. In comments to the Senate upon introduction of the Terrorist Prosecution Act, Senator Specter said the revised language clarified that the bill's objective was to regulate acts of "international terrorism" and not "bar-rooms [sic] brawls."[149] Sofaer, in his address

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148. The Terrorist Prosecution Act adopted the definition of "international terrorism" in the Foreign Intelligence Surveillance Act, (FISA), 50 U.S.C. § 1801(c) (1982). The FISA defines international terrorism as activities that:

> (1) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or any State;
>
> (2) appear to be intended—
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> (A) to intimidate or coerce a civilian population;
>
> (B) to influence the policy of a government by intimidation or coercion; or
>
> (C) to affect the conduct of a government by assassination or kidnapping; and
>
> (3) occur totally outside the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to coerce or intimidate, or the locale in which their perpetrators operate or seek asylum.

Id. In hearings before the Subcommittee on Security and Terrorism, Sofaer expressed reservations about the use of the terms "in an act of terrorism." *Terrorism Hearings, supra* note 132, at 4 (statement of Abraham Sofaer). He said:

> We would not be surprised if the Department of Justice had concerns about making it an element of the offense that the deed in question have been done "in an act of terrorism." The requirement could raise evidentiary and constitutional problems that could unduly complicate prosecutions under this legislation. While the Department of State is comfortable with the bill in this respect as drafted, we believe that investigatory and prosecutorial concerns deserve careful attention from the Committee, and we may in the future develop with Justice a joint position on this issue.

Id. at 4.

149. S. 1429, *supra* note 130, at S9431. Specter states that the Terrorist Prosecution Act simply tracks current law that protects diplomats and other internationally protected persons from assault and murder and extends such law to United States nationals who are victims of international terrorism. *Id.* Specter is referring to 18 U.S.C. § 112 (1982) and 18 U.S.C. § 1116 (1982). Title 18 U.S.C. § 112(a) states:

> (a) Whoever assaults, strikes, wounds, imprisons, or offers violence to a foreign official, official guest, or internationally protected person or makes any other violent attack upon the person or liberty of such person, or, if likely to endanger his person or liberty, makes a violent attack upon his official premises, private accommodation, or means of transport or attempts to commit any of the foregoing shall be fined not more than $5,000

before the Senate Subcommittee, asserts that inclusion of the terms "in an act of international terrorism" not only restricts the bill's scope but also serves a practical jurisdictional purpose.[150] In particular, Sofaer's comments allude to the problem of basing jurisdiction solely on the weakest theory — the passive personality principle.[151]

> Even though some States may extend their criminal jurisdiction generally to serious crimes against their nationals abroad, any such extension should be implemented cautiously. Local authorities bear the primary reponsibility [sic] for law enforcement within their territory, and in the case of most crimes against Americans abroad [we] ordinarily [have] no reason to consider asserting our criminal jurisdiction extraterritorially. As Sen. Specter noted, we want to focus our efforts on international terrorism, not "barroom brawls."[152]

Jurisdiction of United States courts over such crimes as terrorism was provided in section 2321(d) of the bill. This subsection stated:

> The United States may exercise jurisdiction over the alleged offense if the alleged offender is present in the United States, irrespective of the place where the offense was committed or the nationality of the victim or the alleged offender.[153]

Specter stated that the extension of jurisdiction of United States courts to terrorist crimes committed abroad "in no way contravene[s] or conflict[s] with either international or constitu-

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or imprisoned not more than three years, or both. Whoever in the commission of any such act uses a deadly or dangerous weapon shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

18 U.S.C. § 1116(a) provides:

(a) Whoever kills or attempts to kill a foreign official, official guest, or internationally protected person shall be punished as provided under sections 1111, 1112, and 1113 of this title, except that any such person who is found guilty of murder in the first degree shall be sentenced to imprisonment for life, and any such person who is found guilty of attempted murder shall be imprisoned for not more than twenty years.

150. *Terrorism Hearings, supra* note 132, at 4 (statement of Abraham Sofaer).

151. *See supra* notes 62-67 and accompanying text.

152. *Terrorism Hearings, supra* note 132, at 4 (statement of Abraham Sofaer).

153. *Terrorism Hearings, supra* note 15, § 2321(d), 131 CONG. REC., at S9432.

tional law."[154] "While criminal jurisdiction is customarily limited to the place where the crime occurred, it is well-established constitutional doctrine that Congress has the power to apply U.S. law extraterritorially if it so chooses," Specter said.[155] Not only does Congress have the power to apply United States law extraterritorially, but extension of this jurisdiction is also recognized under international law.[156] Specter based the jurisdiction of United States courts to apply the Act extraterritorially upon the "potential adverse effect" the crime may have upon a nation's security or the operation of its governmental functions.[157]

Even if the Terrorist Prosecution Act provides the necessary subject matter jurisdiction to prosecute persons who attack United States citizens or personnel abroad, personal jurisdiction over the offender must be obtained before he can be tried in a United States courtroom.[158] The suspect must first by seized or arrested and brought to the United States to stand trial. In remarks supporting S. 1373, Specter suggested that

> in dealing with the crime of terrorism, we ought to find the terrorists when we have some reason to believe we know who they are. It requires an investigation. It requires pursuit. It may require extradition or, where extradition is not possible, it may require abduction to bring these vicious criminals to trial.[159]

According to Specter, these forceful tactics may be necessary in situations in which (1) the nation's government may be incapable of enforcing law and order[160] or (2) the nation flagrantly violates

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154. *Id.* at S9431.

155. *Id.* Specter cites *Bowman,* 260 U.S. 94 (1922), for this proposition.

156. *Id.*

157. *Id.* In remarks before the Senate, Specter said, "International law also recognizes broad criminal jurisdiction. If an alleged crime occurs in a foreign country, a nation still may exercise jurisdiction over the defendant, pursuant to the 'protection principle,' if the crime has a potentially adverse effect upon its security or the operation of its governmental functions." S. 1492, *supra* note 15, at S1383. Comments to S. 3018 stated that even absent a nexus between the United States and the terrorist attack abroad, jurisdiction over the terrorist's crime could be analogized with the universal crime of piracy. S. 3018, *supra* note 142, at S11,775. Specter stated that if a "pirate can be prosecuted wherever he is found, so should a terrorist be prosecutable wherever the terrorist is found." *Id.*

158. *See supra* note 88 and accompanying text.

159. S. 1373, *supra* note 143, at S8960.

160. *Id.*

international law or harbors international terrorists.[161]

The language of subsection (d) of an amended version of the Terrorist Prosecution Act (formerly subsection (c) in S. 3018 and S. 1373) omitted language contained in the two earlier Senate bills that the United States may exercise jurisdiction over the alleged offender if he is present in the United States irrespective of the manner in which he was brought before the court.[162] As a compromise toward facilitating passage of the bill, this controversial language disregarding the *manner* in which the terrorist is brought to the United States was dropped in the amended Terrorist Prosecution Act that entered the Subcommittee.[163] This language, referred to as the bill's "abduction" language, appeared to condone the use of self-help by the United States to procure personal jurisdiction over the terrorist. Even after the language was omitted, Senator Specter continued to support the use of forcible seizure to bring terrorists to justice.[164] Instead of relying

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161. *Id.*

162. Proposed § 2321(c) stated:

> (c) The United States may exercise jurisdiction over the alleged offense if the alleged offender is present in the United States irrespective of the place where the offense was committed or the nationality of the victim *or the alleged offender or the manner in which the alleged offender was brought before the court* (emphasis supplied).

S. 3018, *supra* note 142, at S11,776.

163. *See* S. 1429, *supra* note 130, § 2. During hearings before the Subcommittee on Security and Terrorism, Sofaer noted the absence of so-called "self-help" language in S. 1429.

> I was glad to see that the bill does not provide for any "self-help" measures. The Due Process Clause of the Constitution does not automatically preclude U.S. courts from trying persons forcibly seized abroad by U.S. authorities. It would be wrong, however, to extrapolate from this the conclusion that such seizures themselves are perfectly lawful. . . . In general, seizure by U.S. officials of terrorist suspects abroad might constitute a serious breach of the territorial sovereignty of the foreign State, could violate local kidnapping laws, and might well be viewed by the foreign State as a violation of international law and as incompatible with any bilateral extradition treaty in force. Yet, self help is sometimes necessary in various areas of public and private law, ande [sic] this area is no exception. In light of the fact that the bill itself contains no self-help provision, I will leave to a more appropriate occasion a further treatment of this question, which in any event should proceed only after close consultation with the Department of Justice and other interested agencies.

Terrorism Hearings, supra note 132, at 5 (statement of Abraham Sofaer).

164. During a segment of the MacNeil/Lehrer News Hour on October 10, 1985, concerning the Achille Lauro incident, Sen. Specter was asked whether the

upon specific language of the Act to support the abduction of known terrorists, Specter relied instead upon existing law. He told the Senate:

> In many cases, the terrorist murderer will be extradited or seized with the cooperation of the government in whose jurisdiction he or she is found. Yet, if the terrorist is hiding in a country like Lebanon, where the government, such as it is, is powerless to aid in his removal, or in Lybia [sic], where the Government is unwilling, we must be willing to apprehend these criminals ourselves and bring them back for trial. We have the ability to do that right now, under existing law. . . . Forcible seizure and arrest is a strong step, but threat of terrorism requires strong measures, and this is clearly preferable to the alternatives of sending in combat troops or bombing a few neighborhoods.[165]

United States should attempt to apprehend the Achille Lauro hijackers to prosecute them. A portion of the conversation follows.

MACNEIL: If they [hijackers] are not turned over to the United States or Italy or put on trial there, should the United States make some attempt to get them itself?

SEN. SPECTER: Well, if we could, short of military action, I think that we should. There is precedent by the Supreme Court of the United States which says that if we can attain custody of people, we can bring them to the United States. . . .

MACNEIL: Would you approve a clandestine semimilitary operation to grab them, like the Israelis grabbed -

SEN. SPECTER: Eichmann.

MACNEIL: Eichmann.

SEN. SPECTER: Yes, I would, providing it was done carefully; providing that it was targeted to the specific individuals; that it did not run a material risk of hitting innocent people; and that it could be done discreetly. That is the substance of a bill which I introduced 18 months ago in the United States Senate.

MacNeil/Lehrer News Hour, transcript #2619, Oct. 10, 1985, pp. 5-6 (copy available at the offices of the Vanderbilt Journal of Transnational Law). Later in the newscast, MacNeil asked another guest, Professor Hisham Sharabi, of Georgetown University, about his views on the seizure of terrorists.

MACNEIL: Professor Sharabi, let me ask you this, finally — we have a minute. The Senator says the United States would be justified in seizing these hijackers and bringing them back here for trial? What is your feeling about that?

PROFESSOR SHARABI: I'm against that. I think that would be engaging in the kind of terrorism that President Reagan mentioned in — a few weeks ago. I don't think that's the way that a superpower should act.

MacNeil/Lehrer NewsHour Transcript # 2619, Oct. 10, 1985, at 7.

165. S. 1429, *supra* note 15, at S1384. The existing law referred to by Specter is the Ker-Frisbie Doctrine. For a discussion of this doctrine, see *supra* notes 92-

In addition to omitting the "abduction" language of S. 3018 and S. 1373, the Terrorist Prosecution Act revised section 2321(e) to read:

> In enforcing subsections (a) and (b), the Attorney General may request and shall receive assistance from any Federal, State, or local agency, including the Army, Navy, and Air Force, and the Federal Bureau of Investigation, any statute, rule, or regulation to the contrary notwithstanding.[166]

Sofaer stated that the Terrorist Prosecution Act properly allocated responsibility for enforcement of terrorism laws to the Executive Branch because of competing foreign policy and international diplomacy considerations.[167] Sofaer cautioned, however, against the allocation of functions within the Executive Branch, *i.e.*, to the Attorney General.

> Ultimately, the President must decide how best to direct U.S. agencies, in particular the armed forces, to carry out international law enforcement activities relating to acts that occur abroad, that sometimes involve foreign states, and that always raise diplomatic, strategic, military and political considerations. A statute mandating a particular allocation of functions within the Executive Branch would hinder our ability to respond in the most effective and appropriate manner to the international terrorist threat.[168]

IV. ANALYSIS

The Terrorist Prosecution Act which received Senate approval is a watered down version of previous attempts by Senator Specter to draft legislation giving United States courts jurisdiction over terrorists who commit murder or other violent crimes against

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99 and accompanying text.

166. S. 1429, *supra* note 130, at S9432. The revised subsection (e) language omitted reference to the Central Intelligence Agency (CIA) as a government agency that could be called upon by the Attorney General to provide assistance in enforcing subsections (a) and (b) of the Act. The bill approved by the Subcommittee further omitted reference to the Federal Bureau of Investigation. Note that S. 1429, which passed the Senate, omitted this subsection entirely. This was the only major difference between the legislation that was recommended by the Subcommittee and the bill that passed in the Senate. *See supra* text accompanying note 129.

167. *Terrorism Hearings*, *supra* note 132, at 8 (statement of Abraham Sofaer).

168. *Id.* at 8-9.

United States nationals. The Act no longer confines its scope to terrorist crimes committed against United States nationals abroad but extends jurisdiction to crimes conspired outside the United States but committed against nationals within United States borders. Similarly, the Act omits any language giving courts jurisdiction irrespective of the manner in which the terrorist is brought to the United States.[169] Likewise, the Act abandons any attempt to define "international terrorism,"[170] merely referring to "terrorist attacks" in the bill's findings and purposes section.[171] Regardless of the Act's attempted simplicity, two basic problems still exist: (1) whether the legislation is founded on accepted jurisdictional principles and (2) if jurisdiction is proper, whether the exercise of jurisdiction over terrorists by forcible seizure or abduction is consistent with constitutional and international law. Clearly, Congress has authority to prescribe legislation that extends extraterritorially to crimes committed outside United States borders, especially when such intent is clearly expressed.[172] The Terrorist Prosecution Act states that the exercise of jurisdiction by the United States over the alleged offender will vest if the alleged offender is present in the United States *notwithstanding that the offense occurred outside the United States.*[173] Thus, drafters of the bill did not intend to limit its application to either territoriality or nationality jurisdictional principles, but rather intended the bill to have extraterritorial effect.

Yet, Congress must do more than just create a statute and announce that it has extraterritorial effect.[174] Enforcement of statutes that affect conduct outside a state's borders depends upon the existence of an acceptable jurisdictional base.[175] Ostensibly, the Terrorist Prosecution Act shares the same jurisdictional base as S. 3018 and S. 1473 which were grounded upon the protective principle. This principle allows the extraterritorial extension of laws to conduct occurring outside a state's borders if that conduct threatens the state's security or governmental functions.[176] In comments to the Senate upon reintroduction of the Protection of

169. *See supra* note 162 and accompanying text.
170. *See supra* note 148 and accompanying text.
171. *See supra* note 124 and accompanying text.
172. *See supra* notes 27-30 and accompanying text.
173. *See supra* text accompanying note 128.
174. *See supra* note 23.
175. *Id.*
176. *See supra* note 52 and accompanying text.

United States Government Personnel Act of 1985,[177] the precursor to the Terrorist Prosecution Act, Senator Specter stated that the "protective principle" was the proper jurisdictional base:

> Clearly, then, the exercise of U.S. criminal jurisdiction is also justified to prosecute the terrorist who assaults or murders American personnel abroad. Such attacks undoubtedly have an adverse effect upon the conduct of our Government's foreign affairs, and potentially threaten the security interests of the United States as well.[178]

Even if the protective principle alone were a proper jurisdictional theory upon which to base both S. 3018 and S. 1473, that base weakens considerably when coverage is broadened to encompass all United States nationals. Both the Terrorist Prosecution Act approved by the Senate and the original act expand the nature of the offense and the extent of asserted United States jurisdiction under the protective principle such that little if any nexus is required between the terrorist attack and the supposed threat to the nation's security or government functions. For example, in such a situation as a random airport attack[179] or an attack at a San Salvador cafe,[180] the murder of United States nationals presents only a very indirect threat to the security of the United States. What remains is only a tenuous connection between the terrorist attack and a presumed intention by the terrorist organization to influence the United States government.

Likewise, reliance upon the Terrorist Prosecution Act for jurisdiction to prosecute terrorists who murder United States citizens may be unnecessary in situations in which use of the protective principle would be most acceptable. For example, during the Achille Lauro hostage incident, a United States national was murdered. If the United States obtained physical custody over the terrorists, they could conceivably be prosecuted for murder under the Terrorist Prosecution Act. However, the Terrorist Prosecution Act would be superfluous in a hostage situation, because the crime is already governed by the 1984 Hostage Act,[181] which currently provides a maximum penalty of life imprisonment—the same penalty under the Terrorist Prosecution Act.[182]

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177. S. 1373, *supra* note 143, at S8960.
178. *Id.*
179. *See supra* notes 8-11 and accompanying text.
180. *See supra* note 138 and accompanying text.
181. *See supra* note 2.
182. When Specter proposed S. 1508, *supra* note 2, which seeks the death

The legislation would also be unnecessary in a situation in which United States Marines were killed while stationed abroad.[183] This situation would be covered by 18 U.S.C. section 1116[184], which deals with the murder of internationally protected persons.[185] Thus, the Terrorist Prosecution Act seems most applicable to the random attack of a United States national who is neither an internationally protected person nor a person taken hostage during an act of international terrorism. Thus, the Terrorist Prosecution Act would be most useful, for example, in the unlikely event that the United States gained custody over the terrorists responsible for the two murders of Americans in the Rome airport. Such a scenario, however, is precisely the situation in which justification for the protective principle as a jurisdictional base for the Act breaks down. A claim of jurisdiction based on the protective principle requires more than a tenuous nexus to the security or government functions of the United States. The protective principle requires that the crime have an intended adverse effect in the country proscribing the conduct.[186] In the airport raid, the alleged targets of the attack were Israeli citizens. The United States citizens were killed because they were in the wrong place at the wrong time. In the San Salvador incident, the attack upon the cafe, in which United States Marines and United States citizens were killed, was arguably intended to influence United States military and political policies in Central America. Yet, if

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penalty for first degree terrorist murder as a result of a hostage situation, he also indicated that S. 1373 and S. 1429 also should be amended to include the death penalty, stating:

> I did not provide for the death penalty in S. 1373 or S. 1429 in order to expedite the passage of these bills. When these bills are considered on the floor, I intend to add the death penalty provision, but if the death penalty provision cannot be passed or if it is file bracketed then we should at least enact the subcommittee provisions of S. 1373 and S. 1429.

S. 1508, *supra* note 2, at S10,182.

183. *See, e.g.*, TIME, Oct. 1, 1984, at 30. On September 20, 1984, at least a dozen persons were killed, including two U.S. liaison officers, when a suicidal terrorist car bombed the United States Embassy in East Beirut. On April 18, 1983, 63 persons, including 17 Americans, were killed in a carbomb attack on the United States Embassy in West Beirut. Six months later, on Oct. 23, 1983, 241 U.S. servicemen were killed when a truckbomb hit the U.S. Marine headquarters near Beirut International Airport. *Id.* at 31.

184. *See supra* note 149.

185. *Id.*

186. *See supra* text accompanying notes 52-61.

the only victims had been two United States civilians on personal business in San Salvador, use of the protective principle to confer jurisdiction under the theory that the act was intended to cause a detrimental effect in the United States would be difficult to justify. Absent a basis for asserting protective jurisdiction, passive personality[187] is the only remaining jurisdictional principle to justify the extraterritorial application of legislation with intent to protect all United States nationals abroad. The RESTATEMENT (SECOND), however, rejects the use of this principle as an independent jurisdictional base.[188] Nonetheless, United States courts continue to recognize the passive personality principle particularly when it is used in conjunction with other jurisdictional principles, such as the protective principle.[189] Growing acceptance of the passive personality principle is acknowledged by the RESTATEMENT (REVISED), particularly when the principle is applied to terrorist attacks upon a state's nationals or assassination of ambassadors or government officials.[190] Even critics of the passive personality principle concede that the danger of abusing this principle to obtain jurisdiction over a terrorist crime is mitigated since any person who commits a terrorist act should realize that such act is probably a crime in some foreign state.[191] Thus, arguably jurisdiction under the protective and passive personality principles, even though precarious, would attach to the Terrorist Prosecution Act when used to prosecute persons who are charged with terrorist-related murders of United States nationals abroad.

Enforcement of the Terrorist Prosecution Act depends upon the presence of the accused terrorist in the United States. This presence could be secured in one of two ways: (1) extradition by the state holding custody of the terrorist or (2) use of force by the United States to secure custody. The former is an accepted method of resolving competing interests between two states; the latter is not. This is true even if the state seeking custody claimed jurisdiction over the terrorist act under either protective or passive personality principles. For example, if the United States used force to capture a known terrorist, it would be violating another state's territorial sovereignty. This action would violate principles

187. *See supra* text accompanying notes 62-67.
188. *See supra* note 65 and accompanying text.
189. *See supra* note 66 and accompanying text.
190. *See supra* note 67.
191. *Id.*

of international law and exacerbate international relations. The Achille Lauro incident aptly illustrates this point. Assuming that both the United States and Italy had passive personality, protective or universal jurisdiction to prosecute the hijackers, an impasse was created when both states asserted a desire to prosecute and punish the captured terrorists.[192] In this situation, resort to international principles placing limitations on jurisdiction to prescribe would be useful.[193] Factors in both RESTATEMENTS encourage one state to consider the other state's interests in asserting its jurisdiction to prescribe and enforce its laws. Factors listed in the RESTATEMENT (SECOND) would encourage use of a balancing test to weigh the competing interests of each state similar to the analysis conducted by the *Citibank* court.[194] The RESTATEMENT (REVISED), applying its reasonableness standard, encourages the state with the lesser interests to defer to the state with the greater interests when conflicts arise. The United States, by demanding custody of the Achille Lauro hijackers and the Palestinian leader Abbas, seemed to ignore the other state's interests in prosecuting the terrorists. Although the United States ultimately conceded custody to Italy, the incident created a rift in otherwise friendly relations between the two countries.

The Terrorist Prosecution Act seemingly disregards concerns for equitably balancing each nation's sovereign and national interests. Implicit in the legislation is the contemplation that United States agents and personnel might be enlisted to aid in the seizure or abduction of terrorists to return them to the United States to stand trial. Even if United States case law upholds the right to try persons who are forcibly seized and brought into the courtroom,[195] international law limits such action.[196] The Terrorist Prosecution Act is unacceptable as a tool to justify the intrusion upon another state's territorial sovereignty. Such disregard for the national interests of other states, whether friend or foe, can only result in impaired international relations.[197] Supporters of the bill argue that in situations in which a known terrorist finds haven in a state supporting terrorism, legal recourse is im-

192. *See supra* notes 4-7 and accompanying text.
193. *See supra* note 81.
194. *See supra* note 79.
195. *See supra* notes 91-99 and accompanying text.
196. *See supra* notes 108-12 and accompanying text.
197. *See supra* text accompanying notes 4-7.

possible or highly improbable. Even under these circumstances, use of terrorist tactics by the United States to fight terrorism is difficult to support under either domestic or international legal principles. The danger always exists that the use of force, if justified by legislation, will not be limited to the above situations but will be used even against friendly nations that have competing jurisdictional claims. Also present is the fear that forceful action by the United States against unfriendly nations would escalate into a major confrontation between the United States and other states.

V. Conclusion

The Terrorist Prosecution Act, which has passed the Senate in amended form, represents an effort by lawmakers to fill a gap in the United States legal arsenal against terrorism by giving courts jurisdiction to prosecute terrorists who commit murder against United States nationals abroad or terrorists who conspire outside the United States to commit terrorist attacks against nationals within the United States. This legislation can be supported as a signal by the United States of its willingness to consider all means of legal sanctions as part of its comprehensive policy for controlling terrorism. Arguably, the legislation may be based on a combination of the protective and passive personality jurisdictional principles, particularly in light of the recent acceptance of the passive personality principle as a jurisdictional base to protect a state's citizens from terrorist acts. Drafters of the bill, however, have promoted the legislation as a tool to gain personal custody over terrorists by forcible abduction and unauthorized entry into another country's sovereign territory. Enforcement of the proposed Terrorist Prosecution Act cannot be supported, therefore, under international legal principles that prohibit a state's violation of another state's territorial sovereignty without that nation's consent. Even absent the restrictions of foreign relations law, forceful action by the United States to kidnap felons has undergone critical scrutiny by domestic courts. Legislation that encourages the use of force by the United States to kidnap terrorists and return them to the United States to stand trial can only be viewed as legislation encouraging the participation by the United States in its own form of terrorism.

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