

# Extraterritorial Jurisdiction Over Acts of Terrorism Committed Abroad Omnibus Diplomatic Security and Antiterrorism Act of 1986

Patrick L. Donnelly

Follow this and additional works at: <http://scholarship.law.cornell.edu/clr>

 Part of the [Law Commons](#)

---

## Recommended Citation

Patrick L. Donnelly, *Extraterritorial Jurisdiction Over Acts of Terrorism Committed Abroad Omnibus Diplomatic Security and Antiterrorism Act of 1986*, 72 Cornell L. Rev. 599 (1987)  
Available at: <http://scholarship.law.cornell.edu/clr/vol72/iss3/7>

This Note is brought to you for free and open access by the Journals at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Law Review by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact [jmp8@cornell.edu](mailto:jmp8@cornell.edu).

## NOTES

### EXTRATERRITORIAL JURISDICTION OVER ACTS OF TERRORISM COMMITTED ABROAD: OMNIBUS DIPLOMATIC SECURITY AND ANTITERRORISM ACT OF 1986

In response to increased public concern over the rising incidence and violence of terrorism against American citizens abroad,<sup>1</sup> Congress enacted the Omnibus Diplomatic Security and Antiterrorism Act of 1986.<sup>2</sup> The Act expands the United States' extraterritorial jurisdiction<sup>3</sup> to foreign nationals<sup>4</sup> involved in international terrorism that injures United States citizens. The statute bases jurisdiction on the passive personality principle<sup>5</sup> and the universal theory<sup>6</sup> rather than concepts of territoriality or nationality. This approach represents a significant departure from prior assertions of federal criminal jurisdiction.<sup>7</sup>

The Act has precedent in international law, and does not transcend Congress's constitutional authority to define and punish terrorism. Concededly, the United States government has traditionally rejected assertions of jurisdiction not based on territoriality or nationality. This Note argues, however, that the executive and judicial

---

<sup>1</sup> See N.Y. Times, Jan. 19, 1986, at 1, col. 4 (discussing rise in terrorism in latter part of 1985 as well as recent proposals to prevent terrorist attacks).

<sup>2</sup> Pub. L. No. 99-399, § 1202, 1986 U.S. CODE CONG. & ADMIN. NEWS (100 Stat.) 853, 896-97 (to be codified at 18 U.S.C. § 2331) [hereinafter "the Act"].

<sup>3</sup> Commentators find it difficult to define "jurisdiction." Courts invoke the term in a variety of contexts, "some relating to geography, some to governmental and judicial structure, some to legislative or judicial power, and some to persons and procedures." George, *Extraterritorial Application of Penal Legislation*, 64 MICH. L. REV. 609, 609 (1966). In the international setting, the term "jurisdiction" refers to the competence of a state to prosecute and punish. The Draft Convention on Research in International Law of the Harvard Law School, *Jurisdiction with Respect to Crime*, 29 AM. J. INT'L L. 435, 467 (Supp. 1935) [hereinafter Harvard Research]. Under United States law, jurisdiction encompasses a variety of different concepts, most notably subject matter and personal jurisdiction. This Note uses jurisdiction in two senses: jurisdiction to prescribe rules for regulating human conduct, and jurisdiction to enforce those rules. Paust, *Federal Jurisdiction over Extraterritorial Acts of Terrorism and Nonimmunity for Foreign Violators of International Law Under the FSLA and the Act of State Doctrine*, 23 VA. J. INT'L L. 191, 201 n.39 (1983).

<sup>4</sup> "A 'national' of a State is a natural person upon whom that State has conferred its nationality, or a juristic person upon whom that State has conferred its national character, in conformity with international law." Harvard Research, *supra* note 3, at 473.

<sup>5</sup> See *infra* note 19 and accompanying text.

<sup>6</sup> See *infra* text accompanying note 18.

<sup>7</sup> See 18 U.S.C. §§ 1-6005 (1982 & Supp. III 1985) (codification of crimes and criminal procedure in federal law).

branches' objections to the Act lack validity because the Act's narrow scope will not abrogate existing jurisdictional lines. This Note first examines the current theoretical bases for asserting jurisdiction under international law, and reviews the traditional American repudiation of any assertion of jurisdiction not based on territoriality or nationality. It next surveys the Act and analyzes the constitutional source of the Act's authority. Next, the Note examines the theoretical problems with asserting jurisdiction over terrorists under the universal theory. It concludes that the passive personality principle provides the Act with a sounder theoretical foundation, and argues that the United States' historic hostility to that principle is unpersuasive in assessing the Act's desirability. Finally, the Note proposes that the United States assert a more limited degree of extraterritorial jurisdiction than the Act mandates. The suggested approach is sufficiently flexible to deter terrorism, yet more sensitive than the Act to important international prudential concerns.

## I

### BACKGROUND

#### A. Jurisdiction and International Law

"International law" is a difficult concept to understand fully. It does not comfortably fit within the modern lawyer's system of codifications and precedent.<sup>8</sup> This difficulty arises because "[i]nternational law is, in one sense, merely a summary of what governments claim as their rights or recognize as the rights of others."<sup>9</sup> International law evolves out of the need for expedient solutions to problems arising between nations.<sup>10</sup> Its development derives from the growing awareness that a nation's existence and relations depend upon predictable and ascertainable rules of law.<sup>11</sup>

These rules spring from two distinct sources: customary and conventional international law. Customary international law arises out of common understandings among nations which gradually crystallize into rules of conduct.<sup>12</sup> Conventional international law consists of treaties, scholars' statements, and decisions of international and domestic tribunals.<sup>13</sup>

---

<sup>8</sup> See Jessup, *The Reality of International Law*, 18 FOREIGN AFF. 244 (1940) (discussing uncertainty and broad scope of international law).

<sup>9</sup> F. DUNN, *THE PROTECTION OF NATIONALS* 21 (1932).

<sup>10</sup> 1 G. HACKWORTH, *DIGEST OF INTERNATIONAL LAW* § 1, at 1 (1940).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* For example, "universal jurisdiction to punish genocide is widely accepted as a principle of customary law." RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 reporters' note 1 (Tent. Final Draft 1985) [hereinafter RESTATEMENT DRAFT].

<sup>13</sup> 1 G. HACKWORTH, *supra* note 10, at 1.

An influential 1935 article<sup>14</sup> suggested that five bases exist for jurisdiction over extraterritorial crimes: territorial, protective, nationality, universal, and passive personality. Under the territorial theory a state may assert jurisdiction with respect to any crime committed wholly or partly within its territory. This jurisdiction extends to any legal entity which, while outside a state's territory, commits or attempts to commit any crime within its realm.<sup>15</sup> Under the protective theory a state may assert jurisdiction over an alien for any crime committed outside its territory impinging upon the security, territorial integrity, or political independence of the state.<sup>16</sup> Under the nationality theory a state may assert jurisdiction over any crime committed outside its territory by a national of that state.<sup>17</sup> The universal theory labels certain crimes so heinous that any nation obtaining control over the suspect may assert jurisdiction regardless of the accused's nexus to the forum.<sup>18</sup> The passive personality principle permits a state to assert jurisdiction over the accused solely because the offense harmed a national of the state claiming jurisdiction.<sup>19</sup> States and scholars have since accepted these theories as defensible grounds for asserting jurisdiction.<sup>20</sup> The Act

---

14 Harvard Research, *supra* note 3.

15 *Id.* at 480.

16 *Id.* at 543.

17 *Id.* at 519.

18 *Id.* at 573; *see infra* notes 22-24 and accompanying text.

19 Harvard Research, *supra* note 3, at 573-77.

S.S. *Lotus* (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 9 (Sept. 7) is the most famous case dealing with the passive personality principle. In *Lotus*, Turkey prosecuted and convicted a French merchant seaman, of the French vessel *Lotus*, for manslaughter. The *Lotus* had collided with the Turkish ship *Boz-Kourt* in international water, causing the loss of eight Turkish lives. France objected to the prosecution on the ground that Turkey had no adequate basis for jurisdiction under any principle of international law. Both France and Turkey submitted the dispute to the Permanent Court of International Justice at the Hague for resolution of the jurisdictional issue. *Id.* at 10-12.

France argued that international law prohibited Turkey from asserting jurisdiction based on the victim's nationality. *Id.* at 6-7. The court ultimately held that Turkey's assertion of jurisdiction was valid because the *Boz-Kourt* was a ship bearing the flag of Turkey and thus Turkish territory. *Id.* at 26. Although the court based its finding of jurisdiction on other grounds, the court expressly reserved its opinion of whether a state may take, by reason of the victim's nationality, jurisdiction over an offense committed by foreigners abroad. *Id.* at 22-23.

Although the decision is equivocal, it is nonetheless significant that the majority, unlike the six dissenting justices, did not expressly repudiate the passive personality principle, thus leaving the door open for acceptance of the principle at a later date. The majority seemed to view jurisdiction with respect to crime as a malleable doctrine, not limited to ideas of territoriality. It viewed crime as a social evil which all states have an interest in suppressing and as a developing idea only limited to the enlightened free will of nations. *Id.* at 18-19.

<sup>20</sup> *See* RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 10-19 (1965); J. BISHOP, INTERNATIONAL LAW CASES AND MATERIALS 553 (1971); Feller, *Jurisdiction over Offenses with a Foreign Element*, in 2 A TREATISE ON INTERNATIONAL CRIMINAL LAW 5 (M. Bassiouni & V. Nanda eds. 1973); Shachor-Landau, *Extra-*

stemmed from a debate on the two most controversial of these concepts, the universal theory and the passive personality principle.<sup>21</sup>

Universal jurisdiction first requires that states recognize a crime as worthy of special treatment.<sup>22</sup> Normally, international agreements and resolutions of international organizations reflect the world community's interest in suppressing these crimes.<sup>23</sup> For example, a tentative draft to the *Restatement (Second) of the Foreign Relations Law of the United States* lists piracy, slave trading, attacks on or hijacking of aircraft, genocide, and war crimes as offenses falling within the United States' universal jurisdiction.<sup>24</sup> The brevity of the preceding list illustrates the difficulty inherent in forging an international consensus on the despicability of any particular act.

Western nations have contested the passive personality principle more vehemently than any other theory of jurisdiction. All Anglo-American nations traditionally oppose the concept<sup>25</sup> and urge that jurisdiction remain primarily territorial. They assert that any notion of jurisdiction other than territoriality or nationality threatens to abrogate all existing jurisdictional lines.<sup>26</sup> A growing number of influential countries, however, expressly accept the passive per-

*territorial Penal Jurisdiction and Extradition*, 29 INT'L & COMP. L.Q. 274, 282-85 (1980); Sarkar, *The Proper Law of Crime in International Law*, in INTERNATIONAL CRIMINAL LAW 50 (G. Mueller & E. Wise eds. 1965); see also cases cited *infra* notes 95 & 99. For an alternative classification system, see Perkins, *The Territorial Principle in Criminal Law*, 22 HASTINGS L.J. 1155 (1971).

<sup>21</sup> See MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING FOUR DRAFTS OF PROPOSED LEGISLATION TO ATTACK THE PRESSING AND URGENT PROBLEM OF INTERNATIONAL TERRORISM, H.R. Doc. No. 211, 98th Cong., 2d Sess. 8 (1984) (proposed legislation "utilizes the well accepted territorial, personal, and passive personality bases for the exercise of legislative jurisdiction under international law").

<sup>22</sup> Blakesley, *A Conceptual Framework for Extradition and Jurisdiction over Extraterritorial Crimes*, 1984 UTAH L. REV. 685, 717.

<sup>23</sup> The United States currently has a number of treaty obligations that define and punish specific acts such as air hijacking. *Id.* at 717 n.104. The United States and six Latin American nations have adopted the Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that Are of International Significance, Feb. 2, 1971, 27 U.S.T. 3949, T.I.A.S. No. 8413. This agreement, however, is the only one to which the United States is a party and that attempts significantly to deal with the terrorist threat.

<sup>24</sup> RESTATEMENT DRAFT, *supra* note 12, § 404; see also Blakesley, *supra* note 22, at 717-19.

<sup>25</sup> See Harvard Research, *supra* note 3, at 579. The British objections to jurisdiction under the principle are mentioned in D. DE VABRES, LES PRINCIPES MODERNES DU DROIT PENAL INTERNATIONAL 107 (1928).

<sup>26</sup> 2 J.B. MOORE, DIGEST OF INTERNATIONAL LAW §§ 200-202 (1906); cf. The Apollon 22 U.S. (9 Wheat.) 362 (1824) (emphasizing that municipal laws of one nation do not extend beyond that territory); State v. Grady, 34 Conn. 118 (1867) (courts of Connecticut take no cognizance of offenses committed in another state); Johns v. State, 19 Ind. 421 (1862) (Indiana can only punish defendants who are within state); State v. Stephens, 118 Me. 237, 107 A. 296 (1919) (courts of Maine have no jurisdiction over offenses of bigamy committed outside state).

sonality principle.<sup>27</sup> Apparently these nations believe that a state should prosecute terrorists for crimes against its citizens when the nation with primary responsibility for such prosecution has failed to do so.

## B. The History of the Passive Personality Principle and Universal Theory in United States Law

In the past the United States has reacted inflexibly to the passive personality principle and the universal theory. It has consistently opposed foreign governments' attempts to assert jurisdiction based on the passive personality theory<sup>28</sup> and has accepted only limited applications of the universal theory.<sup>29</sup>

Beginning in the early nineteenth century, the United States accepted application of the universal theory to the crime of piracy.<sup>30</sup> In 1958, article 19 of the Geneva Convention on the High Seas explicitly provided for the prosecution of pirates wherever found.<sup>31</sup> Several other crimes—slave trade,<sup>32</sup> war crimes,<sup>33</sup> hijacking of civil aircraft,<sup>34</sup> and genocide<sup>35</sup>—have received similar treatment, but lack

<sup>27</sup> See, e.g., C.P. art. 10; SWEDEN PENAL CODE, ch. 2, § 3(3) (G. Mueller ed., T. Sellin trans. 1972). For a look at the nations which adopted this principle as of 1935, see Harvard Research, *supra* note 3, at 578-79.

Since 1975, the French Code of Criminal Procedure has permitted jurisdiction over extraterritorial offenses committed against French nationals: "Any foreigner who, beyond the territory of the Republic, is guilty of a crime either as author or accomplice, may be prosecuted and convicted in accordance with the disposition of French law, when the victim of the crime is a French national." C. PR. PEN. art. 689, para. 1 (Dalloz 1975).

<sup>28</sup> Blakesley, *supra* note 22, at 715 ("The passive personality theory of jurisdiction is generally considered to be anathematic to United States law.").

<sup>29</sup> *Id.* at 715-17.

<sup>30</sup> See 2 G. HACKWORTH, *supra* note 10, § 203, at 681 ("It has long been recognized and well settled that persons and vessels engaged in piratical operations on the high seas are entitled to the protection of no nation and may be punished by any nation that may apprehend or capture them.").

<sup>31</sup> Convention on the High Seas, Apr. 29, 1958, art. 19, 13 U.S.T. 2312, 2317, T.I.A.S. No. 5200, at 6, 450 U.N.T.S. 82, 92. The article provides:

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

<sup>32</sup> *Id.* art. 13, 13 U.S.T. at 2316, T.I.A.S. No. 5200 at 5, 450 U.N.T.S. at 90.

<sup>33</sup> See generally *In re Yamashita*, 327 U.S. 1 (1946) (offenses clause of Constitution empowers Congress to prosecute war criminals although all acts occurred outside of United States territory).

<sup>34</sup> Suppression of Unlawful Acts Against the Safety of Civil Aviation (Sabotage), Sept. 23, 1971, 24 U.S.T. 564, T.I.A.S. No. 7570, 974 U.N.T.S. 177 (convention provides for punishment of aircraft hijackers wherever they are found).

<sup>35</sup> Convention on the Prevention and Punishment of Genocide, Dec. 9, 1948, 78

of consensus over a controlling definition of terrorism has prevented international agreements on that subject.<sup>36</sup> Thus, whether the universal theory embraces terrorism remains unanswered.<sup>37</sup>

Unlike the universal theory, the United States has never accepted any application of the passive personality principle. *Cutting's Case*<sup>38</sup> illustrates the United States' position. In *Cutting* a Mexican court convicted an American citizen of libel based upon a newspaper article printed in Texas. The court asserted jurisdiction under a Mexican statute providing that "[p]enal offenses committed in a foreign country by a Mexican against Mexicans or foreigners, or by a foreigner against Mexicans, may be punished in the Republic."<sup>39</sup> The aggrieved party was a Mexican national, and the accused American had periodically lived in Mexico for several months. Although a Mexican appellate court later ordered the American's release after the victim withdrew his complaint,<sup>40</sup> the controversy elicited some strong words from the United States' executive branch.

In a letter to the United States chargé in Mexico, the Secretary of State made it clear that the United States did not recognize the jurisdiction of any nation over persons accused of offenses wholly committed and consummated within the territory of another sovereign state.<sup>41</sup> The Secretary charged that no customary principle of

U.N.T.S. 277. Although the United States was instrumental in drafting this treaty, the United States Senate has yet to ratify it.

<sup>36</sup> Blakesley, *supra* note 22, at 719 (Terrorism has "not yet achieved sufficient intensity of interest to warrant recognition as [a] true bas[i]s for universal jurisdiction . . .").

<sup>37</sup> See RESTATEMENT DRAFT, *supra* note 12, § 404 comment a.

<sup>38</sup> 1887 PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES [FOR. REL.] 751, *reprinted in* 2 J.B. MOORE, *supra* note 26, § 201, at 232.

<sup>39</sup> C.P.D.F. art. 168, *reprinted in* 1887 FOR. REL. at 856 (emphasis added), *reprinted in* 2 J.B. MOORE, *supra* note 26, § 201, at 230-31.

<sup>40</sup> See DEPARTMENT OF STATE, REPORT ON EXTRATERRITORIAL CRIME AND THE CUTTING CASE 17 (J.B. MOORE ed. 1887), *reprinted in* 1887 FOR. REL. 757, 767.

<sup>41</sup> 1887 FOR. REL. 751, *reprinted in* 2 J.B. MOORE, *supra* note 26, § 201, at 232. Secretary of State Baynard wrote that "the assumption of the Mexican tribunal, under the law of Mexico, to punish a citizen of the United States for an offense wholly committed and consummated in his own country against its laws was an invasion of the independence of this Government." *Id.* at 752, *reprinted in* 2 J.B. MOORE, *supra* note 26, § 201, at 234. He noted, "As to the question of international law, I am unable to discover any principle upon which the assumption of jurisdiction made in Article 186 of the Mexican penal code can be justified." *Id.* at 753, *reprinted in* 2 J.B. MOORE, *supra* note 26, § 201, at 236. He then observed,

It has constantly been laid down in the United States as a rule of action, that citizens of the United States can not be held answerable in foreign countries for offenses which were wholly committed and consummated either in their own country or in other countries not subject to the jurisdiction of the punishing state.

*Id.* at 755, *reprinted in* 2 J.B. MOORE, *supra* note 26, § 201, at 237. He concluded,

To say that he may be tried in another country for his offense, simply because its object happens to be a citizen of that country, would be to assert that foreigners coming to the United States bring hither the penal

international law justified the Mexican statute.<sup>42</sup> In his annual address to Congress, President Grover Cleveland commented on the Mexican question. He reiterated the Secretary's objection and added that jurisdiction based on the passive personality principle would destroy the certainty essential to the law of jurisdiction. This result would undermine the United States' territorial integrity.<sup>43</sup>

The *Restatement (Second) of the Foreign Relations Law of the United States* reflects this traditional hostility toward the passive personality principle: "A state does not have jurisdiction to prescribe a rule of law attaching legal consequences to conduct of an alien outside its territory merely on the ground that the conduct affects one of its nationals."<sup>44</sup> Furthermore, many commentators consider the pas-

laws of the country from which they come, and thus subject citizens of the United States in their own country to an indefinite criminal responsibility.

*Id.*, reprinted in 2 J.B. MOORE, *supra* note 26, § 201, at 238.

<sup>42</sup> *Id.* at 753, reprinted in 2 J.B. MOORE, *supra* note 26, § 201, at 236.

<sup>43</sup> President Cleveland stated:

A sovereign has jurisdiction of offenses which take effect within his territory, although concocted or commenced outside of it; but the right is denied of any foreign sovereign to punish a citizen of the United States for an offense consummated on our soil in violation of our laws, even though the offense be against a subject or citizen of such sovereign. The Mexican statute in question makes the claim broadly, and the principle, if conceded, would create a dual responsibility in the citizen, and lead to inextricable confusion, destructive of that certainty in the law which is an essential of liberty.

1886 FOR. REL. viii, reprinted in 2 J.B. MOORE, *supra* note 26, § 201, at 231-32.

The Mexican reply to President Cleveland countered with the proposition that

[t]he right which every nation has to impose national conditions upon entry of foreigners upon its own territory conveys with it the right within the limits of legislation to hold such foreigners responsible for acts they may commit abroad against that nation or, against any of its citizens or subjects.

1888 FOR. REL. at 1114.

<sup>44</sup> § 30(2) (1965). This position seems to have changed in recent tentative drafts. RESTATEMENT DRAFT, *supra* note 12, §§ 401-404 (Tent. Final Draft 1985 & Tent. Draft No. 7, 1986). Professor Blakesley suggests that although § 402 of the Draft is equivocal as to whether it accepts or rejects the passive personality principle, he believes that the principle appears acceptable when § 402 is read in conjunction with comment (g), which states:

The status in international law of the so-called "passive personality" principle has been in considerable controversy. States have sometimes invoked such a principle to justify application of their law—particularly criminal law—to acts committed outside their territory by persons not their nationals, on the basis that the victims of the acts were their nationals. While the principle has not been generally accepted for ordinary torts or crimes, it has been increasingly accepted when applied to terrorist and other organized attacks on a state's nationals by reason of their nationality . . . .

RESTATEMENT DRAFT, *supra* note 12, § 402 comment g. Concluding, Professor Blakesley states that given the wide support for the principle, it would be difficult to say international law precludes its application. See Blakesley, *supra* note 22, at 716 n.99.

sive personality principle as against United States law<sup>45</sup> because principles of nationality and territoriality generally have governed its exercises of jurisdiction. Finally, a federal court of appeals decision expresses the view that Congress may not employ the passive personality principle in a jurisdictional statute.<sup>46</sup> The Act thus represents a significant departure from the United States' traditional rejection of the passive personality principle.<sup>47</sup> It attempts to reconcile the United States' traditional distaste for the passive personality principle with the reality of terrorism.

## II

### CONGRESSIONAL EXPANSION OF UNITED STATES JURISDICTION TO REACH ACTS OF TERRORISM COMMITTED ABROAD

#### A. The Act

On July 11, 1985, Senator Arlen Specter of Pennsylvania introduced a bill that would expand United States jurisdiction to include terrorists who attack American nationals abroad.<sup>48</sup> This bill formed the nucleus of the Act that President Ronald Reagan signed into law on September 1, 1986.<sup>49</sup> The amendment to title 18 of the United States Code grants United States courts jurisdiction to prosecute any foreign national who, in an act of international terrorism,<sup>50</sup> attempts to kill, kills, assaults, or makes any violent attack upon any American national.<sup>51</sup> It provides for the prosecution of any terrorist found within the territorial limits of the United States regardless of

<sup>45</sup> See, e.g., *id.* at 716.

<sup>46</sup> *United States v. Columba-Colella*, 604 F.2d 356 (5th Cir. 1979) (defendant suspected of receiving stolen vehicle in foreign commerce not within court's jurisdiction because Congress only recognizes protective and objective territorial theories of jurisdiction).

<sup>47</sup> See DEPARTMENT OF STATE, *supra* note 40, at 56-69, reprinted in 1887 FOR. REL. at 793-802.

<sup>48</sup> S. 1429, 99th Cong., 1st Sess. (1985).

<sup>49</sup> Statement on Signing H.R. 4151 into Law, 22 WEEKLY COMP. PRES. DOC. 1124 (Aug. 27, 1986).

<sup>50</sup> See *infra* note 57 and accompanying text.

<sup>51</sup> Section 1202 of the Act provides:

(a) HOMICIDE. — Whoever kills a national of the United States, while such national is outside the United States, shall —

(1) if the killing is a murder as defined in section 1111(a) of this title, be fined under this title or imprisoned for any term of years or for life, or both so fined and so imprisoned;

(2) if the killing is a voluntary manslaughter as defined in section 1112(a) of this title, be fined under this title or imprisoned not more than ten years, or both; and

(3) if the killing is an involuntary manslaughter as defined in section 1112(a) of this title, be fined under this title or imprisoned not more than three years, or both.

(b) ATTEMPT OR CONSPIRACY WITH RESPECT TO HOMICIDE. — Who-

the situs of his offense.<sup>52</sup> For jurisdiction, the Act only requires that the accused has committed an act of international terrorism against an American.<sup>53</sup>

The original Senate proposal<sup>54</sup> defined terrorism by reference to the Foreign Intelligence Surveillance Act.<sup>55</sup> That statute defines international terrorism as a violation of the criminal laws of the United States or any foreign nation that *appears* intended to intimidate or coerce the population, to influence the policy of the government, or to affect the conduct of the government.<sup>56</sup> Although the

ever outside the United States attempts to kill, or engages in a conspiracy to kill, a national of the United States shall —

(1) in the case of an attempt to commit a killing that is a murder as defined in this chapter, be fined under this title or imprisoned not more than 20 years, or both; and

(2) in the case of a conspiracy by two or more persons to commit a killing that is a murder as defined in section 1111(a) of this title, if one or more of such persons do any overt act to effect the object of the conspiracy, be fined under this title or imprisoned for any term of years or for life, or both so fined and so imprisoned.

(c) OTHER CONDUCT. — Whoever outside the United States engages in physical violence —

(1) with intent to cause serious bodily injury to a national of the United States; or

(2) with the result that serious bodily injury is caused to a national of the United States;

shall be fined under this title or imprisoned more than five years, or both.

Pub. L. No. 99-399, § 1202, 1986 U.S. CODE CONG. & ADMIN. NEWS (100 Stat.) 853, 896-97 (to be codified at 18 U.S.C. § 2331).

<sup>52</sup> This conclusion follows from the text of the statute. Amended subsections (b) and (c) both begin “[w]hoever outside the United States” and then list a series of offenses falling within the respective subsection. This language continues the emphasis that began in the earliest drafts of the Act. The statute in its earliest form had made it crystal clear that the bill contains no territorial limits. *See* S. 1429, § 2(a), 99th Cong., 1st Sess. (1985) (“(d) 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.”).

<sup>53</sup> *See infra* note 57 and accompanying text.

<sup>54</sup> S. 1429, § 2(a), 99th Cong., 1st Sess. (1985) (“(c) For the purposes of this section, ‘international terrorism’ is used as defined in the Foreign Intelligence Surveillance Act, title 50, section 1801(c).”).

<sup>55</sup> 50 U.S.C.A. § 1801 (West Supp. 1987) (empowering President to order electronic surveillance to acquire foreign intelligence information).

<sup>56</sup> 50 U.S.C.A. § 1801(c) (West Supp. 1987) (emphasis added) provides:

(c) “International terrorism” means 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* —

(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

Act no longer defines terrorism by reference to the Foreign Intelligence Surveillance Act, it adopts an almost identical definition. As a condition to prosecution under the Act, the Attorney General, or his subordinate, must certify that "such offense was intended to coerce, intimidate, or retaliate against a government or a civilian population."<sup>57</sup>

## B. Constitutional Authority for the Act

Article I, section 8, clause 10 of the Constitution authorizes the Act's expansion of extraterritorial jurisdiction, even if the statute violates customary international law.<sup>58</sup> The Constitution provides Congress with the power to "define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations."<sup>59</sup> This provision contains at least two separate and distinct congressional powers—prescriptive jurisdiction and enforcement jurisdiction.<sup>60</sup> Prescriptive jurisdiction applies to the

(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.

Finding a suitable definition for terrorism is a quagmire which is beyond the scope of this Note. No widespread agreement exists among nations as to the definition of "international terrorism." See Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that Are of International Significance, Oct. 8, 1976, 27 U.S.T. 3949, T.I.A.S. No. 8413; see also H.R. CONF. REP. NO. 783, 99th Cong., 2d Sess. 86 (1986) [hereinafter CONF. REP.] (urging President to call for international negotiations to formulate definition of terrorism), reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS 1925, 1959.

<sup>57</sup> Section 1202 of the Act provides in relevant part:

(e) LIMITATION ON PROSECUTION. — No prosecution for any offense described in this section shall be undertaken by the United States except on written certification of the Attorney General or the highest ranking subordinate of the Attorney General with responsibility for criminal prosecutions that, in the judgment of the certifying official, such offense was intended to coerce, intimidate, or retaliate against a government or a civilian population.

Pub. L. No. 99-399, § 1202, 1986 U.S. CODE CONG. & ADMIN. NEWS (100 Stat.) 853, 897 (to be codified at 18 U.S.C. § 2331(e)).

The Act's legislative history clearly demonstrates that Congress intended that the certification by the Attorney General, or his subordinate, should not be subject to judicial review. The same legislative history, however, emphatically states that the purpose of the Attorney General's certification is to ensure that the Act is not applied to normal street crime or barroom brawls. CONF. REP., *supra* note 57, at 87-88, reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS at 1960-61. Thus, Congress paradoxically intended to limit the scope of the statute while removing the mechanism to carry out that intent.

<sup>58</sup> The Act, however, is within the bounds of customary international law. See *supra* note 27 and accompanying text.

<sup>59</sup> U.S. CONST. art. I, § 8, cl. 10 ("offenses clause").

<sup>60</sup> Comment, *The Offenses Clause: Congress' International Penal Power*, 8 COLUM. J. TRANSNAT'L L. 279 (1969). That the offenses clause envisioned both prescriptive and enforcement jurisdiction is more obvious from an early draft of the provision. The Committee of Detail indicated a desire to express the provision in two separate clauses.

activities, relations, or status of persons.<sup>61</sup> Enforcement jurisdiction authorizes a government to use its resources to induce or compel compliance with its laws.<sup>62</sup>

Statutes and case law interpreting the offenses clause are meager, especially if they are separated from enactments and decisions arising from Congress's related power to define and punish piracies and felonies.<sup>63</sup> Because Congress rarely indicates the constitutional authority for a particular jurisdictional statute, isolating the provisions which rely on the offenses clause is difficult. Similarly, courts have avoided deciding questions under the offenses clause by resorting to more widely recognized powers.<sup>64</sup>

In the early nineteenth century, Justice Story broadly interpreted the offenses power:

As the United States are responsible to foreign governments for all violations of the law of nations, and as the welfare of the Union is essentially connected with the conduct of our citizens in regard to foreign nations, [C]ongress ought to possess the power to define and punish *all* such offences, which may interrupt our intercourse and harmony with, and our duties to them.<sup>65</sup>

Justice Story's reasoning suggests that universally accepted violations of international law are not the only crimes within the clause's scope. A constitutional basis for imposing criminal liability exists if an individual's behavior affects American foreign policy or violates Congress's perception of international norms.<sup>66</sup> The offenses clause thus extends jurisdiction beyond the limits allowed by customary international law.

This position is supported in *Ex parte Quirin*,<sup>67</sup> one of the few cases directly dealing with the offenses clause. In *Quirin* a military tribunal prosecuted, under the Articles of War,<sup>68</sup> German saboteurs

This draft would have empowered the legislative branch to "provide tribunals and punishment for mere offenses against the law of nations [and t]o declare the law of piracy, felonies and captures on the high seas, and captures on land." 4 M. FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 44 (1937).

<sup>61</sup> RESTATEMENT DRAFT, *supra* note 12, § 402.

<sup>62</sup> *Id.*

<sup>63</sup> Comment, *supra* note 60, at 293 ("This scarcity is explained primarily by the fact that the entire volume of American law concerning foreign relations is relatively modest and by the fact that Congress derives overlapping authority in this area from the foreign commerce and implied foreign affairs powers.").

<sup>64</sup> *Id.* ("[W]hen tribunals have faced close questions under the Offences [sic] Clause, they have been able to avoid the issue by resorting to other more ample powers.").

<sup>65</sup> 3 J. STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* 57-58 (1833) (emphasis added).

<sup>66</sup> Comment, *supra* note 60, at 291.

<sup>67</sup> 317 U.S. 1 (1942).

<sup>68</sup> 10 U.S.C. § 802(a)(9) (1982).

who landed on the shores of Long Island and Florida in 1942. The Articles, contrary to customary international law,<sup>69</sup> permit the military to prosecute prisoners of war.<sup>70</sup> The captured soldiers petitioned the Court for a writ of habeas corpus, claiming an unconstitutional prosecution by the military court and the denial of a jury trial. The Court, invoking the offenses clause, denied the writ. Chief Justice Stone wrote that Congress may incorporate customary international law by reference but need not undertake "to codify that branch of international law or to mark its precise boundaries, or to enumerate or define by statute all the acts which the law condemns."<sup>71</sup> *Quirin* thereby reiterated Justice Story's suggestion that Congress has broad discretion in defining and punishing offenses against the law of nations, a discretion unencumbered by international law norms.

The decision in *United States v. Rodriguez*<sup>72</sup> also supports Justice Story's analysis. In *Rodriguez* the court, utilizing the protective theory of jurisdiction,<sup>73</sup> found the statute prohibiting visa forging applicable to acts committed outside of United States territory by virtue of the offenses clause.<sup>74</sup> The court wrote that where there is "a crime against the sovereignty of the state, the very existence of the state provides authority to Congress to prohibit its commission,"<sup>75</sup> and emphasized that "Congress may pick and choose whatever recognized principle of international jurisdiction is necessary to accomplish [its legislative] purpose . . . without waiting for action to be taken by foreign governments which would grant the United States the right to exercise jurisdiction."<sup>76</sup> The court reasoned that prior disuse or even misuse of the federal government's power to incorporate a principle of international jurisdiction into a statute is not a basis for finding that Congress cannot employ this power.<sup>77</sup>

---

<sup>69</sup> *Quirin*, 317 U.S. at 29 ("We may assume that there are acts regarded in other countries, or by some writers on international law, . . . which would not be triable by military tribunal here . . .").

<sup>70</sup> 10 U.S.C. § 802(a)(9) (1982); see also *Quirin*, 317 U.S. at 41 (no need for exception from fifth and sixth amendments "to continue the practice of trying, before military tribunals without a jury, offenses committed by enemy belligerents against the law of war").

<sup>71</sup> 317 U.S. at 29.

<sup>72</sup> 182 F. Supp. 479 (S.D. Cal. 1960), *aff'd in part sub nom. Rocha v. United States*, 288 F.2d 545 (9th Cir.), *cert. denied*, 366 U.S. 948 (1961).

<sup>73</sup> See *supra* text accompanying note 16.

<sup>74</sup> 182 F. Supp. at 494.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 491.

<sup>77</sup> *Id.*; see also *United States v. Layton*, 509 F. Supp. 212, 216 (N.D. Cal.) ("The fact that Congress in the past may have favored or disfavored any particular ground for asserting extra-territorial jurisdiction is irrelevant to the consideration of Congress's con-

In *United States v. Smith*<sup>78</sup> the First Circuit stated that the offenses clause gives Congress the power to authorize assertions of jurisdiction based on any of the internationally recognized principles. The court held that Congress intended a statute prohibiting drug possession on the high seas to apply to acts committed outside United States territory on non-United States vessels.<sup>79</sup> The court upheld the assertion of jurisdiction under an objective territorial principle, which "has been defined as including acts done outside a geographic jurisdiction, but which produce detrimental effects within it."<sup>80</sup> Although this type of jurisdiction is unconventional, the court held that the constitution permits Congress to authorize the assertion of jurisdiction under such a theory.

The *Rodriguez* and *Smith* courts thus accepted Justice Story's conclusion that Congress's authority to proscribe crimes committed outside the United States extends beyond the limits of the American judicial tradition.<sup>81</sup> Congress may define and punish offenses in international law, notwithstanding a lack of consensus as to the nature of the crime in the United States or in the world community.

### III

#### THE EXPANSION OF EXTRATERRITORIAL JURISDICTION IS JUSTIFIABLE WITHIN THE FRAMEWORK OF EXISTING UNITED STATES AND INTERNATIONAL LAW

Even though Congress has constitutional authority to exercise extraterritorial jurisdiction, the Act will only gain acceptance in the world community if it has a legitimate basis in international law. The Act finds such support from the universal theory and the passive personality principle.<sup>82</sup>

---

stitutional power to assert that jurisdiction."), *appeal dismissed*, 645 F.2d 681 (9th Cir.), *cert. denied*, 452 U.S. 973 (1981).

<sup>78</sup> 680 F.2d 255 (1st Cir. 1982), *cert. denied*, 459 U.S. 1110 (1983).

<sup>79</sup> 680 F.2d at 258.

<sup>80</sup> *Id.*

<sup>81</sup> *See supra* notes 65-66 and accompanying text; *see also* *Rivard v. United States*, 375 F.2d 882, 886 (5th Cir.) (although not all nations have accepted objective territorial theory of jurisdiction, court adopted it to permit prosecution of alien drug smugglers who acted solely outside United States where co-conspirators had acted within United States territory), *cert. denied*, 389 U.S. 884 (1967).

<sup>82</sup> *See supra* text accompanying notes 18-19 (defining these bases). None of the other three jurisdictional theories, *see supra* text accompanying notes 15-17, are applicable to the Act. The territorial theory is inapplicable because the Act applies to crimes committed outside the United States. *See supra* note 51. The protective theory is inapplicable because terrorists most often threaten the territorial integrity of states other than the United States, even though they attempt to use United States citizens as a means to their goal. The nationality theory is inapplicable because the Act applies to any person who commits a terrorist act, not just United States nationals. *Id.*

By utilizing international terrorism as its focal point,<sup>83</sup> the Act arguably asserts jurisdiction based upon the universal theory. Under this view, the statute justifies the expansion of extraterritorial jurisdiction by implying that international terrorism deserves treatment as a crime of worldwide magnitude.<sup>84</sup>

The statute also asserts jurisdiction under the passive personality principle by proscribing terrorist acts solely because they injure United States nationals.<sup>85</sup> Although the passive personality principle allows the United States to assert jurisdiction over foreign nationals committing any criminal act that injures a United States national, the Act's definition of international terrorism limits the principle's application to a specified class of crimes. Although both of these theories appear to lend theoretical support to the Act, the passive personality principle is more appropriate than the universal theory. The central problem with relying upon the universal theory revolves around the difficulty in adequately defining terrorism.

#### A. The Universal Theory

The Act should have a solid basis in customary principles of jurisdiction because it will have widespread impact on international relations.<sup>86</sup> Although a state may believe that the exercise of universal jurisdiction is appropriate in a particular situation, universal jurisdiction, by definition, requires an international consensus that the crime is so heinous that any nation obtaining control over the offender ought to assert jurisdiction.<sup>87</sup>

Although many nations condemn terrorism,<sup>88</sup> never will a significant number of states reach such a consensus on a satisfactory definition of the term.<sup>89</sup> The United States government would

---

<sup>83</sup> See *supra* note 57.

<sup>84</sup> See CONF. REP., *supra* note 56, at 86 ("[T]he sense of the Senate [is] that the President should call for international negotiations for the purpose of agreeing on a definition of international terrorist crimes, and whether such crimes would constitute universal crimes under international law."), reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS at 1959.

<sup>85</sup> See *supra* note 51.

<sup>86</sup> Asserting jurisdiction based on the passive personality principle is certain to cause havoc regarding the question of extradition. When one state seeks extradition from another state on the basis of a questionable theory of jurisdiction, disputes are sure to arise. See Blakesley, *supra* note 22, at 716.

<sup>87</sup> As Professor Paust points out, universal jurisdiction is technically jurisdiction to enforce, and this enforcement is made on behalf of the world community. Paust, *supra* note 3, at 211; see *supra* notes 22-24 and accompanying text.

<sup>88</sup> See, e.g., N.Y. Times, Oct. 10, 1985, at A10, col. 4 (U.N. Security Council condemns hijacking of Achille Lauro cruise ship); N.Y. Times, Feb. 13, 1985, at A8, col. 1 (European leaders take steps to coordinate efforts to fight terrorism in Europe).

<sup>89</sup> See Blakesley, *supra* note 22, at 716. Not surprisingly, commentators disagree on whether the universal theory embraces terrorism. Cf. RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 34 (1965) (recognizing only piracy as

probably argue that the fundamental distinction between ordinary crime and terrorism is that crime is motivated by self-interest and terrorism seeks, through violent acts aimed at civilians, to effect political change.<sup>90</sup> In contrast, governments that are politically sympathetic to the perpetrators of such acts would label those actors as national heroes. As long as ideological differences exist, nations will remain unable to agree on who is and who is not a terrorist. Thus, the difference between terrorists, criminals, and freedom fighters will only depend upon where the accused is prosecuted. So long as no useful, widely accepted definition of terrorism under international law exists, the offense cannot fall within universal jurisdiction.

### B. The Passive Personality Principle

The Act is justifiable under the passive personality principle because it asserts jurisdiction on the basis of harm caused to United States nationals while abroad.<sup>91</sup> The Act has ample precedent in international law.<sup>92</sup> Although the passive personality principle is less solidly grounded in United States tradition, an American court has rejected it only when not expressly authorized by Congress. Therefore, the Act does not reverse prior United States policy.

In the past, the judiciary dismissed the passive personality principle as incompatible with United States law. Those early courts, however, did not confront the same issues that exist today, and their holdings did not expressly reject the passive personality principle.<sup>93</sup> Furthermore, early opinions emphasized that territoriality and na-

---

offense subject to universal jurisdiction); RESTATEMENT DRAFT, *supra* note 15, § 404 (extending universal jurisdiction to include "slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps terrorism"); Blakesley, *supra* note 22, at 718-19 (Terrorism has "not yet achieved sufficient intensity of interest to warrant recognition as [a] true bas[i]s for universal jurisdiction . . .").

<sup>90</sup> See *supra* notes 56-57 and accompanying text.

<sup>91</sup> See *supra* note 51.

<sup>92</sup> See *supra* note 27 and accompanying text.

<sup>93</sup> Authors have relied upon a number of cases as repudiating the passive personality principle. But none of these early cases stands for strict repudiation of the principle; all were decided before the Harvard Research article announced that the passive personality principle is an acceptable theory of jurisdiction under international law. See *supra* text accompanying note 14.

In *The Antelope*, 23 U.S. (10 Wheat.) 66 (1825), the Court held that the United States must return only those slaves which Spanish plaintiffs could prove to be theirs. Chief Justice Marshall reasoned that "the Courts of no country execute the penal laws of another." *Id.* at 123. The passive personality principle was not an issue. The Act does not include a provision whereby United States courts execute the laws of another country; rather, under the passive personality principle the United States would apply United States law.

In *Huntington v. Attrill*, 146 U.S. 657 (1892), the Court addressed whether to give effect to a New York penal statute in a Maryland court. Although the parties characterized the action as involving a question of extraterritorial jurisdiction in international law, the case essentially concerned the full faith and credit clause. In addition, the Court

tionality constituted the only valid bases for jurisdictions.<sup>94</sup>

Beginning in the early 1960s, however, federal courts began to recognize all of the principles of jurisdiction that the 1935 *Harvard Research* article set out as valid bases for jurisdiction. In *United States v. Layton*<sup>95</sup> the court exercised jurisdiction over the defendant, who was accused of killing a United States congressman in Guyana. Although the statutes involved did not explicitly authorize extraterritorial jurisdiction, the court stated that "it is proper to infer such an intent and to hold that extra-territorial jurisdiction is implicit in the respective statutes."<sup>96</sup> The court found that four principles of jurisdiction supported prosecution of the defendant, including the passive personality principle.<sup>97</sup> Although jurisdiction was possible without the principle, the court noted with approval that it "is cited in the case law without any suggestion that it should not be relied upon by the courts."<sup>98</sup> *Layton* therefore supports the proposition that courts can apply the passive personality principle even absent specific congressional authorization.<sup>99</sup>

One circuit court has expressly refused to apply the passive personality principle on its own volition. Despite its language, the opinion in *United States v. Columba-Colella*,<sup>100</sup> offers no persuasive evidence that Congress may not employ the principle if it so chooses. The defendant, a Mexican, although pleading guilty at trial to selling a stolen American car while in Mexico, reserved the right to appeal the jurisdictional issue.<sup>101</sup> On appeal the Fifth Circuit first rejected any possible application of the territorial and protective theories before looking to the passive personality principle for possible jurisdiction. In rejecting this principle the court stated:

---

used the word "penal" in a noncriminal sense. Thus, the case is authority neither for nor against the passive personality principle.

The most persuasive of these early cases is *United States v. Nord Deutscher Lloyd*, 223 U.S. 512, 518 (1911), where the Court unequivocally stated that "the defendant cannot be indicted here for what he did in a foreign country." The criminal statute implicated, however, made no provision for extraterritorial application and sought to protect European nationals rather than United States citizens.

<sup>94</sup> See cases cited *supra* note 26.

<sup>95</sup> 509 F. Supp. 212 (N.D. Cal.), *appeal dismissed*, 645 F.2d 681 (9th Cir.), *cert. denied*, 452 U.S. 973 (1981).

<sup>96</sup> 509 F. Supp. at 216.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 216 n.5.

<sup>99</sup> Other cases assert that United States courts may exercise jurisdiction under any of the five theories for jurisdiction, including the passive personality principle. See *United States v. Smith*, 680 F.2d 255, 257 (1st Cir. 1982), *cert. denied*, 459 U.S. 1110 (1983); *United States v. Keller*, 451 F. Supp. 631, 635 (D.P.R. 1978); *United States v. Rodriguez*, 182 F. Supp. 479, 487 (S.D. Cal. 1960), *aff'd in part sub nom. Rocha v. United States*, 288 F.2d 545 (9th Cir.), *cert. denied*, 366 U.S. 948 (1961).

<sup>100</sup> 604 F.2d 356 (5th Cir. 1979).

<sup>101</sup> *Id.* at 358.

[T]hat an act affects the citizen of a state is not a sufficient basis for a state to assert jurisdiction over the act. It is difficult to distinguish the present case from one in which the defendant had attempted not to fence a stolen car but instead to pick the pockets of American tourists in Acapulco. No one would argue either that Congress would be competent to prohibit such conduct or that the courts of the United States would have jurisdiction to enforce such a prohibition were the offender in their control. *Indeed, Congress would not be competent to attach criminal sanctions to the murder of an American by a foreign national in a foreign country . . .*<sup>102</sup>

The court cited no binding authority for these assertions. As the principal authority for rejecting the passive personality principle, it relied upon the *Restatement (Second) of the Foreign Relations Law of the United States*.<sup>103</sup> But since 1979, the year of the *Columba-Colella* decision, the American Law Institute has reconsidered its position.<sup>104</sup> While the language of the American Law Institute's most recent draft would not permit jurisdiction based upon the particular facts of *Columba-Colella*,<sup>105</sup> the draft does not support the Fifth Circuit's assertion that Congress is not competent to prohibit conduct based on the passive personality principle.

The *Columba-Colella* court also relied upon *American Banana Co. v. United Fruit Co.*<sup>106</sup> and *United States v. Aluminum Co. of America*,<sup>107</sup> both of which tangentially touched the passive personality issue in the context of a civil suit.<sup>108</sup> In *American Banana*, an Alabama corporation sued a New Jersey corporation alleging that the Sherman Act governs torts committed in Panama.<sup>109</sup> In holding that the Sherman Act does not govern, the Court presumed that "all legislation is *prima facie* territorial."<sup>110</sup> The decision, however, rested on a construction of the Sherman Act, not the *power* of Congress to prescribe

<sup>102</sup> *Id.* at 360 (emphasis added).

<sup>103</sup> *Id.*

<sup>104</sup> RESTATEMENT DRAFT, *supra* note 12, § 402 comment g; *see supra* note 44.

<sup>105</sup> *See* 604 F.2d at 356.

<sup>106</sup> 213 U.S. 347 (1909).

<sup>107</sup> 148 F.2d 416 (2d Cir. 1945).

<sup>108</sup> The court relied on the language in *American Banana* which reads that "the foregoing considerations would lead *in case of doubt* to a construction of any statute as intended to be confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power." *American Banana*, 213 U.S. at 357 (emphasis added), *cited with approval in Columba-Colella*, 604 F.2d at 360. The court's reliance on the language in *American Banana* raises doubt as to whether the principal basis of that decision was Congress's intent or a rejection of the passive personality principle. Similarly, the court relied on the statement in *Aluminum Co. of America* that "[w]e should not impute to Congress an intent to punish all whom its courts can catch, for conduct which has no consequences within the United States." *Aluminum Co. of America*, 148 F.2d at 443 (emphasis added), *cited with approval in Columba-Colella*, 604 F.2d at 360.

<sup>109</sup> 213 U.S. at 357.

<sup>110</sup> *Id.* (quoting *Ex parte Blain*, 12 Ch. D. 522, 528 (1879)).

rules of conduct for acts committed abroad.<sup>111</sup> Congress clearly intends that the Antiterrorist Act, unlike the Sherman Act, apply extraterritorially.<sup>112</sup> In *Aluminum Co. of America* the Second Circuit upheld the dismissal of a complaint which alleged a conspiracy to restrain foreign and interstate commerce in violation of the Sherman Act.<sup>113</sup> The court relied upon congressional intent in holding that the Sherman Act does not attach liability for conduct outside the United States.<sup>114</sup> Thus, in neither *American Banana* nor *Aluminum Co. of America* did the judiciary challenge the power of Congress to attach criminal liability for acts committed abroad.

Nor did the *Columba-Colella* court evince any constitutional basis for rejecting the passive personality principle. Ultimately, the court simply stated that Congress did not intend to assert jurisdiction over foreign nationals who knowingly received vehicles in foreign countries that were stolen in the United States.<sup>115</sup> The court's broad language suggesting that Congress cannot assert jurisdiction based on the passive personality principle<sup>116</sup> is not supportable in light of Congress's constitutional powers.<sup>117</sup> The case can only mean that a court should not exercise this type of jurisdiction absent clear congressional authorization. Nevertheless, no decisions have emerged which contradict the language of *Columba-Colella*, partially because courts have avoided the passive personality principle where possible and have stretched other more widely accepted theories to meet the needs of the case at bar.<sup>118</sup>

#### IV

##### PROPOSAL FOR LIMITED EXTRATERRITORIAL JURISDICTION BASED ON THE PASSIVE PERSONALITY PRINCIPLE

The Act represents a worthy extension of United States jurisdiction over international crimes pursuant to the passive personality principle. The statute, however, raises difficulties for the United States in the conduct of its foreign policy.<sup>119</sup>

---

<sup>111</sup> *Id.* ("In the case of the present statute the improbability of the United States attempting to make acts done in Panama or Costa Rica criminal is obvious . . . . We think it entirely plain that what the defendant did in Panama or Costa Rica is not within the scope of the statute so far as the present suit is concerned.").

<sup>112</sup> See *supra* note 51.

<sup>113</sup> 148 F.2d at 422.

<sup>114</sup> *Id.* at 443.

<sup>115</sup> 604 F.2d at 358.

<sup>116</sup> *Id.* at 360.

<sup>117</sup> See *supra* notes 59-81 and accompanying text.

<sup>118</sup> See Comment, *supra* note 60, at 293.

<sup>119</sup> Perhaps the Act's most disturbing aspect is no indication in its legislative history that Congress pondered or debated the foreign policy implications of this extension of jurisdiction. See CONF. REP., *supra* note 56, reprinted in 1986 U.S. CODE CONG. & ADMIN.

Unconditional adoption of the passive personality principle may subject United States citizens to reciprocal treatment abroad.<sup>120</sup> The United States cannot hope to prosecute foreign acts committed against its citizens without subjecting United States citizens to similar prosecutions from foreign countries.<sup>121</sup> Such treatment seems particularly likely in nations sympathetic to what the United States calls "terrorism."

Consequently, Congress must define and apply the passive personality principle narrowly to ensure that the United States cautiously asserts such jurisdiction. As the Act stands, the United States retains unfettered jurisdiction over foreign nationals committing acts of terrorism abroad against United States nationals.<sup>122</sup> This jurisdiction is broader than necessary, and could cause hostility toward United States nationals abroad. A more politically sound approach would temper the bill with strict self-imposed limits.

Congress should amend the Act to contain a provision asserting United States jurisdiction only in cases where the state with primary jurisdiction refuses or fails to prosecute the accused.<sup>123</sup> This limited jurisdiction comports with the reasonableness test employed by the German (Federal Republic) Penal Code and the Italian Penal Code.<sup>124</sup> This constraint would reduce conflicts involving concurrent jurisdiction for offenses which fall within the Act and a foreign sovereign's laws. American jurisdiction over these offenses should

NEWS at 1925; H.R. REP. NO. 494, 99th Cong., 2d Sess. (1986), *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS at 1865; S. REP. NO. 304, 99th Cong., 2d Sess. (1986); 132 CONG. REC. H1236-72 (daily ed. Mar. 18, 1986), S6212-13 (daily ed. May 20, 1986), S8403-20, 8435-40, 8458-59, 8470 (daily ed. June 25, 1986), S11,250 (daily ed. Aug. 11, 1986).

<sup>120</sup> See Paust, "Nonprotected" Persons or Things, in LEGAL ASPECTS OF INTERNATIONAL TERRORISM 395 app. at 395 (A. Evans & J. Murphy eds. 1978). In addition, Professor Paust asserts, without citing support, that an act explicitly adopting the passive personality principle would be highly questionable under international law. *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> See *supra* notes 51 & 57 and accompanying text.

<sup>123</sup> [A]rticle 7 of the German (Federal Republic) Penal Code provides for application to acts injuring German nationals if the acts are punishable in the place they occurred or if no other authority takes jurisdiction; article 10 of the Italian Penal Code provides for jurisdiction over acts committed by foreigners abroad that injure Italy or one of its citizens, when the offense is punishable under Italian Law by perpetual hard labor or imprisonment [sic] for one year or more [and no other authority takes jurisdiction].

Blakesley, *supra* note 22, at 714 n.91.

China, however, takes a different approach to the principle in article 9 of its criminal code. That article adopts the passive personality principle, but provides that "an act may be punished notwithstanding that a final decision has been rendered." The Chinese approach thus does not eliminate the possibility of double jeopardy to the wrongdoer. See Sarkar, *supra* note 20, in INTERNATIONAL CRIMINAL LAW, *supra* note 20, at 66 n.78; Harvard Research, *supra* note 3, at 616 n.8.

<sup>124</sup> StGB art. 7; C.P. art. 10; see *supra* note 123.

remain secondary, for no legitimate reason exists to prosecute alleged offenders when other competent courts exercise jurisdiction under the more traditional jurisdictional notions of territoriality and nationality.

To complement this reasonableness test, Congress should redefine "terrorism" to require a heightened state of mind. Under the present definition an alleged offender need only *appear to intend* any one or more of the crime's secondary consequences.<sup>125</sup> This definition blurs the distinction between an ordinary crime committed against United States nationals abroad, and acts actually intended by their perpetrators to have political effects beyond their primary consequences. The statute should require the trier of fact<sup>126</sup> to conclude that the accused *intended* political consequences beyond the primary effects of the crime, and not merely that the crime *appeared intended* to achieve a secondary purpose.<sup>127</sup> This refined definition of terrorism would reduce the likelihood of arbitrary or inappropriate applications of the Act.

By limiting the scope of jurisdiction based on the passive personality principle and redefining "international terrorism," the United States can narrow the risk of unwarranted reciprocal applications of the passive personality principle. If nations were then to follow a strict rule of reciprocity, foreign nations could subject United States citizens to prosecution for acts wholly committed outside the foreign nation's territory only under limited circumstances.

### CONCLUSION

The Omnibus Diplomatic Security and Antiterrorism Act of 1986 is a laudable attempt to deal with the problem of international terrorism by establishing United States jurisdiction over terrorists. The Act is both constitutional and justifiable under internationally accepted notions of jurisdiction. Still, the statute's current form sweeps too broadly to avoid important prudential concerns. If Congress narrows its definition of "terrorism," and limits the Act's scope to situations where the nation with primary jurisdiction refuses to exercise it, the statute will stand as a reasonable attempt by

---

<sup>125</sup> See *supra* note 56.

<sup>126</sup> The trier of fact is better equipped to make this determination than the Attorney General, who currently has that responsibility under the Act. See *supra* note 57 and accompanying text.

<sup>127</sup> *Id.* Although requiring the ultimate trier of fact to find that the defendant *intended* the political consequences of his act would limit application of the statute, the definitional problem of terrorism in international law would remain unresolved. See *supra* note 84.

Congress to reconcile traditional notions of jurisdiction with the emerging reality of international terrorism.

*Patrick L. Donnelly*