Cornell International Law Journal

Volume 21
Issue 1 *Winter 1988*

Article 3

The Omnibus Diplomatic Security and Antiterrorism Act of 1986: Faulty Drafting May Defeat Efforts to Bring Terrorists to Justice

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The Omnibus Diplomatic Security and Antiterrorism Act of 1986: Faulty Drafting May Defeat Efforts to Bring Terrorists to Justice

To combat the dramatic rise in foreign terrorist attacks against U.S. targets,[1] Congress recently enacted legislation intended to enhance the security of U.S. diplomats and civilians residing or travelling abroad.[2] Title XII of the Omnibus Diplomatic Security and Antiterrorism Act of 1986[3] establishes U.S. criminal jurisdiction over extraterritorial terrorist[4] assaults[5] against U.S. nationals.[6] The Act asserts extraterritorial

1. Sen. Arlen Specter of Pennsylvania recently introduced a bill in which he estimates that 6,500 terrorist incidents have occurred worldwide in the past decade, of which 2,500 (38%) have been directed against Americans. S. Res. 190, 99th Cong., 1st Sess., 131 CONG. REC. 8999 (1985).

2. On August 27, 1986, President Reagan signed into law the Omnibus Diplomatic Security and Antiterrorism Act of 1986, Pub. L. No. 99-399, 1986 U.S. CODE CONG. & ADMIN. NEWS (100 Stat.) 853 [hereinafter Antiterrorism Act]. Of the Act's thirteen titles, this Note focuses on Title XII, which creates a mechanism for the criminal punishment of international terrorists. The other titles implement diverse antiterrorist measures. For example, Titles I through IV of the Antiterrorism Act establish a Diplomatic Security Program for the protection of U.S. missions abroad. Title V authorizes the payment of awards for information leading to the arrest of international terrorists. Title VI contains measures for the prevention of nuclear terrorism. Title IX improves the security of maritime activity against terrorist attack.

3. Title XII of the Antiterrorism Act, *id.* at 895, consists of two sections. Section 1201 of Title XII expresses the sense of Congress that the President should encourage the establishment of an international agreement on all aspects of international terrorism. The substance of Title XII, however, appears in section 1202. That section amends Title 18 of the U.S. Code by adding chapter 113A, "EXTRATERRITORIAL JURISDICTION OVER TERRORIST ACTS ABROAD AGAINST UNITED STATES NATIONALS." *See id.* at 896. The codification of section 1202 may be found at 18 U.S.C.A. § 2331 (West Supp. 1987). (Hereinafter Title XII.)

4. Title XII limits prosecution to terrorist attacks by requiring Attorney General certification that the "offense was intended to coerce, intimidate, or retaliate against a government or a civilian population." 18 U.S.C.A. § 2331(e) (West Supp. 1987). An earlier version of the Antiterrorism Act incorporated an existing statutory definition of terrorism. S. 1429, 99th Cong., 1st Sess. § 2(a) (1985). That definition describes international terrorism as an act in violation of the criminal laws of any nation which appears to be intended to intimidate or coerce a civilian population, to influence the policy of a government, or to affect the conduct of a government, and which transcends national boundaries. 50 U.S.C.A. § 1801(c) (West Supp. 1987). The definition of "terrorism" is a subject of international debate and is beyond the scope of this Note. *See, e.g.*, Baxter, *A Skeptical Look at the Concept of Terrorism*, 7 AKRON L. REV. 380 (1973).

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authority solely on the basis of the victim's nationality, a theory of jurisdiction termed the passive personality principle.

The Antiterrorism Act's reliance on the passive personality principle as its sole basis for extraterritorial jurisdiction will hinder, if not prevent, the extradition of terrorists under Title XII. A number of civil law countries recognize the passive personality principle as a legitimate theory of extraterritorial jurisdiction.[7] The principle has also been incorporated into multilateral conventions dealing with terrorism.[8] Nevertheless, the validity and acceptance of the passive personality theory remains uncertain under international law. This Note argues, therefore, that the Antiterrorism Act will not accomplish its goal of enhancing the safety of U.S. citizens abroad because extradition hinges on a questionable theory of jurisdiction.

Congress, when enacting this statute, apparently failed to consider the implications of limiting jurisdictional authority to the passive personality principle. This Note proposes that Congress amend the Antiterrorism Act to incorporate other theories of extraterritorial jurisdiction, thereby strengthening the ability of the United States to obtain jurisdiction to prosecute terrorists in U.S. courts.

This Note focuses on the jurisdictional and extradition aspects of the Antiterrorism Act. Section I generally surveys international extradition law, and then examines specific multilateral arrangements providing for terrorist extradition and prosecution. Section II surveys the theories of jurisdiction available to states in proscribing extraterritorial terrorist acts, including the passive personality principle. Section III then analyzes the obstacles to effective enforcement of the Antiterrorism Act in light of international extradition law and practice. Finally, Section IV proposes improvements to the Act's claim of extraterritorial jurisdiction.

I. Extradition Treaties and International Practice

Because Title XII of the Antiterrorism Act proscribes certain conduct occurring outside territorial borders, the United States will obtain jurisdiction over alleged terrorists primarily by extradition.[9] Title XII's

5. 18 U.S.C.A. §§ 2331(a)-(c) (West Supp. 1987) prohibits actual and attempted terrorist murder, manslaughter, violent assault, and conspiracy to commit homicide.

6. The term "U.S. national" includes not only U.S. citizens but also non-citizens who owe "permanent allegiance" to the United States. 8 U.S.C. § 1101(a)(22) (1982).

7. *See infra* notes 84-85 and accompanying text.

8. *See, e.g.*, Tokyo Convention, *infra* note 35, art. 4(b); New York Convention, *infra* note 36, art. 3, § 1(c); Hostages Convention, *infra* note 37, art. 5, § 1(d).

9. Where a formal extradition request is impractical or inappropriate, however, the United States will consider the forceful abduction of alleged offenders. 132 CONG. REC. S8438 (daily ed. June 25, 1986) (statement of Sen. Specter). The U.S. military's recent interception of the Egyptian airliner carrying the hijackers of the *Achille Lauro* cruise ship in October, 1985, illustrates this approach. *See* N.Y. Times, Oct. 11, 1986, at A1, col. 6. The U.S. Supreme Court has held that forcibly abduct-

effectiveness thus hinges on how successfully it can be used to obtain extradition. This section first discusses the framework and general principles of international extradition, and then examines specific multilateral extradition treaties.

A. Bilateral Treaties and Multilateral Conventions

Under U.S. law, extradition is the "process by which, in accordance to [sic] treaty provisions and subject to its limitations one state requests another to surrender a person charged with a criminal violation of the laws of the requesting state who is within the jurisdiction of the requested state, for the purposes of answering criminal charges. . . ."[10] Although no general extradition duty exists under international law, states may create between themselves a binding obligation to extradite by entering into "contractual," or reciprocal arrangements.[11] While some civil law countries rely on principles of international comity or unwritten reciprocal arrangements for extradition,[12] common law countries generally will not extradite in the absence of a written instrument.[13] Extradition instruments may take one of three primary forms: bilateral extradition treaties, multilateral extradition treaties, or multilateral conventions which contain provisions for extradition.[14]

Bilateral treaties are the most important source of extradition law; the United States, for example, is a party to over 100 such treaties.[15] Each treaty contains both provisions for surrendering alleged or actual offenders and a procedure by which the requested state can deny extra-

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ing U.S. citizens or foreign nationals abroad is not inconsistent with the constitutional guarantee of due process. Frisbie v. Collins, 342 U.S. 519, 522 (1952); Kerr v. Illinois, 119 U.S. 436 (1886). Although forceful abduction eliminates the need to act under an accepted basis of extraterritorial jurisdiction, it remains an extraordinary means of obtaining personal jurisdiction. Accordingly, this Note assumes the United States will primarily use formal extradition methods to obtain authority over terrorists and to submit them to prosecution.

10. M.C. BASSIOUNI, INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER 27 (1974).

11. I. SHEARER, EXTRADITION IN INTERNATIONAL LAW 24 (1971). "Extradition treaties and legislation not only supply the broad principles and the detailed rules of extradition but also dictate the very existence of the obligation to surrender fugitive criminals." *Id.* at 22.

12. These civil law countries will ordinarily have only a small number of extradition treaties, either with states which will not extradite without a treaty, or where for reasons of territorial contiguity or commercial ties, a formal treaty is especially desirable. M.C. BASSIOUNI, *supra* note 10, at 9.

13. *Id.* at 8.

14. States also may obtain personal jurisdiction over alleged offenders by a variety of legal and illegal means. Legal means include exclusion and deportation, in contrast to illegal seizure or abduction. *See* J. MURPHY, PUNISHING INTERNATIONAL TERRORISTS 81-94 (1985). By excluding or deporting an alleged terrorist, a state may deny that person the privilege of remaining in the state, and may place him in the control of another state which seeks jurisdiction. *See* M.C. BASSIOUNI, I INTERNATIONAL EXTRADITION: U.S. LAW AND PRACTICE ch. IV, at § 1-1 (1982). For a brief discussion of abduction, see *supra* note 9.

15. M.C. BASSIOUNI, *supra* note 14, at ch. I, § 5-1.

dition. Because each bilateral treaty constitutes an exclusive, independent source of rights and obligations which binds the parties, different countries' extradition requests based on identical crimes may produce inconsistent results. In short, the grant or denial of extradition will depend upon the terms of the relevant treaty.[16]

Multilateral extradition treaties function identically to bilateral treaties but provide a legal basis for extradition among multiple state parties.[17] Multilateral arrangements promote certainty in extradition practice by reducing inconsistencies among various bilateral treaties and their implementing legislation.[18] In international practice, however, signatories rarely invoke the multilateral treaties dealing exclusively with extradition.[19]

More effective are those multilateral conventions which prohibit certain forms of terrorism and contain provisions for terrorist extradition. These counter-terrorist conventions contain flexible extradition arrangements; signatories may either employ the convention instrument as a legal basis for requesting extradition, or may use bilateral extradition treaties to extradite offenders for the specific crimes proscribed by the convention. The counter-terrorist conventions signify a realization by the world community of the need to create a cooperative international mechanism for the extradition and prosecution of terrorists. Further, the conventions indicate the difficulty of extraditing terrorists within the existing framework of bilateral extradition treaties.[20]

B. Substantive Requirements of Extradition Treaties

Comprehensive assessment of the Antiterrorism Act's utility for terrorist extradition would require analyzing the one hundred plus extradition treaties in force in the United States. The similarities among these trea-

16. In addition to the extradition treaty's specific provisions, other factors may also affect a state's extradition decision, including the nature of the offense, the prerogative, if it exists, to flexibly interpret treaty requirements, the result of the requested state's previous extradition requests to the United States, foreign policy matters, and political relations between the two countries. For a discussion of the policy issues involved in extradition decisions, see generally *id.* at ch. X.

17. *Id.* at ch. II, § 3-6.

18. *Id.* at ch. I, § 4-1. In the United States, extradition treaties are deemed self-executing unless they provide otherwise, and therefore require no implementing legislation. Terlinden v. Ames, 184 U.S. 270, 288 (1901). But, courts will generally interpret subsequently enacted federal legislation as controlling over conflicting treaty provisions. M.C. BASSIOUNI, *supra* note 14, at ch. II, § 4-7.

While the Antiterrorism Act extends U.S. jurisdiction over extraterritorial terrorist assaults, it leaves unchanged the federal extradition statutes, codified at 18 U.S.C. §§ 3181-95 (1982).

19. In contrast to the large number of bilateral extradition treaties to which the United States is a party, it belongs to only one multilateral extradition treaty, a regional accord. Montevideo Convention on Extradition, Dec. 26, 1933, 49 Stat. 3111, T.S. No. 882, 165 L.N.T.S. 45. Moreover, when requesting extradition from member states, the United States prefers using bilateral treaties. *See* M.C. BASSIOUNI, *supra* note 14, at ch. II, §§ 3-1, 3-2.

20. *See infra* notes 40-43 and accompanying text.

ties, however, provide sufficient background for discussing Title XII's potential problems. This discussion will focus on three of the most important substantive requirements incorporated into all extradition treaties and multilateral conventions: (1) extraditability of the offense; (2) double criminality; and (3) reciprocity.[21]

Offenses are extraditable if the parties so deem them. Two approaches to establishing extraditability are most common. A treaty may specifically list extraditable offenses, or it may designate a formula, such as a minimum penalty enforceable in both states, to determine extraditability.[22] For example, the Italy-United States extradition treaty provides that an offense is extraditable "if it is punishable under the laws of both Contracting Parties by deprivation of liberty for a period of more than one year or by a more severe penalty."[23]

The concept of double criminality requires the alleged conduct to be an offense in both the requesting and requested states before the requested state will grant extradition.[24] A variation of the double criminality requirement extends to jurisdictional authority. This "special use" of double criminality provides that not only must the conduct constitute an offense in both states, "but also that the theory of jurisdiction over the conduct asserted by the requesting state be accepted as proper by the requested state."[25] Thus, if the illegal conduct for which extradition is requested (e.g., terrorist assault) constitutes a crime in the requested state, but the theory of jurisdiction asserted (e.g., the passive personality principle) is not recognized by that state, extradition will fail if the treaty requires application of the "special use" of the double criminality requirement.[26]

Reciprocity refers to "the mutuality of obligations and undertakings of the parties" to the extradition agreement.[27] A state may insist on reciprocity as a prerequisite to extradition as a matter of sovereign prerogative,[28] and may apply reciprocity to any aspect of the extradition

21. Specialty and non-inquiry are also substantive requirements. The specialty principle dictates that "a fugitive may not be tried in the requesting State for an offence other than the one for which surrender was made. . . ." I. SHEARER, *supra* note 11, at 146. The non-inquiry doctrine precludes inquiry into the requesting state's legal processes. M.C. BASSIOUNI, *supra* note 14, at ch. VII, § 2-1.

22. M.C. BASSIOUNI, *supra* note 14, at ch. VII, § 4-1.

23. Extradition Treaty Between the United States and Italy, Oct. 13, 1983, art. II, S. TREATY DOC. No. 20, 98th Cong., 2d Sess. 1 (1984), *reprinted in* 24 I.L.M. 1525 (1985).

24. I. SHEARER, *supra* note 11, at 137.

25. Blakesley, *A Conceptual Framework for Extradition and Jurisdiction Over Extraterritorial Crimes*, 1984 UTAH L. REV. 685, 744.

26. The frequency with which the "special use" requirement of double criminality applies to extradition requests is beyond the scope of this Note. Blakesley states that denial on this basis is "standard" in international and U.S. practice. *Id.* at 747. Blakesley's cited sources for this proposition, however, date from 1873 and 1906.

27. M.C. BASSIOUNI, *supra* note 14, at ch. VII, § 2-1. Absent a treaty, the principle of reciprocity may provide the legal basis for extradition.

28. *Id.* § 2-4. Many recent U.S. extradition treaties dispense with reciprocity in the area of jurisdiction. Treaties without such flexibility, however, "would require

process.[29] For example, a U.S. court may deny extradition if the requesting state obtained the indictment by means contrary to U.S. due process standards.[30] Similarly, a country without a death penalty may refuse to extradite a terrorist to the United States, if in the United States the defendant might be subject to the death penalty.[31]

C. Extraditing Terrorists Under Multilateral Conventions

Multilateral conventions can remedy two of the primary impediments to terrorist extradition, the problems resulting from reciprocity and the special use of double criminality. Also, because a state cannot request the extradition of a terrorist unless the alleged conduct constitutes a specific violation of its criminal law, multilateral conventions overcome problems of extraditability by requiring signatories to recognize specific terrorist activities as criminal offenses subject to extradition.[32] The United States is a signatory to six multilateral antiterrorist conventions.[33] United States legislation criminalizing terrorist conduct has largely been enacted in conjunction with U.S. accession to these conventions.[34]

Multilateral conventions provide a cooperative framework between states for terrorist extradition and prosecution, addressing three prevalent terrorist activities: air piracy or "hijacking";[35] attacks upon diplo-

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reciprocity, i.e., similarity of jurisdictional bases." *Id.* at ch. VII, § 2-2 (citation omitted).

29. *Id.* § 2-1.

30. *See id.* § 2-3.

31. For example, the United States sought extradition from West Germany of Mohammed Hamadei, a Lebanese accused of the June, 1985 hijacking of a TWA airliner that resulted in the death of U.S. Navy diver Robert D. Stethem. West Germany conditioned extradition on U.S. agreement not to seek the death penalty. West Germany's constitution forbids the death penalty, and all of the country's extradition treaties allow extradition only where execution is not a possible punishment. Washington Post, Jan. 17, 1987, at A24, col. a. Although the United States acceded to this demand, the West German government ultimately refused extradition because of concern that extradition would endanger the lives of two West German businessmen held in Lebanon by kidnappers seeking Hamadei's release. Washington Post, June 23, 1987, at A12, col. e.

32. No convention can solve the problem of extraditability for states which view terrorist acts as legitimate means of pursuing political change and refuse to join the convention.

33. *See infra* notes 35-37.

34. For example, to fulfill its obligations as a signatory to the International Convention Against the Taking of Hostages, *infra* note 37, the U.S. Congress enacted the Act for the Prevention and Punishment of the Crime of Hostage Taking as part of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 2186 (codified at 18 U.S.C. § 1203 (Supp. III 1985)).

35. The Convention on Offenses and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, 20 U.S.T. 2941, T.I.A.S. No. 6768, 704 U.N.T.S. 219 [hereinafter Tokyo Convention]; the Convention on the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, T.I.A.S. No. 7192, 860 U.N.T.S. 105 [hereinafter Hague Convention]; and the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T 564, T.I.A.S. No. 7570 [hereinafter Montreal Convention].

matic agents;[36] and the taking of civilian hostages.[37] All but one of the counter-terrorist conventions[38] oblige signatories either to submit offenders of these crimes to prosecution or to extradite them to another member state wishing to prosecute.[39]

Counter-terrorist conventions help states overcome the impediments to terrorist extradition that bilateral extradition treaties create.[40] The conventions ensure satisfaction of substantive extradition requirements. To illustrate, each of the counter-terrorist conventions obliges member states to recognize a specific form of terrorist conduct as a criminal offense under their domestic law.[41] Moreover, all but one of the conventions obligate signatories to adopt legislation giving their courts jurisdiction over the proscribed offenses.[42] This requirement prevents terrorists from escaping effective prosecution if a requested state denies extradition.[43] Finally, states may employ either the convention or bilateral treaties to obtain extradition.

Unfortunately, the counter-terrorist conventions also reflect the international community's fragmented approach to proscribing terrorist acts. Rather than providing a general framework for terrorist extradition and prosecution, each convention applies only to a specific terrorist act. For example, while the United States can request and obtain the extradition of a terrorist who assaults a U.S. diplomat abroad under the New York Convention,[44] that convention is inapplicable to extraterrito-

36. The Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents 2, Dec. 14, 1973, 28 U.S.T. 1975, T.I.A.S. No. 8532 [hereinafter New York Convention]; and the Organization of American States Convention to Prevent and Punish Acts of Terrorism Taking the Forms of Crime Against Persons and Related Extortion That Are of International Significance, Feb. 2, 1971, 27 U.S.T. 3949, T.I.A.S. No. 8413 [hereinafter O.A.S. Convention].

37. International Convention Against the Taking of Hostages, Dec. 17, 1979, G.A. Res. 34/146, 34 U.N. GAOR Supp. (No. 39), U.N. Doc. A/34/39 (1979) [hereinafter Hostages Convention].

38. The Tokyo Convention does not obligate member states to extradite alleged offenders. Tokyo Convention, *supra* note 35, art. 16.

39. The counter-terrorist conventions thus incorporate the ancient maxim, *aut dedere, aut judicare*, "extradite or prosecute." The obligation, however, "is not to *try* the accused much less to punish him, but to submit the case to be considered for prosecution by the appropriate national prosecuting authority. If the criminal justice system lacks integrity, the risk of political intervention in the prosecution or at trial exists." J. MURPHY, *supra* note 14, at 10 (emphasis in original).

40. With the exception of the Hostages Convention, *supra* note 37, the counter-terrorist conventions discussed here have been joined by a large number of states world-wide. Accordingly, they are an effective mechanism for states to obtain the extradition of terrorists. For a listing of the member states to these conventions, see DEPARTMENT OF STATE, TREATIES IN FORCE (1986).

41. *See supra* notes 35-37 and accompanying text.

42. Of all the counter-terrorist conventions to which the United States is a party, only the O.A.S. Convention, *supra* note 36, does not incorporate this requirement. However, this convention has, for the most part, been superseded by the New York Convention, *supra* note 36. J. MURPHY, *supra* note 14, at 11.

43. J. MURPHY, *supra* note 14, at 21.

44. *Supra* note 36.

rial assaults on U.S. civilians.

Terrorist extradition is often more difficult to obtain for offenses not specifically proscribed by multilateral agreements. In particular, when a state requests extradition for an extraterritorial terrorist act (such as assault upon or murder of U.S. civilians) the theory of jurisdiction the requesting state asserts must be acceptable to the requested state. The following section, therefore, examines the jurisdictional theories states use in proscribing extraterritorial criminal conduct, focusing in particular upon the passive personality principle on which the Antiterrorism Act relies.

II. Theories of Extraterritorial Jurisdiction under International Law and Their Application to the Extradition of Terrorists

In international law, jurisdiction refers to a state's authority to prescribe rules of conduct and its ability to enforce those rules.[45] Countries universally recognize both aspects of jurisdictional authority, rule-making and rule-enforcing, over conduct occurring within a state's territory "and, beyond it, such other conduct which affects its legitimate interests."[46] While no state disputes another state's power to regulate conduct within its borders, theories of extraterritorial jurisdiction enjoy less consensus.[47] Accordingly, although states must usually recognize a requesting state's assertion of jurisdiction over offenses committed within the requesting state's territory, they need not recognize that authority for offenses committed outside the requesting state's territory.

This section first clarifies the relationship between jurisdiction and extradition. It then explores the major theories of extraterritorial jurisdiction that provide alternative bases for U.S. assertion of jurisdiction over terrorist attacks abroad. Finally, this section examines in detail the passive personality principle, the sole basis for asserting extraterritorial jurisdiction in the Antiterrorism Act.

A. Jurisdiction and Extradition

Extradition consists of the surrender by one country (the "requested state") to another (the "requesting state") of an individual accused or convicted of an offense by the requesting state.[48] The requesting state must be "competent to try and punish" the alleged offender;[49] i.e., the state must demonstrate a legal basis for exercising authority over the individual.[50] The requested state's recognition of the requesting state's jurisdictional authority is thus "a condition precedent both to the request and to the granting of extradition."[51]

45. M.C. Bassiouni, *supra* note 14, at ch. VI, § 1-1.
46. *Id.* § 1-2.
47. *Id.* §§ 1-3, 1-4.
48. Black's Law Dictionary 526 (5th ed. 1979).
49. *Id.*
50. M.C. Bassiouni, *supra* note 10, at 203.
51. *Id.* at 204.

Despite the significance of jurisdiction in extradition practice, few, if any, extradition treaties define jurisdiction. Instead they use "such terms as within the jurisdiction of the requesting state without further clarification."[52] Although extradition treaties do not restrict the jurisdictional theories a state may assert over extraterritorial conduct, many treaties preclude extradition where the requested state does not recognize the jurisdictional theory asserted. To clarify the significance of jurisdiction in extradition practice, the next section describes the general theories of extraterritorial jurisdiction and their status under international law.

B. Extraterritorial Jurisdiction

In 1935, the Harvard Research in International Law ("Harvard Research") completed a Draft Convention on Jurisdiction with Respect to Crime.[53] The Harvard Research identified five general principles, still applicable today, upon which states base criminal jurisdiction:[54] the territorial, the nationality,[55] the protective, the universality, and the passive personality theories of jurisdiction. Except for the territorial theory, these theories support *extraterritorial* jurisdiction when actions beyond state borders implicate certain state interests.

In general, the territorial theory relates to offenses committed in whole or in part within the state's borders. An extended application of the territorial theory, however, reaches extraterritorial conduct. This "objective" arm of the territorial theory justifies extraterritorial jurisdiction over conduct causing a harmful effect within the state.[56] A textbook example of the objective territorial principle occurs when the defendant shoots a gun in Italy, injuring a person in France, who subsequently dies

52. M.C. BASSIOUNI, *supra* note 14, at ch. VI, § 1-1. Many modern extradition treaties, however, distinguish between offenses committed within and without the requesting state's territory. The recognition of extraterritorial jurisdiction may depend upon the offender's nationality, or on the requested state's recognition of the jurisdictional theory asserted. *See, e.g.*, Treaty Between the United States and the Federal Republic of Germany Concerning Extradition, June 20, 1978, art. 1, 32 U.S.T. 1485, 1488, T.I.A.S. No. 9785, at 4. In contrast to this general practice, the counter-terrorist conventions explicitly define the jurisdictional bases exercisable by member states. For example, article 5 of the Hostages Convention, *supra* note 37, authorizes states to establish jurisdiction over covered offenses when acts are: committed within the state's territory; committed by or against the state's nationals; or intended to affect state action.

53. Harvard Research in International Law, *Jurisdiction with Respect to Crime*, 29 AM. J. INT'L L. 435 (Supp. 1935) [hereinafter Harvard Research]. "United States court decisions as well as most coursebooks and treatises on international law have adopted the Harvard Research designations." Blakesley, *supra* note 25, at 687 n.7 (citations omitted).

54. Harvard Research, *supra* note 53, at 445.

55. Under the nationality theory the state may exercise jurisdiction over the criminal acts of its nationals no matter where the offense takes place. *See id.* at 519-39.

56. Blakesley, *United States Jurisdiction Over Extraterritorial Crime*, 73 J. OF CRIM. L. & CRIMINOLOGY 1109, 1123 (1982). "The objective territorial principle is designed to allow the state to take jurisdiction and to prosecute, convict and punish the perpetrator of conduct which *causes* harm within the territory of the forum state, even though none of the conduct occurs there." *Id.* at 1124-25 (emphasis in original).

of the wound in Switzerland.[57] In this case the harm in France (or Switzerland) was caused by extraterritorial conduct (i.e., in Italy). Under the "objective" arm of territorial theory, therefore, either France or Switzerland could exercise jurisdiction over the defendant.

The protective principle of jurisdiction allows a state to assert jurisdiction over an alien (an individual or a legal entity) "acting outside the state's territorial boundaries but in a manner which threatens significant interests of the state."[58] Relevant protective interests include threats to national security, territorial integrity, political independence, or self-defense.[59] In general, the protective principle has broad applicability because states can use it to assert jurisdiction over inchoate offenses which pose a *potentially* damaging effect.[60]

Under the universality theory, a state may assert jurisdiction based merely on the alleged offender's presence within its territory. Unlike other jurisdictional theories, the universality theory requires no territorial, nationality, or "effects" link.[61] Instead, the universality principle applies to offenses considered so grave as to affect the interests of all states, regardless of where the offender acts.[62] It grants to all states jurisdiction to prosecute the offender. Traditionally, this principle has been applied to piracy and the slave trade.[63]

Today there is some movement to expand the number of offenses subject to universal jurisdiction. For example, the Tentative Final Draft of the Restatement (Second) of Foreign Relations Law of the United States (the "Restatement (Second) Tentative Final Draft") lists "attacks on or hijacking of aircraft," and "perhaps terrorism" as crimes possibly subject to universal jurisdiction under customary international law.[64]

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57. *See* Blakesley, *supra* note 25, at 696-97.

58. M.C. BASSIOUNI, *supra* note 10, at 259; *see also* RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(3) (Tent. Draft No. 2, 1981); Blakesley, *supra* note 56, at 1132-49; Paust, *Federal Jurisdiction Over Extraterritorial Acts of Terrorism and Nonimmunity for Foreign Violators of International Law Under the FSIA and the Act of State Doctrine*, 23 VA. J. OF INT'L L. 191, 209-10 (1983).

59. Paust, *supra* note 58, at 210. "Because of the significant dangers the protective principle poses to relations among nations, application of the theory is limited to those recognized and stated abstractions or functions." Blakesley, *supra* note 56, at 1138.

60. *See* United States v. Pizzarusso, 388 F.2d 8, 10-11 (2d Cir. 1968); *see also* Blakesley, *supra* note 56, at 1137-38.

61. *See* M.C. BASSIOUNI, *supra* note 10, at 261-62.

62. *Id.* at 262.

63. *Id.* at 263, 266-67. More recently, the Nuremberg Tribunals applied the theory to genocide and war crimes. *Id.* at 268-69. Its application has recently expanded to crimes such as narcotics trafficking, counterfeiting, and hijacking. *Id.* at 268.

64. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (Tent. Final Draft, 1985) [hereinafter RESTATEMENT (SECOND) TENTATIVE FINAL DRAFT]. Comment a to § 404 of the Restatement (Second) Tentative Final Draft, provides: "*Expanding Class of Universal Offenses*. . . . Universal jurisdiction over the listed offenses is established in international law as a result of universal condemnation of those activities and general interest in cooperating to suppress them, as reflected in widely-accepted international agreements and resolutions of international organizations." *Id.* § 404, comment a (emphasis in original). A reporter's note

However, a state must base its assertion of universality jurisdiction on world-wide recognition of the offense as a "crime against mankind."[65] As the equivocal language of the Restatement suggests, most forms of terrorism do not yet command this recognition.

The protective, universality, and objective territorial theories may all potentially justify the assertion of jurisdiction over extraterritorial terrorist assaults. Indeed, the majority of states recognize these theories[66] and have successfully asserted them to obtain extradition of criminal offenders. In contrast, the international community has traditionally regarded the passive personality theory, the sole basis for jurisdiction relied on by the Antiterrorism Act,[67] as the least favored basis for asserting extraterritorial jurisdiction. Because a state "cannot properly prescribe activity or exercise jurisdiction unless it is pursuant to an 'accepted' basis of jurisdiction,"[68] this Note will examine the development and status of the passive personality theory of jurisdiction.

C. Evolution of the Passive Personality Principle

1. International Law

The leading decision on state authority to regulate extraterritorial conduct affecting its nationals is the *S.S. Lotus* case.[69] In 1926, a French and a Turkish steamer collided on the high seas, resulting in the death of eight Turkish nationals aboard the Turkish ship.[70] Despite protests from France, Turkey seized the captain of the French steamer upon his arrival in Constantinople.[71] A Turkish court subsequently tried and convicted the captain of manslaughter[72] under a provision of the Turkish Criminal Code permitting the exercise of passive personality jurisdiction.[73] With the acquiescence of Turkey, France appealed the

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in the Restatement (Second) Tentative Final Draft states that the First Restatement of Foreign Relations Law listed piracy as the only offense subject to undisputed universal jurisdiction. *Id.* § 404, reporter's note 3. The First Restatement "listed other crimes of universal interest but deemed them not yet subject to universal jurisdiction as a matter of international law." *Id.*

65. *See* M.C. BASSIOUNI, *supra* note 14, at ch. VI, § 6-1.

66. *See* RESTATEMENT (SECOND) TENTATIVE FINAL DRAFT, *supra* note 64, § 402 comments (a)-(f).

67. Title XII of the Antiterrorism Act uses the passive personality principle to assert extraterritorial jurisdiction because it prohibits foreign terrorist assaults when the victim is a U.S. national. 18 U.S.C.A. § 2331 (West Supp. 1987).

68. Blakesley, *supra* note 56, at 1157.

69. The S.S. Lotus (France v. Turkey), 1927 P.C.I.J. (Ser. A) No. 10 (Sept. 7).

70. *Id.* at 10.

71. *Id.*

72. *Id.* at 11.

73. The Turkish Penal Code provided:

> Any foreigner who . . . commits an offense abroad to the prejudice of Turkey or of a Turkish subject, for which offense Turkish law prescribes a penalty involving loss of freedom for a minimum period of not less than one year, shall be punished in accordance with the Turkish Penal Code provided he is arrested in Turkey.

Turkish Penal Code, art. 6, Law No. 765 of March 1, 1926, *quoted in* The S.S. Lotus (France v. Turkey) 1927 P.C.I.J. (Ser. A) No. 10, at 14-15 (Sept. 7).

conviction to the Permanent Court of International Justice.[74] The Court upheld Turkey's right to prosecute the French national[75] based on a combination of two theories of jurisdiction: the passive personality and the "floating territorial" theories.[76] All six dissenting judges,[77] however, declared that international law did not permit the exercise of jurisdiction based solely on the victim's nationality.[78]

Eight years later, the influential Harvard Research Draft Convention[79] categorized the passive personality principle as an insufficient basis for extraterritorial jurisdiction under international law. The Convention termed the passive personality theory the most strongly contested and "most difficult to justify in theory" of all the principles of jurisdiction.[80] International legal scholars have similarly disparaged the passive personality theory.[81] In fact, some commentators challenged the passive personality principle's inclusion in the early counter-terrorist conventions, asserting that the principle went beyond generally accepted principles of customary international law.[82]

The Restatement (Second) Tentative Final Draft, however, notes an increasing acceptance of the theory.[83] Israel and France, for example, have recently recognized the passive personality principle,[84] and the

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74. The S.S. Lotus (France v. Turkey), 1927 P.C.I.J. (Ser. A) No. 10, at 11 (Sept. 7).

75. *Id.* at 32.

76. *Id.* at 22-27. The floating territorial theory of jurisdiction, a subset of the territorial principle, regards a ship as an extension of the territory of the state in which it is registered. Thus, the Permanent Court of International Justice considered the French steamer's collision into the Turkish ship as having caused an effect in Turkish territory.

77. Twelve judges sat on the *Lotus* court. In the event of a tie, the President's vote became decisive.

78. *The S.S. Lotus*, 1927 P.C.I.J. (Ser. A) No. 10, at 34-107; *see also* W. BISHOP, INTERNATIONAL LAW 548 (3d ed. 1971).

79. *See supra* note 53.

80. W. BISHOP, *supra* note 78, at 579. Harvard Research concluded that other jurisdictional theories, particularly the universality principle, could serve all the interests for which the passive personality might be asserted. *Id.*

81. *See, e.g.*, J. BRIERLY, THE LAW OF NATIONS 234 (1955); *see also* M.C. BASSIOUNI, *supra* note 14, at ch. VI, § 4-2.

82. *See* Murphy, *Protected Persons and Diplomatic Facilities*, in LEGAL ASPECTS OF INTERNATIONAL TERRORISM, 277, 307 (A. Evans & J. Murphy eds. 1978); *see also* DeSchutter, *Problems of Jurisdiction in the International Control and Repression of Terrorism*, in INTERNATIONAL TERRORISM AND POLITICAL CRIMES 377, 383 (M.C. Bassiouni ed. 1975). *But see* Blakesley, *supra* note 25, at 717 n.99 ("Certainly, given the wide acceptance of this principle . . . it would be difficult to say that international law bars a broad application of it."). Moreover, the adoption of the passive personality principle by subsequent conventions may render moot the argument that it is not a generally accepted principle of international law.

83. The Restatement provides: "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, or to assassinations of a state's ambassadors or government officials." RESTATEMENT (SECOND) TENTATIVE FINAL DRAFT, *supra* note 64, § 402, comment g.

84. Israel adopted the passive personality principle into its penal code on March 21, 1972. Penal Law Amendment (Offenses Committed Abroad) (Amendment No.

criminal codes of several other civil law countries use the principle to cover a broad range of conduct.[85] The principle has especially gained recognition in the context of terrorism. Presently, three counter-terrorist conventions recognize the passive personality principle.[86] In particular, sixty-eight parties to the New York Convention[87] explicitly accept the principle's legitimacy for asserting jurisdiction over terrorist attacks upon diplomats.[88]

Despite the passive personality principle's growing international acceptance, the number of nations that would honor its assertion over other forms of terrorism is impossible to determine. No one has comprehensively studied the passive personality principle since the 1935 Harvard Research Draft Convention. Commentators stress that states cannot rely on it as an exclusive basis of jurisdiction.[89] When an additional basis exists, however, the passive personality principle may serve to reinforce the claim of jurisdiction.[90]

2. United States Law

The United States, like much of the international community, has also rejected the passive personality theory in its law and practice. In the *Cutting* case,[91] Mexico tried and convicted an American national for allegedly publishing a libelous account of a Mexican citizen in a Texas newspaper. In a protest letter to the U.S. charge d'affairs in Mexico, Secretary of State Bayard articulated the traditional U.S. position on the passive personality principle:

> [I]t has consistently been laid down in the United States as a rule of action that citizens of the United States cannot be held answerable in foreign countries for offenses that were wholly committed and consummated either in their own country or in other countries not subject to the jurisdiction of the punishing state.[92]

In the most recent case affirming the traditional U.S. position, the United States denied a West German request to extradite several aliens

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4) Law, 5732-1972. France adopted the principle by promulgating article 689 of the Code of Criminal Procedure on July 11, 1975. France adopted the passive personality principle primarily to punish the perpetrators of crimes against French citizens when the country in which the crime was committed failed to prosecute. Blakesley, *supra* note 25, at 714-15.

85. In addition to France and Israel, see *supra* note 84, West Germany, Italy, Sweden, China, and Mexico permit the exercise of passive personality jurisdiction.

86. *See* Tokyo Convention, *supra* note 35, art. 4; New York Convention, *supra* note 36, art. 3; Hostages Convention, *supra* note 37, art. 5.

87. *Supra* note 36.

88. DEPARTMENT OF STATE, *supra* note 40, at 304.

89. *See, e.g.*, M.C. BASSIOUNI, *supra* note 14, at ch. VI, § 4-6.

90. *Id.* Bassiouni points out that, all else being equal, in cases of conflict between two states, the state claiming passive personality as an additional basis receives priority. *Id.*

91. Cutting case, 1887 For. Rel. 751 (1888), *reported in* 2 J.B. MOORE, INTERNATIONAL LAW DIGEST 232-40 (1906).

92. *Id.* at 753-57, 2 J.B. MOORE at 228-32.

for allegedly murdering four German officers on the high seas.[93] West Germany employed a provision of its penal code authorizing passive personality jurisdiction;[94] the United States, however, denied extradition by applying the "special use" of the double criminality condition.[95] Although the United States and West Germany both recognized murder as an extraditable offense, U.S. law disallowed the assertion of extraterritorial jurisdiction based on the passive personality theory.[96] This divergence of jurisdictional recognition precluded extradition. The Restatement (Second) of Foreign Relations Law of the United States embodied the American position at that time: "A state does not have the jurisdiction to prescribe a rule of law attaching a legal consequence to conduct of an alien outside its territory merely on the ground that the conduct affects one of its nationals."[97]

The United States' traditional broad-based rejection of the passive personality principle conflicts with its recent adoption of that principle in joining counter-terrorist conventions and enacting implementing legislation.[98] Nevertheless, application of the passive personality principle to extraterritorial offenses appears to satisfy U.S. constitutional standards.[99] The policy of the United States, though unarticulated, is to recognize passive personality jurisdiction when applied to terrorist acts, but not for other criminal conduct. The passive personality theory thus holds a similar status under both U.S. and customary international law: it is insufficient as an independent basis for jurisdiction, except where a multilateral convention, and its implementing legislation, adopts the principle.

Given the United States' determination to act against terrorist attacks abroad, the logical question is whether other jurisdictional theories could replace or reinforce use of the passive personality theory in the Antiterrorism Act. After discussing the Act, the following section

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93. MS DEP'T OF STATE, file no. P75 9175-0032 (1975), *reported in* Blakesley, *supra* note 25, at 748-49.

94. German Penal Code art. 4(2) (1974).

95. *See supra* note 25 and accompanying text.

96. Although the victims were military representatives of the requesting state, the United States would most likely reach the same result today. Although West Germany and the United States are both signatories to the New York Convention, *supra* note 36, the convention does not include military personnel as "protected persons." Moreover, the United States' current practice of recognizing passive personality jurisdiction in the context of terrorism does not necessarily alter the traditional U.S. rejection of the theory for "non-terrorist" crimes.

97. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 30(2) (1965).

98. In addition to the Antiterrorism Act, the Act for the Prevention and Punishment of the Crime of Hostage Taking, which implements U.S. obligations under the Hostages Convention, *supra* note 37, also recognizes passive personality jurisdiction over terrorist conduct abroad, e.g., kidnapping. 18 U.S.C. § 1203 (Supp. III 1985); *see also infra* note 103.

99. *See* Note, *Extraterritorial Jurisdiction over Acts of Terrorism Committed Abroad: Omnibus Diplomatic Security and Antiterrorism Act of 1986*, 72 CORNELL L. REV. 620 (1987).

examines the inherent problems of extraditing terrorists who assault U.S. nationals abroad.

III. Obstacles to the Successful Extradition of Terrorists under the Omnibus Diplomatic Security and Antiterrorism Act of 1986

The Omnibus Diplomatic Security and Antiterrorist Act of 1986[100] aims to enhance the security of U.S. government personnel[101] and civilians from terrorist activity abroad. Specifically, Title XII of the Act creates extraterritorial authority to prosecute and punish terrorists who cause serious bodily injury to, or the death of, a U.S. national.[102] The Act fills a gap in U.S. law by extending the existing federal prohibition against extraterritorial assault upon U.S. officials to *any* U.S. national abroad.[103] Although the Act contains no special extradition provision,[104] extradition is clearly essential to the Act's utility.[105]

The Antiterrorism Act looks exclusively to the victim's nationality as a basis for asserting extraterritorial jurisdiction.[106] Title XII neither refers to nor supports any other theory of extraterritorial jurisdiction, such as jurisdiction based on "harmful effects" within the United States (the objective territorial theory), or based on national security or self-defense (the protective principle). While terrorists may be prosecuted

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100. *Supra* note 2.

101. *See id.*

102. 18 U.S.C.A. §§ 2331(a)-(c) (West Supp. 1987).

103. *See* JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE, H.R. REP. NO. 783, 99th Cong., 2d Sess. 87 (1986), *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 1926, 1960. 18 U.S.C. § 1116 (1982) prohibits extraterritorial murder or manslaughter of foreign officials, official guests, and internationally protected persons. Congress enacted this provision to implement U.S. obligations under the New York and O.A.S. Conventions, *supra* note 36. United States v. Layton, 509 F. Supp. 212, 222 (N.D. Cal.), *appeal dismissed*, 645 F.2d 681 (9th Cir.), *cert. denied*, 452 U.S. 972 (1981).

104. However, section 1201(c)(2) of the Antiterrorism Act, *supra* note 2, calls on the President to encourage negotiation of an international convention to prevent and control all aspects of international terrorism. The Section expresses the "sense of Congress" that such a convention contain, *inter alia*, uniform extradition rules for terrorists.

105. Sen. Arlen Specter, the sponsor of the original measure finally enacted as Title XII, strongly advocates using force, if necessary, to bring alleged terrorists into custody when extradition is impractical or impossible. *See* 131 CONG. REC. S8960-61 (daily ed. June 27, 1985) (statement of Sen. Specter); *see also Hearing on Bills to Authorize Prosecution of Terrorists and Others Who Attack U.S. Government Employees and Citizens Abroad Before the Subcomm. on Security and Terrorism of the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 40-42 (1985) (statement of Sen. Specter) [hereinafter *Hearing*]. However, even Sen. Specter acknowledges that using such tactics is extreme and ordinarily unnecessary. *Id.* at 33.

106. 18 U.S.C.A. § 2331(a) (West Supp. 1987) provides: "Whoever kills *a national of the United States*, while such national is outside the United States, shall [be subject to severe penalties]." *Id.* (emphasis added). Similarly, section 2331(b) prescribes penalties for "[w]hoever outside the United States attempts to kill, or engages in a conspiracy to kill, *a national of the United States*." *Id.* § 2331(b) (emphasis added). Finally, section 2331(c) provides penalties for extraterritorial assaults intended to or causing serious bodily injury *to U.S. nationals*. *Id.* § 2331(c) (emphasis added).

merely if present within the United States (i.e., according to the universality principle), the definition of the substantive offense is predicated on the victim's U.S. nationality. Thus, for the purposes of extradition, the passive personality principle represents the sole legal basis for the United States to assert jurisdiction over Title XII offenders.

Senator Arlen Specter introduced three bills in 1985 proposing criminalization of terrorist attacks against U.S. citizens abroad.[107] Although these bills varied in the specific crimes proscribed and the victims protected, they shared a common purpose with Title XII as enacted—deterring terrorist acts against U.S. citizens by threatening federal prosecution whenever personal jurisdiction can be obtained.[108]

Unlike Title XII, these proposals did not depend solely on the passive personality principle for jurisdiction. By permitting jurisdiction whenever the alleged offender is found within U.S. borders, "irrespective of the place where the offense was committed or the nationality of the victim or the alleged offender,"[109] the bills made use of the universality principle. Because the bills also employed the passive personality principle,[110] they would, despite some internal inconsistencies,[111] have supported a request for extradition based either on the universality or passive personality theories of jurisdiction.

Congress likely intended to base Title XII jurisdiction upon a combination of the passive personality and protective principles. When Sen. Specter, the bill's sponsor, introduced the legislation into Congress, he stated that the United States was justified in exercising jurisdiction over terrorists attacking U.S. citizens abroad because of the adverse effect of these attacks upon U.S. security and upon the operation of governmental functions.[112] Sen. Specter also stated that it would be appropriate for the United States to exercise extraterritorial jurisdiction over any terrorist act directed against a U.S. citizen anywhere in the world.[113] As enacted, however, Title XII asserts extraterritorial jurisdiction on the

107. S. 1373, 99th Cong., 1st Sess. (1985) ("Protection of United States Government Personnel Act of 1985"); S. 1429, 99th Cong., 1st Sess. (1985) ("Terrorist Prosecution Act of 1985"); and S. 1508, 99th Cong., 1st Sess. (1985) ("Terrorist Death Penalty Act of 1985").

108. *Hearing, supra* note 105 at 22 (letter of Raymond J. Celada, American Law Division, Congressional Research Service, July 26, 1985).

109. S. 1373, *supra* note 107, § 2; S. 1429, *supra* note 107, § 2.

110. S. 1429, *supra* note 107, § 2, defined the substantive offenses as murder or assault against a U.S. national, while S. 1373, *supra* note 107, § 2, defined these crimes as offenses against U.S. citizens.

111. The bills are internally inconsistent because they define the substantive offense as an act against a U.S. citizen or national, yet permit the exercise of jurisdiction irrespective of the victim's nationality. Further, although S. 1373 intends to authorize prosecution of terrorists who attack U.S. government employees, the bill's text proscribes attacks against *any citizen* of the United States. S. 1373, *supra* note 107, § 2(a).

112. *Hearing, supra* note 105, at 36. Clearly, Sen. Specter was referring to the protective theory of jurisdiction.

113. *Id.* at 41 (statement of Sen. Specter).

passive personality theory alone.[114] In enacting this legislation, Congress apparently failed to consider the passive personality principle's questionable status under international law.

Title XII's primary usefulness is to criminalize extraterritorial terrorist assaults against civilians, thereby empowering U.S. authorities to request the extradition of offenders. To ensure that the statute is applied only to terrorist acts and not to "ordinary" violent crimes against U.S. citizens abroad, the Act requires the Attorney General to certify that the offense "was intended to coerce, intimidate, or retaliate against a government or a civilian population."[115]

The Antiterrorism Act is a unilateral response to a particular form of terrorism. Unlike a bilateral extradition treaty or multilateral convention, domestic legislation like the Antiterrorism Act cannot bind foreign states. In this context, barriers to extradition such as the double criminality condition, its "special use," and the political offense exception,[116] may individually or collectively act to bar the extradition of Title XII offenders.

If the predicate offense of the Antiterrorism Act, a terrorist assault upon foreign nationals, is not a crime in the requested state (where, for example, such conduct might be considered a legitimate "political act"), the U.S. request will fail the double criminality requirement, resulting in a denial of extradition.[117] Therefore, although the Antiterrorism Act authorizes U.S. extradition requests, foreign states have no obligation to recognize the criminality of extraterritorial terrorist assaults as within the jurisdiction of the United States.

Similarly, the "special use" of the double criminality requirement[118] will bar extradition where the requested state does not recognize the passive personality theory, the only basis for the Antiterrorism Act's assertion of extraterritorial jurisdiction. In many cases, one or

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114. *See supra* note 106 and accompanying text.

115. 18 U.S.C.A. § 2331(e) (West Supp. 1987).

116. Most extradition treaties and conventions include the political offense exception, which most commentators consider to be an established exception to extradition obligations under customary international law. *See* Bassiouni, *The Political Offense Exception in Extradition Law and Practice*, in INTERNATIONAL TERRORISM AND POLITICAL CRIMES, *supra* note 82, at 399.

Exploration of the political offense exception is beyond the scope of this Note. For a discussion of the problems this exception poses for combatting international terrorism, see Lubet, *Extradition Reform: Executive Discretion and Judicial Participation in the Extradition of Political Terrorists*, 15 CORNELL INT'L L.J. 247 (1982); Friedlander, *Terrorism and International Law: Recent Developments*, 13 RUTGERS L.J. 493, 499-505 (1982); Gilbert, *Terrorism and the Political Offense Exemption Reappraised*, 34 INT'L & COMP. L.Q. 695 (1985); Vogler, *Perspectives on Extradition and Terrorism*, in INTERNATIONAL TERRORISM AND POLITICAL CRIMES, *supra* note 82, at 391-97.

117. Most current U.S. extradition treaties require denial of extradition absent satisfaction of the double criminality requirement. *See* Blakesley, *supra* note 25, at 743. The Swedish-American extradition treaty is an exception, allowing discretion in interpreting this requirement. *See* Extradition Treaty, Oct. 24, 1961, United States-Sweden, art. 1, 14 U.S.T. 1845, 1846, T.I.A.S. No. 5496, at 2.

118. *See supra* notes 25-26 and accompanying text.

both of the double criminality requirements will prevent extradition of Title XII offenders. For extradition to succeed, two conditions must be satisfied: the requested state must recognize the act as criminal, and it must recognize the jurisdictional theory asserted by the requesting state.[119] In sum, the lack of international consensus on the passive personality principle's legitimacy will hinder or prevent the extradition of terrorists to the United States.

IV. Recommendations for Improving the Claim of Jurisdiction over Foreign Terrorist Acts

Absent uniform international recognition of the passive personality theory, the United States, in many cases, has no legal authority for insisting on the extradition of Title XII offenders. Although passive personality jurisdiction may enjoy wide acceptance in the context of terrorism,[120] the United States cannot rely on it exclusively to assert extraterritorial jurisdiction. Congress could greatly increase the likely success of extraditing Title XII offenders by redrafting the Act to include additional jurisdictional grounds.

Congress may have intended to limit the scope of the statute to terrorist assaults affecting U.S. nationals, but it need not have omitted language supporting extradition requests based on other jurisdictional theories. Moreover, there is no indication that Congress, when enacting Title XII, was aware of possible difficulties in extraditing offenders under the passive personality principle.[121]

To remedy these problems, Congress should amend the Antiterrorism Act to incorporate any one, or a combination, of the protective, objective territorial, or universality theories of jurisdiction. Many states that may be reluctant to extradite under the passive personality theory alone will probably comply with a U.S. request if Congress incorporates into the Act one or more additional, more widely accepted, sources of jurisdiction.

The Antiterrorism Act could easily incorporate the protective theory of jurisdiction by including language reflecting the threat to national security posed by foreign terrorist attacks upon U.S. nationals.[122] Certainly, a terrorist attack directed against U.S. nationals to coerce state action may threaten state security, sovereignty, or government func-

119. *See* Blakesley, *supra* note 25, at 739, where the author applies these requirements to the enforcement of U.S. laws prohibiting extraterritorial narcotics conspiracies and other "economic" crimes.

120. As the counter-terrorist conventions demonstrate, the passive personality theory may yet become an accepted basis for the assertion of extraterritorial jurisdiction, particularly in the arena of international terrorism. One explanation for this development is that victims of terrorism are often intentionally targeted for attack because of their nationality. The assertion of passive personality jurisdiction is the logical means for states to protect their nationals from the threat of such attack. *See supra* notes 84-88 and accompanying text.

121. *See supra* notes 109-14 and accompanying text.

122. *See supra* notes 58-60 and accompanying text.

tions. Similarly, when foreign terrorist attacks against Americans produce harmful effects within the United States, the United States could assert jurisdiction according to the objective territorial theory.[123] As currently drafted, however, the Antiterrorism Act fails to provide authority for the assertion of jurisdiction under either theory.

The United States might also assert jurisdiction over foreign terrorist assaults under the universality principle. Although this assertion would be less certain of acceptance, the Restatement (Second) Tentative Final Draft indicates that terrorism may warrant recognition as a crime subject to universal jurisdiction.[124] The Restatement and U.S. courts have introduced the notion "that jurisdiction may be asserted over cases of at least serious and nearly universally condemned extraterritorial . . . offenses as long as the offense was intended to have 'substantial effect' on the territory of the United States, and as long as the assertion of jurisdiction is reasonable."[125] This theory appears to combine the universality and objective territorial theories of jurisdiction. Arguably, the Antiterrorism Act extends jurisdiction over offenses intended to have substantial effect in the United States, supporting the assertion of this hybrid theory of jurisdiction.

Given the traditional disparagement of the passive personality theory under international law, the United States is inviting failure in future requests for the extradition of offenders by asserting jurisdiction on this theory alone. While jurisdiction based directly on injury to a U.S. national abroad intuitively provides more concrete authority than the less tangible "harmful effects" theory or a threat to national security, the objective territorial and protective principles currently enjoy greater recognition under international law.[126] Title XII could retain the requirement of an injury to U.S. nationals, but it should include language to support these alternative theories of jurisdiction.

V. Conclusion

Title XII of the Omnibus Diplomatic Security and Antiterrorism Act of 1986 establishes U.S. criminal jurisdiction over terrorist assaults upon U.S. nationals abroad. The statutory language, however, permits assertion of jurisdiction solely on the basis of the passive personality principle, the least accepted theory of extraterritorial jurisdiction. Despite growing international acceptance of the passive personality theory, the Antiterrorism Act as enacted probably will not succeed in obtaining the extradition and prosecution of terrorists who attack U.S. nationals abroad. The United States could more effectively bring terrorists to jus-

123. *See supra* note 56 and accompanying text.

124. RESTATEMENT (SECOND) TENTATIVE FINAL DRAFT, *supra* note 64, § 404.

125. Blakesley, *supra* note 56, at 1160-61.

126. *See* RESTATEMENT (SECOND) TENTATIVE FINAL DRAFT, *supra* note 64, § 402 comments (a)-(c).

tice by redrafting the Antiterrorist Act to include additional theoretical grounds for asserting extraterritorial jurisdiction.

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