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# Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law

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Anthony J. Colangelo\*

## INTRODUCTION

The United States, like many nation-states, presently claims the authority to project its criminal laws beyond its territorial borders.<sup>1</sup> Indeed, the United States now extends aggressively its criminal laws to activity occurring halfway around the globe.<sup>2</sup> Yet this energetic boom of extraterritorial jurisdiction throws into sharp relief a variety of opposing legal interests: most prominently, those of the foreign individuals to whom the United States subjects its laws. Are there constitutional limits on the ability of the United States to project its criminal laws anywhere in the world, and to anyone it likes? If so, what are they, in what constitutional provisions do they reside, and are they enforceable in U.S. courts? And importantly, if such limits exist, do they hamper the ability of the United States effectively to prosecute dangerous criminals for extraterritorial activity? Given the unprecedented scope of jurisdiction that the United States now claims, the current fight against extraterritorial crime envisages novel legal clashes raising precisely these types of questions. And yet despite their centrality to pressing issues of the day, such as the criminal law front to the war on terror, these questions have been left largely untouched by commentators<sup>3</sup> and unresolved by courts.<sup>4</sup>

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\*Associate in Law, Columbia Law School. Special thanks go to the lovely Carrie Rief. I would also like to thank Gerry Neuman, Mike Dorf, Jose Alvarez, Rob Sloane, Debra Livingston, and Harold Edgar, as well as participants in the Associates Workshop at Columbia Law School.

1. See *United States v. Verdugo-Urquidez*, 494 U.S. 259, 281 (1990) (Brennan, J., dissenting) (quoting V. Rock Grundman, *The New Imperialism: The Extraterritorial Application of United States Law*, 14 INT'L LAW. 257, 257 (1980)).

2. See, e.g., *United States v. Yousef*, 327 F.3d 56 (2d Cir. 2003); *United States v. Yunis*, 924 F.2d 1086, 1091 (D.C. Cir. 1991); *United States v. Bin Laden*, 92 F. Supp. 2d 189 (S.D.N.Y. 2000).

3. See Jordan J. Paust, *Federal Jurisdiction over Extraterritorial Acts of Terrorism and Nonimmunity for Foreign Violators of International Law Under FISA and the Act of State Doctrine*, 23 VA. J. INT'L L. 191 (1983) (arguing that U.S. legislation does not adequately allow the United States to assert jurisdiction over terrorist acts prohibited under international law); Paul B. Stephan III, *Constitutional Limits on the Struggle Against International Terrorism: Revisiting the Rights of Overseas Aliens*, 19 CONN. L. REV. 831 (1986) (argu-

In response to these questions, this Article sets out to identify and evaluate potential constitutional limits on the ability of the United States to extend extraterritorially its criminal laws, and more particularly, its anti-terrorism laws. I focus on the United States' anti-terrorism legislation because given recent history and the current political environment, acts of terrorism are both the most palpable crimes to which the United States applies its laws extraterritorially and the crimes over which the United States most aggressively asserts extraterritorial jurisdiction. In fact, it is presently the stated policy of the United States to wage a war against "terrorism" writ large, wherever it occurs around the world.<sup>5</sup> And a powerful tool in this war is the arsenal of far-reaching anti-terrorism laws currently promulgated in the federal code.

The Article engages and weaves together a number of different areas of law: chiefly, constitutional law, criminal law, and international law. Indeed, I conclude ultimately that while the present constitutional landscape prescribes certain structural and due process limits on the United States' ability to project and apply extraterritorially its anti-terrorism laws, doctrines of international law intersect with the Constitution to avoid these limits, leaving the United States virtually unconstrained to extend the core panoply of its anti-terrorism laws to foreigners abroad.<sup>6</sup> This may seem surprising at first: international law is often thought of as a constraint on state power. Contrary to this assumption, I show that international law actually expands the power of the United States—under the Constitution—in the context of extraterritorial jurisdiction over terrorist acts committed abroad. Specifically, the international legal doctrine of universal jurisdiction interacts with sources of

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ing that the Constitution should not apply to aliens abroad, with a specific focus on limits to U.S. jurisdiction to enforce). Only a few scholars have explored possible doctrinal limits on the extension of U.S. prescriptive jurisdiction. No work has explored comprehensively the question of structural limits, although Curtis Bradley flags possible limits on enumerated powers in discussing universal jurisdiction in U.S. law. See Curtis A. Bradley, *Universal Jurisdiction and U.S. Law*, U. CHI. LEGAL F. 323, 337 (2001) (observing that "the scope of the Define and Punish Clause is unclear, the Foreign Commerce Clause is not limitless, the continuing validity of *Missouri v. Holland* is at least open to debate, and the jurisdictional authority granted by treaties may not extend to conduct by citizens of non-party countries"). The argument that due process restrictions apply to the extraterritorial application of U.S. jurisdiction was first presented in a 1992 article by Lea Brilmayer and Charles Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 HARV. L. REV. 1217, 1242 (1992). While at least one scholar has challenged this argument, see A. Mark Weisburd, *Due Process Limits on Federal Extraterritorial Legislation?*, 35 COLUM. J. TRANSNAT'L L. 379 (1997), courts that have considered the matter have uniformly held that such limits do exist, though they have been divided on what precisely the limits entail.

4. Although all the Circuits to have directly considered the issue seem to agree that there is some form of due process restriction on the extraterritorial application of U.S. law to individuals abroad, they are divided on what precisely due process requires. See discussion *infra* Part II.B.

5. THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (2002), available at <http://www.whitehouse.gov/nsc/nss.pdf>.

6. It is generally accepted that the United States may apply its criminal laws to U.S. citizens for conduct committed abroad. See *United States v. Clark*, 435 F.3d 1100, 1106, 1108 (9th Cir. 2006); see also *The Appollon*, 22 U.S. 362, 370 (1824) ("The laws of no nation can justly extend beyond its own territories, except so far as regards its own citizens") (emphasis added); but see JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS 21–22 (1834).

congressional lawmaking authority to overcome any potential constitutional obstacles to the extraterritorial application of U.S. law to the perpetrators of “universal” crimes under international law; crimes that include terrorist acts like the bombing of public places,<sup>7</sup> infrastructure,<sup>8</sup> transportation systems,<sup>9</sup> airports<sup>10</sup> and aircraft,<sup>11</sup> as well as hijacking,<sup>12</sup> hostage taking,<sup>13</sup> and even financing foreign terrorist organizations.<sup>14</sup> However, constitutional limits—most notably those contained in the Fifth Amendment’s Due Process Clause—do restrict the ability of the United States to apply extraterritorially those U.S. code provisions outlawing conduct that is *not* subject to universal jurisdiction under international law, such as providing material assistance to,<sup>15</sup> or receiving military training from a foreign terrorist organization.<sup>16</sup> My hope in making these arguments is to provide a clearer and more comprehensive picture of this urgent yet under-analyzed legal topic, and to present a compelling claim in favor of an expansive jurisdiction over dangerous extraterritorial crimes like acts of terrorism—but one that both advances and supports the rule of law and individual rights.

Part I of this Article briefly describes the legal concept of jurisdiction and the modern growth of extraterritorial jurisdiction in both national and international law. It explains the different types of jurisdiction at play in combating extraterritorial crime: jurisdiction to prescribe,<sup>17</sup> jurisdiction to adjudicate,<sup>18</sup> and jurisdiction to enforce.<sup>19</sup> And it clarifies that when courts speak of extraterritorial jurisdiction, they are referring principally to jurisdiction to prescribe, or the authority to apply law. I then emphasize the international legal doctrine of universal jurisdiction, which holds that the commission of certain “universal” crimes gives rise to jurisdiction by all states, irrespective of territorial or national links to the accused criminal or the crime itself.

Part II identifies the possible limitations on the extraterritorial application of U.S. prescriptive jurisdiction. These limits are of two main sorts. The first are structural, and go to Congress’s power to legislate in the first instance. The second involve due process considerations imposed by the Fifth Amendment and thus are personal to the accused, shielding the individual against an unconstitutional application of an otherwise lawful enactment.<sup>20</sup>

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7. 18 U.S.C. § 2332f (Supp. 2003).

8. *Id.*

9. *Id.*

10. *Id.* § 37.

11. *Id.* § 32.

12. 49 U.S.C. § 46502 (2000).

13. 18 U.S.C. § 1203 (2000).

14. 18 U.S.C. § 2339C (2000 & Supp. 2003).

15. 18 U.S.C. § 2339B (2000).

16. 18 § 2339D (Supp. 2006).

17. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 401(a) (1987).

18. *Id.* § 401(b).

19. *Id.* § 401(c).

20. See Weisburd, *supra* note 3, at 385.

As to structural limits, I examine the ambit of Congress's lawmaking authority under the most pertinent enumerated powers for enacting anti-terrorism legislation of extraterritorial application. These powers include the Offences Clause, granting Congress the power "[t]o define and punish . . . Offences against the Law of Nations,"<sup>21</sup> the Foreign Commerce Clause, and the Necessary and Proper Clause license to effectuate the Article II Treaty Power. I argue that while anti-terrorism legislation enacted pursuant to the Foreign Commerce Clause and Congress's authority to execute the Treaty Power is subject to potential geographical limits, legislation enacted pursuant to the Offences Clause is not, both as a matter of existing Supreme Court jurisprudence and under at least two original interpretations of the Clause. Moreover, I suggest that Congress also likely has the un-enumerated authority to proscribe terrorist acts abroad pursuant to its "inherent" foreign affairs power. I conclude, however, that when applied to individual defendants, exercises of each of these sources of legislative power—whether enumerated or inherent—are nonetheless still subject to the constraints imposed by the Fifth Amendment's Due Process Clause.

As to Fifth Amendment due process limits, I look to resolve the apparent confusion in the Courts of Appeal, which uniformly have evaluated extensions of U.S. law to foreigners abroad under the Fifth Amendment—and in terrorism cases to boot.<sup>22</sup> Against the conflicting views of commentators—which either look to the domestic context for the appropriate due process framework<sup>23</sup> or resist a due process analysis of federal extraterritoriality largely over concerns that it unduly weakens U.S. sovereignty on the world stage<sup>24</sup>—I propose a due process test that incorporates principles of international law. This test both accurately describes what courts are doing right in practice and successfully balances individual liberty interests against important governmental objectives like combating extraterritorial crime and maximizing U.S. sovereignty. Indeed, my test frees the United States to apply its laws extraterritorially where it otherwise might not be constitutionally capable under some of the tests courts presently purport to employ—namely, tests that borrow from the domestic context and require a nexus to the United States.

Under a test that incorporates international law, where a U.S. law proscribes a "universal" crime, no Fifth Amendment due process claim stands in the way of the application of that law to the individual accused, even where that individual or the conduct in question has no overt nexus to the United States. Because the proscription is not just one of national law, but also of a pre-existing and universally applicable international law, the accused cannot

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21. U.S. CONST. art. I, § 8, cl. 10.

22. *United States v. Yousef*, 327 F.3d 56 (2d Cir. 2003); *United States v. Bin Laden*, 92 F. Supp. 2d 189 (S.D.N.Y. 2000).

23. See *Brilmayer & Norchy*, *supra* note 3, at 1242.

24. See *Weisburd*, *supra* note 3, at 382–83.

claim to be shielded from the application of a prohibition to which he is already and always subject.<sup>25</sup> And thus according to what this Article presents as the proper due process analysis, the application of that law will not run afoul of the Fifth Amendment: the accused cannot claim lack of notice of the illegality of his conduct, or for that matter, of the substantive law being applied to him. But for this theory to hold, the offense must in fact be universal, and the U.S. law must reflect faithfully the international prohibition—that is, it must embody the substantive definition of the crime as prescribed by international law. Otherwise, the notice criteria compelled by Fifth Amendment due process will not be satisfied. The trick then is to determine which terrorist offenses qualify as universal, and whether Congress has defined them correctly.

Part III presents a framework for evaluating these conditions. In response to the first condition, it argues that through their substantive and jurisdictional provisions, widely ratified international treaties indicate which crimes are universal by manifesting not only widespread condemnation of the crime that is the subject of the treaty, but also by establishing and even mandating extraterritorial and extra-national jurisdiction for all states parties with respect to the prosecution of its perpetrators. To be clear at the outset, I do not argue that the treaty provisions themselves set forth definitively the international law of universal jurisdiction in these respects, but rather that they make up the best *evidence* of what that law is. And in the context of the international law against specific acts of terrorism, the custom evidenced by these treaties is bolstered by an extensive state practice guided by a sharp sense of *opinio juris*. Accordingly, and in response to the second condition, these treaties also contain the best record of the international legal definitions of universal terrorist crimes. And since federal legislation implementing U.S. obligations under the treaties tends to track faithfully the treaty definitions of the crimes (and courts consequently use these definitions to prosecute), we can say with some confidence that the U.S. legislation embodies the substantive definition of the crime as prescribed by international law. Hence terrorist crimes that are not universal will not enable the United States to act beyond the constitutional limits mentioned above. But as to the core panoply of terrorist offenses—namely those that are the subjects of widely ratified international treaties evidencing universal jurisdiction<sup>26</sup>—the United States enjoys an unconstrained jurisdiction under both international and national law.

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25. I am not the first to make this point. Brilmayer and Norchi observe for instance that under the Fifth Amendment the United States needs no nexus to prosecute universal terrorist crimes like hijacking “once it is recognized that the forum does not really apply its own law, but rather enforces international law that has been incorporated into domestic law.” Brilmayer & Norchi, *supra* note 3, at 1260.

26. The Appendix to this Article sets forth the relevant U.S. code and international treaty provisions regarding both the definitional substance of the crimes and the expansive jurisdiction that attaches to them.

# I. EXTRATERRITORIAL JURISDICTION IN NATIONAL AND INTERNATIONAL LAW

The concept of jurisdiction plays a central role in the legal relationship between the sovereign state and the individual; to be sure, it establishes the very existence of such a legal relationship by implicating the state's power or authority over the individual.<sup>27</sup> Thus if a state has no jurisdiction over a particular individual, it has no legal authority to subject that individual to its laws and legal process.<sup>28</sup> Yet as a proxy for state power, jurisdiction also defines another species of legal relationship, namely that of the state to other sovereigns, and in this context it might be referred to loosely as national jurisdiction, domestic jurisdiction, or simply "sovereignty."<sup>29</sup> A state's strongest claim of power naturally pertains to persons or things exclusively within its jurisdiction, as opposed to persons or things outside its jurisdiction—for example on the high seas,<sup>30</sup> or within the jurisdiction of other states. However jurisdictions may also overlap; in such cases there is "concurrent" jurisdiction.<sup>31</sup>

Jurisdiction may take different forms. Prescriptive jurisdiction is the state's authority to apply its laws to certain persons or things.<sup>32</sup> For present purposes, the legislative brand of prescriptive jurisdiction encompasses the realm in which Congress legitimately may extend its lawmaking authority, though prescriptive jurisdiction also may be of a judicial character, where it is commonly referred to as a court's subject matter jurisdiction.<sup>33</sup> Adjudicative jurisdiction by contrast is the authority to subject persons or things to judicial process,<sup>34</sup> and accordingly may refer to a court's personal jurisdiction, while jurisdiction to enforce<sup>35</sup> generally entails some exercise of executive power—whether by police, prosecutorial or military action.

At least conceptually, all three forms of jurisdiction just described might be exercised extraterritorially. However, because jurisdiction to adjudicate in the criminal context requires the physical presence of the accused under U.S. law,<sup>36</sup> in practice such jurisdiction is not exercised extraterritorially by courts<sup>37</sup>

27. See BLACK'S LAW DICTIONARY 712 n.1 (7th ed. 1999) (defining jurisdiction as a "government's general power to exercise authority over all persons and things within its territory").

28. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 401(b) (1987).

29. Marcel Brus, *Bridging the Gap Between State Sovereignty and International Governance: The Authority of Law, in STATE, SOVEREIGNTY, AND INTERNATIONAL GOVERNANCE* 7–10 (Gerard Kreijen ed., 2002); see generally John H. Jackson, *Sovereignty-Modern: A New Approach to an Outdated Concept*, 97 AM. J. INT'L L. 782, 786, 789–90 (2003).

30. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 521 (1987).

31. See, e.g., *S.S. Lotus* (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 30–1 (Sept. 7).

32. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 401(a) (1987).

33. *Id.* at cmt. c; see *United States v. Yousef*, 327 F.3d 56, 85 n.16 (2d Cir. 2003).

34. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 401(b) (1987).

35. *Id.* § 401(c).

36. LEA BRILMAYER, AN INTRODUCTION TO JURISDICTION IN THE AMERICAN FEDERAL SYSTEM 329 (1986).

37. Although it is unclear why not: If the defendant has sufficient notice and if the criminal justice system can ensure due process in his absence, something that it is evidently capable of since trials *continue*



(unless of course the court is sitting in the foreign location with the accused present before it). And while jurisdiction to enforce *is* often extended into foreign territories, such an extension is typically the result of executive police or military action. Thus an evaluation of extraterritorial prescriptive jurisdiction concerns itself generally with the United States,<sup>37</sup> and more specifically with Congress's, capacity to extend federal laws to foreign persons or things.<sup>38</sup>

### A. *The Rise of Extraterritorial Prescriptive Jurisdiction*

Jurisdictional rules developed historically to describe and balance the various interests of sovereigns to the conduct of persons or things as well as to other sovereigns. Both international law and national law—the latter drawing explicitly from the former to fashion its early jurisdictional rules<sup>39</sup>—reflect tenaciously the sentiment that a state's jurisdiction is tied foremost to a piece of geographic territory.<sup>40</sup> Accordingly, a state uncontroversially had the general authority to prescribe, adjudicate, and enforce its laws within its own borders.<sup>41</sup> This classical sovereignty model affirms the state's "monopoly" of power within its borders<sup>42</sup> and reveals the traditional paradigm of prescriptive jurisdiction as exclusively territorial.<sup>43</sup> This paradigm not only circumscribed the reach of state authority, but also mutually reinforced the absolute power of every state within its own territory. Thus a state's extension of its lawmaking authority, or prescriptive jurisdiction, into the territory of another state would contravene the second state's sovereignty—a point that only

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in absentia all the time, such proceedings may in fact be desirable in certain circumstances. Continuing with a trial in absentia is permissible under the Federal Rules of Criminal Procedure, *see* Fed. R. Crim. P. 43, and seems to present no constitutional problems. *Crosby v. United States*, 506 U.S. 255, 261–62 (1993).

38. Courts have also viewed the challenge to prescriptive jurisdiction as one of subject matter jurisdiction, *see* *United States v. Yousef*, 327 F.3d 56, 85 n.16 (2d Cir. 2003) ("By 'extraterritorial jurisdiction' we mean subject matter jurisdiction of a United States court to adjudicate conduct committed outside of the United States.").

39. *See* *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909); *Pennoyer v. Neff*, 95 U.S. 714, 722–23 (1878); *The Schooner Exch. v. M'Faddon*, 11 U.S. (7 Cranch) 116 (1812).

40. *See, e.g., Am. Banana Co.*, 213 U.S. at 356 ("[T]he general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done . . . . For another jurisdiction, if it should happen to lay hold of the actor, to treat him according to its own notions rather than those of the place where he did the acts, not only would be unjust, but would be an interference with the authority of another sovereign, contrary to the law of nations, which the other state concerned justly might resent."); *The Schooner Exch.*, 11 U.S. (7 Cranch) at 116 ("[The] full and absolute territorial jurisdiction being alike the attribute of every sovereign, and being incapable of conferring extra-territorial power."); *see also* EDWARD S. STIMSON, *CONFLICT OF CRIMINAL LAWS* 3–8 (1936).

41. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 401(a), (b) and (c) (1987).

42. Jackson, *supra* note 29, at 782, 786.

43. *See The Schooner Exch.*, 11 U.S. (7 Cranch) at 136 ("The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving from an external source, would imply a diminution of its sovereignty to the same extent in that power which would impose such a restriction. All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself.").

becomes clearer in the context of jurisdiction to enforce. Moreover, compared with its civil counterpart, criminal law has viewed jurisdiction in conservatively territorial terms,<sup>44</sup> and until only recently hemmed closely to Blackstone's famous statement that "[c]rimes are in their nature local, and the jurisdiction of crimes is local."<sup>45</sup> For a sovereign to have exercised criminal jurisdiction within this early common law view, the subject harm must have occurred within its territory.<sup>46</sup> In fact, so strong was this jurisdictional assumption that courts apparently viewed the extraterritorial application of law to individuals later brought before them as a *prima facie* due process violation, deeming such an application retroactive since only the locus of the conduct could determine the governing law.<sup>47</sup>

But just as crime evolved to exhibit an inter-jurisdictional flavor due largely to increased travel and communication, so too did jurisdictional rules, which began eroding the rigid territorial paradigm.<sup>48</sup> This is true both of jurisdictional rules among the several states of the United States (the U.S. states),<sup>49</sup> and of jurisdictional norms of international law among the world's nation-states.<sup>50</sup> Both bodies of rules presently provide for *extra*-territorial jurisdiction, and indeed correspond rather neatly in important respects. For example, both now found jurisdiction upon similarly expansive principles of territoriality itself. U.S. states have, for the most part, abandoned the restrictive common law approach to territoriality and have adopted statutes, based largely on the Model Penal Code,<sup>51</sup> that enlarge the concept of territoriality roughly to encompass conduct within the state that leads to<sup>52</sup> or is intended to lead to<sup>53</sup> a harmful result outside the state, as well as to conduct occurring outside the state that leads to<sup>54</sup> or is intended to lead to<sup>55</sup> a harmful result inside the state.<sup>56</sup> Likewise, international law provides a nation-state with territorial jurisdiction over acts that occur within its territory but that may

44. BRILMAYER, *supra* note 36, at 323.

45. WILLIAM BLACKSTONE, 2 COMMENTARIES \*1055, \*1058 (*quoted in* *Huntington v. Attrill*, 146 U.S. 657, 669 (1892)).

46. See BRILMAYER, *supra* note 36, at 323; 4 WAYNE R. LAFAVE, JEROLD H. ISRAEL & NANCY J. KING, CRIMINAL PROCEDURE § 16.4(b) (2d ed. 1999); *see also*, Albert Levitt, *Jurisdiction over Crimes*, 16 J. CRIM. L. & CRIMINOLOGY 316, 331-32 (1925).

47. STIMSON, *supra* note 40, at 7 n.15 (citing JOSEPH BEALE, A TREATISE ON THE CONFLICT OF LAWS § 75 (1916) [quoting the French Count de Vareilles-Sommières, Professor at Lille]).

48. BRILMAYER, *supra* note 36, at 324.

49. *Id.* at 324-28.

50. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 402, 404 (1987) (listing bases of jurisdiction to prescribe).

51. See LAFAVE ET AL., *supra* note 46, § 16.4(c).

52. MODEL PENAL CODE § 1.03(1)(a) (2002); *see also* *Strassheim v. Daily*, 221 U.S. 280, 285 (1911) (observing that "[a]cts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a State in punishing the cause of the harm as if [the defendant] had been present at the effect.").

53. MODEL PENAL CODE § 1.03(1)(b), (c) (2002).

54. *Id.* § 1.03(1)(a).

55. *Id.* § 1.03(1)(b), (c).

56. The constitutionality of this legislation has been held not to violate due process "[b]ecause such legislation adheres to the territorial principle." LAFAVE ET AL., *supra* note 46, § 16.4(c).

have effects outside its territory—or what is called “subjective territoriality,”<sup>57</sup> as well as conduct that occurs outside, but has, or is intended to have, effects within its territory—or what is called “objective territoriality.”<sup>58</sup>

Additionally, the Supreme Court has held that U.S. states can assert jurisdiction extraterritorially based on an individual’s state citizenship,<sup>59</sup> which aligns with the international legal principle that nation-states may assert jurisdiction over their national citizens abroad.<sup>60</sup> In so holding, the Court even observed that “the sovereign authority of [one of the several U.S.] state[s] over the conduct of its citizens upon the high seas is analogous to the sovereign authority of the United States over its citizens in like circumstances.”<sup>61</sup> Finally, the Model Penal Code provides for jurisdiction over conduct occurring outside the state but which “bears a reasonable relation to a legitimate interest of th[e] State and the actor knows or should know that his conduct is likely to affect that interest.”<sup>62</sup> This jurisdictional doctrine reflects what is often termed the “protective principle” in international law.<sup>63</sup> And although controversial, international law even provides for what is called “passive personality” jurisdiction, which tolerates jurisdiction where a state’s nationals are the victims of crimes abroad.<sup>64</sup>

In sum, both national and international jurisdictional rules have evolved to account for the growing reality that crime is no longer strictly local, and presently provide for the extraterritorial extension of criminal law to foreign actors abroad where the state has some objective interest in protecting itself against their potentially harmful acts. This objective interest typically takes the form of a territorial or national link, or “nexus”—whether to the conduct itself, its perpetrators, or its victims.

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57. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(1)(a) (1987).

58. *Id.* § 402(1)(c).

59. *See Skiriotes v. Florida*, 313 U.S. 69 (1941) (holding that Florida could apply its laws to a Floridian for acts committed on the high seas); LAFAYETTE ET AL., *supra* note 46, § 16.4(c) at n.115. It is not clear, however, that this power applies in respect of conduct committed in the territories of other sovereigns as opposed to conduct committed simply on the high seas, which are outside the jurisdiction of any state. *See Skiriotes*, 313 U.S. at 77 (appearing to limit the holding to conduct on the high seas).

60. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(2) (1987).

61. *Skiriotes*, 313 U.S. at 79.

62. MODEL PENAL CODE § 1.03(1)(f) (2002).

63. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(3) cmt. f (1987) (“Subsection (3) restates the protective principle of jurisdiction [which is] the right of a state to punish a limited class of offenses committed outside its territory by persons who are not its nationals—offenses directed against the security of the state or other offenses threatening the integrity of governmental functions that are generally recognized as crimes by developed legal systems, e.g., espionage, counterfeiting of the state’s seal or currency, falsification of official documents, as well as perjury before consular officials, and conspiracy to violate the immigration or customs laws. The protective principle may be seen as a special application of the effects principle . . . but it has been treated as an independent basis of jurisdiction.”).

64. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(3) cmt. g (1987). No such jurisdictional principle exists in domestic law. *See LAFAYETTE ET AL.*, *supra* note 46, § 16.4(c) (observing that a U.S. state “probably has no power to protect its own citizens from conduct by non-citizens taking place in other states and resulting in harm there”).

### B. Universal Jurisdiction

Universal jurisdiction is an exceptional international jurisdictional doctrine that does not have a domestic counterpart. It is exceptional because, unlike the other bases of jurisdiction, universal jurisdiction does not rely on a territorial or national nexus to the act or actors over which a state claims legal authority. Instead, it holds that the very commission of certain “universal crimes” engenders jurisdiction for all states, irrespective of where the crime occurred or which state’s nationals were involved.<sup>65</sup> At present, this category of crime is generally considered to include piracy, slavery, genocide, crimes against humanity, war crimes, torture, and, as I argue in more detail below,<sup>66</sup> certain acts of terrorism.<sup>67</sup> The near future may portend an increased rubric of universal crime that includes other characteristically transnational offenses which call out for a cooperative response from states, such as sex or drug trafficking,<sup>68</sup> or which threaten the very stability of the international system, such as nuclear arms smuggling. A “universal jurisdiction” attaches to these crimes, so the argument goes, because they are widely—indeed universally—condemned, and all states have a shared interest in suppressing them.<sup>69</sup>

Although exceptional, universal jurisdiction is by no means new. Both the concept and the very term “universal jurisdiction” itself appear in early Supreme Court opinions dating back to the founding, in connection to the most injurious international crime of those times: piracy.<sup>70</sup> Rather, the evolution of this jurisdictional doctrine has been a not-uncontroversial matter of expanding the *category* of universal crimes, sparked largely by the post-World War II human rights movement, to include acts perpetrated by foreign governments against their own nationals and entirely within their own territories.

While I take up the question of why terrorist acts are included in the universal jurisdiction category in Part III, and why Congress can proscribe them abroad under various sources of legislative power in the next Part, two basic but salient features of the international law of universal jurisdiction deserve highlighting here for the argument going forward. First, universal jurisdiction is a customary, not a treaty-based, international law. Second, a distinc-

65. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (1987).

66. See *infra* Part III.

67. See, e.g., *United States v. Yunis*, 924 F.2d 1086, 1091 (D.C. Cir. 1991) (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (1987)); see also THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION Principle 2(1) (Stephen Macedo ed., 2001); Anthony J. Colangelo, *The New Universal Jurisdiction: In Absentia Signaling over Clearly Defined Crimes*, 36 GEO. J. INT'L L. 537, 578–602 (2005).

68. Some U.S. Circuit Courts of Appeal appear already to consider drug trafficking on the high seas a universal crime. See *infra* notes 295–298, 308–310, and accompanying text.

69. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 cmt. a (1987).

70. See, e.g., *United States v. Furlong*, 18 U.S. 184, 197 (1820) (explaining in dicta the difference between the crime of piracy, which was subject to “universal jurisdiction” under the law of nations, and murder, which was not).

tive symbiosis exists between universal prescriptive jurisdiction (the international legal prohibition on the crime) and universal adjudicative jurisdiction (the judicial competence of all states to apply that prohibition to perpetrators of the crime). The prescriptive substance of universal jurisdiction both authorizes and circumscribes universal adjudicative jurisdiction. That is to say, the prescriptive substance defines not only the universal crimes themselves, but also the judicial competence for all courts wishing to exercise universal jurisdiction.

### 1. *Universal Jurisdiction Is a Customary International Law*

Customary international law is at the same time a basic and elusive concept. Generally speaking, it is a body of rules or norms that externally influence each state but to which states may nonetheless contribute through their actions and official statements.<sup>71</sup> It is commonly described as resulting from "a general practice accepted as law,"<sup>72</sup> or, in the Restatement's formulation, "a general and consistent practice of states followed by them from a sense of legal obligation."<sup>73</sup> Custom is thus made up of two components: (i) a general state practice, and (ii) a belief or intent to act with legal purpose, or what is often called *opinio juris*.<sup>74</sup> Customary law is universal in its application and is therefore theoretically binding on all states (save possibly for those that persistently object to a given norm during its formation).<sup>75</sup> By contrast, positive international law, or what is more popularly referred to as treaty law, results from formal agreements among states<sup>76</sup> and binds only those states parties to the treaty.<sup>77</sup>

The international law of jurisdiction is a fundamentally customary, not treaty-based, law. It marks out the authority of every state *vis-à-vis* all other states in the international system, and in this way effectively defines the in-

71. George Norman & Joel P. Trachtman, *The Customary International Law Game*, 99 AM. J. INT'L L. 541, 542 (2005).

72. Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1055, T.S. 993.

73. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987).

74. See, e.g., *North Sea Continental Shelf (F.R.G. v. Den./F.R.G. v. Neth.)*, 1969 I.C.J. 4, 44 para. 77 (Feb. 20).

75. ANTHONY A. D'AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* 4 (1971); Ernest A. Young, *Sorting Out the Debate over Customary International Law*, 42 VA. J. INT'L L. 365, 373 (2002). Customary law may not be binding on a so-called "persistent objector," a state that "dissent[s] from a practice while the law is still in the process of development." RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. d (1987); see also Ted L. Stein, *The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law*, 26 HARV. INT'L L.J. 457 (1985). Notably, however, "[a] state that enters the international system after a practice has ripened into a rule of international law is bound by that rule." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 cmt. d (1987).

76. See, e.g., *Yousef*, 327 F.3d at 96 (2d Cir. 2003).

77. Article 34 of the Vienna Convention on the Law of Treaties provides that "a Treaty does not create either obligations or rights for a third state without its consent." Article 35 provides that treaties are only binding on non-parties where the non-party "State expressly accepts that obligation in writing." Vienna Convention on the Law of Treaties arts. 34, 35, May 23, 1969, 1155 U.N.T.S. 331. See also *Yousef*, 327 F.3d at 96 (explaining that a treaty is "binding only on the States that accede to it").

ternational legal construct of the state itself.<sup>78</sup> States nonetheless may create through treaty law positive bases of jurisdiction—but only for those states that are parties to the treaty. For instance, states may agree among themselves to prescribe rules governing certain conduct within their territories, and further may undertake to provide their courts the authority to adjudicate the application of those rules. States may even agree to delegate portions of their prescriptive and adjudicative jurisdiction to international organizations established by treaty, like the World Trade Organization or the International Criminal Court.<sup>79</sup> But again, such positive arrangements are achieved by the mutual consent of the states parties to the agreement, and therefore bind—or establish jurisdiction for—only those states parties.<sup>80</sup> Such arrangements also rely at bottom upon the capacity of states to deal in the initial jurisdictional authority granted them by customary law in the first place.

Like the general international law of jurisdiction, universal jurisdiction is a customary law.<sup>81</sup> It therefore differs from a treaty-based jurisdiction that vests a comprehensive jurisdiction among only those states parties to a given treaty.<sup>82</sup> Rather, the customary law of universal jurisdiction vests all states in the world with jurisdiction over certain crimes;<sup>83</sup> that is, it prescribes the illegality of universal crimes everywhere, and moreover empowers all states to authorize their courts with the competence to prosecute the perpetrators of these crimes.

To illustrate the positive/customary law distinction here, assume a group of European states enter into a treaty providing that states parties must outlaw racial hate speech. Further, assume the treaty contains what is called a

78. See Anthony D'Amato, *The Concept of Human Rights in International Law*, 82 COLUM. L. REV. 1110, 1113 (1982). As noted above, this law traditionally provides the state with jurisdiction over a specific territory. This is why the most recognizable defining characteristic of statehood today continues to be the state's geographic borders. Anthony D'Amato, *Is International Law Really "Law"?*, 79 NW. U. L. REV. 1293, 1308 (1985).

79. International trade scholars have for example argued that states transfer a degree of jurisdiction to international trade regimes. See Joel P. Trachtman, *Institutional Linkage: Transcending "Trade and . . ."*, 96 AM. J. INT'L L. 77, 78–79 (2002) (explaining that through the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS"), the United States "transferred" its "prescriptive jurisdiction," i.e., "a measure of authority over domestic intellectual property law" to other WTO members, or perhaps one might say to the WTO itself). Similarly, some have argued that the International Criminal Court's ("ICC") jurisdiction over the nationals of non-party states is justifiable because the state parties to the ICC have delegated their territorial and universal jurisdictions to the international criminal body. See Michael P. Scharf, *The ICC's Jurisdiction over the Nationals of Non-Party States: A Critique of the U.S. Position*, 64 L. & CONTEMP. PROBS. 67 (2001).

80. See *Yousef*, 327 F.3d at 96.

81. See Colangelo, *supra* note 67, at 567.

82. See ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 64 (1994).

83. Of course one could posit a universally ratified treaty, something that has not happened yet, although the Convention on the Rights of the Child comes pretty close. See Office of the United Nations High Commissioner for Human Rights, Status of Ratifications of the Principal International Human Rights Treaties, June 9, 2004, available at <http://www.unhchr.ch/pdf/report.pdf>.

“prosecute or extradite” provision,<sup>84</sup> which obliges states parties to establish jurisdiction over and to prosecute (or extradite to another state party) any racial hate speakers that end up within their borders—even if the speaker did not express his message within the prosecuting state’s territory. We might say that those states parties to the treaty have—*among themselves*—established a comprehensive prescriptive jurisdiction outlawing racial hate speech, as well as a comprehensive adjudicative jurisdiction subjecting racial hate speakers to prosecution wherever they happen to end up within the combined states parties’ territories. But the prescriptive ban on racial hate speech is not “universal”; it plainly would not extend into the territory of a non-party state like, for instance, the United States, which has a robust free speech right that allows racial hate speech.<sup>85</sup> And since a state’s inherent jurisdiction to adjudicate depends upon jurisdiction to prescribe,<sup>86</sup> it follows that the courts of the European states parties would not have the authority to try and convict a U.S. citizen for uttering racial slurs on a soapbox in Manhattan if he should at some later point travel to Europe (and keeps quiet while there). Similarly, the International Convention for the Suppression of Terrorist Bombings prohibits, among other things, bombing public transportation systems.<sup>87</sup> And it further obligates states parties to prosecute or extradite alleged bombers present in their territories.<sup>88</sup> Syria is not, at the time of this writing, a party to the Bombing Convention.<sup>89</sup> If a Syrian terrorist explodes a bomb on a city bus in Syria carrying only Syrians and flees to the United States, which is a party to the Bombing Convention,<sup>90</sup> could the United States assert jurisdiction under the *positive* law of the treaty? The answer would seem to be no, and for the same reason that the European state cannot assert jurisdiction over the U.S. bigot who speaks in New York but later travels to Europe.

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84. This type of provision is also referred to as *aut dedere aut judicare*.

85. See e.g., *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

86. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 431 cmt. a (1987); CHRISTOPHER BLAKESLEY ET AL., *THE INTERNATIONAL LEGAL SYSTEM* 132, 184–85 (5th ed. 2001).

87. International Convention for the Suppression of Terrorist Bombings art. 2, Dec. 15, 1997, G.A. Res. 52/164, annex [hereinafter Bombing Convention].

88. Article 6 of the Bombing Convention provides that:

Each State Party shall . . . take such measures as may be necessary to establish its jurisdiction over the offenses . . . in cases where the alleged offender is present in its territory and it does not extradite that person to any of the States Parties which have established their jurisdiction . . .

Article 8 provides further that:

The State Party in the territory of which the alleged offender is present shall, in cases to which article 6 applies, if it does not extradite that person, be obliged, without exception whatsoever and whether or not the offense was committed in its territory to submit the case without undue delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State . . .

*Id.* arts. 6, 8.

89. See OFFICE OF THE ASSISTANT LEGAL ADVISER FOR TREATY AFFAIRS, U.S. DEP’T OF STATE, *TREATIES IN FORCE* (2006), available at <http://www.state.gov/documents/organization/66286.pdf> [hereinafter *TREATIES IN FORCE*].

90. *Id.*

But all is not lost under international law. If the conduct of the Syrian bomber constitutes a universal crime, the United States may indeed have jurisdiction, albeit under customary law, and U.S. federal courts therefore would be able to prosecute so long as there is federal legislation criminalizing the act and providing for jurisdiction under domestic law (there is).<sup>91</sup> To summarize then, unlike a treaty-based jurisdiction, the customary international law of universal jurisdiction extends prescriptively into the territories of all states, and moreover empowers them all to adjudicate universal crimes.

## 2. *Universal Jurisdiction's Prescriptive-Adjudicative Symbiosis*

Not surprisingly, universal jurisdiction has provoked skepticism.<sup>92</sup> First of all, it purports to refuse states a degree of exclusivity in the prescriptive authority they generally enjoy within their territories. That is, under the doctrine, states cannot legislatively endorse universal crimes; where they do so, international law (often operating through the laws of other states) effectively reaches into the territory of the offending state to proscribe the acts as criminal irrespective of domestic law, and further empowers all other states to prosecute the crimes. But states overwhelmingly agree that universal crimes ought to be prohibited everywhere; indeed this consensus presumably gave rise to universal jurisdiction over the subject crime in the first place. So there is not too much of a backlash on this point.

Rather, the skeptic's real jab at universal jurisdiction is that it too easily hazards abuse by states that would manipulate the doctrine for their own political agendas. For instance, it potentially exposes an unpopular or resented state's citizens to foreign proceedings engineered for purely sensationalist, rather than legal, ends. Suddenly every state in the world has the authority to meddle in the domestic affairs of every other state without any objective territorial or national nexus, simply by alleging a so-called "universal crime." And thus the criticism is not so much that universal crimes ought not to be prohibited and prosecuted, but rather that states might subjectively stretch the definitions of the crimes to encompass frivolous cases in order to pursue their own political agendas.<sup>93</sup>

91. 18 U.S.C. § 2332f (Supp. 2003).

92. For a good synopsis of the skepticism here, see Henry Kissinger, *The Pitfalls of Universal Jurisdiction*, 80 FOREIGN AFF., July/Aug. 2001, at 86. For an explanation of U.S. political pressure on Belgium to temper its expansive universal jurisdiction law, see Steven R. Ratner, Editorial Comment, *Belgium's War Crimes Statute: A Postmortem*, 97 AM. J. INT'L L. 888, 891 (2003).

93. In Henry Kissinger's words,

To be sure, human rights violations, war crimes, genocide, and torture have so disgraced the modern age and in such a variety of places that the effort to interpose legal norms to prevent or punish such outrages does credit to its advocates. The danger lies in pushing the effort to extremes that risk substituting the tyranny of judges for that of governments; historically, the dictatorship of the virtuous has often led to inquisitions and even witch-hunts.

Kissinger, *supra* note 92, at 86.



This worry is, at least as a legal matter, overblown. As I have argued elsewhere,<sup>94</sup> the international law of universal jurisdiction does not permit such subjective manipulation for corrupt motives. To the contrary, if the adjudicative availability of universal jurisdiction is a matter of international law, so too must be the prescriptive substance of the crime that gives rise to such adjudicative competence. Put differently, because the crime itself generates universal jurisdiction, courts must use the definitional substance of that crime, as prescribed by international law, when prosecuting on universal jurisdiction grounds. Consequently the exercise of universal adjudicative jurisdiction by states depends fundamentally on their application of the substantive law of universal prescriptive jurisdiction. And this substantive definition is a matter of customary international law. Accordingly, where states exaggerate the definition upon which their universal jurisdiction is based, the jurisdictional claim conflicts with the very international law upon which it purports to rely.

To take one rather famous example, the Spanish claim of universal jurisdiction over former Chilean dictator Augusto Pinochet for the crime of "genocide" contradicted international law because the definition of genocide that the Spanish court employed exorbitantly designated—contrary to the established international legal definition of the crime<sup>95</sup>—political groups as falling within the "national group" victim classification.<sup>96</sup> Had the case gone forward on universal jurisdictional grounds of "genocide" (torture ended up being the relevant crime of extradition from Great Britain,<sup>97</sup> though Pinochet was eventually allowed to return to Chile for medical reasons), the Spanish jurisdiction would have been defective as a matter of international law.

My thesis going forward is that the doctrine of universal jurisdiction unfetters U.S. jurisdiction from any potential constitutional constraints so as to extend unconditionally to the most serious terrorist offenses presently outlawed under federal statutes. But as we shall see, the United States' comprehensive jurisdiction in this regard does not extend to just any terrorist crime.

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94. See Anthony J. Colangelo, *The Legal Limits of Universal Jurisdiction*, 42 VA. J. INT'L L. (forthcoming 2006) (on file with author).

95. Since the 1948 Genocide Convention, genocide has been defined in several statutes of international courts and treaties to have as victim groups only a "national, ethnical, racial or religious group, as such." See, e.g., Convention on the Prevention and Punishment of the Crime of Genocide art. II, *opened for signature* Dec. 9, 1948, 78 U.N.T.S. 277, 28 I.L.M. 763 (entered into force Jan. 12, 1951); Statute of the International Tribunal for the Former Yugoslavia art. VI, May 25, 1993, 32 I.L.M. 1192; Statute of the International Tribunal for Rwanda art. II, Nov. 8, 1994, 33 I.L.M. 1598; Rome Statute of the International Criminal Court art. 6, *opened for signature* July 17, 1998, 2187 U.N.T.S. 90. See also *Prosecutor v. Akayesu*, Case No. ICTR 96-4-T, Judgement (Trial Chamber I), ¶ 512 (Sept. 2, 1998). To be sure, the drafters of the Genocide Convention purposefully did *not* include political groups as victim groups. See Beth Van Schaack, Note, *The Crime of Political Genocide: Repairing the Genocide Convention's Blind Spot*, 106 YALE L.J. 2259, 2262–69 (1997).

96. THE PINOCHET PAPERS: THE CASE OF AUGUSTO PINOCHET IN SPAIN AND BRITAIN 103–04 (Reed Brody & Michael Ratner eds., 2000).

97. See *Regina v. Bow St. Metro. Stipendiary Magistrate and Others, Ex parte Pinochet Ugarte* (No. 3), [2000] 1 A.C. 147 (H.L. 1999) (appeal taken from Q.B.) (U.K.).

The terrorist offenses to which the United States applies its laws on these grounds must in fact be universal.

## II. LIMITS ON THE EXTRATERRITORIAL APPLICATION OF U.S. LAW

To effectively make this argument, we need first to explore in detail any potential constitutional limits on the extraterritorial application of U.S. anti-terrorism laws. These limits are of two main sorts. The first are structural, and go to Congress's power to legislate in the first place. The second involve due process interests contained in the Fifth Amendment to the Constitution.<sup>98</sup> Unlike structural limits, due process interests do not restrict Congress's general authority to make and project law extraterritorially, but act instead to shield the individual accused from the application of an otherwise constitutional enactment.<sup>99</sup> This Part argues that the doctrine of universal jurisdiction interacts with a number of sources of congressional lawmaking power, most prominently the Offences Clause<sup>100</sup> and Congress's inherent foreign affairs power, to supply Congress with a literally global reach that avoids any potential due process obstacles to the extraterritorial application of U.S. law to the perpetrators of universal terrorist crimes.

### A. *Structural Limits on Extraterritorial Jurisdiction*

As a general matter, nothing in the Constitution prohibits Congress from legislating extraterritorially. While important Supreme Court decisions involve questions of statutory construction centering on congressional *intent* that a statute apply extraterritorially,<sup>101</sup> scant attention has been paid to the power of Congress in the first instance to regulate conduct abroad under its various sources of legislative authority. But with increased globalization and the aggressive stance Congress has taken in regulating conduct abroad, these types of issues have come swiftly to the fore. This Section canvasses the sources of congressional power to legislate extraterritorially and attempts to detect any potential limits on each source. It examines Congress's authority to proscribe terrorist acts abroad under its most pertinent enumerated powers in this regard—the Offences Clause, the Foreign Commerce Clause, and the Necessary and Proper Clause in conjunction with the Treaty Power—as well as under Congress's “inherent” foreign affairs power. The discussion flags a number of potential limits on Congress's extraterritorial reach under these sources, in particular under the Foreign Commerce Clause and the Necessary and Proper Clause/Treaty Power combination, and concludes that the Offences Clause likely provides the most secure textual basis from which Congress might

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98. The Fifth Amendment provides in relevant part: “No person shall . . . be deprived of life, liberty, or property, without due process of law.” U.S. CONST. amend. V.

99. See Weisburd, *supra* note 3, at 384–85 (1997).

100. U.S. CONST. art. I, § 8, cl. 10.

101. E.g., *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993); *E.E.O.C. v. Arabian Am. Oil Co.*, 499 U.S. 244 (1991).

project U.S. anti-terrorism laws abroad, and that the foreign affairs power provides a similarly strong inherent basis from which to do the same.

### *1. Offences Against the Law of Nations*

Article I, section 8, clause 10 of the Constitution grants Congress the power “[t]o define and punish . . . offences against the Law of Nations.”<sup>102</sup> Compared with other sources of congressional lawmaking power, this Clause has been the subject of little commentary and judicial treatment throughout our constitutional history.<sup>103</sup> Yet it has gained substantial attention lately from both commentators and courts in light of modern developments in the Supreme Court’s federalism jurisprudence and the resuscitation of a 1789 statute, evidently enacted pursuant to the Offences Clause and commonly labeled the Alien Tort Statute, which in its present incarnation provides Federal District Courts with “original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”<sup>104</sup>

Nothing on the face of the Offences Clause, or that might be built into it judicially, suggests extraterritorial restrictions on Congress’s lawmaking authority. Congress simply has the power to proscribe certain conduct, so long as it constitutes an “offence[ ] against the Law of Nations.”<sup>105</sup> Thus the only remaining question for present purposes is whether the crimes we are focused on—acts of terrorism—are offenses against the law of nations within the meaning of the Clause. What Supreme Court jurisprudence there is on the Clause strongly indicates that such crimes are indeed offenses against the law of nations subject to congressional action. That the “Law of Nations” constitutionally comprehends modern prohibitions on the present-day roster of terrorist crimes seems moreover to comport with an original understanding of the Offences Clause on at least two possible interpretations: (i) that the founders themselves embraced an evolving notion of the law of nations, and therefore restricting international law to what it was in 1789 would defeat, rather than uphold, the founders’ original intent; or (ii) that terrorist crimes are sufficiently analogous in important respects to the paramount offense against the law of nations at the time of the founding—piracy—to be included within this classification today.

#### *a. The Supreme Court’s Offences Clause Jurisprudence*

Very few Supreme Court cases address directly the scope of Congress’s power under the Offences Clause, and as a result its precise contours remain some-

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102. U.S. CONST. art. I, § 8, cl. 10.

103. See generally Beth Stephens, *Federalism and Foreign Affairs: Congress’s Power to “Define and Punish . . . offences against the Law of Nations,”* 42 WM. & MARY L. REV. 447 (2000).

104. 28 U.S.C. § 1350 (2000).

105. U.S. CONST. art. I, § 8, cl. 10.

what foggy. What we do know, however, is that the Clause empowers Congress to legislate in respect of a developing category of international offenses. Instead of taking a fixed view of the "Law of Nations" as it existed at the time of the founding, the Supreme Court sees this law as an evolving body of norms against which congressional action is measured at the time Congress legislates. Thus in *United States v. Arjona*,<sup>106</sup> the Court made clear that although the law of nations at the time of the founding did not govern the counterfeiting of foreign government securities, the standard international rule prohibiting the counterfeiting of foreign currency had grown to encompass modern financial instruments, and accordingly "extended to the protection of this more recent custom among bankers of dealing in foreign securities."<sup>107</sup> Just recently, the Supreme Court reaffirmed this fluid view of the law of nations in *Sosa v. Alvarez-Machain*, which dealt with a claim alleging a violation of the law of nations under the Alien Tort Statute.<sup>108</sup> Rejecting the particular claim at issue, the Court nonetheless explained that certain international offenses were actionable under the Statute, and that these offenses were not limited to those that existed at the time of the founding. To the contrary, "any claim based on the *present-day law of nations* [must] rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms" existing at the time the Statute was originally enacted.<sup>109</sup> That is, such a "claim must be gauged against the *current state* of international law."<sup>110</sup> Thus under *Sosa* it is the format of the norm—that it is (a) of an international character, (b) generally accepted, and (c) specifically defined—and not its content, that determines whether it is actionable under the Alien Tort Statute. And if the judicial competence to recognize offenses against the law of nations comprehends an evolving notion of that law in the "cautious" context of the Alien Tort Statute,<sup>111</sup> Congress's legislative power to do the same in enacting anti-terrorism laws must be at least equally as large.<sup>112</sup> It is therefore not surprising that lower courts have found that Congress has the power, under the Offences Clause, to define and punish acts of terrorism.<sup>113</sup> Because prohibitions on terrorist acts are the subject of a large number of widely ratified treaties, numerous U.N. Security Council Resolutions, and other binding international instruments, they have an international character, are generally accepted, and the conduct prohibited is specifically defined.<sup>114</sup> Indeed, if, as I intend

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106. 120 U.S. 479 (1887).

107. *Id.* at 486.

108. 542 U.S. 692 (2004).

109. *Id.* at 725 (emphasis added).

110. *Id.* at 733 (emphasis added).

111. *Id.*

112. See e.g., Note, *The Offences Clause after Sosa v. Alvarez-Machain*, 118 HARV. L. REV. 2378, 2391–92 (2005).

113. See *United States v. Bin Laden*, 92 F. Supp. 2d 189, 220–21 (S.D.N.Y. 2000); *United States v. Yunis*, 681 F. Supp. 896, 903 (D.D.C. 1988).

114. See discussion *infra* Part III.A.1.

to show in Part III, acts of terrorism can qualify as universal crimes—again, offenses that international law considers so harmful that every state has jurisdiction to prosecute them wherever they occur and whomever they involve—such offenses *a fortiori* must qualify as “offences against . . . the Law of Nations” within an evolutionary meaning of the Offences Clause.

*b. Two Original Interpretations of the Offences Clause*

Furthermore, at least two possible original interpretations weigh in favor of including terrorist offenses within the meaning of the Offences Clause: (i) the founders embraced an evolving notion of the law of nations, or (ii) terrorist acts are analogous in critical respects to the original universal crime—piracy—so as to be subject to the law of nations today. On this latter view, since terrorists commit their acts of war outside of the established state accountability paradigm, they have subjected themselves to the jurisdiction of “the law of nations,” which all states may enforce without offending any other state’s sovereignty.

*i. An Evolving Notion of the Law of Nations*

It is clear that the modern law of nations does not reflect the law of nations as it was in 1789. What is less clear is whether, given the philosophical closeness of the law of nations to an immutable natural law in the minds of the founding generation and the limited subject matter it covered, the founders contemplated a law of nations that would evolve to incorporate new offenses under what came to be called “international law.”<sup>115</sup>

A persuasive argument could be made that they did. Like the Supreme Court in *Arjona* and *Sosa*, the founders did not view the law of nations as fixed; rather, it embodied the continually shifting practices of states. As Stewart Jay points out, “[d]iplomatic negotiations from the Revolutionary days onward found Americans consciously attempting to depart from the law of nations—with the intent to change international custom—on issues dealing with treaty formulations and the rights of neutrals trading in wartime.”<sup>116</sup> For example, evaluating rules concerning neutral traders in light of developing custom, Thomas Jefferson as Secretary of State resorted to “[t]he general principles of the law of nations . . . I mean the principles of that law as they have been liberalized in latter times by the refinement of manners &

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115. The terms “international law” and “the law of nations” are not strictly synonymous. The term international law was invented and popularized in the eighteenth century by Jeremy Bentham to describe the interactions between nation-states. The law of nations, by contrast, aligns more closely with natural law concepts of universal moral values. See *United States v. Yousef*, 327 F.3d 56, 104 n.38 (2d Cir. 2003); Harold J. Berman, *The Alien Torts Claim and the Law of Nations*, 19 EMORY INT’L L. REV. 69, 78 (2005); Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 VAND. L. REV. 819, 822–23 (1989).

116. Jay, *supra* note 115, at 846.

morals, and evidenced by the Declarations, Stipulations, and Practice of every Civilized Nation."<sup>117</sup>

But the objection might be made that even if the founders contemplated an evolving law of nations, this law was nonetheless confined to a certain subject matter: states' relations with one another. And thus Jefferson's comments about refining customs pertinent to wartime trade reveals little about the founders' views on whether the law of nations could develop prescriptively to cover more modern international crimes like terrorist acts, which might not involve the interactions of sovereign states at all. Even if one accepts the view that the founders intended the subject matter of the law of nations to remain static, there is a powerful rejoinder made below to this objection specific to terrorism based on the offense of piracy.<sup>118</sup> Yet the attitude that the law of nations could evolve generally—and in ways that might comprehend new offenses outside of its traditional subject matter—is nonetheless manifest in early Supreme Court case law and perhaps even the text of the Offences Clause itself.

In *The Antelope*, for instance, Chief Justice Marshall found that slavery clearly violated natural law: "That it is contrary to the law of nature will scarcely be denied."<sup>119</sup> Nonetheless, "[t]his [practice], which was the usage of all, could not be pronounced repugnant to the law of nations, which is certainly to be tried by the test of neral usage. That which has received the assent of all, must be the law of all."<sup>120</sup> To reach his "legal solution" (as opposed to what the "moralist" might say on the question) Marshall looked to "those principles of action which are sanctioned by the usages, the national acts, and the general assent, of that portion of the world in which [a state] considers [itself] as a part."<sup>121</sup> Employing "this standard as the test of international law," and noting that "[b]oth Europe and America" had practiced slavery for nearly two centuries, he concluded (regrettably) that the practice was legal.<sup>122</sup> But Marshall then asked what would change the legality of the practice—signaling, importantly, that its legality under the law of nations *could* change. The answer, familiar to international lawyers, was consent: "A right, then, which is vested in all by the consent of all, can be divested only by consent."<sup>123</sup> Thus, in Marshall's view, if the consent of nations changed to prohibit slavery, it would become illegal, an offense against the law of nations—a result that obtains today.

That the founders viewed the law of nations as a developing body of rules that might grow to include new offenses may even be implicit in the text of

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117. *Id.* (quoting Letter from Thomas Jefferson to Thomas Pinckney (May 7, 1793), in 7 THE WORKS OF THOMAS JEFFERSON 312, 314 (Paul L. Ford ed., 1904)).

118. See *infra* Part II.A.1.b.ii.

119. 23 U.S. (10 Wheat.) 66, 120 (1825).

120. *Id.* at 120–21.

121. *Id.* at 121.

122. *Id.* at 121–22.

123. *Id.* at 122.

the Offences Clause itself. Blackstone, whose influence on the founders is well-known,<sup>124</sup> set forth the generally accepted offenses at the time<sup>125</sup> in his *Commentaries*: "The principal offences against the law of nations . . . are of three kinds: 1. Violation of safe-conduct; 2. Infringement of the rights of ambassadors; and, 3. Piracy."<sup>126</sup> Yet the Define and Punish Clause—which contains the Offences Clause—explicitly mentions only one of these offenses: piracy. Why not simply list the remaining offenses for a comprehensive list? Or at the very least block out the general types of offenses that might fall within this category to ensure that Congress doesn't act beyond its competence? Perhaps the reason was that the founders did not want to foreclose Congress's ability to respond to future developments in the law of nations.

All of this is not to say that the founders intended to give Congress free rein to *determine* offenses against the law of nations; rather, the word "define" was carefully chosen. It is clear from the drafting history of the Clause that only offenses established by the "consent" of nations, to use Marshall's phrase, would qualify. Congress could not create offenses, but retained only the second-order authority to assign more definitional certainty to those offenses already existing under the law of nations at the time it legislated. This power was necessary; for unlike today, where international instruments like widely ratified treaties spell out in relatively detailed terms international-law prohibitions, the law of nations at the time of the founding was divined largely from general understandings—relying heavily on the writings of publicists<sup>127</sup>—of the practice of "civilized" states. As Beth Stephens points out, addressing the imprecision of this law sparked "the only substantive debate on the offenses section of the Clause."<sup>128</sup> James Wilson had protested that "[t]o pretend to *define* the law of nations which depended on the authority of all Civilized Nations of the World, would have a look of arrogance[ ] that would make us look ridiculous."<sup>129</sup> Gouverneur Morris responded that "[t]he word *define* is proper when applied to *offences* in this case; the law of nations being often too vague and deficient to be a rule."<sup>130</sup> The power "to define" thus balanced concerns over endowing Congress with too much power to manufacture offenses, against worries about importing directly and without legislative refinement what was otherwise an unacceptably raw set of norms. That

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124. See, e.g., *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 162 (1820) (relying on Blackstone for the proposition that piracy is an offense against the law of nations).

125. See, e.g., *Sosa v. Alvarez-Machain*, 542 U.S. 692, 749 (2004) (Scalia, J., concurring in part) ("That portion of the general common law known as the law of nations was [at the founding] understood to refer to the accepted practices of nations in their dealings with one another (treatment of ambassadors, immunity of foreign sovereigns from suit, etc.) and with actors on the high seas hostile to all nations and beyond all their territorial jurisdictions (pirates).").

126. BLACKSTONE, *supra* note 45, at \*68.

127. See, e.g., *Smith*, 18 U.S. (5 Wheat.) at 163.

128. Stephens, *supra* note 103, at 473.

129. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 615 (Max Farrand ed., rev. ed. 1966).

130. *Id.*

Congress could not legislate beyond or alter unilaterally this set of norms is reinforced by statements of the Supreme Court. In an oft-quoted dictum, Justice Johnson rejected the argument that Congress could declare murder to be piracy—an offense against the law of nations—so as to bring the act within its lawmaking powers when committed by foreigners upon foreigners aboard a foreign vessel:

Nor is it any objection to this opinion, that the law declares murder to be piracy. These are things so essentially different in their nature, that not even the omnipotence of legislative power can confound or identify them. Had Congress, in this instance, declared piracy to be murder, the absurdity would have been felt and acknowledged; yet, with a view to the exercise of jurisdiction, it would have been more defensible than the reverse, for, in one case it would restrict the acknowledged, scope of its legitimate powers, in the other extend it. If by calling murder piracy, it might assert a jurisdiction over that offence committed by a foreigner in a foreign vessel, what offence might not be brought within their power by the same device?<sup>131</sup>

And more recently, *Arjona* explained that the question “whether the offence as defined is an offence against the law of nations depends on the thing done, not on any declaration to that effect by Congress.”<sup>132</sup> We might assume nonetheless that Congress, representing the United States’ sovereign lawmaking body within the international system, has at least some leeway to aid in the development of the category of international offenses by pushing the envelope beyond where it already is.

In sum, there is strong reason to believe that the founders embraced an evolving notion of the law of nations; that this law derived from “the usages, the national acts, and the general assent” of states;<sup>133</sup> and that it contemplated a changing category of offenses—but also circumscribed Congress’s lawmaking power pursuant to the Offences Clause. On this interpretation then, if terrorist acts constitute crimes against international law today, the Offences Clause gives Congress the power to prohibit them.

## *ii. Terrorism and Piracy*

There remains still another originalist objection—based on the founders’ strongly held beliefs in sovereign non-interference—to including within the law of nations modern international law offenses. As noted, at the time of the founding two basic types of conduct made up offenses against the law of nations: violations of the rules governing states’ interactions with one another, such as treatment of ambassadors and granting sovereign immunity

131. *United States v. Furlong*, 18 U.S. 184, 198 (1820).

132. *United States v. Arjona*, 120 U.S. 479, 488 (1887).

133. *The Antelope*, 23 U.S. (10 Wheat.) 66, 121 (1825).



from suit, and an especially harmful breed of crime for which no nation could be held officially accountable, that potentially targeted them all, and that called out for cooperative enforcement—piracy.<sup>134</sup> The legal principle that threads this menu of offenses, and that predominated the founders' understanding of the law of nations, was largely one of respect for state sovereignty—both of foreign states and of the young nation itself through expectations of reciprocity. In fact, motivating the inclusion of the Offences Clause in the Constitution in the first place were the founders' fears that the several U.S. states had not provided adequate legal recourse to foreign ambassadors (and, by implication, their representative governments) who had suffered some insult or injury on U.S. territory, and most importantly, the need for the fledgling nation to avoid possibly serious conflicts resulting from these failures at the state level.<sup>135</sup>

The founding-era respect for sovereignty was, as we know, strongly evident in jurisdictional rules of non-interference which held, to borrow Marshall's formulation in *The Antelope*, that "no [state] can rightfully impose a rule on another. Each legislates for itself, but its legislation can operate on itself alone. . . . [and therefore] [t]he Courts of no country execute the penal laws of another."<sup>136</sup> On this basis, those who advocate an originalist approach to constitutional interpretation tend to reject inclusion within the founders' conception of the law of nations the post-World War II development of international human rights law, which purports to govern how a sovereign state treats its own subjects within its own territory, and even permits other states the capacity to enforce against violations of these norms.<sup>137</sup> As an initial matter, it is not at all clear that the law of nations at the time of the founding rejected this idea. For instance, its condemnation of tyranny permitted foreign-state assistance to overthrow the tyrant who "violat[ed] the fundamental laws."<sup>138</sup> Moreover, as we shall see with piracy, the foreign state

134. See *Sosa*, 542 U.S. at 749 (Scalia, J., concurring in part); BLACKSTONE, *supra* note 45, at \*67.

135. Edmund Randolph, for instance, complained at the Constitutional Convention in 1787 that under the Articles of Confederation Congress "could not cause infractions of treaties or of the law of nations, to be punished: that particular states might by their conduct provoke war without controul . . ." 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 19 (Max Farrand ed., rev. ed. 1966); see also Stephens, *supra* note 103, at 465–69.

136. 23 U.S. at 122–123.

137. See, e.g., *Sosa*, 542 U.S. at 749 (Scalia J., concurring in part).

138. Emmerich de Vattel, the international legal scholar whose heavy influence on the founders is well established, see, e.g., Jay, *supra* note 115, at 840; Thomas H. Lee, *Making Sense of the Eleventh Amendment: International Law and State Sovereignty*, 96 NW. U. L. REV. 1027, 1062 (2002), wrote in his *Law of Nations*:

But, if the prince, by violating the fundamental laws, gives his subjects a legal right to resist him,—if tyranny, becoming insupportable, obliges the nation to rise in their own defence,—every foreign power has a right to succour an oppressed people who ask for their assistance.

...

[F]or, when a people, from good reasons take up arms against an oppressor, it is but an act of justice and generosity to assist brave men in the defence of their liberties. Whenever, therefore, matters are carried so far as to produce a civil war, foreign powers may assist that party which appears to them to have justice on its side. He who assists an odious tyrant,—he who declares for an unjust and rebellious people,—violates his duty.

that acted against tyranny was not enforcing its own laws, but rather the law of nations.

What made piracy different from all other extraterritorial crimes at the time of the founding—and indeed what made it a universal crime—was that prosecuting a pirate under the law of nations did not interfere with the sovereignty of any other state. Pirates had disavowed their nationality and the laws of their sovereign. By so doing, they brought themselves outside of any state's specific jurisdiction, and were instead subject to the "law of nations," which all states could enforce without fear of treading on any other state's sovereignty.<sup>139</sup> Of course piracy actually needed to take place on *some* state's territory—namely, the ship that flew its flag. And pirates were in fact *some* state's nationals. But it was the pirate's repudiation of the authority of any and every state that placed his depredations within the ambit of the law of nations, and that exposed him to the jurisdiction of all. Put differently, the pirate effectively opted out of what Blackstone called the "law of society," and accordingly forfeited also its protection:<sup>140</sup> the pirate became literally an outlaw, whom all states could pursue and punish. In Blackstone's words, "[a]s therefore [the pirate] has renounced all the benefits of society and government, and has reduced himself afresh to the savage state of nature by declaring war against all mankind, all mankind must declare war against him."<sup>141</sup>

Thus in *United States v. Palmer*, Chief Justice Marshall held that Congress, by its use of the general terms "any person or persons," had not intended to extend the 1790 Act outlawing robbery on the high seas to foreigners aboard a foreign-flag vessel because "[t]hese are offenses against the nation under whose flag the vessel sails, and within whose particular jurisdiction all on board are."<sup>142</sup> Consequently, such an offense "is not a piracy within the true intent and meaning of the act."<sup>143</sup> However, just two years later, Marshall held that the same "any person or persons" language in section 8 of the Act did encompass "general piracy . . . committed [on the high seas] by persons on board of a vessel not at the time belonging to the subjects of any foreign power, but in possession of a crew acting in defiance of all law, and acknowledging obedience to no government whatever."<sup>144</sup> The Act "extend[ed] to all persons on board vessels which throw off their national character by cruizing piratically and committing piracy on other vessels."<sup>145</sup> It was therefore purposeful abandonment of sovereign allegiance and obedi-

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EMMERICH DE Vattel, *LAW OF NATIONS* 155 (Joseph Chitty ed., 1863) (1773). It is no great leap to see this rule as the forerunner of the international human rights movement generally, and humanitarian intervention specifically.

139. See, e.g., 4 BLACKSTONE, *supra* note 45, at \*70.

140. *Id.*

141. *Id.*

142. 16 U.S. 610, 632 (1818).

143. *Id.* at 634.

144. *United States v. Klintock*, 18 U.S. 144, 152 (1820).

145. *Id.* at 153; see also *United States v. Holmes*, 18 U.S. 412, 417 (1820).

ence—the disregard of all law—that made the pirate. In fact, as some commentators have observed, privateering, “a form of nationally sponsored piracy,” was not considered criminal activity at all; instead, it was a form of legitimate warfare.<sup>146</sup> So long as the privateer operated under what was called a letter of marque and reprisal issued by a sovereign power, the privateer’s acts were not deemed illegal.<sup>147</sup> While today we might consider such plunder by force or threat of force a war crime, back then it constituted just another accepted way for states to pursue their national interests. And thus the only legal distinction between piracy and privateering was the status of the actors and the ship on which they sailed.<sup>148</sup> Importantly, unlike with piracy, states had recourse against other states who licensed privateers; by contrast, pirates waged a war under the color of no state’s authority.

Like pirates, terrorists, and in particular al Qaeda and those like al Qaeda, also have opted out of the “law of society”<sup>149</sup>: they “acknowledg[e] obedience to no government whatever [and] act[ ] in defiance of all law,”<sup>150</sup> such as the law distinguishing between military and civilian targets (indeed their purpose is often to kill as many civilians as possible), and their acts potentially target all states. The terrorist has literally, in Blackstone’s frighteningly fitting phrase, “declare[d] war against all mankind,” and thus “all mankind must declare war against him.”<sup>151</sup>

To be sure, and as with piracy which took place on floating pieces of states’ territory—i.e., their flag vessels—terrorist acts of war must actually occur in some state’s jurisdiction. And like the pirate, the terrorist is, in actuality, a national of some state. But by “throw[ing] off his national character”<sup>152</sup> in committing his illegal acts of war, the terrorist has, like the pirate, exposed himself to the enforcement jurisdiction of all states. He too wages a lawless war under the color of no state’s authority. While some states doubtlessly may offer support surreptitiously to terrorists, just as some states of old probably secretly supported pirates when it served their political interests, such under-the-table support is not official—indeed far from it: states accused of supporting terrorists often protest vigorously such accusations, and certainly reject being held accountable for terrorist crimes.<sup>153</sup> Thus just

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146. Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction’s Hollow Foundation*, 45 HARV. INT’L L.J. 183, 210 (2004) (quoting ANGUS KONSTAM, *PRIVATEERS AND PIRATES 1730–1830*, at 3 (Osprey Publishing Ltd. 2001)); accord Michael D. Ramsey, *Textualism and War Powers*, 69 U. CHI. L. REV. 1543, 1615–16 (2002).

147. See Kontorovich, *supra* note 146, at 211–12.

148. *Id.*

149. 4 BLACKSTONE, *supra* note 45, at \*71.

150. *Klintock*, 18 U.S. at 152.

151. 4 BLACKSTONE, *supra* note 45, at \*71.

152. *Klintock*, 18 U.S. at 153.

153. Take, for example, the very recent Israeli military response against Lebanon for the actions of the terrorist organization Hezbollah against Israel, for which Israel held Lebanon directly responsible. See Greg Myre and Steven Erlanger, *Clashes Spread to Lebanon as Hezbollah Raids Israel*, N.Y. TIMES, July 13, 2006, A1. Despite the fact that Hezbollah was operating freely in Lebanon, Lebanon maintained that it had nothing to do with the Hezbollah attacks. Lebanese Prime Minister Fouad Siniora insisted repeatedly

as pirates were not privateers acting under the official aegis of sovereign letters of marque and reprisal, terrorists are not officially part of any sovereign state's armed forces.<sup>154</sup> Because terrorists operate outside the traditional paradigm of state accountability when they commit their crimes, they are, like pirates, subject to the law of nations, which any state may enforce through criminal prosecution. And just like prosecuting the pirate, prosecuting the terrorist for offenses against the law of nations disrespects no state's sovereignty.

On any reading then, terrorist acts are consistent with the current Supreme Court's, as well as the founders' original conception of, "offences . . . against the Law of Nations." And because these offenses are not offenses under only U.S. law, but also under the law of nations, Congress may legislate extraterritorially as to these crimes pursuant to the Offences Clause.

## 2. *The Foreign Commerce Clause*

Like Congress's general ability to legislate extraterritorially, its ability to reach conduct abroad deriving from the Article I, Section 8 power "[t]o regulate Commerce with foreign Nations"<sup>155</sup> has begun only recently to catch the attention of defendants, courts and commentators.<sup>156</sup> Noting the absence of controversy surrounding the Clause in comparison with its domestic counterpart—Congress's power to regulate commerce "among the several States"<sup>157</sup>—the Ninth Circuit observed in a very recent opinion that "[i]t is not so much that the contours of the Foreign Commerce Clause are crystal clear, but rather that their scope has yet to be subjected to judicial scrutiny."<sup>158</sup> In fact, it is not even clear whether the three-category framework<sup>159</sup> that the Supreme Court has consistently and "mechanically recited"<sup>160</sup> in evaluating congressional action under the Domestic Commerce Clause<sup>161</sup> applies equally to

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that the Lebanese government was "not aware of and does not take responsibility for, nor endorses," Hezbollah's actions. *Id.* Any country might, therefore, prosecute the Hezbollah militants for crimes committed in violation of international law without offending Lebanon—a result that likely would not obtain if, say, a Lebanese soldier were in the dock. Rather, the terrorist, like the pirate, is a stateless criminal subject to the law of nations whom all states may prosecute.

154. Indeed, the United States, in waging its military campaign in Afghanistan, makes a legal distinction between Taliban forces and al Qaeda forces, and goes so far as to consider the effort two separate wars against two separate enemies. See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2794 (2006) (describing "the Executive's assertions that Hamdan was captured in connection with the United States' war with al Qaeda and that that war is distinct from the war with the Taliban.").

155. U.S. CONST. art. I, § 8, cl. 3.

156. See Bradley, *supra* note 3, at 336.

157. U.S. CONST. art. I, § 8, cl. 3.

158. *United States v. Clark*, 435 F.3d 1100, 1102 (9th Cir. 2006).

159. *Gonzales v. Raich*, 545 U.S. 1, 16–17 (2005) (setting forth the three categories: "First, Congress can regulate the channels of interstate commerce. Second, Congress has authority to regulate and protect the instrumentalities of interstate commerce, and persons or things in interstate commerce. Third, Congress has the power to regulate activities that substantially affect interstate commerce.") (internal citation omitted).

160. *Raich*, 545 U.S. at 33 (Scalia, J., concurring).

161. I use the terms "Domestic Commerce Clause" and "Foreign Commerce Clause" for ease of refer-

congressional action taken under the Foreign Commerce Clause.<sup>162</sup> The relevant questions for our purposes are whether restrictions exist on Congress's ability to extend extraterritorially U.S. law under the Foreign Commerce Clause and, if so, what those restrictions look like. And finally, how might such restrictions limit Congress's ability to apply U.S. law to terrorist offenses abroad?

The text of the Foreign Commerce Clause along with what we know about the founders' beliefs regarding state sovereignty and attendant rules of jurisdictional non-interference lead persuasively to the conclusion that for Congress to act extraterritorially under the Clause, the conduct it seeks to regulate must exhibit a direct connection to U.S. commerce. Further, where Congress looks to extend U.S. law to activity entirely within the jurisdictions of other nation-states, the connection to U.S. commerce should be at least as strong as the connection to interstate commerce in the domestic context. That is, it should be "part of an economic class of activities that have a substantial effect" on U.S. commerce.<sup>163</sup> Thus while Congress might have a long reach due to the increasingly interconnected global economy, it does not have the ability to project willy-nilly U.S. law to *any* conduct of a commercial nature abroad. Put differently, Congress may not regulate conduct that bears a relationship only to foreign commerce *generally*—say, exploding a bomb on an "instrumentality" of foreign commerce facilitating travel within India or even between India and Pakistan—but not to U.S. commerce specifically.

First, use of the word "with" in the Clause's phrase "with foreign Nations"<sup>164</sup> indicates on its face some U.S. connection to the commerce that is the subject of federal regulation. There are two parties, or sides, to the "commerce" contemplated in the Clause. One plainly is "foreign Nations," for they are mentioned explicitly but are lumped together. And thus although implicit, the other side to the commerce equation naturally must be the United States. Hence there is no power to regulate unless the foreign commerce is "with" not only foreign nations, but also "with" the United States. In other words, the founders didn't give Congress the general power to regulate commerce "among foreign Nations."

Moreover, for Congress to extend its lawmaking power inside the territories of foreign states, the connection to U.S. commerce should be at least as strong as the connection to interstate commerce "among the several States."<sup>165</sup> This is because the different use of the words "among" and "with" in the

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162. Saikrishna Prakash, *Our Three Commerce Clauses and the Presumption of Intrasentence Uniformity*, 55 ARK. L. REV. 1149, 1166 (2003) ("Apparently, the Supreme Court has never discussed the applicability of the three-part Lopez test to gauging the limits of the foreign commerce power."); Clark, 435 F.3d at 1116.

163. *Raich*, 545 U.S. at 17 (internal quotation marks omitted).

164. U.S. CONST. art. I, § 8, cl. 3.

165. U.S. CONST. art. I, § 8, cl. 3 (emphasis added).

Interstate and Foreign Commerce Clauses indicates that the federal government has more power under the Interstate Commerce Clause to infringe the sovereignties of the several U.S. states than to infringe the sovereignties of foreign states. Again, use of the word “among” to describe the federal government’s relationship *vis-à-vis* the several U.S. states implies some superiority over them—an ability to control and coordinate, or to “make regular,”<sup>166</sup> interstate commerce generally. This element of general control makes it easier to reach into the borders of the several states when “necessary and proper” to do so.<sup>167</sup> As Marshall observed in *Gibbons v. Ogden*, “[t]he word ‘among’ means intermingled with. A thing which is among others, is intermingled with them. Commerce among the States, cannot stop at the external boundary line of each State, but may be introduced into the interior.”<sup>168</sup>

By contrast, use of the word “with” to describe the federal government’s relationship *vis-à-vis* foreign states under the Foreign Commerce Clause implies that such states are on equal footing with the United States; commerce “with” foreign nations presumptively may well stop at the external boundary lines of these sovereigns.<sup>169</sup> The District Court in *Yunis* made this point

166. See Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101 (2001).

167. Article I, section 8, clause 18 grants Congress the power “to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.” U.S. CONST. art. I, § 8, cl. 18.

168. 22 U.S. (9 Wheat.) 1, 194 (1824).

169. One could question this textual interpretation in light of Congress’s “plenary power” over the Indian Tribes. At least at some points in Supreme Court history, Congress has drawn justification for this power from the Indian Commerce Clause, which grants Congress the power to regulate commerce “with the Indian Tribes.” U.S. CONST. art. I, § 8, cl. 3. While the Court initially rejected the Indian Commerce Clause as the source of federal plenary power over Indian tribes, explaining that to find such power “would be a very strained construction of th[e] clause.” *United States v. Kagama*, 118 U.S. 375, 378–79 (1886) (finding plenary power not in the text of the Constitution but on a wardship theory), later opinions have located plenary power in the Treaty Clause and in the Indian Commerce Clause. See *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989). Yet in its most recent decision on the matter, *United States v. Lara*, 541 U.S. 193 (2004), the Court seemed, if not explicitly to move away from this textual justification, certainly to downplay it, leading one commentator to observe that “the Court blithely repeated these claims [that the Treaty Clause and Indian Commerce Clause grant plenary power] without pausing to make sense of them.” Saikrishna Prakash, *Against Tribal Fungibility*, 89 CORNELL L. REV. 1069, 1079 (2004). While the Court noted in *Lara* that it “has traditionally identified the Indian Commerce Clause . . . and the Treaty Clause . . . as sources of [federal] power,” 541 U.S. at 200, it then went on to justify plenary power on a theory of “preconstitutional powers necessarily inherent in any Federal Government,” *id.* at 201. Hence, it is not entirely clear whether the Court still views the Indian Commerce Clause as the source of plenary power over the Indian tribes. Of course, even if it did, one might also contend with some force that the Court is wrong. See Prakash, *supra*, at 1081 (“The Commerce Clause does not confer upon Congress complete power over Indian tribes. One cannot read the power to regulate commerce with Indian tribes as a power to regulate the Indian tribes themselves.”). Alternatively, for our purposes—which again, look to measure the status of “foreign Nations” within the Commerce Clause—there also exists a plain textual difference between “foreign Nations” and “Indian Tribes.” The Court highlighted this distinction in *Kagama*, indicating that Indian Tribes do not enjoy the same sovereign status as foreign nations. 118 U.S. at 379 (“The commerce with foreign nations is distinctly stated as submitted to the control of Congress. Were the Indian tribes foreign nations? If so, they came within the first of the three classes of commerce mentioned, and did not need to be repeated as Indian tribes . . . . But these Indians are within the geographical limits of the United States. The soil and the

concretely. Rejecting the government's claims that section 32(a) of the federal code prohibiting destruction of "any aircraft in the special aircraft jurisdiction of the United States or any civil aircraft used, operated, or employed in interstate, overseas, or foreign air commerce"<sup>170</sup> reached "alleged perpetrators of aircraft piracy irregardless [sic] of where the offense took place or which country operated the aircraft,"<sup>171</sup> the court explained:

Certainly Congress has plenary power to regulate the flow of commerce within the boundaries of United States territory. But it is not empowered to regulate foreign commerce which has no connection to the United States. Unlike the states, foreign nations have never submitted to the sovereignty of the United States government nor ceded their regulatory powers to the United States.<sup>172</sup>

Furthermore, as a matter of original intent, the idea that the Foreign Commerce Clause might license Congress with the broad ability to extend U.S. laws extraterritorially into the jurisdictions of other nations would have been anathema to the founders given their driving belief in the sovereign equality of states and its accompanying rigid conception of territoriality—which, to borrow yet again from Chief Justice Marshall, held that "no [state] can

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people within these limits are under the political control of the Government of the United States, or of the States of the Union. There exist within the broad domain of sovereignty but these two.").

170. 18 U.S.C. § 32(a)(1) (2000).

171. *United States v. Yunis*, 681 F. Supp. 898, 907 (D.D.C. 1988).

172. *Id.* at 907 n.24. One might object to these arguments by drawing from Supreme Court statements that although the domestic and foreign commerce powers are contained in parallel clauses, "there is evidence that Founders intended the scope of the foreign commerce power to be the greater." *Japan Line Ltd. v. County of Los Angeles*, 441 U.S. 434, 448 (1979). For instance in cases like *Japan Line* and *Board of Trustees of the University of Illinois v. United States*, 289 U.S. 48 (1933), the Court has indicated that it is the absence of federalism concerns that fuels the comparatively larger breadth of the Foreign Commerce Clause. As the Court in *Japan Line* put it: "Congress's power to regulate interstate commerce may be restricted by considerations of federalism and state sovereignty. It has never been suggested that Congress's power to regulate foreign commerce could be so limited." 441 U.S. at 448 n.13; *see also* *Bd. of Trs. of Univ. of Ill.*, 289 U.S. at 57 ("The principle of duality in our system of government does not touch the authority of the Congress in the regulation of foreign commerce."). From this type of statement it is tempting to jump to the somewhat awkward conclusion that while the several U.S. states are constitutionally cognizable sovereigns against which federal power must be measured under the Domestic Commerce Clause, foreign states are not so privileged under the Foreign Commerce Clause. Such a conclusion would, however, be wrong. The Court's statements explaining Congress's larger power under the Foreign Commerce Clause relate only to the federal government's authority *vis-à-vis* the several U.S. states, not foreign states. In other words, while federalism concerns might inhibit congressional action that infringes upon the legislative realm constitutionally left to the states, no similar state's-rights objection exists regarding Congress's external lawmaking power to regulate foreign commerce on behalf of the nation. To be sure, both *Japan Line* and *Board of Trustees of the University of Illinois* involved challenges to the federal government's authority *vis-à-vis* U.S. states (California and Illinois respectively). In this context, the Court observed in *Japan Line* that "the Framers' overriding concern [motivating inclusion of the Foreign Commerce Clause was] that 'the Federal Government must speak with one voice when regulating commercial relations with foreign governments,'" 441 U.S. at 449 (quoting *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285 (1976)), and, in *Board of Trustees of the University of Illinois* that "[i]n international relations and with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power." 289 U.S. at 59.

rightfully impose a rule on another[,] [e]ach legislates for itself, but its legislation can operate on itself alone."<sup>173</sup> Recall the reason why Congress was allowed to legislate extraterritorially over piracy absent a U.S. connection even though the act technically occurred within another state's territory: the conduct was prohibited as a matter of *the law of nations*, not of U.S. law, and thus the United States was not imposing its *own* rule on other nations, but merely enforcing (on their behalf) a universal norm when it prosecuted pirates. No such analysis applies to extraterritorial projections of Congress's Foreign Commerce Clause power.

But we know that the federal government can and does extend its legislation into the territories of foreign states where the conduct in question has an adequately strong connection to U.S. commerce. For instance, the United States may extend U.S. law to U.S.-flag aircraft abroad since technically the aircraft are pieces of U.S. territory, and the United States may even extend U.S. law to conduct occurring entirely within the territories of other states that nonetheless "was meant to produce and did in fact produce some substantial effect" on U.S. commerce.<sup>174</sup>

The crucial principle at play in this analysis is, again, sovereignty. While the federal government retains the power to infringe the sovereignties of the several U.S. states in order to represent the U.S. nation as a unified and, indeed, sovereign whole on the world stage, the text of the Foreign Commerce Clause, as well as the founders' notions of jurisdiction, oppose Congress disparaging the sovereignties of foreign states by purporting to legislatively "impose a rule *on*"<sup>175</sup> these states via a Clause that permits only the power to regulate commerce "with" them<sup>176</sup>—that is, absent some valid justification to do so.

One readily apparent way to measure whether a valid justification exists, and thus whether a particular congressional extension of jurisdiction abroad respects the sovereignty of other states, is the law of nations, to which all states theoretically have consented.<sup>177</sup> And because the effects test under pre-

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173. *The Antelope*, 23 U.S. at 122–23.

174. *Hartford Fire Ins.*, 509 U.S. at 796; see also *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 443–44 (2d Cir. 1945).

175. *The Antelope*, 23 U.S. at 122 (emphasis added).

176. U.S. CONST. art. I, § 8, cl. 3 (emphasis added).

177. To be clear, I am not contending here that international law, on its own authority, restricts Congress's legislative reach under the Foreign Commerce Clause. Rather, it is primarily the text of the Clause, and in particular, use of the word "with" that limits Congress's authority—especially when contrasted with use of the word "among" in the Domestic Commerce Clause. As discussed, this textual difference indicates that Congress has limited power to infringe the sovereignties of foreign nations through exercises of extraterritorial prescriptive jurisdiction, and even indicates that Congress may have less power in this respect than it has to infringe the sovereignties of the several U.S. states under the Domestic Commerce Clause where Congress seeks to regulate activity entirely within a state that nonetheless "substantially affects U.S. commerce." But because international law describes what is and is not acceptable interference in the jurisdictions of foreign states and has evolved to allow exercises of prescriptive jurisdiction over conduct that occurs outside a state's borders but has an effect within them, we can say that Congress may extend U.S. law to foreign conduct substantially affecting U.S. commerce without infringing the sovereignties of foreign states—giving Congress essentially the same power it has to in-



sent-day international law<sup>178</sup> has, as we saw in Part I, abandoned strict territoriality and evolved in a way that matches up nicely with the effects test under the Commerce Clause—i.e., the conduct must have a “substantial effect” on U.S. commerce<sup>179</sup>—Congress should be free to extend U.S. law to such conduct abroad in line with both the text of the Foreign Commerce Clause and the founders’ notions of jurisdictional non-interference (if we agree that the founders viewed the law of nations as an evolving body of norms, including jurisdictional norms). Thus where terrorist acts are of an economic character and have a substantial effect on U.S. commerce, they fall within Congress’s Foreign Commerce Clause power. But absent this substantial effect, Congress’s authority to extend U.S. law extraterritorially under the Clause is doubtful at best. Compared with the Offences Clause then, the Foreign Commerce Clause likely provides a limited source of congressional power over terrorist acts abroad.

### 3. *The Treaty Power*

Another source of authority for extending U.S. law to terrorist activity abroad is located in the combination of Congress’s Necessary and Proper power and the Executive’s Article II Treaty Power.<sup>180</sup> The Necessary and Proper Clause grants Congress the power “to make all Laws which shall be necessary and proper for carrying into Execution . . . all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”<sup>181</sup> This power is extensive. According to Marshall’s now famous test in *McCullough v. Maryland*: “Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”<sup>182</sup> Courts have viewed this “plainly adapted” standard to “require[ ] that the effectuating legislation bear a rational relationship to a permissible

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fringe the sovereignties of the several U.S. states under the Domestic Commerce Clause where it regulates conduct internal to those states. Interestingly, then, employing these expansive international rules of jurisdiction to inform the text of the Foreign Commerce Clause may actually amplify Congress’s power beyond a literal reading of the Clause’s text, a reading that would seem to assign Congress less power than it has in the domestic realm. Again, this is not to say that Congress is limited by international law in its regulation of foreign conduct, including foreign commerce. As I discuss below in subsection 4, Congress likely has another, broader power—a Foreign Affairs Power, from which to extend U.S. law beyond the limits prescribed by international law.

178. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(1)(c) (1987).

179. *Gonzales v. Raich*, 125 S.Ct. 2195, 2205 (2000).

180. See *Missouri v. Holland*, 252 U.S. 416, 432 (1920); *Neely v. Henkel*, 180 U.S. 109, 121 (1901); see also LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 204 & n.111 (Oxford Univ. Press 1996) (1972) (“The ‘necessary and proper’ clause originally contained expressly the power ‘to enforce treaties’ but it was stricken as superfluous.”) (citing 2 THE RECORDS OF THE CONVENTION OF 1787, at 382 (Max Farrand ed., rev. ed. 1966)).

181. U.S. CONST. art. I, § 8, cl. 18.

182. 17 U.S. (4 Wheat.) 316, 421 (1819).

constitutional end.”<sup>183</sup> And to implement the Treaty Power, Congress even may regulate conduct that otherwise falls outside of its enumerated powers: “if the treaty is valid there can be no dispute about the validity of [a] statute [passed] under Article I, Section 8, as a necessary and proper means to execute the powers of the Government.”<sup>184</sup> Thus if the United States enters into a valid treaty outlawing certain terrorist conduct, Congress may prohibit that conduct as a necessary and proper exercise of its power to effectuate U.S. obligations under the treaty.<sup>185</sup> And because the aim of the treaty is to prohibit the conduct in question within the territories of all the signatory states, Congress legitimately may extend the prohibition into the foreign territories of other states parties to the treaty, even absent any direct U.S. connection to the conduct.<sup>186</sup> But what happens when the conduct occurs in the territory of a foreign state that is not a party to the treaty? Can Congress legitimately extend U.S. law, under the auspices of carrying out U.S. obligations under the treaty, into the territory of the non-party state?

While the Necessary and Proper Clause’s critical role in beefing up federal power *vis-à-vis* the several states has led some to question its currently broad and prevailing construction,<sup>187</sup> the particular, and for our purposes most interesting issue of whether Congress may extend U.S. law implementing a treaty into the territory of a non-party state has yet to attract serious scholarly or judicial attention.<sup>188</sup> And its resolution is far from clear. For example, suppose the United States, Mexico and Canada enter into a treaty outlawing the human consumption of snails due to a perceived gastropoda shortage on the North American continent, and Congress, using its Necessary and Proper Clause powers, enacts legislation implementing this prohibition. Would Congress be able to extend the prohibition on snail eating into, say, France? At the very least, the Necessary and Proper Clause’s “plainly adapted” test<sup>189</sup> re-

183. *United States v. Wang Kun Lue*, 134 F.3d 79, 84 (2d Cir. 1997); see also Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 TEX. L. REV. 795, 812–27 (1996) (“To the extent that modern courts ever acknowledge that Congress is exercising power granted by the Necessary and Proper Clause, they have translated Marshall’s statements on the meaning of ‘necessary’ and the congressional discretion on the degree of necessity into a rational basis test; namely, asking whether Congress’s determination that the regulation in question will promote a legitimate federal end was one that could rationally be reached.”).

184. *Holland*, 252 U.S. at 432.

185. See *Yousef*, 327 F.3d at 108–10, 97; *Yunis*, 924 F.2d 1086, 1091; *Wang Kun Lue*, 134 F.3d at 84.

186. See e.g., *Yousef*, 327 F.3d at 108–10.

187. See Randy E. Barnett, *Necessary and Proper*, 44 UCLA L. REV. 745 (1997); David E. Engdahl, *The Necessary and Proper Clause as an Intrinsic Restraint on Federal Lawmaking Power*, 22 HARV. J.L. & PUB. POL’Y 107 (1998); Gardbaum, *supra* note 183, at 812–27; Gary Lawson & Patricia B. Granger, *The “Proper” Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267 (1993).

188. For instance, Curtis Bradley seems simply to assume that treaties do not extend into the territories of non-party states. See Bradley, *supra* note 3, at 337 (noting that “while the treaties by themselves may not give Congress the power to exercise universal jurisdiction over citizens of non-party countries, the treaties are likely to add support for such exercises of jurisdiction—for example, by bolstering the claim that such jurisdiction is supported by the ‘law of nations’”).

189. *McCullough v. Maryland*, 17 U.S. (4 Wheat.) 421 (1819).

quires a “telic”<sup>190</sup> relationship, or means-ends fit, between the legislation and the valid governmental objective. Certainly a strong argument could be made that because the treaty only pertains to the United States, Mexico, and Canada, it is neither necessary nor proper to extend its terms to a non-party state since the legislative means would have no relationship to the governmental end; i.e., effectuating the treaty—which, by its very character, is limited only to certain states.

Where things get tricky is when the treaty purports to have a more general applicability, a feature most forcefully evidenced in the anti-terrorism context by the so-called “prosecute or extradite” provision. Again, this type of provision, common among anti-terrorism treaties,<sup>191</sup> generally obliges states parties to prosecute or extradite to another state party violators of the treaty “found” or “present” within their territories.<sup>192</sup> The question then becomes whether Congress’s power under the Necessary and Proper Clause to execute the prosecute or extradite provision allows the seemingly retroactive extension of U.S. law into the non-party state and application of that law to the accused while there, should the United States happen to gain custody over him at some later point. To continue with our snail treaty hypothetical, suppose the treaty contained a prosecute or extradite provision typical of those found in anti-terrorism treaties, mandating that:

The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State.<sup>193</sup>

Now suppose the United States has reason to believe that a French tourist presently visiting New York City has, at some point since the snail treaty took effect—but while back home in France—eaten snails, and let us even stipulate that the snails were harvested in France. Does the Necessary and Proper Clause empower Congress to extend U.S. law to this past conduct simply because the French snail-eater ended up at some later point on U.S. territory? Surely, and as we will see in the next section,<sup>194</sup> a persuasive due process argument

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190. The literature on the Necessary and Proper Clause uses the term “telic” consistently. This term was evidently used first by David Engdahl to describe the means-ends fit under the Clause. See DAVID E. ENGDALH, *CONSTITUTIONAL FEDERALISM IN A NUTSHELL* 20 (2d ed. 1987).

191. See Appendix (setting forth prosecute or extradite provisions for anti-terrorism treaties).

192. *Id.*

193. This particular provision appears in the Convention for the Suppression of Unlawful Seizure of Aircraft art. 7, Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105, and in the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation art. 7, Sept. 23, 1971, 24 U.S.T. 564, 974 U.N.T.S. 178.

194. See *infra* Part II.B.

can be made that the application of the U.S. law to this individual is arbitrary and unfair. But under the expansive powers of the Necessary and Proper Clause, can we say for certain that Congress does not have the ability in the first instance to carry into effect U.S. treaty obligations in this respect?

Regardless of the answer to this question, there is of course a much safer enumerated power to rely upon should the United States wish to prosecute terrorists (though admittedly not snail-eaters) under a treaty's implementing legislation where the act occurs in the territory of a non-party state: the Offences Clause. Again, because terrorist crimes are universal "offences against the Law of Nations,"<sup>195</sup> the international legal prohibition on such crimes extends into the territories of all states, including non-party states. There is, in other words, no extraterritorial limitation.

#### 4. Foreign Affairs Power

Finally, Congress also probably has the authority to legislate extraterritorially over terrorist offenses pursuant to what is generally referred to as its "foreign affairs power." Typically associated with the controversial<sup>196</sup> yet abiding Supreme Court opinion in *United States v. Curtiss-Wright Export Corporation*,<sup>197</sup> the foreign affairs power locates in the government inherent powers over foreign affairs that do "not depend upon the affirmative grants of the Constitution" but instead "have vested in the federal government as necessary concomitants of nationality."<sup>198</sup> The basic theory behind *Curtiss-Wright* is that because the United States is a sovereign state, it necessarily must have the same powers as other sovereign states in its external affairs, regardless of whether the Constitution affirmatively grants these powers to the federal government.<sup>199</sup> In the Court's words, the inherent foreign affairs powers are found "not in the provisions of the Constitution, but in the law of nations."<sup>200</sup> At least one court so far has indicated that this power authorizes congressional regulation of terrorist acts abroad. The district court in *United States v. Bin Laden*<sup>201</sup> suggested, evidently in dicta,<sup>202</sup> that Congress might punish acts committed abroad against U.S. nationals and property<sup>203</sup> because such leg-

195. U.S. CONST. art. I, § 8, cl. 10.

196. For a good discussion of the various criticisms of *United States v. Curtiss-Wright Export Corporation*, see generally Michael D. Ramsey, *The Myth of Extraconstitutional Foreign Affairs Power*, 42 WM. & MARY L. REV. 379 (2000); see also *supra*, at 394 (concluding in part that "it is impossible to defend *Curtiss-Wright*'s conclusion [that the federal government has an inherent foreign affairs power]").

197. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

198. *Id.* at 318.

199. *Id.* ("As a member of the family of nations, the right and power of the United States in [the foreign affairs] are equal to the right and power of the other members of the international family. Otherwise, the United States is not completely sovereign.").

200. *Id.*

201. *United States v. Bin Laden*, 92 F. Supp. 2d 189, 220-21 (S.D.N.Y. 2000).

202. The court appeared to rely on the Offences Clause to justify constitutionality of the legislation. *Id.* at 220.

203. *Id.* at 218 (quoting 18 U.S.C. § 2332a(a) (1994 & Supp. 1999)).

islation was "foreign affairs legislation."<sup>204</sup> According to the court, because the legislation punishing terrorist acts against U.S. nationals and property was designed on its face, and by its legislative history, to protect U.S. foreign affairs interests, Congress had the authority to enact it.<sup>205</sup>

The foreign affairs power is notoriously cagey and difficult to pin down. As one commentator recently observed, "its judicial application is replete with so many inconsistencies that its basic contours remain ill-defined and incoherent."<sup>206</sup> Indeed, as Louis Henkin succinctly put it, "No one knows the reaches of the foreign affairs power of Congress."<sup>207</sup> My intention in this small section is not to undertake the huge task of defining or adding coherence to the doctrine, but merely to evaluate whether Congress might use it to legislate over terrorist offenses abroad.

Reliance on an inherent foreign affairs power to legislate over terrorist acts abroad raises a number of potential issues, none of which however appears to limit significantly Congress's authority in this area. One preliminary issue is whether, acting on this basis, Congress has authority to legislate beyond the prescriptive boundaries set by international law. That is, if the foreign affairs power originates from "the law of nations,"<sup>208</sup> must the legislation enacted pursuant to this power conform to that law, and does this somehow constrain Congress's reach over terrorist acts abroad? There are, moreover, important separation-of-powers and structural issues to address, which concern the extent of Congress's autonomous competence to exercise the federal government's foreign affairs powers, and whether a given piece of legislation adequately achieves that goal. Phrased more pointedly: to what extent must Congress act in coordination with the Executive, which has "plenary and exclusive" power over foreign affairs according to *Curtiss-Wright*,<sup>209</sup> and how do courts gauge whether Congress properly has exercised its power?

#### *a. Conformity with International Law*

As to whether the legislation must conform with international law, *Curtiss-Wright* makes clear that the fount of inherent federal foreign affairs power is "the law of nations," and from this proposition presumes that "operations of the nation in [foreign] territory must be governed by . . . the principles of international law."<sup>210</sup> The *Bin Laden* court acknowledged the role of international law in this respect, even quoting congressional findings behind the challenged anti-terrorism legislation that "it is an accepted principle of international law that a country may prosecute crimes committed outside its

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204. *Id.* at 221.

205. *Id.*

206. Jide Nzelibe, *The Uniqueness of Foreign Affairs*, 89 IOWA L. REV. 941, 943 (2004).

207. HENKIN, *supra* note 180, at 71.

208. *Curtiss-Wright Export Corp.*, 299 U.S. at 318.

209. *Id.* at 320.

210. *Id.* at 318.

boundaries that are directed against its own security or the operation of its government functions . . . ."<sup>211</sup> One might argue therefore that because international law generates the foreign affairs power, that power reciprocally must obey international law.

Of course even if this were the case, a vast amount of U.S. law outlawing terrorist acts abroad against U.S. nationals and property would be sustainable because, as the *Bin Laden* court recognized, the United States has a right under international law to protect its interests. In fact, even where no objective U.S. interests are implicated, much anti-terrorism legislation would conform with international law since many terrorist crimes are, as we shall see in Part III, universal.

But in any event, the argument that exercises of the foreign affairs power must obey international law is wrong. Its flaw is that as a sovereign state the United States must also have the power to breach international law. All states have this power. Indeed, it is one important way in which international law changes: breaches gain acceptance and blossom into new rules.<sup>212</sup> If the United States did not have the power to breach international law, it could not contribute to the formation of new rules in the same way, and to the same extent, as other sovereign states. Hence if we take *Curtiss-Wright's* nationhood proposition seriously, Congress theoretically could legislate extraterritorially as to any conduct whatsoever, so long as the legislation is in pursuit of "foreign affairs." To try to break this circularity we might raise our next series of questions, which ask in essence how to determine whether something constitutionally concerns "foreign affairs," and whether a specific piece of legislation constitutionally qualifies as "foreign affairs legislation."

*b. Coordination with Other Branches*

One quite important but no less controversial aspect of *Curtiss-Wright* that the *Bin Laden* court neglected to mention was the Supreme Court's insistence not only on an inherent foreign affairs power, but also that it is the Executive, not Congress, that enjoys the primary authority to wield it.<sup>213</sup> The facts of *Curtiss-Wright* involved a constitutional challenge to a joint resolution of Congress authorizing the President to place an embargo on arms sales to, among other countries, Bolivia and Paraguay, which he did.<sup>214</sup> The *Curtiss-Wright Corporation*, which had been prosecuted for violating the embargo, argued that Congress improperly had delegated its lawmaking authority to the President.<sup>215</sup> Rejecting this argument, the Court held that because the President had extensive foreign affairs powers, the fact that Congress chose

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211. *Bin Laden*, 92 F. Supp. 2d at 221.

212. See D'AMATO, *supra* note 75, at 97-98; Anthony D'Amato, *The Theory Of Customary International Law*, 82 AM. SOC'Y INT'L L. PROC. 242, 246 (1988); D'Amato, *supra* note 78, at 1310-11.

213. *Curtiss-Wright*, 299 U.S. at 320.

214. *Id.* at 311-13.

215. *Id.* at 314-15.

to grant him discretion to impose the embargo presented no constitutional problem. The Court explained that "we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations."<sup>216</sup> To be sure, it is "a power which does not require as a basis for its exercise an act of Congress."<sup>217</sup> The implication here arguably may be that Congress, acting independently on *its own* authority, has a comparatively small foreign affairs power because such power resides first and foremost in the Executive. A strong version of this argument might even posit that for Congress to legislate pursuant to an inherent foreign affairs power, some executive policy must underlie that legislation.<sup>218</sup> Even if this view is correct, and let's assume for the sake of argument that it is since we are looking to identify any potential constraints on Congress's power, it would nonetheless seem to present no obstacle for the operation of anti-terrorism foreign affairs legislation. These days an executive anti-terrorism policy is not hard to find; indeed it makes up the centerpiece of current U.S. foreign policy—as articulated by the Executive<sup>219</sup>—and we might conclude that to execute it, Congress has a broad license to proscribe terrorist acts anywhere around the world.<sup>220</sup>

### *c. Measuring Exercises of the Power*

But Congress still must exercise its power responsibly and within certain bounds. For the Supreme Court also has explained that "[b]road as the power in the National Government to regulate foreign affairs must necessarily be, it is not without limitation. The restrictions confining Congress in the exercise of any of the powers expressly delegated to it in the Constitution apply with equal vigor when that body seeks to regulate our relations with other nations."<sup>221</sup>

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216. *Id.* at 319–20.

217. *Id.* at 320.

218. Such a result would match up with Saikrishna Prakash and Michael Ramsey's conclusion that if one locates the executive power over foreign affairs in the text of the Constitution (as opposed to outside of it *a la* *Curtis-Wright*), "Congress lacks a comprehensive power to legislate in foreign affairs. Outside its specific foreign affairs powers such as declaring war or regulating commerce, and laws necessary and proper to such powers, Congress may legislate only to carry into execution the President's foreign affairs powers." Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 *YALE L.J.* 231, 355–56 (2001).

219. See *infra* note 258 (citing President George W. Bush's Address to a Joint Session of Congress and the American People (Sept. 20, 2001) and THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (2002), in which the President explained that "[t]he United States of America is fighting a war against terrorists of global reach. The enemy is not a single political regime or person or religion or ideology. The enemy is terrorism—premeditated, politically motivated violence perpetrated against innocents.").

220. See generally HENKIN, *supra* note 180, at 74 ("Indeed, one can readily build a plenary power of Congress to enact laws in regard to foreign affairs as necessary and proper to carry into execution the President's 'plenary powers' to conduct foreign affairs.").

221. *Perez v. Brownell*, 356 U.S. 44, 58 (1958).

The analysis here seems fundamentally to be, yet again, the familiar rational basis test: "Congress may not act arbitrarily, a rational nexus must exist between the content of a specific power in Congress and the action of Congress in carrying that power into execution."<sup>222</sup> Needless to say, it would be rather difficult to argue that proscribing acts of terrorism abroad is not rationally related to foreign affairs, and consequently this low constitutional hurdle poses no real threat to Congress's authority to enact anti-terrorism laws of extra-territorial application pursuant to its foreign affairs power.

Are there left then *any* limits on Congress's ability to extend U.S. anti-terrorism laws abroad enacted pursuant to its foreign affairs power? The answer, as with legislation enacted pursuant to Congress's enumerated powers, lies in the Fifth Amendment Due Process Clause. What precisely these limits look like or should look like makes up the bulk of the discussion that follows; it is enough here to note that by its terms, *Curtiss-Wright* indicates that the Fifth Amendment applies to exercises of the foreign affairs power in order to protect against infringements of constitutional rights. The Court explained that while the federal government enjoys a sweeping power over foreign affairs, "of course, like every other governmental power, [it] must be exercised in subordination to the applicable provisions of the Constitution."<sup>223</sup> This statement comports with Supreme Court holdings that the government's authority to engage in international lawmaking through its foreign affairs powers does not override individuals' constitutional rights.<sup>224</sup> And thus although the foreign affairs power may be broad, it is still subject to the Fifth Amendment's Due Process Clause which, as we shall see, potentially blocks the extraterritorial application of U.S. criminal laws to individual defendants in certain circumstances.

The upshot is that Congress has sound and relatively broad bases, both textually—the Offences Clause, and an inherently—the foreign affairs power, from which to project U.S. anti-terrorism laws abroad, but that Fifth Amendment due process may preclude the application of that legislation to particular individuals in particular contexts. We now turn to what Fifth Amendment due process entails, and why, under the correct view of its constitutional criteria, where U.S. legislation proscribes universal terrorist offenses, Fifth Amendment due process does not stand in the way of a U.S. prosecution.

### B. Due Process Limits on Extraterritorial Jurisdiction

Unlike structural limitations on extraterritorial jurisdiction which determine Congress's power to legislate in the first instance, Fifth Amendment due process limits profess to insulate individual defendants from the application of an otherwise valid legislative enactment.<sup>225</sup> In other words, such pro-

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222. *Id.*

223. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936).

224. *See* *Boos v. Barry*, 485 U.S. 312, 324 (1988); *Reid v. Covert*, 354 U.S. 1, 16 (1957).

225. *See* Weisburd, *supra* note 3, at 384–85.



tections are personal to the accused, and are therefore conceptually and doctrinally distinct from limits on Congress's general authority to prescribe and project U.S. law extraterritorially. Thus while Congress constitutionally may enact law X, the application of law X to a particular individual abroad might run afoul of the Fifth Amendment if, for instance, under the prevailing due process analysis the application is "arbitrary or fundamentally unfair."<sup>226</sup>

### 1. *The Present Jurisprudential Landscape*

The Supreme Court has for some time now employed a Fourteenth Amendment due process analysis of legislative jurisdiction in the interstate context, which holds that for an application of state law to be constitutionally permissible, "that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair."<sup>227</sup> However the idea that the Fifth Amendment Due Process Clause attaches to the extraterritorial application of federal jurisdiction is of relatively recent vintage. It may well be that the modern boom of far-reaching legislation extending ambitiously our laws to conduct occurring literally around the globe has triggered previously unidentified precincts on the bearing of federal law to individuals abroad.<sup>228</sup> Whether one agrees with this proposition,<sup>229</sup> courts are in fact engaging in this type of

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226. See *United States v. Quintero-Rendon*, 354 F.3d 1320, 1324–26 (11th Cir. 2003); *United States v. Moreno-Morillo*, 334 F.3d 819, 827–30 (9th Cir. 2003); *United States v. Yousef*, 327 F.3d 56, 111–12 (2d Cir. 2003); *United States v. Suerte*, 291 F.3d 366, 369–375 (4th Cir. 2002); *United States v. Perez-Oviedo*, 281 F.3d 400, 402–03 (3d Cir. 2002); *United States v. Cardales*, 168 F.3d 548, 552–54 (1st Cir. 1999); *United States v. Medjuck*, 156 F.3d 916, 918–19 (9th Cir. 1998); *United States v. Klimavicius-Viloria*, 144 F.3d 1249, 1256–58 (9th Cir. 1998); *United States v. Juda*, 46 F.3d 961, 966–967 (9th Cir. 1995); *United States v. Medjuck*, 48 F.3d 1107, 1110–11 (9th Cir. 1995); *United States v. Kahn*, 35 F.3d 426, 429–30 (9th Cir. 1994); *United States v. Martinez-Hidalgo*, 993 F.2d 1052, 1056 (3d Cir. 1993); *United States v. Akins*, 946 F.2d 608, 613–14 (9th Cir. 1990); *United States v. Davis*, 905 F.2d 245, 248–49 (9th Cir. 1990); *United States v. Bin Laden*, 92 F.Supp. 2d 189, 216, 218–20 (S.D.N.Y. 2000).

227. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818 (1985) (quoting *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312–13 (1981)).

It is also clear that Fourteenth Amendment due process protects foreign defendants from the unconstitutional exercise of personal jurisdiction. See e.g., *Asahi Metal Indus. v. Superior Court*, 480 U.S. 102, 113 (1987). The Court in *Asahi* left open the issue of what personal jurisdiction requirements Fifth Amendment due process might impose on a federal long-arm statute over foreign defendants, but did not question that Fifth Amendment due process would apply in such a situation, *id.* at n.\* ("We have no occasion here to determine whether Congress could, consistent with the Due Process Clause of the Fifth Amendment, authorize federal court personal jurisdiction over alien defendants based on the aggregate of national contacts, rather than on the contacts between the defendant and the State in which the federal court sits.") (emphasis in original), a principle which has been upheld in the lower courts. See, e.g., *Go-Video, Inc. v. Akai Elec. Co.*, 885 F.2d 1406, 1413–17 (9th Cir. 1989).

228. See Brilmayer & Norchi, *supra* note 3, at 1233 (observing that "[t]he best explanation for the failure to consider the Fifth Amendment's limit on federal choice of law may simply be intellectual oversight").

229. For an argument that no Fifth Amendment limits exist in part because such limits would weaken the government's power *vis-à-vis* foreign states, see Weisburd, *supra* note 3. But see Brilmayer & Norchi, *supra* note 3, at 1237–39 (arguing that even with regard to the foreign affairs powers, "Fifth Amendment analysis is appropriate, for the due process standard itself allows room for legitimate considerations of national security").

due process analysis, and increasingly so.<sup>230</sup> Indeed, the very same courts that have explicitly considered and rejected claims that the Fourth Amendment applies extraterritorially to aliens have contemporaneously and unequivocally held that the Fifth Amendment Due Process Clause does apply in such situations.<sup>231</sup> And courts specifically have undertaken this analysis to evaluate the extension of federal law to foreign terrorists for actions committed abroad.<sup>232</sup>

It is not the aim of this Section either to justify or to challenge the constitutionality of Fifth Amendment due process limits on federal extraterritorial jurisdiction (this has been hashed out elsewhere to a sufficient degree).<sup>233</sup> Instead, the aim is to evaluate what this due process analysis does, and should, entail. Nonetheless, a quick synopsis of some of the reasons why Fifth Amendment due process would apply might be helpful to set the stage, and might read as follows:

- One possibility is that Fifth Amendment due process protections blocking unconstitutional applications of U.S. law take hold at trial, and therefore apply with full force in all cases before Article III courts.<sup>234</sup>
- Alternatively, these particular Fifth Amendment rights might accompany, or travel with, the extraterritorial extension of U.S. law to foreign persons abroad. While the Fourth Amendment applies to "the people,"<sup>235</sup> implying, according to a plurality of the Supreme Court in *United States v. Verdugo-Urquidez*, "the people of the United States," and therefore predicates its application to a foreigner abroad upon some "substantial connections with the country,"<sup>236</sup> the Fifth Amendment applies more globally to "persons,"<sup>237</sup> arguably precluding the need for a predicate domestic link. After all, *Verdugo* did explicitly draw upon the Fourth Amend-

230. See *Quintero-Rendon*, 354 F.3d at 1324–26; *Moreno-Morillo*, 334 F.3d at 827–30; *Yousef*, 327 F.3d at 111–12; *Suerte*, 291 F.3d at 369–75; *Perez-Oviedo*, 281 F.3d at 402–03; *Cardales*, 168 F.3d at 552–54; *Medjuck*, 156 F.3d at 918–19 (9th Cir. 1998); *Klimavicius-Viloria*, 144 F.3d at 1256–58; *United States v. Caicedo*, 47 F.3d 370, 371–373 (9th Cir. 1995); *Medjuck*, 48 F.3d at 1110–11 (9th Cir. 1995); *Juda*, 46 F.3d at 966–67; *Kahn*, 35 F.3d at 429–30; *Martinez-Hidalgo*, 993 F.2d at 1056; *Akins*, 946 F.2d at 613–14; *Davis*, 905 F.2d at 248–49; *Bin Laden*, 92 F.Supp. 2d at 216, 218–20.

231. See, e.g., *Akins*, 946 F.2d at 613–14; *Davis*, 905 F.2d at 251.

232. See, e.g., *Yousef*, 327 F.3d at 111–12.

233. For competing views on this question, compare Brilmayer & Norchi, *supra* note 3, at 1242, with Weisburd, *supra* note 3.

234. See *United States v. Verdugo-Urquidez*, 494 U.S. 259, 278 (1990) (Kennedy, J., concurring) ("The United States is prosecuting a foreign national in a court established under Article III, and all of the trial proceedings are governed by the Constitution. All would agree, for instance, that the dictates of the Due Process Clause of the Fifth Amendment protect the defendant."). *Chavez v. Martinez*, 538 U.S. 760 (2003), for instance, held that the Fifth Amendment's Self-Incrimination Clause applies only at trial. However, this holding is tied explicitly to the text of the Self-Incrimination Clause, which emphasizes the defendant's rights at the proceedings against him by requiring that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V. *Chavez* also applied the Due Process Clause of the Fourteenth Amendment to conduct occurring outside of the trial context. *Id.*

235. U.S. CONST. amend. IV.

236. *Verdugo-Urquidez*, 494 U.S. at 266, 271–72.

237. See *id.* at 264–69; U.S. CONST. amend. V.

ment's terminological "contrast with the Fifth and Sixth Amendments," explaining that the Fourth Amendment "extends its reach only to 'the people,'" which "refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community"—a term which "contrasts with the words 'person' and 'accused' used in the Fifth and Sixth Amendments regulating procedure in criminal cases."<sup>238</sup>

- Still another possibility emerges from Justice Kennedy's separate opinion in *Verdugo*,<sup>239</sup> which deserves attention since Justice Kennedy created a majority for the Court in that case. It draws on Justice Harlan's concurrence in *Reid v. Covert*<sup>240</sup> that the extraterritorial application of constitutional protections is not governed by some "rigid and abstract rule" so as to lead to "impracticable and anomalous results."<sup>241</sup> Justice Kennedy found that the situation "on the ground," so to speak, in *Verdugo*—which involved a warrantless search in Mexico where warrants evidently could not be obtained—would have made application of the Fourth Amendment impracticable.<sup>242</sup> The opinion quoted Justice Harlan's statement that "the question of which specific safeguards are appropriately to be applied in a particular context can be reduced to the issue of what process is 'due' a defendant in the particular circumstances of a particular case."<sup>243</sup> On this rationale, worries that extending extraterritorially constitutional protections would lead to absurd results like allowing claims against the U.S. armed forces by foreign enemies abroad<sup>244</sup> seem to be adequately redressed, or redressable. Such a context-specific approach would, for instance, make sense of the Fifth Amendment holding in *Johnson v. Eisentrager* that "the Constitution does not confer a [Fifth Amendment] right of personal security or an immunity from military trial and punishment upon an alien enemy engaged in hostile service of a government at war with the United States."<sup>245</sup> The determinative context in that case, obviously, was war. In the words of the Court: "It is war that exposes the relative vulnerability of the alien's status. The security and protection enjoyed while the nation of his allegiance remains in amity with the United States are generally impaired when his nation takes up arms against us . . . . But disabilities this country lays upon the alien who be-

238. *Verdugo-Urquidez*, 494 U.S. at 265–66.

239. *Id.* at 275–79 (Kennedy, J., concurring).

240. *Reid v. Covert*, 354 U.S. 1, 65–78 (1957) (Harlan, J., concurring).

241. *Verdugo-Urquidez*, 494 U.S. at 277–78 (Kennedy, J., concurring) (quoting *Reid*, 354 U.S. at 74) (internal quotations omitted).

242. *Verdugo-Urquidez*, 494 U.S. at 278 (Kennedy, J., concurring) ("The absence of local judges or magistrates available to issue warrants, the differing and perhaps unascertainable conceptions of reasonableness and privacy that prevail abroad, and the need to cooperate with foreign officials all indicate that the Fourth Amendment's warrant requirement should not apply in Mexico as it does in this country.").

243. *Id.* (internal citation and quotations omitted).

244. This possibility was raised by the majority in *Verdugo-Urquidez*, 494 U.S. at 273–74.

245. *Johnson v. Eisentrager*, 339 U.S. 763, 785 (1949).

comes also an enemy are imposed temporarily as an incident of war and not as an incident of alienage.”<sup>246</sup> We might assume then that enemy aliens ought not to be able to claim Fifth Amendment due process rights against federal extraterritoriality. As we shall see, however, whether Fifth Amendment due process applies to enemy aliens would not, in the end, make much of a difference since such individuals would invariably be subject to U.S. jurisdiction either way under the Fifth Amendment due process test developed below. Indeed, what I intend to show is that by its nature, the right due process analysis steers clear of impracticable or absurd results.

In any event, and whatever the underlying rationale, as a descriptive matter the present jurisprudential landscape undeniably reveals potential Fifth Amendment due process barriers to the extraterritorial application of U.S. law. If the United States intends to continue to project its laws globally, which by all accounts it does, and courts remain intent upon employing a due process analysis to such prescriptive projections, which, for the foreseeable future certainly appears to be the case,<sup>247</sup> then a coherent theory articulating the contours of this type of due process analysis would seem imperative. Yet courts have created a confused and ad hoc jurisprudence in this area with different Circuits espousing different requirements—some of which purport unduly to constrain the United States’ ability to catch within the net of our criminal laws especially dangerous breeds of extraterritorial criminals, like foreign terrorists.

## 2. *The Stated Fifth Amendment Due Process Test(s)*

Courts seem uniformly to agree that Fifth Amendment due process requires at the very least that an extraterritorial application of U.S. law not be “arbitrary or fundamentally unfair.”<sup>248</sup> But what these abstract terms mean when applied in fact is still an open question, and one that has caused (apparent) disagreement and confusion in the courts. I put “apparent” in parentheses because despite the different tests different Circuits say they employ, when one views the jurisprudence through the right lens—that of international law—it comes together in a relatively coherent and, as we shall see, most likely constitutionally correct manner.

In the case that seems to have spawned the recent Fifth Amendment due process jurisprudence in this area, *United States v. Davis*,<sup>249</sup> the Ninth Circuit held that “[i]n order to apply extraterritorially a federal criminal statute to a defendant consistently with due process, there must be a sufficient nexus between the defendant and the United States, so that such application would

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246. *Id.* at 771–72.

247. See *supra* note 226. While the courts have disagreed over what the Due Process Clause requires, none of the courts above have held that due process does not apply to limit the extraterritorial application of federal legislation.

248. See *infra* notes 249–257 and accompanying text.

249. *United States v. Davis*, 905 F.2d 245 (9th Cir. 1990).

not be arbitrary or fundamentally unfair.”<sup>250</sup> The nexus analysis seems, at least facially, to match up roughly with *Lea Brilmayer* and *Charles Norchi*’s proposed test in a 1992 article which “borrows from state choice of law doctrine [as governed by the Fourteenth Amendment’s Due Process Clause] and imposes comparable limits on the federal government [through the Fifth Amendment],”<sup>251</sup> to conclude that Fifth Amendment due process requires “‘contacts’ with the forum, ‘interests’ arising out of these contacts, and ‘fairness to the defendant.’”<sup>252</sup> More recently, in *United States v. Yousef*, the Second Circuit explicitly adopted the Ninth Circuit’s nexus requirement to uphold the extraterritorial application of federal law to one of the chief architects behind the planned-but-thwarted Manila air plot, in which terrorists conspired to blow up in mid-flight a dozen U.S. aircraft for the purpose of inflicting harm on the United States and influencing U.S. foreign policy.<sup>253</sup> But while the Ninth and the Second Circuits agree on the appropriate due process requirements, the Third and Fifth Circuits have rejected the need for a nexus,<sup>254</sup> and the First Circuit’s overall approach is still somewhat unclear.<sup>255</sup> The Fifth Circuit has focused instead on whether the given application is “arbitrary or fundamentally unfair” by looking in part to whether the accused had notice that he was subjecting himself to U.S. law,<sup>256</sup> and the Third Circuit appears simply to evaluate without much guidance whether the application is unfair.<sup>257</sup>

Although courts have thus far refrained from striking down the application of federal criminal law to foreign actors abroad on Fifth Amendment due process grounds, defendants are increasingly making these types of claims and a situation is surely conceivable in which some misguided court applying mechanically the foregoing tests—and in particular the nexus requirement—might reject an extraterritorial application of federal legislation to a deserving defendant. Especially in light of the avowed and aggressive stance

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250. *Id.* at 248–49 (citation omitted).

251. See *supra* note 3, at 1239, 1242 (citing *Allstate Insurance Co. v. Hague*, 449 U.S. 302 (1981) (observing that “for a State’s substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair”).

252. *Id.* at 1242.

253. *Yousef*, 327 F.3d at 111–12 (citing *Davis*, the court explained that “[t]he Circuit has not yet decided the extent to which the Due Process Clause limits the United States’ assertion of jurisdiction over criminal conduct committed outside our borders. The Ninth Circuit has held that ‘in order to apply extraterritorially a federal criminal statute to a defendant consistently with due process, there must be a sufficient nexus between the defendant and the United States, so that such application would not be arbitrary or fundamentally unfair.’ We agree.”) (internal citation omitted).

254. *Suerte*, 291 F.3d at 376; *Perez-Oviedo*, 281 F.3d at 403; *Martinez-Hidalgo*, 993 F.2d at 1056.

255. See *United States v. Cardales*, 168 F.3d 548, 553 (1st Cir. 1999). The court held that “due process does not require the government to prove a nexus between a defendant’s criminal conduct and the United States . . . when the flag nation [of the vessel on which the defendant is found] has consented to the application of United States law to the defendants.” *Id.* The court went on to explain that “[t]o satisfy due process, our application [of federal law] must not be arbitrary or fundamentally unfair.” *Id.*

256. *United States v. Suerte*, 291 F.3d 366, 377 (5th Cir. 2002).

257. See *Perez-Oviedo*, 281 F.3d at 403; *Martinez-Hidalgo*, 993 F.2d at 1056.

the United States has taken against all forms of terrorism around the world,<sup>258</sup> and the loose global network interconnecting, supporting, and facilitating certain strains of global terrorism, prosecutions of individual terrorists for violent and destructive acts with no overt connection to the United States should not seem all that far-fetched; indeed, there may be strong national interests for targeting such activity with U.S. laws:

In *Yousef*, the Second Circuit found no due process impediment in applying U.S. anti-terrorism legislation extraterritorially to the accused for the bombing of a Philippine-flag airliner flying from the Philippines to Japan which killed a Japanese national. But such an application of U.S. law was permissible only because the bombing was a planned rehearsal for, and was part of, the larger Manila air plot, which was specifically directed against U.S. aircraft and was intended to harm the United States and influence U.S. foreign policy.<sup>259</sup> Suppose there was evidence that Yousef was an active member of a terrorist group aligned against the United States, but no evidence suggesting that the plane-bombing in question had any connection whatsoever to the United States. Would such terrorist-group membership alone satisfy the nexus requirement permitting a U.S. prosecution for plane-bombing having nothing to do with the United States?

Or suppose there was evidence both that Yousef was a member of a terrorist group aligned against the United States, and that he was indeed conspiring against the United States—but all this evidence was provided by an undercover source or retrieved via classified information technology which the government had an interest in keeping secret. Would the government be forced to implicate its secret source or reveal classified information-gathering techniques in order to demonstrate a sufficient nexus between a particular terrorist or terrorist act and the United States so as to avoid due process barriers to prosecution?

Indeed, should a court rely on a due process analysis that borrows faithfully from state choice-of-law doctrine, the fact that U.S. nationals were the victims of the subject crime might not, on its own, provide the necessary nexus since inter-state doctrine does not recognize the equivalent of the passive personality link in international law.<sup>260</sup> Even the defendant's voluntary pres-

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258. See President George W. Bush, Address to a Joint Session of Congress and the American People (Sept. 20, 2001), available at <http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html>; see also THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 5 (2002) ("The United States of America is fighting a war against terrorists of global reach. The enemy is not a single political regime or person or religion or ideology. The enemy is terrorism—premeditated, politically motivated violence perpetrated against innocents."), available at <http://www.whitehouse.gov/nsc/nss.pdf>.

259. *Yousef*, 327 F.3d at 111–112.

260. See *supra* note 64. The United States has pursued terrorists on these grounds alone. In *Yunis*, the only connection between the defendant, who had hijacked and taken hostage passengers on a Jordanian airliner, and the United States, was that there were two U.S. citizens aboard the flight (who ultimately were unharmed by the incident). 924 F.2d at 1089. The defendant's purpose had nothing whatsoever to do with the United States, but instead was intended to influence an Arab League conference underway and to protest Palestinian presence in Lebanon. *Id.*

ence or residence at some later point in the United States would not create sufficient contacts to allow for the application of U.S. law to conduct that otherwise had no U.S. nexus.<sup>261</sup> Could the U.S. government really be blocked from prosecuting in domestic courts a notorious terrorist found traveling through or hiding out in the United States for harmful acts committed abroad with no domestic link?

In short, could the United States prosecute plane bombers, train bombers, bus bombers, café bombers—take your pick—under U.S. law for these extraterritorial crimes absent an overt connection to the United States given the due process tests set forth above? Where is the nexus? Why should the defendant be “on notice” that he is somehow subject to U.S. law? Wouldn’t such a prosecution seem at the very least arbitrary, and perhaps even unfair? On a reflexive reading of the pertinent Fifth Amendment considerations identified so far, a court might very well conclude that due process is not satisfied in some or all of the contexts just described. And yet such a conclusion would not only be legally wrong, but it would also betray the analytic machinery that is really at work behind the various courts’ rulings to date, and what just happens to be leading them to correct results: international law.

### 3. *The Real Due Process Analysis: Incorporating International Law*

#### a. *A Proposed Test*

In a sense, the current Fifth Amendment due process jurisprudence analyzing extraterritorial applications of U.S. law is a classic example of the difference between what courts say and what courts do. If we look at what courts actually do, the proper Fifth Amendment due process analysis of extraterritorial jurisdiction that emerges might look something like this:

For an extraterritorial application of law to be consistent with due process there must be notice: (a) that the conduct in question is illegal; and (b) of the law one subjects oneself to by its commission, such that the application is neither arbitrary nor unfair.<sup>262</sup>

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261. See *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 426 (2003); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 820 (1985); see also *Allstate Ins. Co. v. Hague*, 449 U.S. at 302, 311 (1981) (“[A] postoccurrence change of residence to the forum State—standing alone—is insufficient to justify application of forum law.”) (citing *John Hancock Mut. Life Ins. Co. v. Yates*, 299 U.S. 178 (1936)).

262. It is tempting and, at least in this author’s view, rather intuitive to want to add on another layer of notice here; that is, notice of where the defendant might be brought into court and subjected to criminal proceedings. See, e.g., Bradley, *supra* note 3, at 339 (suggesting that Fifth Amendment due process in this context should “comport with notions of ‘fair play and substantial justice’ that the defendant ‘should reasonably anticipate being haled’ into the forum”). But there is a rejoinder to this added layer, which is that this particular notice requirement would relate fundamentally to due process concerns governing the exercise of adjudicative, and more specifically, of personal jurisdiction as opposed to prescriptive or legislative jurisdiction. The Supreme Court’s case law on the personal jurisdiction point is, needless to say, not a masterpiece of fairness, and indicates that where a criminal defendant is physically present before the court, irrespective of how he got there, the court has personal jurisdiction—end of story. See *United States*

Supreme Court statements from the inter-state, Fourteenth Amendment due process analysis support a test based on notice,<sup>263</sup> and a notice test also shores up bedrock Fifth Amendment principles of legality, namely, that a criminal law provide “fair warning” of what conduct is prohibited.<sup>264</sup> Only here it would be fair warning not only of what the law prohibits, but also of the fact that the defendant will be subject to its prohibitions. Hence if a Dutch national, in conformity with Dutch law, smokes marijuana in the Netherlands and later, while vacationing in the United States, is arrested and prosecuted under U.S. law on drug charges, due process would not be satisfied on our first criterion since the Dutchman would not be on notice of the illegality of his conduct. Yet if the Dutch national murders another Dutch national in the Netherlands, the first criterion—that he knows his conduct is illegal—would be satisfied. Nonetheless, if he is later arrested in the United States and prosecuted under U.S. homicide law for the killing, such proceedings still might not comport with due process since he would have no notice that he would be subject to U.S. (as opposed to Dutch) homicide law.

These notice criteria center, appropriately, on the individual’s actions and expectations,<sup>265</sup> but they also necessarily take into consideration the interests of the state. Thus if a defendant directs some harmful action against the United States or U.S. interests, it is not arbitrary or unfair to deem him on notice that his conduct is illegal under U.S. law and that he may in fact be subject to that law. The nexus requirement merely functions to ensure that the criteria are met. But as the cases bear out, there are other ways to find that a given extraterritorial application of U.S. law satisfies due process so as not to be arbitrary or unfair, even absent a nexus to the United States—namely, through principles of international law.

### *b. Incorporating International Law*

Despite the ostensibly different Fifth Amendment due process analyses courts appear to employ in these extraterritorial jurisdiction cases, principles of international law tend to tie together the jurisprudence in a relatively coherent and, under the notice criteria just outlined, constitutional manner. As an

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v. Alvarez-Machain, 504 U.S. 655, 662 (1992) (reaffirming the principle that “the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court’s jurisdiction by reason of a ‘forcible abduction’”) (internal citations and quotation marks omitted). Of course even if there is an underlying fairness component requiring that the defendant have some reasonable expectation of being prosecuted in a particular court’s jurisdiction, universal jurisdiction would seem to remedy any potential due process deficiency because it provides not only for universal prescriptive jurisdiction, but also for universal adjudicative jurisdiction. Thus, the defendant would be on notice not only of the illegality of his conduct and the governing law, but also that he is subject to the adjudicative jurisdiction of all states’ courts.

263. See *Phillips*, 472 U.S. at 822 (“When considering fairness in [the due process] context, an important element is the expectation of the parties.”).

264. *McBoyle v. United States*, 283 U.S. 25, 27 (1931); see also, Paul H. Robinson, *Fair Notice and Fair Adjudication: Two Kinds of Legality*, 154 U. PA. L. REV. 335, 364 (2005) (“Fairness requires that an actor have at least an opportunity to find out what the criminal law prohibits.”).

265. See *id.*



initial matter, note that international law does not, on its own, govern the extraterritorial application of U.S. law. While a longstanding rule of statutory construction espoused by Chief Justice Marshall in *Murray v. The Schooner Charming Betsy* directs that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains,"<sup>266</sup> it is nonetheless well-settled that Congress is not bound by international law.<sup>267</sup> And thus, under U.S. law, Congress may extend its prescriptive jurisdiction beyond the perimeters fixed by customary international law.<sup>268</sup> All Congress need do is clearly express its intent to apply a given law extraterritorially, or, as is more likely to be the case with regard to anti-terrorism statutes, the nature of the law itself manifests such an intent.<sup>269</sup>

But international law may come in through the back door—"incorporated," so to speak<sup>270</sup>—through the Fifth Amendment to determine whether a certain *application* of U.S. law to a particular individual abroad comports with due process. That the Fifth Amendment incorporates international law in this manner both *expands* the United States' ability to extend its laws to conduct outside U.S. territory, and effectively addresses a major objection to the imposition of due process limits on federal extraterritorial legislation.

First, constitutionalizing international law in this way frees the United States to apply its legislation extraterritorially to certain individuals where it otherwise might not have such freedom under a due process test focused exclusively on contacts, interests arising out of those contacts, and fairness;<sup>271</sup> a test that some of the inquiries courts purport to employ seem at least facially to reflect. Rather, international law—and especially the doctrine of universal jurisdiction—erases the need for specific contacts and thus effectively deprives certain defendants of due process claims in this respect. In line with the criteria outlined above, because universal crimes are prohibited everywhere, their perpetrators are on notice that such conduct is illegal. Moreover, because the legal prohibition on universal crimes is fundamentally in-

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266. *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21 (1963) (internal quotation marks omitted); *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804).

267. See, e.g., *The Chinese Exclusion Case*, 130 U.S. 581, 600 (1889).

268. See, e.g., *Yousef*, 327 F.3d at 86; *Pinto-Mejia*, 720 F.2d at 259.

269. See *United States v. Bowman*, 260 U.S. 94, 98 (1922); *Yousef*, 327 F.3d at 56 (applying the *Bowman* rule to anti-terrorism statutes); see also *United States v. Delgado-Garcia*, 374 F.3d 1337, 1354 (D.C. Cir. 2004) (Rogers, J., dissenting as to the extraterritorial application of the Immigration and Nationality Act without express statement by Congress, and observing that no statement is needed for extraterritorial application of anti-terrorism statutes because "it is obvious that in declaring [acts of terrorism] to be crimes Congress intends to prohibit them everywhere").

270. This is not to say that international law generally would limit the extraterritorial application of U.S. law via the Fifth Amendment. See Weisburd, *supra* note 3, at 382 ("If Congress is not constrained to conform its legislation to the international obligations of the United States, it could hardly be true that such obligations are of a constitutional dimension. Otherwise, Congress would not be able to set them aside merely by passing a new law. From this conclusion, it necessarily follows that the Fifth Amendment cannot be seen as somehow entailing international limitations on legislative jurisdiction. If it did, then such limitations would be of a constitutional stature.").

271. See *Brilmayer & Norchy*, *supra* note 3, at 1240–42 (citing *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 311–12 (1981)).

ternational—that is, it is not a matter of just U.S. national law alone, but also of a pre-existing and universally applicable international law—defendants cannot claim lack of notice of the law as applied to them. By prosecuting perpetrators of universal crimes, U.S. courts simply adjudicate the substance of an international law to which the defendant is already and always subject.<sup>272</sup> This is, in effect, a strong variety of what is called a “false conflict”<sup>273</sup>: the U.S. law is the same as the law that is otherwise applicable to the defendant.

Second, incorporating international law in this manner goes far to address a major criticism of employing a Fifth Amendment due process analysis to limit extraterritorial applications of federal legislation. Mark Weisburd has taken issue with Brilmayer and Norchi’s assertion that “satisfying international law does not automatically meet the due process standard,”<sup>274</sup> because, according to Weisburd, such an assertion is tantamount to “argu[ing] that the Fifth Amendment denies to the United States a degree of authority recognized and asserted by most other nations of the world,”<sup>275</sup> and is therefore in tension with *Curtis-Wright*’s statement that “the right and power of the United States . . . are equal to the right and power of the other members of the international family. Otherwise, the United States is not completely sovereign.”<sup>276</sup> But the answer to this objection is not to throw out Fifth Amendment due process, which in any event would contradict clear Supreme Court holdings that the government’s authority to act pursuant to international law does not override individuals’ constitutional rights.<sup>277</sup> Rather, the answer is to rethink due process in the context of the international, as opposed to the inter-state, system. By incorporating jurisdictional principles of international law, the Fifth Amendment avoids the constitutional tension: it necessarily accords the United States prescriptive power equal to that of all other states and therefore does not water down U.S. sovereignty on the world stage,

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272. *Id.* at 1254.

273. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 838 n.20 (Stevens, J., concurring) (“‘False conflict’ really means no conflict of laws . . . . A ‘false conflict’ exists when the potentially applicable laws do not differ.”) (internal citations and quotation marks omitted); Joseph William Singer, *A Pragmatic Guide to Conflicts*, 70 B.U.L. REV. 731, 748 (1990) (“If the substantive rules of both states are the same, there is no choice of law to make; the case is a false conflict.”). I say “strong variety” of false conflict here because there are weaker notions of false conflict in choice of law analysis that (i) would require merely that the court reach the same result on the same issue, see *Berg Chilling Sys., Inc. v. Hull Corp.*, 435 F.3d 455, 462 (3d Cir. 2006), and (ii) that evaluate the interests of the states, and where only one state has an interest, would find no conflict, see *Garcia v. Plaza Oldsmobile Ltd.*, 421 F.3d 216, 220 (3d Cir. 2005); see also Singer, *supra*, at 752.

274. Brilmayer & Norchi, *supra* note 3, at 1260.

275. Weisburd, *supra* note 3, at 382–83.

276. *Curtis-Wright Export Corp.* 299 U.S. at 318; see also Weisburd, *supra* note 3, at 383–84.

277. See *Boos v. Barry*, 485 U.S. 312, 324 (1988); *Reid v. Covert*, 354 U.S. 1, 16 (1957); see also RE-STATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 cmt. a (1987) (“[R]ules of international law and provisions of international agreements of the United States are subject to the Bill of Rights and other prohibitions, restrictions, and requirements of the Constitution, and cannot be given effect in violation of them”).

while at the same time securing individual freedoms from arbitrary or unfair governmental action.

Hence, although principles of international law might not determine conclusively the constitutionality of Congress's extraterritorial legislative reach, they nonetheless inform the analysis.<sup>278</sup> The court in *Davis*, for instance, invoked the principle of objective territoriality to defeat the defendant's Fifth Amendment due process objections, holding that "[w]here an attempted transaction is aimed at causing criminal acts within the United States, there is sufficient basis for the United States to exercise its jurisdiction."<sup>279</sup> Other cases similarly have relied upon such a territorial link to uphold the application of U.S. law to conduct on the high seas where it "was likely to have effects in the United States."<sup>280</sup> But these holdings appear largely compatible with the contacts, interests and fairness test used in the domestic context, and consequently international law works no magic to free the United States to act beyond where it already would have competence under a test that borrows from inter-state due process doctrine.

By contrast, the Ninth Circuit's decision in *United States v. Juda* disposed entirely of the nexus requirement where U.S. law had been applied to persons on stateless vessels.<sup>281</sup> The court emphasized that its conclusion was "fully supported by international law principles, which aid us in defining the jurisdictional reach of extraterritorial legislation," and which provide that "any nation may assert jurisdiction over stateless vessels."<sup>282</sup> But if Fifth Amendment due process rights are truly personal to the accused, how can international law rules prescribing the jurisdictional reach of *governments* impair or reduce the fundamental liberty rights of *individuals*?

The answer, suggested by the court's language, is that such individuals are already subject to, and are deemed aware of, a pre-existing body of rules contained in international law. That is, the application of U.S. law to the defendants in *Juda* was "neither arbitrary nor fundamentally unfair [because the] [d]efendants had ample notice that individuals on board stateless vessels take the chance that any nation might exercise jurisdiction over their illegal activities."<sup>283</sup> *United States v. Caicedo* reaffirmed in strong terms this reliance on international law, explaining that "[t]he radically different treatment af-

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278. Courts explicitly rely upon international law to "guide" their analysis. See, e.g., *United States v. Moreno-Morillo*, 334 F.3d 819, 828 n.7 (9th Cir. 2003); *United States v. Perez-Oviedo*, 281 F.3d 400, 403 (3rd Cir. 2002); *United States v. Cardales*, 168 F.3d 548, 553 (1st Cir. 1999); *United States v. Caicedo*, 47 F.3d 370, 372 (9th Cir. 1995); *United States v. Juda*, 46 F.3d 961, 967 (9th Cir. 1995); *United States v. Davis*, 905 F.2d 245, 248-49 n.2 (9th Cir. 1990).

279. *Davis*, 905 F.2d at 249 (quoting *United States v. Peterson*, 812 F.2d 486, 493 (9th Cir. 1987)).

280. *United States v. Khan*, 35 F.2d 426, 429-30 (9th Cir. 1994); see also *United States v. Medjuck*, 156 F.3d 916, 919 (9th Cir. 1998); *United States v. Klimavicius-Viloria*, 144 F.3d 1249, 1257-1258 (9th Cir. 1998); *United States v. Aikins*, 946 F.2d 608, 614 (9th Cir. 1990) ("[T]he entire operation of off-loading was set up by an agreement that was designed to bring the off-loaded marijuana into the United States. A sufficient nexus existed.").

281. *Juda*, 46 F.3d 961, 966-67.

282. *Id.* at 967.

283. *Id.*

forded to stateless vessels as a matter of international law convinces us that there is nothing arbitrary or fundamentally unfair about prosecuting" defendants with no nexus to the United States.<sup>284</sup> Specifically, by traveling on stateless vessels the defendants became "international pariahs . . . . By attempting to shrug the yoke of any nation's authority, they subject themselves to the jurisdiction of all nations *solely* as a consequence of the vessel's status as stateless."<sup>285</sup> The distinction between the status of flag vessels and that of stateless vessels drives home the point that international law unfetters the prescriptive reach of U.S. law from due process constraints in these circumstances:

A defendant [on board a flag vessel] would have a legitimate expectation that because he has subjected himself to the laws of one nation, other nations will not be entitled to exercise their jurisdiction without some nexus. . . . But where a defendant attempts to avoid the law of *all* nations by traveling on a stateless vessel, he has forfeited these protections of international law and *can be charged with the knowledge that he has done so*.<sup>286</sup>

More recent holdings simply note that sailing on stateless vessels is "tantamount to a knowing waiver" of jurisdictional objections.<sup>287</sup>

In *Caicedo*, the U.S. Coast Guard apprehended the defendants on a drug smuggling boat 2000 miles off the coast of San Diego. The government acknowledged in its brief that "there was no evidence that the vessel, its cargo or its crew were destined for the United States, or that any part of the criminal venture occurred in the United States."<sup>288</sup> It would seem clear under even the most liberal reading of a due process analysis that draws from the interstate context that applications of U.S. law to vessels thousands of miles away from the United States and with absolutely no connection to the United States or U.S. interests should not pass constitutional muster. Only by recognizing—and imputing to defendants knowledge of—the international law that criminal activity on stateless vessels is fair game for all states' laws are such applications valid.

### c. Incorporating Universal Jurisdiction

Of course there is another, now familiar principle of international law that exposes individuals to the jurisdiction of all states if they engage in certain conduct: universal jurisdiction. No nexus is required, as Brilmayer and Norchi point out, because "the forum merely provides a mechanism for the im-

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284. *United States v. Caicedo*, 47 F.3d 370, 372 (9th Cir. 1995).

285. *Id.* at 372 (emphasis in original).

286. *Id.* at 372–73 (emphasis added).

287. *Moreno-Morillo*, 334 F.3d at 828.

288. *Caicedo*, 47 F.3d at 371.

plementation of norms that, in theory, are universally in effect.”<sup>289</sup> And in fact, U.S. courts have employed this principle—although not always calling it by name—to avoid any due process restrictions on the extraterritorial application of U.S. criminal laws to individuals with no connection to the United States. Indeed, without this notion of universal jurisdiction undergirding the holdings affirming extraterritorial applications of U.S. law to stateless vessels,<sup>290</sup> such applications could violate due process since the general international principle that criminal activity aboard stateless vessels is subject to the jurisdiction of all states—standing alone—might not fulfill one of the notice elements, namely notice of what is illegal. Consider the case of the high-stakes Australian poker players sailing on the high seas<sup>291</sup> on a stateless vessel: would the application of a U.S. anti-gambling statute to them comply with due process simply by virtue of their boat’s status? The answer should be no, since gambling is not a universally condemned international crime such that the Australians could be deemed on notice of the illegality of their conduct.

That universal offenses are fundamentally of an international dimension is nothing new, as demonstrated by early Supreme Court decisions like the 1820 case *Furlong*,<sup>292</sup> in which Justice Johnson elucidated the difference between the universal crime of piracy and the parochial crime of murder. He explained that because piracy was outlawed by the “law of nations,” and murder was outlawed by national law only, a prohibition on double jeopardy attached to a prosecution for piracy vis-à-vis all other “civilized States,” while no such prohibition would attach to a prosecution for murder. The terms and implications of Justice Johnson’s explanation are striking:

[T]here exist well-known distinctions between the crimes of piracy and murder, both as to constituents and incidents. Robbery on the seas is considered as an offence within the criminal jurisdiction of all nations. It is against all, and punished by all; and there can be no doubt that the plea of *autre fois acquit* [double jeopardy] would be good in any civilized State, though resting on a prosecution instituted in the Courts of any other civilized State. Not so with the crime of murder. It is an offence too abhorrent to the feelings of man, to have made it necessary that it also should have been brought within this *universal jurisdiction*. . . .

I am [therefore] led to the conclusion that [U.S. law] does not extend the punishment for murder to the case of that offence committed by a foreigner upon a foreigner in a foreign ship. But otherwise as to piracy,

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289. Brilmayer & Norch, *supra* note 3, at 1260.

290. See, e.g., *Caicedo*, 47 F.3d at 373.

291. See Brilmayer & Norch, *supra* note 3, at 1253. This scenario where the vessel is also Australian was used to highlight the need for Fifth Amendment due process.

292. *United States v. Furlong*, 18 U.S. 184 (1820).

for that is a crime within the acknowledged reach of the punishing power of Congress.<sup>293</sup>

Why is a double-jeopardy defense available based on a prior piracy prosecution, but not available based on a prior murder prosecution? Perhaps we should invert the question: why is a double-jeopardy defense *not* available based on a prior murder prosecution, but available based on a prior piracy prosecution? As to murder, the answer is clear. The doctrine of multiple sovereigns holds that each sovereign has the right to prosecute on its own laws,<sup>294</sup> and hence there would be nothing wrong with the United States prosecuting a murder under its laws only to have the same act later prosecuted by Great Britain under British law. The logical implication of Justice Johnson's observation that piracy cannot be subject to this same type of double jeopardy is that there is only one source of authority, and one law, under which an individual cannot be punished multiple times: international law.

More recently, the Third Circuit used this theory of universal crime in *Martinez-Hidalgo* to reject the need for a nexus in applying U.S. law to drug smugglers on the high seas consistent with due process on the grounds that "[i]nasmuch as the trafficking of narcotics is condemned universally by law-abiding nations, we see no reason to conclude that it is 'fundamentally unfair' for Congress to provide for the punishment of persons apprehended with narcotics on the high seas."<sup>295</sup> The court went on to clarify that its due process holding was contingent upon the universal nature of the crime.<sup>296</sup> Similarly, the Ninth Circuit buttressed its holding in *Caicedo* by observing that since "trafficking in controlled substances aboard vessels is a serious international problem and is universally condemned," the defendants were "on notice that the United States or any other nation concerned with drug trafficking could subject their vessel to its jurisdiction."<sup>297</sup> Again, what is important here is that since the defendants are *already* subject to a pre-existing proscription on drug trafficking aboard vessels on the high seas,<sup>298</sup> and are deemed aware of that proscription, they cannot somehow claim a due process violation simply because that proscription concretely is applied to them.

This point underscores why some other attempts to marshal international law in order to undercut Fifth Amendment due process claims seem mis-

293. *Id.* at 196–97 (emphasis added).

294. *See* *Heath v. Alabama*, 474 U.S. 82, 88–89 (1985).

295. *United States v. Martinez-Hidalgo*, 993 F.2d 1052, 1056 (3d Cir. 1993); *see also* *United States v. Perez-Oviedo*, 281 F.3d 400, 402 (3d Cir. 2002).

296. *Martinez-Hidalgo*, 993 F.2d at 1056.

297. *Caicedo*, 47 F.3d at 373.

298. The universal prohibition in these cases concerns specifically drug trafficking on board vessels. The cases deal with enforcement of 46 U.S.C. § 1903 (2000), which relates to the "[m]anufacture, distribution, or possession with intent to manufacture or distribute, a controlled substance on board vessels." To support their holdings, the courts cite to "Congressional findings and declarations" contained in 46 U.S.C. § 1902 (2000), providing in part that "[t]he Congress finds and declares that trafficking in controlled substances aboard vessels is a serious international problem and is universally-condemned."

guided and ultimately flawed. For instance, the First Circuit in *United States v. Cardales* held that application of U.S. law to a foreign-flag vessel with no connection to the United States did not offend due process where the flag state consented to such an application.<sup>299</sup> The court's reasoning, relying directly on international law, was that as the state with sovereign authority over the vessel, the flag state could agree to the application of another state's laws to its sovereign "territory"—or, as the case may be, to an extension of that territory (the vessel).<sup>300</sup>

Yet recall the distinction between stateless vessels and flag vessels: stateless vessels, by their status, are automatically subject to the jurisdiction of all states and consequently their crews are "on notice" that any given state's laws might apply to them;<sup>301</sup> flag vessels, on the other hand, have subjected themselves to the laws of their flag state and thus "would have a legitimate expectation that . . . other nations will not be entitled to exercise jurisdiction without some nexus."<sup>302</sup> As opposed to the stateless vessel scenario then, it is far more difficult to conclude that the acquiescence of a flag vessel's government to the random application of another state's laws absent any nexus to that vessel comports with due process. In this context, the governments of the flag state and the prosecuting state simply have agreed amongst themselves—and perhaps quite apart from any conduct, understanding or expectation of the individual defendant—that he would be subject to the prosecuting state's laws.

But due process is tied precisely to these individual considerations. Again, the defendant must have notice both of the illegality of his conduct and of the law to which he subjects himself, absent which an application of extraterritorial jurisdiction may well be arbitrary and unfair. To illustrate, suppose a U.S. traffic cop acting in his official capacity representing the United States in the annual Trans-Atlantic Traffic Cops Convention in London arrests a British citizen under U.S. law for "illegally" driving on the left side of the road. Further, suppose the British government, for reasons of its own, consents to the application of the U.S. traffic code to this individual. Such an application of U.S. law to the British commuter would seem plainly to violate due process as arbitrary, fundamentally unfair and maybe even *ex post facto*. Why should the result be any different for the individual on board the foreign-flag vessel?

One answer, forwarded by the Fifth Circuit in *United States v. Suerte*, is that the Fifth Amendment Due Process Clause does not impose a nexus requirement on legislation enacted pursuant to the Piracies and Felonies Clause be-

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299. *United States v. Cardales*, 168 F.3d 548, 553 (9th Cir. 1995).

300. *Id.* The *Cardales* ruling was justifiable on its alternative holding, which relied on the universal proscription on drug trafficking and cited *Martinez-Hidalgo*—although the court mistakenly characterized the protective principle, rather than the universal principle, as authorizing its jurisdiction.

301. *Caicedo*, 47 F.3d at 372; see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 522(2)(b) & repr's n.7 (1987).

302. *Caicedo*, 47 F.3d at 372.

cause the Clause specifically grants Congress the power to legislate extraterritorially as to conduct occurring on the high seas.<sup>303</sup> Finding no Fifth Amendment obstacle despite the absence of a nexus to the United States, *Suerte* upheld the application of U.S. law to a Malta-flag ship on Malta's consent.<sup>304</sup> The court reviewed the constitutional history of the Piracies and Felonies Clause and found no indication of extraterritorial limits even though, as the court repeatedly noted, the Clause embodied "the only specific grant" of extraterritorial legislative power in the Constitution.<sup>305</sup> It further found significant that the First Congress revealed no intent to limit the scope of its power under the Clause in drafting the Fifth Amendment and that, after proposing the Bill of Rights to the states, the same Congress in 1790 enacted extraterritorial legislation prohibiting conduct committed by "any person or persons" on the high seas.<sup>306</sup> *Suerte* also read early Supreme Court decisions interpreting restrictively the 1790 Act to nonetheless imply its underlying constitutionality.<sup>307</sup> Yet it is unclear what, if anything, an analysis so focused on Congress's power to enact extraterritorial legislation has to do with the quite different, individualized Fifth Amendment due process inquiry of whether a constitutionally enacted statute has been constitutionally applied to a particular individual. As to this latter question, the history and case law surrounding whether an enactment is constitutional to begin with would seem understandably silent. (As an aside, even if we accept this strange exemption for the Piracies and Felonies Clause, it would not seem to apply with equal force to Congress's parallel power to define and punish "offences against the Law of Nations" since a comma separates the grant of power relating to conduct on the high seas on the one hand, and that relating to offenses against the law of nations—which incidentally could occur anywhere, including within the territories of other nations and the United States—on the other.)

Rather, the real reason why *Suerte* was different from our traffic code hypothetical was that the conduct at issue—drug smuggling aboard vessels—was, as the court recounted, "a serious international problem and is *universally-condemned*" such that the defendants were "on notice" that their conduct was illegal everywhere.<sup>308</sup> Where international law has already applied the pro-

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303. *Suerte*, 291 F.3d at 372.

304. *Id.* at 377.

305. *Id.* at 372 (quoting CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS, THE CONSTITUTION OF THE UNITED STATES, ANALYSIS AND INTERPRETATION, S. DOC. NO. 103-6, at 304 (Johnny H. Killian & George A. Costello eds., 1992)).

306. *Id.* The 1790 Act for the Punishment of Certain Crimes Against the United States provides in pertinent part "that if any person or persons shall commit upon the high seas . . . murder or robbery, . . . every such offender shall be . . . adjudged . . . a pirate and felon, and being thereof convicted, shall suffer death" and "that if any . . . person shall commit manslaughter upon the high seas, . . . such person . . . so offending, and being thereof convicted, shall be imprisoned not exceeding three years, and fined not exceeding one thousand dollars." Act of 30 Apr. 1790, ch.9, 1 Stat. 112, 113–15 (emphasis added).

307. *Suerte*, 291 F.3d at 373–74.

308. *Id.* at 377 (quoting 46 U.S.C. App. § 1902 (2000)). As we shall see in Part III, it will not always be the case that an "offense against the law of nations" constitutes a universal crime. For example, if a French prosecutor following government orders brings charges against a British diplomat for failure to



hibition, there is nothing inherently unfair or arbitrary about the United States enforcing that prohibition in its courts, even absent a nexus. Again, it is the international character of the offense that is determinative here. The court even referred to the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, noting that both Malta (the flag state) and the United States (the prosecuting state) were signatories to the Convention.<sup>309</sup> The Convention moreover expressly provides for the boarding of foreign-flag vessels by other states parties upon a flag-state party's consent.<sup>310</sup> And consequently, as a matter of international law, the same prohibition on trafficking drugs on the high seas applied both to Malta vessels and to U.S. vessels, thereby defeating any due process argument that the application of the proscription was arbitrary or unfair.

To return to Yousef therefore, under the various scenarios where his conduct might not exhibit an objective nexus to the United States, the United States would nonetheless be able to apply its anti-terrorism legislation to him consistent with due process so long as his crimes are universal. But this conclusion immediately raises a number of important legal questions:

First, how are courts to determine whether a terrorist crime is universal?

Second, how are courts to determine whether the U.S. legislation they use to adjudicate the crime in question reflects faithfully its international legal definition?

The answers to these questions are critical to the due process analysis, for if the crime is not universal, or if the U.S. legislation does not embody its international legal definition and courts do not apply it as such, due process will not be satisfied on our notice criteria. To break down these requirements a bit more: because it is the universal proscription on the crime that allows the court to avoid due process obstacles, the court necessarily must apply to the defendant that proscription. And as we know, the proscription on universal crime is fundamentally of an international character; to be sure, the international character is what satisfies our notice criteria. In short then, the court must use the substantive prohibition on the crime as defined by international, not national, law. To borrow from *United States v. Smith*, another early Supreme Court case concerning the universal crime of piracy—this time by

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pay her parking tickets, those proceedings may offend the international law of diplomatic immunity, see Vienna Convention on Diplomatic Relations art. 31, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95, but they hardly constitute a universal crime giving rise to criminal jurisdiction by every state around the globe, see *infra* Part III. And thus if that French prosecutor is later vacationing in the United States and finds himself arrested on criminal charges of improper prosecution of a British diplomat in France, he might have a very good due process argument against the application to him of U.S. laws of diplomatic immunity—namely, it is none of the United States' business how France chooses to treat British diplomats on its soil. However, if the French prosecutor orders the French police to torture to death the British diplomat, such conduct may indeed constitute a universal crime and consequently would deprive the Frenchman of a due process claim against the U.S. prosecution.

309. *Suerte*, 291 F.3d at 373–74 (citing United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances art. 17, opened for signature Dec. 20, 1988, 28 I.L.M. 493).

310. United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Dec. 19, 1988, art. 17, 28 I.L.M. 493, 520.

the famed internationalist Justice Story—the common law “recognises and punishes piracy as an offence, not against its own municipal code, but as an offence against the law of nations . . . [thus] the offence is supposed to depend, not upon the particular provisions of any municipal code, but upon the law of nations, *both for its definition and punishment*.”<sup>311</sup>

The next Part presents a framework for answering these questions. As we shall see, and unhappily for plane-bombers, the crime of setting explosives on commercial aircraft is indeed subject to universal jurisdiction, and the U.S. legislation prohibiting it reflects faithfully the international legal definition of the crime.

### III. THE UNITED STATES' UNIVERSAL JURISDICTION OVER TERRORIST OFFENSES

To determine whether a crime is universal, and whether the U.S. legislation proscribing that crime comports with its international legal definition, we must return to some of the international law concepts introduced in Part I. Based on that discussion, we know that universal jurisdiction is a customary, not a treaty-based, international law.<sup>312</sup> And we know also that generally formulated, custom is comprised of state practice and *opinio juris*.<sup>313</sup> We must now discern whether, under this customary-law apparatus, terrorist crimes are universal as prescribed by federal statutes.

This Part argues that widely ratified treaties proscribing universal crimes evidence not only a universal prescriptive prohibition on the crime itself, but also, through their jurisdictional provisions, a universal adjudicative jurisdiction granting all states the power to prosecute universal criminals. I do not argue that the treaties themselves constitute the international law of universal jurisdiction over terrorist offenses—they cannot, since the positive law of a treaty affects only those states parties. Rather, these widely ratified treaties make up the best *evidence* of the customary law of universal jurisdiction. And it is a custom that is supplemented by an increased and extensive state practice, guided by a strong sense of legal obligation, of combating terrorism.

Moreover, and in response to our second question, because treaties evidence the prescriptive prohibition on the substance of the crime, their definitional provisions provide the best record of the customary definitions of universal crimes. And since federal statutes outlawing terrorist offenses by and large implement U.S. obligations under the various anti-terrorism treaties to which the United States is party, the federal definitions track those set forth in the treaties—which again, constitute powerful evidence of custom. Thus with respect to offenses such as bombing public places,<sup>314</sup> infrastructure,<sup>315</sup> trans-

311. *United States v. Smith*, 18 U.S. 153, 161–62 (1820) (emphasis added).

312. See *supra* Part I.B.

313. *Id.*

314. 18 U.S.C. § 2332f (Supp. 2003); Bombing Convention, *supra* note 87.

315. *Id.*

portation systems,<sup>316</sup> airports<sup>317</sup> and aircraft,<sup>318</sup> as well as hijacking aircraft,<sup>319</sup> hostage taking,<sup>320</sup> and even financing terrorist organizations,<sup>321</sup> the United States enjoys a universal jurisdiction. Accordingly, it may apply its laws without constitutional qualification to terrorists for committing such acts, even where they have no nexus whatsoever to the United States. By the same reasoning, however, a theory of universal jurisdiction does not avoid constitutional restraints on federal extraterritoriality where the crime is not universal under international law. Thus, offenses that are not the subjects of widely held international prohibitions, like providing material assistance to,<sup>322</sup> or receiving military training from a foreign terrorist organization,<sup>323</sup> do not qualify as universal. Absent some nexus to the United States, an extraterritorial application of these strictly *national* proscriptions to foreign defendants may well fall short of the notice criteria compelled by Fifth Amendment due process.

### A. *Determining Universal Terrorist Offenses Under International Law*

For a crime to be universal not only must it be universally prohibited as a matter of international prescriptive jurisdiction, but all states must have the judicial competence to prosecute its perpetrators; that is, there must also be universal adjudicative jurisdiction.

#### 1. *Treaties and Universal Prescriptive Jurisdiction*

As Part I explained, while treaties affect only those states that have signed onto them through a formal international lawmaking process, customary law applies to all states and evolves organically in light of state practice conditioned by *opinio juris*. A state's entrance into a treaty, however, can manifest such practice. The idea that generalizable or "norm-creating" treaty provisions—like proscriptions on internationally agreed-upon crimes—generate customary law is not new.<sup>324</sup> In the words of the International Court of Jus-

316. *Id.*

317. 18 U.S.C. § 37 (2000); Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation (Supplementary to the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation) art. 2, Feb. 24, 1988, S. Treaty Doc. No. 100-19, 27 I.L.M. 627 [hereinafter Airport Bombing Convention].

318. 18 U.S.C. § 32 (2000); Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation art. 1, Sept. 23, 1971, 24 U.S.T. 565, 974 U.N.T.S. 178 [hereinafter Montreal Convention].

319. 49 U.S.C. § 46502 (2000); Convention for the Suppression of Unlawful Seizure of Aircraft art. 1, Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105 [hereinafter Hijacking Convention].

320. 18 U.S.C. § 1203 (2000); International Convention Against the Taking of Hostages art. 1, T.I.A.S. No. 11,081, Dec. 17, 1979, 1136 U.N.T.S. 205 [hereinafter Hostage Convention].

321. 18 U.S.C. § 2339C (2000 & Supp. 2003); International Convention for the Suppression of the Financing of Terrorism, G.A. Res. 54/109, U.N. Doc. A/54/49 (1999) [hereinafter Financing Convention].

322. 18 U.S.C. § 2339B (2000 & Supp. 2003).

323. 18 U.S.C. § 2339D (2000 & Supp. 2003).

324. See D'AMATO, *supra* note 75, at 103–66; D'Amato, *supra* note 78, at 1127–47; see also Gary L.

tice, it is "indeed one of the recognized methods by which new rules of customary international law may be formed."<sup>325</sup> Although some might feel the need to temper the formation of custom through treaty by requiring, for example, a certain threshold number of states parties to the treaty before its provisions could constitute custom,<sup>326</sup> I need not go so far for my argument here. Each of the treaties prohibiting terrorist crimes enjoys widespread acceptance.<sup>327</sup> Thus whatever the threshold, it has been met.<sup>328</sup> Indeed, the multitude of states parties to these widely ratified anti-terrorism treaties is representative of a global spectrum of governmental viewpoints that has nonetheless reached a solid consensus that certain terrorist acts are universal crimes. For instance, although the war against terrorism is commonly viewed in the United States and other western nations as a war against a specific strain of terrorism, Islamic fundamentalism,<sup>329</sup> these anti-terrorism treaties are not simply "the West" posturing as internationalist in order to advance its current political agenda upon the rest of the world and, in particular, Islamic states.

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Scott & Craig L. Carr, *Multilateral Treaties and the Formation of Customary International Law*, 25 DENV. J. INT'L L. & POL'Y 71 (1996); Arthur M. Weisburd, *Customary International Law: The Problem of Treaties*, 21 VAND. J. TRANSNAT'L L. 1 (1988).

325. *North Sea Continental Shelf* (F.R.G. v. Den., F.R.G. v. Neth.), 1969 I.C.J. 3, 41 (Feb. 20); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(3) (1987) ("International agreements create law for the states parties thereto and may lead to the creation of customary international law when such agreements are intended for adherence by states generally and are in fact widely accepted.").

326. *See generally* Scott & Carr, *supra* note 324.

327. At the time of this writing, The Convention for the Suppression of Unlawful Seizure of Aircraft has 185 states parties, The Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation has 186 states parties, The Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Aviation has 157 states parties, The International Convention Against the Taking of Hostages has 156 states parties, The International Convention for the Suppression of the Financing of Terrorism has 149 states parties, and The International Convention for the Suppression of Terrorist Bombings has 145 states parties. *See* TREATIES IN FORCE, *supra* note 89.

328. Further, that a couple of the treaties have entered into force only recently; notably, the International Convention for the Suppression of Terrorist Bombings on May 23, 2001, and The International Convention for the Suppression of the Financing of Terrorism on April 10, 2002 (while others have been around for decades), does not diminish their contribution to custom. The Nuremberg Tribunal, for instance, applied to the accused Nazi war criminals before it the detailed provisions of the Hague Convention of 1907 and the Geneva Convention on the Prisoners of War of 1929. *See* International Military Tribunal, Judgment 83 (1947), in NAZI CONSPIRACY AND AGGRESSION: OPINION AND JUDGMENT (1947). The Tribunal, citing no state practice other than that of states agreeing upon the rules contained in, and entering into, these treaties, observed that the rules were "declaratory of the laws and customs of war." *Id.* at 83. As Anthony D'Amato points out, "It strains credulity to suppose that state practice had become so detailed by 1939—particularly between 1929, the date of the Geneva Convention, and 1939!—that the conventions were merely 'declaratory' of such practice. Rather, the more reasonable interpretation is that the conventions 'declared' what the practice is by virtue of the fact that the signatories undertook to declare that practice operative under the conventions themselves." D'AMATO, *supra* note 75, at 113.

329. As the 9/11 Commission Report explains, "the enemy is not just 'terrorism,' some generic evil . . . . The catastrophic threat at this moment in history is more specific. It is the threat posed by *Islamist terrorism* . . . ." THE FINAL REPORT OF THE NAT'L COMM'N ON TERRORIST ATTACKS AGAINST THE U.S. 362 (2004).

In fact, the anti-terrorism treaties evidencing universal crimes have broad and most often overwhelming support from Islamic countries.<sup>330</sup>

Moreover, the treaties prohibiting the terrorist acts listed above are especially powerful generators of custom. They do not merely declare conduct to be illegal under international law; they further require states to criminalize that conduct at the national level and cooperate in bringing perpetrators to justice, thus mandating another layer of state practice often taking the form of implementing legislation.<sup>331</sup> And most forcefully, as the adjudicative section that follows illustrates, the jurisdictional provisions of these treaties effectively extend the prescriptive prohibition contained in the treaty into the territories of non-party states. That is, since states parties to the treaties may establish jurisdiction and prosecute the perpetrators of these crimes without a territorial or national nexus, and even where the crime takes place within the territory of a non-party state, these prohibitions are intended to apply generally,<sup>332</sup> even to non-parties.

Even so, one might still object that a widespread state practice of entering into this type of international treaty is but one way of establishing a customary norm, and that this norm may be severely undercut if all other state practice is decidedly to the contrary. Again, I need not rely on an overly strong version of the generalizable-treaty-as-custom argument to address this objection in the context of international proscriptions on terrorist acts. Extensive state practice backed by a powerful sense of *opinio juris* amply buttresses the prohibitions contained in these widely ratified anti-terrorism instruments. Take for example the voluminous country reports to the United Nations Counter-Terrorism Committee, which was established pursuant to Security Council Resolution 1373.<sup>333</sup> The Committee is charged with monitoring compliance with the Resolution, which was adopted unanimously in the immediate aftermath of the terrorist attacks of September 11, 2001. The Resolu-

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330. A large majority of the 57 members of the Organization of Islamic Countries are states parties to each of the anti-terrorism treaties cited in the Appendix. See Organization of the Islamic Conference, available at <http://www.oic-oci.org/english/main/member-States.htm> (last visited Oct. 29, 2006) (listing current members). All members, with the exception of Palestine and Somalia (neither of which are party to any anti-terrorism treaty), are states parties to both The Convention for the Suppression of Unlawful Seizure of Aircraft and The Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation. Forty-one are party to The International Convention Against the Taking of Hostages, 44 are party to the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Aviation, 37 are party to The International Convention for the Suppression of the Financing of Terrorism and 39 are party to The International Convention for the Suppression of Terrorist Bombings. See *TREATIES IN FORCE*, *supra* note 89.

331. See Hostage Convention, *supra* note 320, art. 2; Montreal Convention, *supra* note 318, art. 3; Hijacking Convention, *supra* note 319, art. 2; see also *id.* art. 4 (providing procedures for "co-operation [among states-parties] in the prevention of the offences" outlawed by the treaty); Financing Convention, *supra* note 321, art. 4, 5, 6, 8, 18(1) and (2); Bombing Convention, *supra* note 317, art. 4, 5, 15(a).

332. See *North Sea Continental Shelf (F.R.G. v. Den., F.R.G. v. Neth.)*, 1969 I.C.J. 3, 41 (Feb. 20); *RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES* § 102(3) (1987).

333. S.C. Res. 1373, pmb., U.N. Doc. S/RES/1373 (Sept. 28, 2001); see, e.g., Counter-Terrorism Committee Practices, Documents and Papers: Country Reports, available at [http://www.un.org/Docs/sc/committees/1373/submitted\\_reports.html](http://www.un.org/Docs/sc/committees/1373/submitted_reports.html) (last visited Oct. 29, 2006) [hereinafter *Country Reports*].

tion reaffirms a universal and unequivocal condemnation of terrorism, the need to combat it “by all means,” and calls on states to carry into effect “full implementation of the relevant international conventions relating to terrorism.”<sup>334</sup> Among other things, the Resolution obliges all states to criminalize and prevent financing terrorism;<sup>335</sup> to “[r]efrain from providing *any* form of support, active or passive, to entities or persons involved in terrorist acts, including by suppressing recruitment . . . and eliminating the supply of weapons to terrorists”;<sup>336</sup> to “[d]eny safe haven” to terrorists;<sup>337</sup> to “[p]revent [terrorists] from using [states’] respective territories for . . . purposes [of committing terrorist acts]”;<sup>338</sup> to prevent the cross-border movement of terrorists;<sup>339</sup> to bring terrorists to justice;<sup>340</sup> and to become parties to and implement fully any international anti-terrorism convention.<sup>341</sup> Subsequent resolutions build on these obligations and confirm the Security Council’s “[c]on-demn[ation] in the strongest terms all acts of terrorism irrespective of their motivation, whenever and by whomever committed.”<sup>342</sup> As of the time of this writing, 193 states—effectively all the states in the world—have submitted detailed and numerous reports to the Committee cataloging the steps they have taken to accomplish the various dictates of the resolutions.<sup>343</sup> These reports strongly demonstrate a collective state practice both denouncing and combating acts of terrorism; they specify in great depth the legislative, executive and judicial responses of states carrying into effect international legal prohibitions on acts of terrorism.<sup>344</sup> For example, states have passed ambitious anti-terrorism laws targeting the acts condemned in the Resolution and in the relevant multilateral treaties, and prosecutions for terrorist activity have increased around the globe.<sup>345</sup>

Perhaps even more importantly, the reports also make absolutely clear that this widespread practice of renouncing and fighting terrorist acts is regarded by states as fulfillment of an international legal obligation; that is, the practice is backed—and guided by—a sharp sense of *opinio juris*.<sup>346</sup> Of course, even as efforts to fight terrorist crimes increase, there will be instances of

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334. S.C. Res. 1373, pmb., U.N. Doc. S/Res/1373 (Sept. 28, 2001) (emphasis added).

335. *Id.* ¶. 1(a)-(b).

336. *Id.* ¶. 2(a).

337. *Id.* ¶. 2(c).

338. *Id.* ¶. 2(d).

339. *Id.* ¶. 2(g).

340. *Id.* ¶. 2(e).

341. *Id.* ¶. 3(d)-(e).

342. S.C. Res. 1624, U.N. Doc. S/RES/1624 (Sept. 14, 2005) (emphasis added); *see also* S.C. Res. 1535, U.N. Doc. S/RES/1535 (Sept. 26, 2004).

343. *See Country Reports*, *supra* note 333. It should be emphasized that while there may not be complete consensus on the proper definition of “terrorism” as a general legal term, these reports—and the applicable multilateral conventions—demonstrate that there are specific *acts* of terrorism that virtually all states consider to be illegal, and that virtually all states combat and feel obliged to combat.

344. *Id.*

345. *Id.*

346. *Id.*

state support of terrorist activity. But such support does not make up any state's official position: no state considers terrorist acts like aircraft bombing, hijacking, and the like to be legal.<sup>347</sup> Instead, states strenuously condemn such international crimes. It is this position, reflected forcefully in the country reports, that demonstrates the legally binding nature of the prohibition for purposes of *opinio juris*,<sup>348</sup> even by those states that may support terrorist activity on the sly. Consequently the international legal prohibitions evidenced by widely ratified anti-terrorism treaties do not stand alone. An extensive state practice fueled by an acute sense of legal obligation substantially bolsters these norms.

The argument based on treaty law is especially useful for deriving customary rules of universal jurisdiction because it engages both the prohibition on the crime and the articulation of its content under international law. The argument goes beyond accepting that plane bombing is prohibited as a matter of international law because the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation prohibits it, to contend that the substantive definition of the crime is reflected in the Convention's provisions. Again, the treaty provisions setting forth penal characteristics do not themselves constitute definitively the customary definitions

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347. As I have observed elsewhere, while the crime of "terrorism" may not be subject to universal jurisdiction because of its definitional imprecision, more clearly defined terrorist crimes are. See Colangelo, *supra* note 94 at 22. By looking to the treaty materials we can detect where discord exists that affects the strength and scope of the customary prohibition on certain crimes. Thus while concretely spelled-out crimes like the Montreal Convention's definition of plane bombing have received unqualified condemnation by states parties, the more recent attempt in The International Convention for the Suppression of the Financing of Terrorism—after it prohibits financing specific terrorist acts (as defined in other widely ratified treaties)—to create a catch-all receptacle for financing "terrorism" generally defined, has met with some resistance by at least three of the thirty-seven Islamic states parties to the treaty. Article 2(1)(b) prohibits

directly or indirectly, unlawfully and wilfully, provid[ing] or collect[ing] funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out

...

(b) Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.

Egypt, Jordan, and Syria made declarations concerning this provision that, to borrow from Egypt's declaration, "acts of national resistance . . . including armed resistance against foreign occupation and aggression with a view to liberation and self-determination" do not qualify as acts of terrorism. See United Nations, *Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 2005* 165, 166, 169 (2006) (Declarations of Egypt, Jordan, and Syria). A large number of other states parties to the treaty objected to these declarations and regarded them as reservations that sought unilaterally to limit the scope of the convention contrary to its object and purpose. See *id.* at 170–83. (Objections of Austria, Belgium, Canada, Denmark, Estonia, Finland, France, Hungary, Italy, Japan, Latvia, the Netherlands, Norway, Portugal, Spain, Sweden, the United Kingdom, and the United States).

348. Rosalyn Higgins makes this point with respect to torture: "The reason that the prohibition on torture continues to be a requirement of customary international law, even though widely abused, is . . . because *opinio juris* as to its normative status continues to exist. No state, not even a state that tortures, believes that the international law prohibition is undesirable and that it is not bound by the prohibition." HIGGINS, *supra* note 82, at 22.

of universal crimes. Rather, these provisions make up strong evidence of what the customary definitions are. Thus we can say that as a matter of customary law, anyone who "unlawfully and intentionally places or causes to be placed on an aircraft in service, by any means whatsoever, a device or substance which is likely to destroy that aircraft, or to cause damage to it which renders it incapable of flight, or to cause damage to it which is likely to endanger its safety in flight"<sup>349</sup> commits a universal crime.

Deriving customary definitions from widely ratified treaty provisions is a far stronger approach—not to mention much less vulnerable to judicial discretion—than the inquiry with which courts formerly were tasked before the modern proliferation of multilateral treaties. To take a remarkably on-point case for present purposes, the Supreme Court's *Smith* decision—quoted at the end of the previous Part—centered on the question whether "the crime of piracy is defined by the law of nations with reasonable certainty."<sup>350</sup> To support the holding that piracy was in fact defined with reasonable certainty, Justice Story relied copiously on the writings of publicists,<sup>351</sup> an approach that has since been chided, and in relatively harsh terms, by at least one Court of Appeals in considering the question of what crimes qualify as universal under international law.<sup>352</sup> Based on the writings of the leading publicists of the day, including Grotius, Bynkershoek, Azuni, Bacon, Martens, Rutherford, Woodeson, Burlamaqui, Scott, Calvinus, Bouchard, Bonnemant, Ferriere, Valin, Straccha, Casaregis, Brown, Beawes, Molloy, Marshall, Jenkins, Targa, Hawkins, Coke, and Blackstone, Justice Story concluded that "[t]here is scarcely a writer on the law of nations, who does not allude to piracy as a crime of a settled and determinate nature; and whatever may be the diversity of definitions, in other respects, all writers concur, in holding, that robbery, or forcible depredations upon the sea, *animo furandi*, is piracy."<sup>353</sup> We should be glad indeed to have resort to treaties!

First, treaties provide direct evidence of the practice and *opinio juris* of those states parties—for the very act of entering into the treaty, of agreeing to its terms, to implement them and to be bound thereby, is in itself a practice.<sup>354</sup> There is no need to rely on the current cadre of international law professors for the definitions of universal crimes. Second, not only do treaties represent more faithfully state practice than what law professors might compile, their definitions are set with far more certainty than what would be the invariably contested conclusions of a host of commentators with diverse per-

349. Montreal Convention, *supra* note 318, art. 1.

350. *United States v. Smith*, 18 U.S. 153, 160 (1820).

351. *Id.* at 161 n.8.

352. See *Yousef*, 327 F.3d at 99–100 (explaining that the district court's reliance on the Restatement to categorize terrorism as a universal crime was incorrect).

353. *Smith*, 18 U.S. at 161.

354. Again, customary rules derived from states entering into anti-terrorism treaties need not rely solely on this practice of entering into treaties; there is also an extensive supplementary practice, backed by *opinio juris*, of states condemning and combating acts of terrorism. See *supra* notes 333–345.



spectives and motives. Unlike piracy (which again, based on publicists' writings had a definite meaning under the law of nations), Justice Story lamented in *Smith* the indeterminacy of the Offences Clause: "Offences . . . against the law of nations, cannot, with any accuracy, be said to be completely ascertained and defined in any public code recognised by the common consent of nations."<sup>355</sup> Alas, we now have just such a code: multilateral treaties.<sup>356</sup>

## 2. *Treaties and Universal Adjudicative Jurisdiction*

But thus far we have answered only half of the universal jurisdiction equation. Not only must the substance of universal crimes be universally prohibited, but all states procedurally must have the judicial competence to prosecute their perpetrators—that is, a universal adjudicative jurisdiction must also attach. As Justice Breyer explained in his concurrence in *Sosa*, which sought to limit the offenses actionable under the Alien Tort Statute:

[I]n the 18th century, nations reached consensus not only on the substantive principle that acts of piracy were universally wrong but also on the jurisdictional principle that any nation that found a pirate could prosecute him. Today international law will sometimes similarly reflect not only substantive agreement as to certain universally-condemned behavior but also procedural agreement that universal jurisdiction exists to prosecute a subset of that behavior.<sup>357</sup>

And how are courts to discern whether a universal adjudicative jurisdiction exists in respect to a certain crime? Again, it would seem treaties furnish the relevant evidence of customary law since they may provide for just this type of procedural rule through their jurisdictional provisions. Specifically, treaties that contain prosecute or extradite provisions mandating each state party on whose territories offenders are "present" or "found" both (i) to "establish its jurisdiction over the offence" and (ii) either to prosecute or to extradite (to another state party),<sup>358</sup> create a comprehensive adjudicative jurisdiction among the states parties to the treaty. Like the substantive prohibition on the content of universal crimes, these treaties also evidence a procedural custom of universal adjudicative jurisdiction. They signal in strong terms

355. 18 U.S. at 159.

356. *Quirin*, for example, used the 1907 Hague Conventions (as well as writings of publicists) to identify the law of war. *Ex parte Quirin*, 317 U.S. 18, 30–35 nn.7, 12 (1942).

357. *Sosa*, 542 U.S. at 762 (citing *United States v. Smith*, 18 U.S. 153 (1820)).

358. A famous example here is the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 113. Article 5(2) of the Convention provides: "Each State Party shall . . . take such measures as may be necessary to establish jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him . . ." And Article 7(1) provides: "The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in [the relevant provision] is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution."

that all states parties agree that all other states parties might both establish and exercise jurisdiction over the offense even without a territorial or national link. Article 5 of the Montreal Convention, for instance, provides that:

Each Contracting State shall ... take such measures as may be necessary to establish its jurisdiction over the offences [defined above] ... in the case where the alleged offender is present in its territory and it does not extradite him ... to any of the States mentioned in paragraph 1 of this Article.<sup>359</sup>

And Article 7 provides further that:

The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State.<sup>360</sup>

Thus, the Montreal Convention not only reflects a universal prohibition on the substantive offense of plane-bombing, but also a universal adjudicative jurisdiction for all states to prosecute plane-bombers found in their territories, irrespective of any national or territorial link to the accused, his victims, or his alleged acts.

As noted above, these jurisdictional provisions also confirm the universality of the crime as a matter of customary *prescriptive* jurisdiction. Because states parties may establish jurisdiction and prosecute perpetrators of the crime absent any territorial or national connection—even where the crime occurs in the territory of a non-party state—the prescriptive prohibition on the crime contained in the treaty effectively extends into all states, even non-parties. It cannot do so as a matter of the positive law of the treaty (again, under the law of treaty, states are not bound by treaties to which they are not party). Rather, it does so as a result of the intent and practice of those states parties to the treaty. In other words, since the prohibition may be applied to and enforced against the perpetrators of terrorist acts even where those acts are committed in the territories of non-party states, states parties have created through their entrance into the treaty a customary international legal prohibition that extends into the territories of all states, irrespective of their status under the positive law of the treaty.

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359. Montreal Convention, *supra* note 318, at art. 5.

360. *Id.* art. 7.

## B. Determining Universal Terrorist Offenses Under National Law

Now that we have a general idea of how to determine which terrorist crimes are universal under international law, we turn to the questions of which terrorist crimes prohibited in the U.S. code are universal, and more specifically, whether this national prohibition adequately embodies the substantive international legal definition of the crime so as to erase the need for a nexus to the United States in line with Fifth Amendment due process.

### 1. Is It the Place of the Courts To Make This Determination?

Of preliminary importance is the proper role of courts in determining these questions, that is, whether judicial review is even appropriate in this context. It is. At stake are individual constitutional rights, or what have come to be regarded as the bread and butter of judicial review.<sup>361</sup> Again, the Fifth Amendment due process analysis evaluates whether U.S. code provisions proscribing terrorist acts adequately capture the international legal definitions of universal crimes so as to provide the individual defendant with constitutionally requisite notice; such an analysis falls squarely within the judiciary's especial competence to protect the individual against arbitrary and unfair government action.<sup>362</sup> Put differently, the inquiry is not some abstract political question of what Congress, or the government at large, deems a universal crime to be—a determination that when made as a matter of general foreign policy quite plausibly would, and should, be immune from judicial interference. Rather, the question is whether the individual defendant is on sufficient notice of the law being applied to him. And for that to occur, the U.S. code definition must reflect to a constitutionally adequate degree an existing international legal proscription on a universal crime.

### 2. What Crimes Are Universal

If we accept the conclusion above that treaties best evidence the customary law of universal jurisdiction, the present analysis of what crimes are universal under U.S. law becomes relatively easy. U.S. code provisions outlawing, *inter alia*, bombing governmental and public places,<sup>363</sup> infrastructure,<sup>364</sup>

361. See HENKIN, *supra* note 180, at 279 ("Increasingly . . . the courts have invoked, extended, and intensified the protections of the Bill of Rights and of later constitutional amendments, and for the courts, at least, the Constitution has long been primarily a bulwark for the individual against excesses by either federal or state authorities."); see also, Nzelibe, *supra* note 206, at 1002 ("Although forays by the courts into foreign affairs are infrequent, the courts have not hesitated to adjudicate on the merits of claims with foreign affairs implications when individual rights or domestic property interests are at stake."); Martin H. Redish, *Judicial Review and the "Political Question,"* 79 NW. U. L. REV. 1031, 1058 (1985) (observing that "the Court's most important function in engaging in judicial review is the protection of individual rights").

362. No court to have considered Fifth Amendment due process limits on federal extraterritorial jurisdiction has suggested that such an evaluation falls outside the judiciary's competence.

363. 18 U.S.C. § 2332f (Supp. 2003); Bombing Convention, *supra* note 87.

364. *Id.*

transportation systems,<sup>365</sup> airports<sup>366</sup> and aircraft,<sup>367</sup> as well as hijacking aircraft,<sup>368</sup> hostage taking,<sup>369</sup> and financing terrorist organizations<sup>370</sup> all implement widely ratified multilateral treaties evidencing universal jurisdiction over those crimes. For ease of reference, the Appendix to this Article sets out the relevant U.S. code and international treaty provisions regarding both the definitions of the crimes and the expansive jurisdiction that attaches to them. However, U.S. code offenses that are not the subject of widely ratified international legal prohibitions like providing material assistance to,<sup>371</sup> or receiving military training from a foreign terrorist organization,<sup>372</sup> are not—at least at the present stage of development of international law—universal crimes.

Additionally, as a structural matter, the fact that these federal statutes outlawing universal crimes implement treaties does not preclude this legislation also being an exercise of other congressional powers that may boast a more catholic reach, like, for example, the Offences Clause<sup>373</sup> or the foreign affairs power. Thus structurally, and as a matter of Fifth Amendment due process, where the U.S. code implements a widely ratified international treaty evidencing a universal proscription, no limits on federal extraterritoriality should stand in the way of a U.S. prosecution, no matter where the crime takes place or whom it involves.

### 3. *Do the U.S. Law Definitions Reflect the International Law Definitions?*

The U.S. code definition of the crime still however must adequately reflect the international legal definition of the crime to ensure compliance with Fifth Amendment due process. Because the U.S. code implements the treaties, the code provisions translating or simply transposing to domestic law, or even incorporating by reference the treaty's provisions, tend by their very nature to reproduce the substance of the conduct prohibited by the treaty. Yet an evaluation of whether the domestic definitions adequately track the international legal definitions as evidenced by the treaties necessarily must allow for some flexibility. Certain variations on the language are almost inevitable given, for instance, the general prescriptions of international treaties as compared to the more U.S.-specific prescriptions of the federal code.<sup>374</sup>

365. *Id.*

366. 18 U.S.C. § 37 (2000); Airport Bombing Convention, *supra* note 317, art. 2.

367. 18 U.S.C. § 32 (2000); Montreal Convention, *supra* note 318, art. 1.

368. 49 U.S.C. § 46502; Hijacking Convention, *supra* note 319, art. 1.

369. 18 U.S.C. § 1203 (2000); Hostage Convention, *supra* note 320, art. 1.

370. 18 U.S.C. § 2339C (2000 & Supp. 2003); Financing Convention, *supra* note 321.

371. 18 U.S.C. § 2339B (2000 & Supp. 2003).

372. 18 U.S.C. § 2339D (2000 & Supp. 2003).

373. *United States v. Arjona*, 120 U.S. 479, 488 (1887) (explaining that the question "whether the offence as defined is an offence against the law of nations depends on the thing done, not on any declaration to that effect by Congress").

374. To take one example, the Montreal Convention, *supra* note 318, provides for the equivalent of universal jurisdiction over anyone who "unlawfully and intentionally":

In light of this reality, the best mechanism for judicial review in this context probably would hold that where the domestic legislation does not substantively alter the definition of the treaty provision it transforms into U.S. law,<sup>375</sup> the application of that legislation complies with Fifth Amendment due process. What this standard means at the edges undoubtedly will spark disagreement, but for now we can say with some confidence that the U.S. code provisions outlawing the principal terrorist offenses set forth in the Appendix adequately match the treaty provisions. As the Appendix bears out, these U.S. code proscriptions are virtually identical to those in the treaties the legislation implements, and in some cases even directly incorporate by reference the treaty definitions.<sup>376</sup> Still, at least some aspects of these crimes may require closer examination. For instance, more difficult are questions of aiding and abetting and criminal enterprise liability. The anti-terrorism treaties all provide for attempt and accomplice liability, but only the more recent treaties—The Bombing Convention and The Financing Convention—explicitly provide for criminal enterprise liability,<sup>377</sup> while all of the U.S.

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places or causes to be placed on an aircraft in service, by any means whatsoever, a device or substance which is likely to destroy that aircraft, or to cause damage to it which renders it incapable of flight, or to cause damage to it which is likely to endanger its safety in flight.

The U.S. implementing legislation, codified at 18 U.S.C. § 32(b)(3) (2000), similarly provides for jurisdiction over "Whoever willfully":

... places or causes to be placed on a civil aircraft registered in a country other than the United States while such aircraft is in service, a device or substance which is likely to destroy that aircraft, or to cause damage to that aircraft which renders that aircraft incapable of flight or which is likely to endanger that aircraft's safety in flight.

375. Some countries evidently do alter the definitions. For example, Germany's former Criminal Code section 220a, which translated the definition of genocide contained in the 1948 Genocide Convention into German law, altered the definition in a way that allowed for far more liability than under the Convention's definition. The act of genocide is defined under the Convention's provisions as:

Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.

The translation in § 220a criminalizes:

Inflict[ing] on the group conditions apt to bring about its physical destruction in whole or in part.

Kai Ambos & Steffen Wirth, *Genocide and War Crimes in the Former Yugoslavia Before German Criminal Courts*, in *INTERNATIONAL AND NATIONAL PROSECUTION OF CRIMES UNDER INTERNATIONAL LAW* 784–86 (Horst Fischer et al. eds., 2001) (emphasis in secondary source).

376. 49 U.S.C. § 46502(b) (2000), the U.S. code provision proscribing aircraft piracy, defines the offense as follows when committed outside the special aircraft jurisdiction of the United States: "An individual committing or conspiring to commit an offense (*as defined in the Convention for the Suppression of Unlawful Seizure of Aircraft*) on an aircraft in flight outside the special aircraft jurisdiction of the United States." (emphasis added); see also Appendix A.

377. Article 2(5)(c) of the Financing Convention provides liability for anyone who:

Contributes to the commission of one or more [principal] offences . . . of this article by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

(i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of an offence as set forth in paragraph 1 of this article; or

(ii) Be made in the knowledge of the intention of the group to commit an offence as set forth in paragraph 1 of this article.

See also Appendix E. Similarly, Article 2(3)(c) of the Bombing Convention provides liability for anyone who:

code provisions criminalize conspiring to commit the subject offense,<sup>378</sup> a charge which might subsume criminal enterprise liability in some instances where the act is later consummated. A real question arises then whether the accomplice liability contained in the earlier treaties extends to notions of criminal enterprise liability, especially where later treaties explicitly supplement accomplice liability with unmistakable criminal enterprise provisions. Or indeed, whether the criminal enterprise feature added to more recent internationally agreed-upon proscriptions on terrorist crimes evidences a shift in custom as to universal terrorist crimes generally, a custom that goes beyond the old treaty provisions providing only for accomplice liability to now also incorporate criminal enterprise liability. While such issues may present courts with a more complicated task, throughout our history the judiciary has proven itself very capable of discerning the content of international law. And again, in the vast majority of cases where the treaty speaks directly to the crime as proscribed in the U.S. code, courts should have no trouble concluding that the offense is universal under international law and that the U.S. code provisions adequately reflect its international legal definition.

#### CONCLUSION

The modern emergence of extraterritorial crime has made imperative the need to evaluate how effectively to achieve justice through expanding notions of jurisdiction while respecting the rule of law and individual rights. This Article has argued principally that the necessary legal machinery is already in place, and that a compelling potential for further evolution rests in the synergy between the U.S. Constitution and principles of international law. In particular, the international law of universal jurisdiction provides the United States with a sound and virtually unconstrained legal basis from which to extend its criminal laws to dangerous extraterritorial conduct like acts of terrorism. And although some U.S. anti-terrorism provisions do not, at least for the time being, proscribe universal crimes, and therefore do not engender unconstrained U.S. jurisdiction, under this Article's framework the United States faces no constitutional obstacles in applying its law extraterritorially to the core array of universal terrorist offenses presently outlawed in the federal code. As to these offenses, the United States enjoys a universal jurisdiction under both international law and its own Constitution.

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In any other way contributes to the commission of one or more [principal] offences . . . of the present article by a group of persons acting with a common purpose; such contribution shall be intentional and either be made with the aim of furthering the general criminal activity or purpose of the group or be made in the knowledge of the intention of the group to commit the offence or offences concerned.

See also Appendix F.

378. See Appendices A-F.

## APPENDIX

## A. Aircraft Hijacking

## 49 U.S.C. § 46502(b)

## (b) Outside special aircraft jurisdiction.

(1) An individual committing or conspiring to commit an offense (as defined in the Convention for the Suppression of Unlawful Seizure of Aircraft) on an aircraft in flight outside the special aircraft jurisdiction of the United States—

(A) shall be imprisoned for at least 20 years; or

(B) notwithstanding section 3559(b) of title 18, if the death of another individual results from the commission or attempt, shall be put to death or imprisoned for life.

(2) There is jurisdiction over the offense in paragraph (1) if—

(A) a national of the United States was aboard the aircraft;

(B) an offender is a national of the United States; or

(C) an offender is afterwards found in the United States.

## CONVENTION FOR THE SUPPRESSION OF UNLAWFUL SEIZURE OF AIRCRAFT

*Article 1*

Any person who on board an aircraft in flight:

a. unlawfully, by force or threat thereof, or by any other form of intimidation, seizes, or exercises control of, that aircraft, or attempts to perform any such act, or

b. is an accomplice of a person who performs or attempts to perform any such act commits an offence (hereinafter referred to as "the offence").

*Article 4*

Each Contracting State shall take such measures as may be necessary to establish its jurisdiction over the offence and any other act of violence against passengers or crew committed by the alleged offender in connection with the offence, in the following cases:

when the offence is committed on board an aircraft registered in that State;

when the aircraft on board which the offence is committed lands in its territory with the alleged offender still on board;

when the offence is committed on board an aircraft leased without crew to a lessee who has his principal place of business or, if the lessee has no such place of business, his permanent residence, in that State.

Each Contracting State shall likewise take such measures as may be necessary to establish its jurisdiction over the offence in the case where the alleged of-

fender is present in its territory and it does not extradite him pursuant to Article 8 to any of the States mentioned in paragraph 1 of this Article. This Convention does not exclude any criminal jurisdiction exercised in accordance with national law.

#### *Article 7*

The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State.

### AIRCRAFT BOMBING

#### 18 U.S.C. § 32(b)

(b) Whoever willfully—

- (1) performs an act of violence against any individual on board any civil aircraft registered in a country other than the United States while such aircraft is in flight, if such act is likely to endanger the safety of that aircraft;
- (2) destroys a civil aircraft registered in a country other than the United States while such aircraft is in service or causes damage to such an aircraft which renders that aircraft incapable of flight or which is likely to endanger that aircraft's safety in flight;
- (3) places or causes to be placed on a civil aircraft registered in a country other than the United States while such aircraft is in service, a device or substance which is likely to destroy that aircraft, or to cause damage to that aircraft which renders that aircraft incapable of flight or which is likely to endanger that aircraft's safety in flight; or
- (4) attempts or conspires to commit an offense described in paragraphs (1) through (3) of this subsection;

shall be fined under this title or imprisoned not more than twenty years, or both. There is jurisdiction over an offense under this subsection if a national of the United States was on board, or would have been on board, the aircraft; an offender is a national of the United States; or an offender is afterwards found in the United States.

### CONVENTION FOR THE SUPPRESSION OF UNLAWFUL ACTS AGAINST THE SAFETY OF CIVIL AVIATION

#### *Article 1*

Any person commits an offence if he unlawfully and intentionally:

- performs an act of violence against a person on board an aircraft in flight if that act is likely to endanger the safety of that aircraft; or



destroys an aircraft in service or causes damage to such an aircraft which renders it incapable of flight or which is likely to endanger its safety in flight; or  
places or causes to be placed on an aircraft in service, by any means whatsoever, a device or substance which is likely to destroy that aircraft, or to cause damage to it which renders it incapable of flight, or to cause damage to it which is likely to endanger its safety in flight; or  
destroys or damages air navigation facilities or interferes with their operation, if any such act is likely to endanger the safety of aircraft in flight; or  
communicates information which he knows to be false, thereby endangering the safety of an aircraft in flight.

Any person also commits an offence if he:

attempts to commit any of the offences mentioned in paragraph 1 of this Article; or  
is an accomplice of a person who commits or attempts to commit any such offence.

#### *Article 5*

Each Contracting State shall take such measures as may be necessary to establish its jurisdiction over the offences in the following cases:

when the offence is committed in the territory of that State;  
when the offence is committed against or on board an aircraft registered in that State;  
when the aircraft on board which the offence is committed lands in its territory with the alleged offender still on board;  
when the offence is committed against or on board an aircraft leased without crew to a lessee who has his principal place of business or, if the lessee has no such place of business, his permanent residence, in that State.

Each Contracting State shall likewise take such measures as may be necessary to establish its jurisdiction over the offences mentioned in Article 1, paragraph 1 (a), (b) and (c), and in Article 1, paragraph 2, in so far as that paragraph relates to those offences, in the case where the alleged offender is present in its territory and it does not extradite him pursuant to Article 8 to any of the States mentioned in paragraph 1 of this Article.

This Convention does not exclude any criminal jurisdiction exercised in accordance with national law.

#### *Article 7*

The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever

and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State.

### HOSTAGE TAKING

#### 18 U.S.C. 1203

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

(b)

(1) It is not an offense under this section if the conduct required for the offense occurred outside the United States unless—

(A) the offender or the person seized or detained is a national of the United States;

(B) the offender is found in the United States; or

(C) the governmental organization sought to be compelled is the Government of the United States.

(2) It is not an offense under this section if the conduct required for the offense occurred inside the United States, each alleged offender and each person seized or detained are nationals of the United States, and each alleged offender is found in the United States, unless the governmental organization sought to be compelled is the Government of the United States.

### INTERNATIONAL CONVENTION AGAINST THE TAKING OF HOSTAGES

#### *Article 1*

Any person who seizes or detains and threatens to kill, to injure or to continue to detain another person (hereinafter referred to as the "hostage") in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking of hostages ("hostage-taking") within the meaning of this Convention.

Any person who:

attempts to commit an act of hostage-taking, or

participates as an accomplice of anyone who commits or attempts to commit an act of hostage-taking likewise commits an offence for the purposes of this Convention.

#### *Article 5*

Each State Party shall take such measures as may be necessary to establish its jurisdiction over any of the offences set forth in article 1 which are committed:

in its territory or on board a ship or aircraft registered in that State; by any of its nationals or, if that State considers it appropriate, by those stateless persons who have their habitual residence in its territory; in order to compel that State to do or abstain from doing any act; or with respect to a hostage who is a national of that State, if that State considers it appropriate.

Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 1 in cases where the alleged offender is present in its territory and it does not extradite him to any of the States mentioned in paragraph 1 of this article.

This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.

#### *Article 8*

The State Party in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a grave nature under the law of that State.

Any person regarding whom proceedings are being carried out in connexion with any of the offences set forth in article 1 shall be guaranteed fair treatment at all stages of the proceedings, including enjoyment of all the rights and guarantees provided by the law of the State in the territory of which he is present.

#### AIRPORT VIOLENCE

##### 18 U.S.C. § 37

(a) Offense. A person who unlawfully and intentionally, using any device, substance, or weapon—

(1) performs an act of violence against a person at an airport serving international civil aviation that causes or is likely to cause serious

bodily injury (as defined in section 1365 of this title [18 USCS § 1365]) or death; or

(2) destroys or seriously damages the facilities of an airport serving international civil aviation or a civil aircraft not in service located thereon or disrupts the services of the airport, if such an act endangers or is likely to endanger safety at that airport, or attempts or conspires to do such an act, shall be fined under this title, imprisoned not more than 20 years, or both; and if the death of any person results from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life.

(b) Jurisdiction. There is jurisdiction over the prohibited activity in subsection (a) if—

- (1) the prohibited activity takes place in the United States; or
- (2) the prohibited activity takes place outside the United States and (A) the offender is later found in the United States; or (B) an offender or a victim is a national of the United States

#### PROTOCOL FOR THE SUPPRESSION OF UNLAWFUL ACTS OF VIOLENCE AT AIRPORTS SERVING INTERNATIONAL CIVIL AVIATION

##### *Article 2*

In Article 1 of the [Montreal] Convention, the following shall be added as new paragraph 1 bis:

“1 bis. Any person commits an offence if he unlawfully and intentionally, using any device, substance or weapon:  
performs an act of violence against a person at an airport serving international civil aviation which causes or is likely to cause serious injury or death; or  
destroys or seriously damages the facilities of an airport serving international civil aviation or aircraft not in service located thereon or disrupts the services of the airport, if such an act endangers or is likely to endanger safety at that airport.”

In paragraph 2 (a) of Article 1 of the Convention [providing for attempt and accomplice liability], the following words shall be inserted after the words “paragraph 1”:

“or paragraph 1 bis.”

##### *Article 3*

In Article 5 of the Convention, the following shall be added as paragraph 2 bis:

“2bis. Each Contracting State shall likewise take such measures as may be necessary to establish its jurisdiction over the offences mentioned in Article 1, paragraph 1 bis, and in Article 1, paragraph 2,

in so far as that paragraph relates to those offences, in the case where the alleged offender is present in its territory and it does not extradite him pursuant to Article 8 to the State mentioned in paragraph 1(a) of this Article.”

#### FINANCING TERRORISM

##### 18 U.S.C. 2339C

###### (a) Offenses.

(1) In general. Whoever, in a circumstance described in subsection (b), by any means, directly or indirectly, unlawfully and willfully provides or collects funds with the intention that such funds be used, or with the knowledge that such funds are to be used, in full or in part, in order to carry out—

(A) an act which constitutes an offense within the scope of a treaty specified in subsection (e)(7), as implemented by the United States [the Convention for the Suppression of Unlawful Seizure of Aircraft, done at The Hague on December 16, 1970; the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on September 23, 1971; the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted by the General Assembly of the United Nations on December 14, 1973; the International Convention against the Taking of Hostages, adopted by the General Assembly of the United Nations on December 17, 1979; the Convention on the Physical Protection of Nuclear Material, adopted at Vienna on March 3, 1980; the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on February 24, 1988; the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, done at Rome on March 10, 1988; the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf, done at Rome on March 10, 1988; or the International Convention for the Suppression of Terrorist Bombings, adopted by the General Assembly of the United Nations on December 15, 1997]; or

(B) any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an

international organization to do or to abstain from doing any act, shall be punished as prescribed in subsection (d)(1).

(2) Attempts and conspiracies. Whoever attempts or conspires to commit an offense under paragraph (1) shall be punished as prescribed in subsection (d)(1).

(3) Relationship to predicate act. For an act to constitute an offense set forth in this subsection, it shall not be necessary that the funds were actually used to carry out a predicate act.

(b) Jurisdiction. There is jurisdiction over the offenses in subsection (a) in the following circumstances—

...

(2) the offense takes place outside the United States and—

(A) a perpetrator is a national of the United States or is a stateless person whose habitual residence is in the United States;

(B) a perpetrator is found in the United States; or

(C) was directed toward or resulted in the carrying out of a predicate act against—

(i) any property that is owned, leased, or used by the United States or by any department or agency of the United States, including an embassy or other diplomatic or consular premises of the United States;

(ii) any person or property within the United States;

(iii) any national of the United States or the property of such national; or

(iv) any property of any legal entity organized under the laws of the United States, including any of its States, districts, commonwealths, territories, or possessions;

(3) the offense is committed on board a vessel flying the flag of the United States or an aircraft which is registered under the laws of the United States at the time the offense is committed;

(4) the offense is committed on board an aircraft which is operated by the United States; or

(5) the offense was directed toward or resulted in the carrying out of a predicate act committed in an attempt to compel the United States to do or abstain from doing any act.

## INTERNATIONAL CONVENTION FOR THE SUPPRESSION OF THE FINANCING OF TERRORISM

### *Article 2*

1. Any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out:

- (a) An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex [the Convention for the Suppression of Unlawful Seizure of Aircraft, done at The Hague on December 16, 1970; the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on September 23, 1971; the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted by the General Assembly of the United Nations on December 14, 1973; the International Convention against the Taking of Hostages, adopted by the General Assembly of the United Nations on December 17, 1979; the Convention on the Physical Protection of Nuclear Material, adopted at Vienna on March 3, 1980; the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on February 24, 1988; the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, done at Rome on March 10, 1988; the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf, done at Rome on March 10, 1988; or the International Convention for the Suppression of Terrorist Bombings, adopted by the General Assembly of the United Nations on December 15, 1997]; or
- (b) Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.

...

3. For an act to constitute an offence set forth in paragraph 1, it shall not be necessary that the funds were actually used to carry out an offence referred to in paragraph 1, subparagraphs (a) or (b).
4. Any person also commits an offence if that person attempts to commit an offence as set forth in paragraph 1 of this article.
5. Any person also commits an offence if that person:
- (a) Participates as an accomplice in an offence as set forth in paragraph 1 or 4 of this article;
  - (b) Organizes or directs others to commit an offence as set forth in paragraph 1 or 4 of this article;
  - (c) Contributes to the commission of one or more offences as set forth in paragraphs 1 or 4 of this article by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
    - (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or pur-

pose involves the commission of an offence as set forth in paragraph 1 of this article; or

(ii) Be made in the knowledge of the intention of the group to commit an offence as set forth in paragraph 1 of this article.

#### *Article 7*

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 2 when:

- (a) The offence is committed in the territory of that State;
- (b) The offence is committed on board a vessel flying the flag of that State or an aircraft registered under the laws of that State at the time the offence is committed;
- (c) The offence is committed by a national of that State.

2. A State Party may also establish its jurisdiction over any such offence when:

- (a) The offence was directed towards or resulted in the carrying out of an offence referred to in article 2, paragraph 1, subparagraph (a) or (b), in the territory of or against a national of that State;
- (b) The offence was directed towards or resulted in the carrying out of an offence referred to in article 2, paragraph 1, subparagraph (a) or (b), against a State or government facility of that State abroad, including diplomatic or consular premises of that State;
- (c) The offence was directed towards or resulted in an offence referred to in article 2, paragraph 1, subparagraph (a) or (b), committed in an attempt to compel that State to do or abstain from doing any act;
- (d) The offence is committed by a stateless person who has his or her habitual residence in the territory of that State;
- (e) The offence is committed on board an aircraft which is operated by the Government of that State.

#### *Compare*

4. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 2 in cases where the alleged offender is present in its territory and it does not extradite that person to any of the States Parties that have established their jurisdiction in accordance with paragraphs 1 or 2.

#### *Article 10*

1. The State Party in the territory of which the alleged offender is present shall, in cases to which article 7 applies, if it does not extradite that person, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case without undue delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. Those authorities shall take their de-



cision in the same manner as in the case of any other offence of a grave nature under the law of that State.

BOMBING PUBLIC PLACES, GOVERNMENT FACILITIES,  
PUBLIC INFRASTRUCTURE AND TRANSPORTATION SYSTEMS

18 U.S.C. § 2332f

(a) Offenses.

(1) In general. Whoever unlawfully delivers, places, discharges, or detonates an explosive or other lethal device in, into, or against a place of public use, a state or government facility, a public transportation system, or an infrastructure facility—

(A) with the intent to cause death or serious bodily injury, or

(B) with the intent to cause extensive destruction of such a place, facility, or system, where such destruction results in or is likely to result in major economic loss, shall be punished as prescribed in subsection (c).

(2) Attempts and conspiracies. Whoever attempts or conspires to commit an offense under paragraph (1) shall be punished as prescribed in subsection (c).

(b) Jurisdiction. There is jurisdiction over the offenses in subsection (a) if—

...

(2) the offense takes place outside the United States and—

(A) a perpetrator is a national of the United States or is a stateless person whose habitual residence is in the United States;

(B) a victim is a national of the United States;

(C) a perpetrator is found in the United States;

(D) the offense is committed in an attempt to compel the United States to do or abstain from doing any act;

(E) the offense is committed against a state or government facility of the United States, including an embassy or other diplomatic or consular premises of the United States;

(F) the offense is committed on board a vessel flying the flag of the United States or an aircraft which is registered under the laws of the United States at the time the offense is committed; or

(G) the offense is committed on board an aircraft which is operated by the United States.

[\*Author's Note: The definitional provisions of this statute match up with those in the Convention as well, e.g., "Military forces of a State" and "Place of public use" are all defined the same way.]

INTERNATIONAL CONVENTION FOR THE SUPPRESSION OF  
TERRORIST BOMBINGS

*Article 2*

Any person commits an offence within the meaning of this Convention if that person unlawfully and intentionally delivers, places, discharges or detonates an explosive or other lethal device in, into or against a place of public use, a State or government facility, a public transportation system or an infrastructure facility:

With the intent to cause death or serious bodily injury; or

With the intent to cause extensive destruction of such a place, facility or system, where such destruction results in or is likely to result in major economic loss.

Any person also commits an offence if that person attempts to commit an offence as set forth in paragraph 1 of the present article.

Any person also commits an offence if that person:

Participates as an accomplice in an offence as set forth in paragraph 1 or 2 of the present article; or

Organizes or directs others to commit an offence as set forth in paragraph 1 or 2 of the present article; or

In any other way contributes to the commission of one or more offences as set forth in paragraph 1 or 2 of the present article by a group of persons acting with a common purpose; such contribution shall be intentional and either be made with the aim of furthering the general criminal activity or purpose of the group or be made in the knowledge of the intention of the group to commit the offence or offences concerned.

*Article 6*

Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 2 when:

The offence is committed in the territory of that State; or

The offence is committed on board a vessel flying the flag of that State or an aircraft which is registered under the laws of that State at the time the offence is committed; or

The offence is committed by a national of that State.

A State Party may also establish its jurisdiction over any such offence when:

The offence is committed against a national of that State; or

The offence is committed against a State or government facility of that State abroad, including an embassy or other diplomatic or consular premises of that State; or

The offence is committed by a stateless person who has his or her habitual residence in the territory of that State; or

The offence is committed in an attempt to compel that State to do or abstain from doing any act; or

The offence is committed on board an aircraft which is operated by the Government of that State.

Upon ratifying, accepting, approving or acceding to this Convention, each State Party shall notify the Secretary-General of the United Nations of the jurisdiction it has established under its domestic law in accordance with paragraph 2 of the present article. Should any change take place, the State Party concerned shall immediately notify the Secretary-General.

Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 2 in cases where the alleged offender is present in its territory and it does not extradite that person to any of the States Parties which have established their jurisdiction in accordance with paragraph 1 or 2 of the present article.

This Convention does not exclude the exercise of any criminal jurisdiction established by a State Party in accordance with its domestic law.

#### *Article 8*

The State Party in the territory of which the alleged offender is present shall, in cases to which article 6 applies, if it does not extradite that person, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case without undue delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State.

...

