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Editorial Note on Extraterritorial Aspects of Jurisdiction

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The foregoing articles by Ms. McGuinness and Mr. Toth focus in part on the extra-territorial aspects of the United States' jurisdiction under its Securities Laws and Regulations. While they consider different aspects of the issues and are valuable contributions to the Journal, neither directs attention to what appears to be the growing tendency of municipal courts in the United States to exercise jurisdiction based on the "protective" and "passive personality" principles.[1] "Jurisdiction asserted upon the principle of passive personality without qualifications has been more strongly contested than any other type of competence. It has been vigorously opposed in Anglo-American countries. . . . It has had distinguished opponents among Continental writers. . . . Of all principles of jurisdiction having some substantial support in contemporary national legislation, it is the most difficult to justify in theory. Unless circumscribed by important safeguards and limitations, it is unlikely that it can be made acceptable to an important group of states. Since the essential safeguards and limitations are precisely those by which the principle of universality is circumscribed in the present article, and since universality thus circumscribed serves every legitimate purpose for which passive personality might be invoked in such circumstances, it seems clear that the recogni-

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[1]It is generally accepted that there are five general principles upon which some degree of penal jurisdiction has been claimed by states. "These five general principles are: first, the territorial principle, determining jurisdiction by reference to the place where the offence is committed; second, the nationality principle, determining jurisdiction by reference to the nationality or national character of the person committing the offence; third, the protective principle, determining jurisdiction by reference to the nationality or national character of the person injured by the offence; fourth, the universality principle, determining jurisdiction by reference to the custody of the person committing the offence; and fifth, the passive personality principle, determining jurisdiction by reference to the nationality or national character of the person injured by the offence. Of these five principles, the first is everywhere regarded as of primary importance and of fundamental character. The second is universally accepted, though there are striking differences in the extent to which it is used in the different national systems. The third is claimed by most states, regarded with misgivings in a few, and generally ranked as the basis of an auxiliary competence. The fourth is widely, though by no means universally, accepted as the basis of an auxiliary competence, except for the offence of piracy, with respect to which it is the generally recognized principle of jurisdic-

tion of the latter principle in the present Convention would only invite controversy without serving any useful objective."[2]

The McGuinness article employs the terms "subjective" and "objective" in relation to what the author has termed "territorial" jurisdiction. And if, indeed, these appellations correctly described the nature of the jurisdiction exercised drawn from the actual facts, and not upon the terms employed by the courts in the cases cited, then the recent cases would be in the mainstream of United States jurisprudence.

"Traditionally, the United States has relied primarily upon the territoriality and nationality principles, Harvard Research at p. 543, and judges have often been reluctant to ascribe extraterritorial effect to statutes. . . . Nonetheless, our courts have developed what has come to be termed the objective territorial principle as a means of expanding the power to control activities detrimental to the state. This principle has been aptly defined by Mr. Justice Holmes in *Strassheim v. Daily*, 221 U.S. 280, 285, 31 S. Ct. 558, 560, 55 L. ED. 735 (1911). 'Acts 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 he had been present at the effect. . . .' See also Judge Learned Hand's opinion in *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir., 1945). Underlying this principle is the theory that the 'detrimental effects' constitute an element of the offense and since they occur within the country, jurisdiction is properly invoked under the territorial principle. See also Restatement (Second), Foreign Relations Law Section 18.

"However, the objective territorial principle is quite distinct from the protective theory. Under the latter, all the elements of the crime occur in the foreign country and jurisdiction exists because the actions have a 'potentially adverse effect' upon security or governmental functions, Restatement (Second) Foreign Relations Law, Comment to Section 33 at page 93, and there need not be any actual effect in the country as would be required under the objective territorial principle. Courts have often failed to perceive this distinction."[3]

Likewise, and considering the traditional official contempt with which it is held, the passive personality principle is quite different from the objective territorial principle, and courts may be excused if they do not employ such term

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tion. The fifth, asserted in some form by a considerable number of states and contested by others, is admittedly auxiliary in character and is probably not essential for any state if the ends served are adequately provided for on other principles." From *Harvard Research in International Law*, published in 29 AM. J. INT'L. L. SUPP. at 575 *et seq.* (1935) and quoted in BISHOP, INTERNATIONAL LAW at 553.

[2]*Harvard Research in International Law* 29 AM. J. INT'L. L. SUPP. 598-99.

[3]U.S. v. Pizzarusso, 388 F.2d 8 (2d Cir. 1968).

in describing the nature of the jurisdiction they are in fact exercising.[4]

The *International Lawyer* would welcome publishable manuscripts dealing directly with this issue.

[4]*Cf.* Bersch v. Drexel Firestone, Inc., 519 F.2d 1001 (2d Cir. 1975), *cert. denied*, 423 U.S. 1018 (1975); *and* IIT v. Vencap, Ltd., 519 F.2d 1001 (2d Cir. 1975); cited in McGuiness, p. _____, *supra.*