THE PROSECUTE/EXTRADITE DILEMMA: CONCURRENT CRIMINAL JURISDICTION AND GLOBAL GOVERNANCE

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ABSTRACT

In an increasingly mobile and interconnected world, national criminal laws interact transnationally through choices between extradition and prosecution in individual cases. The prosecute/extradite dilemma is a critical site of global governance – a decentralized site of interaction between national criminal laws that shapes how national and international interests are articulated and mediated. While criminal laws reflect a state's fundamental norms, effective global governance requires a normative assessment of when a state should – and more crucially, when it should not – seek to further those norms when multiple countries have a basis for applying their criminal laws to particular conduct. This article offers a conceptual framework for such an assessment, with particular emphasis on extraterritorial application of U.S. criminal laws.

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INTRODUCTION

The criminal laws of the United States, whether state or federal, ordinarily apply only to conduct within U.S. territory. Sometimes, however, they apply to conduct abroad, from antitrust conspiracies to torture. Where such extraterritorial criminal prescriptive jurisdiction exists under U.S. law, jurisdiction typically exists under the law of another country as well, such as the country where the conduct occurred. Thus, the resulting dilemma: Given (i) conduct proscribed by U.S. criminal laws that the U.S. government wishes to prosecute, and (ii) an attempt by a foreign country to prosecute under its own law as well, should the U.S. exercise jurisdiction and prosecute the alleged offender in U.S. courts under U.S. law? Or should the United States defer to the country where the conduct occurred, enabling that country to prosecute under its own law?[1]

This article argues that the prosecute/extradite dilemma should be understood as what I refer to as a site of global governance – a decentralized site of interaction between national criminal laws that shapes how national and international interests are articulated and mediated.[2] In an increasingly

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[1] This article does not address the possibility of U.S. courts applying the criminal law of the other country. However, under the "public law taboo," as discussed by Professor Andreas Lowenfeld in the article, *Public Law in the International Arena: Conflict of Laws, International Law, and Some Suggestions for Their Interaction*, 163 RECUEIL DES COURS 311, 322-26 (1979), courts in most countries refuse to apply the criminal laws of other countries. *See, e.g.*, *The Antelope*, 23 U.S. (1 Wheat.) 66, 123 (1825) ("The Courts of no country execute the penal laws of another."); *see also* Philip J. McConnaughay, *Reviving the "Public Law Taboo" in International Conflict of Laws*, 35 STAN. J. INT'L L. 255, 283 (1999); William Dodge, *Breaking the Public Law Taboo*, 43 HARV. INT'L L.J. 161 (2002). While some courts have begun rejecting the "taboo" in the context of regulatory laws such as securities and antitrust law, many courts remain constrained to apply the criminal law of the forum. Thus, in the criminal context, judicial jurisdiction and prescriptive jurisdiction generally operate in tandem. That is, the authority of a court to adjudicate a crime is largely co-extensive with the prescriptive reach of the criminal law of the forum.

[2] Ramesh Thakur & Luk Van Langenhove, *Enhancing Global Governance Through Regional Integration*, *in* REGIONALISATION AND GLOBAL GOVERNANCE 17, 20 (Andrew F. Cooper et al., eds., 2008) [hereafter Thakur & Langenhove, *Enhancing global governance*] (defining global governance). As discussed below, *see infra* text accompanying notes 4-5, I use the term "global governance" here to refer to interactions between national governments irrespective of whether they take place in the context of formal international institution.

interconnected world, where people move easily across borders, where corporations exist transnationally, and where conduct by people and organizations can cause effects in multiple countries, the prescriptive jurisdiction of countries overlaps with increasing frequency.[3] These areas of overlap create the potential for concurrent jurisdiction – conduct over which multiple countries seek to apply their laws, including criminal laws. When concurrent criminal jurisdiction exists, the resolution of the dilemma between prosecution and extradition shapes the dynamic relationship between the laws of the countries involved.

Given the prosecute/extradite dilemma's role in global governance, this article further argues that when countries address the dilemma, they should seek to advance both national and international interests. While criminal laws reflect a state's fundamental norms, effective global governance requires a normative assessment of when a state should – and more crucially, when it should not – seek to advance those norms when multiple countries have a basis for applying their criminal laws to particular conduct.

When the United States, for example, weighs its own interests against another country's interests in prosecuting conduct that is simultaneously subject to each country's criminal laws, the United States should defer to the other country. Thus, if the alleged offender is present in the United States, but another country's interests in prosecution are clearly greater, the United States should extradite the alleged offender to the latter country. Similarly, if the alleged offender is present in a foreign country that has interests in the case that are stronger than those of the United States, the U.S. should decline to request the person's extradition. This article proposes a conceptual framework for how the United States should address the prosecute/extradite dilemma, and thereby further the goals of global governance.

Part I of this article addresses why the prosecute/extradite dilemma is best understood as a site of global governance. Part II describes the existing law relevant to the dilemma, including U.S. and international law on extradition and extraterritorial jurisdiction. Part III proposes a list of factors that should shape the prosecute/extradite decision in order to incorporate both national and international interests. Part IV applies this framework to three hypothetical cases.

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[3] Prescriptive jurisdiction refers to a state's power to apply its law to particular conduct. *See infra* note 31 and accompanying text.

I. THE PROSECUTE/EXTRADITE DILEMMA AS A SITE OF GLOBAL GOVERNANCE

A. The Dilemma's Role in Allocating Criminal Jurisdiction

The term global governance refers to "the formal and informal bundles of rules, roles and relationships that define and regulate the social practices of state and non-state actors in international affairs."[4] What I refer to as "sites of global governance" are best understood as "the complex of formal and informal institutions, mechanisms, relationships, and processes between and among states, markets, citizens and organisations, both intergovernmental and non-governmental, through which collective interests are articulated, rights and obligations are established, and differences are mediated."[5] In other words, I use the term to refer to interactions between national governments that occur both within *and outside of* the context of formal international institutions. Governments allocate responsibility and resolve disputes regarding overlapping authority in a wide variety of ways, from formal diplomacy in established institutions to informal decisions in the ordinary course of governmental affairs. The decision whether to prosecute or extradite is a prime example of the latter. Despite the fact that prosecute/extradite decisions are not made in international institutional fora, they nonetheless determine how criminal jurisdiction will be allocated among multiple countries. Concurrent criminal jurisdiction thus reflects one of the core challenges of global governance: how national laws do, and should, interact in order to realize the national interests of individual countries and the collective interests of the international community.

In theory, there are various ways in which national and international law could address the potential conflicts created by concurrent jurisdiction. For instance, countries could rely on existing limits on multiple prosecutions, such as the *ne bis in idem* principle in international law,[6] and

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[4] Anne-Marie Slaughter et al., *International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship*, 92 AM. J. INT'L L. 367, 371 (1998). Professor Slaughter refers to the concept as "international governance"; other commentators, such as those discussed below, refer to the concept as "global governance."

[5] Thakur & Langenhove, *Enhancing Global Governance*, *supra* note 2, at 20.

[6] Dax Eric Lopez, Note, *Not Twice for the Same: How the Dual Sovereignty Doctrine is Used to Circumvent Non Bis In Idem*, 33 VAND. J. TRANSNAT'L L. 1263 (2000); David Bryan Owsley, Note, *Accepting the Dual Sovereignty Exception To Double Jeopardy: A Hard Case Study*, 81 WASH. U. L. Q. 765 (2003); *see, e.g.*, International Covenant on Civil and Political Rights art. 14(7), Dec. 16, 1966, 999 U.N.T.S. 171 ("No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country."); *see also* Anthony Colangelo, *Double Jeopardy and Multiple Sovereigns: A Jurisdictional Theory*, 86 WASH. U. L. REV. 769 (2009).

the prohibition on double jeopardy in U.S. law.[7] Countries might also negotiate treaties setting out the circumstances under which countries may or may not assert criminal jurisdiction. An international tribunal could be created to weigh competing assertions of jurisdiction. Finally, existing tribunals such as the International Court of Justice (ICJ) could interpret customary international law as applying limits on prescriptive jurisdiction.

These approaches, however, are either inadequate or unworkable. Limitations on multiple prosecutions do not ensure that the country with the greatest interests in applying its laws to particular conduct may do so. Countries are extremely unlikely to negotiate treaties on criminal jurisdiction, given the tremendous hurdles to international cooperation even with respect to civil jurisdiction.[8] A specialized international tribunal on jurisdiction is unlikely for similar reasons. Finally, it is unlikely that customary international law provides limits on prescriptive jurisdiction sufficiently robust to resolve all jurisdictional conflicts. Moreover, even if it were to provide such limits, it is unlikely that the ICJ would be in a position to effectively apply them, since conflicts of jurisdiction generally will not impinge on countries' interests so severely that they will take the relatively drastic step of bringing a contentious case before the ICJ.

Thus, for the foreseeable future, the task of resolving concurrent exercises of criminal jurisdiction will remain with national courts and executives. These courts and executives must balance competing national interests when considering whether to apply local law or to extradite to another country. As a result, individual cases become the primary context in which the criminal laws of various countries interact, and thus where countries shape the extraterritorial contours of those laws.

B. The Need for a Tailored Framework

As a site of global governance, the prosecute/extradite dilemma could be seen as a simple choice-of-law question. When a country chooses to prosecute, it impliedly asserts that its own law should apply to the case; that is, it chooses the equivalent of what conflict-of-laws scholars refer to as "forum law." When a country extradites, it essentially chooses the law of the requesting country. Traditionally, criminal laws have been beyond the scope of conflict of laws. Conflict of laws generally considers which state's laws a court should apply to a particular dispute. Since courts refuse to apply the criminal law of other countries, extradition law supplants conflict

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[7] *See* U.S. CONST. amend. V ("nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb").

[8] *See* Linda Silberman, *Comparative Jurisdiction in the International Context: Will the Proposed Hague Judgments Convention Be Stalled?*, 52 DEPAUL L. REV. 319 (2002).

of laws as the body of law that ultimately determines which country's law will govern a particular criminal case.

Unfortunately, the bright-line distinction between conflict of laws and extradition law is no longer tenable. On the one hand, the "public law taboo,"[9] at least as applied to criminal laws, might be a wise limit on judicial jurisdiction (i.e., the authority of courts to decide particular matters), given underlying differences between civil and criminal laws, and their corresponding remedies and sanctions. That is, as a policy matter, it may indeed be inappropriate for one country's courts to apply another country's criminal laws. Nonetheless, given the dilemma's role as a site of global governance, conflict of laws provides valuable analytical tools, such as the Second Restatement's "most significant relationship" approach,[10] for effectively allocating prescriptive criminal jurisdiction among the countries of the world. The factors discussed in Part III reflect and incorporate these considerations.

Despite the critical role of concurrent criminal jurisdiction in global governance, it remains under-analyzed. While there is a substantial jurisprudence and literature on cross-border concurrent civil jurisdiction,[11] less attention has been paid to concurrent criminal jurisdiction. There are likely three reasons for this discrepancy. First, criminal law remains more deeply rooted in traditional notions of territoriality than are those areas traditionally considered private law, and thus there are simply fewer instances of overlap between multiple countries' criminal laws than their non-criminal laws. Second, private litigants have interests directly tied to the expansion of extraterritorial civil laws and thus have forced courts and commentators to consider how to resolve conflicting exercises of those laws. Third, assessments of the appropriate extraterritorial reach of non-criminal

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[9] *See supra* note 1.

[10] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971) ("The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6."); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 (applying same approach to contracts).

[11] *See, e.g.*, Hartford Fire Ins. Co. v. California, 509 U.S. 764, 812 (1993); United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945); DOUGLAS ROSENTHAL & WILLIAM KNIGHTON, NATIONAL LAWS AND INTERNATIONAL COMMERCE: THE PROBLEM OF EXTRATERRITORIALITY (1982); Hannah Buxbaum, *Multinational Class Actions Under Federal Securities Law: Managing Jurisdictional Conflict*, 46 COLUM. J. TRANSNAT'L L. 14 (2007); Kun Young Chang, *Multinational Enforcement of U.S. Securities Laws: The Need for the Clear and Restrained Scope of Extraterritorial Subject-Matter Jurisdiction*, 9 FORDHAM J. CORP. & FIN. L. 89 (2003); Stephen Choi & Andrew Guzman, *The Dangerous Extraterritoriality of American Securities Law*, 17 NW. J. INT'L L. & BUS. 207 (1996); *Predictability and Comity: Toward Common Principles of Extraterritorial Jurisdiction*, 98 HARV. L. REV. 1310 (1985).

laws are made by courts through judicial opinions, whereas most analogous assessments related to criminal laws are made internally by the executive branches when they decide whether to prosecute a particular case. As such, the reasoning behind such prosecutorial and extradition decisions is not typically made public.

While these factors may explain the disparity in scholarly and judicial attention to concurrent criminal jurisdiction, they do not justify conflating approaches to concurrent civil and criminal jurisdiction. The underlying interests and practical implications of exercising criminal jurisdiction are sufficiently distinct to merit a tailored conceptual framework.

Some may argue that a customized framework is unnecessary because extraterritorial jurisdiction in the criminal context is less problematic than in the civil context. Indeed, extraterritorial criminal jurisdiction is exercised less frequently than extraterritorial civil jurisdiction, creating fewer jurisdictional conflicts. As a practical matter, only one country may apply criminal sanctions at any given time, whereas persons and entities may be subject to the civil remedies of multiple countries at the same time. Moreover, executive officials are responsible for deciding when to pursue criminal prosecution, whereas private plaintiffs choose to sue based on private rights of action. Finally, prosecutors are more likely to take into account the international impact of litigation based on extraterritorial jurisdiction than are private plaintiffs.

Nonetheless, extraterritorial jurisdiction often creates more conflict in criminal cases than in civil cases. In general, criminal sanctions are more onerous than civil remedies. Criminal sanctions also create direct conflicts that countries are forced to resolve through the prosecute/extradite dilemma, since only one country may pursue prosecution at a time. Moreover, the *ne bis in idem* principle in most extradition treaties precludes successive prosecutions by multiple countries for the same crime, which leaves the country with custody of the alleged offender with complete discretion whether to prosecute or extradite.[12] The dilemma does not permit countries to avoid conflicts of prescriptive jurisdiction, whereas courts may apply civil remedies without being forced to resolve those conflicts, since entities may be subject to, and may comply with, civil remedies imposed by multiple countries.[13] Finally, criminal law reflects particularly strong state interests,

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[12] *See, e.g.*, Extradition Treaty art. 6, U.S.-Italy, Oct. 13, 1983, 35 U.S.T. 3023 ("*Non Bis in Idem*[:] Extradition shall not be granted when the person sought has been convicted, acquitted or pardoned, or has served the sentence imposed, by the Requested Party for the same acts for which extradition is requested."). This assumes that the relevant countries, like the United States, do not permit trials *in absentia*.

[13] *See Hartford Fire*, 509 U.S. at 799 (deciding case by finding there was no "real conflict" between U.S. and English law, rather than by resolving concurrent application of U.S. and English law); *see also* William Dodge, *Extraterritoriality and Conflict-of-Laws*

and thus when two or more countries wish to exercise criminal jurisdiction, each may care more deeply about the application of its criminal law than its non-criminal law. For these reasons, understanding concurrent criminal jurisdiction in terms of global governance requires a new mode of analysis, one that is unique to the criminal context.

C. Why Deference Is Sometimes Justified

As Parts I(A) and (B) describe, there are many practical reasons why the prosecute/extradite dilemma plays a crucial role in global governance, and why it is important for government officials and commentators to consider the unique issues raised by concurrent criminal jurisdiction. Yet practical considerations alone would be insufficient to justify a theory for allocating criminal jurisdiction. A theory of concurrent jurisdiction must also justify why a country should, as a normative matter, sometimes defer to the interests of other countries. A normative justification is crucial even if governments around the world already apply approaches similar to the one set forth here. That is, even if countries already decline to prosecute crimes where another country's interest is clearly greater – but where they nonetheless have a basis for applying their criminal laws – this section articulates why the approach is justified in normative terms.

The applicable normative justifications implicate a core theoretical debate in international relations among realists, institutionalists and cosmopolitanists.[14] Realists see states as self-interested, rational, and unitary actors that pursue goals solely with the interest of survival or aggrandizement of the state.[15] They view international cooperation as ineffective, since states exist on the edge of war.[16] Institutionalists also see states as rational actors, but believe that states' well-ordered preferences can lead them to realize mutual gains through cooperation, rather than antagonism.[17] Cosmopolitanists see states as one set of international actors among many, all of which should aim to realize a collective set of norms

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Theory: An Argument for Judicial Unilateralism, 39 HARV. INT'L L. J. 101, 152-68 (1998) (arguing that conflict resulting from concurrent jurisdiction by multiple countries in civil context is not necessarily undesirable; in fact, it is sometimes desirable).

[14] *See* BENEDICT KINGSBURY, OVERVIEW: MILITARY, MARKETS, MORALS (2009), http://iilj.org/courses/documents/Overview-MilitaryMarketsMorals.pdf (describing the theories in the context of international law).

[15] *See* Stephen Krasner, *Realism, Imperialism, and Democracy: A Response to Gilbert*, 20 POL. THEORY 38 (1992).

[16] *See* John Mearsheimer, *The False Promise of International Institutions*, INT'L SECURITY, Winter 1994/95, at 5, 9-10 (1994).

[17] *See* Robert Keohane, *Rational Choice Theory and International Law: Insights and Limitations*, 31 J. LEGAL STUDIES S307, S309 (2002).

based on individual rights and obligations.[18] Deference by the United States in cases of concurrent criminal jurisdiction is likely best supported by institutionalism, since it emphasizes that cooperation can be a rational way to achieve mutual gain. Realism and cosmopolitanism, however, are highly relevant as well.

I argue that deference is supported by four normative justifications in cases where the interests of another country are stronger than the interests of the United States. First, deference could maximize long-term U.S. interests through reciprocity. That is, by deferring in cases where another country's interests are greater, those countries may be more likely to similarly defer to the United States in future cases where U.S. interests are greater. Realists would countenance this explanation, so long as it is backed by another state's clear interests in deferring to the United States in future cases where the United States has the greater interest. Institutionalists would concur, since such deference maximizes long-term national interests by permitting each state to exercise criminal jurisdiction in those cases where their interests are strongest.

Second, deference may minimize jurisdictional conflict, thereby minimizing political conflict. Minimizing conflict is also consistent with each theory. While realists would be more skeptical about the capacity of cooperation and deference to minimize conflict, the objective is still consistent with realism. Minimizing conflict would be a clear instance of mutual gain to institutionalists, and a positive development to cosmopolitanists, assuming it improves the lot of individuals.

Third, deference maximizes the collective international interest in allocating prescriptive jurisdiction according to state interests. In a particular case where the substantive laws of two countries could apply to certain conduct, if State A suffered a much greater harm from the crime than State B, State A's interests would likely be advanced to a greater extent by prosecuting and adjudicating the case than would State B's interests. Over the course of many such cases, if countries with lesser interests defer to countries with greater interests, criminal cases would be decided according to the laws of the countries with the greatest interest. This, in turn, would maximize collective international interests to a greater extent than if criminal jurisdiction were allocated, for example, solely on the basis of the presence of alleged offenders. Institutionalists would likely see this explanation as the most important, since it allocates jurisdictional priorities with the goal of

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[18] *See* David Held, *Law of States, Law of Peoples: Three Models of Sovereignty*, 8 LEGAL THEORY 1, 34 (2002); Noah Feldman, *Cosmopolitan Law?*, 116 YALE L.J. 1022, 1025 (2007); *see also* Martha C. Nussbaum, *The Capabilities Approach and Ethical Cosmopolitanism: A Response to Noah Feldman*, 117 YALE L.J. POCKET PART 123 (2007); Jessica Stern, *The Dangers and Demands of Cosmopolitan Law*, 116 YALE L.J. POCKET PART 322 (2007).

maximizing mutual gains. Realists would likely discount this explanation, since it assumes the existence of collective international interests. Cosmopolitanists would agree that cooperation is productive, but only if individual members of those states also benefit by maximizing the interests of states as political units.

Fourth, deference promotes effective global governance. If countries can rationally and effectively allocate criminal jurisdiction, this might spur international cooperation in other contested areas of global governance as well. For example, if the United States and another country allocate criminal jurisdiction in a mutually beneficial way, they may be more likely to cooperate in addressing other transnational challenges, from banking regulation to environmental conservation. This explanation is consonant with institutionalism, since it sees global governance as a cooperative endeavor. Nonetheless, realists would likely consider this type of cooperation a fruitless pursuit, and cosmopolitanists would insist on evidence that governance mechanisms truly benefit individuals as members of a global community.

D. Illustrating the Dilemma: Three Hypothetical Cases

In light of these practical and theoretical considerations, states should defer jurisdictional priority to other states where those other states' interests are clearly greater. But how should countries achieve a rational allocation of criminal jurisdiction? In other words, given conduct by persons over whom multiple countries have bases to prosecute and punish, which countries should prosecute, and which countries should extradite alleged offenders found on their territory? Extradition laws, conflict of laws, and limits on extraterritorial jurisdiction do not currently provide a full answer. They operate relatively seamlessly in cases where only one country has a basis for applying its laws. But the fit between the applicable law and the underlying concerns becomes strained in cases of concurrent criminal jurisdiction.

The following three hypothetical cases illustrate this strained fit. In Case 1, Italy alleges that X, an Italian national, murdered a fellow Italian in Rome and subsequently fled to the United States. Italy, with which the U.S. has an extradition treaty, requests that the U.S. extradite X to Italy. Italy is the only country with prescriptive jurisdiction. The United States lacks criminal jurisdiction since there were no effects on U.S. territory, X is not a national of the U.S., there were no U.S. victims of the crime, the crime posed no threat to fundamental U.S. interests, and murder does not implicate the universality principle.[19]

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[19] *See infra* text accompanying notes 34-57 (discussing bases of extraterritorial jurisdiction, including universality).

In Case 2, all facts remain the same except for the alleged crime. This time, X was a police officer and the alleged crime is torture. Italy again requests extradition, but U.S. prosecutors have asserted jurisdiction to prosecute the crime under 18 U.S.C. § 2340A, the torture statute, based on the universality principle.

In Case 3, the facts again are the same as Case 1 except for the alleged crime. The new crime involves the hijacking of an airplane, belonging to a U.S. airline and carrying U.S. passengers, in Rome. Italy again requests extradition. U.S. prosecutors have again asserted jurisdiction, this time under the Hostage Taking Act, based on the passive personality principle.[20]

These cases illustrate the tensions inherent in extraterritorial criminal jurisdiction. In each case, should the United States prosecute or extradite? And more importantly, *why* should it choose one or the other?

In light of this tension, the following section examines the existing U.S. and international laws that shape the prosecute/extradite dilemma. It demonstrates that a framework based on clear principles is crucial for the choice to appropriately reflect the governmental and societal interests underlying the dilemma. Following the discussion of the dilemma in U.S. and international law,[21] and a framework for resolving the dilemma,[22] Part IV returns to the hypothetical cases described above to illustrate the application of the framework.[23]

II. THE DILEMMA UNDER U.S. AND INTERNATIONAL LAW

Concurrent criminal jurisdiction is not new. For example, vessels engaged in piracy, which sail on the high seas and fly the flag of one country, have long been subject to the jurisdiction of multiple countries.[24] Extradition is also not new. It is an established mechanism for countries to transfer alleged offenders, typically in cases where the requesting country has a greater interest in prosecuting a case than the requested country has in permitting the person to remain on its territory. What *is* new, however, is the frequency with which criminal jurisdiction overlaps. This places ever-increasing pressure on the prosecute/extradite dilemma as a site of global governance, since the dilemma plays the central role in mediating competing exercises of criminal jurisdiction.

This section demonstrates why existing U.S. and international law do

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[20] 18 U.S.C. § 1203 (making it a federal crime to take hostages "whether inside or outside the United States," so long as "the offender or the person seized or detained is a national of the United States").

[21] *See infra* Part II.

[22] *See infra* Part III.

[23] *See infra* Part IV.

[24] *See infra* note 51.

not adequately capture the role of the dilemma in global governance regarding criminal jurisdiction. Part A, infra, discusses U.S. extradition laws; part B discusses traditional bases on extraterritorial jurisdiction; part C discusses limits on extraterritorial jurisdiction; and part D discusses the role of so-called *aut dedere aut judicare* treaties in allocating criminal jurisdiction.

A. U.S. Extradition Laws

U.S. extradition laws demonstrate how existing laws do not adequately reflect the crucial role that the choice between extradition and prosecution in particular cases plays in shaping the extraterritorial reach of national criminal laws. When a country requests the extradition of an alleged offender located in the United States, U.S. extradition laws do not distinguish based on whether or not a basis exists for jurisdiction under U.S. law. That is, the same extradition procedures and standards apply to cases involving ordinary crimes abroad over which the United States would not have jurisdiction, such as an ordinary robbery, and to cases involving other crimes over which U.S. law does assert jurisdiction, such as the counterfeiting of U.S. currency.[25] This common treatment, however, does not accurately reflect the distinct policy considerations underlying them.

In the first category of cases, where only a requesting country has a basis for applying its criminal law to particular conduct, that country is the only one with interests that would be furthered by prosecution.[26] The United

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[25] In the United States, the statutory framework governing international extradition proceedings is codified at 18 U.S.C. §§ 3181-3196. In addition, extradition generally requires that the United States have an extradition treaty with that country. *See* 18 U.S.C. § 3181 (providing that statutes authorizing extradition apply only "during the existence of any treaty of extradition with such foreign government"); *see also* Factor v. Laubenheimer, 290 U.S. 276, 287 (1933) ("[T]he principles of international law recognize no right to extradition apart from treaty"). There have been some cases where the United States has granted extradition requests in the absence of a treaty, based instead on the basis of comity or reciprocity, though such cases have been rare. M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE 93 (5th ed. 2007) [hereafter BASSIOUNI, INTERNATIONAL EXTRADITION]. The law governing interstate extradition is entirely different, since the U.S. Constitution requires that any state with custody over an individual suspected of a crime in another state extradite the individual to the requesting state. U.S. CONST. art. IV, § 2, cl. 2.

[26] For a discussion on how the United States determines (and should determine) whether a requesting country actually has interests that would be furthered by prosecution, see Sacirbey v. Guccione, 589 F.3d 52 (2d Cir. 2009). In *Sacirbey*, Bosnia requested that the United States extradite a former Bosnian diplomat whom the Bosnian government had accused of embezzlement. *Id.* at 54-56. The court reversed the Magistrate Judge's determination that the applicable extradition treaty had been satisfied, on the grounds that the Bosnian court that had issued the arrest warrant for Sacirbey was no longer in existence. *Id.* at 69. Since there was not a validly pending arrest warrant in Bosnia, the Second Circuit concluded that the U.S.

States does sometimes decline to extradite alleged offenders in those cases, even where the elements required by an extradition treaty are satisfied. Where it declines to extradite, the United States has determined that its interests would be better served by permitting the alleged offender to remain at liberty on U.S. soil than extraditing to the requesting state. Sometimes, that decision is based on the potential for mistreatment, such as torture, upon rendition to the requesting state.[27] Other times the decision may also be a function of political considerations.

In the second category of cases, where both the requesting country and the United States have a basis for applying their criminal laws to particular conduct, the determination of whether to prosecute or extradite is far thornier. Where U.S. law authorizes U.S. courts to adjudicate extraterritorial crimes, the decision whether to extradite involves more than whether or not a foreign country may prosecute and punish a particular alleged offender. It involves *which* country – the United States or the foreign country – may prosecute and punish the alleged offender, and thereby which country's criminal law will ultimately govern the person's conduct.

The similar treatment in extradition law of these two categories of cases is likely the result of two historical trends. First, there have historically been relatively few cases involving concurrent criminal jurisdiction. The majority of extradition requests involve cases where the only valid basis of jurisdiction is territoriality, and thus the only country with jurisdiction is the country where the conduct constituting a crime occurred. Second, extradition has been viewed as an inherently executive function involving sensitive concerns of foreign policy. The decision whether to surrender an individual to another country for criminal prosecution has historically remained the full prerogative of the executive branch. Thus extradition law has developed to permit the executive to make ultimate extradition decisions, regardless of whether there is a basis for applying U.S. criminal law to the case.

These historical explanations, however, do not mean that distinctions between the two sets of cases should be swept under the proverbial rug.

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court could not be confident that the Bosnian government would actually pursue the prosecution in the event Sacirbey were extradited to Bosnia. *Id*.

[27] *See* 22 C.F.R. § 95.2 (prohibiting Secretary of State from ordering extradition of any person to a country where "there are substantial grounds [defined as 'more likely than not'] for believing that he would be in danger of being subjected to torture"); *see also* Michael John Garcia, *The U.N. Convention Against Torture: Overview of U.S. Implementation Policy Concerning the Removal of Aliens*, CRS Report for Congress (2004), *available at* https://www.policyarchive.org/handle/10207/1964. On the reviewability of State Department determinations concerning the likelihood of torture upon extradition, compare *Cornejo-Barreto v. Siefert*, 218 F.3d 1004 (9th Cir. 2000) (finding decisions reviewable through habeas corpus proceedings), with *Mironescu v. Costner*, 480 F.3d 664 (4th Cir. 2007) (finding decisions unreviewable).

Rather, where the United States and another country each bases for applying their criminal laws to particular conduct, the U.S. should resolve the prosecute/extradite dilemma by considering national and international interests, as discussed below in Part III.

B. Traditional Bases of Extraterritorial Jurisdiction

Concurrent jurisdiction will often arise when one country asserts prescriptive jurisdiction on an extraterritorial basis, that is, where one country applies its criminal laws to conduct outside its territory. Thus, to understand the global governance implications of the prosecute/extradite dilemma, it is necessary to understand extraterritorial jurisdiction. Historically, criminal jurisdiction has been limited to the territory where the conduct constituting a crime occurred.[28] The United States, however, has increasingly asserted criminal jurisdiction over conduct occurring outside U.S. territory.[29]

International law has traditionally recognized five principle bases of extraterritorial criminal jurisdiction: objective territoriality, passive personality, active personality, protective and universality.[30] While the

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[28] The Restatement on Foreign Relations Law describes territorial criminal jurisdiction as jurisdiction over "conduct that, wholly or in substantial part, takes place within its territory," RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(1)(a) (1987) [hereafter RESTATEMENT OF FOREIGN RELATIONS], and "the status of persons, or interests in things, present within its territory." *Id.* § 402(1)(b). This territorial focus of criminal law was a staple of English common law, though even then there were exceptions: it provided jurisdiction over treason committed against the English king or queen, regardless of whether the act of treason took place in England or abroad. *See* Richard J. Goldstone, *International Jurisdiction and Prosecutorial Crimes*, 47 CLEV. ST. L. REV. 473, 474 (1999). For the purposes of this Article, I treat jurisdiction by "agreement," such as under the U.S. lease of Guantanamo Bay, as forms of territorial jurisdiction, since under jurisdiction by agreement, the proscribed conduct occurs in territory under the control of the same government that would seek to prosecute the conduct.

[29] For a list of criminal statutes with extraterritorial application, see BASSIOUNI, INTERNATIONAL EXTRADITION, *supra* note 25, at 475-79; *see also* Charles Doyle, *Terrorism and Extraterritorial Jurisdiction in Criminal Cases: Recent Developments*, CRS Report for Congress RL31557 (2002), *available at* http://opencrs.com/document/RL31557 (detailing the recent expansion of U.S. extraterritorial jurisdiction over crimes of terrorism); Tyler Raimo, *Winning at the Expense of Law: The Ramifications of Expanding Counterterrorism Law Enforcement Jurisdiction Overseas*, 14 AM. U. INT'L L. REV. 1473 (1999) (same).

[30] These principles were first articulated by the Harvard Research in International Law. *Jurisdiction with Respect to Crime*, 29 AM. J. INT'L L. 435 (Supp. 1935) [hereafter Harvard Research]. The Restatement describes several other bases of jurisdiction, such as over members of a country's own armed forces, or residency for jurisdiction over "private law" matters such as wills and divorce. *See* RESTATEMENT OF FOREIGN RELATIONS, *supra* note 28, § 402 cmt. e. Other authors also describe the "principle of the flag" (jurisdiction over ships flying a country's flag) and the "representation principle" (jurisdiction when one state is acting

discourse about jurisdiction has moved somewhat away from these terms, these traditional bases provide a valuable vocabulary for understanding the competing interests that countries seek to advance when they exercise jurisdiction. These bases are forms of jurisdiction to prescribe, also known as prescriptive jurisdiction,[31] which refers to a state's power to apply its law to particular conduct.[32] This is in contrast to jurisdiction to adjudicate, which refers to a state's power "to subject persons or things to the process of its courts or administrative tribunals, whether in civil or in criminal proceedings, whether or not the state is a party to the proceedings." This is also in contrast with jurisdiction to enforce, which refers to a state's power "to induce or compel compliance or to punish noncompliance with its laws or regulations, whether through the courts or by use of executive, administrative, police, or other nonjudicial action."[33] These categories of extraterritorial prescriptive jurisdiction reflect the notion that with each basis, the application of that country's law to a set of facts represents the legitimate furthering of that country's interests.

(a) Objective territoriality. International law recognizes a state's authority to apply its law to any crime where "any essential constituent element [of the crime] is consummated on state territory."[34] This "objective

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on behalf of another state). *See* LUC REYDAMS, UNIVERSAL JURISDICTION: INTERNATIONAL AND MUNICIPAL LEGAL PERSPECTIVES 21-22 (2004). While such bases – particularly flag jurisdiction – implicate unique concerns, the five bases listed above generally cover the principle bases of criminal jurisdiction to prescribe.

[31] The one exception may be universal jurisdiction. Most courts and commentators treat universal jurisdiction as another form of jurisdiction to prescribe. *See, e.g.*, Roger O'Keefe, *Universal Jurisdiction: Clarifying the Basic Concept*, 2 J. INT'L CRIM. JUST. 735, 737 (2004). Others, however, treat it as a form of jurisdiction to adjudicate and enforce. *See, e.g.*, Menno Kamminga, *Lessons Learned from the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offenses*, 23 HUM. RTS. Q. 940, 942 (2001). The Restatement seems to treat it as both. *See* RESTATEMENT OF FOREIGN RELATIONS, *supra* note 28, § 404 (jurisdiction to prescribe), § 423 (jurisdiction to adjudicate). The inconsistency is likely due to disagreement on the source of substantive law in prosecutions based on universal jurisdiction, as well as what universal jurisdiction is describing: (1) If international law is what prescribes the conduct, then U.S. statutes merely confer jurisdiction to adjudicate and enforce; (2) If U.S. law prescribes the conduct extraterritorially, then Congress exercises jurisdiction to prescribe; (3) If domestic law in the place of the conduct prescribes the conduct, then U.S. statutes again merely confer jurisdiction to adjudicate and enforce. For the purposes of this Article, I assume that universal jurisdiction is a form of jurisdiction to prescribe, describing the power of the U.S. to define and punish crimes bearing no direct nexus to U.S. interests.

[32] *See* RESTATEMENT OF FOREIGN RELATIONS, *supra* note 28, § 401 ("Categories of Jurisdiction") (defining jurisdiction to prescribe as a country making "its law applicable to the activities, relations, or status of persons, or the interests of persons in things, whether by legislation, by executive act or order, by administrative rule or regulation, or by determination of a court.").

[33] *Id.*

[34] IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 301 (7th ed. 2008).

territoriality" principle often leads to concurrent jurisdiction, since the state or states where the other elements of the crime occurred would also have jurisdiction. The first area where U.S. criminal jurisdiction is based on objective territoriality is where part, but not all, of the acts or omissions constituting the crime occurred in U.S. territory.[35] This is a clear extension of the ordinary territorial principle, since the relevant conduct is in the United States. The second area is where all conduct occurred abroad, but that conduct caused substantial effects in U.S. territory.[36] U.S. courts have upheld jurisdiction based on objective territoriality in several areas, from antitrust to narcotics smuggling.[37]

(b) Passive personality. Passive personality jurisdiction refers to jurisdiction over crimes committed abroad against a country's nationals.[38] Similar to objective territoriality, the passive personality principle creates instances of concurrent jurisdiction when the state where the conduct occurred also asserts jurisdiction. The passive personality principle is potentially far-reaching, since if taken to its logical conclusion, it would justify applying U.S. law to any crime against a U.S. national. As a result, many courts and commentators are critical of the principle.[39] The United States has principally asserted jurisdiction based on the passive personality

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[35] *See* Harvard Research, *supra* note 30, at 487.

[36] *See* RESTATEMENT OF FOREIGN RELATIONS, *supra* note 28, § 402(1)(c) ("conduct outside its territory that has or is intended to have substantial effect within its territory"); *see, e.g.*, 18 U.S.C. § 2332a (use of weapons of mass destruction).

[37] *See, e.g.*, United States v. Nippon Paper Indus. Co., 109 F.3d 1 (1st Cir. 1997) (applying criminal antitrust sanctions extraterritorially); United States v. Wright-Barker, 784 F.2d 161 (3d Cir. 1986) (applying federal narcotics laws to conduct on the high seas); *see also* Elliot Sulcove, Comment, *The Extraterritorial Reach of the Criminal Provisions of U.S. Antitrust Laws: The Impact of* United States v. Nippon Paper Industries, 19 U. PA. J. INT'L ECON. L. 1067 (1998); Michael Bishop, Note, United States v. Nippon Paper Industries Co.: *Criminal Application of the Sherman Act Abroad*, 32 GEO. WASH. J. INT'L L. & ECON. 271 (1999).

[38] *See* RESTATEMENT OF FOREIGN RELATIONS, *supra* note 28, § 402(2) ("the activities, interests, status, or other relations of its nationals outside as well as within its territory"). Many U.S. terrorism prosecutions have been based on passive personality jurisdiction. ROBERT CRYER ET AL., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 42 (2007); *see also* RESTATEMENT OF FOREIGN RELATIONS, *supra* note 28, § 402, Reporter's Note 3 (citing 18 U.S.C. 2231 (Omnibus Diplomatic Security and Antiterrorism Act of 1986), making it a crime to kill, attempt to kill, or cause serious bodily injury to a U.S. national outside U.S. territory).

[39] *See* BROWNLIE, *supra* note 34, at 314 (calling the passive personality principle "the least justifiable, as a general principle, of the various bases of jurisdiction"); Eric Cafritz & Omar Tene, Essay, *Article 113-7 of the French Penal Code: The Passive Personality Principle*, 41 COLUM. J. TRANSNAT'L L. 585 (criticizing French use of the principle in areas more expansive than those relied upon by other countries).

principle over crimes against U.S. government agents[40] and terrorism,[41] though it has also done so in other areas as well.[42]

(c) Active personality. U.S. law sometimes applies to U.S. nationals who are abroad, based solely on the U.S. nationality of the alleged offender.[43] This form of extraterritorial jurisdiction is based on the active personality principle, alternatively called the nationality principle. Typically, a crime subject to active personality jurisdiction would also be subject to the jurisdiction of the country where the conduct occurred.[44] Exercises of jurisdiction would be concurrent if both the country of nationality and the country where the crime occurred were to assert jurisdiction over the crime.

(d) Protective. Protective jurisdiction refers to jurisdiction over crimes committed by aliens that constitute a threat to fundamental national interests, even if no U.S. national is a victim.[45] The U.S. Court of Appeals for the

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[40] *See, e.g.*, 18 U.S.C. §§ 1116 (murder or manslaughter of "internationally protected persons," which would include a "representative, officer, employee, or agent of the United States Government . . . entitled pursuant to international law to special protection against attack"); 1201 (kidnapping of an "internationally protected persons").

[41] *See, e.g.*, 18 U.S.C. § 1203 (hostage taking). For a list of other U.S. statutes concerning terrorist acts committed abroad, with prescriptive jurisdiction based on various bases, including passive personality and universality, see BASSIOUNI, INTERNATIONAL EXTRADITION, *supra* note 25, at 410 n. 300.

[42] *See, e.g.*, United States v. Neil, 312 F.3d 419, 423 (9th Cir. 2002) (upholding conviction under 18 U.S.C. § 2244(a)(3) for sexual contact with a minor in foreign territorial waters on a Panamanian-flagged cruise ship, where victim was a U.S. citizen).

[43] *See, e.g.*, Military Extraterritorial Jurisdiction Act of 2000, 18 U.S.C. §§ 3261–3267; Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 ("PROTECT Act"), Pub. L. No. 108-21, 117 Stat. 650 (2003), codified at 18 U.S.C. § 2252(a). Other examples include the Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces art. VII, 4 U.S.T. 1792, 199 U.N.T.S. 67 (1951) [hereafter NATO SOFA], and 18 U.S.C. § 953 (prohibiting unauthorized "correspondence or intercourse with any foreign government" by any "citizen of the United States, wherever he may be"). *See also* Mark E. Eichelman, *International Criminal Jurisdiction Issues for the United States Military*, 2000 ARMY LAW. 23, 23-24 (2000) (discussing jurisdiction over U.S. military personnel under Status of Forces Agreements); Andrew D. Fallon & Capt. Theresa A. Keene, *Closing the Legal Loophole? Practical Implications of the Military Extraterritorial Jurisdiction Act of 2000*, 51 A.F.L. REV. 271 (2001) (discussing issues raised by the 2000 Act); Geoffrey R. Watson, *The Passive Personality Principle*, 28 TEX. INT'L L.J. 1 (1993); Geoffrey R. Watson, *Offenders Abroad: The Case for Nationality-Based Criminal Jurisdiction*, 17 YALE J. INT'L L. 41, 83 (1992) (advocating for expanded extraterritorial criminal jurisdiction based on active personality principle, calling it "one of the least controversial forms of extraterritorial criminal jurisdiction").

[44] *See, e.g.*, United States v. Clark, 435 F.3d 1100 (9th Cir. 2006) (applying the PROTECT Act to child molestation by an American in Cambodia, where the conduct also violated Cambodian law).

[45] *See* RESTATEMENT OF FOREIGN RELATIONS, *supra* note 28, § 402(3) ("conduct outside its territory by persons not its nationals that is directed against the security of the state or

Second Circuit has defined the protective principle as permitting extraterritorial jurisdiction "over non-nationals for acts done abroad that affect the security of the State."[46] Applying this principle, it upheld jurisdiction over a conspiracy to bomb a U.S. aircraft because "the planned attacks were intended to affect the United States and to alter its foreign policy."[47] U.S. jurisdiction based on the protective principle creates concurrent jurisdiction when the conduct also violates the law of the state where it was committed.

(e) Universality. Universal jurisdiction refers to U.S. authority to prescribe conduct and impose criminal sanctions on a defendant absent any direct nexus between the alleged offense and the United States, other than the defendant's presence in the U.S.[48] It assumes that at the time of the relevant conduct, the person committing the conduct was a non-resident alien of the forum, and the conduct was committed outside the forum with no effects within the forum, on the fundamental interests of the forum, or against nationals of the forum. Instead of requiring a direct nexus, the universality principle reflects the notion that every country has an interest in prosecuting and punishing crimes that are particularly heinous, as well as those that are uniquely international. A country prosecuting based on universality therefore acts on behalf of the international community, since some crimes, such as genocide, affect the interests of all countries. In addition, crimes such as piracy trigger a need for an enforcement mechanism for serious crimes that would otherwise go unpunished.[49]

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against a limited class of other state interests"). The "limited class" includes conduct such as espionage, counterfeiting of currency, among others. *See id.* at cmt. f.

[46] United States v. Yousef, 327 F.3d 56, 110 (2d Cir. 2003).

[47] *Id.* at 97; *see also* United States v. Archer, 51 F. Supp. 708 (S.D. Cal. 1943) ("[A]ny person who takes false oath before a consul [in a U.S. consulate overseas] commits an offense . . . against the sovereignty of the United States.").

[48] *See generally* Kenneth Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785 (1988); REYDAMS, UNIVERSAL JURISDICTION, *supra* note 30; MITSUE INAZUMI, UNIVERSAL JURISDICTION IN MODERN INTERNATIONAL LAW: EXPANSION OF NATIONAL JURISDICTION FOR PROSECUTING SERIOUS CRIMES UNDER INTERNATIONAL LAW (2005). Some commentators refer to this as "territorial" universal jurisdiction because it requires the defendant's presence, which is distinguished from "pure" universal jurisdiction, which would authorize government authorities to request extradition from a third country where the defendant is located. Oxman refers to the former as "pure" universal jurisdiction and the latter as "super pure" jurisdiction. Stephen Oxman, Comment, *The Quest for Clarity*, in UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW 64-65 (Stephen Macedo, ed.) (2003).

[49] BASSIOUNI, INTERNATIONAL EXTRADITION, *supra* note 25, at 417-19 (analogizing principle to Roman concept of *action popularis*); *see also* United States v. Martinez-Hidalgo, 993 F.2d 1052, 1056 (3d Cir. 1993) (upholding conviction under the Maritime Drug Law Enforcement Act for narcotics smuggling on the high seas absent any nexus to the U.S., since "the trafficking of narcotics is condemned universally by law-abiding nations"). *But see*

The Restatement recognizes universal jurisdiction over offenses "recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism."[50] U.S. law authorizes prosecutions based on universal jurisdiction in several contexts, including piracy,[51] genocide,[52] torture,[53] and certain acts of terrorism.[54] Nonetheless, the United States has never conducted a prosecution based on pure universal jurisdiction.[55] The United States has frequently prosecuted aliens for terrorism, but only when U.S. nationals were among the victims. Jurisdiction in those cases has thus been based in part on the passive personality principle.[56] The ongoing prosecution of a Somali citizen for

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Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation*, 45 HARV. INT'L L.J. 183, 186 (2004) (arguing heinousness should not trigger universal jurisdiction, because jurisdiction over piracy, the paradigm crime triggering universal jurisdiction, never related to perceived heinousness of piracy).

[50] RESTATEMENT OF FOREIGN RELATIONS, *supra* note 28, § 404. For a discussion on the crimes subject to universal jurisdiction, see BASSIOUNI, INTERNATIONAL EXTRADITION, *supra* note 25, at 425-49.

[51] 18 U.S.C. § 1651 (applying to any person who "on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States"); *see also* §§ 1652-53, 2280; United States v. Lei Shi, 525 F.3d 709 (9th Cir. 2008) (affirming conviction of a Chinese crewmember who "seize[d] or exercise[d] control . . . by force," 18 U.S.C. § 2280(a)(1)(A), of a Taiwanese vessel on the high seas). For a general discussion of the development of U.S. law on piracy on the high seas, *see generally* ALFRED RUBIN, THE LAW OF PIRACY 168-214 (2d ed. 1998). In fact, the U.S. has authorized universal jurisdiction over piracy since its founding. *See* Act of 30 April 1790, 1st Cong. 2d Sess., 1 Stat. 112; RUBIN, *supra*, at 139; United States v. Smith, 18 U.S. 153 (1820) (Story, J.) (affirming piracy conviction arising out of "plunder and robbery" on the high seas).

[52] *See* 18 U.S.C. § 1091(d)(5) (applying to persons alleged to have committed genocide who can be "found" in the U.S., even if the conduct occurred outside the U.S.). This section was added to the statute by the Genocide Accountability Act of 2007, 110 Pub. L. No. 151, 121 Stat. 1821. Prior to December 2007, the statute only authorized prosecutions for genocide occurring in whole or in part within U.S. territory, or by U.S. nationals.

[53] 18 U.S.C. § 2340A(b)(2) (authorizing prosecutions for torture whenever alleged offender is "present" in the U.S, irrespective of nationality of victim or alleged offender).

[54] *See, e.g.*, 18 U.S.C. § 1203 (authorizing prosecutions for hostage taking whenever an alleged offender is "found in the United States").

[55] A Florida federal court recently convicted Charles McArthur Emmanuel, also known as "Chuckie" Taylor, the son of former Liberian dictator Charles Taylor, of torture in Liberia in violation of 18 U.S.C. § 2340A. *See* Yolanne Almanzar, *Son of Ex-President of Liberia Is Convicted of Torture*, N.Y. TIMES, Oct. 30, 2008, at A16; Carmen Gentile, *Son of Ex-President of Liberia Gets 97 Years*, N.Y. TIMES, Jan. 9, 2009, at A14. Emmanuel, however, is a natural-born U.S. citizen and thus jurisdiction was principally based on nationality. *See* Second Superceding Indictment, United States v. Belfast (a/k/a "Chuckie Taylor"), No. 1:06-CR-20758 (S.D. Fla. Nov. 8, 2007).

[56] *See, e.g.*, United States v. Yousef, 327 F.3d 56 (2d Cir. 2003); United States v. Yunis, 924 F.2d 1086 (D.C. Cir. 1991). While those prosecutions have involved U.S. victims, several

piracy arose out of the seizure of a U.S. ship with U.S. citizens as crew.[57]

C. Limits On Extraterritorial Jurisdiction

Although the United States has greatly expanded its extraterritorial jurisdiction on each of those jurisdictional bases, there are limits. The Restatement on Foreign Relations Law has been influential in articulating those limits. Section 403 of the Restatement limits prescriptive jurisdiction to cases where its exercise would be "reasonable" according to "all relevant factors."[58] It describes the rule of reasonableness as both a principle "established in United States law," as well as an emerging "principle of international law,"[59] which applies in both civil and criminal cases.[60]

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terrorism-related statutes confer universal jurisdiction and are thus not necessarily limited to instances where U.S. nationals are among the victims. *See also* Adam Wegner, *Extraterritorial Jurisdiction Under International Law: The* Yunis *Decision as a Model for the Prosecution of Terrorists in U.S. Courts*, 22 LAW & POL'Y INT'L BUS. 409 (1991) (discussing implications of *Yunis* case).

[57] Complaint, United States v. Muse, No. 09-MAJ-1012 (S.D.N.Y. April 21, 2009).

[58] RESTATEMENT OF FOREIGN RELATIONS, *supra* note 28, § 403(1)-(2). *See infra* Part III. The relevant factors in § 403(2) include the following:

> (a) The link of the activity to the territory of the regulating state, i.e., the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory; (b) The connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect; (c) The character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted; (d) The existence of justified expectations that might be protected or hurt by the regulation; (e) The importance of the regulation to the international political, legal, or economic system; (f) The extent to which the regulation is consistent with the traditions of the international system; (g) The extent to which another state may have an interest in regulating the activity; and (h) The likelihood of conflict with regulation by another state. *Id.*

[59] RESTATEMENT OF FOREIGN RELATIONS, *supra* note 28, § 403, *cmt. a*. *But see* David Massey, Note, *How the American Law Institute Influences Customary Law: The Reasonableness Requirement of the Restatement of Foreign Relations Law*, 22 YALE J. INT'L L. 419, 420 (1997) (contesting proposition that reasonableness requirement reflects customary international law).

[60] While one comment to the Restatement hints that limits to extraterritorial jurisdiction may be more robust in the criminal context than the civil context, *see* RESTATEMENT OF FOREIGN RELATIONS, *supra* note 28, § 403 *cmt. f*, the text of § 403 is equally applicable to civil and criminal jurisdiction. *See* United States v. Nippon Paper Indus., 109 F.3d 1, 7 (1st Cir. 1997) (describing *comment f* as "merely reaffirm[ing] the classic presumption against extraterritoriality – no more, no less"); *see also id.* at 34-40 (Lynch, J, concurring) (using § 403 reasonableness analysis to assess application of extraterritorial criminal jurisdiction to

The International Court of Justice, however, has never imposed limits on prescriptive jurisdiction. In the 1927 *S.S. Lotus* case, the Permanent Court of International Justice upheld Turkish criminal jurisdiction over French citizens based on conduct related to a collision between French and Turkish ships on the high seas.[61] The 2002 *Arrest Warrant Case* also provided little guidance on universal jurisdiction under international law, since the ICJ decided the case on grounds of immunity.[62] Thus the only limits in international law on extraterritorial prescriptive jurisdiction are likely those embodied in the Restatement's requirement of reasonableness.[63]

U.S. courts sometimes impose limits on prescriptive jurisdiction that are different than the Restatement's reasonableness requirement, at least where Congressional intent is ambiguous. For example, while there is no constitutional bar to the extraterritorial application of U.S. criminal laws,[64] courts often apply a presumption against extraterritoriality as a matter of statutory interpretation.[65] The presumption may be rebutted by evidence that Congress did intend the statute at issue to apply to conduct abroad, either from the plain text, legislative history,[66] or the nature of the proscribed conduct.[67] Courts would likely apply this presumption against

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defendants).

[61] *S.S. "Lotus"* (Fr. vs. Turk.) 1927 P.C.I.J. Reports (ser. A), No. 10. (Sept. 7).

[62] *Arrest Warrant of 11 April 2000* (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3 (Feb. 14). Belgium had asserted universal jurisdiction against then DRC Minister of Foreign Affairs and issued a warrant for his arrest. The DRC challenged the arrest warrant as a violation of international law, arguing that international law sets limits on universal jurisdiction and provides immunity for sitting government officials. While the Court based its decision solely on the immunity ground, several judges addressed the jurisdiction issue in separate opinions. *See* Separate Opinion of Judge Guillaume, *id.* at 36-46; Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, *id.* at 64-91.

[63] With respect to universal jurisdiction, some commentators disagree, arguing that international law does impose limits on when a country may exercise universal jurisdiction. *See*, *e.g.*, Anthony Colangelo, *The Legal Limits of Universal Jurisdiction*, 47 VA. J. INT'L L. 149, 150 (2006) (arguing that international law concerning universal jurisdiction circumscribes jurisdiction of national courts to adjudicate certain international crimes).

[64] Chua Han Mow v. United States, 730 F.2d 1308, 1311 (9th Cir. 1984).

[65] E.E.O.C. v. Arabian American Oil Co., 499 U.S. 244, 248 (1991) ("unless there is the affirmative intention of the Congress clearly expressed . . . we must presume it is primarily concerned with domestic conditions.") (internal quotation marks omitted). While the scope of the presumption against extraterritoriality is unclear, other similar canons of statutory interpretation also often apply, such as the canons to "construe[] ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations," *F. Hoffmann-LaRoche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004), and to "help[] the potentially conflicting laws of different nations [to] work together in harmony." *Id.* at 164.

[66] William Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 BERKELEY J. INT'L L. 85, 111 (1998).

[67] Where the nature of the crime does not depend on the locality of the defendants' acts and where restricting the statute to U.S. territory would severely diminish the statute's

extraterritoriality to criminal statutes, since the assumptions underlying the presumption – that Congress generally legislates with domestic concerns in mind,[68] and that courts should avoid "unintended clashes between our laws and those of other nations which could result in international discord"[69] – apply to criminal jurisdiction just as they do to civil jurisdiction.

Both the Restatement approach and presumption approach recognize the tension inherent in extraterritoriality. The United States seeks – and should seek – to further its interests to the greatest extent possible. But the U.S. cannot legislate for the entire world. The concern that the U.S. should not impose rules on the world is rarely triggered by prescriptive jurisdiction based on territoriality. Yet even an exercise of jurisdiction based on conduct in U.S. territory may sometimes be unreasonable. For instance, if only a fraction of the acts or omissions constituting the crime occurred in the U.S., and if the exercise of jurisdiction would unduly interfere with the interests of other countries, the exercise of criminal jurisdiction by the United States would likely be unreasonable.

The assertion of jurisdiction on bases other than territoriality poses even greater risks of conflict, and is thus more controversial. Passive personality jurisdiction is controversial because it implies that people worldwide may be subject to U.S. law with respect to certain conduct when U.S. nationals are among the victims. Universal jurisdiction, if used for politically motivated or vexatious purposes, risks causing tensions between countries.[70] When the exercise of extraterritorial jurisdiction by the U.S. triggers international tensions, political reasons may compel the U.S. to defer to the interests of other countries.[71]

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effectiveness, courts presume that Congress did intend its statutes to apply extraterritorially. United States v. Bowman, 260 U.S. 94, 98 (1922); *see also* United States v. Yousef, 327 F.3d 56, 87 (2d Cir. 2003) (jurisdiction over crimes targeting U.S. aircraft); Ellen Podgor & Daniel Filler, *International Criminal Jurisdiction in the Twenty-First Century: Rediscovering* United States v. Bowman, 44 SAN DIEGO L. REV. 585 (2007) (discussing the legacy of *United States v. Bowman*).

[68] *See* Smith v. United States, 507 U.S. 197, 204 n.5 (1993).

[69] *Arabian American Oil Co*., 499 U.S. at 248.

[70] BASSIOUNI, INTERNATIONAL EXTRADITION, *supra* note 25, at 412. *But see* Colangelo, *The Legal Limits of Universal Jurisdiction*, *supra* note 63, at 150 (arguing that universal jurisdiction does not pose such a threat, since international law provides the definitions of international crimes, which are narrow and thus provide sufficient limits); *see also* Curtis Bradley, *Universal Jurisdiction and U.S. Law*, 2001 U. CHI. LEGAL F. 323, 334-41 (2001) (arguing that in light of these and other concerns, the Constitution's delegated powers limitations cabin exercise of universal jurisdiction by Congress)

[71] *See, e.g.*, United States v. La Jeune Eugenie, 26 F. Cas. 832, 840 (D. Mass. 1822) (No. 15,551) (Story, J.) (declining to exercise jurisdiction over a French slave-trading vessel to avoid "excit[ing] the jealousies of a foreign government, zealous to assert its own rights"). *Cf.* Kimberly C. Priest-Hamilton, Comment, *Who Really Should Have Exercised Jurisdiction Over the Military Pilots Implicated in the 1998 Italy Gondola Accident?*, 65 J. AIR L. & COM. 605,

Despite these limits on extraterritorial jurisdiction, there remain many areas where U.S. criminal laws apply to conduct that could also be governed by another country's law. In other words, the limits do not prevent concurrent criminal jurisdiction. Thus a framework is necessary to resolve the prosecute/extradite dilemma.

D. Aut Dedere Aut Judicare Treaties

The prosecute/extradite dilemma has taken center-stage in treaties that impose a duty on signatory parties to prosecute or extradite conduct outlined by the treaty. This duty is known as an *aut dedere aut judicare* obligation.[72] While there are various formulations of the principle,[73] the core obligation under these treaties remains the same: when an alleged offender is found on the territory of a treaty party, the state must either extradite the person or assert jurisdiction and prosecute in its courts.[74] Moreover, those same

635 (2000) (arguing that U.S. super-power status may prevent political pressure from providing any practical limits on U.S. efforts to exercise extraterritorial jurisdiction, particularly over U.S. military personnel).

[72] *See* International Law Commission, *Preliminary Report on the Obligation to Extradite or Prosecute*, U.N. Doc. A/CN.4/571 (June 7, 2006) (*prepared by* Zdzislaw Galicki); International Law Commission, *Second Report on the Obligation to Extradite or Prosecute*, U.N. Doc. A/CN.4/585 (June 11, 2007) (*prepared by* Zdzislaw Galicki); International Law Commission, *Third Report on the Obligation to Extradite or Prosecute*, U.N. Doc. A/CN.4/603 (June 10, 2008) (*prepared by* Zdzislaw Galicki). Professors Bassiouni and Wise cataloged *aut dedere aut judicare* treaties in twenty-four substantive areas as of 1995, from apartheid to theft of nuclear material. *See* CHERIF BASSIOUNI & EDWARD WISE, *AUT DEDERE AUT JUDICARE*: THE DUTY TO EXTRADITE OR PROSECUTE IN INTERNATIONAL LAW 75-287 (1995).

[73] Bassiouni and Wise describe four formulations: the extradition treaty formula (requiring local prosecution in the event extradition is refused, such as when countries refuse to extradite their own nationals), the 1929 Counterfeiting Convention formula (permitting local prosecution in the absence of extradition, depending on existing national law on jurisdiction), the Geneva Convention grave breach formula (explicitly framing the obligation as an alternative between prosecution and extradition), and the Hague Convention formula (explicitly requiring that state parties authorize jurisdiction over covered crimes in order to facilitate domestic prosecution if it refuses to extradite). *See* BASSIOUNI & WISE, *AUT DEDERE AUT JUDICARE*, *supra* note 72, at 11-19.

[74] The grave breach regime of the Geneva Conventions is a typical example of a treaty-based duty to prosecute or extradite:

> Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case.

treaties often include separate provisions requiring parties to confer jurisdiction through legislation over the crimes covered by the treaties.[75] These provisions eliminate safe havens for persons suspected of having committed crimes of international concern.[76] In the absence of an international court with jurisdiction over particular crimes, alleged offenders will only be brought to justice if prosecuted at the national or sub-national level. The United States has been particularly active in encouraging *aut dedere aut judicare* treaties in the area of terrorism.[77]

Aut dedere aut judicare treaties operate in tandem with the law on extradition and extraterritorial criminal jurisdiction. Ordinarily, when a person is found in the United States who is alleged to have committed a crime in a country in which there is concurrent jurisdiction, the U.S. government has three options: prosecute, extradite, or do neither. *Aut dedere aut judicare* treaties eliminate the last option. Enabling a person to remain at-large on U.S. territory would breach these treaties.

These legal regimes aim to realize a collective interest in ensuring the

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Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva Convention I) art. 49, Aug. 12, 1949, 75 U.N.T.S. 31; *see also* 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft: Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 860 U.N.T.S. 105, 10 I.L.M. 133 (1971) ("Art. 1(2): 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 offender is present in its territory and it does not extradite him.").

[75] *See, e.g.*, Convention Against Torture art. 5(2), Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85 ("Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him.").

[76] Some commentators argue that *aut dedere aut judicare* has become a rule of international customary law and thus constitutes an obligation with respect to certain international crimes irrespective of a country's ratification of a particular treaty. *See, e.g.*, BASSIOUNI AND WISE, *supra* note 72, at 20-50; *accord* Colleen Enache-Brown & Ari Fried, *Universal Crime, Jurisdiction and Duty: The Obligation of* Aut Dedere Aut Judicare *in International Law*, 43 MCGILL L.J. 613 (1997); Michael Kelly, *Cheating Justice by Cheating Death: The Doctrinal Collision for Prosecuting Foreign Terrorists – Passage of* Aut Dedere Aut Judicare *into Customary Law & Refusal to Extradite Based on the Death Penalty*, ARIZ. J. INT'L & COMP. L. 491, 495–506 (2003). However, evidence of state practice is decidedly mixed. *See* Michael Plachta, Aut Dedere Aut Judicare: *An Overview of Modes of Implementation and Approaches*, 6 MAASTRICHT J. OF EUR. & COMP. L. 331, 333 ("[C]ontemporary practice furnishes far from consistent evidence of the actual existence of a general obligation to extradite or prosecute with respect to international offenses."); *accord* Edward Wise, *The Obligation to Extradite or Prosecute*, 27 ISRAEL L. REV. 268, 282-87 (1993). Thus U.S. courts are only likely to find a duty to prosecute or extradite if the U.S. has codified the duty in a treaty.

[77] *See, e.g.*, 1970 Hague Convention, *supra* note 74; International Convention for the Suppression of the Financing of Terrorism art. 7(4), 39 I.L.M. 270, UN Doc. A/RES/54/109 (Dec. 9, 1999).

criminal prosecution of persons alleged to have committed crimes of international concern. These treaties promote such prosecutions by expanding the extraterritorial jurisdiction of signatory states and shaping the way signatory states resolve the prosecute/extradite dilemma in individual cases. *Aut dedere aut judicare* provisions do not, however, dictate or even provide guidance as to which of the two options states should choose.[78] The provisions require prosecution or extradition, and generally do not create hierarchies of jurisdiction. They do not, for example, require a state with jurisdiction based on universality to defer to another state asserting jurisdiction based on territoriality. Thus, even with respect to crimes addressed by treaties, a framework is necessary to resolve the prosecute/extradite dilemma in a way that captures its role in global governance.

III. A FRAMEWORK FOR RESOLVING THE DILEMMA

For the reasons discussed in Parts I and II, supra, existing doctrines and procedures related to extradition and extraterritorial jurisdiction neither adequately describe the interests at stake in the prosecute/extradite dilemma, nor provide a workable normative framework for applying those interests to particular cases. It is thus crucial to articulate the national and international interests involved in the context of concurrent criminal jurisdiction, as well as to apply them in a way that meaningfully mediates among them. Only by accurately articulating these interests and developing a framework for mediating among them, may the prosecute/extradite dilemma effectively contribute to global governance.

The approach set forth here may in fact reflect the process the United States already uses to decide whether to prosecute or extradite in particular cases involving concurrent jurisdiction. Nonetheless, very little public information exists about the process by which these decisions are made, how often such cases arise, and how the United States justifies its decisions whether to prosecute or extradite. Given the important role these decisions serve in determining the extraterritorial contours of criminal jurisdiction, it is important to articulate and analyze the relevant national and interests, and to develop an explicit framework for resolving competing exercises of jurisdiction.

In any case involving concurrent exercises of jurisdiction, each country has interests that are furthered by the opportunity to prosecute and adjudicate

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[78] Bassiouni and Wise suggest that *aut dedere aut judicare* treaties implicitly require that "extradition should take priority, at least in cases in which the requesting state asserts territorial jurisdiction over the offense." They concede, however, that the *aut dedere aut judicare* as such does not "require giving special priority to extradition." BASSIOUNI & WISE, *supra* note 72, at 57.

the case. A country's interest in applying its criminal laws to particular conduct arises out of specific links between the conduct and the country, as reflected in the bases of prescriptive jurisdiction described above. Not all connecting factors, however, are equivalent. For example, conduct on U.S. territory usually implicates U.S. interests more directly and to a greater extent than, for example, conduct abroad against a U.S. citizen.[79] But comparing jurisdiction based on the territoriality and passive personality principles does not necessarily provide easy answers. For instance, U.S. interests abroad may actually be greater than those implicated by domestic conduct when a major terrorist attack abroad occurs against U.S. citizens than when conduct occurs on U.S. territory, but is only a minor part of an otherwise foreign course of conduct. Thus, a jurisdictional hierarchy in which jurisdiction based on territory always trumps jurisdiction based on passive personality, would be unworkable.

A framework for resolving concurrent exercises of criminal jurisdiction must do more than identify bases of jurisdiction. It also cannot rely on a simplistic hierarchy. Rather, an effective framework must recognize that the strength of a country's interest in applying its law depends on multiple factors. This Part provides a framework for analyzing the national and international interests at stake when countries resolve the prosecute/extradite dilemma. The bottom line is this: when a country determines that its interests are less significant than those of another country, it should defer to the country with the stronger interests.

The Restatement provides a starting point for analyzing concurrent jurisdiction. First, any effort by a country to apply its laws to particular conduct must satisfy one or more of the traditional bases of prescriptive jurisdiction.[80] Second, if the factors demonstrate that exercising extraterritorial jurisdiction is "unreasonable," even if otherwise supported by a valid basis of prescriptive jurisdiction, a country "may not exercise jurisdiction to prescribe law" over the conduct at issue.[81] Third, where it would "not be unreasonable" for more than one country to apply its laws to particular conduct – that is, where concurrent jurisdiction is the result of reasonable exercises of jurisdiction by multiple countries – each state that seeks to apply its laws to the conduct "has an obligation to evaluate its own as well as the other state's interest in exercising jurisdiction, in light of all

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[79] *See* Watson, *The Passive Personality Principle*, *supra* note 43, at 1 ("[I]nternational law should permit states to exercise passive personality jurisdiction, but only if the defendant is not prosecuted either by the state in which the crime was committed or by the defendant's home state.").

[80] RESTATEMENT OF FOREIGN RELATIONS, *supra* note 28, §§ 402, 404.

[81] *Id.* § 403(1).

the relevant factors."[82] After this evaluation, "a state should defer to the other state if that state's interest is clearly greater."[83]

This Part addresses how a country should "evaluate its own as well as the other state's interest[s]" in order to determine when one country's interest in applying its criminal laws is "clearly greater" than another country's interest.[84] It does so by analyzing the governmental and societal interests underlying each of the factors connecting particular conduct to the United States. Similar to the Restatement, the factors discussed here are applicable regardless of the basis of extraterritorial jurisdiction. Yet unlike the Restatement's approach, they are tailored to concurrent exercises of criminal jurisdiction.

Other commentators have also addressed the prosecute/extradite dilemma. Professor Bassiouni, for example, has proposed a set of questions to frame the decision whether to extradite, suggesting that the dilemma should be resolved by a hierarchical ranking of the bases of jurisdiction.[85] The *Institut de Droit International* and the Princeton Project on Universal Jurisdiction have also proposed frameworks, but only with respect to universal jurisdiction.[86]

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[82] *Id.* § 403(3).

[83] *Id.*

[84] *Id.*

[85] *See* BASSIOUNI, INTERNATIONAL EXTRADITION, *supra* note 25, at 485-86.

[86] *See* RESOLUTION, UNIVERSAL CRIMINAL JURISDICTION WITH REGARD TO THE CRIME OF GENOCIDE, CRIMES AGAINST HUMANITY AND WAR CRIMES (Aug. 25, 2005), http://www.idi-iil.org/idiE/resolutionsE/2005_kra_03_en.pdf. The resolution stated:

> Any State having custody over an alleged offender, to the extent that it relies solely on universal jurisdiction, should carefully consider and, as appropriate, grant any extradition request addressed to it by a State having a significant link, such as primarily territoriality or nationality, with the crime, the offender, or the victim, provided such State is clearly able and willing to prosecute the alleged offender.

Id.; Principle 8, Princeton Principles on Universal Jurisdiction ("Resolution of Competing National Jurisdictions"). The proposed factors were the following: (a) multilateral or bilateral treaty obligations; (b) the place of commission of the crime; (c) the nationality connection of the alleged perpetrator to the requesting state; (d) the nationality connection of the victim to the requesting state; (e) any other connection between the requesting state and the alleged perpetrator, the crime, or the victim; (f) the likelihood, good faith, and effectiveness of the prosecution in the requesting state; (g) the fairness and impartiality of the proceedings in the requesting state; (h) convenience to the parties and witnesses, as well as the availability of evidence in the requesting state; and (i) the interests of justice. *Princeton Principles on Universal Jurisdiction*, *in* UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW 18, 23 (Stephen Macedo ed., 2003); *see also* Diane Orentlicher, *The Future of Universal Jurisdiction*, *in* UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW, 215, 233-37 (Stephen Macedo, ed., 2003) (concurring with Princeton

These approaches, however, do not fully capture the complex governmental and societal interests underlying the prosecute/extradite dilemma. It is important to articulate the reasons why countries are interested in applying their criminal law to particular conduct. Only by articulating these interests can a country effectively balance its interests, the interests of other states with jurisdiction, and the collective interests of all countries. Moreover, since as a practical matter the decision in the United States whether to prosecute or extradite is made by the executive branch through the State Department, it is important to highlight the considerations that are not political in nature. Where multiple countries have asserted jurisdiction, the foreign relations implications are often salient. While important, those political considerations should not obscure the other interests underlying assertions of criminal jurisdiction.

To some, it may seem a radical proposition to require a country to decline prosecuting cases to which its criminal laws apply. Criminal laws reflect a society's fundamental norms. When a person violates those norms, the applicable social entity, usually the state, may sanction that conduct if the government has chosen to prosecute. However, in an increasingly interconnected world, if every country were to apply its criminal laws to the full extent possible, jurisdictional conflict would be pervasive. To avoid such an untenable escalation of jurisdictional conflict, countries must be willing to decline to prosecute some extraterritorial conduct that its criminal laws could reach, even where a country's exercise of jurisdiction is "reasonable" under the Restatement framework.

For the prosecute/extradite dilemma to become an effective site of global governance, countries must consider the interests of all countries with a basis for prescribing laws over particular conduct, and as the Restatement exhorts, should defer to other states if their interests are "clearly greater." There are seven factors that are relevant to determining which country's interests in prosecuting and punishing particular conduct are greater: the territory where the conduct occurred, the nationality of victims, the nationality of alleged offenders, the character of the alleged crime, convenience of litigation, procedural and substantive fairness in the requesting state, and the nature of potential proceedings. This section discusses each in turn.

A. Territory where the conduct occurred

As the traditional emphasis on territoriality demonstrates, the country where a crime occurred has the greatest connection to the crime. The territorial country has the strongest interest in regulating the conduct of

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Principles' approach to weighing competing national exercises of jurisdiction).

persons located within the territory. That interest is principally in deterrence – to avoid the consequences of the conduct in the future – as well as in retribution. Territoriality is deeply rooted in tradition, both legal and political.[87]

Territory, however, should not be dispositive in establishing jurisdiction, because whenever the facts surrounding a crime give rise to a basis for jurisdiction other than territoriality, the crime has affected interests beyond those of the territorial state.[88] In such cases, jurisdiction should be assessed on a case-by-case basis by balancing the interests of the domestic country and foreign countries. The interests of the foreign countries without a territorial nexus to the crime, whether in the regulation or protection of its nationals, or in punishing heinous international crimes, are significant and legitimate. The exercise of jurisdiction by the territorial state does not extinguish the other countries' interests, or signify that the territorial state's interests should automatically supersede another countries' interests. In other words, countries with a non-territorial nexus to the alleged crime may have interests that are as significant, or more significant, than the interests of the country in which the alleged crime occurred. For example, where there is a strong indication that the territorial state's prosecutions are sham or incompetent, a country with jurisdiction based on passive personality, or even universal jurisdiction, may have a stronger claim for exercising its prescriptive jurisdiction and prosecuting the alleged offender than the state whose jurisdiction is based on territoriality.

The territory where an alleged crime occurred is thus a crucial factor in assessing a country's interest in applying its criminal laws to the conduct. Nonetheless, since countervailing factors are triggered when particular crimes have transnational effects, territoriality is only one factor among several.

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[87] *See* Kal Raustiala, *The Evolution of Territoriality: International relations and American law*, *in* TERRITORIALITY AND CONFLICT IN AN ERA OF GLOBALIZATION, 219, 219 (Miles Kahler & Barbara F. Walter, eds., 2006) ("Territoriality is a defining attribute of the Westphalian state, the model upon which the framers of the US Constitution based their aspirations for a new nation.").

[88] Professor Bassiouni asserts that not only *should* territoriality be dispositive, but also that according to the law of most countries, it *already is* dispositive. BASSIOUNI, INTERNATIONAL EXTRADITION, *supra* note 25, at 367 ("[T]he jurisprudence of almost all states has recognized the territorial theory as ranking over all other theories, and is thus given priority in extradition requests."). While it may be true that territoriality trumps other bases of jurisdiction in most cases, it is also important to provide a framework for exceptional cases, where countervailing concerns may justify the exercise of jurisdiction based on theories other than territoriality, even when another country has asserted jurisdiction based on territoriality.

B. Nationality of victims

A country's interests are also affected when its nationals become the victims of crimes abroad. For example, there may be an impact on U.S. nationals abroad, such as in cases of terrorism, thereby justifying jurisdiction based on both passive personality and universality. Or, the impact may be within the United States, such as in cases of antitrust violations abroad, with jurisdiction based on objective territoriality. In *United States v. Nippon Paper Industries*, Judge Lynch used the reasonableness approach of the Restatement to judge the application of criminal antitrust sanctions against Japanese defendants for conduct in Japan, under which he found the nationality of victims to be determinative.[89] While the conduct violated both Japanese and U.S. law, the defendants specifically intended to, and did, target U.S. markets and U.S. consumers.[90] Judge Lynch concluded that the U.S. had a greater interest than Japan in prosecuting and punishing the conduct.[91]

Similar to other factors in this section, the nationality of victims is relevant, but should rarely be dispositive. As a connecting factor between the United States and the crime, when the conduct occurs within a country's territory, that country will often have the strongest claim for exercising jurisdiction. Nonetheless, in certain limited circumstances, nationality may become the most important connecting factor, such as with crimes committed outside the territory of all countries, such as piracy on the high seas. In such cases, a balance of interests could justify the United States exercising jurisdiction based on the passive personality principle.

C. Nationality of alleged offenders

Countries sometimes seek to regulate the conduct of their nationals abroad. Historically, the application of a state's law to its citizens abroad has stemmed from ancient Roman notions of "personal" law, according to which the applicable law was determined by a person's nationality, rather than territory.[92] While the notion of "personal law" persists in certain limited contexts, such as domestic relations, the notion has been discredited in ordinary civil and criminal contexts.[93] Nonetheless, states retain interests

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[89] 109 F.3d 1, 11-12 (1st Cir. 1997) (Lynch, J., concurring).

[90] *Id.* at 12.

[91] *Id.*

[92] *See* ALAN WATSON, ROMAN LAW & COMPARATIVE LAW 88 (1991) (describing period in Roman history when "the law that ruled a person was that of his own people, irrespective of where he might be").

[93] *See* Rollin Perkins, *The Territorial Principle in Criminal Law*, 22 HASTINGS L.J. 1155, 1156 (1971).

in regulating the conduct of their nationals abroad. Exercises of extraterritorial jurisdiction, such as the PROTECT Act,[94] simply reflect policies sufficiently strong that Congress, by expressly stating that such statutes should apply to conduct abroad, has deemed territorial limits inappropriate. The prosecution of "Chuckie" Taylor, a U.S. citizen, and son of former Liberian dictator Charles Taylor, for torture in Liberia, similarly reflects notions that some crimes are so heinous that they affect U.S. interests when committed by U.S. nationals, even if committed abroad.[95] Other instances of U.S. jurisdiction over conduct by U.S. citizens abroad, such as over U.S. armed forces abroad,[96] likely reflect efforts to avoid the prosecution of U.S. military personnel by other countries.

As with all the factors in this section, the nationality of alleged offenders is not ordinarily dispositive. U.S. interests in regulating its nationals must sometimes yield to other interests, such as those based on territorial connections. Moreover, the nationality of offenders is less important where the alleged crimes constitute gross violations of human rights.[97] Generally, only when all other links are weak should nationality serve as a sufficient nexus for the application of criminal law.

D. Character of the alleged crime

The strength of the connection between a country and a crime committed abroad depends in part on the nature of the alleged offense. International crimes that trigger universal jurisdiction raise particular concerns. As discussed above, international law condemns certain crimes as so heinous or uniquely international that any country may legitimately prescribe and punish the conduct regardless of where it was committed. When the alleged offense is a so-called "ordinary" crime, such as fraud or murder, the territorial state often maintains the closest connection to a crime. However, when the conduct rises to the level of an "international" crime, the

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[94] Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, 18 U.S.C. § 2423(c) (2006) ("Any United States citizen or alien admitted for permanent residence who travels in foreign commerce, and engages in any illicit sexual conduct with another person shall be fined under this title or imprisoned not more than 30 years, or both.").

[95] *See* United States v. Emmanuel, No. 06-20758-CR, 2007 WL 2002452 (S.D. Fla. July 7, 2007) (Order on Defendant's Motion to Dismiss the Indictment); Elise Keppler, Shirly Jean & J. Paxton Marshall, *First Prosecution in the United States for Torture Committed Abroad: The Trial of Charles 'Chuckie' Taylor, Jr.*, Human Rights Watch (Aug. 26, 2008), *available at* http://www.hrw.org/en/news/2008/08/26/first-prosecution-united-states-torture-committed-abroad.

[96] *See* NATO SOFA, *supra* note 43; Military Extraterritorial Jurisdiction Act of 2000, 18 U.S.C. §§ 3261-3267 (2006).

[97] Orentlicher, *The Future of Universal Jurisdiction*, *supra* note 86, at 234-35.

calculus of U.S. interests in deciding whether to prosecute or extradite changes.

The character of an alleged crime is significant even when the conduct occurs in a country's territory. For example, when a foreign vessel is in a U.S. port, it is in U.S. internal waters. As the coastal state with the vessel in its internal waters, the United States can generally prescribe laws on most matters, since internal waters are the maritime equivalent of territory. However, states generally exercise restraint in prosecuting and applying local law to incidents aboard foreign vessels in their ports, limiting enforcement to infringement of customs laws, or activities that disrupt the peace of the port.[98]

E. Procedural and substantive fairness in the requesting state

U.S. courts have long been justifiably wary of assessing the fairness of foreign judicial systems, including in the area of extradition.[99] The increasing influence of international human rights norms, however, has begun to pressure courts, Congress and the executive branch to recognize that some inquiry is necessary.[100] For example, under the Convention

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[98] INTERNATIONAL LAW 630 (Malcolm Evans, ed., 2d ed. 2006); *see also* Wildenhus's Case, 120 U.S. 1 (1887):

> [A]ll matters of discipline and all things done on board which affected only the vessel or those belonging to her, and did not involve the peace or dignity of the country, or the tranquillity of the port, should be left by the local government to be dealt with by the authorities of the nation to which the vessel belonged as the laws of that nation or the interests of its commerce should require. But if crimes are committed on board of a character to disturb the peace and tranquillity [sic] of the country to which the vessel has been brought, the offenders have never by comity or usage been entitled to any exemption from the operation of the local laws for their punishment, if the local tribunals see fit to assert their authority.

Id. at 12.

[99] *See, e.g.*, Prasoprat v. Benov, 421 F.3d 1009, 1016 (9th Cir. 2005) ("We have long adhered to the rule of non-inquiry – that it is the role of the Secretary of State, not the courts, to determine whether extradition should be denied on humanitarian grounds or on account of the treatment that the fugitive is likely to receive upon his return to the requesting state.").

[100] John Dugard & Christine Van den Wyngaert, *Reconciling Extradition with Human Rights*, 92 AM. J. INT'L L. 187 (1998) (arguing that national extradition laws and extradition treaties should explicitly take into account human rights norms in order to balance the interests of fugitives and law enforcement); *see also* Andrew Parmenter, *Death by Non-Inquiry: The Ninth Circuit Permits the Extradition of a U.S. Citizen Facing the Death Penalty for a Non-Violent Drug Offense*, 45 WASHBURN L.J. 657 (2006) (arguing that U.S. should not extradite U.S. citizens to countries that do not have constitutional protections equivalent to U.S.). *But see* Jacques Semmelman, *Federal Courts, the Constitution, and the Rule of Non-Inquiry in International Extradition Proceedings*, 76 CORNELL L. REV. 1198, 1200 (1991) (arguing that while fair and humane treatment of fugitives is important, responsibility in U.S. for assessing

Against Torture, the U.S. Secretary of State is charged with ensuring that the United States does not extradite persons to countries where they are likely to be tortured.[101] This is the case even where there would be no basis for criminal jurisdiction in the United States.

When the United States has jurisdiction, the justification for inquiring into the fairness of procedures in the requesting country is particularly strong. By conferring extraterritorial jurisdiction, Congress has expressed its view that prosecuting alleged offenders would further U.S. policies. In cases of concurrent jurisdiction, the executive branch must weigh the assertion of U.S. jurisdiction against the benefits of deferring to a requesting country's assertion of jurisdiction. In such cases, the procedures and outcome of a prosecution abroad affect U.S. interests to an even greater degree than extradition in the absence of U.S. jurisdiction. In other words, in cases where the United States would have jurisdiction to prosecute a crime, yet chooses to extradite instead, the extent to which the United States furthers its interests depends in part on the foreign prosecution and its outcome. Extradition in those cases does not extinguish U.S. policies. Moreover, the U.S. has an additional interest in the fair adjudication of cases of persons extradited from the United States. When the United States extradites a person who is mistreated or prosecuted using fundamentally unfair procedures, that unfairness harms that U.S. interest.[102]

As with every factor outlined in this section, however, the extent of procedural protections and other characteristics of a foreign prosecution should not be dispositive in most cases. The only cases where treatment upon extradition would be dispositive are where the treatment is likely to rise to the level of torture. Nonetheless, even where a foreign prosecution would be effective, and the requesting country's judicial system would provide protections on par with U.S. constitutional protections, sometimes U.S. interests would be sufficiently strong to justify denying the extradition request in favor of prosecution in the United States.

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such considerations should remain purview of executive branch, not courts).

[101] 22 C.F.R. § 95.2.

[102] For example, the United States faced serious criticism for its recent cases of extraordinary rendition, in which the United States extradited terrorist suspects to countries that were likely to torture those suspects. *See, e.g.*, HUMAN RIGHTS WATCH, DOUBLE JEOPARDY: CIA RENDITIONS TO JORDAN (2008), *available at* http://www.hrw.org/en/reports/2008/04/07/double-jeopardy-0; COUNCIL OF EUROPE, ALLEGED SECRET DETENTIONS AND UNLAWFUL INTER-STATE TRANSFERS OF DETAINEES INVOLVING COUNCIL OF EUROPE MEMBER STATES, Doc. 10957 (2006), *available at* http://assembly.coe.int/Documents/WorkingDocs/Doc06/EDOC10957.htm.

F. Convenience of litigation

A key consideration in weighing concurrent efforts to prosecute should be the relative convenience for both the prosecution and defendant of litigating in the United States, as opposed to another country. This includes the location of evidence and witnesses, as well as the existence of a mutual legal assistance treaty, among other considerations. The *forum non conveniens* doctrine in common law countries captures the same underlying policy. When a particular forum would present substantial obstacles to effective litigation that are not outweighed by the forum's interest in adjudicating the case, the doctrine permits the forum court to dismiss the case.[103] The *forum non conveniens* inquiry has traditionally been inapplicable to criminal proceedings, likely because most criminal prosecutions occur relatively near to where the crime occurred. Moreover, the doctrine is one limiting judicial jurisdiction, not prescriptive jurisdiction. Nonetheless, this factor remains highly relevant to a decision whether to prosecute based on extraterritorial prescriptive jurisdiction.

Assuming that sufficient evidence may be gathered in each country, convenience of litigation generally becomes important only at the margins, when the other factors indicate that the U.S. and the requesting state both have strong claims for exercising jurisdiction. Convenience may, however, become highly relevant when prosecution in the U.S. would not only violate the principles underlying *forum non conveniens*, but also when there would be no practical way to acquire evidence located abroad.[104] However, even in less extreme cases, litigation convenience is sufficiently relevant that it should be among the factors that the U.S. should consider when deciding whether to prosecute or extradite.

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[103] *See* Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981). In *Piper*, the Supreme Court cited "private interest" factors ("relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive") and "public interest" factors ("the 'local interest in having localized controversies decided at home'; the interest in having the trial of a diversity case in a forum that is at home with the law that must govern the action; the avoidance of unnecessary problems in conflict of laws, or in the application of foreign law; and the unfairness of burdening citizens in an unrelated forum with jury duty") as relevant to the *forum non conveniens* inquiry. *Id.* at 241 n.6 (citing Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508-09 (1947)).

[104] While there are generally avenues available to acquire evidence located abroad, whether through Mutual Legal Assistance Treaties or other mechanisms, absent such a mechanism, the state where evidence is located is under no obligation to accede to requests for transmittal of evidence.

G. Nature of potential proceedings

In most cases where a country requests extradition, that country's objective is to acquire custody of the person in order to initiate a criminal prosecution. There is, however, a possibility that some countries, such as those that have experienced dictatorship or severe conflict, would seek extradition not for the purposes of criminal prosecution, but rather for some other form of transitional justice, such as a truth commission.[105] A prosecute/extradite framework that effectively serves its role in global governance must take into account the nature of proceedings that would be utilized in each country with prescriptive jurisdiction.

The importance of considering a range of efforts at transitional justice is particularly significant in the context of universal jurisdiction, since the number of countries with jurisdiction over the crime is limited only to the extent countries have chosen not to assert universal jurisdiction. Inquiry into a requesting country's choice among forms of post-conflict justice may seem particularly inappropriate to U.S. officials determining whether to prosecute or extradite. An effective balancing of interests, however, requires that those officials recognize that alternatives to prosecution are valid. Sometimes deference to a requesting country in cases of concurrent jurisdiction would be justified even if the requesting country does not intend to conduct a formal criminal prosecution.

For example, if the United States were to have custody of a person alleged to have committed genocide in a foreign country, that foreign country may seek to bring the person before a truth commission rather than pursue a criminal prosecution. Such an effort should in most cases be granted equivalent deference to a criminal prosecution. However, the purposes and methods of truth commissions and other transitional justice mechanisms may not precisely align with those of criminal prosecution. When the United States decides whether to prosecute or extradite, it is not only deciding which country's law should apply and where the case should be adjudicated. It is also deciding whether the alleged crime should be adjudicated through a criminal proceeding or through an alternative process. Effective global governance requires that the United States take into account this complex additional layer when deciding whether to prosecute or extradite in such a scenario.

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[105] For example, the 1990 UN Model Treaty on Extradition includes amnesty as a mandatory ground for refusal of extradition, whether granted by the requesting or requested state. G.A. Res. 45/116 (1991), art. 3(e). *See also* Stefano Betti, *The Duty to Bring Terrorists to Justice and Discretionary Prosecution*, 4 J. INT'L CRIM. JUST. 1104, 1112 (2006) (noting that non-criminal transitional justice mechanisms should been seen as legitimate alternatives that reinforce, rather than undermine, role of judicial proceedings).

IV. APPLYING THE FRAMEWORK

As the discussion in Part III demonstrates, addressing the prosecute/extradite dilemma involves the analysis of public and private interests, which are both highly fact-specific. Bright-line rules, therefore, are inappropriate. Nonetheless, the hypothetical cases in Part III illustrate how this framework captures the underlying interests. Case 1 involves the ordinary murder; Case 2 involves torture; Case 3 involves aircraft hijacking.

In Case 1, when Italy requests extradition, it seeks to further its interests in deterrence and retribution through the prosecution of X. When the United States accedes to Italy's extradition request, it furthers its interests as well, principally by ensuring that Italy will extradite persons requested by the U.S. in the future. In cases such as Case 1, where there would be no basis for U.S. jurisdiction, all of the factors above point to the U.S. extraditing the alleged offender to Italy. The crime occurred on Italian territory and both the alleged offender and victim were Italian. The crime does not justify an exception from territoriality, and concerns of fairness in Italy are likely minimal. Evidence and witnesses are likely all located in Italy, and the procedure that Italy seeks to use – criminal prosecution – is the same as that which the U.S. would apply were the scenario reversed.

Moreover, since Congress has not conferred jurisdiction over the crime, it has implicitly expressed that the United States does not have interests that are furthered by prosecuting ordinary crimes outside U.S. territory. It has also ratified an extradition treaty with Italy,[106] and thus, articulated its interest in encouraging extradition between the two countries when extradition requests fulfill the necessary conditions provided by the treaty. By extraditing, the United States recognizes that the requesting country will be able to further its interests to a greater extent through prosecution than the United States would be able to further its own interests by refusing to extradite. Since U.S. law does not authorize jurisdiction over the alleged crime, and since there is an extradition treaty with Italy, U.S. interests are most furthered by extradition.

In Cases 2 and 3, however, the existence of U.S. jurisdiction over the alleged crimes means that the decision whether to prosecute or extradite is truly a dilemma, requiring a complex balancing of governmental and societal interests between the United States and the requesting country. Nonetheless, it is possible to ascertain those interests based on concrete connecting factors, and to articulate those interests with reasonable specificity.

In Case 2, an Italian police officer tortured an Italian citizen. Under 18 U.S.C. § 2340A, the United States would have jurisdiction over the crime as soon as the alleged offender arrived on U.S. territory, since the statute

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[106] Extradition Treaty, U.S.-Italy, *supra* note 12.

applies "irrespective of the nationality of the victim or alleged offender." When Italy requests extradition, it again seeks to deter criminal conduct within its territory. When the United States considers prosecuting in U.S. courts under U.S. law, it seeks to enforce the international norm against torture, while also deterring and expressing retribution with respect to a particular set of acts that it considers threatening to its interests. However, the factors above favor prosecution in Italy rather than the United States. The crime occurred in Italy, and both the alleged offender and victim were Italian. The character of the offense is grave, since it arguably violates a norm of international law. However, it does not rise to the level of genocide, for instance, where the character of the offense easily outweighs the territorial interests of the country where such conduct would have occurred.

Case 3 is arguably the hardest case, because the aforementioned interests are most in conflict. In Case 3, an Italian national hijacked a U.S.-registered aircraft carrying U.S. nationals as passengers. The Hostage Taking Act provides the basis for jurisdiction.[107] When Italy requests extradition, it seeks to further the same interests as in Case 1, namely deterrence and retribution with respect to criminal conduct that occurred within its territory. When the United States considers prosecuting in U.S. courts under U.S. law, it seeks to further its own interests in deterring and expressing retribution with respect to acts it considers terrorism. Thus, the factors above point in conflicting directions. The crime occurred on Italian territory, but there were nationals of various countries on board, including Americans and Italians. The alleged offender was Italian, but from the U.S. perspective, the nationality of the offender is of diminished importance when the conduct is aircraft hijacking, and the victims included Americans. The procedure sought in both countries is criminal prosecution. The fairness of the Italian criminal justice is not an issue, and neither is the availability of evidence since the U.S. and Italy have concluded a Mutual Legal Assistance Treaty.[108]

Articulating the conflicting interests and concerns in this way does not necessarily provide a clear answer. The commonalities on the issues of procedure, fairness and convenience do not provide guidance on how to resolve the contested issues of territoriality, nationality and the character of the offense. After all, a balancing test is not a litmus test. This approach does, however, force the countries involved to consider the true extent of their interests before applying their respective criminal laws to the case. Once articulated with reasonable specificity, the decision whether or not to exercise jurisdiction may rest on political decisions. And that is precisely the point. As a practical matter, cases involving passive personality

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[107] *See* 18 U.S.C. § 1203.

[108] S. TREATY DOC. NO. 98-25 (1984).

jurisdiction are among the most bitterly contested extraterritorial criminal cases. Articulating the interests does not resolve the conflict. It does, however, permit the United States to more accurately ascertain the U.S. and foreign interests involved, and thereby improve its capacity to further U.S. interests while simultaneously minimizing the degree of jurisdictional conflict with other countries.

CONCLUSION

As our world becomes more closely interconnected through communications, technology, and transportation, transnational crime has emerged as a challenge requiring a transnational response. As a result, the United States has increasingly asserted jurisdiction over crimes committed abroad that affect U.S. interests. At the same time, extradition treaties have proliferated, creating mechanisms for the transfer of alleged offenders. It is now time to create a framework for balancing competing assertions of criminal jurisdiction by multiple countries. The framework should maximize the interests of individual countries as well as the collective interests of the international community. Framing the prosecute/extradite dilemma in terms of global governance is a crucial starting point.