UNITED STATES JURISDICTIONAL CONSIDERATIONS IN INTERNATIONAL CRIMINAL LAW

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As technological developments have facilitated interactions among nations and their residents, the United States has followed the international trend of expanding jurisdiction over crime with international elements. This article will briefly discuss the traditional bases of asserting jurisdiction over such crimes.[1] The potential limitations to the assertion of these bases of jurisdiction are also discussed. New directions in the various jurisdicitional categories, all showing an expansion of jurisdiction, are examined. Finally, various mechanisms with which to reduce tensions and limit the inevitable conflicts which arise from the concurrent assertion of jurisdiction are suggested.

The very essence of criminal law is impregnated with the principle of the territorial sovereignty of the State. This principle requires courts within the particular State to apply the forum's criminal law, whereas in civil or commercial cases the courts may sometimes apply foreign law. The inability to apply foreign law makes conflict of jurisdiction problems in criminal law cases more important and more difficult to resolve. The potential for misunderstandings with other

1. For the purposes of this article, the term "crime" will include criminal sanctions imposed in a civil proceeding, as well as the more traditional concepts of criminal activity. In certain instances, the distinction between a civil and criminal matter is blurred in the American legal system. This is in contrast to other systems of law which clearly distinguish between civil and criminal actions.

States when they are denied the ability to assert criminal jurisdiction is much greater than in civil cases.[2]

When analyzing trends in United States criminal jurisdiction, it is useful to distinguish among (1) jurisdiction to prescribe (also referred to as legislative jurisdiction), (2) jurisdiction to enforce (or executive or enforcement jurisdiction) and (3) jurisdiction to adjudicate.[3]

I. JURISDICTION TO PRESCRIBE

Jurisdiction to prescribe is the authority of a State to make and apply its law to things, or to the conduct, relations, status or interests of persons via legislation, executive act or order, administrative rule or even court action.[4] According to the Restatement and subject to certain limitations, under international law the United States may exercise jurisdiction to prescribe and apply its law with respect to:

1. a. Conduct, a substantial part of which occurs within its territory;

b. The status of persons, or interests in things, present within its territory;

c. Conduct outside its territory which has or is intended to have substantial effect;

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2. *See, e.g.*, Szaszy, *Conflict-of-Laws Rules in International Criminal Law and Municipal Criminal Law in Western and Socialist Countries*, in 2 M. BASSIOUNI & V. NANDA, A TREATISE ON INTERNATIONAL CRIMINAL LAW 135-68 (1973). A doctrinal problem underlying jurisdictional and other international criminal legal issues is that international criminal law results from the convergence of two different legal disciplines which have emerged and developed ostensibly along different routes. These two disciplines, the criminal aspects of international law and the international aspects of natural criminal law, give international criminal law a schizophhrenic character and magnify the potential for doctrinal confusion and divergent approaches. Bassiouni, *The Penal Characteristics of Conventional International Criminal Law*, 15 CASE W. RES. J. INT'L L. 27 (1983).

3. RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES (Revised) § 401 at 96 (Tent. Draft No. 2, 1981) [hereinafter cited as RESTATEMENT]. Not all commentators agree on the categories of jurisdiction or the parameters of each category. *See, e.g.*, Blakesley, *United States Jurisdiction Over Extraterritorial Crime*, 73 J. CRIM. L. & CRIMINOLOGY 1109 (1982); Norton, *Extraterritorial Jurisdiction of U.S. Antitrust and Securities Laws*, 28 INT'L & COMP. L.Q. 575 n.1 (1979); Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law*, 76 AM. J. INT'L L. 280, 292 n.58 (1982); Feller, *Jurisdiction Over Offenses with a Foreign Element*, in BASSIOUNI & NANDA, *supra* note 2, at 5, 9-10 (1973). *See generally*, Green, *International Crimes and the Legal Process*, 29 INT'L & COMP. L.Q. 567 (1980). For a proper perspective, it is also useful to trace the growth of the jurisdictional unit through recorded history. *See, e.g.*, Muellen & Besharov, *The Scope and Significance of International Criminal Law*, in BASSIOUNI & NANDA, *supra* note 2, at 5, 6 (1973).

4. RESTATEMENT, *supra* note 3, introductory notes to Pt. IV (Jurisdiction and Judgments), at 87-95.

2. The conduct, status, interests or relations of its nationals outside its territory; or

3. Certain conduct outside its territory by persons not its nationals which is directed against the security of the State or certain State interests.[5]

A. Bases of Jurisdiction to Prescribe

Since the 1935 Harvard Research Drafts on International Law, the above theories have been identified with the following five bases of criminal jurisdiction: (1) territorial, (2) protective, (3) nationality, (4) passive personality and (5) universal.[6] Federal and state court decisions in the United States, as well as most textbooks and treatises, adopt these bases.[7]

1. *The Territorial Principle.* In general, territoriality is the typical and nationality the exceptional base for the exercise of jurisdiction. Both bases of jurisdiction may be relevant in some circumstances. For instance, jurisdiction based on effects in a particular territory is more easily utilized when it is applied to nationals of the State exercising the jurisdiction.[8]

Historically, three different practices have been noted regarding the claim of extraterritorial criminal jurisdictiion. One group of States, which includes the United States and the United Kingdom, emphasizes the territorial nature of a criminal act. Nations in this group do not admit that a State may punish an alien for a breach of criminal law where the act is committed outside its territory.[9] A second group, which includes France, Germany and the majority of States, also asserts jurisdiction on a territorial basis. In addition, these States allow the assertion of jurisdiction where acts are directed against the security of the State or its financial credit.[10] A third group, which includes Turkey and Italy, is not restrained in the exercise of jurisdiction by territorial factors. These nations assert their jurisdiction when the crime, wherever committed, is a social evil which all civilized nations are interested in suppressing. This juris-

5. *Id.* § 402, at 98.

6. *Harvard Research in International Law, Jurisdiction With Respect to Crime*, 29 AM. J. INT'L L. 435 (Supp. 1935).

7. Blakesley, *supra* note 3, at 2 n.5.

8. RESTATEMENT, *supra* note 3, § 402 comment b, at 98-99.

9. For background on extraterritorial criminal jurisdiction in English law, see Lew, *The Extraterritorial Criminal Jurisdiction of English Courts*, 27 INT'L & COMP. L.Q. 168 (1978); Akehurst, *Jurisdiction in International Law*, 46 BRIT. Y.B. INT'L L. 145 (1972-73).

10. *See, e.g.*, Feller, *supra* note 3, at 26-28.

diction is referred to as the universality principle. In practice, however, these States will assert jurisdiction only for acts of foreigners committed abroad when the "crimes" are prejudicial to the State or one of its nationals.[11]

Traditionally, the United States and the United Kingdom have at least theoretically denied the ability of a State to assert criminal jurisdiction outside of its territory against a non-national. They believe, however, that in certain circumstances a crime may be committed within the territory of a State and therefore be justiciable by its criminal courts even though the actor is physically outside the territory. Moreover, these States assert jurisdiction when an act is committed physically outside the territory but injures, harms or affects its citizens or interests located within its territory. The basis for jurisdiction in such cases is often referred to as "objective territorial jurisdiction."[12] Recently, U.S. prosecutors and courts have relied increasingly on the "objective territorial jurisdiction" or the "effects" doctrine, as it is also called.[13]

2. *The Protective Principle.* Under the protective principle, a State has the right to exert jurisdiction over a certain class of limited offenses which are committed outside its territory by non-nationals. This claim may be invoked to assert jurisdiction when the offenses are directed against the security of the State or against important State interests or functions.[14] While the protective principle is seldom invoked in the United States, it has been used to establish jurisdiction over non-nationals who make false statements on visa applications at U.S. consulates.[15] Some United States courts have asserted the protective principle simultaneously with the objective

11. 6 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 94-95 (1970).

12. Rex v. Godfrey, [1923] 24 K.B.; Ford v. United States, 273 U.S. 593 (1927). *See also* J. BRIERLY, THE LAW OF NATIONS 232-33 (5th ed. 1955).

13. *See, e.g.*, text accompanying notes 148-161 (discussion of the interaction between "effects" and "nationality" in the Marc Rich case, on the one hand, and in Bank of Nova Scotia II and Falconer cases on the other). Many crimes contained in the United States Code are based on interstate commerce and use of the mails, including federal securities laws.

14. RESTATEMENT, *supra* note 3, § 402 comment d, at 99; *Harvard Research in International Law, The Draft Convention With Respect to Crime*, arts. 7, 8, 29 AM. J. INT'L L. 435 (Supp. 1935); WHITEMAN, *supra* note 11, at 95-100. Representative offenses include: espionage, counterfeiting of the State's seal or currency, the falsification of official documents, perjury before consular officials and conspiracies to violate immigration and custom laws.

15. 18 U.S.C. § 1546 (1976). *See, e.g.*, United States v. Pizzarusso, 388 F.2d 8 (2d Cir. 1968), *cert. denied*, 392 U.S. 936 (1968); United States v. Rodriguez, 182 F. Supp. 479 (S.D. Cal. 1960); United States v. Archer, 51 F. Supp. 708 (C.D. Cal. 1943).

territoriality principle to support criminal jurisdiction.[16]

3. *The Nationality (or Active Personality) Principle.* The United States does not often base extraterritorial jurisdiction on the nationality of the offender.[17] This jurisdictional base, which is referred to as the nationality or active personality principle, is most often applied in situations which involve subsidiaries of United States corporations rather than to individual citizens.

The nationality principle is derived from the notion of State sovereignty under which nationals are entitled to their State's protection even while outside of its territorial boundaries. These individuals have a corresponding obligation of allegiance to national laws even when outside of the State of which they are citizens.[18] The nationality principle is universally recognized in international law, although its precise definition and application differ widely.[19]

United States federal criminal legislation, in comparison with other national penal codes such as the German Penal Code or the Japanese Draft Penal Code,[20] is not expressly based on nationality. Prosecution for treason in the United States, however, is a longstanding example of criminal jurisdiction based on the nationality principle. The implication of treason cases, specifically *Kawakita v. United States*,[21] is that treason can only be committed by one who is a citi-

16. *See, e.g.*, Rocha v. United States, 288 F.2d 545 (9th Cir. 1961), *cert. denied*, 366 U.S. 948 (1961). *See also* Blakesley, *supra* note 3, at 3.

17. RESTATEMENT, *supra* note 3, § 402(2), at 98. With the exception of legal areas such as tax, selective service and more recently foreign corrupt payments, criminal law has been the primary competence of state legislatures, which have followed the common law tradition of basing jurisdiction primarily on territorial principles and secondarily on residence and domicile rather than nationality. *Id.* § 402, reporters' notes, at 102.

18. Joyce v. Director of Public Prosecutions, 62 T.L.R. 208 (1946); M. BASSIOUNI, INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER 251 (1974); 1 L. OPPENHEIM, INTERNATIONAL LAW 290, 686-89 (8th ed. 1955).

19. BASSIOUNI, *supra* note 18, at 250-51. For five types of legislative enactments of foreign States implementing this principle, see SWEDISH PENAL CODE ch. I, art. I. *See also* Public Prosecutor v. Atoni, 32 INT'L L. REP. 140 (1960) (assertion of jurisdiction over Swede for auto accident in Germany); Re Gutierrez, 24 INT'L L. REP. 265 (1957) (assertion of jurisdiction by Mexican Court over Mexican citizens for theft of truck in Texas). These and other cases are discussed in S. WILLIAMS, INTERNATIONAL CRIMINAL LAW 47-54 (3d ed. 1978) (Unpub. casebook materials for course at Osgoode Hall Law School, York University, Toronto).

20. GERMAN PENAL CODE § 4; JAPANESE DRAFT PENAL CODE arts. 4, 5; George, *Extraterritorial Application of Penal Legislation*, 64 MICH. L. REV. 609, 620 (1966). *See generally* L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT, INTERNATIONAL LAW 445 (1980).

21. Kawakita v. United States, 343 U.S. 717 (1952). *See also* Gillars v. United States, 182 F.2d 962 (D.C. Cir. 1950); Chandler v. United States, 171 F.2d 921 (1st Cir. 1948), *cert. denied*, 336 U.S. 918 (1949).

zen. In contrast with decisions of courts in other countries,[22] United States courts are content to base jurisdiction in treason cases solely on the nationality principle. Other States often assert jurisdiction in such cases based on the protective principle.

Another traditional use of the nationality principle has been in the enjoining of trademark infringement where the acts were done outside of the United States.[23] Most of the traditional applications of the nationality principle, however, relate to national security. Such traditional applications include failure of United States citizens to comply with selective service law,[24] the Logan Act[25] and regulations promulgated under the Trading with the Enemy Act.[26]

In *Blackmer v. United States*,[27] the United States Supreme Court upheld the issuance of a subpoena, pursuant to statute, to a U.S. citizen residing abroad. The subpoena required his attendance in a United States court as a witness. In upholding the subpoena, the Supreme Court commented: "The jurisdiction of the United States over its absent citizen, so far as the binding effect of its legislation is concerned, is a jurisdiction *in personam*, as he is personally bound to take notice of the laws that are applicable to him and obey them."[28]

Some commentators have correctly criticized jurisdiction based on nationality alone[29] where the crime over which jurisdiction is asserted is not also a crime where it is committed.[30] In practice, the attempt to prosecute a person solely on the nationality principle necessitates cooperation from another State. In the absence of an extradition treaty, the willingness of the country to extradite may depend in part on the political relations of the United States vis-a-vis the other State, and in part on the exercise of restraint by the United States in extraterritorial enforcement of its criminal laws. Of course,

22. *See, e.g.*, Joyce v. Director of Public Prosecutions, [1946] Q.B. 347; Rex v. Neumann, [1949] 3 S. Afr. L.R. 1238.

23. Steele v. Bulova Watch Co., 344 U.S. 280 (1952).

24. 50 U.S.C. § 453 (Supp. III 1979) (this act requires every male United States citizen to register for military service).

25. 18 U.S.C. § 953 (this Act prohibits any United States citizen wherever located from carrying on any correspondence or intercourse with any foreign government in its relations with the United States).

26. 31 C.F.R. § 500.329(a)(1).

27. Blackmer v. United States, 284 U.S. 421 (1932).

28. *Id.* at 438.

29. The exception in which jurisdiction based on nationality alone seems appropriate is in cases related to national security. *See supra* notes 24-26.

30. Epstein, *The Extraterritorial Reach of Proposed Criminal Justice Reform Act of 1975-S.1.*, 4 AM. J. CRIM. L. 275, 284-85 (1976). *See, e.g.*, Note, *Extraterritorial Jurisdiction: Criminal Law*, 13 HARV. INT'L L.J. 346, 363 (1972).

choice of law and other policy considerations also come into play.[31]

4. *The Passive Personality Principle.* The passive personality principle permits a State, in certain circumstances, to apply its criminal law to an act committed outside its territory by a non-national because the victim of the act was its national. The principle is normally applied only in instances where terrorist and other organized attacks are made against a State's nationals because of their nationality. It also is applied when a State's ambassadors or government officials are assassinated.[32]

5. *Universal Jurisdiction.* Under the principle of universal jurisdiction a State may exercise jurisdiction to prescribe for a class of offenses known as *delicta juris gentium.*[33] These acts constitute crimes under international law which are recognized by the community of nations as warranting universal concern.[34] Such crimes by their nature threaten to undermine the very foundations of the enlightened international community.[35] Each State has the right to exercise jurisdiction over the offender, even where the other jurisdictional bases are not present. In order to exercise universal jurisdiction, however, the offender must be in the prescribing State's territory. The nexus between the offender and the *lex loci deprehensionis*[36] is considered the injury which the offense causes to the foundation and security of the entire community. As such, each State has the power to exercise criminal jurisdiction.[37] The offenses for which universal jurisdiction may be exercised include piracy, slave trade, attacks on or hijacks of aircraft, genocide, war crimes and terrorism.[38]

6. *The Representation Principle.* When the application of the traditional principles discussed above fails to establish jurisdiction, resort may be had to the representation principle. This residuary doctrine may be employed by a State faced with punishing an of-

31. *See* BASSIOUNI, *supra* note 18, at 252-55.

32. *See* Case of the S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J., ser. A, No. 10 (Judgement of Sept. 7); RESTATEMENT, *supra* note 3, § 402 comments e, f & g, at 100.

33. That is, crimes under international law.

34. RESTATEMENT, *supra* note 3, § 404, at 114.

35. Jescheck, *Crimes du droit des gens,* 36 R. INT'L DR. PENAL 503-544 (1965).

36. That is, the law of the place in which an offense is committed.

37. Feller, *supra* note 3, at 32-34.

38. Some of the international agreements providing for universal criminal jurisdiction are set forth in RESTATEMENT, *supra* note 3, § 404 reporters' note, at 116.

fender physically present in its territory for acts committed outside its territory. These illegal acts are typically of such a nature that the offender is not eligible for extradition to the other State. A jurisdictional problem of this nature ususally arises when (1) there is no mutual extradition agreement between the two countries, (2) the offender is a national of the extraditing State or (3) extradition is not worthwhile considering the *de minimis* nature of the offense.[39] In such instances, the State in whose territory the act was committed will request the State with custody to bring an action against the offender. A prerequisite for establishing this jurisdiction is that the offense must be recognized as a crime in both States. Without this dual recognition the State bringing the action has no legal basis to proceed.[40]

The representation principle extends the concept of *comminio juris*, that is, the will of nations to create a semblance of worldwide communal jurisdiction. Thus, the principle is an attempt to promote the idea that offenders have no asylum from punishment.[41] However, with but a few exceptions, application of the representation principle has been minimal.[42]

7. *Regulation of Activities Aboard Vessels or Aircraft.* Customary international law permits a State to apply its law to activities, persons or things aboard a vessel or aircraft registered in the State.[43] In addition, serious offenses committed aboard a foreign vessel or aircraft "in the commerce of the United States" may be within the jurisdiction of the United States under the objective territorial principle.[44]

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39. BASSIOUNI & NANDA, *supra* note 2 at 35 (1973).

40. *Id.* at 36.

41. *Id.* at 37.

42. *See, e.g.*, European Convention for the Punishment of Road Traffic Offenses, Nov. 30, 1964, Trites et Conventions Europeenees No. 52; CRIMINAL LAW OF SWITZERLAND art. 101 (Road Transport Law of Dec. 19, 1958).

43. J. SWEENEY, C. OLIVER & N. LEECH, THE INTERNATIONAL LEGAL SYSTEM, 146-55, 230-37 (2d ed. 1981).

44. RESTATEMENT, *supra* note 3, § 403 reporters' note 8, at 113. Criminal Jurisdiction in outer space, including the moon and other celestial bodies, on board spacecraft, space laboratories or other space objects in outer space is in need of clarification, although the Outer Space Treaty provides a beginning. *See* Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Jan. 27, 1967, 18 U.S.T. 2410, T.I.A.S. No. 6347, 610 U.N.T.S. 205. *See also* Gorove, *Criminal Jurisdiction in Outer Space*, in BASSIOUNI & NANDA, *supra* note 2, at 48-57 (1973).

B. Instances of Increased Tension Due to the United States' Expansion of Jurisdiction to Prescribe

Over the past twenty years, some States, particularly the United States, have attempted to prescribe their law on the basis of very broad conceptions of territoriality and nationality. Increased international tensions have resulted. Attention has also been focused on the pernicious effects which result when States make conflicting assertions of jurisdiction. For example, enforcement of the United States Trading with the Enemy Act against Canadian subsidiaries of United States companies which trade with China has strained relations between the United States and Canada.[45] Another example occurred in 1964-65, when France became incensed over the Fruehauf episode, which resulted from the participation by a French subsidiary of a United States-owned company in a transaction with China. The transaction took place during a period when France was encouraging and the United States was prohibiting trade with China.[46] Resentment has also occurred between the United Kingdom, France, Japan and the United States with respect to shipping. The United States has resented efforts by these three countries to give governmental protection to what it considers monopolistic or unfair practices. In turn, these three States resent attempts by the United States Federal Maritime Commission to set rules for ocean shipping conferences.[47]

More recently, extraterritorial jurisdiction by the U.S. Securities and Exchange Commission (SEC) has also resulted in tension and resentment abroad.[48] More notable, however, have been attempts by the United States Department of Justice to enforce United States antitrust laws abroad. The United States investigation of the Swiss

45. *See, e.g., Joint Statement on Export Policies of July 9, 1958*, 39 DEP'T ST. BULL. 209 (1959); Corcoran, *The Trading With the Enemy Act and the Controlled Canadian Corporation*, 14 MCGILL L.J. 174 (1968); GOVERNMENT OF CANADA, FOREIGN DIRECT INVESTMENT IN CANADA (The Gray Report) (1972).

46. A. LOWENFELD, TRADE CONTROLS FOR POLITICAL ENDS 80-93 (1977); Craig, *Application of the Trading With the Enemy Act to Foreign Corporations Owned by Americans: Reflections on Fruehauf v. Massardy*, 83 HARV. L. REV. 579 (1970).

47. *See, e.g.*, A. CHAYES, T. EHRLICH & A. LOWENFELD, INTERNATIONAL LEGAL PROCESS 348-488 (1968); May, *The Status of Federal Maritime Commission Shipping Regulation Under the Principles of International Law*, 54 GEO. L.J. (1966); O.E.C.D. COMPROMISE, *reprinted in* 52 DEP'T ST. BULL. 188 (1965).

48. *See, e.g.*, Loomis & Grant, *The U.S. Securities and Exchange Commission, Financial Institutions Outside the U.S. and Extraterritorial Applications of the U.S. Securities Laws*, 1 J. COMP. COR. L. & SEC. REG. 3 (1978). *But see* Widner, *The U.S. Securities Laws—Banking Law of the World? A Reply to Messrs. Loomis and Grant*, 1 J. COMP. CORP. L. & SEC. REG. 39 (1978). *See also* H. STEINER & D. VAGTS, TRANSNATIONAL LEGAL PROBLEMS 1047-74 (2d ed. 1976). See the cases cited in RESTATEMENT, *supra* note 3, § 416, at 144.

watch industry in the 1960's strained relations with Switzerland.[49] Earlier efforts to stop cartels in electric light bulbs and nylon resulted in conflict between the United States, the Netherlands and the United Kingdom.[50]

Another example of the United States' assertion of a very broad concept of territorial jurisdiction is the recent *Datasaab* case.[51] On April 24, 1984, a U.S. District Court fined a major Swedish electronics firm, Datasaab Contracting AB, 3.1 million dollars for illegally selling the Soviet Union a highly sophisticated TERCAS radar system in violation of the United States export control law. The indictment against Datasaab—the first charge of United States export law violations filed against a foreign company—was precedent-setting because the company was half-owned by the Swedish government at the time of the transfers. In this case, the company wanted to continue doing business with the United States, so it agreed to be bound by the court's decision. The fine equaled the value of the goods shipped.[52]

A final example of the United States attempts to expand its jurisdiciton to prescribe is shown in the recent efforts to reform federal criminal statutes. Areas of criminal activity which are more specialized, such as transnational terrorism, have been the subject of sweeping U.S. legislation.[53] Unfortunately, the politicization of transnational terrorism and the failure of many developing countries to agree on definitions of terrorism limit the ability of the United States to enforce such laws when terrorists take haven within their borders.

In addition to the aforementioned instances of increasing ten-

49. COMMON MARKET AND AMERICAN ANTITRUST 311-363 (Rahl ed. 1970); Samie, *Extraterritorial Enforcement of United States Anti-trust Laws: The British Reaction*, 16 INT'L LAW. 313 (1982).

50. *See, e.g.*, EBB, REGULATION AND PROTECTION OF INTERNATIONAL BUSINESS 555-82, 587-98 (1964). *See also* K. BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD 46-51 (1958).

51. United States v. Datasaab Contracting, AB., No. 84-130 Crim. (D.D.C. Apr. 24, 1984) (Datasaab pleaded Nolo contendre).

52. Wash. Post, Apr. 28, 1984, at A1, col. 1. Corporations violating export control laws can be barred from future trading with U.S. companies, causing them severe economic hardship. For strategies in prosecuting and defending a request for mutual assistance in criminal matters in cases involving the Export Administration Act, see Zagaris & Kochinke, *Swiss Supreme Court Grants U.S. Request in the U.S.S.R. Computer Case*, 56 TAXES INT'L 81 (June 1984).

53. *See generally, Firearm Felonies By Foreign Diplomats, 1984: Hearings on S.2771 Before the Subcomm. on Security and Terrorism of the Senate Comm. on the Judiciary*, 98th Cong., 2d Sess. (1984).

sion due to the assertion of conflicting jurisdiction, there are countervailing legal and policy restrictions which limit the United States jurisdiction to prescribe.

C. Limitations on Jurisdiction to Prescribe

1. *Constitutional Limitations.* The United States Constitution, the Bill of Rights and principles of federalism limit the jurisdiction of the United States Congress to prescribe and apply law. Congress, however, has been held to possess authority, often referred to as its "foreign affairs power," stemming from the implicitly sovereign power of the United States government.[54] States are limited in their power to prescribe law not only by the limitations of international law, but also by the Supremacy Clause, United States treaties and federal law.[55] In addition, states are precluded from intruding on the exclusive federal authority in foreign affairs.[56] Subject to these limitations, exercise of jurisdiction by states is governed by the same jurisdictional principles whether the exercise of jurisdiction has international or only domestic implications.[57] Extraterritorial application of law by states has been based on acts or omissions having an "effect" within the state[58], and additionally on slave trading, attacks on or hijacking of aircraft, genocide, war crimes and terrorism.

2. *Limitations of Reasonableness.* Even if one of the bases for jurisdiction is present, a State may not apply law to conduct having links with another State or States when the exercise of such jurisdiction is unreasonable. The determination of whether the exercise of jurisdiction is unreasonable is evaluated in view of all relevant factors. These include:

> (1) the extent to which the activity (a) occurs within the regulating State, or (b) has substantial, direct, and foreseeable effect upon or in the regulating State;
>
> (2) the links, such as nationality, residence, or economic activity, between the regulating State and the persons principally responsible for the activity to be regulated, or between that State and those whom the law or regulation is intended to protect;

54. *See, e.g.*, United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318 (1936); Perez v. Brownwell, 356 U.S. 253 (1967).

55. Hines v. Davidowitz, 312 U.S. 52 (1941).

56. Zschernig v. Miller, 309 U.S. 429, 432 (1968).

57. *See generally* George, *supra* note 20; Rotenburg, *Extraterritorial Legislative Jurisdiction and the State Criminal Law*, 38 TEX. L. REV. 763 (1960).

58. Strassheim v. Daily, 221 U.S. 280, 285 (1911).

(3) the character of the activity to be regulated, the significance of regulation to the regulating State, the extent to which other States regulate such activities, and the extent to which the goals of such regulations are generally accepted;

(4) the existence of justified expectations that might be protected or hurt by the regulation in question;

(5) the significance of regulation to the international political, legal or economic system;

(6) The extent to which another State may have an interest in regulating the activity; and

(7) the potential of conflict with regulation by other States.[59]

In addition to these factors, an exercise of jurisdiction may be unreasonable if it requires a person to take action that would violate a regulation of another State, even if it is not unreasonable under the above criteria. Priority between conflicting exercises of jurisdiction is determined by evaluating the respective interests of the regulating States in view of the seven factors.[60]

3. *Limitations Imposed by International Agreements.* The Draft European Convention on Conflicts of Jurisdiction in Criminal Matters also provides for priorities to determine jurisdictional conflicts. The Convention confers upon one State the primary right to exercise jurisdiction while simultaneously recognizing the jurisdiction claimed by other States on the basis of their international criminal law. The Convention also provides procedural protection to foreigners tried by courts in the State of primary jurisdiction and introduces the safeguard of *non bis in idem*. A second State is thereby prevented from trying the offender again for the same offense once he has stood trial in the first State. In general, the State on whose territory the offense is committed has priority.[61] The Convention also provides means for collaboration among States that each have jurisdiction.[62]

4. *Limitations Imposed by "Blocking Statutes."* By the end of 1980, at least seven foreign States and two Canadian provinces had enacted "blocking statutes," which gave their citizens protection

59. RESTATEMENT, *supra* note 3, § 403(2), at 103.

60. *Id.* § 403(3) at 105. *See also* Lowenfeld, *Public Law in the International Arena: Conflict of Laws, International Law, and Some Suggestions For Their Interaction*, 163 RECUEIL DES COURS 321 (1979).

61. Draft European Conventions on Conflicts of Jurisdiction in Criminal Matters, art. 2.

62. *Id.* art. 8. *See also* COUNCIL OF EUROPE, DOC. NO. 1873, REPORT ON THE SETTLEMENT OF CONFLICTS OF JURISDICTION IN CRIMINAL MATTERS (1965).

against inquiries by authorities in the United States.[63] In 1980, the United Kingdom enacted a law directed specifically against assertion of "extraterritorial jurisdiction" by the United States.[64] The law permits the British Minister of Trade to direct persons in Great Britain to disobey the laws or court orders of an "overseas country" insofar as they apply outside the territorial jurisdiction of the country. This law applies where the Minister determines that compliance with the overseas law or order would be damaging to the trading interests of the United Kingdom or would infringe on its own jurisdiction.

In response to these and similar reactions, some members of the United States legal community are attempting to modify some assertions of jurisdiction.[65] Attempts to limit the assertion of criminal jurisdiction to prescribe are undertaken primarily by United States academic and advisory bodies. In contrast, the promulgation of regulations by the Reagan Administration to extend export controls on oil and gas technology to the Soviet Union has again sparked controversy and resentment against extraterritorial assertion of United States jurisdiction. These regulations include exports of goods originating outside of the United States and technical data of U.S.-owned or controlled companies wherever organized or doing business, as well as foreign-produced products of United States technical data. The violation of these regulations may invoke criminal as well as civil penalties.[66]

II. JURISDICTION TO ENFORCE CRIMINAL LAW

"Jurisdiction to enforce" is the exercise by a State of authority to compel or induce compliance. In criminal law this means imposing sanctions for noncompliance with laws and regulations, whether through judicial proceedings or otherwise.[67] Jurisdiction to enforce

63. Note, *Foreign Nondisclosure Laws and Domestic Discovery Orders in Antitrust Litigation*, 88 YALE L.J. 612 (1979).

64. Protection of British Trading Interests Act, ch. 11 (1980).

65. *See, e.g.*, RESTATEMENT, *supra* note 3, § 415 reporters' notes 5, 7, at 140-141.

66. *See, e.g.*, 47 C.F.R. § 27250 (1982). *See generally* Dresser Industries, Inc. v. Baldridge, 549 F. Supp. 108 (D.D.C. 1982) (plaintiff seeking injunctive relief against Commerce Department sanctions against him for violation of oil and gas technology export controls with regard to the Soviet Pipeline case). *See also* Moyer & Mabry, *Export Controls as Instruments of Foreign Policy: The History, Legal Issues, and Policy Lessons of Three Recent Cases*, 15 L. & POL'Y INT'L BUS. 1, 108-116 (1983); Marcuss & Richard, *Extraterritorial Jurisdiction in United States Trade Law: The Need for a Consistent Theory*, 20 COLUM. J. TRANSNAT'L L. 439 (1981); ABA Comm. on the Extraterritorial Application of U.S. Law, Draft Recommendations (1983) (Statement of Policy on Extraterritorial Application of the Export Administration Act).

67. RESTATEMENT, *supra* note 3, introductory notes to Pt. IV (Jurisdiction and Judgments), at 87-95.

criminal law is normally exercised by administrative agencies. Under the Foreign Corrupt Practices Act,[68] Congress delegated to the SEC the authority to promulgate regulations requiring strict accounting controls and mandatory disclosure. Federal agencies have increasingly become more aggressive in enforcing criminal law extraterritorially.

A. The Expanded U.S. Assertion of Jurisdiction to Enforce

On September 21, 1981, President Reagan, in order to stem the tide of illegal immigration to the United States, proclaimed in an Executive Order[69] that the entry of undocumented aliens from the high seas would be prevented by the interdiction of vessels carrying such aliens. The order authorizes the Secretary of State to enter into cooperative arrangements with governments of countries from which the illegal immigrations were occurring, and also authorizes the Coast Guard to stop and board vessels of foreign countries with which the United States has such cooperative agreements. The Coast Guard may only board ships outside the territorial waters of the United States when there is reason to believe that such vessels are engaged in the irregular transportation of persons in violation of U.S. law, or the law of a country with which the United States has an arrangement. The rationale for this assertion of extraterritorial jurisdiction is the protective principle, that is, to protect United States sovereignty from a rising tide of undocumented aliens.

The U.S. Coast Guard may also intercept vessels on the high seas which are listed on its weekly publication as those suspected of transporting illicit narcotics. In *United States v. Keller*,[70] the Coast Guard located such a vessel on the high seas thirty miles north of Puerto Rico heading in a westerly direction towards the United States. The U.S. vessel, which had an American crew, was searched and 300 pounds of marijuana were discovered. In rejecting the defendants' motion to dismiss for lack of subject matter jurisdicton, the court held that although the acts allegedly occurred outside United States territory, jurisdiction existed under the protective principle.[71] The rationale behind the holding was that the planned invasion of U.S. customs territory had a potentially adverse effect on security and governmental functions. Specifically, such an invasion violated

68. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (1977).
69. Exec. Order No. 12,324, 46 Fed. Reg. 48,109 (1981).
70. State v. Keller, 451 F. Supp. 631 (1978).
71. *Id.* at 635.

the prohibition under U.S. customs law of the importation of certain controlled substances.[72]

In 1981 Congress extended limited jurisdiction over drug enforcement on the high seas to the U.S. armed forces.[73] Previously, this jurisdiction was the exclusive province of the Coast Guard. An amendment to the 1876 Possi Comitatus Act authorizes the armed forces to provide training, advice and the use of military facilities and equipment to civilian authorities, most notably the Coast Guard and U.S. Customs.[74] Originally, the Possi Comitatus Act was enacted to prevent U.S. military personnel from making civil law arrests and, in general, from acting as civil law enforcement agents. The new law allows the Armed Forces to work closely with law enforcement agencies engaged in stemming the flow of illegal substances into the United States. The amendment, however, keeps intact the basic premise of the Possi Comitatus Act, namely, that U.S. armed forces personnel cannot arrest civilians outside of U.S. military bases.

The jurisdictional implications of this amendment are already being felt. In July 1983, the U.S.S. *Kidd*, a Navy destroyer, opened fire on a "suspicious looking" freighter, the *Ranger*, 40 miles north of Puerto Rico in international waters.[75] The freighter, registered in Honduras, was followed by the *Kidd* and eventually hit. The *Kidd*, following the practice of Navy vessels involved in this type of operation, lowered its Navy flag and raised a Coast Guard flag before it opened fire.[76] Incidents such as this indicate clearly that the current Administration is intent on extending to new limits the United States' jurisdiction to enforce its criminal laws.

In addition, the Internal Revenue Service has recently promulgated proposed regulations for U.S. citizens who are shareholders of certain foreign corporations in order to prevent, *inter alia*, tax evasion.[77] Similarly, sections 336 through 342 of the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA) provide for enforcement

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72. *Id.* The Court, however, ruled that it did not have jurisdiction over the second count of the indictment (possession of marijuana with intent to distribute) under the protective principle, apparently because the federal statutes proscribing conspiracy to import and attempting to import marijuana could be applied extraterritorially. The statute which proscribed possession with intent to distribute could only be applied within the boundaries of the United States. *Id.* at 635 n.8. *See* Note, *Drug Smuggling and the Protective Principle: A Journey into Unchartered Waters*, 39 LA. L. REV. 1189 (1979).

73. Possi Comitatus Act, Pub. L. No. 97-86 (codified at 18 U.S.C. 1385 (1982)).

74. *Id.*

75. National L.J., Feb. 13, 1984, at A1, col. 4.

76. *Id.*

77. 46 C.F.R. 7401 (Prop. Amend. to § 1.600-1 of Income Tax Regulations). *See also*

of IRS summonses on United States citizens residing outside the United States.[78] These regulations restrict taxpayers from using the requested documentation to prove their view of the transactions in court. Likewise, the Commodity Futures Trading Commission (CFTC) has recently published a proposed rule which would require a Futures Commission Merchant (FCM), trader or foreign broker to provide the Commission, upon special call, market information concerning its accounts.[79] The proposed rule also provides that if the FCM trader or foreign broker fails to respond to the special call, the CFTC may direct the appropriate contract market and all FCMs to prohibit further trades.[80] This proposed rule, as the cases discussed below and recent Congressional hearings demonstrate,[81] clearly shows that the CTFC is promulgating rules which will increasingly extend its extraterritorial criminal jurisdiction.[82]

B. The Results of this Trend

As a result of the trend toward expanded assertion by the United States of its jurisdiction to enforce criminal laws, individuals and institutions are increasingly caught in situations where they are forced to violate either U.S. law or the law of their domicile. While compromises are sometimes achieved, such enforcement efforts add fuel to the resentment of extraterritorial assertions of criminal jurisdiction.[83] In response, many foreign nations produce blocking legislation. Unless the U.S. government either shows more restraint or concludes bilateral or multilateral agreements, its attempts to unilaterally assert its jurisdiction to enforce criminal laws will produce more tension and further diminish United States political interests abroad.[84]

Zagaris, *The IRS Public Hearing on the Books and Records of Foreign Entities*, 26 TAXES INT'L 6, 7 (Dec. 1981).

78. 46 C.F.R. 7401 (Prop. Amend. to § 1.600-1 of Income Tax Regulations).

79. 47 C.F.R. § 23,951 (June 2, 1982).

80. *Id.*

81. *See generally* COMM. ON GOVERNMENT OPERATIONS, SILVER PRICES AND THE ADEQUACY OF FEDERAL ACTIONS IN THE MARKET PLACE 1979-80, H.R. DOC. NO. 395, 97th Cong., 1st Sess. (1981).

82. *See* Greenstone, *The Foreign Commodity Trader: A Regulatory Dilemma*, 30 AD. L. REV. 535-48 (1978).

83. *See* Zagaris, *Judge Paine Socks it to the Bank of Nova Scotia—The Continuing Saga of the Bank of Nova Scotia Case*, 54 TAXES INT'L 12-20 (Apr. 1984).

84. *See* Zagaris, *Developments in International Enforcement*, 49 TAXES INT'L 4 (Nov. 1983).

III. JURISDICTION TO ADJUDICATE CRIMINAL LAW

"Jurisdiction to adjudicate" is the authority of a State to subject persons to the process of its courts, and particularly to enforce the State's laws and regulations. Since the three categories of jurisdiction are implemented by different branches of United States federal and state governments, and since jurisdictional decisions are implemented by constitutional law, international law, statutory interpretation, foreign policy and practical considerations, such decisions are not always consistent or rational.[85]

A. General Principles

A United States court can try a criminal action for violation of domestic law, but not for violation of a criminal law of a foreign State.[86] Even if authorized by statute, the trial of a defendant for violation of a foreign law could be deemed a denial of due process under the Fifth and the Fourteenth Amendments. Courts in the United States can exercise jurisdiction to adjudicate only pursuant to law or the Constitution. Subject to Article III and other constitutional limitations, Congress determines the jurisdiction of federal courts.[87] The jurisdiction of state courts in the United States is determined by its own state constitution and is further limited by the United States Constitution, particularly the supremacy of treaties and federal law under the Supermacy Clause.[88]

According to the Restatement of Foreign Relations Law, which in turn adopts the principles of the Restatement of Conflicts of Law, a State may exercise jurisdiction (criminal or civil) over a person if the relationship of the person (or thing) to the State makes the exercise of such jurisdiction reasonable.[89] A State's exercise of jurisdiction is reasonable if, at the time jurisdiction is asserted, any one of the following applies: (1) the person (or thing) is present in the territory of the State (other than transitorily); (2) the person, if a natural person, is either domiciled, a resident or a national of the foreign State; (3) the person, if a legal person, is organized pursuant to the law of the State; (4) the person, whether natural or judicial, regularly conducts business in the State; (5) the person, whether natural or judicial, had carried on activity in the State which created liability, but

85. RESTATEMENT, *supra* note 3, at 93.
86. United States v. Hudson and Goodwin, 11 U.S. (7 Cranch) 32, 34 (1812).
87. U.S. CONST. art. III.
88. RESTATEMENT, *supra* note 3, § 442 comment b, at 164.
89. *Id.* § 441(1).

only in respect of such activity; or (6) the person, whether natural or judicial, had conducted outside the State an activity having a substantial, direct or foreseeable effect within the State, which created liability, but only in respect to such activity.[90]

In addition, several constitutional issues, particularly those dealing with safeguarding the rights of the accused, may arise when an individual is arrested for an offense in which international elements are present. For example, under the NATO Status of Forces Agreements[91] and comparable agreements with other countries, the United States has authority to exercise substantial criminal jurisdiction over its military and other defense personnel present in those countries.

Many cases have recently arisen involving contempt convictions and other penalties against persons, including foreign individuals and entities, for failure to respond to subpoenas.[92] These penalties have been upheld in most cases, despite the fact that many of the defendants have claimed the conflicting law of a foreign nation as a defense.[93] Negotiations between the United States and countries in which such subpoened persons reside have resulted in informal agreements. Thus, agreements such as the Memorandum of Understanding on Insider Trading (MOU) between the United States and Switzerland can be expected to further extend the authority of United States courts to enforce their discovery orders in criminal cases.[94]

Moreover, many recent cases have litigated the application of United States constitutional protections abroad. The bulk of these cases have concerned warrantless searches and seizures by the United States Coast Guard in which issues of jurisdiction as well as the admissibility of evidence have been raised.[95] Other cases have con-

90. *Id.* § 442(2).

91. North Atlantic Treaty Status of Forces Agreement, June 19, 1951, 4 U.S.T. 1792, T.I.A.S. No. 2846, 199 U.N.T.S. 67. *See also* Coker, *The Status of Visiting Military Forces in Europe: NATO-SOFA, Comparison*, in BASSIOUNI & NANDA, *supra* note 2, at 115 (1973).

92. Blackmer v. United States, 284 U.S. 421 (1932); U.S. v. Toyota Motor Corp., 569 F. Supp. 1158 (C.D. Cal. 1983).

93. *See, e.g.*, U.S. v. Vetco, Inc., 644 F.2d 1324 (9th Cir. 1981); U.S. v. Field, 532 F.2d 404, 407 (5th Cir. 1976), *reh'g denied*, 535 F.2d 660 (5th Cir. 1976), *cert. denied*, 45 U.S.L.W. 3341 (1976). *See also* Browne, *Extraterritorial Discovery: An Analysis Based on Good Faith*, 83 COL. L. REV. 1320 (1983); Note, *Compelling Production of Documents in Violation of Foreign Law: An Examination and Re-evaluation of the American Position*, 50 FORDHAM L. REV. 877 (1982).

94. *See, e.g.*, Zagaris, *The Netherlands Signs a Treaty with the U.S. for 'Mutual Assistance in Criminal Matters' which Embraces Tax Matters*, 30 TAXES INT'L 4 (Apr. 1982); Zagaris, *The Swiss/U.S. Consultations on 'Insider Trading'*, 30 TAXES INT'L 46 (Apr. 1982).

95. See the excellent analysis in Salzburg, *The Reach of the Bill of Rights Beyond the Terra*

cerned conservation and management of fishery resources over areas beyond the territorial waters of the United States.[96]

B. Warrantless Searches by the Coast Guard

In *United States v. Warren*,[97] the Coast Guard boarded a United States-registered vessel on the high seas to conduct a safety and documentation inspection. After boarding, the officers spotted marijuana and arrested the defendants. The vessel was approximately 700 miles from the United States between Haiti and Cuba in the Westward Passage. The Coast Guard, at the time of boarding, had no reason to suspect anyone on board of wrongdoing and had not witnessed any suspicious activity on the vessel. In addition, the Coast Guard did not know that the ship's destination was Columbia. On the first appeal, the defendants' conviction was reversed because the boarding party included officials of the Customs Service and the Drug Enforcement Agency, as well as Coast Guard officers. Customs agents are unauthorized to board, question or search without probable cause to suspect customs violations. The Fifth Circuit Court of Appeals, in an *en banc* 8-6 decision,[98] reversed on the basis that the Coast Guard authority is plenary as to U.S.-flag vessels beyond the twelve-mile contiguous zone.[99] Thus, the Court held that such officials may seize and board U.S.-flag vessels on the high seas without probable cause or any other particularized suspicion.[100]

In *United States v. Conroy*,[101] another Fifth Circuit case, the conviction of defendants resulting from the search of a U.S.-flag vessel in foreign territorial waters was also upheld. The court stated that the authority of the United States to impose its jurisdiction over U.S.-flag vessels is plenary, regardless of where they are found on the high seas[102] or in foreign waters.[103] The Court rejected the defend-

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Firma of the United States, in INTERNATIONAL ASPECTS OF CRIMINAL LAW: ENFORCING UNITED STATES COMMUNITY LAW IN THE WORLD COMMUNITY 107-54 (R. Lillich ed. 1981); Nanda, *Enforcement of U.S. Laws at Sea—Selected Jurisdicitonal and Evidentiary Issues*, in INTERNATIONAL ASPECTS OF CRIMINAL LAW: ENFORCING UNITED STATES COMMUNITY LAW IN THE WORLD COMMUNITY 155-77 (R. Lillich ed. 1981).

96. United States v. Warren, 550 F.2d 219 (5th Cir. 1977), *rev'd*, 578 F.2d 1058 (5th Cir. 1978) (en banc).

97. *Id.*

98. United States v. Warren, 578 F.2d 1058 (5th Cir. 1978) (en banc).

99. *Id.* at 1064-65 (upholding the Coast Guard authority under 14 U.S.C. § 89 (1976)). See the corresponding statute of the United States customs authority under 19 U.S.C. § 1581(a)(1976).

100. *Id.* at 1068.

101. United States v. Conroy, 589 F.2d 1258 (5th Cir. 1979).

102. *See, e.g.*, Maul v. United States, 274 U.S. 501 (1927).

ants' contention that apprehension in foreign territorial waters was illegal. The Court went on to say that if an improper intrusion was an offense at all, then it was an offense only to the foreign sovereign whose territory had been violated.[104]

The trend of extending United States jurisdiction at sea was temporarily interupted in *United States v. Piner*.[105] In *Piner*, the Ninth Circuit Court of Appeals suppressed marijuana found in a routine search of a pleasure boat in San Francisco Bay. The Court concluded that the random boarding of a vessel after dark for safety and registration inspection without cause to suspect noncompliance is not justified.[106] The Ninth Circuit went on to hold that a stop-and-board inspection after dark must be for cause, which required a reasonable and articulable suspicion of noncompliance, or must be conducted under written administrative standards so that the decision to search is not left to the sole discretion of a Coast Guard officer.[107]

In the case of *United States v. Rubies*,[108] however, the Ninth Circuit Court of Appeals upheld the authority of the Coast Guard to board a flagless vessel on the high seas for a certificate and identification check. Subsequent to the check, the Coast Guard seized the boat after finding marijuana. The Court distinguished *Piner* as a case in which, unlike *Rubies*, there was no probable cause to suspect a violation.[109] The decision has been criticized and explained by the fact that Judge Kennedy, a strong dissenter in *Piner*, was a member of the *Rubies* panel.[110]

C. Enforcement of United States Fisheries Laws

Enforcement by the Coast Guard of U.S. fisheries laws has also led to cases contesting United States jurisdiction. In *United States v. F/V Taijo Maru*,[111] the Coast Guard sighted a Japanese vessel within the U.S. 1966 Contiguous Fisheries Zone. The Coast Guard, having reason to believe that the vessel was fishing in the zone in violation of U.S. fisheries law, gave chase and seized the vessel on the high seas. The defendants argued that pursuant to Articles 23 and 24 of the

103. *Conroy*, 589 F.2d at 1266.
104. *Id.* at 1268. *See also* The Richmond, 13 U.S. (9 Cranch) 102 (1815) (J. Marshall).
105. United States v. Piner, 608 F.2d 358 (9th Cir. 1979).
106. *Id.* at 361.
107. *Id.* at 360.
108. United States v. Rubies, 612 F.2d 397 (9th Cir. 1979).
109. *Id.* at 404.
110. *See* Salzburg, *supra* note 95, at 131
111. United States v. F/V Taijo Maru, 395 F. Supp. 413 (D. Me. 1975).

1958 Geneva Convention on the High Seas,[112] the United States did not have the authority to conduct hot pursuit for violation of exclusive fishery rights occurring within twelve miles of the coast.[113] The Court disagreed with the defendant's contention that a coastal State could establish a contiguous zone only to enforce its customs, fiscal, immigration or sanitary regulations.[114] Instead, the Court stated that the legislative history indicated that the drafters of the Geneva Convention could not agree as to whether a contiguous zone could be established for the purpose of enforcing domestic fisheries laws.[115] Therefore, the Court held that the 1966 Contiguous Fisheries Zone Act controlled and authorized the actions of the Coast Guard.[116]

In *United States v. Tsuda Maru*,[117] a federal district court upheld a warrantless search of a Japanese fishing vessel which was sighted fishing 167 miles from a U.S. island in the Bering Sea and then seized for violating the Fish and Conservation Act of 1976 (FCMA).[118] No suspicion or probable cause of a FCMA violation existed when the Coast Guard initially boarded the vessel for a routine inspection. The Court, however, interpreted the statutory language to authorize warrantless searches.[119] Further justification was based on a recognized exception to the warrant requirement for searches of licensees who are authorized by statute in a closely regulated industry.[120] Thus, the Court analogized the regulation of fisheries to federal gun control and alcohol regulations—areas of the law which have traditionally been within the exception to warrant requirements.[121]

D. Joint Action by United States and Foreign Law Enforcement Offices

Another group of cases which have raised issues of the propriety of conduct by law enforcement officials involve situations in which United States law enforcement officials have participated with foreign

112. 1958 Geneva Convention on the High Seas, Apr. 29, 1958, arts. 23, 24, 13 U.S.T. 2312, T.I.A.S. No. 520, 450 U.N.T.S. 82.

113. *F/V Taijo Maru*, 395 F. Supp. at 419.

114. *Id.*

115. *Id.* at 419-20.

116. *Id.* at 421.

117. United States v. Tsuda Maru, 470 F. Supp. 1223 (D. Alaska 1979).

118. 88 U.S.C. §§ 1801-22 (1976).

119. *Tsuda Maru*, 470 F.Supp. at 1228.

120. *Id.*

121. *Id.* at 1230. Also see the excellent analysis of this and the *F/V Taiyo Maru* cases in Nanda, *supra* note 95, at 172-76.

officials in the investigation, search, arrest and trial of U.S. citizens.[122] These cases, which have involved tax fraud,[123] theft of bank funds,[124] burglary[125] and narcotics violations,[126] have also raised serious questions about the extraterritorial application of United States constitutional protections. Many have been criticized.[127]

E. Enforcement Actions by the Securities and Exchange Commission and the Commodities Futures Trading Commission

A series of enforcement actions by the SEC against Swiss and other foreign numbered accounts reflect a trend by the SEC to assert extraterritorial criminal jurisdiction. This trend is reflected in two recent insider trading cases, *SEC v. Banca della Svizzera Italiana, et al.*, referred to as the "St. Joe case,"[128] and *SEC v. Certain Unknown Purchasers of the Common Stock of Santa Fe International Corporation*.[129] In both cases, allegations were made that customers of Swiss banks used material non-public information to purchase securities prior to the public announcement of takeover bids for St. Joe and Santa Fe. In each case, the SEC was able to override claims made by foreigners that they were protected from SEC orders by secrecy laws. In the *Santa Fe* case, the SEC obtained an order from a U.S. District Court blocking the transfer of assets of the Santa Fe International Corporation. The SEC alleged that traders had inside, non-public information relating to merger discussions, negotiations and proposals between Santa Fe and Kuwait Petroleum Corporation.

In the *Banca della Svizzera Italiana* case,[130] a U.S. District Court ordered the Swiss bank which had bought options in the U.S. for an American client, to disclose the name of the client to the SEC.

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122. *See* Salzburg, *supra* note 95, at 133-151.

123. Stonehill v. United States, 405 F.2d 738 (9th Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977).

124. United States v. Marzano, 537 F.2d 527 (7th Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977).

125. United States v. Jordan, 23 C.M.A. 525, 50 C.M.R. 664 (1975), 24 C.M.A. 156, 51 C.M.R. 375 (1976).

126. United States v. Mundt, 508 F.2d 904 (10th Cir.), *cert. denied*, 421 U.S. 949 (1975).

127. *See* Salzburg, *supra* note 95, at 133-151.

128. S.E.C. v. Banca della Svizzera Italliana, et. al., 32 Fed. R. Serv.2d 1650 (S.D.N.Y. 1981). The case is so-called because it involved transactions in the common stock of the St. Joe Minerals Corporation.

129. S.E.C. v. Certain Unknown Purchasers of the Common Stock of Santa Fe Int'l Corp., No. 81 Civ. 6553 (S.D.N.Y. 1981). *See also* Fedders, *Policing Methods to Obtain Evidence Abroad*, 18 INT'L LAW 89, 100-01 (1984).

130. *Banca della Svizzera Italiana*, et.al., 32 Fed. R. Serv.2d 1650.

The Court rejected the Swiss bank's attempt to invoke Swiss secrecy laws.[131] The SEC charged that several unidentified customers of the Swiss bank made illegal profits through "insider trading" by buying options in St. Joe Minerals Corporation knowing that Seagram Company would announce a takeover.[132]

Other enforcement actions by the SEC have been impeded by the use of financial intermediaries, foreign bank accounts and foreign secrecy laws.[133] The cases have involved alleged violations of the Williams Act,[134] which requires any person or group of persons who acquire more than five percent of a class of restricted securities to disclose their holdings in a filing with the SEC under Sections 13(g) and (d) of the Exchange Act.[135] The Williams Act also requires similar disclosures by persons who make tender offers.[136]

Foreign bank secrecy laws have also hindered the investigation and prosecution of schemes to manipulate the market price of securities,[137] and to sell securities in the United States in violation of the "Securities Act."[138] In addition, financial intermediaries located in jurisdictions with secrecy laws have been used as conduits for making illegal payments,[139] misappropriating corporate assets[140] and laundering funds generated by other illegal activites.[141]

The SEC is aggressively enforcing its regulations by joining financial intermediaries as defendants. It has subpoenaed officers of these institutions as defendants and asked the courts to block their assets. The SEC is also engaging in discussions with some countries (for example, Switzerland and the Netherlands) for enhanced cooperation, whether formal or informal. The MOU with Switzerland is a

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131. *Id.*

132. For additional background on these two cases, see Zagaris, *The S.E.C. Moves Against Foreigners Trading on Inside Information*, 27 TAXES INT'L 44-45 (Jan. 1982).

133. *See* Fedders, *Policing Internationalized U.S. Capital Markets: Methods to Obtain Evidence Abroad*, 18 INT'L LAW. 89, 91-94 (1984).

134. Williams Act, Pub. L. No. 90-459, 90 Stat. 510 (1968).

135. Securities and Exchange Act of 1934, § 13(g) & (h), 15 U.S.C.A. § 78.

136. *See, e.g.*, S.E.C. v. General Refractories Co., 400 F. Supp. 1248 (D.D.C. 1975); S.E.C. v. Banque de Paris et des Pays-Bas (Suisse) S.A., No. 77 Civ. 798 (D.D.C. July 10, 1977).

137. *See, e.g.*, S.E.C. v. Everest Management Corp., 31 Fed. R. Serv.2d 145 (S.D.N.Y. 1980); S.E.C. v. Edward M. Gilbert, 82 F.R.D. 723 (S.D.N.Y. 1979); S.E.C. v. American Institute Counselors, Inc., 1975 Fed. Sec. L. Rep. (CCH) ¶ 97,388 (D.D.C. 1975).

138. *See, e.g.*, S.E.C. v. American Institute Counselors, Inc., 1975 Fed. Sec. L. Rep. (CCH) ¶ 97,388 (D.D.C. 1975).

139. *See, e.g.*, S.E.C. v. Lockheed Aircraft Corp., 404 F. Supp. 651 (D.D.C. 1975).

140. *See, e.g.*, S.E.C. v. Vesco, 58 F.R.D. 182 (S.D.N.Y. 1972).

141. *See, e.g.*, S.E.C. v. Kasser, 548 F.2d 109 (3d Cir. 1972).

result of such negotiations.[142] As a result, Swiss banks are increasingly waiving their rights to bank secrecy.[143] Moreover, the Swiss government has enacted a law on international judicial assistance in criminal matters.[144]

On May 31, 1984, the SEC proposed a federal "waiver by conduct" law that would require anyone purchasing securities in the United States through a foreign bank or brokerage to relinquish the right to prevent disclosure of information to U.S. authorities. The consent to disclosure would be implied by the execution of a transaction in the United States. The SEC has released the proposal for public comment, and it is also recommending that Congress study the proposal.[145] The SEC acknowledges that the Mutual Assistance Treaty and the MOU are helpful against persons trying to utilize Swiss accounts to circumvent U.S. securities laws. However, they do not apply to all violations of the securities law and are only available when a specific Swiss account is involved in a transaction. Spokespersons for the SEC lament that the current disclosure process is cumbersome and unavailable during commission investigations. In addition, the United States cannot negotiate separate agreements with the many countries that have enacted secrecy or blocking statutes. The SEC also claims that none of these proposals provide the necessary framework to resolve the jurisdictional and conflict-of-laws problems.[146]

In the area of the foreign commodities trader, the CFTC has also asserted enforcement actions with extraterritorial effects. On March 17, 1982, the CFTC entered an order against Ralli Brothers (Bankers) S.A.,[147] alleging that Ralli was acting as a foreign broker.

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142. For discussion of the Swiss-U.S. negotiations, and the MOU, see Green, *U.S., Switzerland Agree to Prosecute Inside Traders*, Legal Times, Oct. 4, 1982, at 12. *See also* Fedders, *supra* note 114, at 101-04; Zagaris, *The Swiss/U.S. Consultations on 'Insider Trading'*, 30 TAXES INT'L 46-47 (Apr. 1982).

143. *See, e.g.*, Hudson & Tennison, *Swiss Bank Secrecy Waived for SEC Probe of IU International's Former Chairman*, Wall St. J., May 17, 1982, at 5, col. 1. The waiver is partly the result of discussions between the United States and Swiss authorities. *See* Zagaris, *supra* note 142, at 46-47.

144. *See* Switzerland: Law on International Judicial Assistance in Criminal Matters (Mar. 20, 1981) (translation by Bruno A. Ristau), *reprinted in* 20 INT'L LEGAL MATERIALS 1339 (1981).

145. Ross, *SEC Proposes Law to Aid Policing of Foreign Investments*, Wash. Post, June 1, 1984, at E2, col. 1; *SEC Acts on Foreign Bank Plan*, N.Y. Times, June 1, 1984, at D11, col. 6.

146. Fedders, *supra* note 133, at 104-05.

147. In the Matter of Ralli Brothers (Bankers) S.A., CFTC Docket No. 82-15 (1982). *See also* Zagaris, *A Swiss Bank is the Object of an Enforcement Order by the U.S. Commodity Futures Trading Commission*, 32 TAXES INT'L 40 (June 1982).

The CFTC further alleged that Ralli maintained customer accounts and traded in platinum futures contracts using an omnibus account in its own name. The complaint charged that Ralli refused to provide information concerning the platinum futures contracts traded on the New York Mercantile Exchange in March-June 1981. As a result, the CFTC has ordered a public proceeding at a date to be set in order to determine whether the allegations are true, and if so, whether Ralli should be prohibited from trading in contract markets and assessed penalties.

F. Recent Enforcement Actions which have Given Rise to Friction with Other Countries.

1. *Marc Rich.* On October 19, 1982, a federal grand jury indicted Marc Rich, Pincus Green and others for fifty-one counts of tax-evasion, racketeering, mail and wire fraud. The defendants were also indicted for violating a ban on trading with Iran and for violations of the Racketeer Influence and Corrupt Organization Law (RICO). One year later, the grand jury, purusant to its investigation, subpoenaed Marc Rich to turn over documents then in control of Marc Rich & Co. AG, a Swiss corporation, and Marc Rich & Co. International, its U.S. subsidiary. Marc Rich refused to produce the requested documents and a Federal District Court imposed a contempt fine of 50,000 dollars per day until the documents were produced. The Second Circuit Court of Appeals upheld the sanction.[148]

On August 5, 1983, Marc Rich agreed to produce the documents. However, the Swiss government, after months of unsuccessful diplomatic attempts to persuade the United States to request the documents through existing bilateral treaty procedures, took action to stop the delivery of documents. On August 12, the Swiss federal prosecutor's office confiscated all the requested documents in possession of Marc Rich & Co. AG, in Zug, Switzerland. The Swiss authorities also instituted legal proceedings against Marc Rich & Co. AG, to determine whether compliance with the grand jury subpoena would violate Article 273 of the Swiss Penal Code, which prohibits the disclosure of business secrets to foreigners. Despite the clear implications of a major conflict with Switzerland over the extraterritorial reach of the grand jury subpoena, and the clear inability of Marc Rich to comply with the contempt order, the Federal District Court

148. Matter of Marc Rich & Co., A.6., 707 F.2d 663 (2d Cir. 1983), *cert. denied*, 51 U.S.L.W. 3920 (June 27, 1983).

declined to rescind the sanctions imposed.[149]

The Court relied on the "effects and conspiracy" doctrine, which enabled it to assume jurisdiction over the Swiss corporation even though the company did not conduct business in the United States.[150] In so doing, Judge Sand considered little, if at all, the conflict with Swiss law. This cavalier attitude to the wide-open assertion of jurisdiction is one of the roots of the present conflict between the two countries. If deference is not given to established treaty procedures dealing with the release of secret documents, this conflict between the United States and Switzerland will continue.

2. *X, Y, Z v. The Bank.* In a spin-off case to *Marc Rich*, an English court in *X, Y, Z v. The Bank*[151] enjoined the London Branch of the United States bank from complying with a U.S. District Court order. The order directed the bank to comply with a grand jury subpoena and to furnish all documents in its London branch pertaining to Marc Rich & Co. AG, its Swiss parent and a third affiliated Panama company. The injunction was based partly on the Court's ruling that the applicable law was English because the contractual relationship between the bank and its customer was made in London. Moreover, the consequences of any breach in the contractual relationship would occur in London. The English court concluded as a matter of law that an implied contract between the bank and customer existed, and prohibited the bank, without the consent of the customer, from disclosing any document or other information obtained by the bank in the course of that relationship.[152] The cavalier attitude of Judge Sand in the *Marc Rich* case toward confidentiality can be contrasted to the importance attributed by the Queens Bench Judge Legatt to confidentiality in a common-law, non-statutory setting.[153]

3. *Bank of Nova Scotia, II.* In *Bank of Nova Scotia II*, the U.S. District Court for the Southern District of Florida, on remand, upheld a $1.8 million fine against the Bank of Nova Scotia.[154] The fine

149. *See In re Grand Jury Proceedings: U.S. v. Marc Rich & Co. A.G.*, 44 TAXES INT'L 15-17 (Aug. 25, 1982) (Judge Sands' opinion); Zagaris, *Marc Rich Caves In*, 46 TAXES INT'L 55 (Aug. 1983).

150. *March Rich*, 707 F.2d at 668.

151. X, Y & Z v. The Bank, 2 All E.R. 464 (1983).

152. *Id.*

153. *A U.K. Court Enjoins the London Branch of a U.S. Bank from Supplying Information to a U.S. Grand Jury (excerpts from X, Y & Z v. The Bank)*, 44 TAXES INT'L 4, 10 (AUG. 25, 1982).

154. In re Grand Jury Proceedings, United States v. Bank of Nova Scotia, 722 F.2d 657

was imposed because of the bank's failure to comply with the Court's order to answer a grand jury subpoena. Compliance by the bank would have required contravention of two orders by a Cayman Island court.[155] The case, now pending in the United States Court of Appeals for the Eleventh Circuit, involves not only the principal parties—the United States government and the Bank of Nova Scotia—but also several other governments,[156] including the United Kingdom, Canada, the Cayman Islands and a host of major banks and banking associations. The latter are participating as *amici curiae*. At issue is whether a U.S. district court has the right to compel the Bank of Nova Scotia to comply with a grand jury subpoena in violation of the confidentiality laws of the Cayman Islands.[157]

4. *The Musella Case.* In 1983 the SEC brought a complaint for unlawful insider-trading against Dominick Musella and nine other individuals. The SEC alleged that they used inside information from a law firm to make profitable, illegal transactions. Musella interposed Swiss confidentiality law in order to quash the subpoena. United States Magistrate Bernikow directed Musella to execute a waiver of the Swiss provisions regarding secrecy. The Court, in an order by Judge Haight, rejected Musella's claims that requiring waiver of the Swiss secrecy provisions violated his right to freedom from unlawful searches and seizures under the Fourth Amendment.[158] The Court also rejected his contention that such a waiver would violate his right against self-incrimination under the Fifth Amendment.[159] The order has been stayed pending an appeal to the U.S. Court of Appeals for the Second Circuit.

It is important to note that U.S. authorities have not tried to

(11th Cir. 1983). The case arises from a grand jury investigation concerning allegations of narcotics trafficking and U.S. tax violations. On March 1, 1983, the Federal Grand Jury issued a subpoena *duces tecum* to the Bank of Nova Scotia, requesting documents maintained by the bank in the Bahamas, the Cayman Islands and Antigua. These documents related to a number of United States citizens under investigation. The District Court granted the Bank an extension until May 31 to produce the documents, but on May 31, the Grand Court of the Cayman Islands issued an order prohibiting the disclosure of the information sought by the subpoena. On Oct. 20, 1983, after the bank had not complied with its order, the District Court issued an order holding the bank in contempt and imposed a sanction of $25,000 per day—subsequently the District Court denied the bank's motion to stay the imposition of sanctions pending appeal. In supplemental findings, the District Court found that the bank had not exercised good faith efforts to comply with the subpoena.

155. *Id.*

156. *Id.* at 658.

157. *See* Zagaris, *supra* note 83.

158. S.E.C. v. Mosella, 578 F. Supp. 425 (S.D.N.Y. 1984).

159. *Id.* at 442.

obtain the desired information directly from Swiss authorities under the recently concluded MOU. The frequent use of subpoenas by U.S. courts and their lack of deference to the laws of Switzerland has exacerbated the growing irritation of Swiss authorities. The Swiss are perhaps understandably disenchanted with U.S. authorities who continue to ignore established procedures yet criticize the Swiss for failing to cooperate.[160]

5. *The Falconer Case.* In the *Falconer* case, Ian Falconer, an English attorney residing and practicing law in the Cayman Islands, was served with a grand jury subpoena while in the United States. Falconer was not the target of the grand jury investigation, but merely an intermediary who possessed desired documents. The United States ignored the procedures of the U.S.-Cayman Information Exchange Agreement, and additionally never revealed to Cayman authorities why the documents were required, other than stating that they were needed in an investigation of tax fraud.

The overreaching of the Justice Department is highlighted in the *Falconer* case because jurisdiction over Falconer was highly tenuous. Falconer's only contacts with the United States were vacation trips and cricket team tours. Moreover, Falconer never transacted even unrelated business in the United States. In contrast, in *Bank of Nova Scotia*, the bank had a branch transacting business in the United States. Nevertheless, the U.S. Attorney's Office requested an arrest warrant when Falconer moved to quash the subpoena.[161]

IV. LIMITATIONS ON POWER TO ENFORCE AND ADJUDICATE

A. Foreign Government Diplomats

The United States is a party to several important multilateral treaties as well as a wide network of consular treaties concerning criminal jurisdiction over diplomats.[162] The Vienna Convention on Diplomatic Relations embodies the first comprehensive code entered

160. *See* Zagaris, *supra* note 84. The Swiss are especially disenchanted in light of the amount of cooperation and resources they devote to international enforcement demands of the United States.

161. In re: Grand Jury 83-4 (FL) (S.D. Fla. Case No. FGJ 8304 (FL)). *See* Harwood, *The United States Wants to Arrest Ian Falconer for His 'Utter Contempt' of Jake Snyder*, 56 TAXES INT'L 3 (June 1984).

162. *See, e.g.*, Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95 [hereinafter cited as Vienna Convention on Diplomatic Relations]; Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, T.I.A.S. No. 6820, 596 U.N.T.S. 261.

into by the international community concerning diplomatic conduct and relations.[163] The Convention provides:

(1) Diplomatic agents enjoy immunity from criminal jurisdiction of the receiving State;[164]

(2) Immunity from criminal jurisdiction is extended to all members of the family of a diplomatic agent;[165]

(3) Immunity from criminal jurisdictiion is extended to the members of the administrative and techincal staffs of the mission and their families;[166]

(4) Immunity from criminal jurisdiction is extended to service staffs in respect to acts performed in the course of their duties;[167] and

(5) Private servants are granted limited immuities to the extent "admitted by the receiving State".[168]

In practice, the rules governing diplomatic immunity and exemptions from criminal jurisdiction are relatively uniform when applied to the conduct of heads of diplomatic missions and the official members of their staffs. However, there is no uniform agreement in the establishment of guidelines for servants, subordinate staff members and families of diplomatic personnel.[169]

B. International Organization Diplomats

The enactment of the International Organizations Immunities Act[170] extended immunity from suit and legal process to officers and employees of international organizations. In 1946 the General Convention of Privileges and Immunities was adopted by resolution of the UN General Assembly.[171] The Convention provides privileges and immunities to three classes of officials: (1) the Secretary-General and all Assistant Secretaries who have full diplomatic immunity, (2) specialized agencies and their staffs and (3) officials and experts on special assignments.

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163. Vienna Convention on Diplomatic Relations, *supra* note 162.

164. *Id.* art. 31.

165. *Id.* art. 37(1).

166. *Id.* art. 37(2).

167. *Id.* art. 37(3).

168. *Id.* art. 37(4).

169. Wilson, *Diplomatic Privileges and Immunities: the Retinue and Families of the Diplomatic Immunities*, 14 INT'L & COMP. L.Q. 1265 (1965); Sutton, *Jurisdiction over Diplomatic Personnel and International Organizations Personnel for Common Crimes and for Internationally Defined Crimes*, in BASSIOUNI & NANDA, *supra* note 2, at 97 (1973).

170. 22 U.S.C. 288 (1976).

171. *See* text in U.N. Yearbook, 1946-47.

Although diplomatic personnel are immune from criminal jurisdiction, they are nevertheless required to obey the laws of the receiving State. The method most frequently used to redress a violation of the law of the receiving State by a diplomat is for the receiving State to file a complaint with the person charged with the violation. The most serious action which a host State can enforce against an uncooperative diplomat is expulsion. Such a measure, however, is rarely employed and is usually reserved for political issues, such as participation by an agent in the internal affairs of the host country.[172]

C. Non-Legal Limitations

Non-legal limitations, primarily political and sometimes economic, may prevent States from exercising jurisdiction. Two non-U.S. jurisdiction situations serve as examples. In February 1976, a controversy arose due to reports of involvement by British nationals serving as mercenaries in the Angolan Civil War. A government committee was established under Lord Diplock to investigate whether the British Foreign Enlistment Act[173] was adequate to control the recruitment of British citizens as mercenaries. In August 1976, the Diplock Committee released a report which recommended the abolition of those portions of the Foreign Enlistment Act which made it a crime for British nationals to enlist as mercenaries.[174] The Diplock Report's principle reason for decriminalizing foreign enlistment was the impossibility of extraterritorial enforcement of British law. One recent commentator, however, after reviewing the authorities on jurisdictional enforcement, concluded that ample legal authority existed to support jurisdiction.[175]

The incidents arising out of the Cubana air crash in October 1976 demonstrate the non-legal factors which are involved in decisions to assert jurisdiction. The Cubana airliner arrived in Barbados from Guyana and Trinidad and then took-off from Barbados en route to Jamaica. Nine minutes after take-off an explosion on board forced the plane to return to Barbados. It crashed in the sea, killing all seventy-three persons on board. Two persons were arrested in Trinidad within two days of the crash and confessed that they had placed

172. *See* C. FENWICK, INTERNATIONAL LAW 469-80 (3d ed. 1948).

173. British Foreign Enlistment Act of 1870, 33,34, 35 Vict., ch. 90.

174. *Report of The Privy Counsellors Appointed to Inquire into the Recruitment of Mercenaries* (August 1976).

175. Chase, *Aspects of Extraterritorial Criminal Jurisdiction on Anglo-American Practice*, 11 INT'L LAW. 655-65 (1977). Chase concludes that social and economic reasons overrode legal considerations.

the explosives on the plane in Barbados. Although ample jurisdictional bases existed under both common law and the Montreal Convention,[176] which had been incorporated into Barbados law under the Civil Aviation Act of 1976, Barbados declined to exercise jurisdiction. During the confessions of the two arrested Venezuelan nationals, they stated that they were working as agents of the Central Intelligence Agency. The vehement protests by Cuba against the United States added sensitive political overtones to the incident. The complex political and evidentiary elements, along with the enormous expense of trying the case led Barbados to decline to exercise jurisdiction. Instead, the persons were returned to Venezuela and are being held pending trial.[177]

V. CONCLUSION AND PROSPECTS

The clearest trend in jurisdiction over international criminal matters has been the United States' assertion of broader extraterritorial jurisdiction. This has been reflected in the drafts of the revised criminal code bill in recent Congressional sessions,[178] and is amply demonstrated by the extension of export controls on oil and gas goods and technology to the Soviet Union, the interdiction of foreign vessels on high seas if they are suspected of carrying undocumented aliens and IRS proposed regulations on record disclosure by foreign corporations. These examples evidence the fact that the United States is asserting broader extraterritorial jurisdiction in order to enforce its laws. Court and administrative tribunals are consistently requiring persons abroad to comply with subpoenas or requests to furnish information.

Unfortunately, the expansion of jurisdiction has led to increasing conflicts between United States and foreign law. The resulting

176. Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Montreal Convention), Jan. 26, 1973, 24 U.S.T. 564.

177. For additional discussion of the incidents, see Zagaris, *International Criminal Cooperation in the British West Indies to Prevent and Control Violence: Developments and Prospects*, 2 QUADERNI 265, 291-95 (Int'l. Instit. of Higher Studies in Criminal Sciences, Siracusa, Sicily, May 1979) (copy on file in the offices of Bruce Zagaris). *See also* BARBADOS GOV'T., REPORT OF THE COMM. ON ENQUIRY ON THE CUBANA AIR CRASH OF OCT. 6, 1976 (Pts. I and II); *Two Sensational Developments in the Cubana Crash*, 10 CARIBBEAN CONTACT 1 (July 1982).

178. Criminal Code Revision Act of 1981, H.R. 1647 97th Cong., 1st Sess, 22 CONG. REC. 370 (1981). *See, e.g.*, United States v. Toyota, 569 F. Supp. 1158 (C.D. Cal. 1983); Empson, *The Application of Criminal Law to Acts Committed Outside the Jurisdiction*, 6 AMER. CRIM. L.Q. 32 (1967); Epstein, *The Extraterritorial Reach of the Proposed Criminal Justice Act of 1975-S.I.*, 4 AM. J. CRIM. L. 275 (1975-76); *Reports on Proposed Federal Criminal Code*, 34 BUS. L. 726, 750-59 (Jan. 1979); Note, *Extraterritorial Reach of Proposed Federal Criminal Code*, 13 HARV. INT'L L.J. 346 (1972).

antagonism has resulted in blocking legislation and in turn has led some members of the United States international legal community to recognize the need for more restraint in applying our criminal jurisdiction extraterritorially. However, those recognizing such a need are at present a clear minority comprised mostly of academicians.

Another result of the increase in United States extraterritorial criminal jurisdiction has been the increased discussion with foreign governments over the need for more cooperation concerning jurisdictional conflicts. In some cases the cooperation has been formalized in treaties of mutual assistance in criminal matters.[179] Some of these treaties obligate foreign countries to render assistance in exchange for agreements by the United States government to exhaust cooperative remedies prior to using unilateral measures.

In order to harmonize these conflicts, more cooperation must occur. Increased dialogue and agreement between governments is required to minimize the friction which results from the perception that some governments are asserting jurisdiction in violation of international law. Developments in the United States and other legal systems must move in two directions. First, judicial decisions must expressly consider the needs of the international system. Second, governments must participate in conventions which provide mechanisms by which conflicting assertions of jurisdiction may be resolved.

One commentator has criticized Section 403 and other sections of Tentative Draft No. 2 of the Restatement of Foreign Relations Law for not sufficiently clarifying the weight that courts should give to differing societal and political assumptions.[180] The Restatement has also been criticized for not specifying the values that should influence United States courts in contributing to the legitimation of international jurisdictional norms.[181] In transnational regulatory cases, the interests and values of a foreign State or of the international legal system are more difficult to perceive and weigh than the political and social values of the court's municipal system. Hence, a United States court will usually not identify or recognize the values or legitimacy of protecting business documents or the anonymity of investors when balanced against U.S. interests.[182] Increasingly, U.S. courts have given little consideration to foreign laws and injunctions which forbid

179. Another result has been discussion between countries with mutual assistance treaties in an effort to improve the treaties. For example, the United States and Switzerland have engaged in such discussions.

180. RESTATEMENT, *supra* note 3, § 403.

181. Maier, *supra* note 3, at 316-318. *Cf.* Lowenfeld, *supra* note 60, at 329.

182. *See* United States v. Vetco, Inc., 644 F.2d 1324 (9th Cir. 1981).

compliance with discovery orders and subpoenas issued by United States courts.

It has been advocated that a revision of the Restatement should emphasize the importance of expressly evaluating the needs of the international system when determining whether jurisdiction exists under Section 403 or other applicable sections. According to at least one scholar, the Tentative Draft gives insufficient direction in determining jurisdictional questions. While it identifies the contacts considered relevant in determining whether an appropriate link exists between the regulating State and the events and parties in question, it does not enunciate the values that influence the balancing of these contacts under the reasonableness standard. These basic values should emphasize the importance of the international system's needs and comity. This argument, however, has failed to articulate any specific language which should be incorporated in the Draft Restatement.[183] One means of providing for the needs of the international system is to emphasize in Section 403 of the Draft Restatement the importance of regulations to the international political, legal or economic system and the extent to which such regulation is consistent with the traditions of the international system. New language underlying the values of the international system should be considered.

Equally important as the need in adjudicating jurisdictional issues is the desirability of creating conflict-resolution mechanisms. This would provide a source with which States could confer on issues, communicate in sensitive, difficult cases and consult regularly with other governments on developing values and mechanisms for resolving matters of international criminal jurisdiction. Currently, the best document which the United States can use to confer and conciliate is the Draft European Convention on Conflicts of Jurisdiction in Criminal Matters. The Convention, in addition to providing for jurisdictional bases and assigning priorities to these different bases, also requires cooperation among members of the Convention in its application. The tradition, stability and identity of values among the Council of Europe's members facilitates the application of this and other conventions concerning international criminal matters. In the short run, the United States is likely to conclude bilateral agreements on jurisdiction such as the recently concluded Memorandum of Understanding on Jurisdiction on Insider Trader between the

183. Maier, *supra* note 3, at 318.

United States and Switzerland.[184] Although such a transitional document provides cooperation on a narrow subject matter, the negotiation of a series of such agreements would be more inefficient than one general agreement.

The European Committee on Crime Problems of the Council of Europe, in order to simplify and rationalize the many conventions on international criminal cooperations, is consolidating the existing treaties into a type of model code. The model code provides for cooperation in penal matters and contains four chapters on the principle methods of mutual assistance in penal matters, that is, extradition, mutual assistance, prosecution and enforcement. Another example of an attempt to use conventions is the exchange of tax information provisions in the proposed Caribbean Basin Initiative.[185] In the short-term future, the United States government will probably cooperate increasingly with other governments in order to expand its jurisdiction. The addition of clearer standards for the judiciary in determining extraterritorial application of criminal laws in conjunction with bilateral and multilateral agreements should lead to certainty and predictability in determining questions of international criminal law. In the absence of clearer judicial standards and enhanced cooperation, more tensions between governments with conflicting jurisdictional claims over criminal matters will result.

One policy change that will improve cooperation by foreign governments is the active participation by the United States in regional cooperative arrangements such as the European Committee on Crime Problems. Regional organizations facilitate criminal justice planning, legislation, enforcement and adjudication of crime.[186] Organizations such as the United Nations Commission for the Prevention of Crime and Treatment of Offenders (ILANUD), Interpol and the Regional Police Training Center are already engaged in international criminal cooperation.[187]

A long-term solution is to have a truly international court re-

184. For a discussion of the Memorandum, see Zagaris, *The U.S. and Switzerland Agree to Cooperate on Insider Trading*, 36 TAXES INT'L 52 (Oct. 1982).

185. Caribbean Basin Recovery Act, Pub. L. No. 98-67 (codified 26 U.S.C. § 222(c) 1983). *See* Zagaris, *A Caribbean Perspective of the Caribbean Basin Initiative*, 18 INT'L LAW. 563, 576-81 (1984).

186. *See* Zagaris and Papavizas, *Stopping the Illegal Narcotics Trade in the Caribbean—New Regional Approaches* (submission to the Inter-American Juridical Committee, O.A.S., June 1984).

187. *See, e.g.*, Zagaris, *supra* note 177, at 265-316; *see also* Zagaris, *The Regional Police Training Center in the West Indies: A Model of Intergovernmental Cooperation in Criminal Justice*, 8 J. POLICE SCI. & AD. 460-64 (1980).

solve fractious jurisdictional issues. The International Court of Justice at the Hague has periodically heard international criminal cases under the rubric of a damage or injunctive relief action.[188] The Court, however, needs a charter expansion to be able to deal effectively with issues of international criminal law.[189] A further suggestion has been the establishment of an international criminal court. Although the concept is far from being instituted, it is gaining support.[190] A more likely alternative in the short-term is a special purpose or even temporary international criminal court for specific types of crime such as aggression, terrorism or international narcotics trafficking.[191]

Another possibility is a regional international criminal court, which could at least resolve jurisdictional conflicts in the region.[192] Mediation might also prove a workable mechanism.[193] Bilateral or regional treaties of mutual assistance, while providing specifically for the modes and precedence of procedures, could provide for mediation or arbitration in the event of an alleged dispute over jurisdiction.

188. Such cases include the case of Tehran hostages and the recent Nicaragua case.

189. *The New Horizons of International Criminal Law*, QUADERNI (forthcoming) (Int'l Instit. of Higher Studies in Criminal Sciences, Siracusa, Sicily, May 1984) (copy on file in the offices of Bruce Zagaris).

190. For example, the United Nations Committee on Crime Prevention and Control, at its Eighth Session, urged that the Member States pursue acceptance of an international criminal convention in order to render the prosecution and adjudication of transnational and international crimes more effective. *See* U.N. Doc. E/AC.57/1984/L.3 (1984). The idea of the creation of such a court has been on the agenda of every General Assembly since 1977, and the responses of the governments have been increasingly favorable.

191. *Id.* at 9.

192. *Id.* at 8.

193. *Id.* at 18.