Extraterritorial Jurisdiction: The United States Unwarranted Attempt to Alter International Law in *United States v. Yunis*

Abraham Abramovsky†

I. Introduction

On September 1, 1987, United States law enforcement officials lured Fawaz Yunis, a Lebanese resident-citizen suspected of conducting the 1985 hijacking of a Jordanian airliner,[1] onto a yacht anchored in international waters in the Mediterranean Sea, where they arrested him.[2] Attorney General Edwin Meese acknowledged that it was the first time a suspected terrorist had been arrested overseas by United States law enforcement officials.[3] He insisted that these officials had legal authority to seize Yunis and transport him to the United States under a hostage-taking statute enacted by Congress in 1984.[4]

In the case that followed, *United States v. Yunis*,[5] two critical issues of international law emerged. First, did the United States have jurisdiction over the hijacking of a Jordanian airliner where the only connection between the hijacking and the United States was the chance presence of three United States citizens on board the hijacked airliner?[6] Second, was

† Professor of Law and Director of the International Criminal Law Center, Fordham University School of Law. I would like to extend my appreciation to Ms. Gretchen Van Deusen, a second year law student, who was the primary research assistant on this article. I would also like to thank Andrew Wolfenson, a second year student, and Maureen McCormack, a first year student, for their patience and assistance.

1. United States v. Yunis, 681 F. Supp. 909, 912 (D.D.C. 1988), *rev'd* 859 F.2d 953 (D.C. Cir. 1988).

2. *Id.*; *see also* N.Y. Times, Sept. 18, 1987, at A1, col. 5; *Taking on Terrorists*, U.S. NEWS & WORLD REP., Sept. 12, 1988, at 26.

3. N.Y. Times, Sept. 18, 1987, at A1, col. 5.

4. *Id.* at A11, col. 5-6. The legal authority to which Meese pointed was the Hostage Taking Act, 18 U.S.C. § 1203 (1988). The Hostage Taking Act is the domestic statute providing legal authority for apprehension of a suspected hostage-taker. It was first introduced in Congress in 1984 to implement the International Convention Against the Taking of Hostages, Dec. 17, 1979, G.A. Res. 34/146, 34 U.N. GAOR Supp. (No. 46), U.N. Doc. A/34/46, *reprinted in* 18 I.L.M. 1456 (1979).

5. 681 F. Supp. 896 (D.D.C. 1988).

6. *Id.* at 899 ("There is no dispute that the only nexus to the United States was the presence of several American nationals on board the flight."). Two of the three American nationals on board the Jordanian flight were Professor Landry T. Slade, assistant to the president of the American University of Beirut, and his 18 year-old son. The flight had approximately 60 passengers on board. N.Y. Times, June 13, 1985, at A8, col. 4-5.

a suspect in a hijacking "found" within the United States for purposes of the Hostage Taking Act where the suspect had been forcibly abducted to the United States?[7]

This article examines the district court's reliance on the nationality of chance occupants of the hijacked airliner and on the purported universal condemnation of hijacking to justify its exercise of jurisdiction. The article argues that jurisdiction was not justified under either domestic or international law. The article concludes that if the United States continues to broaden unjustifiably the scope of well-established principles of international law as it did in *Yunis*, it is likely to invite reciprocal conduct against the United States by the very states which sponsor terrorism.

II. Background: Consistency of United States Case Law with International Law

Unlike domestic law, international law claims no statutory structure of its own. International law is based primarily upon custom, treaties and conventions, and the general principles of law recognized by nations. It is also based on judicial decisions and the treatises of highly qualified publicists.[8]

The fundamental basis of international law does not spring from consent to a legislatively-mandated set of rules, but rather from consent to certain modes of behavior among states.[9] Consequently, it is imperative that accepted customs are more, rather than less, closely adhered to as the relationships between nations in the world community become both more complex and more fragile.

When a distinguished group of scholars drafted the Harvard Research Draft in 1935,[10] they were articulating those principles of international

7. One of the principal jurisdictional components of the Hostage Taking Act is that "the offender is found in the United States." 18 U.S.C. § 1203(b)(1)(B) (1988).

8. J. STARKE, INTRODUCTION TO INTERNATIONAL LAW 34-35 (7th ed. 1972) (referring to Statute of the International Court of Justice, art. 38, para. 1).

9. D. GREIG, INTERNATIONAL LAW 3 (1970) (citing Phleger, Legal Advisor to the U.S. State Department, quoting 1 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW at 2):

> International law has been defined as those rules of international conduct which have met general acceptance among the community of nations. It reflects and records those accommodations which, over centuries, states have found it in their interest to make. It rests upon the common consent of civilized communities.

10. *See Research in International Law, Draft Convention on Jurisdiction With Respect to Crime*, 29 AM. J. INT'L L. 437 (Supp. 1935) [hereinafter *Harvard Research Draft*]. According to article 2, entitled "Scope of Convention," the *Harvard Research Draft* sought to define and limit a state's jurisdiction with respect to crime but cautioned that nothing in its provisions would preclude any of the parties to the Convention from entering into other agreements, or from giving effect to other agreements then in force, concerning competence to prosecute and punish for crime which affected only the parties to such other agreements. *Id.* at 439.

law that had come to be recognized as binding only as a result of years of use.[11] The Harvard Research Draft authors found that five generally accepted principles had developed by which states could assert jurisdiction over crimes occurring in part or in whole outside of their territories.[12]

The five principles which allow nations to exercise jurisdiction over extraterritorial crimes are:

1) Territorial Jurisdiction — dependent upon the place where the offense is committed.
2) National Jurisdiction — dependent upon the nationality of the offender.
3) Protective Jurisdiction — dependent upon whether the national interest is injured.
4) Universal Jurisdiction — dependent upon whether the offense is of the type considered particularly heinous and harmful to humanity, and if so, jurisdiction is conferred to any forum that obtains physical custody of the offender.
5) Passive Personality Jurisdiction — dependent upon the nationality of the victim.[13]

Of the five principles, jurisdiction based on Passive Personality has consistently encountered the most resistance, both in the United States and internationally. This resistance is reflected in United States domestic law, in the conduct of United States foreign relations, and in the international agreements that have been concluded concerning hijacking and related matters.

A. *The Concept of Extraterritorial Criminal Jurisdiction in the United States: Avoidance of the Passive Personality Principle*

In the United States, the Passive Personality principle has been least relied upon by all branches of the United States government as a basis for the extraterritorial projection of American authority and has been a particular source of controversy for the United States judiciary.[14]

As early as 1887, in the *Cutting* case,[15] the executive branch announced that it did not concede to foreign governments any right to prosecute American citizens for conduct by them affecting foreign na-

11. The principles in question were drawn from multilateral conventions (albeit few in number), bilateral treaties and customary rules.

12. *Harvard Research Draft* at 439-442. The *Harvard Research Draft* defined a state's jurisdiction as a state's competence under international law to prosecute and punish crimes. *Id.* at 439.

13. *Id.* at 439.

14. "The passive personality theory of jurisdiction is generally considered to be anathematic to United States law." Blakesley, *A Conceptual Framework for Extradition and Jurisdiction Over Extraterritorial Crimes*, 1984 UTAH L. REV. 685, 715.

15. 1887 PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES 751, *reprinted in* 2 J. MOORE, DIGEST OF INTERNATIONAL LAW 228-40 (1906).

tionals but occurring wholly in the United States.[16] Reciprocally, the United States has generally committed itself to refraining from prosecuting foreign nationals for conduct occurring wholly outside the United States which has affected American citizens *abroad*. This is reflected in the Restatement (Third) of the Foreign Relations Law of the United States, which explicitly rejects the Passive Personality theory of jurisdiction.[17]

The tenor of early twentieth century American judicial attitudes concerning the Passive Personality principle is captured by Judge Moore's dissenting opinion in the *Lotus* case.[18] The Permanent Court of International Justice narrowly held that Turkey had the right to apply its criminal law to a French naval officer even though the officer had been on his own French ship, outside Turkish territorial waters, when it collided with a Turkish vessel, causing the death of eight Turkish nationals. In dissent, Judge Moore argued that a nation had no right to reach outside of its territory to punish a foreign national in this way:

> [This principle is] at variance not only with the principle of the exclusive jurisdiction of a state over its own territory, but also with the equally well-settled principle that a person visiting a foreign country, far from radiating for his protection the jurisdiction of his own country, falls under the dominion of the local law and, except so far as his government may diplomatically intervene in case of a denial of justice, must look to that law for his protection.[19]

Recently, United States courts have recognized the Passive Personality principle in a few criminal cases. Without exception, however, there have been either extenuating circumstances or one of the other four principles has been primarily relied upon.

In *United States v. Layton*,[20] the court recognized that Congress' power to authorize extraterritorial jurisdiction over the crimes allegedly

16. *Id.* at 755, *reprinted in* 2 J. MOORE, *supra* note 15, at 237. In *Cutting*, a United States citizen had published an allegedly libelous statement regarding a Mexican national. The statement was published in a Texas newspaper. Therefore, it was intended for circulation only in the United States, and, presumably, it was never circulated in Mexico. Upon his subsequent voluntary entry into Mexico, Cutting was arrested by Mexican authorities for the publication of the allegedly defamatory statements.

17. Section 402 states:

> A state does not have jurisdiction to prescribe a rule of law attaching a legal consequence to conduct of an alien outside its territory merely on the ground that the conduct affects one of its nationals.

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

18. S.S. *Lotus* Case (France v. Turkey), 1927 P.C.I.J. (ser. A.) No. 10 (Sept. 7) [hereinafter *Lotus*].

19. *Id.* at 92 (Moore, J., dissenting).

20. 509 F. Supp. 212 (N.D. Cal.), *cert. denied*, 452 U.S. 972 (1981).

committed by Layton rested on four of the five jurisdictional principles, namely, the Protective, Territorial, Nationality, and Passive Personality principles. Layton's primary defense was that the court lacked subject matter jurisdiction over the charges. He contended that the events on which the charges were based all occurred outside the territorial limits of the United States.

It may be recalled that this case stemmed from the so-called "Jonestown mass-suicide." Laurence J. Layton was indicted on four criminal counts arising from the events which occurred at the Port Kaituma airport in Guyana in November 18, 1978. Those events resulted in the death of Congressman Leo J. Ryan, a member of the United States House of Representatives, and the wounding of Richard Dwyer, the Deputy Chief of Missions for the United States in the Republic of Guyana. Layton was charged with conspiracy to murder a congressman, aiding and abetting in the murder of a congressman, conspiracy to murder an internationally protected person, and aiding and abetting in the attempted murder of an internationally protected person.[21]

The *Layton* court conceded that the Passive Personality principle, in and of itself, is not a sufficient basis for asserting extraterritorial jurisdiction.[22] However, the court declined to address the validity of the Passive Personality principle and instead relied on the authority provided by the three other principles to hold that the court did have jurisdiction over Layton.[23]

Three years later, in *United States v. Benitez*,[24] the Eleventh Circuit concluded that Congress would have intended for the victim's nationality to be a sufficient basis for extraterritorial jurisdiction if the victim was an United States government official. *Benitez* involved charges of conspiracy to murder Drug Enforcement Administration agents engaged in performing their official duties, of assaulting agents with deadly weapons while they were performing official duties, and of robbing agents of official United States passports and their Drug Enforcement Administration

21. *Id.* at 214.

22. *Id.* at 216 n.5. The court acknowledged that the RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 30(2) disapproved of allowing the Passive Personality principle, standing alone, to provide jurisdiction. However, the court went on to state that:

> Given that the assertion of passive personality jurisdiction does not stand alone in this case as the sole basis for extraterritorial jurisdiction under recognized principles of international law, the court need not address the question of whether Congress could assert its jurisdiction over a crime merely on the basis of the nationality of the victim.

Id.

23. *Id.* at 216.

24. 741 F.2d 1312 (11th Cir. 1984), *cert. denied*, 471 U.S. 1137 (1985).

credentials.[25] The defendant was a Colombian national and the alleged crimes occurred in Colombia. The nature of the crimes indicate that they were directed at the victims specifically because of their nationality. One of the main issues on appeal to the Eleventh Circuit was Benitez's contention that the district court had no jurisdiction to try him because he was not a United States citizen and because the underlying acts occurred in Colombia.[26]

The circuit court concluded that the district court's power to try Benitez rested on both the Protective principle and the Passive Personality principle. The circuit court relied almost exclusively on the Protective principle, however, citing the threat to United States interests posed by acts such as those Benitez committed.[27] Thus, as in *Layton*, the Eleventh Circuit avoided addressing directly the issue of whether the Passive Personality principle is competent to stand alone.

In *United States v. Columba-Colella*,[28] the Fifth Circuit unequivocally denied that the Passive Personality principle is competent to stand alone. In *Columba-Colella*, a Mexican national had agreed to fence a car stolen from a United States citizen by a United States citizen. The only connection between the alleged crime and the United States was the citizenship of the victim, the car's owner.[29] In denying extraterritorial jurisdiction to the court, the Fifth Circuit analogized United States jurisdiction over a stolen car sale to United States jurisdiction over pickpocketing in Acapulco involving American victims.[30] Congress would not be competent to prohibit such conduct. Nor would United States courts have jurisdiction to enforce such a prohibition were the offender in their control.

Writing for the Fifth Circuit, Judge Wisdom stated emphatically that an "act affect[ing] the citizen of a state is not a sufficient basis for that state to assert jurisdiction over the act."[31] He held, therefore, that the district court did not have jurisdiction over Columba-Colella, even though an American citizen had been victimized.

25. *Id.* at 1313.
26. *Id.* at 1316.
27. *Id.* at 1317 ("We hold that assault and attempted murder of DEA agents is exactly the type of crime that Congress must have intended to apply extraterritorially."). *See also Layton*, 509 F. Supp. at 217.
28. 604 F.2d 356 (5th Cir. 1979).
29. *Id.* at 357.
30. *Id.* at 360. The opinion went so far as to state that Congress would not be competent to attach criminal sanctions to the murder of an American by a foreign national in a foreign country, even if the victim returned home and succumbed to his injuries. *Id.*
31. *Id.*

B. *The Concept of Extraterritorial Criminal Jurisdiction in Conventions Related to Terrorism*

The increase in worldwide terrorism has presented challenges to long-standing traditions of international law, particularly with respect to jurisdictional issues. To address the scourge of terrorism, the world community has entered into several conventions which deal with the special problems of jurisdiction in respect to offenses committed on board aircraft in flight.[32]

The Tokyo Convention on Offenses and Certain Other Acts Committed on Board Aircraft of 1963[33] was the first significant multilateral attempt to deal with these problems. This convention primarily sought to codify existing customary law providing jurisdiction to the state of registration of the aircraft even though the offense did not occur within that state's territory. The Tokyo Convention dealt only in a limited way with hijackers. It enabled hijackers to be taken into custody or subjected to restraint in the same manner as other offenders. It provided for restoration of control of the hijacked aircraft to its lawful commander and for the continuance of the journey of the passengers and crew.[34]

As the number and severity of international hijackings increased, it became necessary for the international community to deal specifically with the hijacking problem. A first effort at this was the Hague Convention for the Suppression of Unlawful Seizure of Aircraft, to which over 100 hundred countries became signatories on December 16, 1970.[35] The Hague Convention called on contracting states to make the offense of hijacking punishable by severe penalties and to take measures to establish

32. According to D.W. Greig:

> The term *convention* is really just another word for a *treaty*. Indeed, the expression *treaty* is used as a generic term to cover a multitude of international agreements often referred to by a confusing variety of names. Some treaties are called treaties, but others are termed conventions or protocols, declarations, charters, covenants, or pacts; sometimes a treaty is referred to as an agreement, but on other occasions as a modus vivendi, an exchange of notes, or a memorandum of agreement.
>
> Whatever the term used, the agreement must have certain characteristics:
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> (i) it should be in writing;
>
> (ii) it must be an agreement between entities with international personality;
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> (iii) it must be governed by international law; and
>
> (iv) it must create a legal obligation.

D. GREIG, *supra* note 9, at 356.

33. Tokyo Convention on Offenses and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, 20 U.S.T. 2941, T.I.A.S. No. 6768, 704 U.N.T.S. 219 [hereinafter Tokyo Convention]. The text of this convention can also be found in 58 AM. J. INT'L L. 566 (1964).

34. J. STARKE, *supra* note 8, at 229.

35. Hague Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, T.I.A.S. No. 7192, 860 U.N.T.S. 105 [hereinafter Hague Convention]. The text of this convention can also be found in 65 AM. J. INT'L L. 440 (1971).

jurisdiction over the offense and related acts of violence against passengers and crew members. Although the Hague Convention certainly went further than the Tokyo Convention in recognizing the special jurisdictional problems presented by hijacking, it did not resolve the conflict presented by the various nations' application of their domestic criminal laws.[36]

In September 1971, the Hague Convention was supplemented by the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation.[37] Because the occurrence of violent acts on board aircraft had increased in scope and severity, the Montreal Convention did not limit its application to acts of seizure of aircraft in flight as the Hague Convention had done. The provisions of the Montreal Convention expanded the applicable offenses.[38] In addition, the Montreal Convention expanded the situs of the offense to include not only a plane in the air, but also a plane on the ground at any time from the moment when all of its external doors are closed following embarkation until the moment when any such door is opened for disembarkation.[39]

36. J. STARKE, *supra* note 8, at 228.

37. Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 565, T.I.A.S. No. 7570, 974 U.N.T.S. 177 [hereinafter Montreal Convention]. The text of this convention can also be found in 66 AM. J. INT'L L. 455 (1972).

38. Article 1 of the Montreal Convention provides that:

1. Any person commits an offense if he unlawfully and intentionally:

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

(b) destroys an aircraft in service or causes damage to such an aircraft which renders it incapable of flight or which is likely to endanger its safety in flight; or

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

(d) destroys or damages air navigation facilities or interferes with their operation, if any such act is likely to endanger the safety of aircraft in flight; or

(e) communicates information which he knows to be false, thereby endangering the safety of an aircraft in flight.

Id. at 565.

39. Article 2 of the Montreal Convention states:

For purposes of this Convention:

(a) an aircraft is considered to be in flight at any time from the moment when all its external doors are closed following embarkation until the moment when any such door is opened for disembarkation; in the case of a forced landing, the flight shall be deemed to continue until the competent authorities take over the responsibility for the aircraft and for persons and property on board;

(b) an aircraft is considered to be in service from the beginning of the preflight preparation of the aircraft by ground personnel or by the crew for a specific flight until twenty-four hours after any landing; the period of service shall, in any event, extend for the entire period during which the aircraft is in flight as defined in paragraph (a) of this article.

Id.

These conventions provide a comprehensive and necessary definition of hijacking[40] and give jurisdiction over the offense to each contracting state. The operative jurisdictional principle throughout the three conventions, however, is not the Passive Personality principle; it is the Universality principle. Hijacking is labeled a crime against humanity, and therefore any state which obtains custody over an offender is entitled to assert jurisdiction. Only article 4(b) of the Tokyo Convention mentions the Passive Personality principle as a jurisdictional basis.[41] This article, however, actually authorizes assertion of jurisdiction based on either the Nationality principle (in the event the *offender* is a national of the contracting state) or the Passive Personality principle (in the event the *victim* is a national of the contracting state). Furthermore, since it is the only article which relies solely on the nationality of the victim, absent any other nexus to the contracting state, it is unclear whether article 4(b) was ever intended to stand on its own.

The International Convention Against the Taking of Hostages,[42] parent of the American Hostage Taking Act, addresses the problem of nexus for the purpose of jurisdiction. Article 5(1)(d), the jurisdictional statement, provides for Passive Personality jurisdiction, but only where appropriate: "Each State Party shall take such measures as may be necessary to establish its jurisdiction over any of the offenses set forth in article 1 which are committed . . . with respect to a hostage who is a national of that State, if that State considers it appropriate . . . ."[43] It seems clear from this use of language that the Hostage Taking Convention intends to provide for the exercise of Passive Personality jurisdiction only where reasonable, that is, only where a sufficient nexus exists between a hostage-taking incident and a nation's interests. Clearly, hostage-taking incidents are not all alike. An American held hostage as a member of a diverse group, for example, is an altogether different state of affairs from a situation in which an individual American is kidnapped,

40. Article 1 of the Hague Convention provides a succinct definition of hijacking:

> Any person who on board an aircraft in flight: (a) unlawfully, by force or threat thereof, or by any other form of intimidation, seizes, or exercises control of, that aircraft, or attempts to perform any such act, or (b) is an accomplice of a person who performs or attempts to perform any such act, commits an offense.

Hague Convention, *supra* note 35, at 1641.

41. Article 4(b) of the Tokyo Convention states in pertinent part:

> A Contracting State which is not the State of registration may not interfere with an aircraft in flight in order to exercise its criminal jurisdiction over an offense committed on board except in the following cases: . . . (b) the offense has been committed by or against a national or permanent resident of such State.

Tokyo Convention, *supra* note 33, at 2941.

42. International Convention Against the Taking of Hostages, *supra* note 4.

43. *Id.* at art. 5.

draped in an American flag, and required to read political announcements on videotape.

That the framers of the Convention did not intend unrestricted exercise of Passive Personality jurisdiction is also apparent from article 14. Mindful of the supreme sovereignty of state parties, article 14 specifies that:

> Nothing in this Convention shall be construed as justifying the violation of territorial integrity or political independence of a State in contravention of the Charter of the United Nations.[44]

Thus, even if the United States felt justified to assert jurisdiction under article 5(1)(d), article 14 contradicts this justification by, at least theoretically, prohibiting the exercise of jurisdiction if the offense occurred within another country's territory, notwithstanding that other country's inability to prosecute.

A full five years passed from the opening of the Hostage Taking Convention to the commencement of Congressional hearings on implementing the Convention.[45] The prepared statement of Victoria Toensing, Deputy Assistant Attorney General, indicates the urgency with which the Justice Department viewed the legislation. In calling upon Congress to pass the Hostage Taking Act, the Deputy Assistant stressed that:

> The need for passing this legislation goes beyond filling . . . gaps in our present law. Its passage will send an international message of the United States' commitment to combat terrorism. Our failure to implement the Montreal Convention has been an impediment to our diplomatic efforts to encourage further concerted international action against terrorism.[46]

The tone of Toensing's statement indicates recognition by the executive branch that United States domestic law must not only be in compliance with international law but that the United States must look to its treaty commitments to define its domestic law. Specifically with regard to the question of extraterritorial jurisdiction, Toensing stressed that the Justice Department "does not intend to assume jurisdiction where there is no compelling federal interest."[47] But what constitutes a compelling federal interest? Significantly, of the 6,500 incidents classified as terrorist acts between 1973 and 1982, only 38 percent were directed at United States

44. *Id.* at art. 14.

45. The U.S. Senate Subcommittee on Security and Terrorism, Committee on the Judiciary, commenced three days of hearings on Tuesday, June 5, 1984. *Legislative Initiatives to Curb Domestic and International Terrorism: Hearings on S. 2470, S. 2624, S. 2625, and S. 2626 Before the Subcomm. on Security and Terrorism of the Senate Comm. on the Judiciary*, 98th Cong., 2d Sess. 1 (1984) [hereinafter *Legislative Initiatives*].

46. *Id.* at 48.

47. *Id.* at 49.

interests.[48] In 1983, there were approximately 500 terrorist incidents, with over 50 percent directed at United States interests.[49] More often than not, countries other than the United States are the target of terrorist attack.

In sum, international law as codified by the Harvard Research Draft does provide limited acceptance of the Passive Personality principle, and this limited acceptance is reflected in treaties providing for the *reasonable* exercise of Passive Personality jurisdiction. However, the record reveals that United States courts have generally been unwilling to assert jurisdiction based upon the Passive Personality principle alone, and Congress has chosen not to overstep the limited role given the Passive Personality principle in international law.

III. *United States v. Yunis*: A Dangerous Precedent

Displaying a show of force usually reserved for a prelude to battle, the FBI engaged a rented yacht, a naval munitions ship assigned to the United States Sixth Fleet, an aircraft carrier, and a twin-engine S3 aircraft to conduct the arrest of Fawaz Yunis in the Mediterranean Sea.[50] The arrest, code-named operation "Goldenrod,"[51] was the culmination of more than two years of searching for the ringleader of the group responsible for hijacking a Jordanian airliner.[52]

Although the FBI had begun its search for Yunis shortly after he and his co-hijackers escaped into the Beirut suburbs, Yunis had eluded his pursuers. Operation "Goldenrod" gained momentum only after the FBI secured the assistance of a one-time friend of Yunis, Jamal Hamdan, who had turned government informant.[53] Desperately short of funds, Yunis was perfect prey for the sting operation set up between the FBI and Hamdan.[54] In Lebanon, Hamdan, acting on the direction of the FBI, promised Yunis substantial proceeds from a drug deal that the two would consummate with wealthy international dealers on a yacht in the Mediterranean.[55] According to the Government, the operation went smoothly from the moment Yunis stepped on the yacht to when, five

48. *Id.* at 59-61.
49. *Id.* at 61.
50. United States v. Yunis, 681 F. Supp. 909, 912 (D.D.C.), *rev'd*, 859 F.2d 953 (D.C. Cir. 1988).
51. *Id.* at 911.
52. L.A. Times, Oct. 5, 1989, at 6, col. 1.
53. 681 F. Supp. at 912; N.Y. Times, Sept. 19, 1987, at A3, col. 3.
54. 859 F.2d at 955. Government's Omnibus Response to Defendant's Pretrial Motions at 6, United States v. Yunis, 681 F. Supp. 909.
55. *Id.*

days later, the aircraft transporting him from the Mediterranean landed at Andrews Air Force Base in Maryland.[56]

The case came before the District Court for the District of Columbia five months after Yunis' arrest.[57] The counts originally lodged against Yunis fell into three jurisdictional areas. First, Yunis was charged "with conspiracy to commit hostage-taking against passengers and crew, to damage, destroy, disable and place destructive devices aboard an aircraft, and to perform acts of violence against passengers and crew in violation of 18 U.S.C. §§ 371, 1203, 32(a)(1), (2) and (5)."[58] Second, Yunis was charged with "seizing, detaining and threatening passengers and crew members, including three American nationals as hostages, in violation of 18 U.S.C. § 1203."[59] Third, counts II, IV, and V of the indictment charged Yunis with "damaging, destroying, disabling and placing a destructive device upon an aircraft operating in foreign air commerce and committing acts of violence against aircraft personnel in violation of 18 U.S.C. §§ 32 (a)(1), (2), and (5)."[60]

This multi-count indictment was filed September 15, 1987, the day of Yunis' arrest. Upon Yunis' incarceration in the United States, the Government entered a superseding indictment on October 1, 1987 adding additional counts.[61] Counts VI, VII, VIII and IX charged Yunis with "damaging, destroying and placing a destructive device on an aircraft registered in a foreign country and harming aircraft personnel, in violation of 18 U.S.C. §§ 32 (b)(1), (2) and (3) and 49 U.S.C. App. § 1472(n)(1)."[62] The nature of Yunis' offense and his subsequent arrest raised two important issues. First, did the United States have statutory authority to assert jurisdiction over an alien who committed an act on foreign soil? Second, did asserting jurisdiction over Yunis violate international law since the United States was clearly exercising jurisdiction beyond its territorial boundaries? In addressing the first issue of domestic statutory authority, the district court relied on the jurisdictional provisions of both the Hostage Taking statute, 18 U.S.C. § 1203(b)(1), and the Destruction of Aircraft statute, 18 U.S.C. § 32(a), (b).[63]

56. 681 F. Supp. at 912.
57. The precise date is February 12, 1988. Yunis was incarcerated in Washington, D.C. while awaiting trial.
58. 681 F. Supp. at 898.
59. *Id.*
60. *Id.*
61. *Id.*; N.Y. Times, Oct. 7, 1987, at A27, col. 6.
62. 681 F. Supp. at 898.
63. *Id.* at 904-09.

A. *Did the United States Have Statutory Authority to Assert Jurisdiction Over Yunis?*

In applying the Hostage Taking statute, the court found that the language of the statute unambiguously granted the United States extraterritorial jurisdiction because there had been three American nationals on board the Jordanian flight. In fact, Judge Barrington Parker refused to consider whether Congress had actually intended not to extend extraterritorial jurisdiction over offenses where the only nexus to the United States was the presence of American nationals.[64] Quoting the stand of the District of Columbia Circuit on legislative history, he stated:

> [I]t is elementary in the law of statutory construction that, absent ambiguity or unreasonable result, the literal language of the statute controls and resort to legislative history is not only unnecessary but improper.[65]

Conversely, in the case of *United States v. Bowman*,[66] where three American defendants and one British defendant were accused of defrauding the United States government in a scheme involving a wholly-owned United States company in Brazil, the Supreme Court rejected the notion that Congress' intent in enacting the criminal appeals statute in question was not a relevant factor in determining whether extraterritorial jurisdiction applied.[67] Stating in dicta that Congress must explicitly define the locus of a crime for a statute to apply, and if punishment of "crimes against private individuals or their property" is to be extended extraterritorially Congress must so state, the Court held that such strict guidelines need not apply to all criminal statutes.[68] Chief Justice Taft, writing for the Court, stated:

> [T]he same [strict] rule of interpretation should not be applied to criminal statutes which are, as a class, not logically dependent on their locality for the Government's jurisdiction, but are enacted because of the right of the Government to defend itself against obstruction or fraud wherever perpetrated, especially if committed by its own citizens, officers, or agents.[69]

The Supreme Court's rationale was that in such cases, although Congress had not provided specifically for extraterritorial reach of the criminal

64. *Id.* Yunis' counsel argued that Congress did not intend to extend jurisdiction merely on the grounds that American nationals were seized.

65. *Id.* at 904 (citing Eagle Picher Industries Inc. v. E.P.A., 759 F.2d 922, 929 n.11 (D.C. Cir. 1985) quoting Montgomery Charter Serv. Inc. v. Washington Metro. Area Transit Comm'n, 325 F.2d 230, 233 (D.C. Cir. 1963)).

66. 260 U.S. 94 (1922).

67. *Id.* at 102.

68. *Id.* at 98.

69. *Id.* at 98.

law, extraterritorial reach was "to be inferred from the nature of the offense."[70]

However, there is no indication that the offense of hostage-taking is in that special class of cases that by their very nature must imply extraterritorial jurisdiction.[71] Actually, in discussing the Aircraft Sabotage Act, Senator Thurmond emphasized that the Act provided jurisdiction either in "those *rare* instances where the alleged offender would still be on board the aircraft when it lands in the United States, as well as those instances where the offender would *subsequently enter the United States and be found here*."[72]

In applying the Destruction of Aircraft statute, the *Yunis* court found it necessary to dissect the two operative subsections. Subsection 32(a) applies to offenses committed against "any aircraft in the special aircraft jurisdiction of the United States or any civil aircraft used, operated, or employed in interstate, overseas, or foreign air commerce."[73] Subsection 32(b) applies to acts of violence against any individual on board "any civil aircraft registered in a country *other* than the United States . . . *if the offender is later found in the United States*."[74] Yunis was charged pursuant to both subsections — 32(a) because the Jordanian airliner was used in foreign air commerce and 32(b) because he was allegedly *found* in the United States.[75] The court rejected the Government's argument that subsection 32(a) applied.[76] The Government contended that because the American citizens on board the Jordanian airliner must have departed from the United States some time in the past, any flight they boarded in the future, including this particular Jordanian airliner, could be considered in the stream of "foreign air commerce" for purposes of liability pursuant to subsection 32(a).[77] The court declined to find that

70. *Id.* (emphasis in original).

71. In *Bowman*, the very crimes with which the defendants were charged — conspiracy to defraud the corporation in which the United States was a stockholder, and conspiracy on the ship, on the high seas and at the port of Rio de Janeiro as well as in the city, in violation of § 35 of the Criminal Code — led the Court to the conclusion that "it would be going too far to say that because Congress did not fix any locus, it intended to exclude the high seas in respect of this crime. The natural inference from the character of the offense is that the sea would be a probable place for its commission." *Id.* at 99.

72. S. REP. No. 619, 98th Cong., 2d Sess. 5 (1984) (Senator Strom Thurmond reporting from the Committee on the Judiciary on the Aircraft Sabotage Act) (emphasis added).

73. 18 U.S.C. § 32(a) (1988). Note that 32(a) applies not only to United States aircraft, but also to any aircraft departing from the United States.

74. *Id.* § 32(b) (emphasis added).

75. 681 F. Supp. at 905-907 (emphasis added).

76. *Id.* at 907.

77. *Id.*

Congress has the ability to regulate foreign commerce having so attenuated a relationship to the United States.[78]

With respect to subsection 32(b), the court faced a tougher jurisdictional question. Attached to 32(b) is the qualifier that the offender must later be *found* in the United States. The Government, which had prepared the indictment against Yunis long before his apprehension, had intentionally postponed filing counts VI, VII, VIII, and IX, based on violation of subsection 32(b), until after the arrest on board the yacht in the Mediterranean.[79] Thus, cognizant of the fact that it could only charge Yunis with violation of subsection 32(b) if he were later found in the United States, the Government planned his capture and then, as soon as he was within United States jurisdiction at Andrews Air Force Base, asserted jurisdiction on the basis that Yunis was *later found* in the United States.

The process of charging Yunis involved first indicting him under the Hostage Taking statute, which does not require physical presence in the United States in order to exercise subject matter jurisdiction, and then, after his capture and abduction to the United States, charging him with violating the Aircraft Destruction statute. Instead of providing a definitive interpretation of the term "found," the court embraced the Government's argument that the term "found" is neither defined in the statute nor explained in the legislative history.[80] Further, the court concluded that the statute "neither precludes nor approves the extension of jurisdiction over offenders who have been brought to this country by force."[81] It seems inconsistent for the *Yunis* court to hold the legislative history of the Hostage Taking Act to be "unnecessary and improper" in regard to Yunis' claim that the Hostage Taking Act was not intended to assert jurisdiction solely on the nationality of the victims,[82] and then turn about face and take comfort in the Government's argument that "the legislative history and purpose behind the [Destruction of Aircraft] statute support extending jurisdiction over the defendant."[83]

78. As the court noted:

> Rather than relying on Congress's direct authority under Art. I Section 8 to define and punish offenses against the law of nations, the government contends that Congress has authority to regulate global air commerce under the Commerce Clause. U.S. CONST. art I, § 8, cl. 3. But Congress is not empowered to regulate foreign commerce which has no connection to the United States.

Id. at 907 n.24.

79. *Id.* at 898; N.Y. Times, Oct. 7, 1987, at A27, col 6.

80. 681 F. Supp. at 906.

81. *Id.*

82. *Id.* at 904. *See supra* notes 64-65 and accompanying text.

83. 681 F. Supp. at 906.

B. *Did Asserting Jurisdiction Over Yunis Violate International Law?*

The second critical issue raised in *Yunis* concerned whether assertion of jurisdiction by the United States violated international law. Conceding the importance of international law, the court stated that "the government cannot act beyond the jurisdictional parameters set forth by principles of international law and domestic statute."[84] What then are the principles of international law that the court was forced to consider? The court limited its discussion to the Universality principle and the Passive Personality principle and found that the United States had subject matter jurisdiction under both principles.[85]

In addressing the Universality principle, the court found extraterritorial jurisdiction existed on the basis that Yunis' offenses of hostage-taking and destruction of aircraft were of such a heinous nature that they provided the United States with the requisite jurisdiction to prosecute and punish the offender on behalf of the world community,[86] notwithstanding that Yunis was not a United States citizen and that the offense was perpetrated outside United States territory. The court cited several authorities and international treaties[87] in order to support its position that Yunis' offenses were *hosti humani generis* and that, therefore, the United States was justified in asserting jurisdiction under the Universality theory.[88]

84. *Id.*

85. 681 F. Supp. at 903 ("Thus the Universal and Passive Personality principles, together, provide ample grounds for this Court to assert jurisdiction over Yunis.").

86. *Id.* at 901. In fact, the court quoted an excerpt from the President's Message to Congress on the International Convention Against the Taking of Hostages in support of the notion that the very purpose behind the Hostage Taking Act was "to demonstrate to other governments and international forums that the United States is serious about its efforts to deal with international terrorism." President's Message to Congress on the International Convention Against the Taking of Hostages, 20 WEEKLY COMP. PRES. DOC. 590, 592 (Apr. 26, 1984), *cited in* 681 F. Supp. at 905.

87. 681 F. Supp. at 900-01. The court cited art. 4, § 2 of the Hague Convention and art. 5, § 2 of the Montreal Convention as evidence that each contracting party is mandated to "take such measures as may be necessary to establish its jurisdiction over the offenses . . . where the alleged offender is present in its territory." *Id.* at 900. The court chose to focus on the issue of whether aircraft piracy and hostage-taking fit within the category of "heinous" offenses for purposes of satisfying the definition of the Universality principle. In support of the court's position that these offenses do meet the criterion of "heinous," the court cited 2 M. BASSIOUNI, INTERNATIONAL CRIMINAL LAW 31-32 (ed. 1986) and Demjanjuk v. Petrovsky, 776 F.2d 571, 582 (6th Cir. 1985). *Id.* at 900-01. The court characterized *Demjanjuk* as holding that the "[t]reaty against genocide signed by a significant number of states made that crime heinous; therefore Israel had proper jurisdiction over nazi (sic) war criminal under the Universal principle." *Id.* at 900.

88. *Id.* at 901. Further, the court cited to the District of Columbia Circuit's decision in Tel-Oren v. Libyan Arab Republic, 726 F.2d 744 (1984), *cert. denied*, 470 U.S. 1003 (1985), as establishing "that the Universal principle, standing alone, provides sufficient basis for asserting jurisdiction over an alleged offender." 681 F. Supp. at 901. In fact, the court in *Tel-Oren* refused to find jurisdiction based on the Universality principle. 726 F.2d at 744 (1984).

The court had greater difficulty in concluding that the Passive Personality principle applied. It conceded that the Passive Personality principle has historically been the most controversial of the theories justifying the application of extraterritorial jurisdiction.[89] However, the court drew the conclusion that since the Hostage Taking Act provides that a state may exercise extraterritorial jurisdiction over a non-national[90] who commits an offense against a national if that state considers it appropriate, then the Passive Personality principle must be allowed to apply.[91] The court found the Restatement (Revised) of Foreign Relations Law's admonition against the invocation of the Passive Personality principle no longer controlling.[92] It cited the reporter's notes to the Tentative Draft No. 6, which acknowledge that the principle has been increasingly accepted when applied to terrorist and other organized attacks on a state's nationals by reason of their nationality.[93] The court conveniently ignored the fact that there has not been one single case in which United States courts have successfully asserted jurisdiction based on the Passive Personality principle alone.

The court alluded to *United States v. Benitez*[94] in search of support for asserting jurisdiction on the basis of the Passive Personality principle against aliens committing crimes against United States nationals overseas.[95] What the court failed to elucidate, however, is that the controlling jurisdictional factor in *Benitez* was the official status of the victims. Indeed, in *Benitez*, the court stated:

> In resolving this issue, it is important that the crimes for which Benitez has been convicted were assault upon United States DEA agents, attempted murder of United States DEA agents, and theft of United States government property. Given the nature of the offenses and the identity of the victims, we conclude that the district court had jurisdiction to try and convict Benitez.[96]

89. *Id.* at 902 ("Defendant's counsel correctly notes that the Passive Personal[ity] principle traditionally has been an anathema to United States lawmakers.").

90. Hostage Taking Act, *supra* note 4, at art. 5(1)(a), (d).

91. 681 F. Supp. at 902 ("Therefore, even if there are doubts regarding the international community's acceptance [of the Passive Personality principle], there can be no doubt concerning the application of this principle to the offense of hostage taking, an offense for which Yunis is charged.").

92. *Id.*

93. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 (1987). For the text of this section, see *supra* note 17.

94. 741 F.2d 1312 (11th Cir. 1984).

95. 681 F. Supp. at 902 n.12.

96. 741 F.2d at 1316.

Although the *Benitez* court relied on both the Protective principle and the Passive Personality principle for conferring jurisdiction,[97] the court could have relied exclusively on the Protective principle. In *Benitez*, United States interests and integrity were at stake. These interests were highlighted by the DEA status of the victims. Indeed, the case revealed that the DEA agents were not fortuitously victimized, but were selected specifically because of the perceived threat of United States law enforcement methods to the drug dealers in Colombia.

In sum, the court in *Yunis* held that under 18 U.S.C. §§ 1203 and 32(b), the United States has jurisdiction over a foreign defendant absent any nexus to the United States other than the presence of three Americans on a hijacked foreign airliner and even though the defendant's entry into the United States is forced, not voluntary.

IV. Analysis: The Need For a Weightier Nexus

Because Royal Jordanian Airlines Flight 402 was not bound for the United States, had not departed from the United States, never flew over the United States, was not registered in the United States, and did not have the outward appearance of a United States plane,[98] the critical issue is whether the United States should have maintained jurisdiction over Fawaz Yunis.

While the United States may espouse the noble ideal of showing the world that it is tough on terrorism,[99] self-interest dictates that the United States not allow its jurisdictional tentacles to reach so far. There are compelling reasons for the United States to reject the *Yunis* court's reliance on both the Passive Personality principle and the Universality principle. These reasons may be captioned as follows: the danger of provoking reciprocal conduct from unfriendly nations, the danger of setting unsound precedent for other nations to follow, and respect for relations among nations.

A. *The Specter of Reciprocal Conduct*

It is not so farfetched to imagine the prospect of Iran dispatching intelligence agents to the United States to capture United States military of-

97. *Id.; see also* Rivard v. United States, 375 F.2d 882 (5th Cir.) (U.S. court has jurisdiction over aliens for conspiracy to smuggle heroin into U.S. where several of acts in furtherance of conspiracy were committed within U.S.), *cert. denied sub nom.* Groleau v. United States, 389 U.S. 884 (1967).

98. 681 F. Supp. at 899. The *Yunis* court acknowledged that "the only nexus to the United States was the presence of several American nationals on board the flight." *Id.*

99. *See generally Legislative Initiatives, supra* note 45; *see also* President's Message to Congress Transmitting Four Proposed Bills, 20 WEEKLY COMP. PRES. DOC. 590 (Apr. 26, 1984).

ficers for offenses against Iranian nationals stemming from the accidental shooting down of an Iranian airbus over the Persian Gulf. When the United States cries foul, an Iranian tribunal need only refer to the precedent set by *United States v. Yunis*.

In an attempt to deal with the increasing frequency and violence of international terrorism directed against American citizens abroad, Congress has enacted a panoply of statutes. In 1984 Congress implemented the Hostage Taking Act and the Aircraft Destruction Act. Two years later Congress enacted the Omnibus Diplomatic Security and Antiterrorism Act of 1986.[100]

The Antiterrorism Act, unlike the Hostage Taking Act and the Aircraft Destruction Act, was not introduced as enabling legislation seeking to fulfill United States obligations pursuant to international treaties.[101] According to its proponents, the very objectives sought to be achieved by the Antiterrorism Act could best be served by providing that extraterritorial jurisdiction be extended on the basis of the Passive Personality principle, oftentimes the Passive Personality principle standing alone.[102]

It has been argued that the Antiterrorism Act is a worthy extension of United States jurisdiction over international crimes pursuant to the Passive Personality principle.[103] It is claimed that all that would be necessary to prevent damaging reciprocal conduct by foreign nations is for Congress to amend the Antiterrorism Act to "contain a provision asserting United States jurisdiction only in cases where the state with primary jurisdiction refuses or fails to prosecute the accused."[104] It has been further argued that with this limitation on the use of the Passive Personality principle, coupled with a redefinition of "international terrorism" to require a heightened state of mind, "the United States can narrow the risk

100. The Omnibus Diplomatic Security and Antiterrorism Act of 1986 was codified at 18 U.S.C. § 2331 (1988) [hereinafter Antiterrorism Act]. It sought to provide punishment for conduct resulting in homicide, attempt or conspiracy with respect to homicide, and physical violence with intent to cause serious bodily injury. It is essential that the acts occur outside United States territory and that there be victims who are United States nationals, as a national is defined in section 101(a)(22) of the Immigration and Nationality Act, 8 U.S.C. § 1101 (1982).

101. H.R. CONF. REP. NO. 783, 99th Cong., 2d Sess. 1 (1986), *reprinted in* 1989 U.S. CODE CONG. & ADMIN. NEWS 1865. The Conference Report indicates that the Senate amendment to the Antiterrorism Act asked the President to call for international negotiations to define international terrorist crimes and to determine whether such crimes would constitute universal crimes under international law. *Id.* at 86.

102. 18 U.S.C. § 2331(a) (1988) provides in pertinent part: "Homicide. — Whoever kills a *national* of the United States, while such *national* is outside the United States, shall [be punished as provided under this title]." (emphasis supplied).

103. Note, *Extraterritorial Jurisdiction Over Acts of Terrorism Committed Abroad: Omnibus Diplomatic Security and Antiterrorism Act of 1986*, 72 CORNELL L. REV. 599, 616 (1987).

104. *Id.* at 617.

of unwarranted reciprocal applications of the Passive Personality principle."[105]

There are at least three problems with this proposition. The first problem is that the very countries who sponsor terrorism and who could claim jurisdiction under the Nationality principle often choose not to exercise jurisdiction over their offending nationals. Often, these are the very countries from which the United States has the most to fear in terms of reciprocal conduct. As flawed as the proposition is, it appears to reflect the unrealistic view expressed in the prepared testimony of Deputy Assistant Attorney General Toensing during the Hostage Taking Act legislative hearings. In urging extension of extraterritorial jurisdiction, Toensing stated:

> Most perpetrators of hostage-taking outside of the United States will and should be dealt with by the foreign government where the crime occurred. This bill is written to create United States federal jurisdiction in the event the perpetrator evades the jurisdiction of such court, or the court fails to mete out justice in vindication of our interests.[106]

Toensing's comments raise still more concerns. Just what are our interests? Are three Americans on board a Jordanian airliner significant enough to constitute "our interests" in order to warrant subjecting America to reciprocal conduct? Exactly what justice must the other country, with its own statutory structure reflecting different cultural norms, mete out to vindicate United States interests? What if the country to whom most of the victims owe allegiance has not ratified the Hostage Taking Convention so that its domestic law does not give it jurisdiction over the offender?

The explosion in state-sponsored terrorism, primarily promulgated by Syria, Iran, and Libya[107] makes a mockery of the proposition that these countries will sponsor, fund and equip a terrorist activity, then subse-

105. *Id.* at 618.

106. *Legislative Initiatives*, *supra* note 45, at 49.

107. The Libyan-sponsored terrorist actions being perpetrated in the United States by Yu Kikumura, a member of the Japanese Red Army, represent one example of terrorist activities that are sponsored by these four states. Kikumura was arrested on April 12, 1988, by a state trooper in New Jersey. In his possession, the police discovered three eighteen inch bombs made of materials purchased in over 17 states and assembled in fire extinguisher casings. Police also found a map of New York City. Marked in pen on the map was a Navy recruiting station on West 24th Street in Manhattan. According to law enforcement officials, his mission was to detonate the bombs on August 14 as part of a plot seeking revenge for the U.S. air raid against Libya. The explosion would occur exactly two years to the day from the American attack. While Kikumura denied any ties to Libya or any other terrorist organization, witnesses identified him as having participated in terrorist activities in Lebanon and Syria. N.Y. Times, Feb. 4, 1989, at 30, col. 6; *id.*, Feb. 8, 1989, at B2, col. 1.

On the expected day of the bombing, another bomb was detonated in Naples, Italy. The bomb destroyed an American U.S.O. club, killing five people including a U.S. serviceman. As

quently mete out justice against those very groups or individuals implicated in the terrorist act.

The second flaw with the proposition to extend United States jurisdiction to crimes committed abroad pursuant to the Passive Personality principle is that oftentimes the government with primary jurisdiction under the Nationality principle is in such a state of anarchy and disarray that in effect there is no government. Such is the case currently in Lebanon. The volatile nature of politics in the Middle East makes it extremely unrealistic to assume that a country such as Lebanon will assert jurisdiction.[108]

Furthermore, article 8 of the Hostage Taking Convention, requiring the state in which the offender is found without exception either to extradite or prosecute him, whether the offense was committed in its territory or not, is applicable only between states that are parties to the Convention.[109] Since Lebanon is not a party to the Convention,[110] and no extradition treaty exists between the United States and Lebanon,[111] the United States cannot rely on Lebanon's failure to extradite Yunis in order to justify the extraordinary apprehension of Yunis.

In addition, a proposal that would trigger jurisdiction based on the Passive Personality principle would engender animosity when no extradi-

a result of this bombing, another member of the Japanese Red Army, Junzo Okudaira, was arrested. *Id.*, Feb. 4, 1989, at 30, col. 6.

See also N.Y. Times, Feb. 8, 1989, at B2, col. 2 (reporting that Syria helped train Kikumura); N.Y. Times, Aug. 1, 1989, at A1, col. 4 (suggesting that Hezbollah and Pro-Iranian groups were involved in murder of Col. Higgins); Smith, *Hunted By An Angry Faith*, TIME, Feb. 27, 1989, at 28 (discussing Iranian threat against Salman Rushdie).

108. To illustrate, even before Syrian intervention into Lebanon during the beginnings of civil strife in 1976, Lebanon had maintained a government divided along religious lines. The result was that different groups with equal power in the government owed allegiance to competing outside nations. These divided allegiances made it extremely difficult for the Lebanese government to try one of its nationals charged with a terrorist act. *See generally* N. WEINBERGER, SYRIAN INTERVENTION IN LEBANON: THE 1975-1976 CIVIL WAR (1986).

Indeed, when he first received news of Yunis' capture, Lebanese Justice Minister Nabih Berri denounced the seizure of Yunis as "an act close to piracy" and vowed that the Lebanese would "find out the circumstances involved before taking the necessary measures to defend a Lebanese citizen." N.Y. Times, Sept. 19, 1987, at A3, col. 3. Subsequently, however, when confronted with Yunis' testimony that Berri had actually been behind the Jordanian Airlines seizure, Berri withdrew support for Yunis and claimed Yunis' comments were "fabricated by the Israeli and American intelligence." N.Y. Times, Dec. 4, 1987, at A12, col. 3.

109. In INTRODUCTION TO INTERNATIONAL LAW, J.G. Starke notes that "the mere fact that there are a large number of parties to a multilateral convention does not mean that its provision are of the nature of international law, binding non-parties. Generally speaking, non-parties must by their conduct distinctly evidence an intention to accept such provision as general rules of international law." J. STARKE, *supra* note 8, at 43.

110. Lebanon was not a signatory to the Convention, nor has it acceded to the Convention in the interim.

111. No extradition treaty existed between the United States and Lebanon at the time of the Jordanian airliner hijacking, and none has gone into effect in the interim.

tion treaty exists between the requesting state and the state of nationality of the offender. Once again, the very countries from whom the United States has the most to fear in terms of damaging reciprocal conduct are those nations with whom the United States has no extradition treaties.

The third flaw with the proposition invokes a discussion of the Universality principle. The foundation of the Universality principle is a global acceptance that an offense is of such a heinous nature that no state can condone it, and all states are encouraged to punish the offenders.[112] A comprehensive definition of terrorism has eluded world representatives since acts of violence against airline passengers emerged on the world stage. This lack of consensus on the definition of terrorism,[113] despite the need for its suppression, has led to a stalemate in the search for a convention dealing with terrorism as terrorism and not in its alternative forms of hijacking, aircraft piracy, and hostage-taking.

Indeed, it is possible to grasp the difficulty of labeling any offense as universally condemned when one regards the relatively small number of countries which have ratified recent conventions. Although several treaties have already made international crimes out of offenses involving internationally protected persons,[114] civil aviation,[115] and hostage-taking,[116] the universal application of those treaties, as evidenced by the number of countries ratifying them, is a different story.[117] Alarmingly, despite worldwide concern for the growth in terrorism, only 54 states have ratified the Hostage Taking Convention.[118] The United Nations lists 159 member states and 11 non-member states on its roster. If only

112. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 articulates the Universality principle as follows:

> A state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism, even where none of the bases of jurisdiction indicated in § 402 is present.

113. Note, *Extradition in an Era of Terrorism: The Need to Abolish the Political Offense Exception*, 61 N.Y.U. L. REV. 654, 687 (1986).

114. Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1975, T.I.A.S. No. 8532, 1035 U.N.T.S. 167; Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that Are of International Significance, Feb. 2, 1971, 27 U.S.T. 3949, T.I.A.S. No. 8413, *reprinted in* 10 I.L.M. 255 (1971).

115. Tokyo Convention, *supra* note 33; Hague Convention, *supra* note 35; Montreal Convention, *supra* note 37.

116. Hostage Taking Convention, *supra* note 4.

117. In the twenty-seven years that have elapsed since the Tokyo Convention was enacted, 124 countries have ratified the Tokyo Convention. However, as of mid-1989, only 80 countries had ratified the Hague Convention, and only 93 countries had ratified the Montreal Convention.

118. M. BOWMAN & D. HARRIS, MULTILATERAL TREATIES: INDEX & CURRENT STATUS 142 (6th ed. Supp. 1989).

54 states have passed legislation recognizing the Hostage Taking Convention, that represents barely one-third of all United Nations member states. Referring once again to *Yunis*, there is real cause for concern that the court upheld the use of the Hostage Taking Act to provide subject matter jurisdiction when less than one-third of the nations of the world have ratified the Convention supporting that Act.

It is important to note that the act of hostage-taking is simple to define. The taking of hostages as defined in article 1 of the Hostage Taking Convention is a patently discernible event. As long as an individual has physically seized another individual, and as long as the seizing individual has articulated his desire to compel any third party to do or abstain from doing any act, he has committed the offense of hostage-taking. The acts of seizing and articulating demands are visible acts, not requiring any inquiry into the offender's motives. On the other hand, states must resolve several pivotal issues before *terrorism* can truly fall under the Universality principle. Some of these issues are whether to include governmental, state-sponsored, acts as well as private acts, the scope of conduct covered, and whether the "international" component should be determined by the perpetrator's objective, the status of the victim or the territory in which the act occurred. The key problem in formulating a definition acceptable to all nations is that one person's terrorist is another person's freedom fighter; one person's murderer is another person's spiritual leader.[119]

The threat of reciprocal conduct based on the Passive Personality principle formed the basis for the United States aversion to the principle over 100 years ago in the case of *Cutting*.[120] In his communique of May 4, 1888 to the United States consul to Mexico, Secretary of State Bayard, stated:

> To say that [Cutting] may be tried in another country for his offense, simply because its object happens to be a citizen of that country, would be to assert that foreigners coming to the United States bring hither the penal laws of the country from which they come, and thus subject citizens of the United States in their own country to an indefinite criminal responsibility. Such a pretension can never be admitted by this Government.[121]

The threat imposed upon American citizens, which Mr. Bayard articulated above, is ever more present today as the means of travel and com-

119. Indeed, when he was sentenced, Yunis raised this very issue when he asked, "Had I been a member of the contra forces in Nicaragua and committed the same act, would my act be considered terrorism or freedom-fighting?" Wash. Post, Oct. 5, 1989, at A39, col. 1; L.A. Times, Oct. 5, 1989, at 6, col. 1.

120. *See* 2 J. MOORE, DIGEST OF INTERNATIONAL LAW 228, 237 (1906).

121. *Id.* at 238.

munication have advanced. While it is true that terrorist acts of revenge will still occur whether or not the United States expands its use of the Passive Personality principle, the ability of unfriendly countries to justify some of their actions against individuals which they label "terrorists" by appealing to the precedent set by *Yunis* need not continue.

There is no doubt that unfriendly nations will exact their own, often barbaric, form of justice. Barely nine months after the captain of the U.S.S. Vincennes accidentally ordered the downing of an Iranian civilian airliner, the captains's car was the object of a bombing attack by what authorities believed to have been Iranian agents seeking revenge for the downing of the airliner.[122] If indeed, as suspected, the car-bombing incident can be attributed to the Iranian government, then it must be viewed as merely that state's chosen form of justice. If instead of meting out justice in the form of a car-bombing, the Iranian agents had abducted Captain Rogers and taken him to Iran to stand trial; they would find judicial support for their action not only from the holding in *Yunis*, grounded in the theory of the Passive Personality Principle, but also on the basis of the United States longstanding policy of permitting extraordinary apprehensions set down in *Ker v. Illinois*[123] and utilized in *Yunis*.

Since *Ker v. Illinois*[124] was decided by the Supreme Court in favor of the Government's extraordinary apprehension of a fugitive, one may be tempted to hold it out as sound precedent for the district court's decision in *Yunis*. However, several distinctions must be drawn between the two cases. *Ker* involved the attempt to bring back a United States fugitive fleeing the custody of an Illinois court that had already indicted him. Furthermore, because of Peru's occupation by Chilean forces, there was no effective government for United States authorities to negotiate with in pursuance of the extradition treaty. In contrast, *Yunis* involved a Lebanese resident-citizen who was not a fugitive since no American grand jury had returned an indictment against him. Furthermore, there were two governments with which the United States could have negotiated,

122. N.Y. Times, Mar. 11, 1989, at A1, col. 2.

123. 119 U.S. 436 (1886). An Illinois citizen indicted for embezzlement and larceny had fled to Peru, whose capital was occupied by Chilean forces. Because of the Chilean presence, there was no Peruvian government with which the United States government could negotiate. Subsequently, Ker was located and arrested by a private investigator who had been retained by the United States government and was ultimately tried and convicted by an Illinois state court. The court allowed this extraordinary arrest. This case represented the irony that although the United States government had set out to arrest Ker via conventional methods, the Government abandoned the traditional extradition process only when the traditional method was no longer effective.

124. *Id.*

Jordan and Lebanon, notwithstanding the weakness of Lebanon's government.

Ker spawned a line of extraordinary apprehension cases.[125] Foremost amongst those is *United States v. Toscanino*[126] which provided an exception to *Ker*. *Toscanino* forbade jurisdiction to a United States court if an extraordinary apprehension was so violative and abusive, that it "shock[ed] the conscience."[127] Of import, however, is the fact that with rare exception,[128] no district court has ever denied itself jurisdiction over an extraordinary apprehension case because the apprehension was found to have "shocked the conscience" pursuant to *Toscanino*. Despite this fact, the Government's reliance on *Ker* and its progeny[129] to validate its extraordinary apprehensions of foreign drug merchants has been a resounding failure,[130] with the possible exception of General Noriega. Even this apprehension, however, has resulted in protestations from our OAS allies.[131] In addition, Noriega's arrest has been resoundly criticized by such authorities as Stansfield Turner,[132] Director of the CIA during the Carter administration, and Congressman Charles Rangel,[133] Chairman of the Congressional Select Committee on Narcotics. Consequently, resorting to a policy which is, at best, of questionable legality and, at worst, a violation of international law, is problematic. Applying the same policy to the apprehension of alleged terrorists probably would re-

125. *See infra* notes 126 & 128.

126. United States v. Toscanino, 500 F.2d 267, *reh'g denied*, 504 F.2d 1380 (2d Cir. 1974).

127. *Id.* at 273 (quoting Rochin v. California, 342 U.S. 165, 169 (1952)).

128. *But see* United States v. Fernandez-Caro, 677 F. Supp. 893 (S.D. Tex 1987) (granting defendant's motion to suppress fruits of search of his hotel room since the confession concerning location of articles in hotel room had been extorted from defendant by Mexican officials through use of physical torture).

129. *See* United States *ex rel.* Lujan v. Gengler, 510 F.2d 62, 66 (2d Cir.), *cert. denied*, 421 U.S. 1001 (1975) (brutality must be at the hands of U.S. Law enforcement agents); United States v. Lira, 515 F.2d 68, 70-71 (2d. Cir. 1975) (not only must brutality be at hands of U.S. law enforcement agents, but defendant must provide proof of U.S. law enforcement involvement); United States v. Lopez, 542 F.2d 283 (5th Cir. 1976) (strict adherence to 2d Circuit's holding in *Lira*); *see also* United States v. Lara, 539 F.2d 495 (5th Cir. 1976). Although *Lara* declined to apply the *Toscanino* principle explicitly, *Lara* suggests a further limitation of the *Toscanino* exception by holding that the court had personal jurisdiction over the defendant where "U.S. agents played no direct role in the torture allegedly administered by the Panamanian authorities, and . . . the defendant failed to prove that a U.S. Government agent was even present at the time." 539 F.2d at 495.

130. The United States' victory in extraditing Jose Abello Silva, a transporter for the Medellin drug cartel, from Colombia was dampened by the acknowledgment that he is not on the U.S. Justice Department's list of the 12 most wanted Colombian traffickers. N.Y. Times, Oct. 30, 1989, at A13, col. 1.

131. N.Y. Times, Dec. 23, 1989, at A15, col. 5.

132. Wolf, *U.S. Gets Noriega but Moscow Scores Panama Points*, Reuters, Jan. 7, 1990.

133. Wash. Post, Jan. 18, 1990, at A15, col. 3.

sult in even greater protestations and divisiveness both domestically and abroad.

If *Yunis* is accepted under international law, then, conceivably, Iran could dispatch its FBI counterpart to the United States, abduct Captain Rogers, claim that they had "found" him, drawing support from the Universality principle, and claim subject matter jurisdiction on the basis of the Passive Personality principle, since the victims of the incident had been nationals of Iran. As the state of the Passive Personality principle stands now, post-*Yunis*, the presence of an Iranian victim aboard any airliner, no matter what its registry, would not preclude Iranian subject matter jurisdiction.

It is conceded that states such as Iran, Syria, and Libya have their own agenda, and will continue to exact revenge as they see fit, irrespective of any precedent set down by *Yunis*. However, there are any number of countries, which, for various reasons, have vacillated in their relations with the United States, sometimes drawing closer, sometimes moving away.[134] This article suggests that the focus should be centered on the potential reciprocal conduct emanating from these "middle ground" countries. Unlike states sponsoring terrorism, these "middle ground" states do attempt to adhere to norms of international law and to base their foreign relations policies accordingly. If and when they are pressured by more fanatical states, or by their underground movements, to take violent measures, they will find support for such extraordinary actions in *Yunis*.

Moreover, these "middle ground" countries may well buttress their reliance on *Yunis* with the 1989 Department of Justice Directive ("Directive").[135] The Directive gives FBI agents wide latitude for engaging in the extraordinary apprehension of fugitives by permitting FBI agents to enter a foreign country, seize a foreign national, and return him to the United States, without first notifying the appropriate foreign government. The 1989 Directive was issued June 21, 1989 in blatant disregard of internationally accepted norms of asserting extraterritorial jurisdiction.

It should be noted that the Directive is violative not only of international law, but also of other Department of Justice Directives. The 1980

134. The relationship of the United States and O.A.S. during the later years of Noriega's reign of power contrasts sharply with the O.A.S. criticism of the United States apprehension of Noriega. *See also* N.Y. Times, Dec. 23, 1989, at A15, col. 5.

135. N.Y. Times, Oct. 14, 1989, at A6, col. 4. *See also* United States v. Verdugo-Urguidez, 58 U.S.L.W. 4263 (U.S. Feb. 28, 1990). (Fourth Amendment does not apply to search and seizure by U.S. law enforcement agents of property owned by a nonresident alien and located in a foreign country.)

Directive, issued during President Carter's term in office, specifically precluded the FBI from seizing fugitives in foreign countries without obtaining consent from the rightful authorities. In the 1980 Directive, it was specifically stated that FBI agents and/or their counterparts who disobeyed the Directive could face criminal prosecution in the United States for kidnapping. However, shortly after the arrest of Yunis, Stephen Trott, then head of the United States Department of Justice Criminal Division, opined that United States courts would not look with disdain upon abductions of Middle Eastern terrorists, when he stated: "If FBI agents hypothetically ran over to Beirut with a net, snagged somebody and brought him back here, the court would say, 'we don't care how long he was in the net; they fed him, he's here.' "[136] Arguably, one can directly attribute the 1989 Directive's issuance to the Government's originally, frustrated efforts to obtain custody of General Manuel Noriega and the successful apprehension and prosecution of Fawaz Yunis.

B. United States v. Yunis: *A Dangerous Precedent*

Fawaz Yunis was convicted on March 14, 1989. The jury found him guilty of hostage-taking, aircraft piracy and conspiracy.[137] Coincidentally, the 1989 Directive was issued June 21, 1989, a mere one month after Yunis was convicted. Barely three months later, Yunis was sentenced, on October 4, 1989, by District Court Judge Aubrey Robinson, to serve thirty years for hostage-taking, twenty years for aircraft piracy, and five years for conspiracy.[138] In declining the Government's request for an imposition of a life sentence, Judge Robinson noted Yunis' "sensitivity" evidenced by his permitting "two people with serious medical conditions to disembark" as a mitigating factor, and sentenced him accordingly.[139] Nevertheless, Judge Robinson concluded that a long prison term was necessitated, since, "time 'will never wipe out what is in the minds' of the plane's passengers and crew."[140] Although the maximum sentence was not imposed, Assistant United States Attorney Jay B. Stevens stated that the sentence was satisfactory since " 'it vindicates the

136. N.Y. Times, Jan. 19, 1986, at A1, col. 4 & A10, col. 6.

137. Wash. Post, Mar. 15, 1989, at A1, col. 2; L.A. Times, Mar. 14, 1989, at 1, col. 1; Chicago Tribune, Mar. 15, 1989, at 10, col. 1; London Daily Telegraph, Mar. 16, 1989, at 16.

138. The terms are to run concurrently, and Yunis will be given credit for the two years he served in prison awaiting trial and sentencing. *See* N.Y. Times, Oct. 5, 1989, at A7, col. 1; London Daily Telegraph, Oct. 5, 1989, at 10.

139. L.A. Times, Oct. 5, 1989, at 6, col. 1.

140. Chicago Tribune, Oct. 5, 1989, at 6, col. 1.

victims in this case, it is a substantial punishment, and it sends a clear message' that terrorists and air pirates will be prosecuted."[141]

To date, it is impossible to chronicle how many countries have adopted *Yunis* as precedent, or foretell how many will rely on it in the future since only a few months have elapsed since Yunis was sentenced and the 1989 Directive was issued. However, it is significant that the only country which has most recently engaged in an extraordinary apprehension, specifically and expressly relying on *Yunis*, was Israel, a United States ally. Although Israel is not in a declared war with Lebanon, Israel is in a declared war with Syria, and Syria maintains substantial control over Lebanon's affairs. Israel has consistently invoked the anticipatory self-defense provisions of article 51 of the United Nations Charter[142] when it has conducted an abduction in the territory of either of these states.

On July 28, 1989 Israeli commandos stormed an apartment in a Lebanese village, seeking and capturing Sheik Abdul Karim Obeid, the feared leader of one of Lebanon's most violent pro-Iranian groups, the Party of God (Hezbollah).[143] The Israeli commandos spirited Obeid and two of his aides back to Israel, where they were incarcerated. When the Israelis abducted Sheik Obeid from Lebanon on July 28, 1989, they chose not to claim anticipatory self-defense, but to rely for support on the United States action in *Yunis*.[144]

The parallels between this abduction and that carried out by the United States against Yunis are startling, especially in light of the United States condemnation of the Obeid capture.[145] First, the Israeli government waited fourteen hours after the abduction before disclosing its details to the media.[146] The United States kept details of Yunis' abduction

141. Wash. Post, Oct. 5, 1989 at A39, col. 3; *see also* N.Y. Times, Oct. 5, 1989 at A7, col. 1; L.A. Times, Oct. 5, 1989 at 6, col 1.

142. Article 51 provides that:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

U.N. CHARTER art. 51.

143. N.Y. Times, July 29, 1989, at A1, col. 1.

144. *Id.*

145. *See U.S. Avoids Direct Criticism of Israeli Raid*, Reuters, Aug. 28, 1989: "In July, asked about the kidnapping by Israel of Sheikh Abdel Karim Obeid, Bush implicitly condemned the seizure by saying that kidnapping did not serve the cause of peace." *See also* N.Y. Times, Aug. 1, 1989, at A7, col. 6 (Sen. Robert Dole's condemnation of Israel's abduction of Sheik Obeid).

146. N.Y. Times, July 29, 1989, at A1, col.1.

secret until Yunis was arraigned in the United States, five days after his seizure on the Mediterranean.[147] Second, Israel immediately termed the capture of Obeid as an "arrest," precipitated on the grounds that Obeid was a "preacher, inciter, and, at times, a planner of attacks against Israel."[148] Similarly, a senior United States Justice Department official stressed that Yunis' arrest "was not a kidnapping and was pursuant to a warrant" issued in Washington D.C. on September 11, 1987.[149] Third, and most ominously, when defending his government's actions, Israeli Cabinet Minister Ehud Olmert found precedent in the action of the United States:

> [I]n dealing with these terrorists you must take extraordinary measures, and even the United States of America, just two years ago, kidnapped one of these Hezbollah leaders, because you can't just negotiate with them.[150]

Clearly, Mr. Olmert was referring to the United States abduction of Yunis in 1987. When presented with the question of why the Israeli government did not consider the possibility that Obeid's kidnapping would result in the retaliatory murder of Colonel Higgins, one of the American hostages held in Lebanon, Olmert responded: "Don't forget that when your country two years ago kidnapped Fawaz Yunis, also a Hezbollah man from more or less the same group, this question could have been asked with the same validity."[151] The execution of Colonel Higgins underscores the fact that even though the United States may not be the primary target of a violent act of reciprocal conduct, its vital interests may be directly or indirectly threatened when another country, relying on *Yunis*, commits an act of extraordinary apprehension.

There is no doubt that Israel was looking to the precedent set by *Yunis* to justify its actions. Comparing the United States abduction of Yunis with Israel's abduction of Obeid, it seems that the Israeli actions were more justified since Yunis was considered by Reagan Administration officials as a "hired gun" and not a major strategist involved in planning terror operations,[152] while Obeid was the leading figure of Hezbollah in south Lebanon and played an important role in organizing actions against Israel's continuing presence in the south Lebanon "security

147. N.Y. Times, Sept. 18, 1987, at A1, col. 5.
148. N.Y. Times, July 29, 1989, at A1, col. 1.
149. N.Y. Times, Sept. 18, 1987, at A11, col. 6.
150. *Nightline: Hezbollah Claims Hostage Killed* (ABC television broadcast, July 31, 1989) (transcript on file at Journal Graphics, Inc., New York, N.Y.).
151. *Id.*
152. N.Y. Times, Sept. 19, 1987, at A3, col. 4.

zone."[153] The fact that Yunis was a relatively minor character in international terrorism was reiterated by noted authority Robert Kupperman, a specialist for the Center for Strategic and National Studies in Washington, D.C. He stated that "at best, [Yunis] is a second-tier hijacker."[154] Authorities on terrorism also assert that the hijacking in which he allegedly took part hardly ranked among the world's major terrorist incidents.[155] For the United States to condemn the extraordinary apprehension of a major Islamic terrorist leader, Obeid, while expending immense resources to capture the "hired gun," Yunis, is nothing less than hypocrisy.

If, in the interest of combatting international terrorism, United States courts are going to overrule an historical aversion to the Passive Personality principle, then it is imperative that the perpetrator's offense have a significant nexus to the interests of the United States. That nexus must evidence intent on the terrorist's part of specifically singling out United States nationals to be the victims in furthering his goals. This approach is compatible with the Restatement (Third) of Foreign Relations Law. The Restatement (Third) has retreated from its predecessor's strong disfavor towards the Passive Personality principle by stating in a note to Section 402:

> The [Passive Personality] principle has not been generally accepted for ordinary torts or crimes, but it is increasingly accepted as applied to terrorist and other organized attacks on a state's nationals by reason of their *nationality*, or to assassination of a state's diplomatic representatives or other officials.[156]

There is no indication that Yunis' seizure of the Jordanian airliner was predicated on the American nationality of three of the passengers. To the contrary, Yunis is reported to have personally reassured the three Americans on board that they would not be harmed.[157] In order to in-

153. Muir, *Lebanese Shiites Dispute Gains to Israel From Kidnapping*, Christian Sci. Monitor, Aug. 2, 1989, at 3, col 1.

154. L.A. Times, Feb. 20, 1989, at 14, col. 1.

155. Wash. Post, Feb. 27, 1989, at A14, col. 2.

156. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 note (emphasis added).

157. United States v. Yunis, Government's Omnibus Response to Defendant's Pretrial Motions, at 18. *See also* Abramovsky, *Multilateral Conventions for the Suppression of Unlawful Seizure and Interference with Aircraft (Part. 1): The Hague Convention*, 13 COLUM. J. TRANSNAT'L L. 381 (1974), for an illustration of the fact that not all hijackers have the same characteristics. An analysis of the reported hijackings since 1930 results in the identification of five basic types of hijackers: (1) the disgruntled national who unlawfully seizes an aircraft and commands its flight to a country which shares his political ideology; (2) the so-called "flying commando" bent on the triple goal of political blackmail, destruction of the aircraft, and incarceration or death of its passengers, so as to focus world attention on his cause; (3) the mentally deranged individual who has chosen hijacking either as a device to gain recognition

crease respect for the Passive Personality principle and maintain its integrity, the courts must demand that the United States government establish that United States citizens were not merely the unfortunate chance victims of a politically motivated offense, but that their very identity as Americans was instrumental in the terrorist's objectives. Only then can the United States lessen the likelihood of devastating reciprocal reprisals from unfriendly nations.

The implication is clear that other countries will begin to justify state-ordered "kidnapping" by citing the United States actions in *Yunis*. While Israel may be justified in taking the steps that it did on the basis that it is in an undeclared war, it is significant that a high-ranking Israeli official felt compelled to point to the United States abduction of Yunis for support.

C. *A Sound Interpretation of the Universality Principle Is Fundamental to World Order*

Fear of reciprocal assertions of jurisdiction is not the only reason why *Yunis* must not be allowed to stand as precedent. The fragile relations between nations is the other overriding reason. The pivotal role of custom in international law has been defined thus:

> [I]nternational custom results from similar and repeated acts by states — repeated with the conscious conviction of the parties that they are acting in conformity with law. Thus there would be two factors in the formation of custom: (1) a material fact — the repetition of similar acts by states, and (2) a psychological element usually called the *opinion juris sive necessitatis* — the feeling on the part of the states that in acting as they act they are fulfilling a legal obligation.[158]

It follows that if custom is the accepted repetition of certain acts by states, and this repetition induces predictability, then the United States must respect the consequences of setting a new precedent when it abducts a suspect and claims jurisdiction under the Universal theory on the basis of the suspect being "found."

Prior to resorting to extraordinary apprehensions, an effort to contact and persuade interested states to take action is essential. Apparently, this approach was not contemplated in *Yunis*. Speaking with reporters several days after seizing Yunis, Justice Department officials "empha-

and notoriety or as a mode of escape from intolerable psychological pressures; (4) the common criminal who uses the aircraft as a vehicle of escape from pending prosecution or incarceration; and (5) the extortionist who has chosen the hijacking route as an avenue to instant wealth. *Id.*

158. D. GREIG, *supra* note 9, at 16 (citing Kopelman, *Custom as a Means of the Creation of International Law*, 18 BRIT. Y.B. INT'L L. 129 (1937)).

sized that no other country had been involved [in the arrest], and that the operation had been executed entirely by United States law enforcement and military officials."[159] Even if one attributes jurisdiction over hostage-taking based on the Universality theory, underlying that theory is the tacit understanding that jurisdictional preference must be given to the state asserting territorial jurisdiction.[160] It is conceded that the government in Lebanon, which could claim jurisdiction based on the Nationality and Territoriality principles is in disarray and, therefore, in no position to assert jurisdiction. However, there is no indication that there were negotiations between the United States and Jordan, even though Jordan was waging its own campaign to locate Yunis. Jordan, the country of airline registration, was empowered to claim jurisdiction on the basis of territoriality.

This occurrence of competing jurisdictions parallels the situation encountered when the United States, frustrated by Egypt's act of granting exit permission to the suspected hijackers of the *Achille Lauro*,[161] intercepted the Egyptian airliner carrying the four gunmen and forced the airliner to land. As in the present case, the interception was said to have occurred without the knowledge of Egypt, or Italy,[162] the country of registration for the ship. No matter how frustrated the United States was with Egypt's action in allowing the hijackers to leave Egyptian territory, "Egypt's failure to carry out its own obligations under the Hostage Convention did not permit the United States to exercise self help to bring the alleged hijackers of the *Achille Lauro* to justice."[163]

Likewise, the failure of Lebanon and Jordan[164] to assert jurisdiction over Yunis did not permit the United States to mock the intention of the Universality principle by abducting Yunis under the guise of "finding"

159. N.Y. Times, Sept. 18, 1987, at A1, col. 5.

160. Hostage Taking Convention, *supra* note 4.

161. It will be recalled that this October 1985 affair involved the seizing of an Italian registered cruise ship, the *Achille Lauro*, by four armed men who were allegedly members of the Palestine Liberation Front. During the seizure, the hijackers killed a wheelchair-bound passenger, Leon Klinghoffer. The individual supposedly behind the entire operation, Mohammed Abbas Zaidan, remained on shore, orchestrating the group's moves via radio contact. When Abbas succeeded in negotiating with Egyptian authorities for the exchange of the ship's hostages for the safe passage of the terrorists out of Egypt, the *Achille Lauro* returned to Port Said. The next day, United States Navy planes intercepted the Egyptian aircraft carrying the hijackers and Abbas and forced the aircraft to land at a NATO base in Sicily. The Italians refused to extradite the terrorists and Abbas because they wanted to try the five in Italy, and because the United States maintains the death penalty. McGinley, *The Achille Lauro Affair — Implications for International Law*, 52 TENN. L. REV. 691-93 (1985).

162. N.Y. Times, Oct. 12, 1985, at A1, col. 5.

163. McGinley, *supra* note 161, at 720.

164. Lebanon had no obligation under the Hostage Taking Convention to assert jurisdiction over Yunis, because Lebanon was not a party to the Convention. The operative section of the Convention, had Lebanon been a signatory, is article 5(1)(b):

him for purposes of Universal jurisdiction. Moreover, by taking the overt, antagonistic steps that the United States did, rather than covertly aiding Jordan in the apprehension of Yunis, the United States subjected itself to violent reciprocal conduct and international scorn. It is critical to note the difference between an offender being "found" within the territory of a state seeking jurisdiction and an offender who is captured outside the territory and then subsequently brought into that state.

Tracing the evolution of the Universality principle from its roots in piracy reveals that the United States has attached an improper meaning to the concept of an offender being "found." Although there have been acts of violence and conquest by one country against another since time immemorial, piracy on the high seas was the first offense specifically labeled as a crime against all nations of the world.[165] The salient attributes of piracy were the fact that the pirate ship and its crew owed allegiance to no country, the globe-trotting pirates exacted tremendous damages on the burgeoning international flow of commerce, and no country would offend another country's sovereignty by capturing and punishing the pirates.

Thus, in 1958, when the authors of the Convention on the High Seas[166] sought to codify the international view towards sea piracy, they found ample support for asserting that a state may punish a pirate encountered within its territory, and also that a state may pursue a pirate and then bring him into that state's territory. Specifically, article 19 of the Geneva Convention on the High Seas states:

> On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship taken by pirates and under the control of pirates, and arrest the persons and seize the property on board.[167]

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

(b) by any of its nationals or, if that State considers it appropriate, by those stateless persons who have their habitual residence in its territory.

Jordan's obligation to establish jurisdiction is found in article 5(1)(a) which states:

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

(a) in its territory or on board a ship or aircraft registered in that State.

The language of the Convention is one of obligation, not merely cooperation as the Convention on the High Seas, *infra* note 166, had been. Because Jordan was the state of registration for the aircraft, it did have a treaty obligation. However, that obligation was not absolute. Jordan was required only to take necessary steps; its failure to apprehend Yunis cannot be interpreted as depriving it of the right to have continued taking steps to bring Yunis to justice.

165. *See* U.S. CONST. art. I, § 8, cl. 10; *see generally*, J. STARKE, *supra* note 8, ch. 9.

166. Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82.

167. *Id.* at art. 19, 13 U.S.T. at 2317.

The Geneva Convention on the High Seas clearly recognizes the Universality principle as a basis of jurisdiction. This basis of jurisdiction is a major exception to the normal rule that jurisdiction follows the flag of the country to which the ship is registered. Under the piracy exception to the Territoriality principle, it is not necessary that the seizing state negotiate with another state asserting territorial jurisdiction because the very nature of piracy presupposes that the pirate vessel is stateless and thus no other state is competing for territorial jurisdiction.

The concept of apprehending an offender is next encountered in the Tokyo Convention. Chapter V of that convention outlines the powers and duties of states.[168] Even though by 1963 offenses committed on board civil aircraft had taken on universal condemnation, the Tokyo Convention does not provide for absolute jurisdiction for any state that captures the offender. Unlike the Convention on the High Seas, stringent qualifications are placed on when a state can assert jurisdiction and when it cannot.[169]

The first time wide latitude is given to the concept of finding the offender is in the Hague Convention. The main provisions of the Hague Convention create universal jurisdiction for prosecution of hijackers. Furthermore, the Convention obligates the signatories either to prosecute or to extradite the offenders. As stated by article 7:

> The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever, and whether or not the offense was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution.[170]

168. Tokyo Convention, *supra* note 33, 20 U.S.T. at 2948. Chapter V, art. 13 entitles, but does not obligate, states to enter into possession of offenders in the following manner:

> 1. Any Contracting State shall take delivery of any person whom the aircraft commander delivers pursuant to Article 9, paragraph 1.
>
> 2. Upon being satisfied that the circumstances so warrant, any Contracting State shall take custody or other measures to ensure the presence of any person suspected of an act contemplated in Article 11, paragraph 1 and of any person of whom it has taken delivery. The custody and other measures shall be as provided in the law of that State but may only be continued for such time as is reasonably necessary to enable any criminal or extradition proceedings to be instituted.

Id.

Significantly, art. 9, para. 1, to which art. 13, para. 1 refers, states that:

> The aircraft commander may deliver to the competent authorities of any Contracting State in the territory of which the aircraft lands any person who he has reasonable grounds to believe has committed on board the aircraft an act which, in his opinion, is a serious offense according to the penal law of the State of registration of the aircraft.

Id. at 2947.

169. Tokyo Convention, *supra* note 33, Chapter II, 704 U.N.T.S. at 222-24.

170. Hague Convention, *supra* note 35, at 15.

This is the first time the word "found" is encountered in conventions covered by the Universality principle. It is reasonable to assume, however, that the framers of the Hague Convention intended to apply the same restrictions on the word "found" that were implied in the Tokyo Convention; namely, the contracting state into whose territory the hijacker either commanded the plane or where the plane eventually landed is the state in the territory of which the alleged offender is "found" for the purposes of the Hague Convention.

Although the nature of the offenses covered in the Montreal Convention differ from those covered in the Hague Convention, the respective articles dealing with gaining possession of the offender are identical. Both conventions provide jurisdiction "whether or not the offense was committed in its [the asserting state's] territory"; however, the intention of article 7 as it stands in both conventions cannot be interpreted to include jurisdiction over those offenders who are "found" only as a result of an extraordinary apprehension of the offender in territory far from the contracting state's territory.

The foundation of the Universality principle is the recognition by all state's that a crime is of such a potentially disastrous nature that it should not go unpunished by any country. Surely, the authors of the conventions would have contemplated that countries closest to the location of the offender would be those within whose territory the offender would be "found."

Finally, although it has by no means been accorded universal recognition, the Hostage Taking Convention provides further revelation of the interpretation to be accorded the word "found." Significantly, the Hostage Taking Convention, rather than expanding the definition of "found," simply incorporates the identical language of the Hague and Montreal Conventions in regard to the obligation to either extradite the offender or prosecute him.[171] It is more than logical to assume that the original intention, articulated in the Tokyo Convention, was not to give widespread jurisdiction to any country bent on pursuing an offender, but rather to lessen the threat that an offender would go unpunished simply because no country would assume jurisdiction to apprehend or try him.

The United States, in enacting the Hostage Taking Act, unfortunately overlooked this rationale and chose instead to find support for its obtrusive measures in article 5 of the Hostage Taking Convention.[172] Article 5

171. Hostage Taking Convention, *supra* note 4, art. 8(1), 18 I.L.M. at 1460; Montreal Convention, *supra* note 37, art. 7, 24 U.S.T. at 571; Hague Convention, *supra* note 35, art. 7, 22 U.S.T. at 1646.

172. Hostage Taking Convention, *supra* note 4.

mandates that each state shall take measures necessary to establish its jurisdiction over hostage-taking offenses where the alleged offender is "present" in its territory and it does not extradite him either to the state of registration of the airliner or to the state which was being compelled by the actions of the offender. It is not insignificant that the authors of the Hostage Taking Convention qualified this "presence" of the offender by mandating jurisdiction only in the event that the offender is not extradited. If the authors had intended for any state to assert jurisdiction on a "first come, first serve" basis, then there would have been no need to include the provision for extradition. The authors intended that the offender be present in the contracting state's territory either as a result of the plane landing in that state's territory or as a result of the offender voluntarily entering the territory.

In sum, the *Yunis* court erred in two distinct areas in its application of the Hostage Taking Act. In the first instance, the clear absence of an overwhelming number of signatories to the pertinent conventions, as discussed herein, puts in doubt the notion that the conventions, and thus the Hostage Taking Act, provided jurisdiction under the Universality principle. Secondly, in choosing to interpret the terms "in the presence of the State" and "found in the State" to imply jurisdiction over an offender who is captured elsewhere and transported back to the United States, the United States grossly overlooks the original basis for extraterritorial jurisdiction. Both in regard to piracy on the high seas and aircraft offenses, the concerns have historically focused on the fear that no country would assert jurisdiction because of the lack of any clear territoriality.

V. Proposals

As this article has stressed, neither United States case law nor customary international law supports allowing the Passive Personality principle to provide United States jurisdiction when the only nexus to the United States is the fortuitous presence of a United States national.

A very interesting, though currently impractical, approach to resolving the issue presented herein has been proposed by a recognized international law scholar. Professor M. Cherif Bassiouni, who has written extensively on international criminal law, has authored the Draft International Criminal Code, published in 1980.[173] The Draft International Criminal Code seeks overall to address the fact that there is no statutory codification of international crimes. The Draft Code provides for two

173. M. BASSIOUNI, INTERNATIONAL CRIMINAL LAW: A DRAFT INTERNATIONAL CRIMINAL CODE (1980) [hereinafter the Draft Code].

bases of enforcing criminal laws:[174] either through an International Criminal Court or through each nation's own criminal justice system. It provides for one, unifying category of international crimes. Those crimes include, *inter alia*: acts of torture, acts of piracy, crimes relating to international air communications, unlawful use of the mails, drug offenses, and hostage-taking.[175]

The Draft Code gives primary jurisdiction for all offenses arising under it to an International Criminal Court. It is only in the event that the court refuses to take jurisdiction over a given case that a state may assert jurisdiction, and then only on a priority basis.[176] Thus, the Code provides for jurisdiction under the Passive Personality principle but only as a means of last resort, and the court must first be satisfied that another state is not more deserving of jurisdiction under the Territoriality principle or the Nationality principle. Such an International Criminal Code and an International Criminal Court to enforce the provisions of the Code would presumably reduce the specter of reciprocal acts against the United States since the United States would not be disregarding another state's interest, but rather would be acting in accordance with an accepted international code. Although there are tremendous obstacles before the Draft Code may be implemented, it provides an excellent framework for resolving the jurisdictional dilemmas presented by cases such as *Yunis*.

In the near future, the United States may have another, more potent weapon to fight terrorism. On August 3, 1989, the United States and the Soviet Union reached an agreement whereby the two countries would accept the binding arbitration of the International Court of Justice (I.C.J.) regarding seven treaties, including the treaty dealing with hostage-taking.[177] Ironically, the provisions of the agreement weaken the United States primary defense of the actions it has taken in cases such as the *Achille Lauro* and *Yunis*. Many people in the government have taken

174. *Id.* at 37.

175. *Id.* at 49.

176. *Id.* at 45. Article III, § 2 of the Draft Code provides:

> In the event the [International Criminal] Court refuses to take jurisdiction over a given case or over a given person accused of a violation of this Code the Contracting Parties will have the right to exercise their jurisdiction in accordance with the order of priority which follows: (a) the Contracting Party in whose territory the crime occurred in whole or in part; (b) any contracting Party of which the accused is a national; (c) any Contracting Party of which the victim is a national; (d) any other Contracting Party within whose territory the accused may be found.

Id.

177. N.Y. Times, Aug. 8, 1989, at A5, col. 1. According to the agreement, Washington and Moscow are to let the I.C.J. adjudicate disputes over the interpretation of treaties dealing with aircraft hijacking, sabotage, and acts of terrorism.

the position that self-help is the only solution when one country is unable to try or extradite an accused terrorist.[178] Under the provisions of the U.S.-U.S.S.R. agreement, however, disputes over extradition and other treaty requirements will be settled by a special chamber of five judges chosen by the contesting sides from the 15 members of the full court. The verdict would be final and binding.[179]

The agreement between the United States and the Soviet Union is meant to engender confidence on the part of the rest of the world, so that increasingly more countries will turn to the I.C.J. for adjudication of their treaty disputes. It is acknowledged, however, that the U.S.-U.S.S.R. proposal is currently only in its embryonic stage and sufficient time has not yet passed to accurately judge its results.

Although both the notion of an International Criminal Court and the U.S.-U.S.S.R. agreement provide fertile ground for improvements in the extraterritorial jurisdiction dilemma, history has shown what a mockery most sovereigns make of such international sources of dispute resolution. As long as other countries, both friendly and adversarial, witness the United States resorting to extraordinary apprehension measures and distorting the Passive Personality principle, those other countries will deem themselves justified in taking the same, or even more ominous, measures.

The United States government conceded that Yunis' intent in hijacking the Jordanian airliner was to pressure the Arab League into expelling all Palestinians from Lebanon.[180] Thus, for purposes of the Hostage Taking Convention, Yunis did possess the requisite intent to coerce a third party.[181] However, for purposes of asserting subject matter jurisdiction by the United States, any clear nexus to the United States was lacking.

Customary international law provides for two conventional ways of obtaining custody of a suspect. A requesting country should either await voluntary entry of the suspect into that state's territory, or it should utilize the extradition process.[182] If, and only if, these measures fail, should

178. N.Y. Times, Jan. 19, 1989, at A1, col. 4.

179. N.Y. Times, Aug. 8, 1989, at A5, col. 1.

180. N.Y. Times, Sept. 18, 1987, at A1, col. 5.

181. Hostage Taking Convention, *supra* note 4, at art. 1. Article 1 of the Hostage Taking Convention dictates that the Convention only becomes operative if any person seizes or detains and threatens to kill, to injure, or to continue to detain another person (hostage) "in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage."

182. The United States, concerned with expanding its young nation and providing a safe harbor to the world's oppressed, did not actively engage in extensive extradition treaties until the mid-1800s. The first extradition treaty, the Jay treaty, signed by the United States and Great Britain in 1794, was restricted to extradition for the offenses of murder and forgery.

it resort to asserting jurisdiction on the basis of the Passive Personality principle. Although the United States, as previously indicated, has never recognized the competency of the Passive Personality principle to stand alone, there may be special circumstances in which its use, alone, may be invoked. Such use must be dictated by a new multilateral treaty or by amending[183] the Hostage Taking Convention. Although the Hostage Taking Convention was ratified by only 57 countries, clearly signaling, amongst other things, the dissatisfaction of the majority of the U.N. members with the Convention's "soft" qualification of the use of the Passive Personality principle,[184] amending the Convention to more clearly restrict use of the Passive Personality principle may prove satisfactory. A new or amended convention which deletes reference to terrorism may meet with greater ratification success, since such widespread disagreement over the definition of terrorism exists.

The new or amended convention would provide for resort to the Passive Personality principle only if the following circumstances existed:

1) The presence of the contracting state's nationals was not fortuitous. Clear evidence that the specific flight was chosen as a target because of the presence of the contracting state's nationals must exist; and

2) No previous warning had been issued to the contracting state's nationals by the contracting state advising them to stay away from that specific geographic area because of conflict, violence or instability, thereby reducing the contracting state's liability for its citizens who had assumed the risk of dangerous travel; and

3) The contracting state's nationals were victimized specifically because of their status as citizens of that state, not merely because they held a political affiliation contrary to the objectives and sympathies of the hijackers. At the same time, a claim that victims were selected because of their religion, ethnicity, or other non-political attribute would not rob the contracting state of jurisdiction. If the victims had been selected accord-

Treaty of Amity, Commerce and Navigation, Nov. 19, 1794, United States-Great Britain, art. 27, 8 Stat. 116. The first comprehensive treaty, the Webster-Ashburton Treaty, was signed by the United States and Great Britain on August 9, 1842. Webster-Ashburton Treaty, Aug. 9, 1842, United States-Great Britain, art. 10, 8 Stat. 572.

183. "The most usual way of ensuring reconciliation of the provisions of treaties with changing conditions is through amendment clauses inserted in the treaties themselves, thus giving effect to the basic principle that a treaty may be amended by agreement of the parties (cf. Vienna Convention, article 39)." J. STARKE, *supra* note 8, at 435.

184. Article 5(1)(d) of the International Convention Against the Taking of Hostages provides that:

> 1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over any of the offenses set forth in article 1 which are committed: . . .
>
> (d) with respect to a hostage who is a national of that State, if that State considers it appropriate.

ing to such criteria, the contracting state would retain authority to apprehend the hijacker;[185] and

4) The contracting state is a third party being compelled by the hostage-takers, and the hijackers are holding that state's nationals in furtherance of compelling the state; and

5) Clear evidence exists that the hostage-taking act was not of the genre falling within the political offense exception, since the perpetrator's acts may be those specifically protected by the exception.[186]

Under these limited circumstances, there would be a sufficient nexus between the hijacker's acts and the nationals of the state for the state to assert extraterritorial jurisdiction based on the Passive Personality principle.

In circumstances where the hijacked flight flew over the contracting state's territory, occurred on one of the contracting state's planes, or was destined for the contracting state, there would be no need to invoke the Passive Personality principle since either the well-established Territoriality principle or the Protective principle would provide sufficient basis for jurisdiction. Likewise, the Protective principle would apply where the contracting state's diplomats were taken hostage due to their diplomatic or official status. An amended or new convention as proposed would significantly mitigate the prospects of reciprocal conduct by non-aligned countries since they would likely be signatories to such a convention, and because the extraordinary apprehension would derive from a convention, and not from the unauthorized, unilateral actions of one country. Pursu-

185. For example, if it was shown that a contracting state's nationals were selected specifically because of their Jewish faith, this would generally satisfy the requirement for application of the Passive Personality principle. However, a distinction must be drawn between the status of the Jewish person who is travelling in a manner or to a destination likely to put him on guard, and one who is travelling purely for pleasure or non-confrontational business. A recent example of the former, where protection would not extend, involved three American Jews, headed by Rita E. Hauser, who travelled secretly to Stockholm to meet with Khalid al-Hassan, an Arafat confidant and a co-founder of the PLO. N.Y. Times, Dec. 16, 1988, at A1, col. 5. An example of the latter, where the Passive Personality principle would provide jurisdiction, is the merciless killing of Leon Klinghoffer, a wheelchair-bound Jewish American by four men, allegedly members of the Palestine Liberation Organization. Klinghoffer was a passenger on board a cruise ship, the *Achille Lauro*, in the Mediterranean, not in an area likely to be subject to violence. N.Y. Times, Oct. 8, 1985, at A1, col. 6.

186. For a detailed analysis of the political offense exception, see Abramovsky, *The Political Offense Exception and the Extradition Process: The Enhancement of the Role of the U.S. Judiciary*, 13 HASTINGS INT'L & COMP. L. REV. 501-24 (1990).

One of the foundations of the exception, the Sprizzo test, provides for a balancing test involving the following factors: (1) the nature of the act, (2) the context in which it is committed, (3) the status of the party committing the act, (4) the nature of the organization on whose behalf it is committed, and (5) the particularized circumstances of the place where the act takes place. *In re* Requested Extradition of Doherty, 599 F. Supp. 270, 275 (S.D.N.Y. 1984). The Sprizzo test is named after the district court judge who formulated the test.

ant to a new or amended convention, Congress would be required to amend section 1203(b)(1)(A) of the Hostage Taking Act[187] to include the qualifications outlined above. Congress should likewise amend section 32(b) of the Destruction of Aircraft statute to limit the definition of "found" to include only those occurrences where the offender enters the United States voluntarily. Once again, this will lessen the prospect of unfriendly nations stretching half-way across the globe to abduct an American citizen allegedly guilty of an act considered heinous by the unfriendly nation. Such a requirement will also reduce the likelihood of animosity between countries with competing jurisdictional interests.

VI. Conclusion

While resorting to unilateral apprehension may, on occasion, result in the apprehension of some alleged terrorists, the detriment that such a policy poses substantially outweighs the benefits it presents to United States nationals. As was discussed above, such a policy may well result in abductions from the United States of United States citizens by its enemies. The United States would be hard-pressed to denounce such conduct when its own precedent would be utilized to sanction its validity. No body of nations has awarded the United States the role of "Policeman of the World," conferring on it the right to stretch its long arm of jurisdiction half-way around the world to seize an offender when there are other states more appropriately positioned to accomplish the same goal. The United States may protect its interest and avoid worldwide criticism by limiting application of the Passive Personality principle and the Universality principle to those cases where a true and compelling nexus to the United States exists. In fact, as the United States is seeking to find a way to combat international terrorism while avoiding alienating and antagonizing other, equally interested countries, it would do well for its lawmakers to remember that an essential component of terrorism is its internationalism. The United States cannot presume that it is the only country with the desire and resources to combat this growing phenomenon.

187. 18 U.S.C. § 1203(b)(1)(A) (1989) now provides merely that jurisdiction may be exercised extraterritorially if "the offender or the person seized is a *national* of the United States . . . ." (emphasis added).