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An Israeli military court recently convicted Faik Bulut, a twenty-
three-year-old Turkish citizen, of the offense of belonging to Al-
Fatah in Lebanon and Syria and sentenced him to seven years in
prison. 1 Bulut was captured in February 1972 during an Israeli raid

1. Judgment of Aug. 7, 1973, slip op. at 1, 8 (Military Court, Lod, Israel, in Hebrew)
[hereinafter Judgment]. A second specification, for which Bulut was sentenced to a
100 miles into Lebanon. Ten fedayeen, who were captured in Lebanon later in 1972, were scheduled to follow Bulut into court to be tried for the same offense. These are the first cases to be tried under a 1972 amendment to the Israeli Penal Law (Offenses Committed Abroad), which states in part: "The courts in Israel are competent to try under Israeli law a person who has committed abroad an act which would be an offense if it had been committed in Israel and which harmed or was intended to harm the State of Israel, its security, property or economy or its transport or communications links with other countries."

The trials raise two important issues in international law. First, is there a substantive basis under international law for the exercise of jurisdiction by the state of Israel despite the fact that the offenses were committed by nonnationals outside Israel? Second, is that exercise of jurisdiction consistent with international law despite the fact that the defendants were brought to Israel in a manner not condoned by international law? While these two issues will be analyzed separately, they are related: Both involve the relative freedom of an individual from the control of foreign legal systems.

concurrent term of four years, charged him with receiving weapons training. Judgment, supra, at 1, 8-9.

3. Id.
4. A more celebrated case might have arisen under this law had two Palestinian leaders not narrowly escaped being aboard the airplane, chartered by Iraqi Airlines, that was diverted to Israel by Israeli military aircraft last August. N.Y. Times, Aug. 11, 1973, at 1, col. 3 (late city ed.).
5. Passed by the Knesset on the 6th Nisan, 5732 (March 21, 1972), [5732 (1972)] Sefer Ha-Chukkim 92, amending Penal Law Revision (Offenses Committed Abroad) Law 5716—1955, [5716 (1955)] Sefer Ha-Chukhim 7, 10 Laws of the State of Israel 7 [hereinafter Amendment to the Offenses Committed Abroad Law]. In the Knesset these was an effort to stress the consistency of the provisions of the amendment with international law. The Minister of Justice, in introducing the bill, noted 19 nations that accept principles of extraterritorial jurisdiction, 13 of which were asserted to have statutes similar to the Israeli statute. Diverey-Ha-Knesset 2509 (Debates of the Knesset, in Hebrew), May 25, 1971. However, some provisions of these statutes have not been greatly used. See text accompanying notes 38–44 infra.
6. The domestic constitutionality of the Israeli statute and the validity of the convictions under the terms of the statute itself will be assumed; no attempt will be made to discuss those issues. The possibility that Bulut was a prisoner of war will also be left for other discussions. The Israeli military court found that Bulut was not a prisoner of war under article 4 of the Geneva Convention Relative to the Treatment of Prisoners of War, opened for signature August 12, 1949, [1955] 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135, and that therefore the provisions of chapter III of that Convention (Penal and Disciplinary Sanctions) did not apply. In introducing the amendment under which Bulut was convicted to the Knesset and stressing its accordance with international law, the Israeli Minister of Justice noted that there was no intention to give competence to Israeli courts to try, for instance, Egyptian soldiers brought to Israel or representatives of weapons factories that sell weapons to Egypt or Jordan, exercises of jurisdiction that would be contrary to international law. Diverey-Ha-Knesset 2522 (Debates of the Knesset, in Hebrew), May 25, 1971.
The first issue, whether there is a substantive basis for Israeli jurisdiction, requires an examination of the four principles that have been widely recognized as bases for penal jurisdiction. The most universally accepted of these is the principle of territoriality, jurisdiction determined by reference to the place where the offense was committed. This principle derives from the concepts of territorial sovereignty and the equality of states. Its fundamental justification is that the "territorial sovereign has the strongest interest, the greatest facilities, and the most powerful instruments for repressing crimes, whether committed by native-born subjects, or by domiciled aliens, in his territory." An extension, or more accurately a subcategory, of the territorial principle is the "objective territorial" principle. Since an act that is initiated in one state and has an effect in a second state is deemed to have been committed in part in the second state, the second state may have jurisdiction over an offender who has never left the first state.

7. See R. MERLE & A. VITU, TRAITE DE DROIT CRIMINEL 198-201 (1967); RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 10-19 (1965) [hereinafter RESTATEMENT]; Empson, The Application of Criminal Law to Offenses Committed Outside the Jurisdiction, 6 AM. CRIM. L.Q. 92 (1967); Feller, Jurisdiction over Offenses with a Foreign Element, in 2 INTERNATIONAL CRIMINAL LAW 5, 17-34 (M. Bussiouni & V. Nanda ed. 1973); [Harvard] Research in International Law, Introductory Comment, Jurisdiction with Respect to Crime, 29 Am. J. Int'l. Law 445, 445 (Supp. 1935); Sarkar, The Proper Law of Crime in International Law, in INTERNATIONAL CRIMINAL LAW 50, 50-76 (G. Mueller & E. Wise ed. 1965); authorities cited in id. at 129-30. Other "principles of jurisdiction," such as the "objective territorial" principle, see note 11 infra, are, in essence, extensions of these four.

Probably the most authoritative source in this area is [Harvard] Research in International Law, Jurisdiction with Respect to Crime, 29 Am. J. Int'l. Law 435 (Supp. 1935) [hereinafter Harvard Research]. After the League of Nations Assembly called for a "Conference for the Codification of International Law" (which subsequently met at The Hague, March-April, 1930), the faculty of the Harvard Law School, in 1927, undertook to organize a Research in International Law for the purpose of preparing drafts of international conventions on subjects selected by the Assembly to be dealt with at the conference. The method followed by the American Law Institute was adopted for the Research, the work of which progressed despite lack of significant achievement in actual codification. By 1935, ten conventions on various areas of international law had been drafted, including the Draft Convention on Jurisdiction with Respect to Crime. The results of this particular effort were published in the 1935 Supplement to the American Journal of International Law, which includes the Draft Convention, an Introductory Comment, a Bibliography, and extensive comments detailing the means and sources of the provisions of each article. The Harvard Research has been quite influential in the understanding of jurisdiction with respect to crime. The Restatement (SECOND) OF FOREIGN RELATIONS LAW, published by the American Law Institute after ten years of research and revision, purports to restate the law and therefore does not contain the occasional attempts at improvement of existing practice that are found in Harvard Research.

8. See RESTATEMENT, supra note 7, §§ 17-19; Harvard Research, supra note 7, at 480-500.

9. See Sarkar, supra note 7, at 51.


11. United States and British cases that support the "objective territorial" principle
The second generally accepted principle is that of nationality, jurisdiction determined by the nationality of the person committing the offense. This principle is based on the sovereignty of the state and the close legal relationship of the national to his state.

The third principle is the protective principle, which determines jurisdiction by reference to the state whose national interests are endangered by the offense. Although the origins of this principle date back to the Italian cities of the 15th and 16th centuries, it has more recently had a rapid development. Countries that derive their jurisprudence from the English common law were, until recently, particularly reluctant to use this principle as a basis of jurisdiction. Its theoretical basis is the right of self-defense, but

are cited in Harvard Research, supra note 7, at 488-91. United States v. Aluminum Co. of America, 148 F. 2d 416 (2d Cir. 1945), is frequently cited to support that principle because of its broad language that “it is settled law . . . that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends; and these liabilities other states will ordinarily recognize.” 148 F. 2d at 443. The particular issue involved was whether Aluminium, Ltd., a Canadian corporation formed to take over the non-U.S. properties of Alcoa, had violated section 1 of the Sherman Act by forming an “alliance” with other foreign producers of aluminum ingot. When considering the above quoted language, however, one should take into account the limited fact situation. The stockholders of Aluminium were mainly U.S. citizens, 148 F. 2d at 439-40, Aluminium had strong ties with Alcoa, 148 F. 2d at 439-40, and there was a factual finding of intended effects on aluminum prices in the United States. 148 F.2d at 444.

12. See Restatement, supra note 7, §§ 26-32; Harvard Research, supra note 7, at 519-42.
14. Various grounds reflecting these relationships are
(1) that since the State is composed of nationals, who are its members, the State's law should apply to them wherever they may be; (2) that the State is primarily interested in and affected by the conduct of its nationals; (3) that penal laws are of a personal character, like those governing civil status, and that, while only reasons d'ordre public justify their application to aliens within the territory, they apply normally to nationals of the State everywhere; (4) that the protection of nationals abroad gives rise to a reciprocal duty of obedience; (5) that any offense committed by a national abroad causes a disturbance of the social and moral order in the State of his allegiance; (6) that the national knows best his own State's penal law, that he is more likely to be fairly and effectively tried under his own State's law and by his own State's courts, and that the most appropriate jurisdiction from the point of view of the accused should be considered . . . ; (7) that without the exercise of such jurisdiction many crimes would go unpunished, especially where States refuse to extradite their nationals. Harvard Research, supra note 7, at 519-20. Some nations have extended this principle to domiciled aliens, see Harvard Research, supra, at 533; In re Friedman, [1947] Ann. Dig. 127 (No. 58) (Cour de Cassation, Belg., 1947), and to employees of the state. Harvard Research, supra, at 539-41. Section 1 of the Penal Law Revision (Offenses Committed Abroad) Law 5716-1955, [5716 (1955)] Sefer Ha-Chukkim 7, 10 Laws of the State of Israel 7, asserts jurisdiction over nationals, residents, or public servants committing such offenses as bribery, decoy, and extortion.
15. See Restatement, supra note 7, § 33; Harvard Research, supra note 7, at 543-63.
16. See Harvard Research, supra note 7, at 543; Sarkar, supra note 7, at 68.
17. See Harvard Research, supra note 7, at 543-44; Sarkar, supra note 7, at 68-69.
18. Sarkar, supra note 7, at 68. See also Explanatory Note to the Amendment to the Offenses Committed Abroad Law (in Hebrew) published in Hatta'ot-Chok No. 944 of
the practical justification for the protective principle is the inade­quacy of national legislation in punishing offenses committed within the territory against the vital interests of foreign states.¹⁹

The fourth recognized principle, that of universality,²⁰ gives jurisdiction to the state that has custody of a person who has committed certain universally recognized crimes. The principle originated when piracy was a menace to international commerce, and it was justified by the saying that “the pirate who preyed upon all alike was the enemy of all alike.”²¹ In addition, most acts of piracy occurred on the high seas, where no state had territorial jurisdiction. The universality principle has more recently been asserted to cover other delicta juris gentium (crimes against the law of mankind), notably war crimes.²²

Of course, not all of these principles apply to the case of Bulut and the ten fedayeen. Because the alleged offenses were committed by non-Israelis in Lebanon and Syria, the nationality principle cannot be invoked by Israel. Nor can the territorial principle be applied, unless in the form of the objective territorial principle, which would require that an effect in Israel be found. Such an effect, in these cases, could only be on the security interest of the state as a whole,

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¹⁹. Harvard Research, supra note 7, at 552.
²⁰. See Restatement, supra note 7, §§ 94-95; Harvard Research, supra note 7, at 563-92.
²¹. Harvard Research, supra note 7, at 566.
²². See text accompanying notes 59-67 infra. A fifth principle, the passive personality principle, by which jurisdiction is determined merely by reference to the nationality of the victim, has been asserted by some nations. In the famous case of the S.S. “Lotus,” [1927] P.C.I.J., ser. A, No. 9, [1927-28] Ann. Dig. 153 (No. 59), the Permanent Court of International Justice reserved its opinion on the validity of the passive personality principle. [1927] P.C.I.J., ser. A, No. 9, at 22-23. In the same Israeli Amendment to the Offenses Committed Abroad Law, supra note 5, Israel claimed jurisdiction over an act abroad “which would be an offense if it had been committed in Israel and which harmed or was intended to harm the life, person, health, freedom or property of a national or resident of Israel.” Section 2B(a) of the Amendment to the Offenses Committed Abroad Law, supra. Although section 2B(b) limits the application of section 2B(a) to acts that are offenses both in Israel and in the state of commission, Professor Dinstein of Tel-Aviv University has criticized this provision. Dinstein, The Amendment to the Offenses Committed Abroad Law (in Hebrew), 2 EUNEY MISHPAT 829, 830-34 (1972). While he would recognize the passive personality principle if it takes into account various aspects of a particular case, citing factors listed by M. Altamira in his dissenting opinion in the “Lotus” case, [1927] P.C.I.J., ser. A, No. 9, at 102, Professor Dinstein criticized section 2B(a) of the amendment as going far beyond any recognized limited passive personality principle. A full discussion of whether this principle is consistent with international law is beyond the scope of this Note, but it is not widely recognized. Harvard Research, supra note 7, at 445. It is also subject to the criticism that a visitor to a foreign nation would “carry” the laws of his nation around with him. See Letter from Mr. Bayard, Secretary of State, to Mr. Connery, Chargé to Mexico, [1887] FOREIGN REL. U.S. 751 (1888), 2 J. MOORE, INTERNATIONAL LAW 292-40 (1906).
and few cases have relied on such an effect. If such an effect were found, the state asserting jurisdiction could doubtless also base its claim on the protective theory, which covers offenses against the security of the state but does not require a factual finding of an effect within the state. The Israeli prosecutors and courts have not based their claims to jurisdiction on the objective territorial theory. The provision of the amendment under which Bulut was tried was intended to broaden Israeli protective jurisdiction, and the military court relied on the protective principle in upholding the validity of the statute. The court expressly refrained from relying on the universality principle, but the prosecution and defense counsel argued as if it were an asserted basis of jurisdiction. Because notions based on the universality principle are often expressed when cases such as that involving Bulut are discussed—as demonstrated by the actual argument in that case—it is necessary to examine the underlying rationale and the possible applicability of the universality principle, as well as the protective principle relied upon by the Israeli court.

The protective principle is the most likely source of substantive jurisdiction in these cases. The Harvard Research Draft on Jurisdiction with Respect to Crime defines protective jurisdiction as follows:

**Article 7—Protection—Security of the State**

A state has jurisdiction with respect to any crime committed outside its territory by an alien against the security, territorial integrity or political independence of that State, provided that the act

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23. In *Ex parte Savarkar*, [1910] 2 K.B. 1096 (C.A.), a British subject was extradited to India for offenses under the Indian Penal Code, including seditious acts in England, but some acts in India were also charged. The Court of Appeals discussed only whether it had jurisdiction in light of the particular procedural facts of the case and did not discuss the merits of the issue of Indian jurisdiction. In Judgment of Dec. 15, 1908, ZEITSCHRIFT FÜR INTERNATIONALES RECHT 235 (Niemeyer ed. 1909) (Reichsgericht, Ger.), an offense involving the distribution of pamphlets in Austria gave Germany jurisdiction because it was deemed to have continued in Germany when the recipients of the pamphlets returned there, as the defendant had intended. In addition, the defendant was a German national who distributed the books in Austria expressly in order to escape punishment in Germany.


or omission which constitutes the crime was not committed in exercise of a liberty guaranteed the alien by the law of the place where it was committed.

Article 8—Protection—Counterfeiting
A state has jurisdiction with respect to any crime committed outside its territory by an alien which consists of a falsification or counterfeiting, or an uttering of falsified copies or counterfeits, of the seals, currency, instruments of credit, stamps, passports, or public documents, issued by that state or under its authority.28

The American Law Institute's Restatement (Second) of Foreign Relations Law defines the protective principle in a slightly different way:

§ 33. Protective Principle
(1) A state has jurisdiction to prescribe a rule of law attaching legal consequences to conduct outside its territory that threatens its security as a state or the operation of its governmental functions, provided the conduct is generally recognized as a crime under the law of states that have reasonably developed legal systems.

(2) Conduct referred to in Subsection (1) includes in particular the counterfeiting of the state's seals and currency, and the falsification of its official documents.29

The distinction between offenses involving the security of the state and those involving government administrative functions, emphasized by their separation into two articles in the Harvard Research Draft, is justified because offenses on the order of counterfeiting are almost everywhere regarded as harmful,30 whereas offenses involving the security of one state may be allowed or even encouraged in another because of the political orientation of the offenses. The protective principle has been recognized in the United States with regard to government administrative functions,31 and the application of that principle with regard to counterfeiting has been incorporated into a League of Nations convention32 that had been ratified or acceded to by over thirty states as of 1960.33

28. Id. at 440.
29. Restatement, supra note 7, § 33, at 92.
30. Harvard Research, supra note 7, at 562.
31. See United States v. Pizzarusso, 388 F.2d 8 (2d Cir. 1968) (alien in Canada who swore falsely in applying for U.S. visa violated 18 U.S.C. § 1546 (1970) and was held subject to U.S. jurisdiction under the protective principle); Rocha v. United States, 288 F.2d 545 (9th Cir. 1961) (aliens charged with conspiracy to defraud the United States by falsely claiming while abroad to be married to U.S. citizens held subject to U.S. jurisdiction under protective principle); cases cited in Harvard Research, supra note 7, at 544-45.
The protective principle with regard to the security of the state (hereinafter the protective (security) principle) is recognized primarily through its widespread assertion by non-Anglo Saxon nations, many of which have passed penal laws that provide for jurisdiction over crimes committed by foreigners abroad against what is, in one formulation or another, the “security of the state.”

The French Code of Criminal Procedure, for instance, provides: “Every foreigner who outside the territory of the Republic renders himself guilty, either as perpetrator or as accomplice, of a felony or misdemeanor against the security of the state . . . may be prosecuted and tried according to the provisions of French law if he is arrested in France or if the Government obtains his extradition.”

In addition, the Bustamante Code, Convention on Private International Law, in force in fifteen Latin American Republics as of 1950, provides: “Article 305. Those committing an offense against the internal or external security of a contracting State or against its public credit, whatever the nationality or domicile of the delinquent person, are subject in a foreign country to the penal laws of each contracting State.”

However, jurisdiction over foreigners for acts undertaken abroad that were harmful to the security of the state has actually been exercised only in a series of French cases arising out of World War I. In

34. Penal codes of over 40 countries that have such provisions are cited in Harvard Research, supra note 7, at 547-51. More recent provisions are cited in Sahović & Bishop, The Authority of the State: Its Range with Respect to Persons and Places, in MANUAL OF PUBLIC INTERNATIONAL LAW 311, 363-64 (M. Sørensen ed. 1968); Feller, supra note 7, at 27 n.19. One example is the Italian Penal Code (1930), as translated in Harvard Research, supra note 7, at 548:

Article 7. A national or foreigner who commits any one of the following offenses in foreign territory shall be punished under Italian law: (I) Crimes against the personality of the State . . . . Article 8. A national or foreigner who commits in foreign territory a political crime other than those specified in (I) of the preceding Article shall be punished under Italian law . . . For the purposes of penal law, any crime which injures a political interest of the State, or a political right of a national, is a political crime. An ordinary crime, determined wholly or in part by political motives, is likewise considered to be a political crime.

Another is the Venezuelan Penal Code (1926), as translated in Harvard Research, supra, at 548: “Article 4. There are subject to prosecution in Venezuela and shall be punished according to the Venezuelan penal law: . . . (2) The foreign subjects or citizens who in a foreign country commit any crime against the security of the Republic . . .” A third is the Ethiopian Penal Law (1957), as translated in Sahović & Bishop, supra, at 363: “Article 13. The present code is applicable to all persons who, abroad, have committed one of the offenses against the Sovereign and the Empire, its servants, its integrity, its institutions, or its essential interests, provided in . . . [specifying provisions of the code].”


Sahović and Bishop, supra note 34, at 363; 34 Pan-Am. Union L. & T.S. iv (page number supplied) (1950).

February 20, 1928, 86 L.N.T.S. 111, 332.

See cases cited in Harvard Research, supra note 7, at 549.
Wechsler jurisdiction was found to try a Rumanian (taken into French custody in Paris at a time when the German Army was deep into France) for corresponding in Switzerland and Germany with the enemies of France. In In re Urios jurisdiction was found to try a Rumanian (taken into French custody in Paris at a time when the German Army was deep into France) for corresponding in Switzerland and Germany with the enemies of France. In In re Urios the conviction in French Algeria of a Spaniard was upheld. The defendant, the captain of a Spanish merchant ship, was convicted of maintaining correspondence in Spain with the enemies of France during the war. In In re Bayot the defendant, a Belgian, was charged with having procured in Belgium metals and objects of all kinds for the German authorities, and with having assisted German officers and policemen to discover articles concealed by their owners. The French court held that Article 7 of the Code d'Instruction criminelle, “based on the right of legitimate defence, gives the French courts jurisdiction to take cognisance of crimes aimed at the security of the State committed outside French territory by a foreigner who has been arrested in France. . .” Apart from these French cases, nations have generally not exercised jurisdiction over nonnationals acting abroad to the detriment of the security of the state, despite claims in statutes and dicta that a state has such jurisdiction. Even in the early days of the Third Reich, the National Socialist regime in Germany refrained from invoking the protective jurisdiction asserted in German statutes, despite frequent opportunities to do so.

The French assertions of jurisdiction have been criticized as “inadmissible in principle and in excess of anything which international law permits.” A French commentator has pointed out the inconsistency that a soldier of an enemy power fighting France is not in violation of the law while a national of a neutral state who is acting in a neutral state may be in violation of the law.

42. [1923-24] Ann. Dig. at 109 (No. 54).
43. See, e.g., Nusselein v. Belgian State, [1950] Ann. Dig. 136 (No. 35) (Cour de Cassation, Belg., 1950) (acts committed in Belgium); In re Friedman, [1947] Ann. Dig. 127 (No. 59) (Cour de Cassation, Belg., 1947) (defendant, although an alien, was a resident of Belgium before the war and therefore was considered to owe a duty to Belgium).
45. Harvard Research, supra note 7, at 558. Professor Garcia-Mora has described these cases as “almost bordering on absurdity.” Garcia-Mora, Criminal Jurisdiction over Foreigners for Treason and Offenses Against the Safety of the State Committed upon Foreign Territory, 19 U. Pitt. L. Rev. 567, 579 (1958).
46. Code Penal Annoté, art. 76, No. 3 (Gayon), quoted in Harvard Research, supra note 7, at 558-59. It might be argued in reply that, while exercising jurisdiction over an enemy soldier would serve no international purpose, the exercise of jurisdiction over individual nationals of a neutral state may prevent confrontation with the neutral state itself and thus help to keep neutral states out of wars. Such an argument
Professor Garcia-Mora has pointed out the desirability of "substantial restrictions on the exercise of protective jurisdiction."\(^47\) He discusses three rights relied on by those who favor protective jurisdiction: the right of self-defense, the asserted sovereign right of a state to determine the scope of its penal law, and the right of a state to be secure from the disruption of its institutions.\(^48\) He attacks the justification based on the right of self-defense because of the likelihood of unjust, politically oriented judgments in such cases and because the concept of self-defense theoretically allows undue discretion to the prosecuting state. He also notes the paradox of talking of "self-defense in the presence of a wrongful fait accompli."\(^49\) Professor Garcia-Mora finds the second justification, that a state has a sovereign right to determine the scope of its penal law, applicable only within the territory of the state; beyond that the question becomes one of conflict of jurisdictions and therefore of international concern. The third justification he finds the "most persuasive and logically consistent."\(^50\) He recognizes that the right of a state to be secure from the disruption of its institutions is not generally protected by the exercise of territorial jurisdiction on the part of other states. He argues, however, that the same right implies a "duty of other States to prevent treasonable and other harmful activities from being carried on under the protection of their territorial sovereignty."\(^51\) Only the failure to perform this duty has given rise to the need to assert protective jurisdiction, and Professor Garcia-Mora urges fulfillment of this duty through domestic legislation or, preferably, an international convention.

The Harvard Research Draft Convention on Jurisdiction with Respect to Crime, although not in this instance purporting to be a restatement of practice,\(^52\) limits the protective (security) principle to acts "not committed in exercise of a liberty guaranteed the alien by the law of the place where it was committed."\(^53\) The Restatement limits the protective principle to conduct "generally recognized as a crime under the law of states that have reasonably developed legal

\(^{47}\) Garcia-Mora, supra note 45, at 589.
\(^{48}\) Id. at 584-88.
\(^{49}\) Id. at 585. The latter point is compelling only where a dangerous period, such as World War I in the French cases, has passed; otherwise, the deterrence value of the prosecution may be significant in spite of the "wrongful fait accompli."
\(^{50}\) Id. at 587.
\(^{51}\) Id. at 587.
\(^{52}\) Harvard Research, supra note 7, at 557.
\(^{53}\) Id. at 543.
Although the two limitations differ, they do indicate a general reluctance on the part of legal scholars to recognize an unqualified protective (security) principle. The principle has rarely been applied, and then only in cases where the prosecuting state was at war at the time of the offense and the defendant committed acts specifically directed against or affecting that state. When it is further taken into account that even these cases were heavily criticized, it is clear that an unlimited protective (security) principle is not recognized in international practice.

In the current Israeli cases, the exercise of protective jurisdiction is based on a nearly unlimited interpretation of that principle. Assuming that Lebanon guarantees at least the right to be a member of a Palestinian organization, and that such membership is not recognized as a crime under the law of states with reasonably developed legal systems, the offenses tried in Israel do not fall within the limitation of either the Harvard Draft or the Restatement. The defendants there are not even charged with acts aiding a wartime enemy of the state, as in the French cases, but rather merely with membership in an organization. The latter offense is likely to endanger the security of Israel only in a more indirect and insubstantial way. It is not difficult to conclude that the Israeli exercise of protective jurisdiction in these cases sets a significant new precedent for the application of an almost unlimited protective (security) principle.

As noted above, the prosecution and defense counsel in the Bulut case made arguments that could only have been based on the principle of universal jurisdiction. The principle of universality—the right to try, despite nationality or place of crime, merely on the basis of custody—is recognized as applying only to crimes that affect the international community and are against international law. Although universal jurisdiction over piracy has long been recognized, war crimes have also come to be generally accepted as justifying universal jurisdic-

54. Restatement, supra note 7, § 33.
55. The more the term “generally recognized” is taken to mean “universally recognized,” the more the Restatement provision would appear to offer wider protection for possible defendants than the Harvard Research formulation. Sedition, for instance, may not be found to be “generally recognized as a crime under the law of states that have reasonably developed legal systems,” while free speech or free press may not be guaranteed by the law of the place of the commission of the crime.
56. See text accompanying notes 39-41 supra.
57. Judgment, supra note 1, at 4.
58. See notes 20-22 supra and accompanying text.
59. See Sahović & Bishop, supra note 34, at 365.
A number of nations have also proposed or asserted universal jurisdiction over the crimes of slave trading and traffic in women and children. In addition to these widely recognized offenses, made subject to universal jurisdiction by customary international law, the offenses of airplane hijacking and airplane sabotage have been made subject to a limited form of universal jurisdiction by multilateral treaty. Beyond the offenses mentioned above, universal jurisdiction has been generally recognized only in a few rare procedural situations, not relevant to the Israeli cases.

61. United Nations War Crimes Comm., 15 Law Rep. of War Crimes Trials 26 (1949). See also Attorney General v. Eichmann, 36 I.L.R. 277, 298-304 (Supreme Court of Israel sitting as a Court of Criminal Appeal, 1962); Carnegie, Jurisdiction over Violations of the Laws and Customs of War, 39 B.U.R. Y.B. Intl. L. 402 (1963); Cowles, Universality of Jurisdiction over War Crimes, 33 Calif. L. Rev. 177 (1945). Jurisdiction was based on the universality principle in the Eichmann case, but the district court invoked protective jurisdiction as well, on the theory that there is a recognized connection between the State of Israel and the Jewish people and that the crimes attributed to Eichmann were "the killing of millions of Jews with intent to exterminate the Jewish people." 36 I.L.R. at 52-54.

62. E.g., Costa Rica, France, Poland, and Spain. Harvard Research, supra note 7, at 569-70. Mexico and Poland, among others, have asserted universal jurisdiction over the crime of counterfeiting, id. at 570, although this jurisdiction will, in most cases, be more accurately classified as protective. See text accompanying notes 28-33 supra.


1. Each Contracting State shall take such measures as may be necessary to establish its jurisdiction over the offence and any other act of violence against passengers or crew committed by the alleged offender in connection with the offence, in the following cases:
   (a) when the offence is committed on board an aircraft registered in that State; (b) when the aircraft on board which the offence is committed lands in its territory with the alleged offender still on board; (c) when the offence is committed on board an aircraft leased without crew to a lessee who has his principal place of business or, if the lessee has no such place of business, his permanent residence, in that State.

2. Each Contracting State shall likewise take such measures as may be necessary to establish its jurisdiction over the offence in the case where the alleged offender is present in its territory and it does not extradite him pursuant to Article 8 to any of the States mentioned in paragraph 1 of this Article.


Genocide was denounced as a crime under international law by the United Nations General Assembly in 1946, but the Genocide Convention adopted by the General Assembly in 1948 (which came into force in 1951 but has not been ratified by the United States) provides in art. VI: "Persons charged with genocide or any of the other acts enumerated . . . shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction." Convention on the Prevention and Punishment of the Crime of Genocide, adopted Dec. 9, 1948, 78 U.N.T.S. 277, 280, 282.

64. The Harvard Research Draft Convention provides for jurisdiction of a state with respect to a crime committed outside its territory by an alien:

(a) When committed in a place not subject to its authority but subject to the authority of another State, if the act or omission which constitutes the crime is also an offence by the law of the place where it was committed, if surrender of
Some states have also asserted universal jurisdiction over such offenses as the use of explosives to cause a common danger, traffic in narcotics or pornography, injury to submarine cables, crimes against the public health, and injury to international means of communication. However, there has been little consensus on these items.

The part of the amendment to the Israeli Offenses Committed Abroad Law intended to conform to the universality principle, which is entitled "Offenses against humanity," itself includes only genocide, Nazi offenses, piracy, certain air navigation offenses, and certain dangerous drug offenses. The part of the amendment to the Israeli Offenses Committed Abroad Law intended to conform to the universality principle, which is entitled "Offenses against humanity," itself includes only genocide, Nazi offenses, piracy, certain air navigation offenses, and certain dangerous drug offenses.

Thus, not only has membership in a terrorist organization not been recognized as a proper occasion for the exercise of universal jurisdiction, but even terrorist acts themselves have not been so recognized. Drafts of the proposed convention on terrorism (which has not yet even been finalized, much less put into effect) would not cover the offenses being tried in Israel. In current Israeli cases on the universality principle thus would be a sig-

the alien for prosecution has been offered to such other State or States and the offer remains unaccepted, and if prosecution is not barred by lapse of time under the law of the place where the crime was committed. The penalty imposed shall in no case be more severe than the penalty prescribed for the same act or omission by the law of the place where the crime was committed.

(b) When committed in a place not subject to the authority of any State, if the act or omission which constitutes the crime is also an offense by the law of a State of which the alien is a national, if surrender of the alien for prosecution has been offered to the State or States of which he is a national and the offer remains unaccepted, and if prosecution is not barred by lapse of time under the law of a State of which the alien is a national. The penalty imposed shall in no case be more severe than the penalty prescribed for the same act or omission by the law of a State of which the alien is a national.

(c) When committed in a place not subject to the authority of any State, if the crime was committed to the injury of the State assuming jurisdiction, or one of its nationals, or of a corporation or juristic person having its national character.

(d) When committed in a place not subject to the authority of any State and the alien is not a national of any State.

Harvard Research, supra note 7, at 573.

65. Id. at 570-71.

66. Amendment to the Offenses Committed Abroad Law, supra note 5, § 2A (not to be confused with § 2(A)).

67. The International Law Commission Draft Code of Offenses Against the Peace and Security of Mankind goes beyond the Nürnberg Charter and Judgment to the effect that encouragement of terrorist activities against another state is regarded as an offense against the peace and security of mankind, but the comments specifically say that this and certain other offenses can only be committed by the authorities of a state. Garcia-Mora, supra note 60, at 27.

significant and unprecedented expansion of that principle as it is now recognized.

Clearly the state of Israel is faced with a serious problem posed by terrorist acts of organizations outside of its territory whose aims are entirely hostile to the Israeli government—acts that are frequently not controlled by the states in which the organizations operate. Exercise of expanded extraterritorial jurisdiction should have some effect in deterring people from joining anti-Israeli terrorist organizations. Similarly, general acceptance of expanded extraterritorial jurisdiction may have some effect in deterring people from joining terrorist organizations around the world. However, deterrent effects are hard to measure, especially effects on determined, if not desperate, political groups. Nations may, of course, differ in the importance they attribute to these effects. In deciding whether internationally recognized extraterritorial jurisdiction should be expanded, the benefits of deterrence must be weighed against other, less desirable effects of such an expansion.

One effect is the infringement of freedoms that some nations guarantee their citizens. In the United States, at least, freedom of association extends to membership in such organizations as the Black Panthers, the Minutemen, and the Ku Klux Klan, even though some members of those groups may be guilty of serious crimes. For another country to try someone merely for membership in an organization in the name of which illegal acts are committed by others would appear an undesirable form of guilt by association.

Other nations may have different legal principles and may legiti-

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69. Even someone accepting Arab claims of the illegality of Israeli reprisals, the occupation of Arab territory, and even the existence of the Israeli state itself can see that Israel has been the object of illegal acts of organizations outside of Israel. It has been suggested that there is a duty on the part of states to exercise territorial jurisdiction to prevent activities harmful to foreign states. See note 51 supra and accompanying text. See also Draft Convention for the Prevention and Punishment of Certain Acts of International Terrorism, in Report of the Ad Hoc Committee on International Terrorism, 28 U.N. GAOR Supp. 28, at 28, U.N. Doc. A/9028 (1973). For a proposal that a head of state be held personally liable before an international criminal tribunal for a state’s failure to take sufficient precautions when he has reason to anticipate the commission of acts of terrorism, see Kuttner, Constructive Notice: A Proposal To End International Terrorism, 19 N.Y.L.F. 325 (1975).

70. The United States Supreme Court has repeatedly “pointed out the fallacy of the suggestion that membership in the Communist Party, or any other political organization, can be regarded as an alternative, but equivalent, expression for a list of undesirable characteristics . . . . Even assuming that Congress had reason to conclude that some Communists would use union positions to bring about political strikes, ‘it cannot automatically be inferred that all members share[ ] their evil purposes or participat[ ] in their illegal conduct.’” United States v. Brown, 381 U.S. 437, 455-56 (1965), quoting Schware v. Board of Bar Examiners, 353 U.S. 232, 246 (1957).

71. The crime of conspiracy is, of course, a different matter, as it requires an intent on the part of the defendant to achieve a certain objective that, under the common law definition, is the commission of either an unlawful act or a lawful act by unlawful means. W. LaFave & A. Scott, CRIMINAL LAW § 61, at 433 (1972).
mately forbid membership in specific organizations. However, it would appear that the assertion of extraterritorial jurisdiction has gone too far if one nation can impose those different principles on people in other nations. It is not difficult to hypothesize a situation in which an American citizen’s membership, while in the United States, in an organization such as a Latvian exile group, the American Nazi Party, or the Black Panthers, would violate the law of, for instance, the Soviet Union, Germany, or South Africa. While it may be said that, in order to enjoy his membership safely, such a person need only avoid entering the territory of these countries, this suggestion assumes that the individual will know of the foreign law involved and would, in any case, be a significant burden on international travel.

A second effect of the expansion of extraterritorial jurisdiction is to increase the likelihood of subjecting an individual to penal sanctions for actions he was unlikely to know were illegal. The Universal Declaration of Human Rights, adopted by the United Nations General Assembly in 1948, provides that “[n]o one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed.” Presumably, this widely recognized freedom from ex post facto laws is based on the premise that it is unjust to try a person for actions that he could not have known were against the law. The same policy would militate against an expansion of extraterritorial jurisdiction to include offenses as indirect in their harmful consequences as a membership in an organization. A man may reasonably be expected to know or at least to be held accountable for the laws in effect in the place where he is (territorial principle), the laws of the state of which he is a citizen (nationality principle), internationally recognized laws (universality principle), and laws of those states which his actions may clearly and directly affect (protective principle). However, if either of the last two categories is greatly expanded, it becomes much less reasonable to hold someone accountable under them, because of the number and variety of laws that would then be applicable to him.

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72. Such avoidance will not, of course, remove the possibility of jurisdiction in such a foreign state brought about through an illegal forcible abduction. See discussion accompanying notes 81-137 infra.
75. Of course, while it is impossible for one to know of an ex post facto law, it is only highly unlikely that an individual will know of broad extraterritorial restraints imposed by foreign states.
76. Not only is such a situation unfair to the defendant, but there is also no deterrent effect from laws that cannot reasonably be perceived and followed. Defense
terdependent world, acts may have potential indirect effects in many of the world’s 130-plus nations. To subject someone to the laws of more than two or three jurisdictions would appear as unjust as to subject him to ex post facto laws.77

In addition to the substantive dangers described above, the unilateral expansion of extraterritorial jurisdiction sets an unfortunate procedural precedent. Although it may be argued that “new” customary international law must begin somewhere, and that Israel is one of a few countries now faced with a terrorist problem, it would be preferable to expand extraterritorial jurisdiction through multilateral convention, as was done in the case of the airplane sabotage and hijacking conventions.78 Indeed, even the customary universal principles regarding piracy79 and certain war crimes80 have been codified by such conventions. The existence today of various

counsel in the Bulut case argued that, since the Offenses Committed Abroad Law was not published outside Israel, the defendant would not know of its existence. Judgment, supra note 1, at 1. The court replied that the Israeli legal requirements for publication were met and considered any argument that the law had to be published worldwide to be frivolous. The court further accepted the prosecution’s argument that it could hardly be a complete surprise to the defendant that his acts were amenable to punishment in Israel, because Israel had “warned and warned and warned” the terrorist organizations and their participants, id. at 4-5. No doubt knowledge of the illegality in a foreign state of membership in an organization that is directly and expressly hostile toward that state is more likely than such knowledge with respect to organizations, such as political parties, that are not so clearly directed. However, it seems to be unreasonable to expect an individual to know of the illegality in a foreign state of mere membership in an organization. Beyond noting that Bulut had admitted knowing the anti-Israeli goals of Al-Fatah, id. at 6, the court gave no indication that Bulut knew that he had violated Israeli law by his acts and was subject to its jurisdiction.

77. Cf. Lambert v. California, 355 U.S. 225 (1957), which dealt with a defendant who had been convicted of failing to register as required by a Los Angeles ordinance that made it unlawful for any person convicted of an offense punishable as a felony in California to be or remain in the city more than five days without registering with the police. The United States Supreme Court held that the ordinance in its application to a person who was not aware of the registration requirement was a denial of due process of law. Justice Douglas spoke for the majority: “Where a person did not know of the duty to register and where there was no proof of the probability of such knowledge, he may not be convicted consistently with due process. Were it otherwise, the evil would be as great as it is when the law is written in print too fine to read or in a language foreign to the community.” 355 U.S. at 229-30 (emphasis added).

78. See note 63 supra.


international fora with nearly universal access makes the treaty method of altering the international law of jurisdiction a practical one. In such fora objections to unwarranted expansions can be voiced, and no expansion of jurisdiction will be approved that unduly burdens freedoms guaranteed by any major legal system. Nations can discuss the delicate but important balancing between interests of state security and of individual freedoms, without the random, action-and-reaction effect inherent in unilateral attempts to expand customary international law. It may be true that, at present, no international forum would approve the current Israeli extension of extraterritorial jurisdiction, but that merely emphasizes the unacceptability of these precedents to major legal systems such as the American system.

If Israel unilaterally extends protective or universal jurisdiction to offenses of membership in organizations, why could not other nations similarly extend extraterritorial jurisdiction to acts of a different nature? Statements, political contributions, or acts of economic significance as simple as deciding where to invest may be deemed by one country or another to violate its new conception of international law or to harm its security interests. Such extensions could result again in trials as lacking in safeguards to individual liberty as trials based on ex post facto laws and, ultimately, in severe practical restrictions on foreign travel. In addition, the expansion of extraterritorial jurisdiction beyond the minimum necessary to preserve a state’s security or to curb delicta juris gentium may, through infringement of the sovereignty of other states, lead to friction among nations. The result would be to undermine the international peace that international law is intended to foster.

In short, the precedent being set in Israel opens a Pandora’s Box. It is questionable whether the deterrent value of such trials is worth their costs.

The second issue raised by the trials of Bulut and the ten fedayeen is whether Israel’s exercise of jurisdiction over them is consistent with international law despite the fact that they were forcibly abducted. Any argument that Israeli courts do not have jurisdiction because custody was so obtained, however, must contend with numerous precedents that support the principle of male captus, bene detentus—an illegal apprehension does not preclude jurisdiction. The court in the Bulut case relied on this line of authority to

82. Helpful surveys of the cases are found in I. Shearer, Extradition in International Law 72-76 (1971); Garcia-Mora, Criminal Jurisdiction of a State over Fugitives Brought from a Foreign Country by Force or Fraud: A Comparative Study, 32 Ind. L.J. 427, 430-46 (1977); O’Higgins, Unlawful Seizure and Irregular Extradition, 96 Brit. Y.B. Int’l L. 279 (1960); Sponsler, International Kidnapping, 5 Int’l Law. 27 (1971).
reject the contention that Bulut should not be tried because he was
brought to Israel involuntarily and without extradition.83

The primary American precedent is Ker v. Illinois.84 Ker was
tried in Illinois for larceny committed in that state, after having been
kidnapped in Peru and brought to the United States against his will.
The American who took Ker into custody had the proper extradition
papers with him when he arrived in Lima but did not present them
to any officer of the Peruvian government or make any demand on
that government for Ker's surrender. He forcibly brought Ker to
San Francisco, whereupon Ker was extradited to Illinois.85 The Court
rejected Ker's argument that the proceeding had been in violation of
his rights under the due process clause of the fourteenth amend­
ment.86

Counsel for Ker relied primarily, however, on a treaty between
Peru and the United States to argue that he could not be tried in
the United States.87 The Court, first, found that the case was not
covered by a treaty right of asylum and, second, distinguished
United States v. Rauscher,88 which held that a defendant properly
surrendered under an extradition treaty could be tried for no offense
other than the one for which he was delivered under the extradition
proceedings.89 The distinction was that in Ker the pertinent extradi­
tion treaty "was not called into operation, was not relied upon, was
not made the pretext of arrest, and ... it was a clear case of kid­
napping within the dominions of Peru, without any pretence of
authority under the treaty .... "90 The theory of the distinction was
that Rauscher was "clothed with the protection which the . . . true
construction of the treaty gave him"91 and that the United States
therefore had a treaty obligation to Great Britain to try him for no
crime other than the one for which he was extradited. But, since no

83. Judgment, supra note 1, at 5-6.
84. 119 U.S. 436 (1886).
85. 119 U.S. at 438-39. A fact of the case that was available to the Court but was
not mentioned in its opinion was that the Peruvian government had at the time only
a nominal existence in the mountains 85 miles from Lima. Lima was occupied by
Chilean forces, and the military governor of Lima had dispatched an officer to assist
the American messenger in putting Ker on his way back to the United States. Fairman,
86. "We do not intend to say that there may not be proceedings previous to the
trial, in regard to which the prisoner could invoke in some manner the provisions of
[the due process clause], but ... we do not think he is entitled to say that he should
not be tried at all for the crime with which he is charged in a regular indictment." 119 U.S. at 440.
87. 119 U.S. at 441.
88. 119 U.S. 407 (1886), decided the same day as Ker, also with a majority opinion
by Justice Miller.
89. 119 U.S. at 443.
90. 119 U.S. at 443. But see note 85 supra.
91. 119 U.S. at 443.
treaty between the United States and Peru had been invoked, the United States had no such obligation to Peru with regard to Ker. Therefore, he was entitled to no protection under the treaty.

Apart from the due process and treaty issues, the Ker Court declined, on the ground that the question was not a federal one, to consider whether customary international law would preclude trial in a state court following a forcible abduction. However, the Court did cite authority for the statement that "such forcible abduction is no sufficient reason why the party should not answer when brought within the jurisdiction of the court which has the right to try him for such an offence, and presents no valid objection to his trial in such court."

Despite its limited holding and peculiar fact situation, Ker has been relied on extensively for the principle that forcible abduction does not preclude the exercise of jurisdiction. For example, in response to a Mexican request for the return of one Martinez, who had been improperly brought into the United States in order to stand trial for an offense against the laws of California, the United States relied on Ker to maintain that "the irregularity in the manner of bringing the defendant within the jurisdiction was not a defense which could be pleaded as a valid bar to trial for a crime upon a regular indictment . . . ." The United States noted also that Martinez's kidnapper had been surrendered to the government of Mexico.

More recently, in Frisbie v. Collins, an interstate forcible abduction case, the Supreme Court unanimously reaffirmed Ker.

92. The Ker Court noted that "it is quite a different case [from Rauscher] when the plaintiff in error comes to this country in the manner in which [Ker] was brought here, clothed with no rights which a proceeding under the treaty could have given him, and no duty which this country owes to Peru or to him under the treaty." 119 U.S. at 443.
93. 119 U.S. at 444.
94. 119 U.S. at 444.
95. Letter from the Acting Secretary of State to the Mexican Chargé, [1906] 2 FOREIGN REL. U.S. 1121-22 (1909).
96. Id.
98. While living in Chicago, Collins was allegedly forcibly seized, handcuffed, blackjacked, and taken to Michigan, where he was convicted of murder. 342 U.S. at 520. The offense presumably occurred in Michigan. Collins v. Frisbie, 189 F.2d 464, 465 (6th Cir. 1951). Professor Sponsler has distinguished interstate cases from international cases on the basis that considerations in international cases of the disruption of the certainty of the flow of commerce and of the protection of individual rights are lacking in interstate cases. Sponsler, supra note 82, at 45. In addition, violation of national sovereignty is not an issue in interstate cases.
99. This Court has never departed from the rule announced in Ker v. Illinois . . . that the power of a court to try a person for crime is not impaired by the
Despite criticism of the Ker doctrine, federal courts of appeals have continued to follow Frisbie and the Ker doctrine. The authoritative English case, cited with approval in Ker, is Ex parte Scott, in which the defendant was held on the charge of perjury, a misdemeanor, despite the fact that she had been apprehended by a British police officer in Brussels and conveyed to England. Scott was followed in several later cases, notably Ex parte Elliott, in which Lord Goddard noted that, if an abducted defendant "has been arrested in a foreign country and detained improperly from the time that he was first arrested until the time he lands in this country, he may have a remedy against the persons who arrested and detained him, but that does not entitle him to be discharged, though it may influence the court if they think there was something irregular or improper in the arrest."
Cases in other British Commonwealth jurisdictions have also adopted the doctrine. In a South African case, *Abrahams v. Minister of Justice*, an application for habeas corpus was dismissed on the basis of "clear precedent . . . that once there is a lawful detention, the circumstances of the arrest and capture are irrelevant." However, the court noted the Minister of Justice's statement that the petitioner and his three companions would be returned to Bechuanaland "in order to preserve friendly relations with neighboring States . . ." In a Palestinian case, *Afouneh v. Attorney General*, Afouneh, accused of murder in Palestine, had been arrested in Damascus, Syria, and conveyed to the Palestinian border by members of the Palestine police force. Proper extradition papers arrived in Syria after the forcible abduction. The court relied on *Ex parte Scott* and *Moore's Digest of International Law* (which cited *Ker*) to hold that Afouneh could not "set up in answer to the indictment the unlawful manner in which he was brought within the jurisdiction of the court. It belongs exclusively to the government from whose territory he was wrongfully taken to complain of the violation of its rights." In addition, cases from Belgium and Germany hold that domestic courts will not review the regularity of a foreign extradition.

By contrast, two French cases have not followed the *Ker* doctrine. In *Case of Nollet*, a Belgian fugitive from France was arrested in Belgium by French authorities and turned over to the Belgian police, who, thinking he was French, turned him over to the French authorities at the border. The court reasoned that the defendant would not be before the court at all if the French authority will probably exercise jurisdiction over a criminal brought before it in violation of international law, no precedent binds any British court to adopt this view. O'Higgins, *supra* note 82, at 319. This conclusion is based on the view that all the British precedents dealt with arrests illegal under British or foreign domestic law and did not consider international law. O'Higgins, *supra*, at 282-89.

106. [1963] 4 S. Afr. L.R. 542. The petitioner was allegedly abducted from Bechuanaland Protectorate to South West Africa by six people, including some South African police, and arrested on a charge under the Suppression of Communism Act.


109. [1941-42] Ann. Dig. 327 (No. 97) (Supreme Court of Palestine sitting as a Court of Criminal Appeal, 1942).


111. Geldof v. Meulemeester and Steffen, 31 I.L.R. 385 (Cour de Cassation, 1961) (defendant extradited from The Netherlands on basis of request submitted two days after deadline established by treaty).

112. Extradition (Jurisdiction) Case, [1925-27] Ann. Dig. 344 (No. 165) (Supreme Court of the Reich, 1926) (appellant fraudfeasor's plea interpreted by court to be allegation that the conditioned extradition from Switzerland to Germany, following extradition from France to Switzerland, was illegal).

113. 18 JOURNAL DU DROIT INTERNATIONAL 1188 (Cour d'appel de Douai, 1891).
ties had not violated the Belgian border and held that it was as though the arrest never occurred at all. The defendant was released. Similarly, in *In re Jolis*, a Belgian subject accused of theft in France was arrested in Belgium and brought back to France by two French officials. In ordering immediate release, the court held that the arrest and therefore all subsequent proceedings were "completely null and void." No other jurisdiction has been found to follow the French example.

Although Anglo-American and Palestinian precedent carry great weight in Israel, Israeli precedent in the *Eichmann* decisions, in so far as it is relevant, is entitled to the greatest weight. Nazi war criminal Adolf Eichmann had been kidnapped in Argentina, allegedly by agents of the Israeli government, and forcibly brought to Israel. Counsel for Eichmann contended that "the prosecution of the accused in Israel following his abduction from a foreign country conflicts with international law and exceeds the jurisdiction of the Court." The Israeli district court dealt extensively with British, American, and Palestinian precedent, particularly *Scott, Ker, Afouneh*, and *State v. Brewster*, an early Vermont case cited with approval in *Ker*. The court concluded that in so far as Argentina's sovereignty has been impaired "the incident has been closed," and thereupon the episode of the kidnapping of...

114. [1933-34] Ann. Dig. 191 (No. 77) (Tribunal Correctionnel d'Avesnes, 1933).
115. [1933-34] Ann. Dig. at 191.
116. More recently, the principle has been limited even in France to irregular seizure carried out by officials in disregard of extradition treaties or laws. In the 1964 Cour de Cassation case of Argoud, the defendant was captured in Germany by unknown persons and found trussed and gagged inside French territory by French police, who had no knowledge of him until an anonymous telephone call led them to him. In permitting the exercise of jurisdiction, the court distinguished between a "disguised extradition" carried out by officials and an abduction carried out by private persons. I. Shearer, supra note 82, at 74.
119. Argentina lodged a complaint with the Security Council of the United Nations; in response, a resolution (S.C. Res. 158, U.N. Doc. S/4949 (June 23, 1960)) was passed, requesting "the Government of Israel to make appropriate reparation in accordance with the Charter of the United Nations and the rules of international law" and expressing "the hope that the traditionally friendly relations between Argentina and Israel will be advanced." 36 I.L.R. at 58. Pursuant to this resolution the two governments issued a joint communique on August 3, 1960, resolving "to regard as closed the incident which arose out of the action taken by citizens of Israel, which infringed the fundamental rights of the State of Argentina." 36 I.L.R. at 59.
120. 36 I.L.R. at 23.
121. 7 Vt. 118 (1855) (Canadian national held subject to Vermont jurisdiction after being forcibly brought back from Canada to stand trial for theft in Vermont).
122. 66 I.L.R. at 59-71. *In re Jolis*, discussed in text accompanying notes 114-15 supra, was cited as the only conflicting precedent the court could find. 66 I.L.R. at 68.
the accused passed from the level of international law to the level of municipal law . . . . In view of the settlement of the incident between the two countries before trial brought, judgment may without hesitation be based on the continuous line of British, Palestinian and American case law, beginning with *Ex parte Scott* and going on to *Frisbie v. Collins* and after.

... [T]here is no immunity for a fugitive offender save in the one and only case where he has been extradited by the asylum State to the requesting State for a specific offence, which is not the offence for which he was being tried. 123

On appeal, it was also contended that each of the authorities on which the district court had relied dealt with an offender who had fled from the area of jurisdiction of a court that was already competent to try him at the time he committed his offense, whereas such was not the case with Eichmann. The Supreme Court of Israel rejected this argument by noting that "since the crimes attributed to him are of an international character and have been condemned publicly by the civilized world . . . by virtue of the principle of universal jurisdiction, every country has the right to try him." 124

As the Israeli district court recognized, 125 there has been considerable criticism of the *Ker* doctrine. The distinction 126 between *Ker*, where an extradition treaty was ignored, and *United States v. Rauscher*, where the Court held that a fugitive properly extradited for one offense could not be tried for another, has been termed "arbitrary" and "unsound." 127 Professor Dickinson has argued that "the same reasoning which enabled the extradited fugitive in *United States v. Rauscher* to invoke the treaty to his own advantage, "in good faith to the country which has sent him here," should have enabled the kidnapped fugitive to invoke international law in good faith to *Peru*." 128

It has been argued that "courts have been misled by the wide and general phraseology" of cases such as *Ker*, which was arguably decided on the basis that there was no violation of international law. 129 Occasional decisions of municipal courts "thus cannot be said to

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123. 36 I.L.R. at 70-71, 76.
124. 36 I.L.R. at 306 (emphasis original).
125. 36 I.L.R. at 68-70.
126. See text accompanying notes 88-91 supra.
128. Id. at 238.
129. Morgenstern, *Jurisdiction in Seizures effected in Violation of International Law*, 29 Barr. Y.B. INTL. L. 255, 269-70 (1952). *Ker* was arguably delivered over to the American messenger with the consent and assistance of the de facto authorities. See note 85 supra.
affect the principle, affirmed in *Jois*, that an arrest in violation of international law can have no legal effect.\(^{130}\) The Israeli district court met these criticisms by noting that “the critics admit... the established rule...”\(^{131}\)

The *Ker* doctrine recently has also been severely challenged in the United States. In *United States v. Toscanino*,\(^{132}\) the Second Circuit held that a defendant who allegedly had been kidnapped in Uruguay, tortured, and forcibly brought to the United States, where he was convicted on a narcotics charge, would be entitled to release if he could produce evidence of his allegations on remand. The court noted that the due process clause has evolved in meaning since *Ker* and *Frisbie*. The Supreme Court decisions in *Mapp v. Ohio*\(^{133}\) and *Rochin v. California*\(^{134}\) had added to the requirement of a procedurally fair trial a requirement that the accused be protected from illegal pre-trial conduct of law enforcement authorities. Applying the rationale of *Mapp* and *Rochin*—that deterring illegal police conduct requires that the fruit of the conduct not be used to convict the victim of the conduct—the court held that there could be no jurisdiction over a defendant brought into custody by illegal forcible abduction. *Toscanino* presents a stronger case for the “exclusionary rule” than even *Mapp* or *Rochin*, for officers can be prosecuted in the United States for domestic wrongdoing, but apprehension of international kidnappers by the state of refuge may be impossible.

Finding jurisdiction after forcible abduction may significantly encourage such internationally illegal abduction. If extradition, the internationally recognized method of getting custody, is unavailable for any reason, kidnapping provides a simple solution. Kidnapping is not deterred, not only because the fugitive will certainly stand trial, but also because there is very little threat of judicial punishment of the kidnappers, who, no doubt, will be returned to the state of refuge for trial only in rare circumstances.

The question becomes whether the social cost of the encouragement of such kidnapping is worth the deterrent value of trying those offenders who cannot be extradited. Aside from the abstract con-

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\(^{130}\) *Id.* at 27.

\(^{131}\) 36 I.L.R. at 68.

\(^{132}\) No. 73-2732 (2d Cir., May 15, 1974).

\(^{133}\) 397 U.S. 643 (1961).

\(^{134}\) 342 U.S. 165 (1952). *Rochin* held that the due process clause requires that a state court conviction resting on evidence obtained through police brutality be set aside, and *Mapp* interpreted the clause as requiring the application of the exclusionary rule to state prosecutions, so that evidence obtained by illegal search and seizure by state officers could not be admitted in a criminal trial of the person from whom it had been seized. The *Toscanino* court also relied on Judge Friendly’s dissent in *United States v. Edmons*, 452 F.2d 577 (2d Cir. 1970). Also, *Toscanino*, unlike *Ker* and *Frisbie*, involved the violation of a treaty obligation, and therefore fell within the rule of *United States v. Rauscher*, 119 U.S. 407 (1886). See text accompanying notes 87-88 supra.
tention that forcible abduction violates national sovereignty, its encouragement would undermine the international and domestic law of extradition, which provides certain safeguards for human rights. These safeguards include a mandatory hearing\textsuperscript{135} and the general unavailability of extradition for political offenses\textsuperscript{136} and for offenses not criminal in the extraditing state.\textsuperscript{137} A weakening of extradition standards would be a retreat from the ordered relations among nations that are the goal of international law. The current Israeli cases thus encourage international kidnapping and consequently undermine international safeguards.

However, a total repudiation of the \textit{Ker} doctrine is not necessary to support the conclusion that jurisdiction should be precluded in the current Israeli cases. Unlike the current cases, \textit{Ker}, \textit{Frisbie}, \textit{Scott}, \textit{Afouneh}, and \textit{Eichmann} all involved offenses such as larceny, murder, perjury, or war crimes, which presumably were crimes also in the states of refuge, and which were not “political” crimes.\textsuperscript{138} Those offenses were thus of a kind widely recognized as extraditable, assuming a treaty,\textsuperscript{139} while the offense of belonging to Al-Fatah is not a crime in Lebanon and is arguably a “political” offense. While this distinction may lead one to conclude that there is, therefore, more reason to find Israeli jurisdiction, because kidnapping would be the only practical method of bringing the offender into custody, the distinction more logically cuts the other way. International extradition exemptions and safeguards are widely accepted presumably because individual nations find policy reasons to support them.\textsuperscript{140} These policy objectives are threatened more, it may be argued, when jurisdiction is exercised where extradition is forbidden, than where extradition is possible but merely bypassed.

In addition, it may have been implicit in the \textit{Ker} doctrine cases that preclusion of jurisdiction because of forcible abduction would

\textsuperscript{135} See, e.g., 18 U.S.C. § 3181 (1970). The laws of most non-Anglo-Saxon jurisdictions reject the production of evidence of guilt at such hearings and look only to proof of identity and the conformity of the request to treaty and statutory requirements. I. Shearer, \textit{supra} note 82, at 157.

\textsuperscript{136} See 6 M. Whiteman, Digest of International Law 799-857 (1968); I. Shearer, \textit{supra} note 82, at 156-69.

\textsuperscript{137} See 6 M. Whiteman, \textit{supra} note 136, at 773-79; I. Shearer, \textit{supra} note 82, at 137-41.

\textsuperscript{138} On the question of whether war crimes are “political,” see I. Shearer, \textit{supra} note 82, at 185-87.

\textsuperscript{139} See sources cited in notes 136-37 \textit{supra}.

\textsuperscript{140} A nation may pride itself on being a place of political asylum, and purely political offenders do not generally present a threat to life or property in other states. I. Shearer, \textit{supra} note 82, at 188. The double-criminality safeguard prevents a person's liberty from being restricted because of offenses not recognized as criminal by the state of his residence, in addition to preventing the embarrassment of the "social conscience" of the state "by an obligation to extradite a person who would not, according to its own standards, be guilty of acts deserving punishment." I. Shearer, \textit{supra}, at 137-38.
merely be a waste of time and energy, because the government might then simply extradite properly. Such a notion would, of course, not apply in cases where extradition is completely unavailable. 141

A further distinction between the Ker doctrine cases and the current Israeli cases is that attempted by the defense in the Eichmann cases: 142 In Ker, Frisbie, Scott, and Afouneh, the offenses had been committed in areas subject to the territorial jurisdiction of the state to which the fugitive was returned, whereas Eichmann had never been in Israel. It might be more justifiable to try someone who was within the territorial jurisdiction of the court at the time of the offense than to assert jurisdiction over one who has never been within that jurisdiction. The Israeli supreme court in Eichmann met this contention by pointing out the "international character" of Eichmann's crimes. 143 Criticisms of the Ker doctrine 144 aside, jurisdiction may be justified despite forcible abduction in cases where universal jurisdiction is relied upon. But in the current cases, which purport to rely on the protective principle, there is neither a crime of an "international character," nor is it alleged that the offenders committed crimes within the territory of Israel prior to abduction. Also, the offenders are not nationals of Israel. 145 Thus, a preclusion of jurisdiction on account of forcible abduction would not require an overruling of Eichmann. 146 Indeed, the exercise of jurisdiction in the instant cases is an extension of the much-criticized Ker doctrine from cases where substantive jurisdiction was based on the territorial, universality, or nationality principle to cases where jurisdiction is based on the protective principle—the principle that provides the least likelihood of fair warning to possible offenders.

Although, conceptually, the expansion of extraterritorial jurisdiction and the exercise of jurisdiction after forcible abduction involve the infringement of a state's sovereignty, it is individual human rights that are ultimately affected. Despite assertions by both Israeli courts in Eichmann that the question of substantive Israeli jurisdiction and the question of immunity because of kidnapping were "entirely separate," 147 the way in which either one of these questions

141. Apart from the safeguards mentioned, Israel lacks regular extradition procedures with its Arab neighbors. TIME MAGAZINE, Aug. 20, 1973, at 31.
142. See text accompanying note 124 supra.
143. 36 I.L.R. at 306 (emphasis original).
144. See text accompanying notes 125-37.
145. Nationality thus does not provide jurisdiction as it arguably does in United States v. Cotten, 471 F.2d 744 (9th Cir.), cert. denied, 411 U.S. 936 (1973), discussed in note 101 supra.
146. A further distinction between the recent cases and the Eichmann case derives from the fact that, with regard to the impairment of Argentine sovereignty, the Eichmann incident was diplomatically "closed," see text accompanying note 123 supra, while there has been no such diplomatic "closing" of Israeli incursions into Lebanon.
147. 36 I.L.R. at 25, 307.
is answered seriously affects the human rights policy analysis of the
other. The policy implicit in the Universal Declaration of Human
Rights, that an individual must be held accountable only for compli-
ance with laws of which he can reasonably become aware," can be
implemented by limiting extradition as well as by limiting extra-
territorial jurisdiction. The more one is limited, the less compelling
becomes the reason to limit the other. If protective or universal
jurisdiction is to be greatly expanded, the policy behind making
extradition unavailable for political crimes248 or for offenses not
criminal in the extraditing state249 becomes much stronger. Fur-
thermore, any strong policy behind a limitation of extradition a fortiori
strengthens the policy against any circumvention of extradition
rules. Thus, the more extraterritorial jurisdiction is expanded,
the less should illegal apprehension be encouraged. This interrela-
tion has been reflected in France, the country that has asserted the
most far-reaching protective jurisdiction, but also the one country
whose courts have rejected the Ker doctrine. If the protective or
universality principles are expanded, the argument against use of
the Ker doctrine becomes much stronger. If jurisdiction is exercised
despite forcible abduction, the argument against unprecedented ex-
pansion of extraterritorial jurisdiction in turn is strengthened.

Thus, the exercise of jurisdiction over Bulut, and later over the
ten fedayeen, on the basis of an expanded protective (or universal)
jurisdiction and on the basis of the Ker doctrine of jurisdiction
despite forcible abduction is, in each respect and particularly in com-
bination, a precedent harmful both to the order of the international
system and to individual human rights.